

#1947

## ARBITRATION DECISION

September 17, 2007

In the Matter of:

State of Ohio, Department of  
Administrative Services

and

Ohio Civil Service Employees Association,  
AFSCME Local 11

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Case No.02-02-20060810-0016-01-09  
Veronica Moore, Grievant

## APPEARANCES

### For the State:

John Dean, Labor Relations Specialist, OCB  
Monica Rausch, Labor Relations Manager  
Aimee Hage, Legal Intern, OCB  
Cheryl Beaty, Assessment Manager  
Patty Magazine, Human Resources Coordinator  
Virginia Dillon, Operations Manager  
Linda St. Clair, Computer Operator Supervisor 2

### For the Union:

Sharon V. Ralph, Staff Representative  
John Gersper, Staff Representative  
Kenny Keirns, Chapter President  
Veronica Moore, Grievant

### Arbitrator:

Nels E. Nelson

## BACKGROUND

The grievant, Veronica Moore, was hired by the Department of Administrative Services in June 1987. She worked as a Data Librarian 1 until February 1992 when she became a Computer Operator 1 and subsequently, a Computer Operator 2 and 3. For the past 14 years, she has worked on the third shift at the State of Ohio Computer Center.

On June 16, 2006, the grievant and four other employees applied for a first shift Computer Operator 4 position at SOCC. Since the Computer Operator 4 position is in Pay Range 29, Article 17, Section 17.05, requires the job to be filled based on qualifications, experience, education, and active disciplinary history and awarded to the most qualified applicant unless there is a more senior applicant who is substantially equal.

The selection process used by the state is based on DAS Procedure P 401, dated October 24, 2005. Pursuant to this procedure, the state developed 12 questions for structured interviews to determine the qualifications of the applicants for the position, i.e., the knowledge, skill, and ability required for the position. In addition, it established four levels of education, worth from 25 points to 100 points, and four levels of experience, worth from 10 points to 100 points. Total weighted scores are computed by assigning a 60% weight to qualifications, a 30% weight to experience, and a 10% weight to education.

The interviews were conducted by three individuals: Virginia Dillon, the Operations Manager for the third shift at SOCC; Linda St. Clair, a Computer Operator Supervisor 2; and Patty Magazine, the Human Resources Coordinator for the Service Delivery Division of DAS.

The five applicants were interviewed on two days. The grievant, MacAurthur Ruggs, Victoria Sansom, and Mukesh Thaker were interviewed on July 16, 2006, and Lamar Stevens was interviewed on August 1, 2006. The state indicates that after each interview, the interviewers discussed the applicant's answers to the 12 questions and

arrived at a consensus score. Once all of the interviews were completed, Magazine computed the total weighted scores for each applicant based on the scores for the interview, experience, and education.

The total weighted scores for the five applicants were as follows:

MacArthur Ruggs	89.7
Lamar Stevens	79.8
Veronica Moore	76.5
Victoria Sansom	66.0
Mukesh Thaker	58.8

Based on these scores, the Computer Operator 4 position was awarded to Stevens.

On August 10, 2006, Kenny Keirns, the DAS Chapter President and a union steward, filed a grievance on behalf of the grievant. The union charged that the grievant should have been selected for the Computer Operator 4 position based on her qualifications, experience, education, and seniority. It noted that she had 496 seniority credits compared to Stevens who had only 194 seniority credits. The union asked that the grievant be awarded the position and given appropriate back pay and benefits.

The step three grievance hearing was held on August 30, 2006. At that time, the union argued that several individual scores for education were improperly assigned, that the changes in the scores for Stevens on one of the interview questions were “suspicious”; and that the state violated Section II, Part L of Procedure P 401 by selecting Stevens rather than the grievant. In addition, the union amended its grievance to include an alleged violation of Article 25, Section 25.09, because of the state’s refusal to comply with its records request.

When the grievance was denied on September 29, 2006, the case was appealed to arbitration. The hearing was held on July 23, 2007. Post-hearing briefs were received on August 17, 2007.

## ISSUE

The parties agreed that the issue is:

Did the Employer violate Article 17 of the contract when it did not select the Grievant for a vacant Computer Operator 4 position? If so, what shall the remedy be?

## RELEVANT CONTRACT PROVISION

### Article 17

Promotions, Transfers, Demotions and Relocations

\* \* \*

#### 17.05 - Selection

\* \* \*

If the position is in a classification which is assigned to pay ranges eight (8) through twelve (12) or twenty-eight (28) or higher, the job shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, education and active disciplinary record. For purposes of this Article, disciplinary record shall not include oral or written reprimands. Where these factors are substantially equal, State seniority shall be the determining factor.

## UNION POSITION

The union argues that the state violated Article 25, Section 25.09, of the collective bargaining agreement. It indicates that it requested Magazine's interview notes for the applicants for the Computer Operator 4 position but management stated that no notes existed and that it was not entitled to them. The union reports that the notes were finally provided at the arbitration hearing where it was agreed that it could comment on them in its written closing statement.

The union complains that Magazine failed to rate the applicants. It points out that while she took notes on the applicants' answers to the questions, she did not assign scores to them. The union notes that instead, she became part of the "consensus review" with the two other raters.

The union challenges the scoring process. It observes that Stevens was interviewed two weeks after the other candidates. The union states that “it is very troubling to [it] that this ‘Consensus Review’ meeting took place after the last interview, which was ... two weeks after the other candidates were interviewed.” (Union Written Closing Statement, page 5)

The union also questions the fact that Dillon and St. Clair raised their scores for Stevens. It complains that it has “no way of knowing why these raters who so meticulously documented every step of the process to that point failed to document the rationale for raising the scores for the successful candidate.” (Ibid.) The union adds that at the arbitration hearing none of the three raters could remember why there were no notes regarding the matter.

The union maintains that court decisions arising out of the Civil Rights Act of 1964 and other legislation have resulted in the federal government instituting guidelines and directives to correct discrimination and bias in the selection process. It relies on Developing and Conducting the Structured Situational Interview, U.S. Office of Personnel Management, January 1994, which it states was distributed to help eliminate illegal bias and discrimination. The union indicates that pages 23 and 24 of the report stress the importance of documentation for later defensibility.

The union cites two cases in support of its position. It points out that in Colon v. Sorensen, 668 F. Supp. 1319, the court held that “it is standard operating procedure in the Department of Labor for interview notes to be retained and filed with the other material relevant to the filling of a job vacancy.” The union notes that in Green v. USX, 843 F.2d 1511, the court held:

We are aware that no one criterion is significant to every job and that, for some jobs, criteria such as college educations, which are in themselves valuable, are not valuable to the employer in light of his or her employment needs. In the present case, however, USX articulated no logically comprehensible standard that it used to identify applicants who were “better

qualified” to do the jobs for which USX was hiring. Moreover, it presented no evidence demonstrating that it evaluated applicants nondiscriminately to determine who those persons were.

The union argues that the state violated the contract when it selected a less senior applicant for the Computer Operator 4 position. It contends that the contract controls and that the state misinterpreted Policy P 401. The union indicates that Cheryl Beaty, an Assessment Manager at DAS, testified that the grievant was substantially equal to the selected candidate. It claims that “when it was determined that [the grievant] was substantially equal to the individuals in the group of candidates who were interviewed, she should have been selected pursuant to Article 17.05 of the Collective Bargaining Agreement.” (Union Written Closing Statement, page 8)

The union suggests that the state cannot return the improperly selected candidate to his former position. It states that returning him to his former position would be tantamount to creating a second vacancy, which according to Article 17 must be posted. The union cites OCSEA, Local 11, AFSCME - AFL-CIO and State of Ohio/BWC, Case No. 34-34-020211-0014-01-09, May 17, 2004, where Arbitrator Stein stated that although “he had no authority to maintain or remove the improperly selected bargaining unit member from the position that was grieved, it has been the practice of the State of Ohio Office of Collective Bargaining to insist that there is only one vacancy grieved and one vacancy available.” (Ibid.)

The union concludes that the grievant should have been awarded the position as a Computer Operator 4. It asks the Arbitrator to award her the position and grant her appropriate back pay to the date of the appointment of the selected candidate.

## STATE POSITION

The state argues that the selection of the successful candidate for the Computer Operator 4 position was based on qualifications, experience, and education as permitted by the contract and pursuant to its procedure and a long-standing practice. It points out that Beaty testified that when the QEE language was adopted, she worked to ensure that DAS used a defensible method for awarding jobs. The state notes that she indicated that job analysis was used to design the structured interview questions and that she consulted with DAS experts to insure that the QEE language would be fully and fairly implemented.

The state contends that it has a proper method for determining the equality of candidates. It observes that Beaty testified that candidates whose weighted scores are ten or fewer points below the highest score are considered substantially equal. The state claims that “this has been DAS’s method for determining the equality of candidates since the inception of the QEE language and has been reflected in its written QEE selection procedure in various forms throughout the life of the procedure.” (State Written Closing Statement, pages 2-3)

The state rejects the union’s argument that the scoring and procedures DAS used in the instant case were deficient. It states that Section L, Paragraph 4 of Procedure P 401 does not create a sliding scale where a candidate merely needs to be within ten points of another candidate to be considered. The state insists that “it is the highest scoring candidate that sets the 10-point threshold, not every employee who is within 10 points of another higher scoring candidate.” (State Written Closing Statement, page 3)

The state suggests that the union's interpretation of the QEE language is erroneous. It acknowledges that its policy refers to "above the rest" and "within 10 points of each other" but states that Article 17 makes it clear that such language is necessarily anchored to the highest scoring candidate. The state claims that "the sliding scale the Union seeks to establish would erode the ability of the employer to select the successful candidate based on QEE and would let seniority decide selections when clearly the contract calls for the selection of the most qualified candidate or one that is substantially similar." (State Written Closing Statement, pages 3-4)

The state argues that it properly selected the candidate to fill the position at issue. It points out that the grievant was more than ten points below the highest scoring candidate, meaning that she was not substantially equal to the most qualified candidate. The state stresses that "to yoke the grievant into the substantially equal group with the most qualified candidate merely because she was within 10 points of someone else who was within 10 points of the top scoring candidate is contrary to the contract, the practice of DAS, and the written procedure of DAS as it is intended to be read and has been interpreted." (State Written Closing Statement, page 4)

The state rejects the union's allegation of bias. It acknowledges that some of the interview scores of the candidates were scratched out and changed. The state claims, however, that the interviewers discussed the responses of each of the candidates and reached a common score. It asserts that "on just a couple of occasions, they 'jumped the gun' and scored a question without fully completing the discussion." (State Written Closing Statement, page 4)

The state insists that the change in the scores was not intended to aid one candidate over another. It indicates that the interviewers finalized scores of one candidate before interviewing the next one. The state claims that this ensured that each candidate was being scored on his or her own responses and was not affected by the relative strengths or weakness of the other candidates' responses.

The state maintains that the union did not demonstrate how changing the scores affected the grievant. It states that the score of the top scoring candidate, who set the ten-point range for determining the equality of candidates, was not changed. The state further observes that the interviewers did not change the grievant's score or any other score that affected her relation to the top score.

The state rejects the union's claim that the U.S. Supreme Court determined that methods similar to those used by DAS were improper. It indicates that at the arbitration hearing the union promised to provide it with the citations to support this claim. The state complains that despite a subsequent request for the citations, none were provided. It asserts that "it would be improper to consider this evidence as DAS has not been afforded the opportunity to review it." (State Written Closing Statement, page 5)

The state concludes that it properly selected the successful candidate for the Computer Operator 4 position. It asks the Arbitrator to deny the grievance.

### ANALYSIS

The issue before the Arbitrator is whether the state violated Article 17 of the contract when it did not select the grievant to fill the Computer Operator 4 position. The union argues that the state violated Article 17 because it improperly assigned points to the applicants for the position and because the method it used to select the successful

applicant was incorrect. In addition, union complained that the state violated Article 25, Section 25.09, of the agreement by refusing to provide it with copies of Magazine's ratings of the applicants.

The union raised three specific issues regarding the points assigned to the applicants. It challenged the process used because Magazine did not assign points to the applicants, questioned the fact that Dillon and St. Clair changed Stevens' score on one of the interview questions, and charged that the interviewers failed to document the reason for changing Stevens' score.

The Arbitrator rejects the union's claim that the selection was invalid because Magazine failed to score the applicants responses to the interview questions. It appears to the Arbitrator that Magazine, who is a Human Resources Coordinator, was not included on the interview panel to judge the applicants' responses to technical questions but was there to oversee the process and to compute the total weighted scores. Dillon and St. Clair, who would be directly and indirectly responsible for whoever was selected to fill the Computer Operator 4 position, were responsible for determining the technical qualifications of the applicants.

The Arbitrator must comment on the union's complaint that the state violated Article 25, Section 25.09, by refusing to provide Magazine's notes for the applicants' interviews. While this charge was added to the grievance at step three of the grievance procedure, the issue submitted to the Arbitrator was simply whether the state violated Article 17 of the contract. The Arbitrator, however, must note that the state provided the requested material at the arbitration hearing and the union had the opportunity to address Magazine's notes at the hearing and in its written closing statement.

The Arbitrator must also dismiss the union's charge that the selection process was tainted by the fact that Dillon and St. Clair changed Stevens' score on one question from six to seven. As they explained, they did so after reviewing their notes and discussing his response to the question. This is consistent with P 401 and the practice followed in other cases.

The Arbitrator believes that it is also worth noting that the change in Stevens' score did not impact the grievant. As will be discussed below, the grievant was not selected because her score was more than ten points below that of Ruggs, the top scorer. The change in Stevens' score did not affect Ruggs' score or that of the grievant.

The Arbitrator dismisses the union's claim that the selection process was improper because it failed to document the reason for the change in one of Stevens' scores. Dillon and St. Clair testified that when they discussed his response to the question, they agreed that their initial score of six should be raised to seven. The process is not invalidated by the fact that they could not recall the specific reason for the change or the fact that they did not document it. As the union acknowledges, the panel did carefully preserve its notes and the consensus scores for each of the applicants.

The union's claim that federal guidelines or procedures and court decisions required the documentation of the reason for changing Stevens' score cannot be accepted. While the U.S. Office of Personnel Management's Developing and Conducting the Structured Situational Interview stresses the importance of documenting the interview process and Colon indicates that notes from interviews should be retained, neither suggests that there is any need to document the discussions leading up to final interview scores. Green did not appear to be relevant to the instant case.

The Arbitrator appreciates the state's complaint that the union failed to abide by the promise it made at the hearing to provide the citations to support its assertion that court decisions required the interviewers to document the reason for changing Stevens' score. Had the two cases cited by the union in its written closing statement had any impact on the Arbitrator's decision, he would have given the state the opportunity to comment on the decisions.

The remaining issue is the union's charge that the selection method used by the state was contrary to P 401 and Article 17, Section 17.05, of the agreement. The union position is that the grievant should have been selected because she was within ten points of Stevens and, therefore, should have been chosen because she had more seniority credits than he did.

The Arbitrator must reject the union's position. Article 17, Section 17.05, requires jobs in Pay Range 28 or higher to be awarded based on qualifications, experience, education, and active disciplinary history and when these factors are substantially equal, give the job to the applicant with the most state seniority. To implement this directive, the state has relied on Policy P 401.

Sections II(L)(3) and (4) of the policy govern the selection of the applicants.

They state:

3. If any candidate is not substantially equal (i.e., weighted score of 10 points or more above the rest), then the top scoring candidate shall be selected.

4. If more than one candidate scores 10 points or more above the rest, number 3 above shall be applied to the higher scoring group and state seniority shall be the determining factor.

While the language could be improved upon, the meaning is clear. If one applicant has a score of ten or more points higher than the other applicants, he or she is awarded the job.

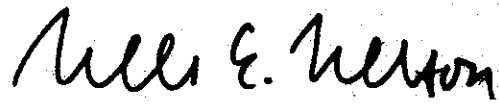
If one or more applicants have scores within ten points of the highest scoring applicant, the one with the most state seniority is selected for the position.

The Arbitrator must also point out that the union's position could produce unreasonable results. If the grievant were awarded the job because she was within ten points of Stevens, an employee within ten points of her could argue that he or she should have been given the job. If that person was awarded the job, someone within ten points of him or her could argue that he or she should have gotten the job. Thus, the union's interpretation could result in the lowest scoring person being granted a job. This is clearly not the intent of Article 17, Section 17.05.

Based on the above analysis, the Arbitrator concludes that the state properly assigned points to the applicants for the Computer Operator 4 position and selected the appropriate applicant for the job.

#### AWARD

The grievance is denied.

A handwritten signature in black ink that reads "Nels E. Nelson". The signature is written in a cursive, flowing style.

Nels E. Nelson  
Arbitrator

September 17, 2007  
Russell Township  
Geauga County, Ohio