

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, ENVIRONMENTAL PROTECTION AGENCY

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME

GRIEVANT: RALPH BAKER

GRIEVANCE NUMBER: 12-00-20080402-0097-01-13

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
NOVEMBER 23, 2009

Appearances

For the Employer

Ellen Gerber
Don Starr
Ryan Sarni

Manager
Second Chair
Advocate

For the Union

Ralph Baker
Deborah Bailey

Grievant
Advocate

INTRODUCTION

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/ Mediation Panel between the State of Ohio, Environmental Protection Agency, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period March 1, 2006 to February 28, 2009 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. Both declined and closed the hearing with oral closings.

JOINT ISSUE

Were the Grievant's contractual rights violated in the EPA's selection of the Environmental Specialist 3 position, PLN 20043329

JOINT STIPULATIONS

1. The grievance is properly before the arbitrator.
2. There are no procedural objections.

PERTINANT CONTRACT PROVISIONS

Article 17- Promotions, Transfers, Demotions and Relocations

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17.05- Selection

If the position is in a classification which is assigned to pay ranges one (1) through seven (7) and pay ranges twenty-three (23) through twenty-seven (27), the job shall be awarded to the qualified employee with the most State seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee. As permitted by law, affirmative action shall be a valid criterion for determining demonstrably superior.

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. When these factors are substantially equal State seniority shall be the determining factor.

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(Joint Exhibit 1, Pg. 41)

17.06- Proficiency Instruments/Assessments

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 Section 17.05. 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 maintenance⁴ of security and integrity of the test.

(Joint Exhibit 1, Pgs. 42-43)

CASE HISTORY

Ralph Baker, the Grievant is an Environmental Specialist 2 (ES2) in the division of Drinking and Ground Water. At the time of the disputed matter, he had realized twenty-one years of service.

On November 8, 2007, a job was posted for an Environmental Specialist 3 (ES3) position. On November 19, 2007, the Grievant submitted an online application for the disputed position, and was granted an interview held on December 19, 2007. It should be noted, a total of five bargaining unit members applied and were interviewed for the disputed position. The Grievant realized an evaluation based on his written and oral interviews which caused a final ranking of fourth place.

On or about March 20, 2008, the Grievant was informed that he was not selected to fill the position in question. Justin Bowerman, an employee with seven years of service, was selected for promotion and was notified of this decision on January 25, 2008 (Joint Exhibit 2, Pg. 181).

On April 2, 2008, the Union contested the Grievant's nonselection by filing a formal grievance. It states in pertinent part:

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DDAGW-NWDO posted a position for an Environmental Specialist 3 (PCN 20043329) with a posting deadline of 11/23/07. Interviews were held and Mr. Baker was not selected for the position. He was informed by e-mail on March 20, 2008 that a person with less experience had been selected. This is a grievance on non-selection

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(Joint Exhibit 2, Pg. 1)

The parties were unable to resolve the disputed matter during the subsequent stages of the grievance procedure. Neither party raised procedural nor substantive arbitrability concerns. As such, the grievance is properly before the arbitrator.

THE MERITS OF THE CASE

The Union's Position

The Union opines that the selection in this instance was improper and a direct violation of Article 17 selection requirements, the selected applicant did not exhibit qualifications, experience and education at levels superior to those enjoyed by the Grievant. If anything, these selection criteria were substantially equal requiring the use of State Seniority as the determining factor. In this instance, the Grievant's seniority status should have led to his appointment.

Several questions were raised regarding the instrument used for evaluation purposes. A number of items in the interview section were viewed as excessively broad-leading the raters to subjective outcomes which eroded score reliability.

Other arguments dealt with the rating process itself. The Union argued the methods used to allocate points were highly questionable, and the scoring was insufficient. The evaluation of credentials and other relevant characteristics was tarnished when Shannon Nabors, one of the evaluators, neglected to record and score some of the questions dealing with technical aspects of the position.

The Employer's Position

The Employer opined that it did not violate the Grievant's Article 17 rights when it selected another individual, with less seniority, to fill the vacant Environmental Specialist 3 position. The promoted applicant evidenced qualifications, experience and education which exceeded those enjoyed by the Grievant. Written test and interview

results more than adequately support the view that these individuals were not substantially equal on the criteria specified in Section 17.05.

The tests, themselves, were valid, Ellen Gerber, District Manager, developed the instrument in question by creating questions from a variety of sources. She spoke to other relevant management representatives about critical ES3 characteristics and requirements. Gerber, moreover, linked developed questions with critical aspects of the relevant position description and selection criteria specified in Article 17.

Shannon Nabors did in fact refuse to score Questions 24 and 25. She felt that these questions required someone with technical expertise which exceeded her level of knowledge. Yet neither applicant was prejudiced by this decision.

All three evaluators independently selected Justin Bowerman as the top scorer and the best candidate for the position in question. The scoring of all questions was fair and accurate. Throughout the evaluation process the Grievant failed to provide sufficient detail and specificity when compared against those responses articulated by the selected candidate.

The Arbitrator's Opinion and Award

From the testimony and evidence adduced at the hearing, a complete and impartial review of the record including pertinent contract provisions, it is the Arbitrator's opinion that the Employer did not violate the Grievant's contractual rights when it selected Justin Bowerman to fill the disputed position.

Testing outcomes clearly established a substantial difference which precluded the use of State Seniority as the determining factor. The promoted employee realized a total score of 112.5 points. As such, the Grievant had to properly support changes in scoring equaling 41.5 points. For reasons to be discussed in subsequent portions of this Opinion and Award, none of the proposed scoring changes and related errors in question construction were supported by the record.

A few preliminary comments are in order. There was some reference in the Step 3 response regarding an age discrimination allegation. The record reviewed by the Arbitrator did not expose an argument of this sort. As such, the Arbitrator does not view this charge as ripe for arbitral review.

A vexing portion of the record deals with Shannon Nabors unwillingness to evaluate both participants on questions 24 and 25, which dealt with technical aspects of the disputed position. Declining to evaluate did not tarnish the outcome because Nabors evaluated neither individual. Two other evaluators were still involved and completed the Question 24 and Question 25 evaluations. Both reached consensus regarding appropriate point allocations. The reliability of the results were heightened rather than lessened by Nabors' decision not to evaluate. Testing outcomes could have been questioned if she had attempted to evaluate technical matters without the necessary background.

A total of fifteen(15) questions were challenged by the Grievant. Thirteen(13) questions dealt with portions of the oral interview while two(2) questions dealt with written portions of the evaluation. Based on the existing score differential, the Grievant would have to prevail in all of the challenges and realize close to maximum scores to

overtake the point total amassed by the successful applicant. For the reasons specified below, the Grievant was unable to support any of his challenges.

Question 1 and Question 3 of the written portion of the evaluation were challenged. Question 1 was worth ten(10) points. The Grievant realized zero(0) points while the successful applicant received three(3) points. This question required the applicants to write a “sound byte” or small speech within five(5) minutes. The Grievant maintained the question was unfair because not enough time was given to write an appropriate response. Yet he was given the same amount of time as the other applicants. His response was cryptic, and failed to respond to the questions asked by the Employer. As such, the score was fair, proper and accurate requiring no modification.

Question 3 was worth ten(10) points and required applicants to review a “draft” letter and identify approximately forty(40) errors. Both applicants scored 2.5 points out of ten available points. The Grievant maintained additional points were in order but failed to identify specific scoring errors. He did, however, note one overlooked error identification; an error also identified by the selected applicant. The Employer gave both individuals credit which made the attained score accurate. Again, the record supported no change in the Greivant’s score.

The remaining questions in dispute were part of the structured interview process where all members of the applicant pool were asked identical questions. Notes were taken by the evaluators. A review of the interviewers’ notes exposed a certain consistency; most if not all of the transcription were identical in terms of content. Responses were then evaluated and scored by applying matrixes which contained required responses with an “other” category for unanticipated, yet correct, responses. Other questions had an open-

ended format with no expected pre-identified response. Here, candidates responded to questions which tapped specific examples regarding knowledge, experience and training.

Five(5) questions were nested within the latter category of items: Questions 6, 7, 8, 12, and 23. The record, again, fails to support any point adjustment. A review of these questions generates an incontrovertible theme. Oftentimes, the Grievant's responses lacked specificity and detail resulting in low scores. His problems were not a function of question vagueness or subjectivity in scoring. Rather, they were a consequence of an unresponsive interviewing style. A formidable hurdle preempting a positive evaluation outcome.

A few examples disclose this glaring theme. Question 6 asked the applicants to explain their level of experience in teaching or explaining drinking water operations. The Grievant failed to specify in sufficient detail his training experiences. He spoke about day-to-day discussions with colleagues and presentations where rules and technical issues were discussed. The nature of the rules and technical issues were never articulated.

Question 7 dealt with technical education and experience as it relates to this position. The Grievant was given full credit for his education as an engineer but felt he deserved more points for this attribute. He was, however, extremely weak on the experience aspect of this question.

Question 12 involved staff technical training needs. Again, the Grievant failed to discuss specific needs. He merely spoke in general terms. The Grievant spoke about "tools" but never identified the "tools" in question.

Question 23 asked applicants to describe complex drinking water investigations and what they learned from each example. The Grievant provided three examples, but failed to articulate what he learned from each situation.

Eight(8) questions in dispute were part of the former category of items: Questions 1, 2, 15, 17, 19, 21, 24, and 25. Again, the Employer was looking for specific responses during the interview. The Grievant argued this format was too subjective. He never, however, claimed the expected responses were wrong or lacked job relatedness. In fact, when he articulated an unanticipated response, he was given credit for it. Throughout this grouping of questions he failed to specify sufficient responses to justify additional points. The evaluators' transcriptions and application of question specific rating keys support the Employer's determination with no point adjustments justified.

Question 1 dealt with the reasons he wanted to be an ES3. He received two out of ten points and maintained he should have received ten points. He was given credit for his experience and other relevant qualifications. He completely missed the mark by only noting promotion opportunity, his comfort level and his experience at various divisions.

Similar issues became apparent when reviewing Question 2 desired responses. This question dealt with the most important things an ES3 can do for staff. Out of a possible 10 points, the Grievant realized five points. He failed to recognize a number of critical features: provide outreach and training; provide input in investigations/emergencies; review ES2 work for consistency. Applicability; participate in work groups; maintain knowledge of public water system operation rules; and explain why other relevant qualifications are important to provide.

Quite perplexing are his initial comments regarding this question. He noted, "You would have to tell me, posting doesn't say." A brief time later he also said, "Do you know what I mean?" Shannon attempted a prompt to redirect his response in a positive direction by stating, "We need to know what you think the role is." The record clearly documents his inability to properly respond to the question.

Question 15 dealt with ensuring consistency among staff in NWDO and statewide. A total score of 10 points was possible, while the Grievant only realized a total of 6 points. Again, he failed to articulate several critical answers, but was given credit for an "other" response. The interview transcripts support these omissions.

Question 16 concerned an angry staff member who complained about other staff being paid the same but not doing as much work. This item was worth 5 points, yet the Grievant realized a 2-point total. The Grievant remarked that this was an awkward scenario because an ES3 is not a member of management. He failed, however, to respond in sufficient detail regarding what actions needed to be taken. These include in pertinent part: get all information regarding concerns; listen carefully; ensure you will bring issue to management (in confidence); encourage them to continue to do a good job; lowering quality of work will hurt them; and work closely with other staff to improve work product. As such, the Employer's score was accurate, proper and required no modification

This analysis establishes a clear pattern of superficial responses which lacked detail. The Employer's scores were an accurate and unprejudiced depiction of the Grievant's responses. The Arbitrator's review of the remaining questions (Questions 19,

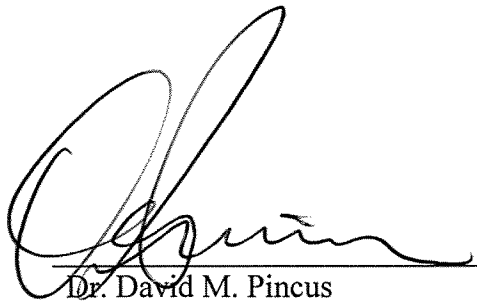
21, 24, and 25) merely supports the previously discussed pattern. As such, a detailed analysis is unnecessary and would be redundant.

AWARD

The grievance is denied. The Grievant's contractual rights were not violated

11/23/09

Chagrin Falls, Ohio



Dr. David M. Pincus
Arbitrator