In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

And

The State of Ohio, Rehabilitation Services Commission

Case No. 29-04-20090231-993-01-14

Before: Harry Graham

APPEARANCES: For OCSEA/AFSCME Local 11:

Sharon VanMeter Ralph
OCSEA/AFSCME Local 11
390 Worthington Rd.
Westerville, OH 43082-8331

For Rehabilitation Services Commission:

Bobby L. Johnson
Rehabilitation Services Commission
150 East Campus View Blvd.
Columbus, OH 43235

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter on January 27, 2011. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were submitted by the parties. They were exchanged by the Arbitrator on March 19, 2011 and the record was closed.

ISSUE: At the hearing the parties agreed upon the issues in dispute between them. Those issues are:

Is the grievance properly before the Arbitrator? If so, did the Employer violate the

Collective Bargaining Agreement in the manner in which it administered the exam for Disability Claims Specialist in 2009? If so, what shall the remedy be?

BACKGROUND: On January 7th, 2009 the Employer posted for vacancies within the Rehabilitation Services Commission. The posting was open through January 16, 2009 and involved positions in the Bureau of Disability Determination. Nine (9) openings were posted in the classification of Disability Claims Specialist. That classification is at a high level and is differentiated by a number of parenthetical working titles. The posted positions were:

Vocational Advice Specialist – 2 positions
Quality Assurance Specialist – 2 positions
Medical Operation Specialist – 2 positions
Disability Hearing Officer – 3 positions

On February 13, 2009 the Union submitted a grievance. That grievance was denied and advanced to arbitration by the Union. As indicated by the agreed-upon issues, dispute exists over whether or not the grievance is arbitrable on its merits.

POSITION OF THE UNION: The Union contends the grievance is reachable on its merits. Section 25.02, Step 1 of the 2006-2009 Agreement provides that the Union has ten (10) work days "from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event." Step one grievances are to be presented "orally."

The record does not indicate when the Union initially submitted the grievance at Step 1. In due course the grievance was reduced to writing and submitted on February 13, 2009. (Jt. Ex. 2). It was denied in writing on March 23, 2009.

The Grievance was submitted by Chris Smith, Union Steward. Mr. Smith has ten years of service and is knowledgeable in matters of contract administration. The test

that is grieved in this situation is the first since revisions were made to it in 2007. Mr. Smith filed the grievance within ten work days after the Grievants were not awarded the positions at issue in this proceeding. Under these circumstances the grievance must be considered to have been properly filed the Union contends.

It is the case that Arbitrator Nels Nelson and I have been confronted with similar issues in the past. (Case Nos. 24-04-20000407-0432-01-14, 2001, Nelson, 14-00-990106-0002-01-14, Graham, 1999, 29-04-112304-0745-01-14, Graham, 2006). That is not dispositive of the outcome of this dispute. The policy that is the subject of this grievance was altered subsequent to the decisions of Arbitrator Nelson and myself. As this particular policy was not considered by either arbitrator, it should be scrutinized in this proceeding according to the Union.

In Case No. 24-04-20000407-0432-01-14 Arbitrator Nelson alluded to an expert on testing from the Union. That person was to "(a) Review competencies, KSA's, and test items" along with the expert in the employ of the Employer. In this situation that did not happen. In the various arbitrations over this issue preceding this one the Union did not advance that argument. As it is newly raised, it must be considered on its merits according to the Union.

Presuming the merits of this dispute are reached the Union points out that it was not until this grievance was filed did it learn the test for the Disability Claims Specialist had been changed. It had no opportunity to review the revised test. At arbitration the Employer asserted the changes made to the test were "maintenance." As the Union and its expert had no opportunity to review the test it cannot be determined with certainty whether any revisions constituted maintenance or were more substantive.

It is the case that the Employer has issued a policy governing the manner in which it fills the position of Disability Claims Specialist. (Jt. Ex. 5) On page 4 the selection procedure is set forth. It includes the minimal acceptable competency (MAC). The MAC must be 70. Candidates who do not attain the MAC are not permitted to take the second section of the exam. In this situation the employer granted progress in the exam procedure to those who had scored 75.5. Ten applicants who scored above 70 but less than 75.5 were denied the opportunity to advance. The selection process is governed by Article 17, Section 17.05. In relevant part that section provides that this position is to be awarded "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." The Union asserts that applicants who met the minimum qualifications should be permitted to advance. The Union points out that two successful exam results are required which may result in a less qualified junior employee securing a vacant position over a senior colleague. This, the Union asserts, violates the Agreement. It urges that the grievance be reached on its merits and that all applicants improperly denied a chance to advance in the promotional process be advanced to the position of Disability Claims Specialist with complete back pay and benefits.

POSITION OF THE EMPLOYER: As seen by the Employer this dispute is not arbitrable. It is untimely. The promotional policy, HR 2007.17, was implemented on September 6, 2007. The Agreement, cited above, requires that grievances be filed not later than ten work days from the date the grievant became aware or should reasonably

have become aware of the event prompting the grievance. There is no reason to extend the ten work day limit. In fact, there was a Labor-Management Committee meeting on July 26, 2007. At that meeting the Employer distributed changes in the promotional policy and discussed them with the Union. Minutes of the meeting were taken. The Union signed for them on August 28, 2007. As seen by the Employer, the tolling of the time for processing grievances commenced on July 26, 2007. As the grievance was not filed until February 13, 2009 it is clearly belated. It should not be reached on its merits the State asserts.

It is the case that Arbitrator Nelson and I have confronted the testing issue prior to this dispute. On three occasions the Employer has prevailed. In essence, the State asserts "enough is enough." Further, Arbitrator David Pincus came to consider this issue in 2008. The facts before Arbitrator Pincus were the same as those in this situation. The Union was asserting that the cutoff score for advancement established by the Employer was improper. Arbitrator Pincus denied the grievances and explicitly found that the promotional examination was content valid. There is no change in the test under consideration in this proceeding and the test before Arbitrator Pincus according to the State. Thus, the grievance must be denied it contends.

The test at issue in this proceeding was not new. Two applicants were permitted to carry over scores from prior tests. If this were a new test they would not have been permitted to do so. It is the case that changes were made in the test. They were minor and constituted routine maintenance. A new exam was not created. The test used in this situation was fundamentally the same as that used in 2005. As the grievance was

filed belatedly and only minor changes were made in the exam the Employer urges the grievance be denied.

DISCUSSION: Employer Exhibit 1 in this proceeding represents the Minutes of the Agency wide Labor/Management Committee Meeting of July 26, 2007. It indicates at the second item that a copy of the OCSEA Selections Policy was distributed and discussed. "Feedback" was secured and the Employer indicated it would take such feedback under consideration. A revised policy was to be distributed to staff in August, 2007. Note well that as of the July 26, 2007 meeting date there was a tentative element to the policy. It was under development and the Employer represented it would consider the views of the Union. It cannot be said that the policy took effect on July 26, 2007 given the record in Employer Exhibit 1. Had the Union filed a grievance within the ten (10) work day period specified in Article 25 it would have been premature as the Employer had neither promulgated the policy nor acted under it. The record does not evidence issuance or discussion of a revised policy as of August, 2007. Not to September, 2007 (Jt. Ex. 5) was the revised policy issued. As the promotion policy at issue in this proceeding was not in effect in July, 2007 it cannot be said that the tolling of the time limits to file a grievance commenced on July 26, 2007. Nor may it be said that such tolling commenced with issuance of the policy on September 6, 2007. (Jt. Ex. 5). There were no grievants. There was no action precipitating a grievance until the test administered in January, 2009. Nor would the Employer desire that a grievance have been filed prior to that date. Any grievance would have been speculative in nature. When the test was administered in January, 2009 Mr. Smith acted promptly to protest perceived deficiencies. His grievance was properly submitted.

It is the case that issues over promotional testing have reached arbitration before. Arbitrators Nelson, Pincus and I have considered such. That does not make this particular dispute *Res Judicata* or subject to *Collateral Estoppel.* This dispute arises under a policy different from that considered at arbitration in the past. As that is the case the holdings of some years ago may, or may not be, applicable to the present controversy. This dispute must be considered on its merits.

On August 17, 2001 Arbitrator Nelson issued a Consent Award involving these parties. At item 2 on page 2 it is indicated that "The employer's testing expert/consultant including the agency use of DAS **and the union's testing expert/consultant shall do the following..."** (Emphasis supplied) No involvement was had by any expert/consultant on behalf of the Union in this situation. On its face this is a breach of the 2001 Consent Award issued by Arbitrator Nelson.

At arbitration the State indicated changes had occurred in the test. These are shown in Joint Exhibit 7. They were characterized by the Employer as "Test Maintenance." That may or may not be the case. Absent examination by a test expert on behalf of the Union the assertion of the State is unproven.

Joint Exhibit 5 is the policy governing selection procedure for filling vacancies in OCSEA/AFSCME bargaining unit at the Rehabilitation Services Commission. At page 4 reference is had to the minimal acceptable qualification. (MAC).The MAC for this exam was 70. Ten applicants (the grievants) scored 70 or above but less than 75.5. They were not afforded an opportunity to move to the second round of testing. The test references a MAC of 70. It also provides "If an employee scores below the MAC he/she will not be considered for the position because the individual is not proficient in the

minimum qualifications." (Jt. Ex. 5, p. 4). The implication is that if an individual scores at or above the MAC they will be considered for the position. Failing to do so represents a breach of the promotional procedure found in the Agreement.

AWARD: The grievance is sustained. Those who scored 70 or above on the MAC and were not permitted to advance to the second round of testing are to be automatically advanced to the second round of any future examination for positions at pay range 28 and above for the term of the existing Collective Bargaining Agreement. All scores achieved from 70 to 75.5 are to carry forward for the duration of the current Collective Bargaining Agreement without need for taking the initial stage of any test administered by the Employer. The Employer is to promptly afford the Union an opportunity for its test expert/consultant to evaluate the exam per the terms of Arbitrator Nelson's Consent Award of August 17, 2001.

Jurisdiction is retained for 90 calendar days from the date of this award.

Signed and dated this 8th day of April, 2011 at Solon, OH.

Harry Graham
Arbitrator