

In the Matter of Arbitration	:	Grievance No.: 15-02-20140124-0010-01-07
	:	
Between the	:	
	:	
State of Ohio, Department of	:	Grievant: Perry Watley
Public Safety,	:	
Employer	:	
and the	:	
	:	Date of Hearing: May 29, 2015
Ohio Civil Service Employees Association,	:	
American Federation of State, County and	:	
Municipal Employees, Local 11, AFL-CIO,	:	
	:	Howard D. Silver, Esquire
Union	:	Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: State of Ohio, Department of Public Safety, Employer

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PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing on May 29, 2015 at 10:00 a.m. in a conference room at the offices of the Union at 390 Worthington Road, Westerville, Ohio 43082. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded on May 29, 2015 and the hearing record was closed at that time.

Post-hearing briefs from both parties were received by the arbitrator on June 29, 2015 and exchanged between the parties.

No challenge to the arbitrability of the grievance has been raised.

This matter proceeds under the authority of the parties' collective bargaining agreement in effect from March 1, 2012 through February 28, 2015, under Article 25, Grievance Procedure.

Both parties have carried out their respective procedural obligations in moving the unresolved grievance to final and binding arbitration.

This matter is properly before the arbitrator for review and resolution.

ISSUE

The parties agreed to the following issue statement:

Was the contract violated when the Employer took the grievant's application out of the selection process, and if so what shall the remedy be?

JOINT STIPULATIONS

The parties have stipulated to the following:

1. The instant case is a non-selection grievance.
2. The posted vacancy was for a Customer Service Assistant 2 (CSA2), pay range 28.
3. The grievant and the selected candidate were the only applicants in the pool.
4. The vacancy was a lateral for the grievant and the selected candidate.
5. Grievant and Selected Candidate were coworkers in the same office performing the same duties.
6. Grievant is, and the selected candidate was, a Driver License Examiner 1, pay range 28.
7. The grievant and the selected candidate met Minimum Qualifications for the CSA 2 posting.
8. The grievant and the selected candidate are discipline free (at the time of application as well as currently).
9. The grievant is more senior than the selected candidate.
10. The CSA 2 vacancy is in the same office as the grievant's spouse.
11. The grievant's spouse is a CSA 3.
12. ORC 4117.01(F) Definition of a supervisor: "Supervisor" means any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment, ...

JOINT EXHIBITS

The parties stipulated to the authenticity and admissibility of the following exhibits:

Joint Exhibit 1 – Parties’ collective bargaining agreement in effect from March 1, 2012 through February 28, 2015.

Joint Exhibit 2 – Grievance form dated January 21, 2014 from the Union and grievant Perry Watley.

Joint Exhibit 3 – Posting of Customer Service Assistant 2 position, inviting bids from January 6, 2014 to January 15, 2014 at 11:59 p.m.

Joint Exhibit 4 – Application from Rosalyn A. Gaines for posted Customer Service Assistant 2 position; Ms. Gaines was selected by the Employer for the posted position.

Joint Exhibit 5 – Application from grievant Perry Watley for posted Customer Service Assistant 2 position.

Joint Exhibit 6 – Classification specification for Customer Service Assistant classification series, series number 6443, includes classification specification for Customer Service Assistant 2, job code number 64432 and Customer Service Assistant 3, job code number 64433.

Joint Exhibit 7 - January 17, 2014 email from Jennifer Pletcher, HCM Analyst, Human Resources, Ohio Department of Public Safety, to Mr. Watley, notifying Mr. Watley that as to the CSA 2 position for which Mr. Watley had made application, Mr. Watley’s application “... will not be moving forward in the application process.”

Joint Exhibit 8 – January 17, 2014 memorandum from Jennifer Pletcher, HCM Analyst, Human Resources, Ohio Department of Public Safety, to Derek Hooten, Cincinnati Reinstatement Office Customer Service Manager, recommending that applicant Rosalyn Gaines be selected to fill the vacant, posted Customer Service Assistant 2 position located at the Bureau of Motor Vehicles’ Cincinnati Reinstatement Office. In making this recommendation Ms. Pletcher noted that Human Resources had reviewed the application from Ms. Gaines and had found that this applicant met the minimum qualifications for the position. Ms. Pletcher also paraphrased the language in Article 17, section 17.05 by including in her memorandum the following:

“If the position is in a classification which is assigned to pay ranges 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. When these factors are substantially equal State seniority shall be the determining factor.”

Joint Exhibit 9 – Position description for the Customer Service Assistant 3 position filled by Aiasha Watley.

Joint Exhibit 10 – Unsigned and undated position description presenting job duties for a position classified Customer Service Assistant 2.

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Department of Public Safety, the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, the Union, are parties to a collective bargaining agreement in effect from March 1, 2012 through February 28, 2015, Joint Exhibit 1.

On January 6, 2014, the Employer posted notice of a vacant, full-time, permanent, bargaining unit position classified Customer Service Assistant 2, a position at the Ohio Department of Public Safety’s Bureau of Motor Vehicles’ Cincinnati Reinstatement Office at 10948 Hamilton Avenue, Cincinnati, Ohio 45231. This posting invited bids for this full-time, permanent, bargaining unit position. The time period for the submittal of an application for the posted position was from January 6, 2014 to January 15, 2014 at 11:59 p.m.

By the end of the period for submitting bids on the posted position, January 15, 2014 at 11:59 p.m., the Employer had received two applications for the posted Customer Service Assistant 2 position, one from the grievant, Perry Watley, and one from Rosalyn Gaines, the applicant who was selected to fill the position. Mr. Watley and Ms. Gaines were coworkers in the same office

and performed the same duties when they filed their applications. See Joint Stipulation 5. Both Ms. Gaines and Mr. Watley at the time their applications were submitted were serving within positions classified Driver License Examiner 1, pay range 28. See Joint Stipulation 6.

Both Ms. Gaines and Mr. Watley met the minimum qualifications for the Customer Service Assistant 2 position. See Joint Stipulation 7. The grievant and Ms. Gaines are discipline free, both at the time of the submittal of their applications and currently. See Joint Stipulation 8.

Mr. Watley possesses more State seniority than Ms. Gaines. See Joint Stipulation 9.

The vacant Customer Service Assistant 2 position was lateral to the positions filled by Mr. Watley and Ms. Gaines when they submitted their applications for the vacant position. See Joint Stipulation 4.

The Customer Service Assistant 2 position at issue in this proceeding is located in the same office in which Mr. Watley's wife works. See Joint Stipulation 10. Mr. Watley's wife works from a position classified Customer Service Assistant 3. See Joint Stipulation 11.

On January 17, 2014, Mr. Watley was notified that his application for the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office was being removed from consideration. See Joint Exhibit 7, page one.

On January 22, 2014, Ms. Gaines was notified that she had been selected to fill the posted Customer Service Assistant 2 position at the BMV's Cincinnati Reinstatement Office. This notice informed Ms. Gaines that she would begin her new assignment in the posted position effective Monday, February 10, 2014. See Joint Exhibit 8, page 2.

On January 24, 2014, the Union and Mr. Watley filed a written grievance form with the Employer that stated the following:

Perry Watley DX2 submitted online an application for a lateral transfer to a vacant CSA2 position (20051439) on January 12, 2014. On Jan 17, 2014 Mr. Watley received a Email from Jennifer Pletcher, HCM Analyst HR. "Per our earlier conversation concerning the CSA2 – BMV – Cincinnati Reinstatement position you will not be moving forward in the application process." Mr. Watley state he was told he could not be consider for vacancy due to it would be a conflict because his wife work in office CSA3

Under "Remedy sought" within the written grievance form, Joint Exhibit 2, page one, the following appears: "That Mr. Watley be awarded the vacant CSA2 position (20051439) any back pay due all benefits and to be made whole in all ways stop discrimination".

A step three meeting about the grievance was convened on February 19, 2014. This step three meeting was attended by the grievant, the grievant's Union representative, and the step three meeting officer, Samantha Genders. Within the step three response issued by Ms. Genders on April 1, 2014, Joint Exhibit 2, pages 5 – 6, it was noted that the grievant applied for a Customer Service Assistant 2 position in the Cincinnati Reinstatement Office but the grievant was removed from consideration because the grievant's spouse is a Customer Service Assistant 3 in the Cincinnati Reinstatement Office. Ms. Genders noted in her step three response that the grievant's spouse is the lead worker over the posted CSA 2 position.

Ms. Genders in her April 1, 2014 step three response noted that the Union emphasized that the grievant's spouse is a bargaining unit employee and therefore would not be supervising the CSA 2 position in the Cincinnati Reinstatement Office. The Union argued at the step three meeting that nepotism is not an issue as to the CSA 3 position because that position has no supervisory authority over the CSA 2 position. The Union pointed out at the step three meeting that another married couple was permitted to work together at the BMV's Seven Hills Office, and pointed out that a supervisor in the Sharonville Office had been allowed to supervise her sister-in-law in the absence of her sister-in-law's direct supervisor.

Ms. Genders in her step three response refers to Article 17, section 17.09 of the parties' collective bargaining agreement which addresses nepotism. The language of Article 17, section 17.09 begins: "No employee shall be directly supervised by a member of his/her immediate family. 'Immediate family' is defined for the purposes of this Section to include: spouse ..."

Ms. Genders noted in her step three response that the grievant's spouse is a CSA 3 at the Cincinnati Reinstatement Office and serves as a lead worker over the CSA 2 position sought by the grievant. In this regard Ms. Genders referred to the position description for the position filled by Mrs. Watley which includes a reference to serving as a lead worker over lower-level Customer Service Assistants (i.e., provide work direction and training on a daily basis).

Ms. Genders stated in her step three response that the examples of purported nepotism cited by the Union are distinguishable from the facts underlying the CSA 2 position at issue under Mr. Watley's grievance. Ms. Genders noted in her step three response that the two employees at the Seven Hills BMV Office cited by the Union are both classified CSA 2, and in the other example, the fill-in supervisor is not assigned as the employee's day-to-day supervisor.

Ms. Genders in her step three response directed that the grievance be denied in its entirety.

The grievance remained unresolved and was moved to final and binding arbitration under Article 25, section 25.02, Step Five.

SUMMARY OF TESTIMONY

Donna Howard

Donna Howard is employed by the Ohio Department of Public Safety in a position classified Customer Service Assistant 2. Ms. Howard has been employed by the Ohio Department of Public Safety for fourteen years. Ms. Howard provided previous service in the Department from

a position classified Clerk 3. Ms. Howard's employment history includes working as a paralegal in a law office. Ms. Howard serves as Vice President of Union Chapter 2503.

Ms. Howard referred to Article 17, section 17.04, Applications, within the parties' collective bargaining agreement. This provision begins: "Employees may file timely applications for permanent transfers, promotions, lateral transfers or demotions. Applicants must specify on the application how they possess the minimum qualifications for the position."

Ms. Howard referred to Article 17, section 17.05(A)(3) in the parties' collective bargaining agreement, language that provides that if there are multiple applicants for a lateral transfer "... the selection will be made from the most senior applicant who meets minimum qualifications as stated above."

Ms. Howard explained that an expectational interview is conducted among applicants for a position at the discretion of the Employer. Ms. Howard testified that expectational interviews are not used in scoring applicants.

Ms. Howard testified that the issue of nepotism arises when a supervisor directly supervises a family member. Ms. Howard testified that in the case of Mr. Watley, his application should not have been removed from consideration for the posted position because Mr. Watley's wife is not a direct supervisor. Ms. Howard referred to Article 17, section 17.09 – Nepotism, which begins with the sentence: "No employee shall be directly supervised by a member of his/her immediate family." Ms. Howard agreed that there follows a definition for "immediate family" that includes spouse.

Ms. Howard referred to Ohio Revised Code section 4117.01(F) that defines "Supervisor" as meaning:

... any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment...

Ms. Howard testified that a Customer Service Assistant 3 position assigned to a reinstatement office is not required to perform direct supervisory duties.

Stacy Mixon

Stacy Mixon is a Fiscal Specialist with the Ohio Department of Public Safety and President of Union Chapter 2503. Ms. Mixon testified at the hearing herein that couples in relationships work together in the workplace within the Ohio Department of Public Safety. Ms. Mixon testified that this happens all the time. Ms. Mixon testified that it is not uncommon within the Ohio Department of Public Safety to encounter married co-workers.

Aiasha Watley

Aiasha Watley is the wife of Perry Watley, the grievant in this proceeding. Ms. Watley serves within a Customer Service Assistant 3 position at the Ohio Department of Public Safety's Cincinnati Reinstatement Office.

Ms. Watley has been employed by the Ohio Department of Public Safety for fifteen and one-half years, having begun her service within the Department as a Customer Service Assistant 2 in 1999 and assuming the position of Customer Service Assistant 3 in 2003. Ms. Watley testified that the Cincinnati Reinstatement Office issues drivers' licenses.

Ms. Watley testified that the Cincinnati Reinstatement Office has a Customer Service Manager, Derek Hooten, Ms. Watley's direct supervisor and the only direct supervisor assigned to the Cincinnati Reinstatement Office. Ms. Watley testified that there are seven to eight Customer

Service Assistant 2's within the Cincinnati Reinstatement Office and one Customer Service Assistant 3, Ms. Watley.

Ms. Watley testified that a customer service desk is staffed by the Customer Service Assistant 2's, with two CSA 2's assigned to the front customer service desk during working hours. Ms. Watley testified that she does provide training to CSA 2's but noted that some CSA 2's also provide training. Ms. Watley testified that she has no authority to recommend who to retain in the office but does provide information to her supervisor about how the work of the office is progressing.

As a lead worker in the Cincinnati Reinstatement Office Ms. Watley makes a bank deposit on behalf of the office when Customer Service Manager Hooten, who normally handles this duty, is unavailable to make the deposit.

Ms. Watley testified that she is not called upon to make judgments about policy. Ms. Watley confirmed that lunch breaks and mid-shift breaks are scheduled by Ms. Watley in her capacity as the Customer Service Assistant 3 in the office.

Under questioning by the representative of the Employer, Ms. Watley testified that she talks to those customers who have asked to speak to a higher official in interacting with a Customer Service Assistant 2. Ms. Watley has offered guidance to Customer Service Assistant 2's on complex issues. Ms. Watley testified that she provides training to newly hired employees during their probationary periods and advises her supervisor on training.

Under redirect examination by the Union's representative, Ms. Watley testified that she makes no recommendation as to discipline, leave requests, or promotions from her CSA 3 position in the Cincinnati Reinstatement Office.

Perry Watley

Perry Watley has been employed by the Ohio Department of Public Safety for twenty-three and one-half years. Mr. Watley serves within a position classified Driver License Examiner 1. Mr. Watley began his tenure with the Ohio Department of Public Safety at the Sharonville Office, moved to the Mt. Healthy Office, and then moved to the Seven Hills Office.

Mr. Watley testified that he wished to be considered for the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office because he had spent twenty-three and one-half years “on the road” in the heat and the cold and wished to work from a position that was more regular in its hours and its duties.

Mr. Watley testified that he had received a telephone call from Jennifer Pletcher who informed Mr. Watley that Mr. Watley would not be considered for the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office because of nepotism, as Mr. Watley’s wife was serving as a Customer Service Assistant 3 at that office.

Jennifer McLendon

Jennifer McLendon is a Human Capital Management Manager employed within the Ohio Department of Public Safety’s Division of Human Resources. Ms. McLendon has been serving in her current position since February, 2015. Prior to her current assignment, Ms. McLendon served as a Human Capital Management Senior Administrator for one and one-half years.

Ms. McLendon referred to Joint Exhibit 6, the classification series that contains both Customer Service Assistant 2 and Customer Service Assistant 3. Ms. McLendon noted that while Customer Service Assistant 2’s are to interact directly with customers, a Customer Service Assistant 3 is to serve as a lead worker with responsibilities that include directing the work of the

office and providing training. As a lead worker, the Customer Service Assistant 3, according to Ms. McLendon, is also required to provide notice about issues of work performance.

Under questioning by the Union's representative, Ms. McLendon confirmed that the Customer Service Assistant 3 position is within the bargaining unit and is assigned bargaining unit work. Ms. McLendon agreed that there is nothing within the classification specification for Customer Service Assistant 3 that refers to providing input on work performance.

Jennifer Pletcher

Jennifer Pletcher is a Human Capital Management Senior Analyst employed within the Ohio Department of Public Safety in the Division of Human Resources. Ms. Pletcher's prior employment was as an HCM Analyst.

Ms. Pletcher explained that there had been two applicants for the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office, Ms. Gaines and Mr. Watley. Their applications were directed to a hiring manager to determine whether minimum qualifications were met. Ms. Pletcher testified that the hiring manager noted that the Customer Service Assistant 3 position at the Cincinnati Reinstatement Office was filled by the spouse of one of the applicants. The issue was raised with the Ohio Department of Public Safety's Human Resources Administrator and it was determined by the Employer that a conflict of interest would arise with the employment of Mr. Watley in the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office, that such a circumstance would violate contract language that bars nepotism, and therefore Mr. Watley's application was ordered withdrawn from consideration by the Employer.

Elizabeth Dziatkowicz

Elizabeth Dziatkowicz is a Human Capital Management Administrator within the Ohio Department of Public Safety. Ms. Dziatkowicz has served in her current position since December, 2014. During the nine years prior to her present assignment, Ms. Dziatkowicz served as an HCM Manager within the Ohio Department of Public Safety.

Ms. Dziatkowicz testified that she had been informed by Ms. Plethcher of the Customer Service Assistant 3 position filled by Ms. Watley and the application from Ms. Watley's spouse to fill the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office. Ms. Dziatkowicz stated that the Customer Service Assistant 3 position was not a supervisor's position but Ms. Watley, according to Ms. Dziatkowicz, was supervising in her role as a lead worker.

Derek Hooten

Derek Hooten is the Customer Service Manager at the Cincinnati Reinstatement Office and has served in this position for seven years. Mr. Hooten supervises a staff of nine – eight Customer Service Assistant 2's and one Customer Service Assistant 3. Mr. Hooten handles all of the work performance evaluations, leave requests, and discipline recommendations for the office.

Mr. Hooten testified that the Customer Service Assistant 3 position at the Cincinnati Reinstatement Office is a lead worker position responsible for scheduling breaks and lunch periods, overseeing the work of the office, providing training, and making deposits of money in the absence of Mr. Hooten. Mr. Hooten described Customer Service Assistant 2's as being responsible for assisting customers, a duty also performed by the Customer Service Assistant 3 who also answers questions from Customer Service Assistant 2's. Mr. Hooten testified that he would request the opinion of Customer Service Assistant 3 Watley about how training was going.

POSITIONS OF THE PARTIES

Position of the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

The Union refers the arbitrator to Article 17, section 17.05(A)(3) that provides: “If there are multiple applicants, the selection will be made from the most senior applicant who meets minimum qualifications as stated above.” It is the Union’s position that this language controls in this proceeding and supports upholding the grievance.

As to the nepotism claim made by the Employer in this proceeding, the Union points to Article 17, section 17.09 that begins: “No employee shall be directly supervised by a member of his/her own immediate family.” The Union confirms that this Article goes on to define “immediate family” as including a spouse, the relationship presented by the facts of this case. The Union points out, however, that the Ohio Revised Code defines “Supervisor,” and lead work does not fall under that definition. Because no direct supervision is provided from the Customer Service Assistant 3 position at the Cincinnati Reinstatement Office in relation to any Customer Service Assistant 2 position, argues the Union, Article 17, section 17.09, Nepotism, does not apply to the facts of this case.

The Union points out that state of Ohio policy and practices define supervision in several places, none of which include lead work. The Union points out that in the state of Ohio Point/Factor Evaluation Manual used to determine pay ranges for classifications, there are three levels of supervision delineated - lead work, direct supervision, and complex direct supervision. The Union notes that lead work is specifically and expressly separated from direct supervision as expressed in the state of Ohio Point/Factor Evaluation Manual.

The Union notes that direct supervision, the lowest level of supervision referenced in Article 17, section 17.09 – Nepotism, is defined within the state of Ohio Point/Factor Evaluation Manual as: “Full supervisory responsibility over a group comprising less than 25% professional and managerial employees.” The Union argues that had the state of Ohio intended lead work to comprise “direct supervision” and therefore covered by Article 17, section 17.09, Nepotism, two separate definitions would not appear in the state of Ohio Point/Factor Evaluation Manual. The Union argues that the state’s own guide indicates that lead work is not to be considered direct supervision and therefore lead work is not included under the definition of nepotism presented in Article 17, section 17.09.

The Union points out that the definition of “supervisor” presented by Ohio Revised Code section 4117.01(F) refers to:

... any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine clerical nature, but requires the use of independent judgment.

The Union points out that the lead worker position at issue in this proceeding does not provide direct supervision under the definition provided for “supervisor” by Ohio Revised Code section 4117.01(F). The Union argues that the state of Ohio draws clear distinctions between what constitutes lead work and what constitutes direct supervision, and the difference between these levels of authority shows that a direct supervisor falls under the provisions Article 17, section 17.09, Nepotism, but a lead worker does not. Because a lead worker does not provide the kind of supervision required to invoke the nepotism language, *i.e.* direct supervision, Article 17, section

17.09 is not applicable to lead work, is not applicable to the facts of this case, and does not bar the grievant from being considered for the Customer Service Assistant 2 position in question.

The arbitrator is urged by the Union to uphold the grievance and order the lateral transfer of the grievant to a Customer Service Assistant 2 position at the Cincinnati Reinstatement Office.

Position of the State of Ohio, Department of Public Safety, Employer

The Employer points out that most of the facts underlying this proceeding are not disputed by the parties. The Employer refers to the January 6, 2014 posting of the Customer Service Assistant 2 position located at the Cincinnati Reinstatement Office and the receipt by the Employer of two applications for the posted position. The Employer notes that it discovered that one of the applicants, Mr. Watley, was the spouse of the incumbent of the Customer Service Assistant 3 position at the Cincinnati Reinstatement Office.

It is the position of the Employer that the dispositive issue in this case is whether or not the Customer Service Assistant 3 (lead worker) in the Cincinnati Reinstatement Office “supervises” lower level employees, namely Customer Service Assistant 2’s in that office. It is the position of the Employer that the Customer Service Assistant 3 position at the Cincinnati Reinstatement Office does “supervise” lower level Customer Service Assistant 2’s, and because of this circumstance the grievant was not eligible to laterally transfer to the vacant Customer Service Assistant 2 position at the Cincinnati Reinstatement Office.

The Employer recalls the testimony from Mrs. Watley, the incumbent of the Customer Service Assistant 3 position at the Cincinnati Reinstatement Office and the grievant’s wife. The Employer notes that Ms. Watley explained in her testimony at the hearing that she is a lead worker at the Cincinnati Reinstatement Office, and although Ms. Watley does many of the same duties assigned to Customer Service Assistant 2’s, Ms. Watley is also responsible for training Customer

Service Assistant 2's, creating employee work schedules, responding to complex customer questions, and performing other administrative tasks as assigned to her by her supervisor, Customer Service Manager Derek Hooten.

The Employer recalls the testimony of Customer Service Manager Hooten at the hearing wherein Ms. Watley's supervisor testified that Ms. Watley was responsible for training employees, in particular new employees, creating employee schedules, and handling escalated and/or complex situations/cases that were not resolved by a Customer Service Assistant 2. Mr. Hooten testified that he often seeks Ms. Watley's opinion and input when it comes time for Mr. Hooten to complete a work performance evaluation for a Customer Service Assistant 2 during a probationary period or a trial period.

The Employer points out that the sole reason the grievant's application for the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office was withdrawn from consideration was Mr. Watley's wife serving in a Customer Service Assistant 3 position at the Cincinnati Reinstatement Office from which Ms. Watley performs "... some supervisory tasks and duties, and as such, functionally supervise lower-level CSA 2's." See Employer's post-hearing brief, page 5.

The Employer argues that there is a distinction between the terms "supervising" and "supervisor." Although the Union has argued that the two words are synonymous, the Employer claims the words are distinguishable.

The word "supervise," a verb, has been defined as: "To oversee (a process, work, workers, etc.) during execution or performance; superintend; have the oversight and direction of." The word

“supervisor” is a noun and has been defined as: “A person who supervises workers or the work done by others; superintendent.”¹

The Employer emphasizes that Article 17, section 17.09 uses the phrase “directly supervised by” and the Employer claims that this phrase speaks to the act of supervising, not to a position classified supervisor. The Employer claims that if Article 17, section 17.09 had intended for “directly supervised by” to mean the same thing as “supervisor,” the word “supervisor” would be presented in this Article. The Employer agrees that the term “supervisor” is defined by Ohio Revised Code section 4117.01(F) but the Employer contends the act of supervising is not confined or exclusive to the position of a supervisor. The Employer argues that certain tasks or responsibilities may be exclusive to a supervisor but other supervisory tasks or responsibilities (assigning work, creating work schedules, training, giving work direction, coaching, providing advice and assistance on complex matters) can be performed by others who do not have the supervisory authority described in Ohio Revised Code section 4117.01(F).

It is the position of the Employer that the position description for a Customer Service Assistant 3 position assigned to the Cincinnati Reinstatement Office describes the duties of a lead worker and assistant to the district supervisor, a position that requires the incumbent of the position to lead a team of lower-level Customer Service Assistants (*i.e.* work direction and training on a daily basis). As argued by the Employer at page 7 of the Employer’s post-hearing brief:

The job duties of a typical lead worker consists of many of the same tasks the employee was responsible for in the past, along with new, supervisory duties. In other words, they have the same responsibilities and tasks of a supervisor, with limited or no authority to carry them out.

¹ Definitions of “supervise” and “supervisor” are from Dictionary.com.

For the reasons presented above, the Employer urges the arbitrator to deny the grievance in its entirety.

DISCUSSION

The facts underlying the grievance in this proceeding are not in dispute between the parties. The Joint Stipulations and the Joint Exhibits presented to the hearing record by the parties indicate two applicants for the posted Customer Service Assistant 2 position at the Cincinnati Reinstatement Office who were, with one exception, equal under every factor bearing on the selection of an applicant for the posted position, including the classification and job duties assigned to each applicant at the time each submitted an application for the posted position. Both applicants were understood by the Employer to meet the minimum qualifications for the posted position.

While almost all the factors referenced in Article 17, section 17.05 were equal between the two applicants, one factor, State seniority, favored applicant Watley.

There is also no dispute that in the case of both applicants for the vacant Customer Service Assistant 2 position at the Cincinnati Reinstatement Office, filling the vacant position would not comprise a demotion or a promotion but a lateral transfer, from a position assigned pay range 28 to a position assigned pay range 28.

Article 17, section 17.05 includes the following language:

... 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.

The hearing record shows by a preponderance of the evidence that neither applicant had prior or current discipline bearing on this selection process. The hearing record shows that the applicants were substantially equal among all factors expressed in Article 17, section 17.05, with the exception of State seniority.

Article 17, section 17.05(A)(3) reads as follows:

If a vacancy is not filled as a promotion pursuant to Sections 17.04 and 17.05, bids for a lateral transfer shall be considered. Consideration of lateral transfers shall be pursuant to the criteria set forth herein. The Agency shall consider requests for lateral transfers before considering external applications. Employees bidding under Section 17.04 (4) shall have grievance rights through Step Three. Employees bidding under section 17.04 (5) shall have no rights to grieve non-selection. The successful applicant shall possess and be proficient in the minimum qualifications of the position description and the classification specification. If there are multiple applicants, the selection will be made from the most senior applicant who meets minimum qualifications as stated above.

Among the selection criteria referenced above there is no question that the grievant, Mr. Watley, was the preferred candidate. Both Mr. Watley and the other applicant, Ms. Gaines, met the minimum qualifications for the vacant position and both Mr. Watley and Ms. Gaines, under the factors presented in Article 17, section 17.05, based on their respective employment histories, were substantially equal, with the exception of State seniority. Using State seniority as a tie-breaker, Mr. Watley is the favored candidate under the language of Article 17, section 17.05.

The withdrawal of Mr. Watley's application from consideration for the posted position by the Employer on January 17, 2014 was not ordered because of any flaw or omission by the grievant under Article 17, section 17.05. The application of the grievant was ordered withdrawn from consideration for the posted position by the Employer under the language of Article 17, section 17.09 – Nepotism, that reads in pertinent part: "No employee shall be directly supervised by a

member of his/her immediate family. 'Immediate family' is defined for the purposes of this Section to include: spouse..."

A preponderance of evidence in the hearing record establishes that Aiasa Watley, the wife of grievant Perry Watley, works from a position classified Customer Service Assistant 3 at the Cincinnati Reinstatement Office and from that position serves as a lead worker over Customer Service Assistant 2 positions at the Cincinnati Reinstatement Office, including the Customer Service Assistant 2 position sought by Mr. Watley and Ms. Gaines. The Employer argues that the withdrawal of Mr. Watley's application from consideration was based on the fact that if Mr. Watley were to be installed in the position at issue, Mr. Watley would be in a position that receives supervisory oversight from an immediate family member, namely Mr. Watley's spouse. The Employer argues that Article 17, section 17.09 prohibits such a circumstance and therefore the Employer barred Mr. Watley from filling the position for which he had made application.

The Union denies that Article 17, section 17.09 – Nepotism, has any application to the facts of this proceeding. The Union argues that for Article 17, section 17.09 to apply, the grievant must be seeking a position that is to be "... directly supervised by a member of his/her immediate family." The Union points out that the position sought by the grievant will not be directly supervised by a member of the grievant's immediate family. The Union points out that if Mr. Watley were to be installed in the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office he would receive all of his immediate, direct supervision from Customer Service Manager Derek Hooten, a person who is not an immediate family member in relation to Mr. Watley.

In considering the grievance the arbitrator keeps in mind the language of Article 25, section 25.03 that specifically and expressly declares that: "The arbitrator shall have no power to add to,

subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.”

The grievant has met all of the selection criteria expressed within Article 17, section 17.05. But for the language of Article 17, section 17.09, the grievant would have been the applicant entitled to selection.

In the case herein, the Employer raises the prohibition against nepotism as expressed in Article 17, section 17.09. There is no question that Aiasha Watley is the spouse of Mr. Watley and therefore an immediate family member in relation to Mr. Watley.

The first sentence of Article 17, section 17.09 reads: “No employee shall be directly supervised by a member of his/her immediate family.” The particulars of this case call for envisioning the installation of the grievant into the position at issue, a Customer Service Assistant 2 position at the Cincinnati Reinstatement Office, and determining whether under this circumstance the grievant would be an employee “directly supervised by a member of his/her immediate family.” There is no question that if installed in the position sought, Mr. Watley would receive lead worker oversight from a member of his immediate family. There is likewise no question, based upon a preponderance of the evidence presented to the hearing record, that Mr. Watley would receive no direct, managerial supervision from a member of his immediate family. Mrs. Watley does not provide direct, managerial supervision to any Customer Service Assistant 2 position at the Cincinnati Reinstatement Office and will not be providing this type of supervision from her current position to the Customer Service Assistant 2 position presently filled by Ms. Gaines.

The grievant in this case is able to show his eligibility for a lateral transfer under the provisions of Article 17, section 17.05. Having established this eligibility, the Employer is tasked with presenting evidence and arguments proving a proper and appropriate application of the limiting language presented in Article 17, section 17.09, showing that the application of this language provides a legitimate basis upon which to deny the position to the more senior applicant, Mr. Watley. Such a showing by the Employer, as noted above, requires proof that if the grievant were to be installed in the position at issue the grievant would be “directly supervised by a member of his immediate family.”

The heart of the dispute between the parties in this proceeding is the interpretation of the words: “... directly supervised by...” found in the first sentence of Article 17, section 17.09 – Nepotism. The Employer understands this language to mean oversight that is imparted by an immediate family member, such as a spouse, from a position that provides supervisory activities in close and direct proximity to the position being overseen. The Employer contends that the kind of managerial, direct supervision that is exercised only from positions located outside the bargaining unit is not a level of supervisory authority that is required to invoke the restrictive language of Article 17, section 17.09. The Employer claims that the work-related oversight from Customer Service Assistant 3 Aiasa Watley that would be extended to her spouse, Perry Watley, if the grievant were to be installed in the position in question, would be “direct” as there is no intervening level of oversight and this supervisory oversight would come from an immediate family member, a type of supervisory activity prohibited by the language of Article 17, section 17.09.

The Union argues that “directly supervised by” refers to direct supervision, the kind of managerial supervision described in Ohio Revised Code section 4117.01(F), a type of supervision not provided by Mrs. Watley from her Customer Service Assistant 3 position.

The arbitrator finds that when the language of Article 17, section 17.09 was agreed by the parties, the phrase “directly supervised by” was understood by both parties to describe managerial supervision, what is commonly referred to as “direct supervision.” The supervision referenced in Article 17, section 17.09 is understood by the arbitrator to include a broad range of employment decisions and recommendations on such work-related matters as work performance evaluation, leave requests, and discipline. This type of supervision is performed from a position located outside the bargaining unit. It is this type of supervision, managerial supervision, that may not be exercised by an immediate family member over a position filled by an immediate family member. The arbitrator is not persuaded that the language of Article 17, section 17.09, when it was agreed, was understood by the parties to bar lead work activities from an immediate family member to an immediate family member.

The arbitrator is not persuaded that if Mr. Watley were to be installed in the Customer Service Assistant 2 position at the Cincinnati Reinstatement Office he would be “directly supervised by” his spouse. Such direct, managerial supervision is a pre-condition to the application of the language of Article 17, section 17.09 – Nepotism, and such direct, managerial supervision is not performed by Ms. Watley.

The arbitrator expresses no opinion as to the wisdom or folly of immediate family members working together; such a question is not before the arbitrator in this case. This is not a case about the rightness or wrongness of a policy.

The dispositive question before the arbitrator in this proceeding is whether the language of Article 17, section 17.09 was properly applied to the grievant's pending application for the Customer Service Assistant 2 position.

The parties' dispute in this case is grounded in terminology, especially the meaning of the term "supervised." The arbitrator understands the term "supervised" as used in Article 17, section 17.09 to mean managerial supervision, commonly referred to as "direct supervision," a type of supervision that is not carried out from a position located in the bargaining unit. Lead work, therefore, is not understood by the arbitrator to be the type of supervision intended by the language of Article 17, section 17.09.

Because a preponderance of the evidence in the hearing record establishes that Mr. Watley, the grievant, if he were to be installed in a Customer Service Assistant 2 position at the Cincinnati Reinstatement Office, would not be "directly supervised by" a member of his immediate family, as that phrase has been construed by the arbitrator in this decision, the arbitrator finds the application of the language of Article 17, section 17.09 to the facts of this case to have been inappropriate. In the absence of direct, managerial supervision from a member of an employee's immediate family, the language of Article 17, section 17.09 does not serve as a limitation on the language bearing on the selection of an applicant for a lateral transfer.

The arbitrator sustains the grievance and orders a remedy to make the grievant whole.

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AWARD

1. The grievance that has given rise to this proceeding is arbitrable and properly before the arbitrator for review and resolution under Articles 17 and 25 of the parties' collective bargaining agreement.
2. The Union has presented a preponderance of evidence to the hearing record proving that the grievant met the minimum qualifications for the posted position; the grievant was not barred by nepotism from the posted position under Article 17, section 17.09; and the grievant had more State seniority than the applicant selected for the posted position.
3. The grievance is sustained.
4. The grievant shall be laterally transferred to a Customer Service Assistant 2 position at the Cincinnati Reinstatement Office retroactive to February 10, 2014.
5. The grievant shall receive all of the benefits to which he is entitled, including seniority, retroactive to February 10, 2014 from the position of Customer Service Assistant 2.
5. The arbitrator shall retain jurisdiction over this case for sixty days.

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
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Columbus, Ohio 43215
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Columbus, Ohio
July 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO and the State of Ohio, Department of Public Safety, grievance number 15-02-20140124-0010-01-07, was served electronically upon the following this 24th day of July, 2015:

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July 24, 2015