

In the Matter of Arbitration Between the	:	Grievance Number: JFS-2019-02022-09
	:	
<b>OHIO CIVIL SERVICE EMPLOYEES</b>	:	
<b>ASSOCIATION, AMERICAN FEDERATION</b>	:	Grievant: Marjoyce Watkins
<b>OF STATE, COUNTY AND MUNICIPAL</b>	:	
<b>EMPLOYEES, LOCAL 11, AFL-CIO,</b>	:	
	Union :	Arbitration Hearing Date: February 24, 2021
and the	:	
	:	
<b>STATE OF OHIO, DEPARTMENT OF JOB</b>	:	Howard D. Silver, Esquire
<b>AND FAMILY SERVICES,</b>	:	Arbitrator
Employer	:	

DECISION AND AWARD OF THE ARBITRATOR

APPEAREANCES

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County and Municipal Employees, Local 11, AFL-CIO, Union

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## PROCEDURAL BACKGROUND

This matter came on for a remote arbitration hearing on February 24, 2021 at 9:00 a. m. via the teleconferencing platform Zoom. During the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded at 12:45 p. m. on February 24, 2021 and the evidentiary portion of the hearing record was closed at that time.

Post-hearing briefs were received by the arbitrator from the parties by March 29, 2021 and exchanged between the parties by the arbitrator on March 30, 2021.

This matter proceeds under a collective bargaining agreement in effect between the parties to this proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, and the State of Ohio, Department of Job and Family Services. The parties' collective bargaining agreement to be applied in this case was in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1.

Neither party has contested the arbitrability of the grievance underlying this proceeding. Based on the language of the parties' collective bargaining agreement and in the absence of any objection to the arbitrability of the grievance, the arbitrator finds the grievance underlying this proceeding to be arbitrable and properly before the arbitrator for review and resolution.

## JOINT ISSUE

Did Management violate the OCSEA collective bargaining agreement by denying the Grievant an interview for a posted Account Executive (PN 20042457) position in the Office of Workforce Development (OWD)?

## JOINT STIPULATIONS

1. The parties agree the issue is properly before the Arbitrator.
2. The parties agree this is a non-selection grievance.
3. The parties agree the disputed posting is for an Account Executive vacancy in Cuyahoga County (PN 20042457) and is a pay range 31.
4. The parties agree the candidates meeting the minimum qualifications according to their applications for the instant posting were Joseph Crestani, Ann Kilroy, Catherine Rafferty, Michelle Kinter, and the Grievant.
5. The parties agree the vacancy was a promotional opportunity for all candidates meeting the minimum qualifications.
6. The parties agree Joseph Crestani, Michelle Kinter and Catherine Rafferty did not pass the assessment.
7. The parties agree Ann Kilroy was the selected candidate for the position.
8. The parties agree the Grievant and Ms. Kilroy were discipline-free at the time of the application/selection and remain discipline-free currently.
9. The parties agree the Grievant possesses more seniority than Ms. Kilroy.
10. The parties agree the Grievant and Ms. Kilroy were both Customer Service Representatives at the time of the posting.

## JOINT DOCUMENTS

1. OCSEA Contract (2018-2021)
2. Documents

- A. Posting - Account Executive pg. 13-19
- B. Application - Marjoyce Watkins pg. 20-25
- C. Position Description – Account Executive (66391) pg. 31
- D. Application/Resume of Selected Candidate – Ann Kilroy pg. 26-30.
- E. Assessment test pg. 32-114
- F. Scores to Assessment test pg. 115-122
- G. Assessment sign in Monday May 6, 2019 pg.4
- H. Security and Confidentiality of Testing and Interviewing Documents Agreement pg. 6
- I. ODJFS (Ohio Department of Jobs and Family Services) Selection Approval pg. 7
- J. OCB Mediation Tracking 11/21/19 pg. 8-9
- K. Interview Emails – Debra Bailey pg. 10-11
- L. Letter – Nancy J. Jancso-Kocarek, SHRM-SCP, CCP pg.12

3. Grievance Trail

- A. Grievance – Filed 5/29/2019 pg. 123
- B. Step 2 Response – 8/28/2019 pg. 124-127

## STATEMENT OF THE CASE

The parties to this arbitration proceeding, the Ohio Civil Service Employees Association, American Federation State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter referred to as the Union, and the State of Ohio, Department of Job and Family Services, hereinafter referred to as the Employer, are parties to a collective bargaining agreement in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1.

Within the parties' collective bargaining agreement is Article 25, Grievance Procedure. The first sentence of Article 25, in section 25.01(A), reads: “A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement.”

In mid-April 2019 the Employer posted on-line an invitation to bid upon an Account Executive position in the Office of Workforce Development (OWD), position number 20042457, a position to operate from the Cleveland District Office located on Superior Avenue in Cleveland, Ohio, Cuyahoga

County. The pay range for the posted Account Executive position was pay range 31. See Joint Stipulation 3.

On April 19, 2019 the grievant, Marjoyce Watkins, a bargaining unit member, filed a bid upon the posted Account Executive position.

Based on the application submitted by the grievant for the posted Account Executive position, the Employer determined that the grievant met the minimum qualifications for the posted position. The Employer determined that five candidates had submitted bids for the posted Account Executive position who met the minimum qualifications for the posted position. In the case of each candidate, selection for the posted position would result in a promotion with an increase in pay. See Joint Stipulations 4 and 5.

The process followed in selecting one of the candidates for the posted Account Executive position moved from posting the position to the receipt of applications to evaluating candidates' minimum qualifications, to an assessment phase comprised of written tests. These assessment tests required written responses to written questions, choosing among multiple answers in the case of multiple choice questions, exhibiting writing skills, and demonstrating the candidate's knowledge of the subject matter of the work and the policies and procedures followed in the Office of Workforce Development. This phase of the selection process, referred to as the assessment, was uniformly presented to the candidates for the posted position and graded under a scoring key that attaches to the three test booklets that comprise the written assessment test. The Employer determined that a minimum passing score for the assessment phase of the selection process was seventy percent (70%). This percentage was calculated by comparing the points available under the assessment test to the points awarded to a candidate upon the answers and responses provided in the assessment test by the candidate.

When the Employer scored the written assessment tests from each of the five candidates the Employer found only one candidate, Ann Kilroy, had attained the seventy percent (70%) score needed to move on in the process, the next step being an interview. The Employer, in scoring the assessment tests, determined that the grievant did not attain a score of seventy percent (70%) and therefore the grievant was not to be offered an interview. The Employer determined that the grievant scored sixty-six percent (66%) on the grievant's written assessment tests.

Ms. Kilroy was selected to fill the posted position even though both Ms. Kilroy and the grievant met the position's minimum qualifications; both Ms. Kilroy and the grievant at the time of their applications were discipline free; and the grievant possessed more state seniority than Ms. Kilroy.

The written assessment test for the posted Account Executive position was taken by the candidates on May 6, 2019. When the grievant had not been notified of her assessment test score by May 16, 2019 Ms. Watkins contacted the Human Resources Department. When no response to her inquiry was received the grievant again reached out to the Department of Human Resources on May 21, 2019. Ms. Watkins received a response to inquiries on May 27, 2019.

The grievant testified at the arbitration hearing that she believes the delay in reporting her assessment test score to have been due to management delaying the transmission of the grievant's assessment score to Human Resources, with this additional time used by management to alter answers on the grievant's assessment test and thereby manipulate the score to be assigned to the grievant's assessment test.

When the grievant was notified that the grievant had not received a passing score on the assessment test and therefore would not be scheduled for an interview for the posted position, the grievant filed a grievance with the Employer on May 29, 2019 charging that by denying the grievant an interview for the posted Account Executive position the Employer had violated the parties' collective

bargaining agreement, specifically by violating Article 2, Non-Discrimination and Article 17, Promotions, Transfers, Demotions and Relocations. A particular reference in the grievance is made to Article 17, section 17.05, Selection.

The grievance filed on behalf of the grievant complained that the assessment was not based on the minimum qualifications for the posted position, and argued that any candidate that met the minimum qualifications for the posted position should have received an interview for the posted position. The grievant alleges that answers she provided in her assessment test were deleted or altered and do not reflect answers the grievant would have chosen in completing the assessment. The grievance alleges that the grievant's assessment score was manipulated by the Employer, especially in scoring the writing sample provided by the grievant in her assessment test.

The grievance was denied by the Employer at Step 2 on August 28, 2019. The unresolved grievance was directed to final and binding arbitration by the Union pursuant to Article 25, section 25.02.

An arbitration hearing was conducted on February 24, 2021. Post-hearing briefs were received from the parties by March 29, 2021.

## SUMMARY OF TESTIMONY

### Marjoyce Watkins, Grievant

Marjoyce Watkins, the grievant in this proceeding, has been employed by the Ohio Department of Job and Family Services since 2005. During her tenure with the Department Ms. Watkins first served as an Office Assistant and then as a Customer Service Representative, in Unemployment and then at a Job Center. Ms. Watkins has worked as a Customer Service Representative since 2011.

Ms. Watkins recalled in her testimony that twenty-two (22) Account Executive positions to be



assigned to Cuyahoga County were posted on-line by the Employer in April 2019. Ms. Watkins submitted an application for one of the posted Account Executive positions. Ms. Watkins was subsequently notified that she was not to receive an interview for the posted position because Ms. Watkins had not passed the assessment test portion of the selection process. Ms. Watkins recalled her surprise upon receiving this information as she knew herself to be the most senior candidate for the posted position.

Ms. Watkins recalled sitting for the assessment test in Columbus, Ohio in May 2019. Later Ms. Watkins discovered that other candidates had received their assessment test scores while Ms. Watkins had not. When Ms. Watkins asked to see her assessment test results and was subsequently shown those results, Ms. Watkins observed that the answers scored on her assessment test were not accurate.

Ms. Watkins was referred to page 2 of Part 1 of Test Booklet #2, paginated 41, question 3, which asks which centers must be physically and programmatically accessible to individuals with disabilities. This multiple choice question presents four answers among which the test taker is "... to circle the single **best** answer for each of (sic) question." (Emphasis in original). The four answer options for question 3 are (a) Comprehensive OhioMeansJobs Centers, (b) Specialized Centers, (c) Comprehensive OhioMeansJobs Centers and Affiliate OhioMeansJobs Centers, and (d) Comprehensive OhioMeansJobs Centers, Affiliate OhioMeansJobs Centers and Specialized Centers. Ms. Watkins selected as the best answer (c), Comprehensive OhioMeansJobs Centers and Affiliate OhioMeansJobs Centers. The answer key for this question identifies the best answer to be (d) Comprehensive OhioMeansJobs Centers, Affiliate OhioMeansJobs Centers and Specialized Centers.

In her testimony at the arbitration hearing Ms. Watkins explained the primary difference between a comprehensive OhioMeansJobs center and an affiliate OhioMeansJobs center, that being the authority of a comprehensive center to make an agency referral to a partner, an option not available at

an affiliate center.

Ms. Watkins was referred to page 3 of Test Booklet #2, paginated 42, question 5 which asks the test taker to select the best answer by circling the answer that **is not** a required Workforce and Opportunity Act (WIOA) partner. (Emphasis in original). The answers presented by question 5 are (a) Medicaid Health, (b) Disability Determination, (c) Vocational Rehabilitation Services, and (d) All of the above. Ms. Watkins selected (b) Disability Determination. The answer key declares (d) All of the above to be the best answer for this question.

Ms. Watkins was referred to question 7 in Test Booklet #2 which asks the test taker to indicate, among the answers presented, the type of career service which includes initial assessment of skill levels including literacy, numeracy, and English language proficiency, as well as aptitudes, abilities (including skill gaps), and supportive services. The answers presented are (a) Basic Career Services, (b) Individual Career Services, (c) Follow-up Career Services, and (d) None of the above. Ms. Watkins selected (b) Individual Career Services. The answer key for this question identifies (a) Basic Career Services as the best answer. Ms. Watkins pointed out in her testimony at the arbitration hearing that initial assessments are conducted among the career services described in answers (a), (b), and (c).

Ms. Watkins was referred to question 8 in Test Booklet #2, paginated 42, a question that asks the test taker to complete a sentence that begins with: "Labor exchange services includes \_\_\_\_\_." The answers available to the test taker in question 8 are (a) diagnostic testing and use of other assessment tools, (b) determinations of whether the individual is eligible to receive assistance from the adult, dislocated worker, or youth programs, (c) recruitment and other business services on behalf of employers, and (d) all of the above. Ms. Watkins selected (b) determinations of whether the individual is eligible to receive assistance from the adult, dislocated worker, or youth programs. The answer key for Test Booklet #2 identifies the best answer for question 8 as (c) recruitment and other business

services on behalf of employers.

Ms. Watkins was referred to question 11 in Test Booklet #2, paginated 43, wherein the test taker is asked to select the best answer to a question about where requests for technical assistance may be sent. The options presented by question 11 are (a) [WIOAQNA@jfs.ohio.gov](mailto:WIOAQNA@jfs.ohio.gov), (b) [Assistance@jfs.ohio.gov](mailto:Assistance@jfs.ohio.gov), (c) OhioMeansJobs.com , and (d) b and c. Ms. Watkins selected (d) b and c. The answer key identifies the best answer for question 11 in Test Booklet #2 to be (a) [WIOAQNA@jfs.ohio.gov](mailto:WIOAQNA@jfs.ohio.gov).

Ms. Watkins referred to Test Booklet #3, paginated 51, wherein a test taker's grasp of correspondence form and grammar is intended to be measured. This exercise takes the form of a business letter that, among other tasks, is to be properly punctuated and spelled. At the end of the salutation on this letter there appears a colon, the generally accepted punctuation in such a circumstance. In this case the letter begins: "Dear Mr. Forcewind:" The colon following Forcewind in the salutation in Ms. Watkins' assessment has been circled. Ms. Watkins believes that this colon was mistakenly identified by scorers as an error, with a point or points deducted as a consequence. Ms. Watkins noted in her testimony that she continues to believe that her use of the colon was not in error and deserved no deduction.

Ms. Watkins noted that there were two vacant Cuyahoga County Account Executive positions posted for bids and Ms. Watkins was not afforded an interview for either position.

Ms. Watkins believes her written assessment test to have been compromised through the manipulation of the test's scoring. Ms. Watkins testified that only two people scored her assessment. Ms. Watkins pointed out that an interview would have avoided this entire process. Ms. Watkins testified that if she had received an interview but not selected for the posted position she would be much more comfortable with the result.

Ms. Watkins testified that her direct supervisor since 2011 has been Hal Casey.

Suzanne L. Gordon

Suzanne Gordon is employed by the Employer at the Lorain Call Center in the trade unit and has served in this capacity for one and one-half years. Prior to her present position Ms. Gordon worked as a Customer Service Representative in Cuyahoga County for four years.

Ms. Gordon applied for the posted Account Executive position in January or February 2019. Ms. Gordon was notified by Carla Smith of the Human Resources Department that she had not been selected for the position.

Ms. Gordon recalled taking the written assessment test for the Account Executive position on May 29, 2019 in Columbus, Ohio. Ms. Gordon recalled difficulties in logging on to the system to take the test. Ms. Gordon recalled reporting these log on problems to test proctors.

John K. McClure

John McClure has been employed by the State of Ohio for ten years, with his entire tenure served in the Ohio Department of Job and Family Services. Mr. McClure has served in three positions in the Department, presently serving in a position classified Program Administrator 2. Mr. McClure serves as the Bureau Chief for Workforce Services. While the grievant works within the bureau managed by Mr. McClure, Mr. McClure has never been a direct supervisor of Ms. Watkins.

Mr. McClure recalled coordinating with Human Capital Management Analyst Amber Shedd of the Employer's Human Resources Department the posting, assessment testing, interviewing, and selection for the Account Executive positions to be filled in Cuyahoga County among the applicants who were determined to have met the minimum qualifications for the posted positions.

Mr. McClure identified the score summary sheet based on the written assessment test completed

and submitted by Ms. Watkins on May 6, 2019, paginated 32, a score summary sheet that provides for three scorers to be identified while the score summary sheet attached to Ms. Watkins' written assessment presents only two scorers - Mr. McClure and Ronnie Marquez-Posey, both dated "5-6-19" on the score summary sheet.

Mr. McClure was referred to a Security and Confidentiality of Testing and Interviewing Documents Agreement, paginated 6, which Mr. McClure signed on May 14, 2019.

Mr. McClure was referred to the score summary sheet for Ann Kilroy, the bargaining unit member selected for the Account Executive position by the Employer, paginated 53. This score summary sheet presents three scorers – William Moore, Ronnie Marquez-Posey, and Kyle Casey, all dated "5-10-19."

Mr. McClure was referred to another score summary sheet dated "5-10-19" for Ms. Kilroy, paginated 61, a sheet identifying William Moore, Ronnie Marquez-Posey, and Kyle Casey as the scorers, and presenting the same point total, seventy-one (71) points, and the same percentage score for the written assessment test, seventy-one percent (71%).

Mr. McClure was referred to another score summary sheet for Ms. Kilroy dated "5-6-19," paginated 69 and presenting three scorers – John McClure, Ronnie Marquez-Posey, and Kyle Casey, with Mr. McClure and Ronnie Marquez -Posey dated "5-6-19" and Kyle Casey dated "5-10-19." The score for Ms. Kilroy on this score summary is identical to the others – seventy-one (71) points and seventy-one percent (71%).

Mr. McClure was referred to Ms. Watkins' score summary sheet dated "5-6-19," paginated 32, a sheet showing a score of sixty-six (66) points and a percentage of sixty-six percent (66%). Mr. McClure was asked whether the grievant's sixty-six (66) points were within the competitive range of the assessment score attained by the selected candidate, Ms. Kilroy, at seventy-one (71) points. Mr.

McClure testified that the sixty-six (66) points were not within the competitive range of the seventy-one (71) points because the sixty-six (66) points did constitute a passing grade.

Mr. McClure was referred to the position description for the classification Account Executive in the Ohio Department of Job and Family Services, paginated 31. This position description includes "Minimum Acceptable Characteristics," a listing that includes "Knowledge of \* \* \* 4) labor market data and employment trends."

Mr. McClure identified Ms. Kilroy's resume and application, paginated 26 – 30.

Under questioning by the Employer's representative, Mr. McClure explained that there were three scorers of Ms. Kilroy's assessment and therefore there are three score summary sheets for Ms. Kilroy.

Under redirect questioning by the Union's representative, McClure confirmed that Ms. Watkins sat for the written assessment test on a single day and her assessment test was scored by two people, not three people.

#### Amber Shedd

Amber Shedd works within the Employer's Human Resources Department as a Human Capital Management Analyst. One of Ms. Shedd's duties is determining whether candidates for a posted position meet the minimum qualifications for the position. This determination is based upon the applicant's application and a questionnaire filled out by the applicant. If it is determined that a candidate meets the minimum qualifications for the position sought, the candidate is invited to continue on to the assessment phase of the selection process. The assessment is comprised of three question booklets.

Ms. Shedd testified that Ms. Watkins did not attain a score of seventy percent (70%) on her

written assessment test and therefore was not afforded the opportunity to move to the next step in the selection process, an interview. The sixty-six percent (66%) score attained by the grievant, explained Ms. Shedd, did not attain a passing level and therefore an interview was not extended to the grievant. The absence of a passing grade by the grievant also kept her score from being found to be within a competitive range of a score that did attain a minimum passing score.

Ms. Shedd explained that once a written assessment test is completed and submitted by a candidate the test is scored, forwarded to an office liaison, then directed on to the Office of Work Development, and on to Ms. Shedd.

#### Ronnie Marquez-Posey

Ronnie Marquez-Posey is a Project Manager employed within the Ohio Department of Job and Family Services' Office of Workforce Development. Ms. Marquez-Posey's duties include scoring written assessment tests and participating in candidate interviews.

Ms. Marquez-Posey was asked about a colon at the end of a salutation in correspondence prepared by Ms. Watkins for inclusion in her assessment test. The colon had been circled (presumably by a scorer) but no other notation appears near or related to it. Ms. Marquez-Posey testified that just because the colon was circled does not mean it was being identified as a mistake, nor does it mean that a point or points were deducted.

#### POSITIONS OF THE PARTIES

##### Position of the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, Union

The Union understands the issue in this case to be whether the Employer violated Article 17 of the parties' collective bargaining agreement when it denied the grievant an interview for the vacant

Account Executive position, and if so, what the remedy shall be.

The Union notes that Ms. Watkins, the grievant, applied for the Account Executive position on April 19, 2019 and was subsequently notified that she had not attained a passing grade for the written assessment test. After making inquiries about the scoring of her assessment test, Ms. Watkins filed a formal grievance on May 29, 2019.

The Union recalls Ms. Watkins' testimony at the arbitration hearing about the grievant's work experience and how she had met the minimum qualifications for the posted position. Ms. Watkins in her testimony spoke of the differences that are encountered from one location to another, and how these differences affected Ms. Watkins' judgment in answering multiple choice questions in the assessment test.

The Union recalls Ms. Watkins testifying that she had been wrongfully targeted by Mr. McClure over the years, and claiming that much in the assessment test calls for subjective scoring, allowing this long-term bias against the grievant to adversely affect the scoring of the grievant's assessment test. The Union notes that Ms. Watkins testified that the Employer violated the parties' collective bargaining agreement when the Employer did not score Ms. Watkins' assessment test thoroughly and denied Ms. Watkins an interview.

The Union points to the testimony of Suzanne Gordon, a candidate for a posted Account Executive position who had sat for the assessment test. Ms. Gordon spoke of her ability to save her test to her desktop and then email it as instructed. Ms. Gordon testified of being able to view her test scores in a sent folder directed to her work email address, capabilities that Ms. Watkins testified had not been made available to her.

The Union points out that only two scorers scored Ms. Watkins' assessment test while other candidates had a minimum of three scorers. The Union notes that one of the scorers of Ms. Watkins'



assessment test had been Mr. McClure.

The Union claims that Ronnie Marquez-Posey testified that she did not score the grievant's assessment test, saying that just because her name is on a score summary sheet does not mean she scored that test. Ms. Marquez-Posey also pointed out in her testimony that just because a colon was circled in a writing exercise in Test Booklet #3 does not mean a mistake had been made by the test taker.

The Union points to the letter from Nancy J. Janco-Kocarek wherein Ms. Janco-Kocarek expresses the opinion that the assessment test scores were very lenient. At page two of the Union's closing argument the Union asserts: "... Again this shows that Grievant and (1) other were singled out because they asserted their contractual rights."

The Union claims the Employer has violated Article 2, Non-Discrimination, in the parties' collective bargaining agreement, specifically by violating section 2.01, Non-Discrimination, and section 2.02, Agreement Rights.

The Union claims the Employer has violated Article 17, Promotions, Transfers, Demotions and Relocations, specifically by violating section 17.04, Applications and section 17.05, Selection.

The Union urges the arbitrator to sustain the grievance for the reasons cited above, order an interview for the position be provided to the grievant, place the grievant in the posted Account Executive position, and compensate the grievant with full back pay.

Position of the State of Ohio, Department of Job and Family Services, Employer

The Employer refers to the joint issue statement stipulated by the parties as presenting the issue in this case, namely: "Did Management violate the OCSEA Collective Bargaining Agreement by denying the Grievant an interview for a posted Account Executive (PN 20042457) position in the

Office of Workforce Development (OWD)?”

The Employer notes that this is an issue case and therefore the Union must shoulder the burden of proof. The Employer points out that this evidentiary burden requires, if the Union is to prevail in this case, that the Union present a preponderance of evidence proving that the denial of an interview to the grievant comprises a violation of the parties' collective bargaining agreement.

The Employer notes that Ms. Watkins filed an application for the posted Account Executive position on April 19, 2019 and was determined to meet the minimum qualifications for the position entitling Ms. Watkins to move to the next step in the selection process – sitting for a written assessment test. This test set a passing score at seventy percent (70%). Ms. Watkins sat for the assessment test on May 6, 2019 and was assigned a score of sixty-six percent (66%). The failure to attain a passing score of seventy percent (70%) was the reason the Employer did not offer an interview to the grievant.

On May 29, 2019 Ms. Watkins filed a grievance alleging a violation of the parties' collective bargaining agreement by the Employer through the denial of an interview for the grievant.

The Employer contends that neither the Union nor Ms. Watkins has presented to the hearing record any evidence of the manipulation of the grievant's assessment test or falsification of the scoring of that test. The Employer points to an email dated May 6, 2019 between Ms. Watkins and Ms. Marquez-Posey showing that the answers provided by Ms. Watkins in her assessment test had not been altered or manipulated. The Employer acknowledges that Ms. Watkins spoke of her suspicions at the arbitration hearing concerning her assessment test and its scoring but the Employer contends that Ms. Watkins did not provide any evidence in support of those suspicions.

The Employer notes that Ms. Watkins' assessment test had been scored by Mr. McClure and Ms. Marquez-Posey, and the conclusion reached by both scorers had been that a passing grade had not been attained. The packet of materials associated with the grievant's assessment test was then directed on to

the Office of Employee and Business Services where a cursory review was provide by HCM Amber Shedd who also concluded that a passing grade had not been achieved.

The Employer claims that there is no evidence in the hearing record that in any way indicates Ms. Watkins' assessment test was scored in a manner different from how other assessment tests were scored or that Ms. Watkins' assessment test had been scored incorrectly or that answers in the grievant's assessment test had been altered. The Employer points to the use of an answer key to determine correct answers to multiple choice questions and the uniform application of that answer key.

The Employer argues that the written assessment test is used to determine whether a candidate meets all of the minimum qualifications necessary to move on to an interview. The Employer points to express language in Article 17, section 17.06 that empowers the Employer to “... use selection devices, proficiency testing and/or assessments to determine if an applicant meets minimum qualifications and, if applicable, to rate applicants pursuant to Section 17.05.” The Employer also points to Article 17, section 17.05 that includes the following: “Selection devices (e. g. structured interview, written test, physical ability, etc.) may be used at the discretion of the Agency.”

The Employer points out that because the grievant did not attain a passing score, her score cannot be viewed as in a competitive range with a passing score.

The Employer argues that the Union has not carried its burden of proof, has not proven a manipulation of Ms. Watkins' assessment test, has not proven the grievant has suffered the discrimination prohibited by Article 2, and has failed to prove that the Employer violated the parties' collective bargaining agreement by denying the grievant an interview.

For the reasons set out above, the Employer urges the arbitrator to find the grievance unproven and without merit, and dismiss the grievance in its entirety.

## DISCUSSION

This is a non-disciplinary case and is viewed as a grievance initiated by the Union. This circumstance requires the Union to carry the burden of proof in this case if the grievance is to be sustained.

The grievance underlying this proceeding was filed on May 29, 2019 charging the Employer with a breach of the parties' collective bargaining agreement through violating Article 2, Non-Discrimination and Article 17, Promotions, Transfers, Demotions and Relocations.

Article 2, Non-Discrimination, in section 2.01, Non-Discrimination, prohibits the Employer and the Union from discriminating in a way that is inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status.

Article 2.02, Agreement Rights, provides that no employee shall be discriminated against, intimidated, restrained, harassed, or coerced in the exercise of rights granted by the parties' collective bargaining agreement, nor shall the employee be reassigned for these purposes.

The discrimination prohibited by Article 2 is the non-uniform application of policies and procedures to employees based upon one or more of the categories enumerated in Article 2, section 2.01.

The arbitrator does not find a preponderance of evidence in the hearing record substantiating that the grievant suffered discrimination in the application of procedures, processes, and policies that relate to posting, bidding on, and selecting a candidate to fill a posted position. There is not a preponderance of evidence in the hearing record indicating that the grievant was intimidated, restrained, harassed, or coerced in the exercise of the grievant's rights under the parties' collective

bargaining agreement. This is not to say that there were no differences in the processes brought to bear on the candidates for the Account Executive position. In the case of Ms. Kilroy, the selected candidate, three scorers scored Ms. Kilroy's written assessment test. In the case of Ms. Watkins, the grievant, only two scorers scored Ms. Watkins' written assessment test. It also appears that Ms. Kilroy's written assessment was scored on May 6, 2019 and again on May 10, 2019, with each score summary sheet for these dates presenting the same points and percentage, seventy-one (71) points and seventy-one percent (71%). The hearing record indicates Ms. Watkins' written assessment test was scored on one occasion by two scorers on May 6, 2019.

While there are variations among the number of scorers and the number of score summary sheets in comparing the grievant's assessment testing experience to Ms. Kilroy's, these differences do not lead the arbitrator to conclude that either of these circumstances worked to the disadvantage of the grievant. The arbitrator finds no evidence indicating that these differences arose from an intention by the Employer to discriminate against the grievant to her detriment, were based on an improper motive related to race, sex, creed, color, age or any of the other protected classes enumerated in Article 2, section 2.01. The arbitrator is persuaded that identical questions were presented in each of the written assessment tests completed by the candidates; the answer key for the written assessment test was applied uniformly in scoring the written assessment tests; a manipulation or alteration of the scoring of the written assessment tests is not substantiated by a preponderance of the evidence in the hearing record.

This is not to say that reasonable people cannot reach different conclusions about the value of the written assessment test in differentiating among candidates in selecting a candidate for a posted position. This difference, however, is a matter of policy and not an issue before the arbitrator in this case.

The grievance herein balances primarily on the agreed language presented in Article 17 of the parties' collective bargaining agreement, Promotions, Transfers, Demotions and Relocations. Article 17, section 17.01 reserves to the Employer the right to determine which vacancies are to be filled and whether the vacancies are to be filled through a permanent transfer under Article 17, section 17.07 or a promotion, transfer, or demotion.

Article 17, section 17.02(B) defines “promotion” as the movement of an employee to a posted vacancy in a classification with a higher pay range within the same agency. Article 17, section 17.02 (E) defines “vacancy” as an opening in a permanent full-time position or a permanent part-time position within a specified bargaining unit covered by the parties' Agreement which the Employer determines to fill. “Vacancy” does not include positions identified through mutual agreement between the Union and the Employer as positions to be excluded from the bargaining unit.

Article 17, section 17.03, Posting, provides that all vacancies within the bargaining unit which the Employer intends to fill are to be posted, with each position posting presenting the position's classification title, the deadline for submitting a bid on the position, the position's pay range, and whether the posted position is to be filled through a promotion.

There has been no issue raised concerning the posting of the Account Executive position. The posting occurred in April 2019; the grievant submitted a timely and appropriate bid in response to the posted position; neither party has raised any issue as to the posting carried out in this case; there is no evidence in the hearing record substantiating any violation of Article 17, section 17.03, Posting.

Article 17, section 17.04, Applications, empowers employees to file timely applications to posted positions to be filled through promotions, with applicants to specify in their applications how they possess the minimum qualifications for the position sought.

Article 17, section 17.05, Selection, provides that if the posted position to be filled is in a

classification assigned to pay range twenty-eight (28) or higher, the position is to 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, Article 17, section 17.05 provides that State seniority shall be the determining factor.

The facts of this case reveal a posting in compliance with Article 17, section 17.03 and an application submitted by Ms. Watkins in compliance with Article 17, section 17.04. The position sought by the grievant would, if the grievant were to be selected for the position, constitute a promotion as this term is defined by Article 17, section 17.02(B). It is also the case that the candidate selected, Ms. Kilroy, and the grievant, Ms. Watkins, had no active disciplinary record, both were determined to have met the minimum acceptable characteristics required by the position description for Account Executive, and the grievant, Ms. Watkins, possessed greater State of Ohio seniority than that possessed by Ms. Kilroy, the selected candidate.

Article 17, section 17.05 also includes the following: “Selection devices (e. g. structured interview, written test, physical ability, etc.) may be used at the discretion of the Agency.”

Article 17, section 17.06, Selection devices/proficiency instruments/assessments, begins with the following:

The Employer may use selection devices, proficiency testing and/or assessments to determine if an applicant meets minimum qualifications and, if applicable, to rate applicants pursuant to Section 17.05.

The agreed provisions of Article 17, sections 17.05 and 17.06 make clear, through express language, that in adjudging candidates within a selection process initiated by a posted position that comprises a promotion, the Employer may require that candidates sit for selection devices that may include a written test, in this case what is called a written assessment, consisting of three test booklets.

This selection device, the written assessment test, includes multiple choice questions for which test takers are to determine the best answer for each question, and poses other forms of questions that are intended to gauge writing skills, reading and comprehension, knowledge of subject matter, and knowledge of grammar and punctuation.

Each of the candidates competing for an Account Executive position in Cuyahoga County received the same written assessment test and there is nothing in the hearing record that indicates the grievant's assessment test was scored differently in comparison to the written assessment test's answer key or in comparison to how other candidates were scored. A test taker may take issue with the fairness or clarity of questions in the written assessment test but if the grievance herein is to be sustained, the arbitrator must be presented with a preponderance of evidence in the hearing record proving that the grievant was treated in a disparate manner for a wrongful purpose, and that this discriminatory treatment is the reason the grievant, the candidate with the most State of Ohio seniority, was not selected for the position.

The arbitrator, as stated above, does not find evidence of discrimination or mistreatment of the grievant. The arbitrator does find that the scoring applied to the grievant's written assessment was in line with how scoring occurred on all candidates' written assessment tests, and the points and percentage produced by the scoring of the grievant's written assessment test did not attain the minimum score required to move on in the selection process, the next step in the selection process being an interview.

In the absence of evidence proving discrimination, in the absence of evidence proving non-uniformity of scoring, and in the absence of evidence indicating a manipulation of the scoring of the grievant's written assessment tests, the arbitrator does not find sufficient evidence in the hearing record to uphold the grievance. The arbitrator finds the grievance has not been proven and therefore the



arbitrator orders the grievance dismissed.

#### AWARD

1. The grievance underlying this proceeding is arbitrable under the language of the parties' collective bargaining agreement.
2. Management did not violate the OCSEA collective bargaining agreement by denying the Grievant an interview for a posted Account Executive (PN 20042457) position in the Office of Workforce Development (OWD).
3. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire  
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Columbus, Ohio  
April 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that duplicate, signed originals of the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO and the State of Ohio, Department of Job and Family Services, grievance number: JFS-2019-02022-09, Grievant: Marjoyce Watkins, were directed electronically to the following this 26<sup>th</sup> day of April, 2021:

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Columbus, Ohio  
April 26, 2021