ARBITRATION DECISION NO.:
392

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
State of Ohio

DATE OF ARBITRATION:
March 20, 1991

DATE OF DECISION:
November 18, 1991

GRIEVANT:
Ohio Civil Service
Employees Association

OCB GRIEVANCE NO.:
None

ARBITRATOR:
Harry Graham

FOR THE UNION:
Linda Fiely

FOR THE EMPLOYER:
Tim Wagner

KEY WORDS:
Minimum Qualifications
Promotions
Contract Construction

ARTICLES:
Article 5 - Management Rights
Article 17 - Promotions and Transfers
    §17.04-Posting
    §17.05-Applications
Article 19 - Job Audits and Reclassifications
    §19.07-Appeal
Article 20 - Classification Modernization
    §20.03-Dispute Resolution

Article 36 - Wages
§36.05-Classifications
and Pay Range Assignments

FACTS:

The issue presented in this case arose as part of a number of disputes involving promotion decisions made by the State. It was the contention of the Union that the State had incorrectly denied a number of employees promotions based on the fact that the employees allegedly did not meet the minimum qualifications for promotion. As the various grievances made their way through the grievance procedure it became apparent that they were symptomatic of an issue extending beyond their individual cases. This issue was concerned with the contention of the Union that it had rights under the Contract to dispute the establishment of minimum qualifications for various positions in State service. The resulting issue was: May the Union dispute the establishment of "minimum qualifications" for classifications established by the State?

UNION'S POSITION:

The union does not dispute that the State may establish minimum qualifications for position descriptions within the confines of the applicable classification specification. The union insists that the Contract permits it to protest minimum qualifications established by the State for new and revised classification specifications. In support of this view, it points to Section 36.05 of the Contract. The language in Section 36.05 permits the Employer to create classifications, change the pay range of classifications, authorize advance step hiring if necessary to fill positions and issue and modify specifications for each classification. Section 36.05 continues to provide that the union is to receive 45 days advance notice of change. At the heart of this dispute is the sentence: Should the Union dispute the proposed action of the employer and the parties are unable to resolve their differences, they shall utilize the appropriate arbitration mechanism. As the union reads this language, it has secured the right to protest the State's determination of minimum qualifications.

EMPLOYER'S POSITION:

The State asserts that the establishment of minimum qualifications is a management right reserved to it under Article 5 of the Contract. The provisions of Article 5 must be read in conjunction with Section 4117.08 of the Ohio Revised Code which provides that there exist certain management rights. Most pertinent to this dispute is the right of the Employer under 4117.08(C) to "Determine the overall methods, processes, means or personnel by which governmental operations are to be conducted.

In the State's opinion, it has retained an unfettered right to establish minimum qualifications. As the State reads the Contract, the union is only permitted to challenge the pay and point factoring of various positions. Nothing in the language of Section 36.05 permits the union to protest the minimum qualifications for various positions that the State chooses to establish.

ARBITRATOR'S OPINION:

The Contract contains language in Section 36.05 that is specific to this dispute. It provides that the Employer may issue or modify specifications for each classification. The language continues to indicate that: "Should the Union dispute the proposed action of the Employer and the parties are unable to resolve their differences, they shall utilize the appropriate arbitration mechanism. (Emphasis added) Should the position of the State be adopted, the phrase emphasized above would be read out of the Contract. This cannot occur. The explicit language of Section 36.05 preserves to the Union the ability to challenge the "proposed action" of the employer by recourse to arbitration, if necessary.

The Union correctly claims that the factors used by the State to measure the ability of candidates for positions must be reasonable. The State must establish qualifications that are reasonably related to the positions it seeks to fill. It cannot be expected that the Employer may set standards that bear no demonstrable relationship to the positions that are vacant. Should the union take the view that this situation has occurred, it has retained the right under the explicit language of Section 36.05 to remonstrate.

AWARD:

The grievance is sustained. The Union may dispute the establishment of minimum qualifications established by the State under the provisions of Section 36.05 of the Contract.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

The State of Ohio

Before:
Harry Graham

Minimum Qualifications

Appearances:

For OCSEA/AFSCME Local 11
Linda Fiely
OCSEA/AFSCME Local 11
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For The State of Ohio
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Introduction:

The issue to be considered in this case arose as part of a number of disputes involving promotion decisions made by the State. It was the contention of the Union that the State had incorrectly failed to promote several employees who subsequently grieved. As the various grievances made their way through the grievance procedure of the parties it became apparent that they were symptomatic of an issue extending beyond their individual cases. This issue was concerned with the contention of the Union that it had rights under the Labor Agreement to dispute the establishment of minimum qualifications for various positions in State service. As a prelude to the specific cases that were advanced to arbitration by the Union a hearing on what may be termed the generic issue posed by the promotion process was held on March 20, 1991. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on October 19, 1991 and the record was closed on that date.

Issue:

At the hearing the parties did not agree upon the precise formulation of the issue in dispute between them. Their difference over the formulation of the issue was narrow and the issue may fairly be stated as being:

"May the Union dispute the establishment of "minimum qualifications" for classifications established by the State?"

Position of the Union:

The Union claims that several sections of the Agreement are relevant to this dispute and support its position. Section 17.04 provides that:

Vacancy notices will list the deadline for application, pay range, class title and shift where applicable, the knowledge, abilities, skills and duties as specified by the position description.

Section 17.05 continues to provide the manner in which bids are to divided. The various classifications in Section 17.05 (A, B, C, D) carry with them the proviso that applicants are to be those people "who possess and are proficient in the minimum qualifications contained in the class specification and the position description.

In the Union's view, the class specification represents a generalized statement of the duties and minimum qualifications of a classification. There is another document relevant to the filling of a vacancy. This is the position description. It is a specific detailed statement of the duties and requirements for filling a designated, specific position. The position description cannot carry with it requirements that exceed those found in the class specification.

The Union does not dispute that the State may establish minimum qualifications for position descriptions within the confines of the applicable classification specification. The Union insists that the Agreement permits it to protest minimum qualifications established by the State for new and revised classification specifications. In support of this view, it points to Section 36.05 of the Agreement. The language in Section 36.05 permits the Employer to create classifications, change the pay range of classifications, authorize advance step hiring if necessary to fill positions and issue and modify specifications for each classification. Section 36.05 continues to provide that the Union is to receive 45 days advance notice of change. Then, at the heart of this dispute is the sentence:

Should the Union dispute the proposed action of the Employer and the parties are unable to resolve their differences, they shall utilize the appropriate arbitration mechanism.

Restrictions are found in Section 36.05 on the Union's ability to protest changes in pay range and classification done as a result of the classification modernization study of the parties. That language is not relevant to this dispute.

As the Union reads the language quoted above, it has secured the right to protest the State's determination of minimum qualifications.

In this proceeding the Employer has argued that it has retained the unfettered right to promulgate minimum qualifications under the Management Rights clause in Article 5. This is not so according to the Union. The text of Section 36.05 is an explicit limitation on management's rights as set forth in Article 5.

The language of Section 36.05 is clear. When that is the case, arbitrators will enforce the language. Numerous arbitration decisions to that effect are cited by the Union. The language at issue in this proceeding is clear. It is not susceptible of any interpretation other than that given by the Union it insists. No arbitrator may deviate from the plain language of the Agreement. To do so would involve legislation of terms and conditions to which the parties did not agree.

Under the terms of this Agreement as is the case with the overwhelming number of labor agreements in the United States the authority of the arbitrator is limited. There is found at Section 25.03 of the Agreement the customary caveat restricting the authority of the arbitrator. No arbitrator may add to, subtract from or modify the terms of the Agreement. Should the position of the State be adopted in this proceeding that cautionary proviso will be violated in the Union's view. The State will have secured an addition to its rights and the Union a commensurate diminution. This cannot occur insists the Union.

There are a number of specific personnel actions of the State that accompany this dispute. These involve the failure of the State to award positions to people who arguably met the minimum qualifications. More significantly for this dispute, the Union asserts that when the State made the promotion decisions which came to be contested, it relied upon classification specifications which were disputed by the Union. Those disputes had not been resolved. Nonetheless, the State held applicants to standards that were in dispute. The Union asserts that applicants cannot be held to qualifications that are actively under challenge. Nor, in the Union's view, may the State require employees to meet minimum qualifications in the position description if those qualifications exceed those found in the classification specification. To permit the Employer to act in such a fashion would be to allow it to deprive qualified employees of promotional opportunities to which they are entitled.

This dispute does not concern itself with the issue of which applicant is better qualified for promotion. Rather, it is concerned with whether or not specific people are qualified for promotion. The Union insists the Agreement permits it to protest standards established by the State. The Employer must show that its standards are fair, reasonable and objective. The factors the State uses to measure ability must be reasonably related to the qualifications set forth on the classification specifications. If the State fails to make such a showing, its promotion decision is open to reversal in the Union's view.

Position of the Employer:

The State asserts that the establishment of minimum qualifications is a management right reserved to it under Article 5 of the Agreement. The provisions of Article 5 must be read in conjunction with Section 4117.08 of the Ohio Revised Code which provides that there exist certain management rights. Most pertinent to this dispute is the right of the Employer under 4117.08c to "Determine the overall methods, processes, means or personnel by which governmental operations are to be conducted."

During the history of negotiations the Union never proposed to take part in the establishment of minimum qualifications. Had it done so, the State would have objected in the most strenuous terms. The State was consistently of the view that there would not occur what it terms co-management. That is, the Union would not have a voice in setting basic aspects of personnel decisions. Included among those personnel decisions which are beyond the influence are those involving the establishment of minimum qualifications for various positions in State service. When the parties negotiated their original agreement in 1986 the Union acknowledged that the Position Description was the most significant document. It set forth precisely the sort of minimum qualifications needed to fill a specific job in State service.

In the State's opinion, it has retained an unfettered right to establish minimum qualifications. As the State reads the Collective Bargaining Agreement permits the Union to challenge the pay and point factoring of various positions. Nothing in the language of Section 36.05 permits the Union to protest the minimum qualifications for various positions that the State choses to establish. The Agreement does not specifically reference the ability of the Union to grieve and arbitrate the establishment of minimum qualifications for various positions in State service. As the State would have the arbitrator interpret the history of negotiations the Union never made explicit proposals on the question of minimum qualifications. The State would not permit the Union to protest the setting of such qualifications in the absence of a proposal from the Union to that effect. Such a proposal was never made by the Union. Hence, it cannot exist in the Agreement according to the State.

The language under dispute in this proceeding is found in Article 36. That Article is concerned with "wages." There exists language elsewhere in the Agreement, at Article 17, which is concerned with "promotion and transfers." If the Union had secured what it alleges it has secured in the Agreement, the logical place would be in the promotion and transfer article, not the wages article. As no specific language to that effect is found in Article 17, the State asserts that the Union is seeking to secure in arbitration that which it did not secure at the bargaining table. Such a result is to be avoided.

Article 19 of the Agreement deals with job audits and reclassifications. The State points out that it confers upon individual employees the right to grieve that they are being worked out of their proper classifications. The language in Article 19 does not confer upon the Union the right to grieve the establishment of minimum

qualifications.

Similarly, Article 20 provides that if the Union is dissatisfied with the results of the Classification Modernization project it may take its concerns to the Labor-Management Committee. Should those concerns not be satisfactorily resolved, it may have recourse to an independent third party knowledgeable in labor relations and classification and compensation systems. Nothing in the language provides an appeals procedure specifically for questions concerning the establishment of minimum qualifications. There is a fine line between duties assigned to specific classifications but not the establishment of minimum qualifications. The Union may protest the former but not the latter according to the State.

During the life of the two agreements to date, the provisions of Section 36.05 have been used only to arbitrate the compensation of certain employees. This is indicative of the parties mutual understanding that it would not be used to contest the establishment of minimum qualifications for various positions according to the State.

There is bargaining history to support this view. In 1987 the then chief negotiators for the parties exchanged correspondence regarding specification changes. The Union objected to approximately 200 changes. None of the grounds proffered by the Union were related to minimum qualifications. In the final analysis, the Union protested the establishment of the proper pay ranges for the Emergency Response Coordinator and the Hazardous Material Specialist. It did not protest the establishment of minimum qualifications. At no time prior to this dispute did the Union assert it had rights under 36.05 to protest the establishment of minimum qualifications.

When the parties came to negotiate the 1989 Agreement there was language change in Article 17. No change occurred in Article 36. The State sought to ensure that it could require candidates for a posted vacancy be proficient in the minimum qualifications contained in the classification specification and position description. In exchange, the Union sought more grievance rights elsewhere in Article 17. It did not propose nor did it secure the ability to protest the establishment of minimum qualifications according to the State. Never during the negotiations did the Union raise the issue. It is precluded from doing so now in the State's view.

There was very minor chance in the relevant language of Article 36 in 1989. The sections in the article were renumbered. The phrase "utilize the appropriate arbitration mechanism in Article 19.07 and 20.03" was slightly altered. The words "in Article 19.07 and 20.03 were eliminated and a period (.) placed after the word "mechanism." The intent of the parties did not change. It was to deal with the Union's concerns over pay when the State changed or established compensation systems. The appropriate arbitration mechanism referenced in 36.05 is that found in 20.03, not a more generalized arbitration procedure akin to that in the grievance procedure. Section 20.03 provides for independent resolution to determine pay range issues. Only these issues are subject to the arbitration procedure referenced in Section 36.05 the State asserts.

It is the responsibility of applicants for vacant positions to fully set forth their qualifications on their applications. The Employer has no duty to inquire of applicants whether or not their applications are complete.

The State points to the same restrictions on the authority of an arbitrator as does the Union. It asserts that should the Union prevail in this dispute it will represent precisely the sort of addition to or subtraction from (depending upon one's point of view) that the Agreement specifically prohibits. In this situation, the State asserts that a finding in favor of the Union will represent an addition to its rights under the Agreement and a commensurate diminution of the rights possessed by the State. This should not occur in its view. Accordingly, the Employer seeks a finding that the Union does not possess the ability to protest the establishment of minimum qualifications on the position description or classification specification.

In the State's view, the Union in this proceeding is seeking to secure something in the "wages" article that bears upon "promotions." An phrase in Article 36 cannot be used to deal with language in Article 17 in the State's view. The parties intended they be separate in 1986 and in 1989. Consequently, the State urges the grievance be denied.

Discussion:

The Agreement contains language at Section 36.05 that is specific to this dispute. It provides that the Employer may issue or modify specifications for each classification. The language continues to indicate that:

"Should the Union dispute the proposed action of the Employer and the parties are unable to resolve their differences, they shall utilize the appropriate arbitration mechanism. (Emphasis added)"

Should the position of the State in this dispute be adopted the phrase emphasized above will be read out of the Agreement. Obviously this cannot occur. As is oft observed in arbitration decisions it is necessary to give full effect to all terms of the Agreement. Should it be determined that the Union lacks the ability to protest the sorts of personnel actions itemized in Section 36.05 of the Agreement the ability of one of the parties, the Union, to have recourse to arbitration will be eliminated. This is not what is provided by the Agreement. The explicit language of Section 36.05 preserves to the Union the ability to challenge the "proposed action" of the employer by recourse to arbitration, if necessary.

Article 5 of the Agreement is the Management Rights article. It confers upon the Employer wide discretion in operating the State's affairs. The discretion afforded the Employer is not unlimited. Article 5 specifically indicates that "Except to the extent expressly abridged only by specific articles and sections of this Agreement...." The parties explicitly recognized and incorporated into the Agreement the normal principle of contract interpretation which holds that specific language must be controlling factor in determining the outcome of a dispute. In this situation the language of Section 36.05 directly addresses the issue before the Arbitrator. If the ability of the Union to challenge proposed specifications for each classification is found to be nonexistent the specific benefit negotiated by the Union will be read out of the Agreement. That cannot occur.

Section 25.03 of the Contract bears upon this dispute as well. It supports the position of the Union. As both parties point out, the arbitrator may neither add to nor subtract from the provisions of the Agreement. If the position of the Union in this dispute is not sustained there will have occurred precisely the sort of diminution of the Union's rights that the Agreement prohibits. Similarly, there will have occurred the addition to the authority of the State that is prohibited by the Agreement as well.

The Union correctly claims that the factors used by the State to measure the ability of candidates for positions must be reasonable. The State must establish qualifications that are reasonably related to the positions it seeks to fill. It cannot be expected that the Employer may set standards that bear no demonstrable relationship to the positions that are vacant. In a word, the State may not seek to require that applicants for vacancies possess the attributes of a rocket scientist when the qualifications of a high school diploma recipient will suffice. Should the Union take the view that that situation has occurred, it has retained the right under the explicit language of Section 36.05 to remonstrate.

Award:

The question posed to the Arbitrator is answered in the affirmative. The Union may dispute the establishment of "minimum qualifications" established by the State under the provisions of Section 36.05 of the Labor Agreement.

Signed and dated this 18th day of November, 1991 at South Russell, OH.

Harry Graham
Arbitrator