

ARBITRATION DECISION NO.:

405

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Aging

Columbus Office

DATE OF ARBITRATION:

September 19, 1991

DATE OF DECISION:

December 10, 1991

GRIEVANT:

Antoinette Savage

OCB GRIEVANCE NO.:

G 87-1214

ARBITRATOR:

Harry Graham

FOR THE UNION:

John Porter

John Feldmeier

FOR THE EMPLOYER:

Tim Wagner

KEY WORDS:

Promotion

Minimum Qualifications

Accountant 3

Demonstrably Superior

1986 Contract

Improper Minimum Qualifications

ARTICLES:

Article 17-Promotions, Transfers,
And Relocations

§17.03-Promotional/Lateral

Transfers Probationary Period

§17.04-Posting

§17.05-Applications

FACTS:

The grievant, an Accountant 2 with the Department of Aging, applied for a promotion within the

department. The grievant possessed approximately seven and one-half years of service at the time she bid on the promotion. On February 20, 1987, the Columbus office of the Department of Aging posted a notice for a vacancy for the position of Accountant 3. A number of people applied for the vacancy including the grievant. The department awarded the position to another employee who was an Examiner 4 with about ten years of service with the department. The employer told the grievant that the reason she was denied the position was that she did not meet the minimum qualifications for the position and the successful applicant was demonstrably superior to her.

UNION'S POSITION:

The grievant fell into job grouping A under the Contract because she was employed as an Accountant 2 in the same office where the vacant Accountant 3 position existed. As an Accountant 2 she was in the same classification series as the vacant Accountant 3 position. The selected applicant was an Examiner 4 in the Columbus office. He was in a different classification series than the vacant position. Although he had more state seniority than the grievant, he fell into job grouping D of the Contract by virtue of the fact that he was not in the same or related classification series as the vacant Accountant 3 position. The union argues that the employer cannot promote a person in group D over a person in group A by asserting that he/she is demonstrably superior since the employer can only compare applicants within the same job grouping for demonstrable superiority purposes. Furthermore, the successful applicant had more seniority than the grievant and Section 17.04 only allows the employer to use demonstrable superiority to promote junior applicants over senior ones.

The employer asserted that the grievant did not meet the minimum qualifications because she did not have undergraduate major coursework in accounting. The union argues that the employer cannot impose such a requirement because it is not listed in the position description or classification specification. Furthermore, the grievant was promoted to a position of Fiscal Officer 1 eight months after her application for the Accountant 3 position. The minimum qualifications for the Fiscal Officer 1 and the Accountant 3 are almost identical. Thus, it is ludicrous for the State to assert that the grievant did not meet the qualifications for the Accountant 3 position.

EMPLOYER'S POSITION:

The grievant did not possess the accounting experience sought by the State. Her work was in accounts payable. It was mainly clerical in nature. Moreover, testimony from the State's expert witness claims that minimum qualifications established for the position came, in essence, from the position description. The grievant did not meet these qualifications. That Ms. Savage was subsequently awarded the Fiscal Officer 1 position is not relevant to this dispute according to the State. Her promotion occurred well after the events under review in this proceeding. It has no bearing on those events.

ARBITRATOR'S OPINION:

The union is correct that the order of preference established by the Contract in Section 17.04, Subsections A through E establishes the primacy of the grievant's bid over the successful applicant. The grievant was in the appropriate classification series while he was not. The Contract provides that before persons in the successful applicant's status may be considered all bidders in classifications above him, Subsections A - C of Section 17.04 must have their qualifications evaluated. Only if bidders in those classifications are found wanting may the State reach people in Subsection D be considered. Furthermore, Section 17.05 provides that the job shall be awarded to the qualified employee with the most state seniority unless the State can show that a junior employee (emphasis added) is demonstrably superior. In this case, the successful applicant is a senior applicant, and thus, cannot be judged to be demonstrably superior under the Contract.

The grievant was qualified for the position. She took five courses in accounting, she was classified as an Accountant 2 and in her position she was able to supervise and review activities of accounting personnel. The department may not go beyond these requirements and specify attainment of undergraduate major coursework in accounting when that is not specified on either the position description or classification

specification. Finally, although the successful applicant may have been more qualified than the grievant, the employer may not promote a senior demonstrably superior bidder over a junior competitor. The language of the Contract specifically prohibits such action.

AWARD:

The grievance is sustained. The grievant is to be paid the pay and benefits to which she would have been entitled from the date her application was denied to the date she departed State service.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

**The State of Ohio,
Department of Aging**

Before:

Harry Graham

Case No.:

G87-1214

Appearances:

For OCSEA/AFSCME Local 11:

John Porter
John Feldmeier
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For The State of Ohio:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on September 19, 1991 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the Employer violate the Collective Bargaining Agreement when it failed to promote Antoinette Savage to the position of Accountant 3? If so, what shall the remedy be?

Background: No dispute exists over the facts that prompt this proceeding. The Grievant, Antoinette Savage, possessed approximately seven and one-half (7.5) years of service at the time the events giving

rise to this dispute arose. On February 20, 1987 the Columbus office of the Department of Aging posted a notice for a vacancy for the position of Accountant 3. A number of people applied for the vacancy including the Grievant, Ms. Savage. The Department reviewed the various bids and determined to award the vacancy to one Burris Jones. At the time of the vacancy Mr. Jones was an Examiner 4 and possessed about ten years of service with the Department. Ms. Savage was an Accountant 2 with 7.5 years of service.

Upon the denial of her promotion Ms. Savage filed a grievance. That grievance was denied at all steps of the procedure and the parties now agree that it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points to Article 17 of the 1986-1989 Labor Agreement as supporting its view that Ms. Savage was improperly denied the Accountant 3 position at issue in this proceeding. Section 17.04, Subsections A - E specify the manner in which applicants for vacant positions are to be classified. Paragraph A provides that employees within the "office, 'institution' or county where the vacancy is located, who presently hold a position in the same, similar or related class series." Paragraph B deals with employees in the geographic district of the Agency and Paragraph C is concerned with all other employees in the agency who hold a position in the same classification series. Group D is made up of all other agency employees and Group E is all other State employees.

Section 17.05 of the Agreement continues to provide that the State must apply the hierarchy of Section 17.04 to the bidders. Thus, it must first look to employees in Subsection A of Section 17.04. It must then award the position to the most senior qualified bidder in Subsection A unless the State can show that a junior applicant within Subsection A is "demonstrably superior." Only if there are no qualified bidders in Subsection A may the State expand the search process to employees in Subsections B - E.

In this situation, Ms. Savage is in Group A as she was employed as an Accountant 2 in the same office where the Accountant 3 position existed. As an Accountant 2 she was in the same classification series as the vacant Accountant 3 position. Burris Jones, selected by the State, was an Examiner 4 in the Columbus office. He was in a different classification series than Ms. Savage. Though he had more state seniority than she, he fell into subsection D of Section 17.04 by virtue of the fact that he was not in the same or related classification series as the vacant Accountant 3 position. As that was the case, he cannot be preferred over the Grievant in the Union's opinion.

At the time these events were unfolding and Ms. Savage commenced the procedure culminating in this proceeding she was not told that she failed to meet the minimum qualifications for the Accountant 3 position. Sue Hammond who conducted the interview process on behalf of the Department informed her that she was rejected as Mr. Jones was demonstrably superior. This is confirmed by her written response at Step 1 of the Grievance Procedure. Only later, at the arbitration hearing itself, did the State assert the defense that Ms. Savage did not meet the minimum qualifications for the position. The Employer must not be permitted to raise various defenses throughout the grievance and arbitration procedure. The true issue in this case is demonstrably superior, not minimum qualifications in the Union's view. The belated defense of the alleged failure of Ms. Savage to meet the minimum qualifications for the position should not be countenanced insists the Union. No post hoc rationale should be accepted. The action of the Employer must be evaluated against the standard it utilized at the time it occurred. As that did not occur, the Union urges that the alleged failure of the Grievant to meet the minimum qualifications for the position be disregarded.

In the event it should be determined that examination of Ms. Savage's qualifications is appropriate, the Union asserts that she meets the standards established by the State. Included on the posting was a requirement for undergraduate major coursework in accounting. The Employer cannot impose such a requirement in this case due to language found in Section 17.03 of the Agreement. That language provides that vacancy notices are to list knowledge, skill, abilities and duties as specified by the "position description." Nothing in the position description references undergraduate accounting major coursework in accounting. Hence, reliance upon the fact that Ms. Savage does not possess such coursework was improperly held against her according to the Union.

The Employer establishes the attributes for the position in the position description. It can include any characteristics it desires. It retained its freedom to do so under the Agreement. It cannot alter the minimum

acceptable characteristics on a posting in order to accommodate the desire of a particular department or section within a department. If that were permitted to occur the potential for tailoring a position for the attributes of a particular person is obvious.

In the Union's view the State admitted in the course of the Grievance Procedure that Ms. Savage was qualified for the Accountant 3 vacancy. When it asserted that Mr. Jones was demonstrably superior to Ms. Savage it was admitting she met the minimum qualifications for the position. Section 17.05 of the Agreement provides that the position "shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee." The inquiry over whether or not one employee is demonstrably superior to another may not occur until after the State has determined which applicants are qualified. When the State moved to select Mr. Jones it must have determined that Ms. Savage was qualified.

Furthermore, Ms. Savage was subsequently promoted to a position of Fiscal Officer 1. This occurred 8 months after she was denied the Accountant 3 position. The minimum qualifications for the Fiscal Officer 1 and the Accountant 3 are almost identical. It is "ludicrous" for the State to assert Ms. Savage did not meet the minimum qualifications for the Accountant 3 vacancy and then find her qualified for the Fiscal Officer 1 vacancy given the similarity of the two positions.

In the opinion the person who made the selection for the vacant Accountant 3 position, Ms. Hammond, was unbelievable upon examination. She did not show ability to understand the contractual concept of minimum qualifications. Nor did she demonstrate knowledge of the minimum qualifications as they applied directly to this position. In addition, at Step 4 of the Grievance Procedure, the State relied upon a classification description for the Accountant 3 position that was not in effect at the time these events transpired. It relied upon a subsequent classification description. The State cannot be permitted to rely upon qualifications it deems acceptable some time afterwards. Applicants must be held to only those standards in effect at the time of their application. As that did not occur in this instance, the Union urges Ms. Savage's grievance be sustained.

In addition, Ms. Savage had 31 months as an Accountant 1 and 2 with the Department. She prepared reports, balanced accounts, posted ledgers, and maintained accounts payable records. She was trained by the State in its computerized accounting program. She more than met the 3 month experience requirement reflected in the posting.

Under Section 17.05 of the Agreement the Union asserts that the Employer must carry the burden of showing a junior applicant is demonstrably superior. The Employer did not meet this burden in the Union's opinion. In the initial screening process the Employer must evaluate applicants who fall into Subsection A of Section 17.04. If qualified bidders are within this group the State may look no further. Mr. Jones to whom the State awarded the position fell into Subsection D of Section 17.04. The State improperly looked to Subsection D to find a candidate to compare to Ms. Savage, a Subsection A employee for purposes of this dispute. In addition, Subsection D of Section 17.04 provides that the concept of "demonstrably superior" may be used by the State to promote a junior employee. Mr. Jones was senior to Ms. Savage in terms of state seniority. As that is the case, the State cannot rely in any manner on the concept of demonstrably superior to support its position in this dispute the Union insists.

The phrase "demonstrably superior" in the Agreement is more significant than the phrase "relatively equal." In *Illinois v. AFSCME* and *Miller* Arbitrator David Dolnick found for the Grievant in a case similar to this one. In that situation the Grievant was denied a promotion on the grounds that she possessed a high school education while three junior employees had college degrees. Arbitrator Dolnick applied the standard of "head and shoulders." That standard was also applied in *Illinois v. Clarkin* decided by Arbitrator Marvin Hill. In accord with *Clarkin*, that Mr. Jones had more formal coursework in accounting than did Ms. Savage should not be permitted to control the outcome of the dispute. He did not meet the "head and shoulders" standard which the State must meet under the terms of the Agreement according to the Union.

The State must be held to reasons it advanced for its action at the time it occurred. The Employer must find there existed a demonstrably superior employee when it failed to promote Ms. Savage. The Employer cannot do so under the terms of the Agreement. Ms. Savage had excellent evaluations. Both she and Mr. Jones were evaluated by Ms. Hammond. She gave Ms. Savage superior marks. Now, well after the events,

the State must not be permitted to alter the terms of its bargain and disregard the order of selection in Section 17.04 and apply criteria in Section 17.05 in order to justify its actions. The Union urges an award in its favor together with backpay and benefits from the date Ms. Savage was denied the promotion to the date she departed State service.

Position of the Employer: The State points to Section 17.05 of the Agreement which provides that the vacant position is to be awarded to the "qualified employee with the most state seniority...." As the State interprets this phrase, the applicant must first be qualified before other sections of the Agreement come into play. In determining qualifications, the relevant document is the position description. In this case, that is the position description for the Accountant 3 vacancy.

The posted vacancy specified that applicants possesses certain qualifications. These were completion of a undergraduate major coursework in accounting and six months experience as an accountant or three months experience in accounting or completion of one year of training in accounting at the graduate level. There are two requirements that must be satisfied by applicants. These are the undergraduate major coursework requirement "and" one of the remaining requirements. The major coursework in accounting requirement must be satisfied before evaluating other attributes applicants might bring to the position. Applicants must bring to their application the major coursework in accounting and one of the other qualifying standards. In this case, Ms. Savage did not have undergraduate major coursework in accounting. Whatever other attributes she might have possessed, she did not bring with her application the prerequisite for successful competition for the vacancy by virtue of the fact she lacked the educational background for the vacancy.

In this situation, Ms. Savage did not possess the accounting experience sought by the State. Her work was in accounts payable. It was mainly clerical in nature. She did not bring with her application either the education or experience required to do the job. Hence, her application was properly rejected according to the State. Moreover, testimony from the State's expert witness, Meril Price, came on the record to the effect that the minimum qualifications established for the position came directly from the minimum acceptable characteristics. That testimony was un rebutted.

The Union did not protest the establishment of the minimum qualifications for the position. The Union claimed that the State violated Section 17.03 of the Agreement. That section is irrelevant to this dispute as it deals with posting. The State posted the position properly and properly included on the posting the minimum qualifications. If the Grievant or the Union took issue with the minimum qualifications as established by the State, a grievance might have been filed. No such grievance was filed. No protest was made of the minimum qualifications was made either as part of this grievance or in a separate filing.

That the State did not raise the issue that the Grievant was not qualified until the third step of the grievance procedure does not preclude it from doing so. Lower level supervisors make initial determinations on grievances. Neither the Union nor the State have been barred from adding to the their arguments as grievances advance through the procedure. That normal course of events should prevail in this situation according to the State.

The State properly worded the posting. Its text is almost verbatim from the position description. The minimum qualifications set forth come from the position description. Testimony to that effect is on the record from the State's expert, Ms. Price. It is unrefuted.

In fact, the Grievant was misclassified as an Accountant 2. She was more properly classified as an account clerk supervisor. As this was the case, Ms. Savage lacked the experience in accounting required to be qualified under the minimum qualifications as set forth on the posting.

That Ms. Savage was subsequently awarded the Fiscal Officer 1 position is not relevant to this dispute according to the State. The position descriptions for the Accountant 3 and the Fiscal Officer 1 positions are different. The vacancy for the Accountant 3 involved work in a new project being started by the Department of Aging, the Passport program. Accounting work there was considerably more involved than accounting tasks performed by the Fiscal Officer 1 who was working in a well established program, replete with standards of performance and instructions for employees. Her promotion to Fiscal Officer 1 occurred well after the events under review in this proceeding. It has no bearing on those events. Should it be given

weight in reaching a decision, the State asserts the Arbitrator would be violating the prohibition against an Arbitrator adding to or subtracting from the contents of the Agreement found in Section 25.03.

The cases from Illinois offered by the Union in support of its position should be discounted by the Arbitrator according to the State. No bargaining history was proffered by the Union. The construction of the term "demonstrably superior" might well be different in Illinois and Ohio. In this situation as in others before this Arbitrator the State asserts that the fact an employee meets minimum qualifications does not mean they are qualified for a specific job. Rather, it means they are qualified to work in a particular classification. In this case, the Grievant was neither qualified nor did she meet the minimum qualifications for the posted vacancy. As that is the case, the grievance should be denied according to the State.

Discussion: The Union is correct that the order of preference established by the Agreement in Section 17.04, Subsections A through E establishes the primacy of Ms. Savage's bid over that of Mr. Jones. She was in the appropriate classification series while he was not. The Agreement provides that before persons in Mr. Jones status may be considered all bidders in classifications above him, Subsections A - C of Section 17.04, must have their qualifications evaluated. Only if bidders in those classifications are found wanting may the State reach people in Mr. Jones subsection, D.

When Ms. Savage filed her grievance and the Step 1 hearing was held the appropriate management official, Susan Hammond, denied it. The ground for denial was that Mr. Jones was demonstrably superior to Ms. Savage. The same claim was advanced by the State in the Step 3 hearing. That reason for denying Ms. Savage's grievance flies in the face of the plain language of the Agreement at Section 17.05 which provides that the job shall be awarded to the qualified employee with the most state seniority unless the State can show that a junior employee (emphasis supplied) is demonstrably superior. Mr. Jones cannot secure the position in dispute due to the fact that he may or may not be demonstrably superior to Ms. Savage. The language applies only to situations in which a junior employee is promoted over a senior employee. In this case, the reverse occurred. Mr. Jones was senior to Ms. Savage, albeit in a different subsection of Section 17.04 of the Agreement. The demonstrably superior language of the Agreement does not apply to people in his situation and cannot be used by the State to support its action in this case. The State cannot show that a junior employee was demonstrably superior to the Grievant as the person who received the position, Mr. Jones, was senior to her. Reliance by the State upon the allegedly superior qualifications of Mr. Jones is misplaced.

It is not possible to move from that conclusion to the conclusion sought by the Union, that Ms. Savage be awarded the position. That the State modified its position during the course of the grievance procedure to encompass Ms. Savage's alleged lack of qualifications for the Accountant 3 vacancy does not render it improper in this situation. All concerned know that the concepts of minimum qualifications and demonstrably superior are inextricably bound together in the Agreement. The parties discussed the issue thoroughly in the grievance procedure during the years preceding the arbitration hearing. The Union cannot claim to have been surprised by the Employer's line of defense. At various stages of the grievance procedure the Employer justified its action on the grounds that Ms. Savage was not qualified for the Accountant 3 position. It is necessary to determine whether or not Ms. Savage was qualified for the vacancy at issue in this proceeding.

The Classification Description for the Accountant 3 (Joint Ex. 5) position contains sections relating to job duties and major worker characteristics. Under major worker characteristics are found "Knowledge of (1) budgeting, (2) bookkeeping, (3) inventory control, (4) public accounting" In several locations on the Position Description for the Accountant 3 vacancy at issue (Joint Ex. 5) there is reference to the requirement applicants must know public accounting. Examination of Ms. Savage's transcript at Columbus State shows six courses in accounting (five if her failure in Principles of Accounting 1 is discounted.) Five (or six) courses in accounting hardly constitutes knowledge of public accounting as commonly conceived. Despite that, the Employer determined that she had sufficient public accounting knowledge to perform the duties associated with the Accountant 2 position. She was apparently qualified to do auditing and maintain bookkeeping accounting operations. In her position she was able to "supervise and review" activities of accounting personnel. No doubt whatsoever exists in the mind of this Arbitrator that Mr. Jones was substantially more

qualified than Ms. Savage for the position. No one examining their respective backgrounds could reach any other conclusion. That said, Mr. Jones cannot be given the position under the language of the Agreement as he was senior, not junior to Ms. Savage as is prescribed by Section 17.05A of the contract. Furthermore, at the time of the vacancy, Ms. Savage met the minimum acceptable characteristics of the Accountant 3 position as specified by the State itself on its own Position Description and Classification Specification. The Department may not go beyond these requirements and specify attainment of undergraduate major coursework in accounting when that is not specified on either the Position Description or Classification Specification. Nor may it promote a senior demonstrably superior bidder over a junior competitor. The language of the Agreement at Section 17.06 specifically prohibits such action.

Award: The grievance is SUSTAINED. The Grievant is to be paid the pay and benefits to which she would have been entitled from the date her application was denied to the date she departed State service.

Signed and dated this 10th day of December, 1991 at South Russell, OH.

HARRY GRAHAM
Arbitrator