

ARBITRATION DECISION NO.:

427

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Motor Vehicles

DATE OF ARBITRATION:

March 20, 1992

DATE OF DECISION:

April 1, 1992

GRIEVANT:

Livingston McClinton

OCB GRIEVANCE NO.:

15-02-(91-07-22)-0056-01-09

ARBITRATOR:

Harry Graham

FOR THE UNION:

Brenda Goheen

FOR THE EMPLOYER:

Edward A. Flynn

KEY WORDS:

Promotions

Minimum Qualifications

ARTICLES:

Article 17-Promotions and

Transfers

§17.05-Applications

§17.06-Selection

FACTS:

On May 28, 1991, the Bureau of Motor Vehicles posted to fill the vacant position of Reproduction Equipment Operator I. The grievant filed a timely bid for the position. Bids were received from several other people as well. The person selected for the position was a bargaining unit employee with three years less seniority than the grievant. At the time of his bid the grievant was classified as a Data Entry Operator I. The grievant's bid was rejected based on the employer's belief that the grievant did not meet the minimum qualifications for the position and the position was awarded to the less senior employee. In order to protest what he regarded as a violation of the Agreement, the grievant filed a grievance.

UNION'S POSITION:

The union points to the position the grievant held at the time of the bid and which he holds to this day. The grievant is a Data Entry Operator. As such, he utilizes a machine known as Classic 5600 which is a reader/printer. He also operates a camera known as the VT 220. Both are pieces of microfilm equipment. The qualifications set forth on the posting are formal education in arithmetic and the ability to read and write. The grievant has 2-1/2 years of college education. He obviously meets those requirements. The posting also requires three months training or experience in the operation of reproduction equipment. The posting lists examples of reproduction equipment such as "photocopiers, [and] microfilm equipment." The grievant meets that requirement as well. No reason exists to believe that the grievant did not meet, and in fact exceed the minimum qualifications for the position. The Union argues that he should be awarded the job of Reproduction Equipment Operator.

EMPLOYER'S POSITION:

The employer differs with the union over the characterization of the Classic 5600. It believes that it is not reproduction equipment. More accurately, it is more accurately described as retrieval equipment. Its operation is conceptually different from that performed by reproduction equipment. The state points out that the grievant was not allowed to complete the selection process. He was not interviewed. If the grievant and union prevail in this proceeding the state urges that the grievant not be awarded the position. The state believes that it has the right to go back and review the applicants once again with the understanding that the grievant meets the minimum qualifications for the position. However, the state may show that a junior applicant is demonstrably superior to the grievant.

ARBITRATOR'S OPINION:

The state's position in this cases hinges on semantics. it urges the arbitrator to make a distinction between "retrieval" and "reproduction." However, in the opinion of the arbitrator if making paper copies of microfilmed images on paper is not reproduction, what is it? It is clear that the grievant was qualified for the position.

However, the state is correct in saying that it has a right to go back and review the applicants if the union prevails. The state may reevaluate the original applicants to determine whether or not a junior applicant is demonstrably superior to the grievant.

AWARD:

The grievance is sustained. The state is directed to reopen the selection process for the Reproduction Equipment Operator vacancy at issue in this proceeding. The bid of the grievant is to be reconsidered.

TEXT OF THE OPINION:

**In the Matter of Arbitration
Between**

OCSEA/AFSCME Local 11

and

**The State of Ohio, Bureau of
Motor Vehicles**

Case Number

15-02-(91-07-22)-0056-01-09

Before:

Harry Graham

Appearances:**For OCSEA/AFSCME Local 11:**

Brenda Goheen
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Bureau of Motor Vehicles:

Edward A. Flynn
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Introduction:

Pursuant to the procedures of the parties a hearing was held in this matter on March 20, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue:

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

Did the Grievant meet the minimum qualifications for promotion to Reproduction Equipment Operator?
If so, was the Grievant improperly denied the promotion to Reproduction Equipment Operator?
If so, what shall the remedy be?

Background:

The facts that prompt this proceeding are not in dispute. On May 28, 1991 the Bureau of Motor Vehicles posted to fill a vacant position. That position was as a Reproduction Equipment Operator I. The Grievant filed a timely bid for the position. Bids were received from several other people as well. Among those who bid in addition to the Grievant was Tina Sturtz. Ms. Sturtz has a seniority date of May 22, 1989. The Grievant, Livingston McClinton, has a seniority date of June 23, 1986. At the time of his bid Mr. McClinton was classified as a Data Entry Operator I. Mr. McClinton's bid was rejected and the position awarded to Ms. Sturtz. In order to protest what he regarded as a violation of the Agreement Mr. McClinton filed a grievance. It was denied at each step of the Grievance procedure and the parties agree that it is now properly before the Arbitrator for determination on its merits.

Position of the Union:

Section 17.05 of the Agreement is applicable to the dispute. It provides that bidders are to be divided into certain classes for purposes of the selection process. Bidders are to possess and be proficient in the minimum qualifications contained in the classification specification and the position description. If that is the case the senior qualified bidder is to receive the position unless the State can show that a junior bidder was "demonstrably superior" to the more senior applicant. In this situation, the Union insists that the Grievant met the minimum qualification standard. As that is the case, it urges he be awarded the position with retroactive pay.

In support of its view that the Grievant met the minimum qualifications for the vacant position the Union points to the position he held at the time of the bid and which he holds to this day. Mr. McClinton is a Data

Entry Operator. As such, he utilizes a machine manufactured by Bell and Howell known as a Classic 5600. The Classic 5600 is what is known as a reader/printer. It scans microfilm and when the appropriate document is found, makes a print on plain paper. In essence, it performs a copying function. The copies are made from microfilm to paper. In the daily tasks performed by the Grievant copies of traffic citations and drivers license applications are routinely made. As a regular part of his duties Mr. McClinton also operates a camera known as the VT 220. That is a 16mm camera. The Bell and Howell Classic 5600 also uses 16mm film. The VT 220 reproduces an image from paper on to film. The Classic 5600 does the reverse. Both are microfilm equipment. The Classic 5600 is a photocopier, albeit one that differs from the traditional Xerox equipment. Where Xerox and similar machines copy from paper to paper, the Bell and Howell copies from film to paper. The Grievant was well qualified to perform the tasks associated with the position of Reproduction Equipment Operator by virtue of his experience. The qualifications set forth on the posting are formal education in arithmetic and the ability to read and write. The Grievant has 2.5 years of college education. He obviously meets those requirements. The posting also requires three months training or experience in operation of reproduction equipment. The posting furnishes examples of reproduction equipment as "photocopiers, microfilm equipment." The Grievant meets that requirement as well. No reason exists to believe that Mr. McClinton did not meet, and in fact exceed, the minimum qualifications for the vacant position. As that is the case, the Union insists that he be awarded the job of Reproduction Equipment Operator.

Position of the Employer:

The Employer differs with the Union over the characterization of the Classic 5600. In its opinion, the 5600 is not reproduction equipment. More accurately, it is to be described as retrieval equipment. The Classic 5600 retrieves images from film and prints them on paper. That operation is conceptually different from that performed by reproduction equipment in the opinion of the Employer.

The State also points to the Position Bid Sheets submitted by Mr. McClinton and Ms. Sturtz and asserts that Mr. McClinton gave the Employer no grounds to select him. Ms. Sturtz indicates on her bid that she films driver applications on a Bell and Howell SRM micro-imagery camera. She also uses other cameras in the Department in her position as a Clerk I. Mr. McClinton cites his experience working with the Bell and Howell Classic 5600 which he terms a "reader printer." Experience with a reader printer does not serve to qualify a person for the Reproduction Equipment Operator vacancy in the State's view. The State asserts further that it is up to the bidder to indicate fully the education and experience that qualifies him or her for the position bid upon. Ms. Sturtz did that. Mr. McClinton did not. Consequently, the State acted properly in this situation it asserts.

The State points out that Mr. McClinton did not complete the selection process. He was not interviewed. If the Grievant and Union prevail in this proceeding the State urges that Mr. McClinton not be awarded the vacant position. There is in Section 17.06 of the Agreement the possibility for the State to promote a junior employee over a more senior colleague. This may be done when the junior employee is "demonstrably superior" to the senior bidder. It may be that Ms. Sturtz is demonstrably superior to Mr. McClinton. As that is the case, the State asserts that an award of the disputed position to Mr. McClinton is premature should he prevail in this proceeding. In that event the State should be directed to reopen the selection process and evaluate Mr. McClinton against other bidders it claims.

Discussion:

The position of the State in this dispute hinges on semantics. It urges the Arbitrator make a distinction between "retrieval" and "reproduction." In the opinion of the State, the differences between those two processes are so vast as to disqualify the Grievant from promotional consideration. In this instance, the State doth protest too much. In support of its claim that there exists a fundamental conceptual difference between retrieval and reproduction the State introduced material from the manufacturer of the Classic 5600 and the SRM Microimagery System, Bell and Howell. Employer Exhibit 4 is a letter from Ronald D. Flowers, Bell and Howell Senior Account Manager to Kevin Gay of the Bureau of Motor Vehicles. It was introduced to support the position of the State that Mr. McClinton was experienced in retrieval, rather than reproduction. It

does not do so. Mr. Flowers defines a microfilm reader/printer as "a retrieval device used to view and or make paper copies of microfilmed images on paper." (Emphasis supplied) If making paper copies of microfilmed images on paper is not reproduction, what is it? Mr. McClinton testified that when he made copies of microfilm documents on paper the process was similar to the normal copying process such as might occur when using a Xerox or other office copier. This view was seconded by Mr. Gay, Supervisor of the Motor Vehicles film room.

The position of the Employer that Mr. McClinton's bid sheet was unresponsive to the posting is belied by the plain wording of the posting and his bid. Joint Exhibit 4 is the posting. It refers to the functions of the Reproduction Equipment Operator as one who "searches files to retrieve original applications." If the Employer insists as it does in this case that the Grievant's skills were in retrieval rather than reproduction his application clearly, unambiguously and without doubt reflects his knowledge of the retrieval function.

Whether or not the vacancy required skills in retrieval or reproduction is truly a distinction without a difference in this situation. Examination of the operating manuals of the Classic 5600 and the SRM Microimagery System does not indicate that the SRM Microimagery System to be more difficult to operate than the Classic 5600. Mr. McClinton testified he thought he could learn the tasks associated with the vacant position in three days. Mr. Gay, the supervisor, estimated five days were required to learn the job duties. Whatever the correct number, the parties agree that Mr. McClinton could learn the work of the Reproduction Equipment operator quickly. At the hearing it was undisputed that Mr. McClinton works with microfilm equipment in his current position. While the Employer took pains to emphasize the distinction between reproduction and retrieval equipment in this dispute, it failed to point to the plain words of the posting that refer to experience in the operation of "microfilm" equipment. Mr. McClinton possesses such experience and is senior to the person who was awarded the position.

In its presentation of its case to the Arbitrator the State urged that if it was found that Mr. McClinton were to prevail in this situation, as is obviously the case from the text above, that he not be awarded the position. In the opinion of the State as he did not complete the selection process it would be premature to direct that he fill the vacancy. In this view, the State is correct. Reference is had to Section 17.06 of the Agreement. Language found at that Section provides that "The job 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 burden is on the State to show that a junior applicant, Ms. Sturtz in this case, is demonstrably superior to the senior bidder, Mr. McClinton. Should the State believe it can carry its burden it may continue to deny the promotion at issue to Mr. McClinton. The Union may then protest in the fashion provided by the Agreement.

Award:

The grievance is sustained. The State is directed to reopen the selection process for the Reproduction Equipment Operator vacancy at issue in this proceeding. The bid of Livingston McClinton is to be reconsidered.

Signed and dated this 1st day of April, 1992 at South Russell, OH.

HARRY GRAHAM, Arbitrator