

ARBITRATION DECISION NO.:

545

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation and Developmental Disabilities

Division of Administration

DATE OF ARBITRATION:

March 11, 1994

DATE OF DECISION:

June 6, 1994

GRIEVANT:

Elaine Blaum

OCB GRIEVANCE NO.:

24-01-(92-10-27)-0091-01-04

ARBITRATOR:

Nels Nelson

FOR THE UNION:

Robert W. Steele, Staff Rep.

Joe Raggola, Second Chair

FOR THE EMPLOYER:

Ed Ostrowski, Labor Relations Chief

Rachel Livengood, OCB, 2nd Chair

KEY WORDS:

Promotion

Additional Minimum Qualifications

Proficiency in Minimum Qualifications

Remedy

Demonstrably Superior

ARTICLES:

Article 17 - Promotions, Transfers, and Relocations

§ 17.05 - Applications

§ 17.06 - Selection

FACTS:

The grievant is an Accountant/Examiner 3 at the Ohio Department of Mental Retardation and Developmental Disabilities. She applied for a position as an Accountant/Examiner 4, but was not given an interview for the higher position because she did not meet the requirements of experience in Medicaid auditing, cost reporting, and reimbursement experience. An Accountant/Examiner 2 was awarded the

position. The grievant alleged that the state violated Article 17 of the Contract in two ways. First, the state included position specific minimum qualifications in the job posting in addition to the minimum qualifications from the class specification and, secondly, it selected a less senior employee for a position for which the grievant was qualified, without granting the grievant an interview.

UNION'S POSITION:

The union argued that the state violated Article 17 of the Contract by promoting a junior employee for the position that the grievant also bid on. Furthermore, the union contended that the additional minimum qualifications listed on the job posting were vague, because the posting failed to identify the familiarity or experience necessary to meet the additional qualifications.

The grievant was not given an interview for this position, because she allegedly was not qualified. However, the union asserted that the grievant did have the required experience for the position and if the grievant would have been given an interview she would have been able to explain her past experience.

The grievant was not given an interview because she had not participated in a "Medicaid" audit and was not working with Medicaid money at the time of the promotion. The union contended that the process through which applicants were screened prior to being interviewed was arbitrary and discriminatory.

The union contended that the application materials submitted by the grievant indicated that she met the minimum qualifications for the position. Therefore, she should be awarded the position and be made whole for any back pay and benefits lost. In the alternative, if the arbitrator does not grant the promotion to the grievant, she should at least be awarded an interview.

EMPLOYER'S POSITION:

The state argued that the minimum qualifications are not limited to those set forth in the class specifications. In order to receive an interview the applicant must also meet any additional qualifications contained in the position description. This process has been affirmed in previous arbitration cases.

The state also asserted that any position whose primary responsibilities include Medicaid-related duties, requires an applicant to meet the additional Medicaid minimum qualifications of the position which the grievant did not. The state claimed that the grievant's experience with Medicaid was too limited. As required by Article 17, the state asserted that an individual with in-depth experience was needed for this position.

ARBITRATOR'S OPINION:

The Arbitrator found that the grievant's description of her experience did not demonstrate that she met the standards of Article 17 which require that a bidder be "proficient" in the minimum qualifications contained in the classification specification and the position description. The grievant's description of her experience did not indicate that she was "proficient" in Medicaid auditing, cost reporting, and reimbursement. Therefore, the grievant was not qualified for the position.

Even if the grievant was granted an interview and was not given the position, the contract still would not have been violated, because the individual who was offered this position had "demonstrably superior" qualifications. In this case, given the fact that the individual who was awarded the position was "demonstrably superior," the grievant's greater seniority is irrelevant.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

ARBITRATION DECISION

June 6, 1994

In the Matter of

**State of Ohio, Department of Mental
Retardation and Developmental Disabilities**

and

**Ohio Civil Service Employees Association,
AFSCME Local 11**

Case No. 24-01-(92-10-27)-091-01-14
Elaine Blaum, Grievant

APPEARANCES

For the State:

Ed Ostrowski, Labor Relations Chief
Rachel Livengood, Office of Collective Bargaining, Second Chair
Eric Boyd, Labor Relations Officer
Mary Beth Wickerham, Federal Funds Office Chief
Lizabeth J. Dible, Labor Relations Officer
Meril Price, Personnel Director, MR/DD
Melody Snively, Personnel Officer, MR/DD

For the Union:

Robert W. Steele, Staff Representative
Joe Raggola, Second Chair
Elaine C. Blaum, Grievant
Cornelius McGrady, Steward
Edward Doaks, Management Analyst Supervisor, Dept. of Human Services
Adam Hubble, OCSEA

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Elaine Blaum, has been employed by the Ohio Department of Mental Retardation and Developmental Disabilities since 1974. She began work in a secretarial position and by 1990 had advanced to Accountant/Examiner 3 in the Division of Administration, Office of Federal Funds. On September 2, 1992 she applied for a position as Accountant/Examiner 4 in the same area. The job posting listed the minimum qualifications from the class specification and, in addition, listed position specific minimum qualifications including "experience in ... Medicaid Auditing/Cost Reporting/Reimbursement."

The applicants were screened by Mary Beth Wickerham, the chief of the Office of Federal Funds; Melody Snively, a personnel officer in the Department of MR/DD; and Al Sanders, an equal employment opportunity program supervisor. They determined that the grievant did not meet the requirement for Medicaid auditing, cost reporting, and reimbursement experience and did not interview her. On October 14, 1992 the grievant

learned that the position was awarded to Deborah Hoffine, an Accountant/Examiner 2 in the Office of Federal Funds, who was less senior.

The grievant filed a grievance on October 27, 1992. It charged that the state violated Article 17 of the collective bargaining agreement by including position specific minimum qualifications in the job posting in addition to the minimum qualifications from the class specification and by selecting a less senior employee for a position for which she was qualified without granting her an interview.

The grievance was processed pursuant to Article 25 of the collective bargaining agreement. It was denied at step 3 on January 20, 1993 and at step 4 on February 8, 1993. The case was appealed to arbitration and the hearing took place on March 11, 1994. Written closing statements were filed on April 27, 1994.

ISSUE

The issue as framed by the Arbitrator is as follows:

Did the state violate the collective bargaining agreement when it failed to grant the grievant an interview for the position of Accountant/Examiner 4 in the Department of MR/DD, Division of Administration, Office of Federal Funds and/or when it did not award her the position?

RELEVANT CONTRACT PROVISIONS

ARTICLE 17

Promotions, Transfers, and Relocations

* * *

17.05 - Applications

Employees may file timely applications for permanent transfers, promotions or lateral transfers. Upon receipt of all bids the Agency shall divide them as follows:

A. For the vacancies that the Employer intends to fill by promotion the applications shall be divided as follows:

1. All employees within the office (or offices if there is more than one office in the county), "institution" or county where the vacancy is located, who presently hold a position in the same, similar or related classification series (see Appendix 1), and who possess and are proficient in the minimum qualifications contained in the classification specification and the position description.

* * *

17.06 - Selection

A. In cases of promotion:

1. The Agency shall first review the bids of the applicants from within the office (or offices if there is more than one office in the county), county or "institution. " 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. Affirmative Action shall be a valid criterion for determining demonstrably superior. Interviews may be scheduled at the discretion of the Agency. Such interviews may cease when an applicant is selected for the position.

UNION POSITION

The union argues that the state violated Article 17 of the collective bargaining agreement. It indicates that this provision requires the promotion of the senior qualified bidder unless the state can show that "a junior employee is demonstrably superior to the senior employee." The union claims that the state makes the promotion decision which it has the opportunity to review it to see that it is not arbitrary, capricious, or discriminatory.

The union charges that in the instant case the promotion process was arbitrary and discriminatory. It asserts that the state ignored the grievant's application and failed to acknowledge the substantive experience listed on her application. The union complains that Wickerham was allowed to deny the grievant an interview and to promote a pre-positioned junior employee.

The union contends that the additional minimum qualifications listed on the job posting were vague. It points out that the posting failed to identify the familiarity or experience necessary to meet the additional qualifications. The union maintains that the grievant and other applicants were not placed on notice concerning the amount of experience needed.

The union claims that the additional qualifications were defined during the arbitration hearing. It notes that Edward Doaks, a supervisor in the Department of Human Services, testified that in order to perform a Medicaid audit an employee must have an accounting background but that Medicaid knowledge can be gained through on-the-job training. The union indicated that Medicaid cost reporting is essentially "a recording report in spreadsheet format" and that the refunding of Medicaid waivers is an example of reimbursement.

The union asserts that the grievant had the required experience either through her past or current job duties as enumerated on her application. It indicates that her duties at the time of the posting consisted primarily of processing payments and maintaining and auditing several grant funds including Chapter I, Chapter II, Client Assistance Program, Early Intervention, and part of the Foster Grandparents Program. The union points out that in addition the grievant's application stated:

"Process ISTVs to receive (or pay out) funding dollars due to (or from) the department (maintain on 20/20 spreadsheet) ... This would include retrieving Medicaid Medicare cross-over monies, and funding dollars ... At one point I did process payment of HAB Center - PASSAR - Supported Living - Title XX and Clothing Dollars"

It claims that the new position requires a knowledge of the Community Alternative Funding System and OBRA waivers and that the grievant possesses such knowledge.

The union alleges that the agency "missed the forest for the trees." It accuses the state of arbitrarily neglecting to grant the grievant an interview and promotion because she did not participate in a Medicaid audit and was not working with Medicaid money at the time of the promotion. The union contends that in OCSEA/AFSCME Local 11 and State of Ohio, Rehabilitation Service Commission, Case No. 29-01-(89-08-30)-0019-01-09 and OCSEA/AFSCME Local 11 and State of Ohio, Bureau of Motor Vehicles, Case No. 1502-(91-07-22)-0056-01-09 Arbitrator Harry Graham found such judgment to be arbitrary.

The union challenges the process by which applications for the position were reviewed. It claims that the sole criterion used by Snively and Sanders was whether the word "Medicaid" appeared in an application in conjunction with auditing, cost reporting, or reimbursement. The union maintains that this resulted in them simply "rubber stamping" any substantive determination made by Wickerham.

The union argues that Wickerham's determination of the merits of the grievant's application is suspect. It contends that she ignored the grievant's assertion that she worked with the Medicaid programs enumerated on her application. The union maintains that Wickerham passed over the grievant's Medicaid work because it was performed under a prior supervisor and because she assumed that the Medicaid work previously done in the office was somewhat different if not negligible.

The union argues that reliance on Wickerham's sole judgment is exceedingly questionable because her actions constitute prima facie evidence of discrimination. It states that at approximately the same time she was adding the Medicaid auditing requirement to the job posting, she sent Hoffine to the Richland County Department of Human Services for two days to observe a Medicaid audit. The union indicates that while that

assignment may not constitute pre-positioning, it means that the Arbitrator should carefully scrutinize Wickerham's objectivity, especially considering the fact that she admitted to socializing with Hoffine.

The union charges that Wickerham failed to investigate whether the grievant met the additional qualifications. It complains that the grievant should have been granted an interview so that she would have been able to explain her past experience with Medicaid programs. The union maintains that by failing to grant the grievant an interview Wickerham was unable to question her about her knowledge of the rules and procedures in Medicaid work.

The union concludes that the application materials submitted by the grievant indicate that she met the additional minimum qualifications for the position of Accountant/Examiner 4. It contends that the grievant was denied an interview and the position in violation of Article 17 of the collective bargaining agreement. The union asks the Arbitrator to award the position to the grievant with back pay and any benefits lost to the date on which the grievance was filed or, in the alternative, to award an interview to the grievant so that she can explain the Medicaid experience listed on her application and so that an informed decision can be made regarding her application.

STATE POSITION

The state argues that the minimum qualifications for a position are not limited to those set forth in the class specifications. It points out that Article 17 refers to employees or applicants who meet not only the minimum qualifications contained in the class specification but also qualifications in the position description. The state indicates that this process is affirmed in OCSEA/AFSCME Local 11 and State of Ohio, Department of Transportation, Case No. 31-12-(5-3-90)-31-01-06; OCSEA/AFSCME Local 11 and State of Ohio, Bureau of Workers' Compensation, Case No. 34-04-991-07-08)-117-0109; and OCSEA, Local 11, AFSCME, AFL CIO and Public Utilities Commission, State of Ohio, Case No. 26-00-(90-02-05)-0005-01-14. The state stresses that in OCSEA/AFSCME Local 11 and State of Ohio, Bureau of Employment Services, Case No. 11-09-(86-04-11)-001-01-14-0 the union agreed that minimum qualifications are not limited to the class specification.

The state contends that it is permitted to use additional position specific minimum qualifications. It points out that Meril Price, the personnel director for the Department of MR/DD, testified that the state has been using additional position specific minimum qualifications for more than ten years. The state notes that Snively stated that 50% of the postings in the department contain additional position specific minimum qualifications.

The state asserts that in the instant case there was a legitimate need to use additional position specific minimum qualifications. It claims that the need for Medicaid expertise is the result of the evolution of the Office of Federal Funds and the "explosion" of the office's Medicaid responsibilities as the Voinovich administration adopted a policy of delegating responsibility for Medicaid to various departments. The state indicates that as a result Wickerham established a new unit in the office whose principal responsibility was Medicaid creating the need for an Accountant/Examiner 4 who was proficient in Medicaid.

The state argues that the grievant was not appropriate for that particular position in that particular unit. It contends that Medicaid is a "very involved, highly complex (perhaps convoluted) field." The state maintains that any position whose primary responsibilities include Medicaid requires more than a tangential acquaintance with the field.

The state asserts that the grievant was only a clerical vis-a-vis Medicaid and engaged in no analysis, trouble-shooting, problem-solving, or independent analysis relating to Medicaid. It claims that in PASARR the grievant's responsibilities were checking for accuracy and reimbursement and that her end product was a check. The state asserts that the programs listed in Union Exhibits 1, 2, 3, and 9 are state programs rather than federal Medicaid programs.

The state claims that the union's reliance on the Medicaid Handbook is misplaced. It points out that Wickerham testified that the handbook was created by the County Board Association for its own use and was not sanctioned by the Ohio Department of MR/DD. The state claims that it was distributed to the staff of the Office of Federal Funds for informational purposes and not as a reference or source book.

The state asserts that the grievant admitted at the step 3 grievance meeting that she was not proficient in Medicaid auditing and had no experience whatsoever in Medicaid cost reporting. It acknowledges that at the arbitration hearing the grievant denied making such admissions but it claims that the step 3 hearing officer, Michael Fuscardo, who served as a reference on the grievant's application for the position, noted that the grievant made these admissions. The state contends that it is unlikely that the grievant's own reference would misquote her.

The state rejects the union's argument that the grievant had some Medicaid experience so that she should have been awarded the job. It points out that Article 17 calls for employees who "possess and are proficient in the minimum qualifications." The state contends that proficiency means "broad-based, in-depth experience, rather than isolated, limited exposure." It maintains that this is the standard followed in OCSEA/AFSCME Local 11 and State of Ohio, Department of Transportation, Case No. 31-12-(5-3-90)-31-01-06; OCSEA/AFSCME Local 11 and State of Ohio, Bureau of Workers' Compensation, Case No. 34-04-991-07-08)-117-01-09; and OCSEA, Local 11, AFSCME, AFL-CIO and Public Utilities Commission, State of Ohio, Case No. 26-00-(9002-05)-0005-01-14.

The state challenges the union's contention that Hoffine was pre-positioned for the position. It states this charge goes beyond the scope of the issue submitted to arbitration. The state claims that OCSEA, Local 11, AFSCME, AFL-CIO and Public Utilities Commission, State of Ohio, Case No. 26-00-(90-02-05)-0005-01-14 rejects the notion of pre-positioning where a job has specialized duties and responsibilities. It also asserts that the argument flies in the face of the union's assertion that Hoffine had no real Medicaid background, that she lied on her application, and that the Richland County training was worthless.

The state argues that the applications of Laura Garvin and Annette Mayer are irrelevant and should be ignored. It states that the issue submitted to arbitration is the grievant's qualifications and that it does not extend to other applicants. The state indicates that in any event the reviewers would have had to eliminate the grievant and every other state employee before Garvin or Mayer, who were not state employees, could have been considered. It maintains that this point is supported by OCSEA/AFSCME Local 11 and State of Ohio, Department of Aging, Case No. 03-00-(87-12-14)-0001-01-14-0.

The state rejects the argument that a disparity in the check-marks made by the reviewers on the application check sheets for Garvin and Mayer show a haphazard approach to hiring by the state. It stresses that it uses three reviewers to insure that the most qualified applicants are hired. The state notes that the reviewers rate the applicants separately and if a discrepancy exists, meet and reach a consensus. It indicates that in the cases of Garvin and Mayer the reviewers never met because a qualified bargaining unit applicant had already been found.

The state contends that the testimony of Doaks should be discounted as irrelevant and immaterial. It claims that he admitted that he was not familiar with Medicaid waivers, CAFS, TCM, or PASSAR which are important to the instant case. The state further asserts that Doaks agreed that the ISTV system was little more than check-writing despite the fact that the grievant cited it as part of her experience with Medicaid.

The state concludes that the union did not carry its burden of proof and asks the Arbitrator to deny the grievance. It states that if the Arbitrator feels that the grievant met the minimum qualifications, the only fair remedy would be to order the grievant to be interviewed to determine whether Hoffine's qualifications were "demonstrably superior" to the grievant pursuant to Article 17.06(A)(1). The state points out that the Arbitrator reached a similar conclusion in Ohio Civil Service Employees Association AFSCME Local 11 and State of Ohio, Department of Agriculture, Case No. 04-00-(90-11-16)-0035-01-13.

ANALYSIS

The facts giving rise to the instant grievance are clear. On September 2, 1992 the grievant applied for a position as an Accountant/Examiner 4 in the Office of Federal Funds in the Division of Administration of the Department of Mental Retardation and Developmental Disabilities. The job posting listed the minimum qualifications from the class specification and additional position specific minimum qualifications including "experience in ... Medicaid auditing/cost reporting/reimbursement." The state determined that the grievant did not meet the additional position specific minimum qualifications for the position and the job was awarded

to Hoffine -- a less senior employee. The union contends that the grievant did meet the additional position specific minimum qualifications and that she should have been granted an interview and awarded the position.

The grievant's application for the position included a lengthy and detailed description of her experience. It very clearly indicates that she had extensive experience with numerous grant programs. However, the only specific reference to Medicaid relates to processing Inter State Transfer Vouchers or ISTV'S. The application indicates that the grievant was involved in retrieving Medicaid cross-over monies.

Although the grievant's description of her experience indicates some exposure to Medicaid, the Arbitrator does not believe that the grievant's description of her experience demonstrates that she meets the contractual standard to be deemed qualified for the position. Article 17, Section 17.05(A) creates several steps for filling a position beginning with the consideration of employees in the office, "institution", or county where a vacancy exists who hold positions in the same, similar, or related classifications and ending with consideration of all state employees. In each instance the applicants consist of those "who possess and are proficient in the minimum qualifications contained in the classification specification and the position description." The grievant's detailed description of her experience simply does not indicate "proficiency" in Medicaid auditing, cost reporting, and reimbursement.

The Arbitrator believes that even if it was concluded that the grievant met the additional position specific minimum qualifications, there still would not have been a violation of the collective bargaining agreement when the position was awarded to Hoffine. Article 17, Section 17.06(A)(1) requires an agency to review bids from applicants and award the position to the employee with the most seniority unless it can show that a junior employee is "demonstrably superior to the senior employee." In the instant case Hoffine's application for the position very clearly indicates that she had considerable experience in the Medicaid programs administered by the Department of Mental Retardation and Developmental Disabilities. A comparison of Hoffine's application and the grievant's application along with her testimony at the hearing regarding her experience indicates that Hoffine had "demonstrably superior" qualifications for the position in question. Thus, even if the grievant had been granted an interview, the state still properly could have awarded the position to Hoffine.

The union argued that the selection procedure was defective because the additional position specific minimum qualifications were vague and because the outside reviewers' sole criterion in reviewing the applications was whether auditing, cost reporting, or reimbursement were used in conjunction with the word Medicaid. The Arbitrator must disagree. First, although the state could have described the level or degree of Medicaid experience it desired, the process was not invalidated by not doing so. The grievant's testimony at the hearing did not indicate that she had Medicaid experience that she failed to describe on her application that would have qualified her for the position. Second, the screening by Snively and Sanders was not inappropriate. They looked for an indication of Medicaid auditing, cost reporting, and reimbursement experience which the posting listed as part of the additional position specific minimum qualifications. In the grievant's application there was no indication that she had such experience.

The union also charged that Wickerham's "actions constitute prima facie evidence of discrimination." This charge is based upon the fact that she added the additional position specific minimum qualifications to the minimum qualifications in the class specifications, sent Hoffine to observe a Medicaid audit in the Richland County Department of Human Services, and socialized with Hoffine.

The Arbitrator does believe that any of these facts establish discrimination. First, Wickerham included the additional position specific minimum qualifications in the job posting because the job involved Medicaid auditing, cost reporting, and reimbursement. There is nothing to suggest that they were added to exclude the grievant from consideration for the position. Second, while it is true that Hoffine was sent to observe a Medicaid audit about the same time as the job at issue was being posted, the union acknowledged that it did not constitute pre-positioning. Third, the fact that Wickerham may have socialized with Hoffine does not establish that she acted improperly in awarding the Accountant/Examiner 4 position. Further, the record indicates that the grievant and Wickerham were also friends at the time of the posting.

Based upon the above analysis the Arbitrator must conclude that the state did not violate the collective bargaining agreement when it did not interview the grievant for the position of Accountant/Examiner 4.

Furthermore, the testimony and evidence presented at the hearing indicate that even if the grievant had been granted an interview, Hoffine's qualifications were "demonstrably superior" to the grievant's qualifications and on that basis Hoffine could have been awarded the position despite the grievant's greater seniority.

AWARD

The grievance is denied.

NELS E. NELSON
Arbitrator

June 6, 1994
Russell Township
Geauga County, Ohio