

ARBITRATION DECISION NO.:

548

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation and Correction

London Correctional Institution

DATE OF ARBITRATION:

June 30, 1994

DATE OF DECISION:

July 6, 1994

GRIEVANT:

Roger Adkins

OCB GRIEVANCE NO.:

27-13-(93-04-23)-0643-01-03

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Patrick A. Mayer

FOR THE EMPLOYER:

Colleen Wise

Edith Bargar

KEY WORDS:

Application for Promotion

Burden of Proof

Policies

Seniority

Timeliness of Filing a

Promotional Bid

ARTICLES:

Article 16 - Seniority

Article 17 - Promotions and Transfers

§ 17.05 - Applications

FACTS:

The Grievant, a Corrections Officer, completed an application blank for the position of Corrections Supervisor I and had the application notarized. The Grievant filed for the promotion in response to a posting for that position. The Grievant testified that he put his application through a slot in the door of the Personnel Office before the posting was removed. Above the slot in the door is a sign that states "Applications

Received Here."

The Grievant stated that after the posting was taken down, he went to the Personnel Office to make a change in his application. The Personnel Officer was unable to find the Grievant's application and gave him another one to fill-out. The Personnel Officer told the Grievant that he could backdate the application to the deadline and that a notary was not necessary. The Grievant testified that he was not notified about the application again until he found out that the position was filled.

The President of the local union testified that none of the Corrections Supervisor I postings since the posting had been filled by seniority.

The Personnel Officer testified that no application could be accepted after the posting was taken down. She further testified that only one or two applications came into the office by way of the door slot. She also stated that the slot was for the purpose of receiving items from employees who worked on shifts when the Personnel Office is not open. The Personnel Officer verified the Grievant's testimony that she gave him a new application and told him to backdate it. She then took the new application to the warden, who refused to accept it because it was not timely filed. She could not remember if she had notified the Grievant of this or not.

The position of Corrections Supervisor I was filled, based upon seniority, and was granted to an employee who had less seniority than the Grievant.

UNION'S POSITION:

The Grievant took all of the steps necessary to timely apply for the posted position of Corrections Supervisor I. The Union maintains that the application was either lost or destroyed by the employer. Whatever the reason for the disappearance of the application, the proof shows that the application was timely filed, and the contract was violated when the Grievant was not selected for the position.

EMPLOYER'S POSITION:

The Grievant never filed a timely application, and that the backdated application was accepted subject to the Warden's approval. The Warden's approval was denied and the backdated application was invalid. Further, the burden is on the Union to show that the Employer violated the contract and the Union has not done so.

ARBITRATOR'S OPINION:

The arbitrator found the testimony of the Grievant, that he had deposited his application in the door slot of the personnel office, to be credible. The arbitrator further found that the slot on the Personnel door is clearly marked as an appropriate place to put information for the Personnel office.

The arbitrator went on to state that the burden is on the employee to initiate the application process. However, where applications must be "timely" to be valid, there should be a policy to provide a method of validating "timeliness" and a method to validate and acknowledge receipt. In this case there was no such policy in effect.

The Employer introduced no evidence to cast doubt on the credibility of the Grievant. The method chosen by the Grievant to enter his application was within the proper procedure as set forth by the Employer and the Employer had no safeguards in its procedure to record the filing of an application.

The Grievant was never put on notice that his backdated application was not accepted by the Warden and this failure by management allowed the Grievant to reasonably believe that the problem was rectified.

While the Employee has the burden of filing a timely application, the burden of establishing reasonable and fair office procedures which insure safety and accuracy of application filings falls on the employer.

The Arbitrator concluded that the Grievant filed a timely application for the position of Corrections Supervisor I and when the position was filled on a strict seniority basis, the Employer violated the Contract by appointing a person with less seniority than the Grievant.

AWARD:

The Grievance was granted.

TEXT OF THE OPINION:

**In the Matter of the
Arbitration Between**

**OCSEA, Local 11
AFSCME, AFL-CIO
Union**

and

**State of Ohio
Department of Corrections
and Rehabilitation
Employer.**

Grievance No.:
27-13-(93-04-23)-0643-01-03

Grievance Date:
April 23, 1993

Grievant:
Adkins, Roger

Hearing Date:
June 30, 1994

Award Date:
July 6, 1994

Arbitrator:
R. Rivera

For the Union:
Patrick A. Mayer

For the Employer:
Coleen Wise
Edith Bargar

Present at the Hearing in addition to the Grievant and Advocates were David Carpenter, President of Local (witness), Marie Nibert, Personnel Officer III (witness), F. Andrew Hildebrand, LRO, and Dave Burrus, LRO.

Joint Exhibits

1. Contract
2. Grievance Trail
3. Posting for Corrections Supervisor I
4. Sworn statement of a Notary dated June 30, 1993

5. Seniority List

Union Exhibits

1. Copy of Grievant's application filed March 10, 1993
2. Memo dated April 13, 1993 from Deputy Warden to Warden

Employer Exhibits

1. Application dated July 13, 1993 from Grievant
2. Statement withdrawing application of July 13, 1993
3. Undated typed statement of M. Nibert

Joint Stipulations

1. The Grievant has been employed at London Correctional Institution since November 1984.
2. Warden Alexander's testimony regarding both of Grievant's application is that he did not see the first application and would not consider the second application because it was filed after the deadline. In addition, Warden Alexander' s testimony is that he did not tell the Personnel Officer Marie Nibert to destroy the application filed by the Grievant.

Issue

Did the Employer violate the Contract, in particular Articles 16 and 17, by failing to appoint the Grievant to the position of Corrections Supervisor I? More particularly, did the Grievant file a timely application? If the Grievant did file a timely application and the Employer failed to appoint the Grievant, what shall the remedy be?

Facts

This Grievance takes place at London Correctional Facility, a state prison. The Grievant is a Corrections Officer whose seniority date is 11/26/84. (Joint Exhibit 5) On March 3, 1993, a position of Corrections Supervisor I was posted. (Joint Exhibit 3) This posting was removed on March 12, 1993. The Grievant testified that upon viewing the posting that he obtained an application blank. He stated that he took the application blank home and filled it out. His days off were Sunday and Monday. His shift was 5:50 a.m. to 2:50 p.m. Tuesday through Saturday. on his off-day, March 8, 1993, he took the application to a notary in a bank and had it notarized. Joint Exhibit 4 is a statement of Notary James Hayes stating, under oath, that he notarized an application for a "Sergeant's position at London Correctional Institution" on March 8, 1993 for the Grievant. The Grievant stated that he brought the application to work on Tuesday and intended to hand it in to the Personnel Office after his shift but forgot. He said that on Wednesday, March 10th, before his shift began he noticed a member of the 3rd shift putting an item through the slot in the door of the Personnel Office. The Grievant testified that he put his Application through that slot at about 5:50 a.m. on March 10th.

The Arbitrator, in the presence of the Advocates, viewed the site of the drop slot. The front door to the Personnel Department has a slot in the wooden section. The slot leads to a drop box attached to the inner section of the door. Above the slot on the door is a sign that says "Applications Received Here."

The Grievant said that on March 19, 1994 he went to the Personnel Department and saw Personnel Officer III Nibert. He said that he told Ms. Nibert that an address had changed for one of his references, and he wanted to correct it. She attempted to find his application but was unsuccessful. She gave him another

application to fill out which he did. She indicated that he could backdate the application to March 12, 1994 and that obtaining a notary was unnecessary that she would "take care of it."

The Grievant testified that he never heard another word about his application nor the position until he "saw the new stripes on Officer Harris."

On cross examination, the Grievant said that he has not filed an application on other positions since that date because he feared "repercussions." Upon being shown an application signed by himself and dated July 13, 1993 (Employer's Exhibit 1), he agreed that he had filed it, and he likewise agreed that he withdrew that application (Employer's Exhibit 2). He again stated that he believed that he would not get any of these promotions.

Mr. David Carpenter, President of the LOCI Local Union, testified. He stated that none of the Corrections Supervisor I postings since the posting at issue had been filled by Seniority.

Personnel Officer III Marie Nibert testified for the Employer. She said that any application for the posting at issue was filed in "the merit case file." No application would be received after the posting was taken down except that three days were allowed for mail ins.

With regard to applications, she testified that her office received approximately 4,900 applications per year. She said that about 95% are handed in to a member of the staff and about 5% are mailed in. A small number are placed in the door slot. She claimed that only 1 or 2 a year came through the slot in the door. The office hours of the Personnel Office were from 8:00 a.m. to 4:30 p.m., and the slot in the door was for the purpose of receiving items from other shifts. She indicated that most of the third shift used the slot for their business with the Personnel Office. She stated that the Personnel Department had no standardized nor written policy with regard to the receipt of applications. Ms. Nibert maintained that "the Personnel Department had never lost anything."

She testified that the Grievant came to her on March 19, 1993 to make a change in his application for the Corrections Supervisor I job. She said that she was unable to find his application and that when she asked her staff no one had any knowledge with regard to the whereabouts of the application. She gave the Grievant a new application form to fill out, and he did so. She said he could backdate it to March 12th but that she would time stamp it March the 19th. (Union Exhibit 2) She told him that he need not obtain a Notary.

Ms. Nibert said that she took the application to the Warden. She was unable to recall when she did this. The Warden told her he would not accept the application because it was not timely filed. She said that she was "sure that she would have notified the Grievant" that the application was not filed, but she could not remember notifying him nor could she produce any written notification. She said that she remembered a memo on the subject. She identified Union Exhibit 2 as the Memo that she remembered. She pointed out that the memo had no "cc" on it, and she could not remember if the Grievant was sent a copy although she said "he certainly should have been." The memo reads as follows:

"TO: George D. Alexander, Warden
 FROM: Steven M. Dorsey, Deputy Warden Programs
 DATE: April 13, 1993
 SUBJECT: Candidate Selection - Corrections
 Supervisor I Position
 RE: Position Control Number - 3236.0

The merit selection file for the above position has been screened and is attached. This position represents the first Corrections Supervisor I Position to be filled by seniority since unionization of the Sergeants. While Roger Adkins claims to have submitted an application within the posting period, no evidence is available to substantiate that claim and his second application was deemed untimely. James Moore, CFS 1 has the most seniority however has declined the position. Therefore, based on seniority, I am recommending Officer

Jeffrey Harris be selected to fill the vacant position. (Union Exhibit 2)”

Ms. Nibert identified Employer's Exhibit 3 as a statement that she wrote. However, the statement contained no date, and Ms. Nibert could not remember when she typed it.

Ms. Nibert testified that the position at issue was filled by seniority. She said that if the Grievant's application had been timely that he would have received the job.

Union Position

The Grievant is a Corrections Officer with 10 years seniority. He completed an application for the posted position of Corrections Supervisor I. He took the application and had the application notarized. The notary swears to this fact. Then, the Grievant placed his application in the slot in the door of the Personnel Department. This method was an authorized method of turning in applications. After the closing of the posting, the Grievant went to Personnel Department to change an address on one of his references. At that time, the Personnel Officer told the Grievant that she could not find his original application. She then permitted him to fill out another application, suggested that he backdate the application until the 12th, and then said that she "would take care of" the notarization. The Grievant presumed that he would be considered for the posting. Subsequently, he learned that another less senior person had been appointed and that the position filled by seniority. The Union maintains that the application was either lost or destroyed by the Employer. However, whatever the reason for the application's disappearance, the proof shows that the application was timely filed, and the Contract was violated when the Grievant was not placed in the position. The Union requests that the Grievant be placed in the position of Corrections Supervisor I and that he receive all backpay and benefits dating from the date that the less senior person was promoted erroneously.

Employer's Position

The Grievant never filed a timely application. The Personnel Office never received an application between March 3 and March 12th. The application (Union Exhibit 1) filed on the 19th of March was untimely. Ms. Nibert only allowed the Grievant to file an application on the 19th SUBJECT to the condition that the Warden would accept a late application. The Warden did not accept it, and the application of the 19th was invalid. Article 17.05 states that "Employee may file timely applications ..." The burden is on the employee to start the process. Moreover, the burden is on the Union in this Grievance to show that the Employer violated the Contract. The Union has not met this burden. The Employer requests that the Grievance be denied in its entirety.

Discussion

The Grievant under oath stated that he placed his application through the door slot of the Personnel Office on March 10 at 5:50 a.m. (approximate). No one has challenged the Grievant's statement that he received an application, filled it out at home, and had it notarized on March 8, 1994. (In fact, the notary's statement is a joint exhibit.) The Grievant then had 4 full days to file the application. He admits that he intended to go to the Personnel Office after his shift (2:20 p.m.) on the 9th (Tuesday) and drop off the application but, in his own words, he forgot. At that point he still had three full days to file the application. He testified that on March 10th he placed the application in the slot on the door of the Personnel Office. He did not, as the Employer attempted to argue, have any duty to wait and bring the application in during office hours after his shift. The slot on the Personnel Door is clearly marked as an appropriate place to put applications. Moreover, common practice is that information for the Personnel Department is placed in that slot by personnel whose shift does not correspond with the hours of the Personnel Office.

The testimony of the Personnel Officer is that the Personnel Office never received the application. The Arbitrator doubts the claim by the Personnel Officer that no document has ever been lost by the Personnel

Department. Human error exists everywhere, and the Arbitrator sincerely doubts that the London Correctional Personnel Office is immune to human error. The Employer is correct that the burden is on the Employee to initiate the application process. However, the Employer has a responsibility as well. Where applications must be "timely" to be valid, reasonable persons would expect a policy to provide a method of validating "timeliness" and a method to validate and acknowledge receipt. Ms. Nibert testified that no standard policy nor written procedure existed for receiving applications. The Personnel Department both by notice (the sign on the door) and by practice (past conduct) made the slot on the door an acceptable method of applying for a position. Ms. Nibert testified that all applications were placed in a file. No log was kept of the applications received. Apparently, the applications were not time stamped. No receipt was given nor mailed to applicants. These methods are all standard methods of regular offices.

The Grievant has the burden of proving he did an action that by his own admission had no witnesses. The affidavit of the notary supports the Grievant's position that he filled out the application in plenty of time for a timely filing. Once he had done that and had four days to turn in the application, why would he not do so? One contention would be that he forgot every day for four days. That scenario is possible but not probable. The Employer introduced no evidence to cast doubt on the credibility of the Grievant. They introduced no evidence to impeach the credibility of the notary and, in fact, accepted his statement as a joint exhibit. Moreover, the method chosen by the Grievant was within the proper procedure as furnished by the Employer. The Employer had no safeguards in its procedure to record the receipt and timely filing of any application. The Employer could require that an applicant turn the application in during business hours and receive a receipt. All applications could be logged in a log book separate from the application file. Any one of these routine procedures could have obviated this claim.

Moreover, the Grievant was never put on notice that his application was not timely. When he went to the Personnel Office to change the address of a reference, he learned that the application was missing. Instead of being directed to file a grievance or engage in some other procedure, he was permitted to file another form, allowed to back date it, encouraged to trust the person by being told they would take care of the notary requirement, and allowed to leave. Ms. Nibert claims that she warned the Grievant that his backdated application might not be allowed by the Warden. The Grievant maintains that she never said that to him. However, taking her claim as the correct one, the Grievant was never officially notified by the Warden or the Personnel Officer that his backdated application had been refused. Although the Union did not claim an estoppel, a neutral observer could conclude that the conduct of the Personnel Office in receiving the backdated application and the failure of the Warden to notify the Grievant in a timely manner allowed the Grievant to reasonably believe that the problem was rectified.

While the Employee has the burden of filing a timely application, the burden of establishing reasonable and fair office procedures that ensure the safety and accuracy of application filings falls on the Employer. Here, the Employer had no procedures that protected the security of the application procedure.

The testimony of the Grievant was credible. His testimony is bolstered by the Notary statement. The Employer has provided no evidence that casts doubt on the testimony of the Grievant. Moreover, the Grievant availed himself of the procedure provided by the Employer (the door slot).

The Arbitrator concludes that the Grievant filed a timely application for the position of Corrections Supervisor I and when the position was filled on a strict seniority basis, the Employer violated the Contract by appointing a person with less seniority than the Grievant.

Award

The Grievance is granted. The Grievant is to be appointed a Corrections Supervisor I. The appointment is to be back dated to the date that Corrections Supervisor Harris was appointed. The Grievant is to be granted additional pay to compensate him for that time period and is to receive any other benefits that he ought to have received. The appointment of Corrections Supervisor Harris is unaffected by this award.

RHONDA R. RIVERA, Arbitrator

Date: July 6, 1994