

ARBITRATION DECISION

August 19, 2008

#1004

In the Matter of:

State of Ohio, Department of Commerce,)
Division of Real Estate)

and)

Ohio Civil Service Employees Association,)
AFSCME Local 11)

Case No. 07-00-20070703-0531-01-09
Ronald Richards, Grievant

APPEARANCES

For the State:

Andrew Shuman, Advocate, Labor Relations Administrator
Jessie Keyes, Second Chair, Office of Collective Bargaining
Beth Arrick, Legal Intern
Helena Barter, Human Resources, Department of Commerce
Kalinda Frazier, Manager, Department of Commerce
Tammy Brown, Operations Manager

For the Union:

Barbara Follmann, Staff Representative
Ray Blackerby, Steward
Ron Richards, Grievant

Arbitrator:

Nels E. Nelson

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AUG 19 2008

OCSEA-OFFICE OF
GENERAL COUNSEL

BACKGROUND

The grievant is Ronald Richards. He filed a grievance on July 3, 2007, charging that the state violated Article 17, Section 17.05, of the collective bargaining agreement when it awarded a Customer Service Assistant 2 position in the Division of Real Estate of the Department of Commerce to another applicant. He asked to be placed in the position and made whole.

The grievance was processed pursuant to Article 25 of the contract. The step three hearing was held on July 31, 2007, and the response is dated September 20, 2007. The dispute was presented in mediation on February 5, 2008, but remained unresolved.

On June 25, 2007, the Arbitrator heard the grievance under the non-traditional arbitration process set forth in Article 25, Section 25.11, of the agreement. At the conclusion of the hearing, the Arbitrator expressed his concern about the validity of the selection process employed by the state. At the suggestion of the Arbitrator, the parties agreed to attempt to work out a resolution. It was agreed that if the parties were unable to settle the case, the Arbitrator would issue his award.

On July 22, 2008, the Arbitrator was notified that the parties had not been able to resolve the grievance. He was also told that they would submit one page closings by email no later than July 25, 2008. The Arbitrator received the closing statements on July 23, 2008.

ISSUE

The issue as agreed to by the parties is:

Did the Employer violate Section 17.05 of the collective bargaining agreement by not selecting Ronald Richards for the position of Customer Service Assistant 2 (PN20060533) in the Division of Real Estate? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 17, Section 17.05 and Article 25, Section 25.11

UNION POSITION

The union argues that the grievant is entitled to the position of Customer Service Assistant 2 in the Division of Real Estate of the Department of Commerce. It charges that the interview questions used in the selection process were misleading and that the preferred answers did not always fit the questions. The union contends that the overall test was "not good."

The union also challenges the scoring of the test. More specifically, it contends that if the grievant's responses to questions 1, 4, and 9 were properly scored, he would have had a total of 90 points compared to the 100 points of the selected applicant. The union asserts that a ten point difference means that two applicants are "substantially equal" so that under Article 17, Section 17.05, the grievant was entitled to the position.

STATE POSITION

The state acknowledges that the interview process was not a valid method of selecting among the applicants for promotion. It states that neither party wants to harm either the grievant or the selected candidate. The state indicates that simply placing the grievant in the position would be inappropriate since an assessment that was invalid for the grievant was invalid for the successful applicant.

The state contends that the Arbitrator should order that both candidates be evaluated using a valid testing instrument. It suggests the following alternatives:

The state civil service test for Customer Service Assistant 2, created and validated by DAS, will be available within the next several weeks. This test is general to the classification and would not require specific knowledge of Department of Commerce policies or procedures, thus not allowing an advantage to either candidate. The test is administered and scored by DAS with no involvement from the agency.

The Employer could develop, with the assistance of the Union, mutually agreeable questions and answers and retest both candidates using neutral raters from outside the division who have no knowledge of either candidate.

The Employer could develop, with the assistance of DAS and review of the Union, a valid assessment for the position. (State Written Closing Statement, page 1)

The state maintains that the back pay should be limited. It states that "the grievant has not served in the position and any back pay should be limited to the period from the date of the initial hearing (June 25, 2008) until the Grievant begins in the position." (Ibid.)

ANALYSIS

The Arbitrator agrees with the state regarding the interview process. The procedure used by the division was not a valid method for selecting the employee to be promoted to Customer Service Assistant 2. He further concurs that simply placing the grievant in the position would be unfair to the selected applicant. Thus, a valid method must be used to choose between the grievant and the selected applicant.

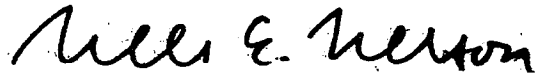
The Arbitrator believes that the time that has already passed dictates that the dispute be resolved as soon as practicable. This suggests that while it might be desirable for the union to have input into developing the process, the test prepared and administered by DAS will provide a speedier resolution.

The remaining issue is the back pay due the grievant should he be deemed entitled to the promotion. While the Arbitrator is sympathetic to the state's concern that the grievant is not entitled to a large amount of back pay because he has not performed the job, this is the situation in nearly all promotion cases. The Arbitrator sees nothing in the instant case that would justify denying the grievant back pay if he was wrongly denied promotion because of the invalid selection method used by the employer.

AWARD

The award of the Arbitrator is as follows:

- 1) The grievant and the selected applicant are to be given the state Civil Service test for Customer Service Assistant 2. It will be administered and scored by DAS with no involvement by the Department of Commerce. If the grievant's score is greater than or substantially equal to the score of the previously selected applicant, the grievant shall be awarded the position; otherwise, the previously selected applicant shall remain in the position.
- 2) If the grievant is awarded the position, he shall be made whole for the difference in the rates of pay for the position he holds and the position he is seeking.
- 3) The Arbitrator will retain jurisdiction to resolve any dispute that may arise in the implementation of his award.



Nels E. Nelson
Arbitrator

August 19, 2008
Russell Township
Geauga County, Ohio