

1119

In the Matter Arbitration Between the	:	Grievance Number: 19-00-120511-3-1-7
	:	
STATE OF OHIO,	:	
Employer	:	Grievant: Larry N. Smith
and the	:	
	:	
OHIO CIVIL SERVICE EMPLOYEES	:	Date of Hearing: April 26, 2013
ASSOCIATION, AFSCME, LOCAL 11,	:	
AFL-CIO,	:	
Union	:	Howard D. Silver, Esquire
	:	Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: State of Ohio, Employer

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JUN - 3 2013
OCSEA OFFICE OF
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PROCEDURAL BACKGROUND

This matter came on for hearing on April 26, 2013 at 9:00 a.m. in room 188 of the offices of the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO at 390 Worthington Road, Westerville, Ohio 43082. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions.

The parties agreed to an issue statement, stipulated facts, and joint exhibits. The stipulation as to the joint exhibits acknowledges their existence and consents to their admission to the hearing record but reserves to the parties the right to argue about the significance of the joint exhibits.

Following the presentation of evidence and oral closing arguments, the hearing record was closed at 2:00 p.m. on April 26, 2013.

The parties have stipulated that the grievance is properly before the arbitrator.

ISSUE

Did the Employer violate Article 17 of the parties' collective bargaining agreement when it did not select the grievant, Larry N. Smith, for the position of Insurance Complaint Analyst 3?

If so, what shall the remedy be?

STIPULATED FACTS

The parties stipulated to the following facts:

1. The grievance is properly before the arbitrator.
2. Larry Smith is an Insurance Complaint Analyst I.

3. Larry Smith has worked for the Ohio Department of Insurance since May 14, 2007.
4. Larry Smith interviewed for an Insurance Complaint Analyst 3 position on April 24, 2012.
5. The interview panel consisted of Kim Lowry, Dena Bell, and Derrick Dozier.
6. Larry Smith received full credit for his answers to questions 4, 9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27.3.
7. Larry Smith was not selected for an Insurance Complaint Analyst 3 position.
8. Adam Agin interviewed for an Insurance Complaint Analyst 3 position on May 4, 2012.
9. Susan [Craft] interviewed for an Insurance Complaint Analyst 3 position on May 15, 2012.
10. Adam Agin and Susan [Craft] were selected for Insurance Complaint Analyst 3 positions.

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the state of Ohio, Ohio Department of Insurance, the Employer, and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, the Union, are parties to a collective bargaining agreement in effect from March 1, 2012 through February 28, 2015. Within this collective bargaining agreement in Article 17, Promotions, Transfers, Demotions, and Relocations, in section 17.04, Applications, language appears that authorizes employees to file timely applications for permanent transfers, promotions, lateral transfers, or demotions. According to the language of Article 17, section 17.04, an applicant is to specify on the application how the applicant possesses the minimum qualifications for the position sought.

Article 17, section 17.04 provides that upon receipt of all of the applicants' bids, the Agency is to divide them into five categories: (1) All employees in the office, institution, or county where the vacancy is located who possess and are proficient in the minimum qualifications contained in the classification specification and the position description; (2) All employees within a geographic district of the Agency where the vacancy is located who presently hold a position in the same, similar, or related class series; (3) All other employees within the geographic district of the Agency where the vacancy is located who possess and are proficient in the minimum qualifications contained in the position's classification specification and position description; (4) All other employees of the Agency, including intermittent employees, and (5) All other employees of the State (Inter-Agency Transfer).

Article 17, section 17.05, Selection, provides that if the position sought is assigned to pay range 28 or above (the Insurance Complaint Analyst 3 position is assigned to pay range 32), the position is to be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, education, and active disciplinary record. When these factors are substantially equal, seniority as a state of Ohio employee shall determine the selection.

Article 17, section 17.05 provides that interviews of applicants may be scheduled at the discretion of the Agency.

Article 17, section 17.05(A)(1) provides that the Agency shall first review the bids from applicants who are in the position's office, county, or institution. Article 17, section 17.05(A)(2) provides that if no selection is made in accordance with Article 17, section 17.05(A)(1), the Agency is to first consider those employees filing bids under section 17.04(A)(2) and section 17.04(A)(3). Article 17, section 17.05(A)(2) provides that employees of the Ohio Department of Insurance bidding under Article 17, section 17.04(4) possess grievance rights through step three.

The language of Article 17, section 17.05(A)(2) provides that applicants who are not employed by the Ohio Department of Insurance shall have no right to grieve non-selection.

Article 17, section 17.06, Proficiency Instruments/Assessments, provides that the Employer may use proficiency testing and/or assessments to determine if an applicant meets minimum qualifications and, if applicable, to rate applicants pursuant to Article 17, section 17.05.

On March 23, 2012, the Ohio Department of Insurance posted a notice of two vacant Insurance Complaint Analyst 3 positions within the Ohio Department of Insurance's Division of Consumer Services. Each position is paid at pay range 32. Each position is full-time, permanent, and in a bargaining unit. The duties and minimum qualifications for the position are presented in the posting.

The grievant in this proceeding, Larry N. Smith, possesses over thirty years of work experience in the insurance industry. Mr. Smith has been employed by the Ohio Department of Insurance as an Insurance Complaint Analyst 1 since May 14, 2007.

Mr. Smith's work in the insurance industry began in the 1970s when Mr. Smith served for five and one-half years as an agent for the Western and Southern Life Insurance Company.

Mr. Smith moved to the J. C. Penney Insurance Company where he spent six years selling life, health, property, and casualty insurance.

Mr. Smith accepted a position with Mutual Life of Washington D. C. where he served for five years as a branch manager, supervising six agents and office personnel.

Mr. Smith then moved to United Insurance of America where he spent four years marketing life insurance and health insurance.

In 1990 Mr. Smith opened his own insurance agency which he operated until 2006. While operating his insurance agency from 1990 through 2006, Mr. Smith hired two agents and his agency operated in a three-state area.

Mr. Smith began his employment with the Ohio Department of Insurance on May 14, 2007 within an Insurance Complaint Analyst 1 position and continues to serve in this position.

Mr. Smith timely filed an application with the Employer for a promotion to the posted Insurance Complaint Analyst 3 position. Mr. Smith interviewed for the position on April 24, 2012. Mr. Smith participated in a testing and interview procedure that offered a maximum of 140 points. The Employer determined that a passing grade would be no less than 70% of the maximum points available. Ninety-eight points were needed to attain a passing grade ($.70 \times 140 = 98$).

There is in the hearing record no indication that Mr. Smith failed to possess the minimum qualifications for an Insurance Complaint Analyst 3 position. There is no indication in the hearing record that Mr. Smith's application was untimely filed or incomplete.

The points accrued by Mr. Smith from his answers to questions before three interviewers, Kim Lowry, Dena Bell, and Derrick Dozier, and from a writing exercise that is part of the testing procedure, totaled 93.5 points, a score that is 4.5 points below the 98 points needed for a passing grade. Because Mr. Smith's score did not attain 70% of the 140 points available, Mr. Smith was denied the promotion sought through his application. A state of Ohio employee in a different state department, the Ohio Department of Taxation, Adam Agin, was hired for the Insurance Complaint Analyst 3 position after scoring 98.5 points under the testing procedure. Susan Craft, an applicant external to the Ohio Department of Insurance, with a score of 103.5 points, was selected for a second Insurance Complaint Analyst 3 position.

On May 11, 2012, Mr. Smith filed a written grievance with the Employer charging that the refusal to promote Mr. Smith to the position of Insurance Complaint Analyst 3 presented a violation of Article 17, sections 17.04, 17.05, and 17.06 of the parties' collective bargaining agreement. Within his grievance Mr. Smith complained of the vagueness of some of the questions in the testing procedure and claimed that these questions were open to interpretation. It is claimed in the grievance that Mr. Smith passed the promotional test despite issues that arose about the test's questions. The written grievance, Tab 1, page 1, asks that the grievant be awarded the position of Insurance Complaint Analyst 3 effective the date upon which this position was filled.

The grievance was moved to step three where it was denied by the Employer on July 24, 2012. See Tab 1, page 11.

On August 2, 2012, the Union directed notice to the Employer that the Union was requesting that the unresolved grievance involving Larry Smith be moved to arbitration. See Tab 1, page 15.

DISCUSSION

The grievance that has given rise to this arbitration proceeding raises issues that address the grievant's final score under the bidding, testing, and selection process applied by the Employer to fill two Insurance Complaint Analyst 3 positions, the process set out in Article 17 of the parties' collective bargaining agreement. One issue raised by the grievance addresses the manner in which Mr. Smith's answers were assigned points under the scoring guidelines that are presented in the test's answer key. In addressing this issue the Union has compared the points

assigned to Mr. Smith's answers to the points assigned to answers from the two applicants who were selected, Mr. Agin and Ms. Craft.

The Union claims that some of the questions posed in the interview/testing process and some of the answers relied on by the Employer in making scoring decisions were either mistaken or not objective or open to more than one interpretation, causing confusion about the meaning of the question and what answer or answers were required to successfully answer the question.

The language of Article 17, section 17.01, Policy, reserves to the Employer the right to determine which vacancies are to be filled. The determination of which applicant is to be selected for a vacant position is a matter to be determined by the Employer so long as the selection system used by the Employer is not arbitrary, capricious, or an abuse of discretion, or violative of the parties' collective bargaining agreement. In the absence of such disqualifying defects in the testing and selection process applied by the Employer, the arbitrator is not empowered to nullify or modify the questions used in the testing process.

While the arbitrator has no power to order a change to the testing process applied by the Employer so long as the testing process is not found arbitrary, capricious, or an abuse of discretion, or a violation of the parties' collective bargaining agreement, the arbitrator does have the authority to insure that the testing process administered under Article 17 was reasonably and fairly applied to the grievant and therefore not in violation of the parties' collective bargaining agreement. A dispute between the parties about how the scoring system was applied to the grievant does raise an issue within the scope of the arbitrator's authority under the parties' collective bargaining agreement.

The arbitrator does not find the questions used by the Employer in this case to have been arbitrary, capricious, or an abuse of discretion. The arbitrator does not find the content of the

testing process applied to the grievant to have violated the parties' collective bargaining agreement. The arbitrator finds no basis upon which to alter the testing process. The arbitrator does, however, consider how the testing process was applied to the grievant, to determine whether any parts of the testing procedure were scored arbitrarily or in error. In carrying out this function the arbitrator turns to the test questions that are disputed, the questions that were the subject of the arbitration hearing conducted on April 26, 2013.

Question 5: What provision of the Homeowners contract addresses disputes between the company and the insured when the claim amount is in dispute?

The points to be awarded under question five are one point per listed benchmark, with partial points allowed, with a maximum of two points.

The benchmarks listed in the test's answer key for question five are "appraisal provision" and "bring suit." Mr. Smith answered this question by referring to an appraisal provision, for which he received one point, and arbitration for which no point was awarded. Mr. Smith did not mention bringing a lawsuit.

The Union argues that the correct answer to question five should include arbitration, in addition to the two benchmarks presented in the test's answer key, appraisal provision and bring suit. In this regard the Union points to Tab 10, page 254, page sixteen within the April, 2010 Ohio Department of Insurance's Guide to Automobile Insurance that refers to appraisal or arbitration under "Resolving claim disputes."

There is testimony in the hearing record from Jana Jarrett, a Deputy Director in the Ohio Department of Insurance who leads the Consumer Services Division. Deputy Director Jarrett testified that it is rare to find an arbitration provision in a homeowner's insurance policy.

As noted above, the arbitrator defers to the judgment of the Employer in the construction of questions and the determination of appropriate answers to those questions unless a test question or test answer is found to be arbitrary, capricious, or an abuse of discretion. The arbitrator does not find question five to be arbitrary, capricious, or an abuse of discretion. Under the scoring guidelines for this question, Mr. Smith gave one of the listed benchmarks and received one point for this correct answer as required. "Arbitration" may be an appropriate answer to a question that involves an automobile insurance policy but question five refers to the "Homeowners contact."

The arbitrator finds question five to have been scored correctly. The arbitrator makes no order to change the one point scored for Mr. Smith's answer to question five.

Question 6: Pursuant to 3937.31 of the Ohio Revised Code, there are four reasons a company can cancel an automobile policy. Please name as many as you can.

The points to be awarded under question six are one point per correct answer, with a maximum of four points.

Ohio Revised Code section 3937.31(A) has four numbered paragraphs - (A)(1), (A)(2), (A)(3), and (A)(4). Paragraph (A)(1) of Ohio Revised Code section 3937.31 presents two reasons for cancelling a policy, with the two reasons separated by the disjunctive "or." While there are four numbered paragraphs in Ohio Revised Code section 3937.31(A), there are five separate, distinct reasons expressed within these four paragraphs for the cancellation of an automobile insurance policy.

In answer to question six, Mr. Smith provided four correct answers out of a possible five correct answers, namely lying on application, license suspended or revoked, non-payment of premiums, and filing fraudulent claims.

On behalf of the Employer it is pointed out that of the four benchmarks presented on the test's answer key, Mr. Smith mentioned three, and was assigned three points for the three correct answers provided by Mr. Smith.

The scoring guideline for question six does not refer to awarding points for mentioning benchmarks; question six's scoring guideline refers to one point per correct answer to a question about reasons expressed in Ohio Revised Code section 3937.31 under which a company may cancel an automobile insurance policy. Mr. Smith provided four correct answers in responding to question six and is entitled to one point per correct answer, up to a maximum of four points. The arbitrator finds that the score of three points assigned to Mr. Smith's answer to question six was arbitrary and in error. The arbitrator orders that a fourth point be awarded for the answer provided by Mr. Smith to question six, bringing the total points for Mr. Smith's answer to question six to four points.

Question 8: What is negligence? Please name the elements of negligence.

The points to be awarded under question eight are a maximum of three points for a proper and thorough definition of negligence, and one point for each of four elements of negligence, for a maximum available point total of seven points.

In response to question eight Mr. Smith named all four of the elements of negligence – duty of care, breach of duty, causation, and harm/damage. In providing a definition for negligence, Mr. Smith stated that negligence is a failure to exercise the degree of care required of a reasonable and prudent person. Mr. Smith did not conclude his definition of negligence with "...resulting in injury or damage to another."

In his testimony at the hearing, Mr. Smith referred to Tab 10, page 253, page 15 of the Ohio Department of Insurance's 2010 Guide to Automobile Insurance. Mr. Smith described this booklet as a study tool he used to prepare for the promotional test for the Insurance Complaint Analyst 3 vacancy. At page 15 of this guide, Tab 10, page 253, negligence is defined as follows:

If a traffic accident happens because you do not use the amount of care that could be expected of a reasonable and prudent person under the circumstances, you are considered **negligent**. (emphasis in original)

The arbitrator finds that while the harm/damage to another was not included in Mr. Smith's definition of negligence, Mr. Smith's definition of negligence was in accordance with a definition for negligence expressed in an official Ohio Department of Insurance publication. While Mr. Smith did mention harm/damage as an element of negligence in providing to interviewers the four elements of negligence, he did not repeat this element in his definition for negligence.

The arbitrator is persuaded that knowing the four elements of negligence reflects an understanding of the definition of negligence. The arbitrator is persuaded that Mr. Smith did provide a definition of negligence that was reasonable under the circumstances, and during his response to this question made it evident that he understood the meaning of negligence. Accordingly, the arbitrator orders that an additional point be added to the score for Mr. Smith's answer to question eight, bringing the score of six points assigned by the interviewers to a score of seven points.

Question 11: Certain factors are considered when determining whether or not a vehicle is a total loss. Please name at least 3.

The points to be awarded for the answer to question eleven are one point for each listed benchmark in the question's answer key, up to a maximum of three points.

The benchmarks listed for question eleven are statutes or regulations, salvage value, vehicle value, third party loss of use, and others.

Mr. Smith's response to question eleven included repair cost, actual cash value of the vehicle, and age. Mr. Smith disputed that salvage value is used by insurance companies to determine whether to find a vehicle a total loss.

The Employer points out that under question eleven Mr. Smith's answer was assigned one point for actual cash value of the vehicle and assigned one point for repair cost. Age, as provided by Mr. Smith in his answer, was determined by the interviewers to be included in determining the actual cash value of the vehicle. The Employer contends that age is not a separate, distinct factor but comprises a variable considered in determining the actual value of the vehicle. The Employer claims the answer "age" is not entitled to a separate point.

The arbitrator does not find the Employer's scoring of question eleven to have been arbitrary, capricious, or an abuse of discretion. The arbitrator does not order an alteration of the points assigned to Mr. Smith's answer to question eleven.

Question 12: What references should be utilized in the claims/liability determination process?

The points available under question twelve are a maximum of four points, with one point for the mention of each reference listed in the answer key.

The benchmarks presented in the answer key for question twelve are the Ohio Revised Code; Insurance Policy/Contract; State Statutes, etc.; UFCPA; and Other Resources as appropriate.

Mr. Smith's answer to question twelve included statement from insured, parties involved, statement from police or police report, and any witnesses. Mr. Smith was awarded one point for his answer under Other Resources as appropriate. The arbitrator does not find this scoring decision to have been arbitrary, capricious, or an abuse of discretion. The arbitrator does not order an alteration of the scoring of question twelve.

Question 15: Tell me about a time when you had to balance attention to details and the big picture. (What process did you use?)

The points to be awarded for the answer to question fifteen are one point for a specific, relevant example, and one-half point for each benchmark mentioned, up to a maximum of two additional points. The maximum points available for question fifteen are three points.

In answer to question fifteen, Mr. Smith spoke of a major mailing that he handled for the Insurance Company of America. Mr. Smith spoke of the responses to this mailing having to be categorized for life, health, annuities, or property and casualty insurance. Mr. Smith spoke of the follow-up required, spoke of the number of leads based on the results of the mailing, and spoke of having to keep track of sales, premiums, and net commissions. Mr. Smith mentioned in his answer "focus" and "attention to detail," two benchmarks listed in the answer key for question fifteen. Mr. Smith received one-half point for each of the two benchmarks he mentioned.

Mr. Smith did not receive one point for describing a specific, relevant example. The interviewers determined that Mr. Smith had failed to provide an example with a big picture and therefore the score assigned to Mr. Smith for his answer to question fifteen totaled one point.

Two other applicants, Mr. Agin and Ms. Craft, received the maximum of three points for their answers to question fifteen. Mr. Agin referred to decisions to be made in his personal life, including whether to move in with his girlfriend and whether to accept a promotion. Ms. Craft spoke of addressing forty-seven catastrophic claims during a single morning and calling each of the claimants, starting with those with the worst damage. Mr. Agin and Ms. Craft were found to have presented specific, relevant examples for question fifteen; Mr. Agin and Ms. Craft received one point for this aspect of their answers; Mr. Agin and Ms. Craft received two additional points for mentioning benchmarks for this question.

The arbitrator is unable to make out the distinction claimed by the Employer that shows Mr. Agin and Ms. Craft presented relevant, specific, big picture examples in their answers but Mr. Smith did not. The Employer contends that Mr. Smith's answer to question fifteen does not include a specific, relevant example, thereby excluding Mr. Smith from the one point awarded for providing a specific, relevant example. Mr. Smith's response to question fifteen referred to a major mailing for an insurance company, how the responses to the mailing were to be collected, and how the data generated by this mass mailing was to be maintained and analyzed. The arbitrator finds that the example provided by Mr. Smith in answer to question fifteen is specific and relevant to that question. There is a big picture perspective to the example provided by Mr. Smith as well as a need to pay attention to details, and Mr. Smith's example is as specific and as relevant to the question as the examples provided by Mr. Agin and Ms. Craft. The arbitrator finds the refusal to assign a point to Mr. Smith's answer to question fifteen for providing a

specific, relevant example to have been arbitrary. The arbitrator orders that one point be added to Mr. Smith's score for question fifteen, for providing a specific, relevant example, producing a score of two points for question fifteen.

Question 27-1: In this scenario provided, assuming Mary carries "full coverage" with minimum liability limits, which coverages may apply under Mary's policy?

The points to be awarded under question 27-1 are one point per listed benchmark, to a maximum of six points. Mr. Smith, in his answer to this question, mentioned the listed benchmarks collision, BI, UM/UIM, MPC, and liability. Mr. Smith referred to limited liability coverage amounts. Mr. Smith believes two of the answers appearing in the benchmarks in the answer key for question 27-1, tow emergency and PLUP, are inappropriate answers to this question.

The arbitrator finds that Mr. Smith mentioned five of the benchmarks listed in the answer key to question 27-1 and received one point for each of the benchmarks he mentioned. The arbitrator finds the score of five points for Mr. Smith's answer to question 27-1 to have been appropriate and therefore orders no change to the score assigned to this question.

Question 27-2: Walk us through the proper steps of a thorough liability investigation for this scenario.

The points to be awarded under question 27-2 are one point for each benchmark listed in the answer key up to a maximum of eight points.

In answer to question 27-2, Mr. Smith mentioned statements from Bruce and Mary, police report, talk to or obtain statement from witness, observe accident, and contact XYZ and

ABC - check on coverage. The listed benchmarks mentioned by Mr. Smith in his answer to question 27-2 were found by the interviewers to have been: resolve coverage questions (contact XYZ & ABC – check on coverage); secure thorough recorded statements from parties and witness (talk to or obtain statement from witness); secure police report and speak with officer, if necessary (police report).

Mr. Smith's answer to question 27-2 included: "Take statements from Bruce & Mary." The Employer found that Mr. Smith had received one point for "Secure thorough recorded statements from parties and witness" and is not entitled to a second point for "Take statements from Bruce & Mary."

The arbitrator finds that Mr. Smith mentioned three benchmarks in his answer to question 27-2 and therefore is entitled to three points for his answer to this question. The arbitrator does not order a change to Mr. Smith's score for question 27-2.

Question 28: Writing Exercise.

The maximum points available for question twenty-eight, a writing exercise, are 25.5 points. The writing exercise called for by question twenty-eight assumes an assignment of a complaint file that had been reviewed by a coworker who is away from the office on an extended leave. The coworker had recommended the closure of the file and had sent the recommendation to a supervisor. The coworker found no evidence showing the company had acted improperly. The applicant is directed to review the entire complaint and all attached documents and draft a memorandum to a supervisor with the applicant's analysis of the file, conclusions, and a recommendation on the steps to be used in handling the complaint to conclusion. Each applicant had thirty minutes to review the complaint file and complete the memorandum.

Tab 6, pages 43 and 44 present the scoring sheet used to score question twenty-eight. This scoring sheet refers to General Assessment, a maximum of .5 point; Format, a maximum of 5 points; Spelling, a maximum of 5 points; Grammar, a maximum of 3 points; Report Content, a maximum of 4 points; Analysis, Conclusions and Recommendations, a maximum of 5 points; and Clarity of the Report, a maximum of 4 points. Format; Report Content; Analysis, Conclusions and Recommendations; and Clarity of the Report each allows partial points to be awarded. Spelling and Grammar are scored on the number of spelling and grammatical errors in the memorandum.

Mr. Smith's response to question twenty-eight appears at Tab 7, page 76, and the scoring sheets for Mr. Smith's writing exercise appear at Tab 7, pages 73 and 74 (Kim Lowry); pages 93 and 94 (Dena Bell); and pages 113 and 114 (Derrick Dozier).

At the top of Mr. Smith's written response to question 28 there appears: "To supervisor of Property & Casualty Unit." Under this first line, four spaces down, there is presented: " Re: our file number CSD-1111111 J & N Jordan."

The written response by Mr. Smith to question twenty-eight begins with the salutation: "Dear Supervisor." The first sentence of Mr. Smith's memorandum reads: "This is response to your request for me to review the above listed case." The article "a" or "the" appears to be missing immediately prior to the word "response" in the first sentence.

The second paragraph of Mr. Smith's written response to question twenty-eight contains two sentences that read:

After reviewing the information provided, which include the police report and the witness's statement the J & N Jordan were driving in car #2. Mr. Richardson was driving in car #1. This is based on the police report stating "both occupants of unit 2 were taken to the hospital.

The first sentence of the second paragraph refers to information, singular, but presents the word “include,” a word to be used with a plural object. The word “include” is absent the necessary “s” at this word’s conclusion, needed to comply with grammatical rules about objects and verbs agreeing in terms of singular or plural.

In the first sentence of the second paragraph of Mr. Smith’s memorandum the name Jorden is spelled Jordan, a spelling error. In the second sentence of the second paragraph the word “occupants” is misspelled “occupents,” a second spelling error.

The third paragraph of Mr. Smith’s written response to question twenty-eight reads: “The letter dated October 30, 2010 from Safe Insurance states that they can’t locate a policy on the Jordens.” In this sentence Safe Insurance, singular, is referred to as “they,” plural, a grammatical error.

The final paragraph in the written response by Mr. Smith to question twenty-eight, Tab 7, page 76, reads:

This case should remain open and a follow up request to the Jorden’s for a request for more information. “IE” a copy of the insurance that was provided to them by Mr. Richardson.

The last line in the written response from Mr. Smith to question twenty-eight reads: “Larry N. Smith.”

The scoring sheet for the written memorandum produced in response to question twenty-eight has as a first scoring category General Assessment that offers a maximum of one-half point for “Interoffice memorandum is directed to the Supervisor.” Although Mr. Smith’s written response to question twenty-eight begins with: “To supervisor of Property & Casualty Unit,” Mr. Smith was scored zero points for General Assessment. The arbitrator finds one-half point to be

appropriate in scoring General Assessment because Mr. Smith directed his interoffice memorandum to the supervisor.

Within the scoring procedure for Format, five points are to be assigned to a well-formatted memorandum that presents headings and organizes the memorandum into sections; three points are to be assigned to a memorandum that contains some limited organization of the memorandum into sections; and zero points are to be assigned to a memorandum that contains no organization. Mr. Smith's written response was scored one point, a rating below some limited organization of the memorandum into sections but above contains no organization.

Mr. Smith's written response to question twenty-eight was found to contain two spelling errors, and for this, as indicated in the scoring guideline for spelling, one point was assigned to Mr. Smith's memorandum.

As to grammar, Mr. Smith's response was found to contain three or more grammatical errors, and under the scoring sheet for question twenty-eight, Mr. Smith was assigned zero points.

Under the scoring procedure for Report Content, three points are to be assigned to a memorandum that identified more than four issues/recommendations to the supervisor, two points are to be assigned to a memorandum that identified three to four issues/recommendations to the Chief, and one point is to be assigned to a memorandum that identified one to two issues/recommendations from the Chief. Mr. Smith's memorandum was assigned one point for Report Content, one to two issues/recommendations from the Chief.

The scoring procedure for Analysis, Conclusions, and Recommendations offers a maximum of five points for a complete and accurate analysis, conclusions, and recommendations in which the facts and evidence are analyzed to draw the appropriate conclusions. Three points

are to be assigned for an incomplete or partially accurate analysis and conclusion in which the facts and evidence are analyzed to draw the appropriate conclusions. Partial points may be awarded. Mr. Smith's response was assigned one point under Analysis, Conclusions, and Recommendations.

Under Clarity of the Report a maximum of four points may be assigned for a response that contains all necessary information, presented in a manner that leaves no room for misinterpretation. Two points are to be assigned to a response that contains the most necessary information, and one point is to be assigned to a response that lacks a significant amount of essential information and lacks style or detail that would enhance a correct interpretation. Zero points are to be assigned to a response that presents essential information incorrectly or presents wrong information or is expressed in a manner that leads the reader to an incorrect interpretation. Mr. Smith's response was assigned zero points.

The arbitrator is persuaded that the written response from Mr. Smith to question twenty-eight was directed to a supervisor and therefore Mr. Smith's memorandum is deserving of the one-half point offered under General Assessment.

As to Format, while Mr. Smith's written memorandum is in the form of a letter rather than a memorandum, it is organized into paragraphs and complete sentences, and therefore contains some organization. The one point assigned under Format is found appropriate.

The two spelling errors in Mr. Smith's memorandum are to produce one point and one point was assigned because "Jordan" should have been spelled "Jorden" and "occupents" should have been spelled "occupants."

The grammatical errors in the written response from Mr. Smith to question twenty-eight include a missing word before the word "response" in the first sentence, a missing "s" at the end

of the word “include” in the first sentence of the second paragraph, and the word “they” rather than “it” in the first sentence of the third paragraph. Three grammatical errors are to produce a score of zero points which is what was assigned to Mr. Smith’s memorandum for this scoring category.

As to Report Content, one point was assigned for identifying one or two issues/recommendations from Chief. The arbitrator is unclear as to what recommendations from the Chief are to be presented but finds the content of Mr. Smith’s memorandum to have been appropriately scored.

As to Analysis, Conclusions and Recommendations, Mr. Smith was assigned one point and this was because his response was found to be incomplete or a partially accurate analysis and conclusion in which the facts and evidence are analyzed to draw the appropriate conclusions. The written response by Mr. Smith presents a conclusion, that the file not be closed, and a description of who was in which vehicle and a statement from the insurance company that a policy could not be located. There is no analysis in the memorandum by Mr. Smith and the assigned single point is appropriate under Analysis, Conclusions and Recommendations.

As to no points being assigned to Mr. Smith’s memorandum under the scoring category Clarity of the Report, the arbitrator does not find this score arbitrary or incorrect.

The arbitrator finds that the score for Mr. Smith’s written response to question twenty-eight should have added to it one-half point, making Mr. Smith’s score for question twenty-eight 4.5 points.

Because the grievant is an employee of the Ohio Department of Insurance and works within the office containing the position to be filled, the grievant is entitled to a preference in the selection process for the vacant position over applicants external to the Ohio Department of

Insurance. The preference enjoyed by the grievant as an employee of the Ohio Department of Insurance requires satisfaction of minimum qualifications, which Mr. Smith possesses; a timely and complete application submitted to the Employer, which was accomplished by Mr. Smith; and a score of at least 98 points out of a maximum of 140 points under the scoring procedure created and applied by the Employer.

The arbitrator has not altered or ignored any part of the scoring provisions applied by the Employer in carrying out the selection process as to the applicants for two vacant Insurance Complaint Analyst 3 positions.

Under the parties' collective bargaining agreement the grievant in this case does not compete with external candidates as Mr. Smith is entitled to be selected for one of the positions if he can attain a passing score of at least 98 points. The Employer assigned to Mr. Smith a score of 93.5 points among the maximum 140 points available through the testing procedure. The arbitrator has found that in four instances, question six, question eight, question fifteen, and question twenty-eight, the scoring applied to Mr. Smith had been arbitrary. To correct that which the arbitrator found to be arbitrary in the scoring procedure applied to Mr. Smith's answers, the arbitrator has ordered that 3.5 points be added to Mr. Smith's 93.5 points, leading to a point total of 97 points.

There is nothing arbitrary or capricious about the Employer's determination of a passing score for the promotional testing procedure used to fill the position of Insurance Complaint Analyst 3. Setting seventy percent of the maximum available points under the testing procedure as the minimum passing score was neither arbitrary nor unreasonable, and the minimum passing score of 98 points was applied uniformly. A passing score requiring at least seventy percent of the 140 points available was not contested before, during, or after the testing procedure.

Mr. Smith's point total as ordered by the arbitrator, 97 points, is obviously very close to a passing score of 98 points. 97 points nevertheless remains short of the 98 points required for a passing score. The shortfall in this regard, albeit by a single point, presents a non-passing score. A score of 97 points does not support the selection of the grievant. A failure by the Employer to select the grievant for the vacant position was therefore not a violation of the parties' collective bargaining agreement. The absence of a violation of the parties' collective bargaining agreement requires a dismissal of the grievance.

AWARD

1. The grievance giving rise to this arbitration proceeding is found arbitrable and properly before the arbitrator for review and disposition.
2. The grievant scored 97 points in a promotional testing procedure that required 98 points for a passing score.
3. The Employer did not violate Article 17 of the parties' collective bargaining agreement when it failed to select the grievant for the position of Insurance Complaint Analyst 3.
4. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire
Arbitrator
500 City Park Avenue
Columbus, Ohio 43215

Columbus, Ohio
June 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, grievance number 19-00-120511-3-1-7, was served electronically upon the following this 3rd day June, 2013:

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