#1134

In the Matter of Arbitration	:	Case Number: 27-23-20130228-0015-01-03
Between the	:	
Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union	:	Grievant: Christine Minney
and the	:	Date of Hearing: March 11, 2014
State of Ohio, Department of Rehabilitation and Correction, Employer	:	Howard D. Silver, Esquire Arbitrator

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, Union

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Staff Representative
OCSEA, AFSCME, Local 11, AFL-CIO
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For: State of Ohio, Department of Rehabilitation and Correction, Employer

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PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing on March 11, 2014 at 9:00 a.m. in a conference room at the Ross Correctional Institution, 16149 State Route 104, Chillicothe, Ohio 45601. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded at 3:00 p.m. on March 11, 2014 and the evidentiary record was closed at that time.

Post-hearing briefs from both parties were received by the arbitrator by April 7, 2014 and exchanged between the parties on April 8, 2014.

This matter proceeds under the authority of Articles 17 and 25 of the parties' collective bargaining agreement in effect from March 1, 2012 through February 28, 2015. No issue as to the arbitrability of the grievance has been raised. This matter is properly before the arbitrator for review and resolution.

STIPULATED ISSUE

Did the Employer violate Article 17 of the Contract when it filled a Training Officer position (PN 20025846) at the Ross Correctional Institution? If so, what shall the remedy be?

JOINT STIPULATIONS

1. The grievance is properly before the Arbitrator.

2. The grievance involves the selection and filling of a bargaining unit position in accordance with Article 17 of the 2012 – 2015 Contract.

3. The position at issue is Training Officer (PN 20025846) at Ross Correctional Institution (RCI) which was posted from 12-4-12 – 12-14-12.

4. James Vickers was the selected candidate for the position at issue.

5. The Training Officer Interview questions were based on a 100-point scale.

6. James Vickers' seniority date is 1-6-03.

7. Chris Minney's seniority date is 7-27-92.

8. Management utilized two separate assessment tests for the Training Officer position. One assessment was given on 1-17-13 and the other assessment was given on 2-11-13.

9. James Vickers was assessed on 1-17-13 and Chris Minney was assessed on 2-11-13.

JOINT EXHIBITS

The parties jointly submitted fifteen exhibits that included the parties' collective bargaining agreement, Joint Exhibit 1; the grievance trail, Joint Exhibit 2; the posting for the Training Officer position that was posted from December 4, 2012 through December 14, 2012; a minimum qualification conversion table; and a Subject Matter Expert (SME) screening summary that identifies seven applicants determined to meet the minimum qualifications for the Training Officer position posted from December 4, 2012 through December 14, 2012 among the thirty-two applications received; the classification specification for the Training Officer position, and a position description for the Training Officer position, Joint Exhibit 3.

Joint Exhibits 4 through 9 are the SME screening materials for applicants Christine Minney, the grievant; James Vickers, the incumbent; Michael Henness; Gary Rowe; Thomas Burger; and Jeff Carroll. Joint Exhibits 10 and 11 present employee history reports, known as EHOCs, for Christine Minney and James Vickers, respectively. These exhibits, Joint Exhibits 10 and 11, include the training file for each. The parties have included Joint Exhibit 12, a seniority list; Joint Exhibit 13A which presents Training Officer questions and their answer key for the interviews on January 17, 2013, and Joint Exhibit 13B which presents the questions and answer

key for the interviews conducted on February 11, 2013. Joint Exhibit 14 is a job task analysis worksheet for Institutional Training Officer. Joint Exhibit 15 is comprised of e-mails between the parties concerning an agreement reached in September, 2010 to settle a grievance, grievance number 27-23-20091113-0061-01-03, that addressed temporary work level assignments under Article 7, section 7.10 of the parties' Agreement.

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, hereinafter the Union, and the State of Ohio, Department of Rehabilitation and Correction, hereinafter the Employer, are parties to a collective bargaining agreement in effect from March 1, 2012 through February 28, 2015, Joint Exhibit 1. Within the parties' collective bargaining agreement is Article 17, Promotions, Transfers, Demotions and Relocations.

Article 17, section 17.05 presents, in pertinent part:

* * *

> If the position is in a classification which is assigned to pay ranges eight (8) through twelve (12) or twenty-eight (28) or higher, the job shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, education and active disciplinary record. For purposes of this Article, disciplinary record shall not include oral or written reprimands. When these factors are substantially equal State seniority shall be the determining factor...

On August 20, 2012, Melody Haskins began her employment at the Ross Correctional Institution (RCI) as a Warden's Assistant 2. Among a variety of duties Ms. Haskins was responsible for supervising the training department at the institution. Shortly after Ms. Haskins' arrival at RCI the institution's Training Officer, Dusty Cox, notified Ms. Haskins that that was to

be his last day of active duty at the institution as he was departing under a disability leave of absence. Being new to the institution Ms. Haskins did not know who at the institution was capable of assuming the Training Officer position being vacated by Mr. Cox. Ms. Haskins asked Mr. Cox for a suggestion about who should be assigned to the Training Officer position. Mr. Cox suggested James Vickers to Ms. Haskins for the Training Officer position.

Ms. Haskins put in a request that Mr. Vickers fill the RCI Training Officer position under a temporary work level (TWL) assignment and later sent out an e-mail that provided notice of the temporary work level assignment.

The parties settled a grievance in September, 2010 that involved grievant Mike Henness. Within this settlement, Joint Exhibit 15, pages 6-7, the following appears at page 6:

> At Ross Correctional Institution (RCI), the parties acknowledge the one hundred twenty (120)–day limit in Article 7.10 for any OCSEA bargaining unit employee assigned to a temporary working level (TWL) filling a vacant bargaining unit or exempt position during the posting and hiring process, unless there is an extension authorized and signed by the RCI OCSEA chapter president or authorized signor.
>
> * * *
>
> If there is no posting for the vacant position at the end of the 120 day period, and Management seeks to continue temporarily filling the vacant position, the parties agree that another OCSEA bargaining unit employee who meets minimum qualifications will be selected from the pool of interested employees. If no employee from the interest pool meets the minimum qualification, the parties may extend the currently assigned TWL employee. Extensions will not exceed 120 days, will always be in writing and signed by the chapter president or designee.

On December 4, 2012, the Employer posted a vacant Training Officer position at the Ross Correctional Institution, Joint Exhibit 3. The posted position, PN 20025846, is a full-time, permanent, bargaining unit position assigned to pay range 31. Within this posting, at Joint Exhibit 3, page 2, minimum qualifications are presented as follows:

6 courses in human resources, education, sociology or psychology or 18 mos exp in preparing informational or instructional programs; 18 mos trg or 18 mos exp in public speaking or effective communications skills; 3 mos trg or 3 mos exp in operating audio visual equipment.
- Or equivalent of Minimum Class Qualifications For Employment noted above.

The RCI Training Officer posting posted on December 4, 2012 remained posted until December 14, 2012 at 5:00 p.m. During this ten-day period thirty-two applications were submitted registering the interest of these applicants in filling the posted Training Officer position.

Upon receipt of the thirty-two bids on the RCI Training Officer position the Employer first determined who among these applicants met the minimum qualifications for the posted position. The separation of those applicants who were determined to have met the minimum qualifications for the posted position from those applicants who were determined not to have met the minimum qualifications for the posted position was first performed by Anna Zimmerman, a Human Capital Management Senior Analyst working at RCI.

Ms. Zimmerman's review of the thirty-two applicants for the Training Officer position at RCI determined that many of the applicants, including Christine Minney, the grievant, did not meet the minimum qualifications for the posted Training Officer position. Those applicants determined by Ms. Zimmerman to have not met the minimum qualifications for the posted position were excluded from further consideration.

A number of applicants for the Training Officer position at RCI who had been declared ineligible due to a lack of minimum qualifications complained about the determination by Ms. Zimmerman as to their purported lack of minimum qualifications for the posted position. In response to these complaints Ms. Zimmerman presented the applications to J. D. McIntosh, a Program Administrator employed within the Ohio Department of Rehabilitation and Correction's

Corrections Training Academy (CTA). Mr. McIntosh has twenty-nine years of experience with the Ohio Department of Rehabilitation and Correction, with twelve years of experience as a program administrator at the CTA. Mr. McIntosh is responsible for the supervision of institutional training officers among institutions in the southwest quadrant of the state of Ohio. This assignment includes the Ross Correctional Institution.

Mr. McIntosh reviewed the conclusions reached by Ms. Zimmerman and expressed the opinion that in the case of Christine Minney and three others, Ms. Zimmerman's findings about a lack of minimum qualifications had been mistaken. Ms. Zimmerman accepted the findings from Mr. McIntosh. The four additional applicants determined by Mr. McIntosh to have met the minimum qualifications for the posted position, including Christine Minney, were permitted to proceed through the selection process described in Article 17, section 17.05 for the vacant Training Officer position at RCI.

A first round of interviews of those candidates originally determined eligible by Ms. Zimmerman occurred on January 17, 2013. A second set of interviews, using a separate version of the interview questions and exercises, occurred on February 11, 2013 among candidates originally determined ineligible by Ms. Zimmerman who were subsequently determined eligible by Mr. McIntosh.

The interviews that occurred on January 17, 2013 included applicants James Vickers and Michael Henness. The grievant, Ms. Minney, was interviewed on the second day of interviews, February 11, 2013, along with Jeff Carroll, Gary Rowe, and Thomas Burger.

The interviews and evaluations of applicants on January 17, 2013 and the interviews and evaluations of applicants on February 11, 2013 for the vacant Training Officer position at RCI were grounded in separate versions of an assessment instrument established by the Ohio

Department of Rehabilitation and Correction's Corrections Training Academy. At the hearing Mr. McIntosh testified that there are four different sets of interview questions to protect the security and reliability of the interview questions. Mr. McIntosh testified that any of the four versions of the assessment instrument can be used.

There is in the hearing record a substantial factual rift between eyewitnesses to the interview of Ms. Minney on February 11, 2013. One major factual disagreement is whether Ms. Minney, while being interviewed on February 11, 2013, had had before her in written form the questions being directed to Ms. Minney by the three interviewers/raters. Ms. Minney testified that the written questions had not been in front of her during her interview; another eyewitness who was present during the interview of Ms. Minney testified that written questions had been placed before all interviewees during their interviews; another eyewitness to the interview of Ms. Minney on February 11, 2013 could not recall whether the written questions had been before Ms. Minney during the interview.

On February 20, 2013, the Employer awarded the RCI Training Officer position to James Vickers.

James Vickers' seniority date is January 6, 2003.

Christine Minney's seniority date is July 27, 1992.

On February 26, 2013, a grievance form was filed that charged that the award of the RCI Training Officer position to James Vickers on February 20, 2013 violated Article 17, section 17.05 of the parties' collective bargaining agreement. The grievance filed on February 26, 2013, Joint Exhibit 2, stated that the officer who had been awarded the position had been placed in a temporary work level assignment in August, 2012, prior to the institution posting the temporary work level position so staff could apply for this temporary assignment. The grievance states that

this individual was sent for special training (Network Administrator for ELMS) for the Training Officer position.

The grievance filed on February 26, 2013, Joint Exhibit 2, asks that RCI be ordered to cease violating the Contract between the parties when filling vacant positions, and asks that the Training Officer position be immediately awarded to the appropriate applicant and this person be made whole.

The grievance was denied by the Employer at Step three of the parties' contractual grievance procedure, Article 25, section 25.02, on April 15, 2013 with the following explanation:

> There is no evidence the Employer pre-positioned the selected employee or that the selected employee's assignment in a TWL training officer position disadvantaged the grievant. Although the questions used during the first series of interviews were different than those used in the second series of interviews, the questions in both interviews reasonably relate to the duties of a training officer and were intended to quantifiably measure the likelihood of success in the training officer position as it relates to qualifications, education and experience (in accordance with Article 17.05). Further, the scoring indicates a differentiation between the selected candidate and the grievant sufficient to demonstrate a level of qualifications, education and experience strong enough to overcome seniority (relative disciplinary records as defined by Article 17.05 were not raised). The selection was made in accordance with the Contract.
>
> The grievance is denied at Step 3.
>
> See Joint Exhibit 2, page 3.

The grievance was appealed, remained unresolved, and was moved to arbitration on May 1, 2013 by the Union. See Joint Exhibit 2, pages 4-5.

The arbitration hearing occurred on March 11, 2014. Post-hearing briefs from the parties were received by the arbitrator by April 7, 2014 and exchanged between the parties on April 8, 2014.

POSITIONS OF THE PARTIES

Position of the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, Union

The Union points to the testimony from the grievant, Ms. Minney, who testified that she has been employed by the Ohio Department of Rehabilitation and Correction at the Ross Correctional Institution for twenty-one years and has worked as a Correction Officer during the past eighteen years. The Union notes that Ms. Minney has been a certified Training Instructor for five years, with certification in CTA Instructor's Course, Customer Responsiveness, CPR/First Aid, OC, and Institutional Skills. Ms. Minney had not received Enterprise Learning Management (ELM) training but the Union points out the Employer decides who is to receive ELM training.

The Union recalls the testimony of Ms. Minney about having had experience as the owner and operator of a pet store where Ms. Minney trained employees, performed payroll functions, and operated a computer on a daily basis. The Union notes that Ms. Minney was not determined to be a qualified applicant under the initial review of Ms. Minney's application by Human Capital Management Senior Analyst Anna Zimmerman but Ms. Minney was subsequently determined eligible under a second review by CTA Program Administrator J. D. McIntosh.

The Union notes that Ms. Minney testified that she had not been given the same test or lesson plan exercise that had been given to the applicant who had been selected, and Ms. Minney testified at the hearing that at her interview she had been directed to identify the five parts of a lesson plan and each part's function. Ms. Minney testified that she had *not* been directed to identify the five parts of a lesson plan's *coversheet* and each part's function.

The Union notes that Ms. Minney asked at her interview how she should present her lesson plan and had been told to present the instruction however she wished. Ms. Minney testified at the hearing that she found the instruction unclear.

Ms. Minney testified that she reviewed the selection file for Mr. Vickers and discovered that Mr. Vickers had been assigned points that should not have been assigned. Ms. Minney found in her assessment that points had been withheld from Ms. Minney that should have been assigned to Ms. Minney.

Ms. Minney testified at the hearing that during her interview on February 11, 2013, a copy of the interview questions had not been before Ms. Minney.

The Union recalls the testimony from Mike Henness, the President of the Union Local for the past five and one-half years. In his testimony Mr. Henness confirmed that ELM training is for a data system that records employee training. Mr. Henness confirmed that management selects who is to receive ELM training. Mr. Henness testified that the interview questions were not placed before him during his interview on January 17, 2013.

The Union recalls the testimony from Patty Rich who, on behalf of the Union, examined the two versions of the tests used to rate a single pool of applicants. Ms. Rich concluded that Mr. Vickers had been overrated by nine points and Ms. Minney had been underrated by ten to thirteen points.

The Union recalls the testimony from Ms. Rich wherein Ms. Rich expressed the opinion that the presentation portion of the test is subjective, and without a videotape of the interview the Union is unable to prove what really happened during the presentation. The Union notes that one rater gave Ms. Minney credit for facial expression, eye contact, and gestures while a different rater did not give Ms. Minney credit for any of these elements but did indicate in the interview

notes that Ms. Minney's actions in this regard had been minimal. The Union argues that even with minimal eye contact, facial expression, or gestures, some credit should have been given. The Union claims this is what makes scoring the assessment's exercise so subjective.

The Union points out that Ms. Minney was the only applicant who completed the computer exercise and argues that Ms. Minney should therefore be the only applicant to receive the maximum points for this question.

The Union recalls the testimony of J. D. McIntosh, a Program Administrator at the Ohio Department of Rehabilitation and Correction's Corrections Training Academy. Mr. McIntosh explained in his testimony at the hearing that he was one of the raters on both days of interviews. Mr. McIntosh testified that he had not received the applications of the first group approved for interviews by Ms. Zimmerman but did review a second group of applications provided to him by Ms. Zimmerman accompanied by a request that Mr. McIntosh review the applications to determine whether minimum qualifications had been met.

The Union notes that Mr. McIntosh in his testimony at the hearing stated that Ms. Minney did make eye contact with him during her presentation of the lesson plan but Mr. McIntosh withheld points from Ms. Minney because Ms. Minney had been seated during the presentation rather than standing.

The Union recalls the testimony from Melody Haskins, an interviewer/rater on both days of interviews who testified at the hearing that Ms. Minney had not made eye contact with her during Ms. Minney's presentation of a lesson plan, had not used facial expressions or gestures during this presentation, and had been seated during her presentation.

The Union recalls the testimony of Anna Zimmerman who had originally determined that Ms. Minney had not met minimum qualifications. A second review had been conducted wherein

four additional applicants were found to have met minimum qualifications. This second review was done by Mr. McIntosh.

The Union recalls the testimony of Ms. Zimmerman in response to a question about whether Ms. Minney may have been provided with a wrong question. Ms. Zimmerman replied that a copy of the interview questions had been on the table.

The Union contends that a review of Ms. Minney's application clearly shows she met minimum qualifications. The Union points to the language of Article 17, section 17.05 as the Contract language that is directly applicable to this grievance. As argued by the Union at page seven of its post-hearing brief:

> ...The article clearly states that the job shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, and education and that when these factors are substantially equal State seniority shall be the determining factor.

The Union contends that it is the Employer's responsibility and burden to apply a fair and reliable assessment instrument. The Union contends that none of the Employer's witnesses at the hearing were able to explain how the interview questions and written exercises used by the raters served to establish the experience and education of applicants as required by Article 17, section 17.05. The Union notes that nothing in the hearing record indicates the percentages of the whole to be assigned to qualifications, experience, and education, for example, qualifications 50%, experience 25%, and education 25%.

The Union claims that the Employer pre-selected a candidate for the posted Training Officer position at RCI and took steps to assure that that candidate was selected. The Union notes that the selected candidate had previously been chosen to fill a temporary work level assignment as a Training Officer at RCI and this assignment had been made prior to an e-mail

announcing that a TWL opportunity for a Training Officer position had become available. The Union notes that the notice that did go out about the temporary work level assignment was missing several names normally found on the list of e-mail recipients for such an announcement. In this regard the Union notes that Union President Mike Henness, who is normally included in such a distribution list, was left off even though Mr. Henness had expressed an interest in the TWL assignment in prior discussions with the Warden.

The Union notes that neither Ms. Haskins nor Ms. Zimmerman gave credit to Ms. Minney for eye contact or facial expressions, yet credit for these elements of Ms. Minney's presentation was provided by Mr. McIntosh.

The Union claims that Ms. Zimmerman's testimony to the effect that the written questions were on the table before Ms. Minney during her interview is unsupported. The Union contends that the Employer has acted in an arbitrary manner in filling the temporary work level assignment and in assessing applicants for the full-time Training Officer position.

The Union contends that the grievant, Christine Minney, was relatively equal to and more senior than the applicant selected by the Employer for the RCI Training Officer position and the Union contends that Ms. Minney should have been awarded this position.

The Union asks the arbitrator to sustain the grievance and award the Training Officer position at the Ross Correctional Institution to Christine Minney with full back pay retroactive to February 20, 2013.

Position of the State of Ohio, Department of Rehabilitation and Correction, Employer

On behalf of the Employer it is claimed that Article 17 was followed in awarding the posted position to the superior candidate, James Vickers, on the basis of qualifications, experience, and education. The Employer claims the assessment instrument obtained from the

Ohio Department of Rehabilitation and Correction's Corrections Training Academy was appropriately, fairly, and rationally applied through applying the criteria described in the assessment instruments, Joint Exhibits 13A and 13B.

The Employer contends that the Union presented no testimony or evidence that demonstrated the evaluators awarded points in a manner inconsistent with the parties' Contract or in a manner that was unreasonable, arbitrary, or capricious. The Employer contends that final tabulations under the assessment instruments, based upon a 100-point scale, showed Mr. Vickers received a final average score of 90.0 while the grievant received a final average score of 67.3. The Employer views the difference between these scores to be more than sufficient to overcome awarding the position solely on the basis of seniority, and the Employer argues that the scores demonstrate the grievant and the selected candidate were not "substantially equal." The Employer notes that Mr. Vickers scored higher on the assessment instrument and had more training experience than Ms. Minney, as documented in his application for the posted position, Joint Exhibit 5. The Employer contends that the superior rating earned by Mr. Vickers shows the award of the RCI Training Officer position to Mr. Vickers was appropriate and did not violate the Contract between the parties.

The Employer argues that the temporary work level assignment under which Mr. Vickers worked had no impact on the selection for the posted position and the Employer contends there is no evidence in the hearing record showing the temporary work level assignment caused an increased score for Mr. Vickers over the grievant. As stated by the Employer at page two of the Employer's post-hearing brief:

> ...RCI's Training Officer unexpectedly and abruptly notified his supervisor, Melody Haskins, that he would be off work on a disability leave of absence. As the institution was in the process of in-service training, it was critical and urgent

> for someone to be immediately placed in a Temporary Working Level (TWL) in order for this training to continue as scheduled. As Ms. Haskins had only worked at RCI for two (2) weeks, she asked for recommendations as to who could best serve in a TWL for the Training Officer. Mr. Vickers, being the most qualified of those recommended was selected to serve in the immediate TWL. A notification of interest was later sent out to employees via email seeking names of employees who may also be interested in serving in the TWL...

The Employer contends that the Union President's name was left off the TWL notice unintentionally and resulted from an oversight that had no effect upon the selection process for the posted position. The Employer notes that the notice did have the grievant's name on the e-mail's recipients list and Mr. Henness had been aware of the notification of interest regarding the temporary work level assignment. As noted by the Employer at page three of its post-hearing brief:

> ...After review of the additional employees who were interested in the TWL, the Employer chose to keep Mr. Vickers in the assignment. It is important to note that there are no provisions of the agreement that prescribe *how* Management makes its TWL selections. The Union argued that by virtue of being placed in a TWL, Mr. Vickers was prepositioned for the full-time selection of Training Officer. The Employer argues that Mr. Vickers' training record speaks for itself. He sought and acquired additional training prior to ever going into the TWL and his training far exceeds any additional training the grievant had acquired in that same time period. In addition, you heard testimony from Mike Henness, Union President and Union Witness, that he felt leaving Mr. Vickers in the TWL was the best thing for the institution; therefore, he signed/approved two (2) TWL extensions.

The Employer acknowledges that some applicants were originally determined to not meet minimum qualifications but under a second review were found to have met minimum qualifications. The Employer claims that Ms. Zimmerman took the appropriate steps to ensure that all qualified applicants were interviewed and assessed for the posted position. As argued by the Employer at page four of its post-hearing brief:

> The bottom line, this case is not about minimum qualifications; it is about comparing Qualifications, Experience and Education and any negative inference the Union attempts to raise regarding the issue of minimum qualifications should be discarded.

The Employer claims the grievant was interviewed appropriately and reasonable steps were taken by the Employer to protect the integrity of the assessment instrument. Two separate assessment instruments were applied to prevent any unfair advantage and the Employer contends both instruments equally and fairly measured qualifications, experience, and education necessary to successfully filling the position, in accordance with the language of Article 17.

In response to question five in the version of the assessment instrument used at Ms. Minney's interview, a question that asked Ms. Minney to describe five parts of a lesson plan coversheet and each part's function, Ms. Minney described five parts of a lesson plan and each part's function. The Employer points to the testimony of Ms. Zimmerman and Ms. Haskins, members of the assessment/interview panel, who testified that Ms. Minney had been asked to name the five parts of a lesson plan coversheet and both Ms. Zimmerman and Ms. Haskins testified that Ms. Minney had had a copy of the questions in front of her during the interview. The Employer states that Mr. Henness, RCI Union Local President and witness for the Union, stated he could not recall if the questions had been before him during his interview but stated that in all of his other interviews the questions had been placed in front of him. The Employer contends that there is sufficient evidence in the hearing record to substantiate that the grievant gave only a minimally correct response to question five, naming only one of five parts, evaluation, and was appropriately assigned five points for this single correct response.

The Employer notes that there is no argument put forward by the Union that the interviewers failed to fairly and accurately record the interviewees' answers to questions. The

issue therefore, argues the Employer, is limited to whether the grievant's responses to the questions warrant a different point value.

The Employer refers to Union Exhibit 3, page 12, a Training Officer position – Ross Correctional Union Summary that presents a breakdown of the points assigned by the raters to Mr. Vickers, presents a breakdown of the points assigned by the raters to Ms. Minney, and presents the points that the Union believes should have been assigned to Mr. Vickers and Ms. Minney under the January 17, 2013 and February 11, 2013 assessments.

The Employer's comparison of where the parties agree and disagree about the points to be assigned to the answers to questions 1 through 6c appears in the Employer's post-hearing brief at pages 5-7.

Both parties have agreed that Mr. Vickers' answer to question one on the January 17, 2013 assessment instrument should result in ten points, a question offering a maximum of fifteen points.

Both parties have agreed that Ms. Minney's answer to question one on the February 11, 2013 assessment instrument should result in fifteen points, a question offering a maximum of fifteen points.

Both parties have agreed that Mr. Vickers' answer to question two on the January 17, 2013 assessment instrument should result in five points, the maximum points available for this question.

Both parties have agreed that Ms. Minney's answer to question two on the February 11, 2013 assessment instrument should result in five points, the maximum points available for this question.

Both parties have agreed that Mr. Vickers' answer to question three on the January 17, 2013 assessment instrument should result in fifteen points, the maximum points available.

As to question three on the February 11, 2013 assessment instrument directed to Ms. Minney, the Union argues that twenty points should have been assigned rather than the fifteen points assigned by the interviewers/raters.

Both parties have agreed that Mr. Vickers' answer to question four on the January 17, 2013 assessment instrument should result in fifteen points, a question offering a maximum of twenty points.

As to question four on the February 11, 2013 assessment instrument directed to Ms. Minney, the Union believes Ms. Minney should have been assigned fifteen points rather than the ten points assigned to Ms. Minney. The Employer claims that Ms. Minney provided two correct responses under question four of the February 11, 2013 assessment instrument and appropriately received ten points for her answer.

As to question five on each of the assessment instruments, both parties agreed that Mr. Vickers should receive twenty-five points for his description of the five elements of a lesson plan. The Employer contends that Ms. Minney did not give a correct response to question five directed to her on February 11, 2013 but did provide one correct element in response to the question directed to her about the five parts of a lesson plan coversheet and received an appropriate score of five points for her answer to question five.

Both parties have agreed that Mr. Vickers and Ms. Minney should receive zero points for question 6a.

Both parties have agreed that Mr. Vickers should receive seven points for question 6c and Ms. Minney should receive nine points for question 6c. Question 6c relates to a lesson presentation exercise, an exercise offering a maximum of ten points.

For question 6b, the Employer contends that Mr. Vickers appropriately received ten points by showing he was able to operate a computer. Both parties agreed that Ms. Minney should receive ten points for question 6b, the maximum points available.

The Employer points out that when the point totals of the raters are averaged, and the point totals agreed by the parties are considered, Mr. Vickers attains a score of eighty-seven points and Ms. Minney attains a score of sixty-nine points. The Employer notes that to score in the ninetieth percentile of a score of 87, a score of 78.3 is required (87 x .9 = 78.3). The Employer notes that even if Mr. Vickers' score were to be lowered to 80, a score of 72 would be required to reach the ninetieth percentile of a score of 80. A score of 72 is a score above what the grievant attained. The Employer argues that the Union has failed to demonstrate that the grievant's score was within the ninetieth percentile of the selected candidate's score and therefore Mr. Vickers has been demonstrated to be the superior candidate based on qualifications, experience, and education.

The Employer contends that Article 17 of the parties' Agreement demands that qualifications, experience, education, and work record be considered in the selection process. The Employer contends that the parties' Agreement demands a balancing of these criteria with seniority through a "significantly more qualified" provision. The Employer contends that the grievant cannot overcome the point advantage attained by the selected candidate, Mr. Vickers. The Employer points out that it may not disregard the qualifications, experience, and education of candidates in awarding the position. The Employer claims that it selected Mr. Vickers through

the application of an appropriate assessment instrument that identified Mr. Vickers as the best candidate based on qualifications, experience, and education.

The arbitrator is urged to find that the Employer made an appropriate selection and did not violate the Contract between the parties. The arbitrator is urged by the Employer to deny the grievance in its entirety.

DISCUSSION

Article 17, section 17.01 of the parties' Agreement reserves to the Employer the right to determine which vacancies to fill by permanent transfer, promotion, transfer, or demotion.

Article 17, section 17.06 of the parties' Agreement empowers the Employer to 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.

Article 17, section 17.05 of the parties' Agreement, in its third full paragraph, reads as follows:

> If the position is in a classification which is assigned to pay ranges eight (8) through twelve (12) or twenty-eight (28) or higher, the job shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, education and active disciplinary record. For purposes of this Article, disciplinary record shall not include oral or written reprimands. When these factors are substantially equal State seniority shall be the determining factor.

The position at issue in this proceeding is assigned to pay range 31. Neither of the two applicants being compared in this proceeding, Mr. Vickers and Ms. Minney, have an active disciplinary record.

There is no dispute as to the greater seniority of the grievant, Ms. Minney, in comparison to the selected candidate, Mr. Vickers. Mr. Vickers' seniority date is January 6, 2003; Ms.

Minney's seniority date is July 27, 1992. Mr. Vickers has eleven years of seniority; Ms. Miney has almost twenty-two years of seniority.

The express language of Article 17, section 17.05 provides that the position shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, and education, and when these factors are substantially equal, state seniority is to be the determining factor.

Because the grievant has more seniority than the selected candidate, the Union can prevail in this proceeding if the two candidates are shown to have had substantially equal qualifications, experience, and education. As noted in the Employer's post-hearing brief, the parties have generally agreed that "substantially equal" means a lower score is at least ninety percent (90%) of a higher score. When the lower score is at least ninety percent (90%) of the higher score, the two scores are considered "substantially equal" under Article 17, section 17.05 and state seniority determines the selection.

The Employer has express authority under Article 17, section 17.06 to use proficiency testing and/or assessments to rate applicants under Article 17, section 17.05. The facts of this case reflect two versions of an assessment instrument provided to the Ross Correctional Institution by the Ohio Department of Rehabilitation and Correction's training academy to be used in determining the qualifications, experience, and education of applicants for the RCI Training Officer position. The arbitrator finds nothing in the assessment instruments or in the recordkeeping done during the interviews that indicates a violation of the parties' Agreement.

Reference has been made in the hearing record to the temporary work level assignment which Mr. Vickers filled beginning in August, 2012. The Union has argued that the assignment of Mr. Vickers to the TWL in August, 2012, prior to the issuance of notice of the availability of

the TWL assignment, was a pre-positioning of Mr. Vickers for the RCI Training Officer position that was to be posted.

The Employer points out that the assignment of Mr. Vickers to the TWL was needed to allow in-service training, then on-going, to continue uninterrupted. The Employer denies that it pre-positioned any candidate for the RCI Training Officer position and refers to the written extensions signed by Union President Henness for this temporary work level assignment.

The stipulated issue statement in this case asks whether the Employer violated Article 17 of the parties' Contract when the Employer filled a Training Officer position at the Ross Correctional Institution. The assignment of Mr. Vickers to the temporary work level assignment in August, 2012 is an issue that lies outside the scope of the arbitrator's authority under the stipulated issue statement in this proceeding. The arbitrator finds no direct effect upon the scores of either candidate, Mr. Vickers or Ms. Minney, by the TWL assignment under the assessment instruments applied by the Employer on January 17, 2013 and February 11, 2013. The arbitrator otherwise expresses no opinion as to the temporary work level assignment awarded to Mr. Vickers in August, 2012.

As to the assessment of Mr. Vickers on January 17, 2013 and the assessment of Ms. Minney on February 11, 2013, the fact that two versions of the assessment instrument were used complicates the comparisons to be made between the two interviews but does not present a circumstance that in and of itself violates the parties' Agreement. Some of the questions put to Mr. Vickers and to Ms. Minney were identical in content, simply numbered differently (e.g., question three directed to Mr. Vickers on January 17, 2013 is identical to question one directed to Ms. Minney on February 11, 2013). Each version of the assessment instrument had two questions that did not appear on the other assessment instrument, questions one and two directed

to Mr. Vickers, and questions two and four directed to Ms. Minney. Each question two offered a maximum of five points and both Mr. Vickers and Ms. Minney received the maximum five points for their answers to question two on their respective assessment instruments.

Question four directed to Mr. Vickers on January 17, 2013 is identical to question three directed to Ms. Minney on February 11, 2013. Both questions address how to respond to disruptive behavior during training. The maximum points available to Mr. Vickers for this question were twenty; the maximum points available to Ms. Minney for this question were fifteen.

The two other asymmetrical questions in the assessment instruments are question one directed to Mr. Vickers on January 17, 2013 about improving training, offering a maximum of fifteen points, and question four directed to Ms. Minney on February 11, 2013 that addresses an exempt employee who is absent from training, offering a maximum of twenty points.

Both assessment instruments offer a maximum of 100 points.

An examination of the scores for Mr. Vickers and Ms. Minney reflects seven questions through which points may be accumulated (question 6a offers zero points). Among the seven questions scored for Mr. Vickers, the parties agreed on six of the questions. The only disagreement between the parties as to the scoring of Mr. Vickers' assessment instrument is the Union's belief that four points should have been assigned to Mr. Vickers for question 6b, an exercise to gauge a candidate's ability to operate a computer, rather than the ten points assigned to Mr. Vickers by the interviewers/raters, the maximum points offered by this question. The Union notes that Ms. Minney completed the computer exercise and received a maximum score of ten points; Mr. Vickers did not complete the exercise and received a maximum score of ten points.

Among the seven questions for which points were available to Ms. Minney on February 11, 2013, three questions are disputed, with the Union arguing that the fifteen points assigned to Ms. Minney's answer to question three as to disruptive behavior during training should have been twenty points; the ten points assigned to Ms. Minney for her answer to question four involving an absent exempt trainee should have been fifteen points; and the five points assigned to Ms. Minney for her answer to question five should have been, and would have been, twenty-five points had the interviewers/raters and the interviewee, Ms. Minney, agreed on the question to be answered by Ms. Minney on February 11, 2013, whether that question addressed a lesson plan coversheet or a lesson plan.

Union Exhibit 3 presents the answers heard by the interviewers/raters on February 11, 2013 from Ms. Minney in response to questions three and four. The responses from Ms. Minney were recorded manually and individually by each of the interviewers/raters. These responses provide no basis upon which to order an alteration to the points assigned to Ms. Minney for these questions.

Ms. Minney's answer to question three, found at Union Exhibit 3, page 5, included three correct responses for which fifteen points were appropriately assigned.

Ms. Minney's answer to question four, found at Union Exhibit 3, page 5, included two correct answers as listed on the answer key for the February 11, 2013 assessment instrument, Joint Exhibit 13B, page 1, for which ten points were appropriately assigned.

The arbitrator finds no basis upon which to change the points assigned to Ms. Minney for questions three and four of the February 11, 2013 assessment.

As to the points assigned to Mr. Vickers for the computer exercise, as will be seen later in this discussion, standing alone, the disputed six points do not change the outcome of this

arbitration. If Mr. Vickers' score for question 6c were to be reduced by six points as proposed by the Union, Mr. Vickers' score would be reduced to 81 points (87 – 6). Ninety percent (90%) of a score of 81 points is a score of 72.9 points, a score that remains above the score of 69 assigned to the grievant.

If question five for Mr. Vickers and Ms. Minney is set aside in the consideration of the scoring, Mr. Vickers' score would be sixty-two points (87 – 25) and Ms. Minney's score would be sixty-four points (69 – 5). Under this calculation Ms. Minney's score would be seen to be substantially equal to the score of Mr. Vickers, indeed Ms. Minney's score would present the higher score in determining whether substantially equal qualifications, experience, and education had been demonstrated.

Union Exhibit 3 at page 6 presents what each of the three interviewers/raters heard from Ms. Minney on February 11, 2013 in response to question five. Which question five was put to Ms. Minney is disputed between the parties, with the Employer claiming that Ms. Minney was asked about a lesson plan coversheet as presented in the February 11, 2013 version of the assessment instrument, Joint Exhibit 13B, and the Union contending that Ms. Minney was asked the question from the January 17, 2011 version of the assessment instrument about a lesson plan, not a lesson plan coversheet.

Each of the interviewers/raters heard Ms. Minney on February 11, 2013 describe five parts of a lesson plan, and within this listing of lesson plan parts heard Ms. Minney mention one part that is common to both a lesson plan and a lesson plan coversheet, evaluation. The Employer assigned five points for the evaluation part mentioned by Ms. Minney in her answer and disallowed other points for Ms. Minney's answer to question five.

The arbitrator harbors no doubt as to whether on February 11, 2013 Ms. Minney understood the difference between the five parts of a lesson plan and the five parts of a lesson plan's coversheet. The arbitrator harbors no doubt as to whether Ms. Minney was capable of describing the five parts of a lesson plan's coversheet. The arbitrator believes Ms. Minney understood the question put to her as question five on February 11, 2013 to ask for the five parts of a lesson plan and did not understand the question to refer to a lesson plan's coversheet.

The issue in this case, however, is not whether Ms. Minney was capable of answering the question the Employer believes was put to Ms. Minney on February 11, 2013. The issue is whether the Union has presented a preponderance of evidence to the hearing record to indicate that the error as to the question put to Ms. Minney on February 11, 2013 was committed by the Employer rather than Ms. Minney.

It makes no sense that a candidate interested in securing a posted position would purposefully ignore or misconstrue the content of a question asked during an interview for the posted position. It is clear to the arbitrator that Ms. Minney on February 11, 2013 understood question five differently than the interviewers/raters. If there was a cognitive disconnect involving question five directed to Ms. Minney on February 11, 2013, proving which party committed the error causing this misunderstanding is an evidentiary burden which the Union must bear in this proceeding.

The arbitrator does not find a preponderance of evidence in the hearing record proving that the error that occurred as to question five on February 11, 2013 was committed by the Employer. All of the other questions in the February 11, 2013 version of the assessment instrument were presented correctly to Ms. Minney and nothing in the documentary record or in the testimony of witnesses, other than the testimony of Ms. Minney, indicates that among the

seven questions on the February 11, 2013 version of the assessment instrument, six were correctly communicated to Ms. Minney and one question from the January 17, 2013 version of the assessment instrument was inserted and directed to Ms. Minney.

The arbitrator is unable to say with any confidence that the questions put to Ms. Minney on February 11, 2013 were in written form before Ms. Minney during her interview. If the questions were before Ms. Minney, her claim that she heard an incorrect question would be undercut by having the question in writing available to her during the interview.

If the question in written form was not before Ms. Minney during her interview, an incorrect presentation of the question becomes a greater possibility but does not establish that an incorrect form of the question was directed to Ms. Minney.

The arbitrator is prepared to believe that a mistake occurred and that mistake is what caused Ms. Minney to answer as she did in response to question five. The arbitrator does not find, however, a preponderance of evidence in the hearing record showing the mistake to have been committed by the Employer.

The arbitrator shares the Union's concern about the subjective aspects of the assessment instruments used on January 17, 2013 and February 11, 2013 for the RCI Training Officer position. In this regard the arbitrator refers to the presentation exercise, question 6c in the January 17, 2013 assessment instrument, Joint Exhibit 13A, and question 6B of the February 11, 2013 assessment instrument, Joint Exhibit 13B. In this case the parties reached agreement on the points to be awarded to Mr. Vickers and Ms. Minney for questions 6c and 6B, respectively, with seven points assigned to Mr. Vickers and nine points assigned to Ms. Minney.

It is regrettable that the selection of a bargaining unit member for a promotion should balance on a miscommunication between the interviewers and the interviewee. The

determination of who is to bear the adverse consequence of this miscommunication rests upon evidence, or the lack thereof, as to the party that committed the mistake. There is not a preponderance of evidence in the hearing record to indicate that it was the Employer who made the mistake in this instance.

In the absence of a preponderance of evidence to the contrary, the arbitrator finds that the Employer did not violate Article 17, section 17.05 of the parties' Contract when it filled a Training Officer position (PN 20025846) at the Ross Correctional Institution.

AWARD

1. The grievance giving rise to this proceeding is arbitrable and properly before the arbitrator for review and resolution.

2. The Employer did not violate Article 17 of the Contract when it filled a Training Officer position (PN 20025846) at the Ross Correctional Institution.

3. The grievance is denied.

Howard D. Silver

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

Columbus, Ohio
April 30, 2014

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO and the State of Ohio, Department of Rehabilitation and Correction, case number 27-23-20130228-0015-01-03, was served electronically upon the following this 30th day of April, 2014:

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