

#1168

In the Matter of Arbitration Between the	:	Grievance Number: DPS-2017-00092-7
	:	
OHIO DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE OHIO STATE HIGHWAY PATROL,	:	
	:	Grievant: Gary L. Eley
	:	
Employer	:	
and the	:	
	:	Date of Hearing: March 19, 2018
	:	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 11, AFL-CIO,	:	
	:	Howard D. Silver, Esquire
	:	Arbitrator
Union	:	

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

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PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing on March 19, 2018 at 9:00 a.m. in room 195 at the offices of the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, 390 Worthington Road, Westerville, Ohio 43082. At the hearing both parties were afforded a fair and full opportunity to submit evidence and arguments in support of their positions. The hearing concluded at 11:45 a.m. on March 19, 2018 and the evidentiary portion of the hearing record was closed at that time.

Post-hearing briefs were filed by the parties with the arbitrator on May 4, 2018 and were exchanged between the parties by the arbitrator on May 5, 2018.

This matter proceeds under the authority of a collective bargaining agreement in effect between the parties from July 1, 2015 through February 28, 2018, Joint Exhibit 1.

No challenge to the arbitrability of the grievance at issue in this proceeding has been raised. The arbitrator finds the grievance addressed by this proceeding to be arbitrable under the language of the parties' collective bargaining agreement and properly before the arbitrator for review and resolution.

AGREED ISSUE STATEMENT

Did the Employer violate Article 17 of the parties' Collective Bargaining Agreement when it filled a Motor Carrier Enforcement Inspector position (PCN20063518)?

If so, what shall the remedy be?

JOINT EXHIBITS

The parties agree that the following exhibits are authentic and properly admitted to the hearing record.

1. 2015–2018 Collective Bargaining Agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11
2. Electronic Grievance Trail – DPS-2017-00092-7
 - a. Grievance
 - b. Step 2 Grievance Hearing
 - c. ADR/Mediation
 - d. Arbitration
3. Motor Carrier Enforcement Inspector (MCEI, 20063518) Job Posting
4. State of Ohio Job Application for MCEI 20063518
 - a. Gary L. Eley, Grievant
 - b. David S. Smith, Jr., selected candidate
5. Information Sharing Agreement
6. MCEI Assessment/Interviews – (under seal)
 - a. Gary L. Eley, Grievant
 - b. David S. Smith, Jr., selected candidate

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter referred to as the Union, and the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol, hereinafter referred to as the Employer, are parties to a collective bargaining agreement in effect from July 1, 2015 through February 28, 2018, Joint Exhibit 1.

In November 2016 the Employer posted written notice of the Employer's intention to fill a Motor Carrier Enforcement Inspector (MCEI) position, pay range 29, class number 23111, at the District 1 headquarters in Findlay, Ohio. Two internal candidates made application to fill the posted MCEI position, David S. Smith, Jr. and the grievant, Gary L. Eley.

The Motor Carrier Enforcement Inspector classification specification describes the purpose of this classification to be the performance of inspections of commercial motor vehicles and drivers to ensure compliance with state and federal safety and economic regulations, and to provide assistance to law enforcement personnel in investigations of commercial vehicle crashes. As an incumbent of a full performance level position, a Motor Carrier Enforcement Inspector is expected to independently perform inspections of commercial motor vehicles and drivers to ensure compliance with state and federal safety and economic laws, rules, and regulations. The class concept in the classification specification for Motor Carrier Enforcement Inspector reads as follows:

The full performance level class works under direction & requires considerable knowledge of state & federal laws, rules & regulations, pertaining to motor carrier industry & operations & inspection techniques in order to conduct independent roadside inspections of commercial motor vehicles & drivers to ensure compliance with federal & state regulations (e.g., brakes, steering, lights load securement, fifth wheel, record of duty status, driver qualifications, license, hazardous materials).

Both candidates for the posted MCEI position, Mr. Smith and Mr. Eley, were determined to meet the minimum qualifications for the MCEI position and their bids were moved to the second stage of the selection process – the application of a selection device, a proficiency test and/or assessment intended to rate applicants as authorized by agreed language in Article 17, section 17.05. Article 17, section 17.05 includes the following language: "Selection devices (e.g. structured interviews, written test, physical ability, etc.) may be used at the discretion of the

Agency.”

Mr. Smith and Mr. Eley each sat for a structured interview on December 9, 2016. Each candidate was asked the same ten questions before the same four-person interview panel comprised of James Feddern, Will Ogden, Chad Enderby, and Douglas VanSickle. Each member of the interview panel without consultation assigned a score to each response to each question from each candidate by applying the same scoring rubric for this purpose.

The scores assigned by the interviewers to the responses to each question from the candidates were averaged and totaled. Based on the final score for each candidate, Mr. Smith was determined to have the higher point total and declared the selection by the Employer for the posted MCEI position.

On January 10, 2017 a grievance was filed with the Employer on behalf of Mr. Eley charging a violation of the parties’ collective bargaining agreement by the Employer’s failure to appoint Mr. Eley to the MCEI position. The Union contends that the crux of this dispute between the parties balances on a determination of whether the interviewers’ scores for the grievant were based on the grievant’s interview performance or whether the grievant’s scores assigned by the interview panel were based on the grievant’s experience, qualifications, and education. The Union contends that the grievant’s thirteen years of experience as a Motor Carrier Enforcement Inspector did not receive the rating such experience deserves. The Union contends that the grievant’s experience “would enable him/her to very easily perform the job duties associated with the Motor Carrier Enforcement Inspector position.” See Rating Scale, Joint Exhibit 6.

The Union argues that the actions of the Employer in failing to appoint the grievant to the vacant MCEI position presents a violation of the intent and spirit of Article 17, sections 17.05 and 17.06 in the parties’ collective bargaining agreement. The Union argues that the Employer is

restricted by the language of the parties' collective bargaining agreement to rating qualifications, experience, and education, and emphasizes that there is no language in the parties' collective bargaining agreement that would allow the selection to be based upon a critique of an interviewee's performance during the interview or would allow withholding points from any of the three assessment factors - qualifications, experience, and education, for "poor interview performance."

The Union urges that the grievance be sustained and the grievant made whole by placing the grievant in the position he would have been in had Mr. Eley been selected to fill the posted MCEI position in January 2017.

The Employer claims that every action taken by the Employer in relation to the posted position is authorized by express, specific language in the parties' collective bargaining agreement. The Employer denies it violated the parties' collective bargaining agreement by selecting Mr. Smith for the posted position.

The Employer denied the grievance and the unresolved grievance was moved to final and binding arbitration at the direction of the Union.

SUMMARY OF TESTIMONY

Gary L. Eley

Under direct questioning by the Union's representative, the grievant in this proceeding, Gary L. Eley, identified Union Exhibit 1 as the OAKS Employee History Report (commonly referred to as an EHOC) for Gary L. Eley that begins on June 17, 1985 with Mr. Eley's hire by the Ohio Department of Transportation as a seasonal worker in an unclassified position. This initial employment of Mr. Eley ended on September 6, 1985.

As reported on Mr. Eley's OAKS Employee History Report, on January 6, 1986 Mr. Eley

was hired by the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol to serve as a Motor Vehicle Inspector, the classification under which Mr. Eley served until a lateral transfer to PUCO Transportation Investigator occurred effective August 5, 1996. Mr. Eley served as a PUCO Transportation Investigator until the classification of Mr. Eley's position changed as a result of a class plan change ordered by the Ohio Department of Administrative Services, changing the classification of Mr. Eley's position effective July 20, 1997 from PUCO Transportation Investigator to Motor Carrier Enforcement Inspector.

Mr. Eley continued to serve in a position classified Motor Carrier Enforcement Inspector until November 17, 2009 when his employment was terminated. Mr. Eley was reinstated to his position with the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol effective July 31, 2010 as a Stationary Load Limit Inspector.

Mr. Eley moved to a Driver's License Examiner position effective November 20, 2011.

Mr. Eley served as a Driver's License Examiner until June 28, 2015 at which time he moved laterally to a position classified Motor Vehicle Inspector. Mr. Eley continues in a position classified Motor Vehicle Inspector, the position filled by Mr. Eley when he submitted his bid on the Motor Carrier Enforcement Inspector position posted in November 2016.

Mr. Eley confirmed that from 1997 through 2009 he had served as a Motor Carrier Enforcement Inspector.

Mr. Eley identified Union Exhibit 2 as the classification specification for the classification series Motor Carrier Enforcement Inspector. This classification series contains the classification Motor Carrier Enforcement Inspector, class number 23111, and the classification Motor Carrier Enforcement Inspector Supervisor, class number 231115. The series purpose presented in the classification specification for the classification series Motor Carrier Enforcement Inspector

provides that the purpose of the Motor Carrier Enforcement Inspector occupation is to perform inspections of commercial motor vehicles and drivers to ensure compliance with state and federal safety and economic regulations and to assist law enforcement personnel with investigations of commercial vehicle crashes. The classification specification for Motor Carrier Enforcement Inspector provides that this classification is a full performance level class working under direction and requiring considerable knowledge of state and federal laws, rules, and regulations pertaining to the motor carrier industry, motor carrier operations, and motor carrier inspection techniques to conduct independent roadside inspections of commercial motor vehicles and drivers to ensure compliance with federal and state regulations.

Mr. Eley identified Union Exhibit 3 as his official performance reviews for 2009, 2010, and 2011.

Page 1 of Union Exhibit 3 describes a review period from February 9, 2009 through February 8, 2010. The date of evaluation presented on this performance review is December 20, 2010 and identifies Mr. Eley's position as Stationary Load Limit Inspector.

Page 2 of Union Exhibit 3 refers to a review period from November 20, 2011 through January 19, 2012. The date of evaluation presented on this performance review is January 7, 2012 and identifies Mr. Eley's position as Driver's License Examiner 1.

Page 3 of Union Exhibit 3 refers to a review period from January 4, 2012 through March 19, 2012. The date of evaluation presented on this performance review is March 6, 2012 and identifies Mr. Eley's position as Driver's License Examiner 1.

Each of the above-referenced performance reviews indicated an overall satisfactory rating and presented positive comments about Mr. Eley's work performance, including Mr. Eley utilizing "... his previous knowledge of commercial inspections to his position at the scales." Mr. Eley is

described as quickly grasping the concepts required for the daily duties of a Driver's License Examiner I position, and in the most recent performance review Mr. Eley is described as cooperative, conscientious, and dedicated.

Mr. Eley testified that during his interview for the posted Motor Carrier Enforcement Inspector position, in his responses to a number of questions put to him by the interviewers Mr. Eley had referred to his past experience with the Department of Public Safety, Division of the Ohio State Highway Patrol, in particular the thirteen years Mr. Eley had served as a Motor Carrier Enforcement Inspector. Mr. Eley noted that he has been an employee of the State of Ohio for thirty-one and one-half years.

Mr. Eley pointed out that effective June 28, 2015 he had moved to a position classified Motor Vehicle Inspector and continues to serve in this position.

James Feddern

James Feddern is a Public Utilities Transportation System Administrator who served as one of four interviewers of Mr. Smith and Mr. Eley on December 9, 2016 for the posted Motor Carrier Enforcement Inspector position. Mr. Feddern serves as a manager over Motor Carrier Enforcement Inspectors.

Mr. Feddern recalled that during the interview of Mr. Eley for the MCEI position Mr. Eley had provided a marginal response to question one of the interview. Mr. Feddern recalled that Mr. Eley had made reference to his prior employment as a Motor Carrier Enforcement Inspector but otherwise provided little information other than: "I've done this before."

Mr. Feddern recalled that in responding to question two of the interview Mr. Eley had provided an acceptable response but had provided little more in his answer than a reference to sixteen years as an MCEI, without further explanation. Mr. Feddern recalled that Mr. Eley

provided no other verbal description in response to question two and Mr. Feddern testified that this very limited response from Mr. Eley, with little beyond the mention of Mr. Eley's prior MCEI experience, was encountered throughout the interview of Mr. Eley.

Mr. Feddern described question three of the interview as prompting a marginal response from Mr. Eley; questions five and six of the interview producing acceptable responses from Mr. Eley; question seven eliciting a marginal response from Mr. Eley; question 8 resulting in a limited response from Mr. Eley; and questions nine and ten giving rise to acceptable responses from Mr. Eley. Mr. Feddern recalled that Mr. Eley's responses to the questions put to him at the interview had been very limited and were graded as such, as required by the rating scale for content appearing on each of the structured interview's questions.

Mr. Feddern was referred to Article 17, section 17.05, Selection, in the parties' collective bargaining agreement that includes the following language:

* * *

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.

* * *

Selection devices (e.g. structured interview, written test, physical ability, etc.) may be used at the discretion of the Agency.

Under questioning by the Employer's representative, Mr. Feddern was referred to Article 17, section 17.06, Selection Devices/Proficiency Instruments/Assessments. The first sentence of Article 17, section 17.06 reads as follows:

The Employer may use selection devices, proficiency testing and/or

assessments to determine if an applicant meets minimum qualifications and, if applicable, to rate applicants pursuant to Section 17.05.

Mr. Feddern testified that Mr. Eley's score from the structured interview was based on Mr. Eley's responses to the questions during the interview and Mr. Feddern testified that Mr. Eley's responses during the interview varied little from: "I had the job before." Mr. Feddern testified that Mr. Eley failed to explain what he had done in his prior employment as an MCEI.

Mr. Feddern testified that there had been two candidates for the posted MCEI position and Mr. Eley's responses during the interview had been very basic while Mr. Smith's responses had been much more forthcoming, providing a much wider range of information. Mr. Feddern testified that Mr. Smith was selected to fill the posted position. Mr. Feddern recalled that prior discipline had played no part in reaching the selection decision.

Douglas K. VanSickle

Douglas K. VanSickle is a Motor Carrier Enforcement Inspector Supervisor assigned to District 1. Mr. VanSickle served as one of four interviewers of Mr. Smith and Mr. Eley on December 9, 2016. These interviews were the first interviews in which Mr. VanSickle had participated as a supervisor.

Mr. VanSickle explained that the interviewers of Mr. Smith and Mr. Eley on December 9, 2016 did not confer with each other on the scores to be assigned to the responses to questions from each candidate. Mr. VanSickle recalled Mr. Eley's response to question one as Mr. Eley's statement that he had filled a Motor Carrier Enforcement Inspector position formerly for thirteen years.

As to question two posed during the December 9, 2016 interviews Mr. VanSickle recalled that Mr. Eley had limited his response to the fact that he had served for thirteen years in the position

of Motor Carrier Enforcement Inspector from 1996 through 2009. Mr. VanSickle recalled that Mr. Eley's response to question two and other questions posed during the interview were limited to a reiteration of the fact that Mr. Eley had formerly served as a Motor Carrier Enforcement Inspector. Mr. VanSickle agreed that someone with thirteen years of experience as a Motor Carrier Enforcement Inspector would probably easily perform the duties of a Motor Carrier Enforcement Inspector.

Under questioning by the Employer's representative, Mr. VanSickle agreed that thirteen years of experience in a position does not in and of itself substantiate that someone is able to perform the duties of that position. Mr. VanSickle emphasized the limited nature of the responses from Mr. Eley, answers in which very little detail was offered.

Mr. VanSickle recalled that Mr. Smith, the other candidate for the posted MCEI position, had gone on at great length about his work experience and his understanding of the duties and responsibilities of the Motor Carrier Enforcement Inspector position. Mr. VanSickle testified that Mr. Smith had had no previous experience as a Motor Carrier Enforcement Inspector but had elaborated at great length and in detail his understanding of what the posted position required in terms of job duties.

Mr. VanSickle testified that prior discipline had played no part in the selection process followed in filling the posted MCEI position.

Will Ogden

Will Ogden is a Sergeant with the Ohio State Highway Patrol and served as one of the four interviewers of Mr. Smith and Mr. Eley on December 9, 2016 for the posted MCEI position.

Mr. Ogden recalled that in response to question two Mr. Eley had asserted that he had sixteen years of experience as a Motor Carrier Enforcement Inspector, and twelve years of

experience as a Motor Vehicle Inspector. Mr. Ogden recalled Mr. Eley stating that he had served as a scale operator, asserting that he meets all of the qualifications for the position to be filled.

Mr. Ogden testified that the number of years served by Mr. Eley in an MCEI position, in an MVI position, and in a Scale Operator position was the only information provided by Mr. Eley. No other detail was offered. Mr. Ogden noted that he has known Mr. Eley since 2005 and knows Mr. Eley to have served for a number of years as a Motor Carrier Enforcement Inspector.

Mr. Ogden explained that there had been one instance of misconduct when Mr. Eley had responded to a traffic scene where he was arrested for operating a motor vehicle while under the influence (OMVI).

Mr. Ogden testified that he has been the supervisor of Mr. Eley for one year and during this time period there has been no problem with Mr. Eley's work.

Mr. Ogden recalled that during Mr. Eley's interview, concerning a question about Mr. Eley's ability to perform the job responsibilities of the Motor Carrier Enforcement Inspector position, Mr. Eley had responded that he had done the job before and concluded his answer with that statement. Mr. Ogden testified that this was an acceptable response but provided no detail as to either the understanding by Mr. Eley of what the Motor Carrier Enforcement Inspector position entailed or why his abilities and past experience supported the conclusion that he would be able to perform the job duties of the position to be filled.

Under questioning by the Employer's representative Mr. Ogden agreed that the number of years that Mr. Eley served as a Motor Carrier Enforcement Inspector does not answer questions about Mr. Eley's understanding of what the current job entailed.

Mr. Ogden recalled that Mr. Smith's responses had included much greater detail than had been provided in Mr. Eley's responses, and confirmed that prior discipline had played no part in

the selection process used to fill the posted MCEI position.

Mr. Ogden noted that Motor Vehicle Inspectors inspect passenger vehicles and school buses while Motor Carrier Enforcement Inspectors inspect commercial buses and commercial motor vehicles.

Under redirect questioning by the Union's representative, Mr. Ogden testified that experience as a Motor Vehicle Inspector (MVI) is not counted as experience for service as a Motor Carrier Enforcement Inspector (MCEI).

Chad Enderby

Chad Enderby is a Lieutenant with the Ohio State Highway Patrol. At the time of Mr. Enderby's testimony in this proceeding Lieutenant Enderby was assigned to the Cleveland District as a Staff Lieutenant. In 2016 Lieutenant Enderby had served as the Northwest Regional License and Commercial Standards Commander. In 2016 Lieutenant Enderby had not been Mr. Eley's supervisor.

Mr. Enderby served as one of the interviewers of Mr. Smith and Mr. Eley on December 9, 2016. Mr. Enderby identified Union Exhibit 4 as an inter-office communication from Lieutenant Enderby to Captain Alwine, dated December 13, 2016. This inter-office memorandum addresses the applicants for the posted MCEI position in District 1 – Mr. Smith and Mr. Eley. This memorandum notes that: "Mr. Smith was very descriptive with his answers."

As to Mr. Eley's responses to questions during his December 9, 2016 interview Lieutenant Enderby had written in his December 13, 2016 memorandum, Union Exhibit 4:

... Even though Gary has previously held the position as a Motor Carrier Inspector his answers to the interview questions were undescriptive and brief. Giving the impression that his knowledge and experience is limited also seeming that he did not have a clear understanding of the job requirements and duties.

After completing interviews, the panel recommends that David S. Smith be considered for the position of Motor Carrier Enforcement Inspector.

Under questioning by the Employer's representative, Mr. Enderby recalled that Mr. Eley's answers had been short, brief, and limited to references to past job performance. Mr. Enderby recalled that Mr. Smith's responses had been in depth, very descriptive, and accompanied by numerous examples of how Mr. Smith had applied his abilities to his work. Mr. Enderby described Mr. Smith as confident and exhibiting enthusiasm for the posted position. Mr. Enderby recalled that prior discipline did not play a role in the selection process for the MCEI position.

Under redirect examination by the Union's representative, Mr. Enderby confirmed that the candidate selected, Mr. Smith, had had no prior experience as a Motor Carrier Enforcement Inspector. Mr. Enderby noted however that Mr. Smith's previous work experience had included functions similar to duties required of an MCEI, including checking equipment. Mr. Enderby recalled that Mr. Smith had described how his prior work experience was applicable to the responsibilities assigned to a Motor Carrier Enforcement Inspector position.

Theresa Martelli, Ph.D.

Theresa Martelli, Ph.D. is the testing administrator for the Ohio State Highway Patrol. Dr. Martelli has served in this capacity for twenty-nine years.

Dr. Martelli described each interview that occurred on December 9, 2016 as a proficiency assessment instrument that was valid as to subject matter in that the questions posed during each interview were grounded in the duties of the position to be filled, and substantively and procedurally consistent in that both interviews were comprised of the same questions, before the same interviewers, and scored in the same way.

Dr. Martelli identified Employer's Exhibit 1 as a Content Validation Summary Screening Tool for the Motor Carrier Enforcement Inspector classification. This summary presents a breakdown of the points assigned to administration, 15%; communication, 20%; interpersonal, 15%; knowledge, 15%; leadership, 20%; and problem-solving and decision making, 15%.

Dr. Martelli stated that the level of detail provided by a candidate in his responses to interview questions is a factor to be considered, with more detailed responses indicating greater knowledge of what is required by the position to be filled.

Dr. Martelli explained that the assessment applied in the case of the Motor Carrier Enforcement Inspector position was internally consistent in how its measurements were taken, and the raters in this process, the four interviewers, were consistent in that each interviewer unilaterally assigned a rating to each response from each candidate to each interview question.

Under questioning by the Union's representative, Dr. Martelli was asked whether a longer answer to an interview question was necessarily a better answer, to which Dr. Martelli responded that a longer response to an interview question can serve to offer a more detailed and informed description of what the candidate brings to the position to be filled.

POSITIONS OF THE PARTIES

Position of the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union

It is the position of the Union that between the two applicants for the posted position of Motor Carrier Enforcement Inspector, the grievant, Mr. Eley, was superior to the other applicant, David Smith, in qualifications, education, and experience. The Union notes that following a structured interview of each applicant, David Smith was selected as the superior candidate in qualifications, education, and experience, and the Union asks how this could have occurred

without a violation of the parties' Agreement.

The Union claims that the interviewers of the applicants are mistaken but the interviewers are not to be assigned fault because the system itself is defective. The Union contends that the structured interviews that were conducted were not in compliance with the Ohio Department of Administrative Services' test administration guidelines. The Union points to Attachment 1 in the Ohio Department of Administrative Services' test administration guidelines which is Appendix D, Rater Training Fact Sheet for a Structured Interview. The Union argues that the raters of the structured interviews in this case were not trained or provided a copy of the Ohio Department of Administrative Services' test administration guidelines, although these guidelines are available from the Ohio Department of Administrative Services' website.

The Union notes that the U. S. Office of Personnel Management in a guide issued by that office, Attachment 2, states that it is essential to train the persons who will administer the structured interview, and asserts that interviewer training increases the accuracy of the interview. This practical guide states that before or during training the interviewer should receive a guide describing the interview process in detail.

The Union notes that during the structured interview no follow up questions were put to the interviewees by the interviewers. Appendix D issued by the Ohio Department of Administrative Services in its test administration guidelines provides for follow up questions, describing them as useful tools in the interview process to clarify a candidate's answer. These guidelines state that by applying these guidelines an interviewer will be able to use follow up questions appropriately and consistently during an interview.

The Union notes that none of the interviewers asked follow up questions during the structured interviews. The Union claims that the point of an interview is to get information from

the interviewee needed to make an informed decision, "... not to just let the interviewee sit there and fail." See Union's post-hearing brief, page 2. The Union contends that an interviewee does not know if he is providing sufficient information to the interviewers.

The Union points out that a preponderance of evidence in the hearing record indicates that the interviewers did not compare their scores although the Ohio Department of Administrative Services' structured interview guidelines indicate that they should have compared their scores.

The Union points to the scoring key applied to the structured interviews. The first sentence for each rating refers to the type of response provided by the interviewee, whether detailed and comprehensive, far exceeds; comprehensive, exceeds; acceptable, meets; limited, marginal; or less than acceptable, limited. Also included as part of the scoring key is: "No response."

The Union contends that because of the brevity of the grievant's responses to the structured interview questions, the grievant was rated at the level of meets or marginal, that is, either at an acceptable response level or at a marginal response level. The Union claims that it is not until the reader encounters the second sentence in each scoring category that experience is considered, and the Union claims that the ratings of "far exceeds" and "exceeds" had already been eliminated from consideration because of the shortness of the answers provided by the grievant in his responses during the structured interview. The Union argues that by first eliminating the two highest scoring categories because of the shortness of the grievant's answers, when experience was considered the grievant showed himself far superior to his rival candidate but this consideration was eliminated from consideration, and therefore the higher ratings for the grievant's experience were diminished to a substantial degree by the categorization of the depth of Mr. Eley's answers.

The Union argues that the scoring key used for the structured interviews in this case violates the agreed language contained in Article 17, sections 17.05 and 17.06 by imposing a

different standard than qualifications, education, and experience. The Union does not claim this to have been an intentional violation, asserting that the contractual breach in this regard can be easily fixed by rearranging sentences in the scoring key's present configuration.

As to the claim from the interviewers that the grievant's statement about possessing thirteen years of experience in filling the position at issue was meaningless without greater explanation and definition from the grievant, the Union argues that this is nothing but a ruse raised in an attempt to cover up what is otherwise known to be true. As stated at pages 4 – 5 of the Union's post-hearing brief:

... We all share the understanding that actually performing the specific job previously is the best measure of potential success in hiring processes. It is a long-standing principle that is enshrined universally. Employment advertisements ask for and require experience. The trades have used years of experience to move from Apprentice to Journeyman to Master for centuries. When someone says they have been an electrician for 20 years, you know what that means. You don't ask them to explain how to install a power outlet. The concept of time and classification is also enshrined throughout the State of Ohio employment laws and rules. Only one applicant, Gary Eley, is actually certified under Ohio Civil Service Law as a Motor Carrier Enforcement Inspector. The four subject matter experts who performed these interviews knew exactly what Gary Eley had done for thirteen years.

The Union points to two arbitration decisions, one of which was issued by the undersigned. In that case the arbitrator found that a dispute between the parties about how a scoring system was applied to the grievant raised an issue within the scope of the authority of the arbitrator under the parties' collective bargaining agreement.

In the other arbitration decision arbitrator Harry Graham found that the grievant had possessed superior experience than that possessed by the successful bidder.

The Union argues that the procedural errors made during the interview process invalidated the interviews. The Union claims that the grievant was never truly interviewed. This failure on the part of the Employer, argues the Union, is due to a lack of training and is not the fault of the

grievant.

The Union reminds the arbitrator in the case herein that the grievant is a thirty-one (31) year employee of the State of Ohio with almost thirteen (13) years of experience serving as a Motor Carrier Enforcement Inspector. The Union contends that the experience, qualifications, and education possessed by the grievant are vastly superior to the experience, qualifications, and education offered by the selected bidder, Mr. Smith, a seven (7) year employee as a Motor Vehicle Inspector with thirty-one (31) years of experience as a motor vehicle mechanic.

The Union urges the arbitrator to sustain the grievance in its entirety and direct that the posted position be awarded to the grievant, Gary Eley, with appropriate back pay, benefits, and training. The Union asks the arbitrator to retain jurisdiction over his award for six (6) months to assure proper execution of the award.

Position of the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol,
Employer

The Employer notes that due to the nature of the dispute between the parties in this case, a matter of contract interpretation, the Union must bear the burden of proof.

The Employer refers to language in Article 17, section 17.05, Selection that includes the following:

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, and education and active disciplinary record. For purposes of this Article, disciplinary records shall not include oral or written reprimands. When these factors are substantially equal State seniority shall be the determining factor.

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Selection devices (e.g. structured interview, written test, physical ability, etc.) may be used at the discretion of the Agency.

The Employer points out that the evidence in the hearing record indicates a structured interview was the selection device applied by the Employer in the case of the posted Motor Carrier Enforcement Inspector position for which Mr. Eley and Mr. Smith had applied. The structured interview was comprised of interview questions put to the applicants to demonstrate the most qualified applicant for the position. The Employer points out that the structured interview used was developed through a job analysis method and had been designed to assess whether the candidates had the knowledge, skills, and abilities that are required for the position to be filled. Each structured interview resulted in a score indicating how well the applicants demonstrated proficiency in the minimum qualifications of the position. The Employer emphasizes that the Employer exercised its right, expressed in Article 17, section 17.05, to interview the candidates for the posted position, based on the pay range assigned to the posted position, pay range twenty-nine (29).

The Employer recalls the testimony from Dr. Theresa Martelli provided at the arbitration hearing. In her testimony Dr. Martelli noted that the job analysis utilized in the case of the Motor Carrier Enforcement Inspector position is grounded in Western Region Intergovernmental Personnel Assessment Council (WRIPAC) methodologies to determine the critical tasks and associated knowledge, skills, and abilities of the position under review. The Employer recalls Dr. Martelli's testimony in which she described the Content Validation Summary Screening Tool, Employer's Exhibit 1 that outlines the job analysis and assigns points to critical areas of the interview. Dr. Martelli's testimony is recalled to the effect that the purpose of the assessment tool is to rate the candidates, and Dr. Martelli stated that those who provide more detail in their answers appropriately receive higher scores.

The Employer recalls that Dr. Martelli stated in her testimony at the arbitration hearing that

the structured interview for each candidate was viewed by Dr. Martelli's staff using a statistical analysis method known as Inter-Rater Reliability. This analysis measures the degree of agreement among raters and provides a score reflecting how consistent the ratings given were by the interviewers. Dr. Martelli described a perfect reliability score as plus one (+1.0) and described an opposite score reflecting an absence of consistency as minus one (-1.0). The Employer recalls that Dr. Martelli stated that in the case of the posted Motor Carrier Enforcement Inspector position the interview panel's Inter-Rater Reliability score had been + .96.

The Employer argues that a preponderance of evidence in the hearing record from a variety of witnesses described the grievant as having failed to adequately articulate information requested during the structured interview. The Employer argues that the Union would have the arbitrator believe it is the interviewer's responsibility to interpret the candidate's meaning in his or her responses when, in fact, argues the Employer, it is the interviewee's responsibility to convey the information to the interviewer. In this regard the Employer recalls a question put to each of the candidates requesting a description of public relations skills and how such skills could be used to enhance the public image of the Ohio State Highway Patrol. The Employer claims that the grievant's response had been ambiguous and lacking in detail, referring only to the fact that he had dealt with the public in the past but provided no information as to how his skills would enhance the public image of the Ohio State Highway Patrol. Mr. Smith provided a more detailed response, describing his experiences in dealing with drivers and members of the public, and described his attempts to be understanding and empathetic in each situation.

Another question directed to each applicant referred to working under adverse conditions and requested information about past experiences in performing under adverse conditions. The Employer claims the grievant was vague in his response, stating that he had previously worked as

a Motor Carrier Enforcement Inspector in all kinds of weather. Mr. Smith provided specific examples of safety measures he had used to ensure that tasks were completed, ensuring that vehicles were at a safe location away from the road and making himself aware of the weather conditions when going out on the road.

The Employer points out that in addition to the content portion of each question of the structured interview there was also a separate element that was graded for communication. Dr. Martelli noted that the communication competency in the job analysis screening tool assigned twenty percent (20%) of the overall score to this factor. The Employer claims that because communication is such an important component of the position in question, it was evenly divided among the interview questions. By providing limited responses, argues the Employer, the grievant's communication rating was directly and significantly affected.

The Employer contends that the cause of the grievant's poor performance during the structured interview was his lack of communication, his inability to successfully articulate responses, and his inability to fully answer questions put to him during the structured interview. At the arbitration hearing the Employer recalls the grievant saying: "... Had I known then what I know now I would have answered the questions differently." The Employer argues that this is an acknowledgment by the grievant that his minimal responses during the structured interview resulted in minimal scoring.

The Employer points out that the grievant's prior disciplinary record played no part in the outcome of the selection process at issue in this proceeding. The Employer claims that the reason for scoring the grievant lower than the selected candidate, Mr. Smith, was grounded solely in the grievant's lack of detail and failure to articulate his responses. The Employer notes that the grievant's employment was reinstated effective November 17, 2009 and Mr. Eley had been

promoted to a Driver's License Examiner 1 on November 20, 2011 and then subsequently laterally transferred to his current position in the Licensing and Commercial Standards Unit. The Employer argues there is no indication of any bias or prejudice based upon prior discipline involving Mr. Eley.

The Employer recalls the testimony Motor Carrier Enforcement Manager James Feddern, a member of the structured interview panel who testified at the arbitration hearing herein: "The Employee needs to be specific, articulate in their interview. It makes for an even playing field." The Employer believes this statement to be at the heart of this matter and notes that at no time did the Employer anticipate or infer meaning in the grievant's responses to the questions put to him, for to do so, argues the Employer, would produce a playing field that was not even. The Employer contends that the language of Article 17, section 17.05 is intended to even the playing field and to afford an opportunity to all bargaining unit employees to demonstrate how he/she rates in terms of qualifications, experience, and education. The Employer notes that the structured interviews comprised the mechanism that measured those qualities for the posted MCEI position, and the power to use a selection device to measure applicants is specifically and expressly granted to the Employer by language in Article 17, section 17.06 of the parties' Agreement.

The Employer points out that if the position that had been posted had been assigned a pay range of twenty-seven (27) or less the posting would have been awarded based on bargaining unit seniority. Because the position in question is assigned a pay range of twenty-nine (29), a pay range higher than pay range twenty-seven (27), Article 17 directs the Employer to award the position on the basis of qualifications, experience, and education. To this end the parties' Agreement vests in the Employer the right to use a selection device that may be a structured interview in rating the candidates.

The Employer argues that the issue in this case is whether the Employer has the right to select a candidate with less seniority due to the candidates' performance during a structured interview. The Employer claims that during the arbitration hearing the Union did not challenge the legitimacy or validity of the structured interviews, and the Employer points out that the structured interviews were produced using well-established methods to insure that questions related to the position in question and were administered uniformly among the candidates.

The Employer points out that the grievant had been aware that he had not performed well in articulating responses during the structured interview. The Employer claims that the Union has failed to show how the grievant demonstrated superior qualifications, education, and experience compared to the successful bidder, Mr. Smith, when the testimony from all four of the interviewers at the structured interview confirmed at the arbitration hearing that the grievant had failed to provide adequate responses to the questions posed. The Employer reiterates that the burden of proof must be borne by the Union in this case if the Union is to prevail. The Employer argues that the Union has fallen short of carrying that burden of proof and therefore the grievance should be denied in its entirety.

The Employer concludes its post-hearing arguments with the following:

Should this grievance be granted, it would undermine the intent of the Collective Bargaining Agreement which is to award the position to the employee based on their ability to demonstrate how he/she is the best candidate for the position. To grant the grievance would be unfair to the less-senior bargaining unit employees who have prepared and performed well on the assessments.

Accordingly, the Employer requests the Arbitrator deny this grievance in its entirety.

DISCUSSION

Because the position at issue in this proceeding, Motor Carrier Enforcement Inspector is assigned to pay range 29 the requirements expressed in Article 17, section 17.05 apply. Article 17, section 17.05 – Selection includes the following language: “... the job shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, education, and active disciplinary record.” Both applicants, David S. Smith and Gary L. Eley, were determined to meet the minimum qualifications necessary to filling an MCEI position. Neither applicant presented an active disciplinary record. The remaining factors enumerated in Article 17, section 17.05 are qualifications, experience, and education.

Article 17, section 17.05 also presents the following language: “Selection devices (e.g. structured interview, written test, physical ability, etc.) may be used at the discretion of the Agency.”

Article 17, section 17.06 – Selection Devices/Proficiency Instruments/Assessments begins with the following sentence: “The Employer may use selection devices, proficiency testing and/or assessments to determine if an applicant meets minimum qualifications and, if applicable, to rate applicants pursuant to Section 17.05.”

As can be seen from the express language presented within Article 17, sections 17.05 and 17.06 a structured interview may be used at the discretion of the Employer as a selection device. Under the express language of Article 17, section 17.06 that selection device may be used to rate applicants as authorized by language presented in Article 17, section 17.05. There is no ambiguity about the Employer’s authority to use a structured interview as a selection device so long as the selection device is applied fairly and uniformly to all applicants and the selection device reasonably relates to the position to be filled.

Beyond determining minimum qualifications and whether an active disciplinary record is presented, the factors to be assessed in selecting an applicant for the position in question under Article 17 are experience, qualifications, and education. The hearing record does not reflect the difference in education between the applicants nor does the hearing record reflect that any difference in education was a significant factor in making the selection. Experience was a significant differentiating factor within the selection process as expressly agreed in the language of Article 17, sections 17.05 and 17.06.

The hearing record contains credible evidence substantiating the grievant's work experience as a Motor Carrier Enforcement Inspector from 1997 through 2009, a period of thirteen years.¹ There is nothing in the hearing record to indicate that Mr. Eley's service as a Motor Carrier Enforcement Inspector had been less than satisfactory during those years. The hearing record reflects that Mr. Smith's experience included service as a motor vehicle mechanic but did not include service as a Motor Carrier Enforcement Inspector. These circumstances were known to the Employer at the time of the structured interviews on December 9, 2016.

The Union contends that the disparity between the two applicants in their work experience as it relates to the position to be filled clearly favors the grievant, and the Union argues that this substantial difference between the candidates should be found to be dispositive in sustaining the grievance herein and directing that the position under review be filled by the grievant, Mr. Eley.

The Union does not contest the express language in Article 17, sections 17.05 and 17.06 authorizing the Employer, at the Employer's discretion, to apply a selection device, including a structured interview, to rate applicants. The Union argues that while the grievant's responses to

¹ Mr. Eley served in a position classified PUCO Transportation Investigator from August 5, 1996 until a lateral transfer to an MCEI position in July 1997. Because of the lateral nature of the transfer, presumably there was some overlap in duties between these two positions.

the questions posed during the structured interview may not have been as florid as Mr. Smith's responses to the same questions, the Union reminds the arbitrator that the parties' collective bargaining agreement refers to qualifications, experience, education, and active discipline as differentiating selection factors and makes no reference to how well an interviewee performs during the interview. The Union argues that to penalize the grievant in this case because his communication style is different, more reserved, more focused than that of the longer-winded Mr. Smith is unfair and uncalled for because although less detailed than Mr. Smith's responses, the responses from the grievant were nonetheless sufficient to substantiate the vast difference in work experience separating Mr. Eley from Mr. Smith in relation to the position to be filled, Motor Carrier Enforcement Inspector. The Union argues that the grievant may not be critiqued as if performing on a stage but rather is entitled to have his interview substantiate his claim of possessing far greater experience in the position to be filled than Mr. Smith.

The express language of Article 17, sections 17.05 and 17.06 does not refer to how well an interviewee performs in terms of facility of speech, flowery rhetoric, or melodious and poetic allusions pleasing to the ear. The Union is correct that the grievant in this case is not required to entertain the interview panel and the Union emphasizes that the grievant is not to be rated on his abilities as an interviewee, rather the grievant is to be rated on "experience" as expressed in Article 17, section 17.05.

It should not be forgotten that there are four differentiating factors enumerated in Article 17, section 17.05 – education, experience, active discipline, and qualifications. The arbitrator presumes that the factor qualifications would include minimum qualifications, those qualifications that must be possessed to be eligible for further consideration in the selection process. The arbitrator does not, however, find the factor qualifications to be limited to minimum qualifications.

The express language of Article 17, section 17.05 requires a consideration of each of the factors, experience and qualifications among them.

The Employer is permitted by express language in the parties' Agreement to apply a selection device that may take the form of a structured interview, and the Employer may use such a selection device to rate applicants. The Union is correct that ultimately the question of experience is to be used to differentiate the applicants but the Employer is also correct that so long as the structured interview is consistent in its application to applicants and reasonably related to the position to be filled, such a selection device may be applied at the discretion of the Employer and used to determine the outcome of the selection process.

This is not to say that the theatricality of the interview performances are to determine how they are to be rated; this is to say that the grievant may be required to participate in the selection device, in this case a structured interview, and in so doing subject his bid on the posted position to the scoring system applied uniformly to both applicants, based on the responses from the applicants to the same questions that comprised the structured interview so as to calculate for each applicant an averaged and totaled score. The grievant was not required to perform as an actor on a stage but the grievant was required to participate in the structured interview, as express language in the parties' Agreement makes clear. The grievant responded to the same questions posed to the other applicant, before the same four interviewers who rated the responses of both applicants, applying the same scoring system to both applicants. The scores assigned by the interviewers to the responses from the applicants were averaged, totaled, and compared.

The structured interview of the applicants included questions about work experience. The questions put to the applicants also included inquiries about the responsibilities of the position to be filled under the Motor Carrier Enforcement Inspector classification specification in its present

form. Also asked was how past work related to the job responsibilities of the MCEI position. These questions were related to the particular job duties of the position to be filled, were posed in identical form to each of the applicants, and produced in the case of Mr. Smith a lengthy and detailed description of his work history and a description of his understanding of how his work history related to the job responsibilities of a Motor Carrier Enforcement Inspector. In contrast to Mr. Smith's responses, the responses from Mr. Eley were limited in most cases to: "I've done the job before."

The responses from the two applicants to each of the ten questions of the structured interview were scored for content as it related to experience and education, but also for communication ability, a qualification that applies especially acutely in interactions with members of the public while on duty. Such a qualification in this area does not appear to the arbitrator to be outside of the factors to be considered in making a selection under Article 17, sections 17.05 and 17.06.

The grievant determined how he wished to answer the questions put to him during the structured interview. The responses provided by Mr. Eley were wholly determined by Mr. Eley. For whatever reason, Mr. Eley chose not to provide details of his past work history and his knowledge of the job duties of the MCEI position to be filled. Mr. Eley limited his responses to a reference to Mr. Eley's past experience as an MCEI for thirteen years. Mr. Eley's responses were wholly voluntary and within Mr. Eley's discretion. Mr. Eley's responses were graded, averaged, and totaled.

The arbitrator does not find in the hearing record evidence of bias or inconsistency in the application of the structured interview to the applicants on December 9, 2016. The same ten questions were put to each applicant; the same four-person interview panel observed and rated the

responses to the questions from the applicants, and the scores assigned were averaged, totaled, and compared under the same scoring system, with Mr. Smith's point total exceeding Mr. Eley's point total. The variances identified by the Union in its post-hearing brief from the Ohio Department of Administrative Services' administrative test guidelines, including a Rater Training Fact Sheet for a Structured Interview, and interview guidelines issued by the United States Office of Personnel Management do not persuade the arbitrator that the structured interviews as applied were illegitimate or invalid. The Employer's discretion in applying a selection device, including a structured interview, allows the differences identified by the Union. Without evidence of some internal inconsistency or bias, the arbitrator finds no reason to invalidate the results of the selection device applied by the Employer.

The arbitrator finds the Employer possessed the authority under express language in the parties' collective bargaining agreement to apply a selection device in the form of a structured interview to determine the selection of the applicant for the posted Motor Carrier Enforcement Inspector position. Having shown the Employer's authority for the application of such a selection device, and having shown that such a selection device was applied, the Union was afforded an opportunity to substantiate by a preponderance of evidence the unfair or biased nature of the selection device, or the lack of uniformity in applying the selection device, or a lack of consistency in scoring under the selection device. The arbitrator does not find a preponderance of evidence disqualifying the structured interview, the selection device applied by the Employer, as having been unfairly applied or applied with bias or applied inconsistently between the applicants. The arbitrator also finds that differentiating factors expressed in Article 17, section 17.05 to be used in making the selection – experience, education, qualifications, and active discipline, were appropriately considered and applied through the application of the selection device.

In the absence of such invalidating evidence the arbitrator declines to grant the grievance, finding no proven violation of the parties' collective bargaining agreement.

AWARD

1. The grievance at issue in this proceeding is arbitrable and properly before the arbitrator for review and resolution.
2. The selection device applied to the selection process in this case was neither internally inconsistent nor disconnected from the duties of the position to be filled.
3. The selection device applied by the Employer was within the discretion of the Employer under Article 17, sections 17.05 and 17.06.
4. The Employer did not violate Article 17 of the parties' Collective Bargaining Agreement when it filled a Motor Carrier Enforcement Inspector position (PCN20063518).
5. The grievance is denied.

Howard D. Silver

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June 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Department of Public Safety, Division of the Ohio State Highway Patrol, the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, the Union, was served electronically upon the following this 4th day of June, 2018:

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