#707A

REVIEWED BY

AUG 28 2001

GRIEVANCE COORDINATOR

In the Matter of Arbitration	
Between	Case Number:
OCSEA/AFSCME Local 11	14-00-(990106)-0002-01-14
and	Before: Harry Graham
The State of Ohio, Department of Health	

APPEARANCES: For OCSEA/AFSCME Local 11:

Brenda Goheen
Staff Representative

For The State of Ohio:

Chris R. Keppler
Labor Relations Officer

INTRODUCTION: Pursuant to the procedures of the parties this dispute came to be submitted via briefs for arbitration. It arose from a prior dispute determined by this Arbitrator in 1999. That proceeding involved the failure of the Employer to grant an interview to the Grievant, Bridget Edwards, for the vacant position of Fiscal Specialist 2 and the failure of the Employer to award Ms. Edwards the vacancy. In my decision I determined that complete resolution of the dispute before me was to be held in abeyance. That was due to the fact that Ms. Edwards had pending, but unresolved, disciplines on her record. I continued to hold that if Ms. Edwards' disciplines were reduced or removed from her record that she should be

interviewed for the Fiscal Specialist 2 position. I also indicated that were she interviewed and not awarded the position, the burden would rest with the Employer to demonstrate why that had not occurred. Finally, I retained jurisdiction over this dispute pending the outcome of the grievances involving Ms. Edwards' disciplines. My decision was dated November 23, 1999.

On June 14, 2000 the Union and the Employer resolved a three-day suspension of the Grievant that had been grieved. It was reduced to a one day suspension. In compliance with the terms of my award Ms. Edwards was interviewed for the Fiscal Specialist 2 position. She was not awarded it as set forth to her in a letter from the Employer dated November 17, 2000. On April 11, 2001 the Employer was notified by the Union of its intent to again challenge the non-selection of Ms. Edwards for the vacancy. It is that challenge that is under review in this proceeding.

POSITION OF THE UNION: As the Union recites the record in this matter the parties at arbitration before me in November, 1999 agreed that the State would withdraw reliance upon Ms. Edwards' disciplines. In my decision, I gave her disciplinary record weight. This should not have occurred in the Union's view.

Were it to be the case that Ms. Edwards' record of

discipline is considered, the fact is that she presently has a one-day suspension in her file. As noted above, that represents a reduction from the prior three-day suspension on her record when I heard dispute over Ms. Edwards' non-selection in 1999. When in my decision I evaluated the qualifications of Ms. Edwards and the choice of the Employer, Jacqueline Dennis, I determined that Ms. Dennis' application did "not show her to be superior" to that of Ms. Edwards. (p. 8). As that is the case, the Employer must demonstrate that the various disciplines on Ms. Edwards' record are sufficient to overcome her greater seniority than Ms. Dennis and her obvious qualifications for the vacancy.

This dispute involves Section 17.05 of the Agreement and a position in a pay range for which seniority becomes the relevant factor when "qualifications, experience and education" are "substantially equal." Taking into account Ms. Edwards' history of discipline, the fact remains that she is "substantially equal" to Ms. Dennis in the opinion of the Union. When her application was once again rejected the Employer asserted to contrary. It did not provide evidence in the Union's view. In my decision I found that Ms. Edwards brought to her application many instances of superiority to that of Ms. Dennis. As she now carries a one-day suspension and is otherwise superior to Ms. Dennis, she should be

awarded the position with attendant back pay and benefits the Union contends.

POSITION OF THE EMPLOYER: According to the Employer it complied in full with my November 23, 1999 decision. Ms. Edwards' discipline was reduced. She was interviewed. She was not awarded the position on November 17, 2000. It was not to April, 2001 that the Union again took up her cause. A delay of such magnitude is unreasonable in the Employer's opinion. In the grievance procedure of the parties the Union is permitted sixty days to appeal a grievance to arbitration. Its appeal in this instance was belated and should not be reached on its merits according to the State.

Should Ms. Edwards' appeal be reached, the Employer asserts it acted properly. Once again it relies upon Section 17.05 of the Agreement for support. As noted above, the disputed position is in a pay range for which the Employer must rely upon seniority when "qualifications, experience and education" are "substantially equal." Ms. Edwards is senior to Ms. Dennis. Her qualifications were not "substantially equal to those of Ms. Dennis in the State's opinion. In 1998 she was rated "below expectation" in four areas of her performance evaluation. Ms. Dennis was rated "above expectations" in five areas of her performance evaluation for the same year. Further, Ms. Edwards had five instances of

discipline between April, 1997 and November, 1998. Ms. Dennis had none. This renders her substantially unequal to Ms. Dennis. Thus, the grievance should be denied in its entirety according to the State.

DISCUSSION: That the Union took five months to advance Ms. Edwards appeal once again to arbitration is not considered by this Arbitrator sufficient ground to disqualify it. This dispute arose from another. Note that on page 11 of my award in 1999 I indicated that "The resolution of this dispute is held in abeyance." It remained in limbo. This controversy is not new, it is a continuation of the previous unresolved matter. Consequently, the Union is not bound by the provisions of the grievance procedure as found at Section 25.02 of the Agreement.

At page 9 of my previous decision I found that Ms. Edwards' then-current evaluation was poor. I further observed that an evaluation "is <u>part</u> of the 'qualifications' for the position." (p.9, emphasis supplied). Given Ms. Edwards' substantial qualifications for the vacant position I determined that her poor evaluation was insufficient to deny her an interview. In compliance with my award, an interview was held. Ms. Edwards was once-again denied the position.

There is, nonetheless, the record to consider. Ms. Dennis performance evaluation for 1998 is superior to that of

Ms. Edwards. The margin is not close. To the contrary, Ms. Edwards received four "below expectations" on her evaluation compared to the five "above expectations" given to Ms. Dennis. Performance evaluations are part of the decision-making mix in personnel decisions. In this situation they weigh against Ms. Edwards. They are not the sole consideration. Even taken together with the discipline on Ms. Edwards record, they must be evaluated against the standard set forth in the Agreement. To reiterate, that standard is one of "qualifications, experience and education." In the original decision (Nov. 23, 1999) the "qualifications, experience and education" of Ms. Edwards and Ms. Dennis were evaluated. Ms. Dennis has three years of coursework at a Liberian University. Ms. Edwards has two degrees from American Universities. I found her coursework superior to that of Ms. Dennis. (p.7). Ms. Edwards is superior to Ms. Dennis on the contractually mandated criteria of "education." Similarly, the record before me showed that Ms. Edwards experience was "superior" to that of Ms. Dennis. (p.7). Thus, on two of the criteria in the Agreement the Grievant must be ranked ahead of the person selected by the Employer. This is before any consideration is had of seniority, the determining factor in situations where "qualifications, experience and education" are "substantially equal." Those factors are not

substantially equal. Ms. Edwards is superior to Ms. Dennis under the terms of the Agreement. Were there rough equality between them, Ms. Edwards must carry the day by virtue of her seniority. Even rough equality is absent in this situation given the superior credentials of the Grievant on the contractually mandated criteria of education and experience.

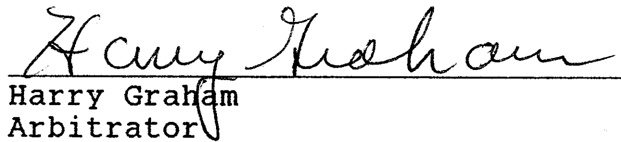
In essence, the Employer urges that Ms. Edwards failings in the area of evaluations and discipline, thus, her downgrade on the standard of "qualifications" are sufficient to disqualify her. For the reasons set forth above, that is incorrect. Further, the concept of "qualifications" is expansive. It includes not just discipline and evaluation, but also elements of education and experience. Ms. Dennis is not the proverbial ten and Ms. Edwards the proverbial zero in the area of qualifications. The situation is less clear-cut than that.

Were the position of the Employer to be sustained in this dispute the factors of "experience" and "education" to be evaluated in promotion decisions, would be read out of the Agreement. That cannot occur. Ms. Edwards is superior to Ms. Dennis on those contractually mandated standards. She is due the Fiscal Specialist 2 position even without reference to the factor of seniority.

AWARD: The grievance is sustained. The grievant is to be

awarded the Fiscal Specialist 2 position retroactive to the date it was originally awarded to Jacqueline Dennis. She is to be paid the difference in straight time wages between the amount she earned as a Fiscal Specialist 1 and the amount she would have earned as a Fiscal Specialist 2.

Signed and dated this 17th day of August, 2001 at Solon, OH.



Harry Graham
Arbitrator