

REGULAR REGIONAL ARBITRATION PANEL

To file
MANAGER, HUMAN RESOURCES
HAWKEYE DISTRICT 12/3

96 DEC -2 AM 10: 20

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

**AMERICAN POSTAL WORKERS
UNION, AFL-CIO**

GRIEVANT: M. Fenimore

POST OFFICE: Des Moines, IA

CASE NO.: I90C-4I-C 95052365

BEFORE: EDWIN H. BENN, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Sylvia Morris, Labor Relations Specialist

For the Union: Carl Casillas, National Business Agent

Place of Hearing: Des Moines, Iowa

Date of Hearing: October 23, 1996

Date of Award: November 23, 1996

Relevant Contract Provisions: Article 33.2

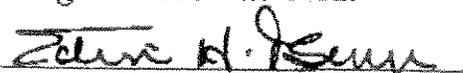
Contract Year: 1994

Type of Grievance: contract

GRIEVANCE & ARBITRATION
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Award Summary

The grievance is sustained. It was arbitrary for Management to conclude that under Article 33.2 there was an "appreciable difference" between Grievant and the junior employee awarded the Express Mail Technician position in dispute in this case. As a remedy, Grievant shall be awarded the Express Mail Technician position retroactive to the date the position was given to the junior employee and Grievant shall be made whole in all respects which shall include loss of any pay (including overtime) as a result of not working in that position. Grievant shall also be entitled to out of schedule pay for any differences in hours between the Express Mail Technician position and the positions Grievant has worked since 14 days before this grievance was filed.


Edwin H. Benn
Arbitrator

I. ISSUE

Did Management violate the Agreement when it failed to award the position of Express Mail Technician to Grievant Marilyn Fenimore? If so, what shall the remedy be?

II. FACTS

This dispute arises at the Des Moines, Iowa facility and concerns the awarding of a position to a junior employee.

Grievant, a PS-6 Consumer Affairs and Claims Clerk, has a seniority date of March, 1980. Jt. Exh. 11. Christina Mozena, a PS-6 Bulk Mail Technician, has a seniority date of March, 1987. Jt. Exh. 10.

By letter dated December 6, 1994, Management awarded a posted PS-6 Express Mail Technician (Relief & Pool) position to the junior Mozena over Grievant even though both scored 70 points as reflected on the Qualifications Rating Sheet for the position. Jt. Exhs. 6, 7, 12.

The Union grieved and a Step 1 settlement resulted in the appointment of a review committee. Jt. Exh. 17.¹ The review committee then examined the qualifications of the candidates.

In pertinent part, the Qualifications Rating Sheets for Grievant and Mozena revealed the following scores (Jt. Exhs. 8, 9):

<u>Knowledge, Skills, Abilities, Experience & Other Requirements</u>	<u>Grievant</u>	<u>Mozena</u>
1. Provides technical information to customers, affected units, and Postal employees.	3.7	4

¹ Aside from Grievant and Mozena, another employee, Robin Worley, was considered for the position. Jt. Exh. 15.

2. Responds directly, in writing or over the phone, to inquiries about service features.	5	4
3. Receives and processes customer inquiries and complaints; investigates causes of service failure and prepares written details. Provides follow-up contact to locate lost missent Express Mail shipments. Recommends changes as needed.	5	5
4. Provides other Express Mail Service offices with information relating to service commitment irregularities, proof of delivery receipts, verification of claims, customer irregularities, etc.	5	3
5. Reviews Express Mail service claims for postage refunds and merchandise/document reconstruction insurance.	5	5
6. Receives reports and data relating to International Express Mail Service and prepares International Express Office Report. May review dispatch and receipt manifest and initiate inquiries. May investigate and prepare replies for international inquiries and bulletins of verification.	3.5	3.2
7. Receives changes to routes; updates all records. files pertinent change information and notifies appropriate units.	3.2	5
8. Prepares required reports.	3	5
9. May provide technical guidance and oversee lower level employees.	4	3.5
10. Requisitions, receives, and stores supplies, material and equipment. Processes supply orders and maintains records.	4	4.5
11. Performs other job related tasks in support of primary duty.	4	5

An interview was conducted with Grievant receiving a score of 25.5 and Mozena receiving a score of 27.3. *Id.*

After appropriate weighting calculations were performed as required by Section 4 of the form, Grievant had a score of 82.6 and Mozena had a score of 85.82. *Id.*²

Human Resources Associate Janet Hiney served as the Chair of the review committee. When asked how Grievant and Mozena compared, Hiney answered "fairly close." When asked if she saw any noticeable differences between Grievant and Mozena, Hiney testified that as far as knowledge, skill and ability were concerned, Grievant and Mozena were "extremely close".

Mozena was again selected for the position. The selecting official, then Manager Postal Business Center Joyce Campbell Arnold, testified that after reviewing the results from the review board, the scores confirmed that Mozena was the best qualified candidate. Arnold also testified that Mozena was selected because of her strong HR skills. Arnold described Mozena as confident, responsive and enthusiastic. When asked if both Grievant and Mozena were qualified for the position, Arnold stated that they were. When asked for the differences were between the two candidates, Arnold responded that she was looking for responsiveness and communications skills which were vital critical factors in Mozena's favor.

This grievance followed.

III. DISCUSSION

Article 33.2 states as follows:

ARTICLE 33

PROMOTIONS

* * *

² The third candidate, Worley, achieved a score of 39.64. Jt. Exh. 16. Given the disparity in scores, the only two viable candidates were Mozena and Grievant.

Section 2. Craft Promotions

When an opportunity for promotion to a craft position exists in an installation, an announcement shall be posted on official bulletin boards soliciting applications from employees of the appropriate craft. Craft employees meeting the qualifications for the position shall be given first consideration. Qualifications shall include, but not be limited to, ability to perform the job, merit, experience, knowledge, and physical ability. When there are qualified applicants, the best qualified applicant shall be selected, however, if there is no appreciable difference in the qualifications of the best of the qualified applicants, and the Employer selects from among such applicants, seniority shall be the determining factor.

....

The question in this case is whether there was an "appreciable difference" between Mozena and Grievant that justified Management's selection of the junior Mozena over Grievant? I find there was not.

I must take into account Management's right under Article 3 "[t]o promote, ... [and] assign ... employees". That right is heavily factored into the determination under Article 33.2 concerning whether there is an "appreciable difference" between candidates. Because this case involves the exercise of a managerial prerogative in determining the existence of an "appreciable difference" between candidates, the real question in this case is whether Management's decision was arbitrary—*i.e.*, whether there is a "rational basis" for Management's determination that there was an "appreciable difference" between the junior employee Mozena and Grievant.³ I find there was no such "rational basis" for Management's determination and, thus, the managerial decision was arbitrary.

Putting aside the fact that the first time through the evaluation process, Grievant and Mozena had identical scores of 70 and yet the junior Mozena was

³ See generally, my award in C7C-4M-C 30920 (1994) and cases cited therein.

chosen, after the initial grievance was filed and settled, the second time through the process Grievant scored 82.6 and Mozena scored 85.82—a difference of 3.22 points amounting to a difference of less than 4%. Examination of the 11 categories set forth above on the Qualifications Rating Sheets for Grievant and Mozena shows the employees to be very similar, to say the least. If the interview scores are considered for Grievant and Mozena (25.5 and 27.3, respectively), the difference between the two candidates is only 2.3 points. Throw into the mix that the Chair of the review committee, HR Associate Hines, testified that Grievant and Mozena were “fairly close ... extremely close”, there is just no rational basis for Management to conclude that there was an “appreciable difference” in Mozena's favor.⁴ Because no rational basis existed, that decision was arbitrary.

Given the above, because it was arbitrary for Management to conclude that there was an “appreciable difference” between the Mozena and Grievant, under Article 33.2 seniority is therefore the governing factor. Because Grievant had seven years seniority over Mozena, the Express Mail Technician position should have been awarded to Grievant.⁵

⁴ “Appreciable” is defined as “considerable”. *The Random House Dictionary of the English Language* (2nd ed.).

⁵ At the hearing, the Service argued that Article 33 does not apply because no “promotion” was involved in this case (Grievant, a PS-6, sought the Express Mail Technician's position which was also a PS-6). That is new argument not raised during the handling of the grievance which cannot now be considered. See NC-E-11359 (Aaron, 1984) at 3-4:

It is now well settled that parties to an arbitration under a National Agreement between the Postal Service and a signatory Union are barred from introducing evidence or arguments not presented at preceding steps of the grievance procedure, and that this principle must be strictly observed. The reason for the rule is obvious: neither party should have to deal with evidence or argument presented for the first time in an arbitration hearing, which it has not previously con-

[footnote continued on next page]

As a remedy, Grievant shall be awarded the Express Mail Technician position retroactive to the date the position was given to Mozena and Grievant shall be made whole in all respects which shall include loss of any pay (including overtime) as a result of not working in that position. Grievant shall also be entitled to out of schedule pay for any differences in hours between the Express Mail Technician position and the positions Grievant has worked since 14 days before this grievance was filed.

IV. AWARD

The grievance is sustained. It was arbitrary for Management to conclude that under Article 33.2 there was an "appreciable difference" between Grievant and the junior employee awarded the Express Mail Technician position in dispute in this case. As a remedy, Grievant shall be awarded the Express Mail Technician position retroactive to the date the position was given to the junior employee and Grievant shall be made whole in all respects which shall include loss of any pay (including overtime) as a result of not working in that position. Grievant shall also be entitled to out of schedule pay for any differences in hours between the Express Mail Technician position and the positions Grievant has worked since 14 days before this grievance was filed.


Edwin H. Benn
Arbitrator

Dated: November 23, 1996

[continuation of footnote]

sidered and for which it has had no time to prepare rebuttal evidence and argument.

Indeed, a review of the grievance documents (Jt. Exh. 2) shows that the Service steadfastly maintained that it complied with Article 33.2 and never asserted that Article 33.2 was not applicable.



Sept. 94

American Postal Workers Union, AFL-CIO

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Jerome L. "Jerry" Martin
and
John Clark
National Business Agents
Chicago Region, Clerk Division

MAKE MANAGEMENT PAY

If they intentionally violate the National Agreement they should pay for it. Unfortunately we can't justify a monetary award in every remedy, but we always should if it's possible to do so. The remedy should always begin with the simple, obvious, and corrective language, but "make whole" and "out of schedule" pay should follow if involved.

I recently sent two arbitration decisions and a post hearing brief defining chances to obtain out of schedule pay for certain violations. The two decisions involved management not awarding a bid once it was posted, and abolishing a job that we proved was needed and still worked.

I have subsequently received two other decisions from two different Arbitrators that also have granted out of schedule pay for different reasons. One of the issues involves four years of higher level as well as out of schedule pay for the entire period, because the grievant should have been awarded the position as "best qualified".

The second case involves the improper posting of non consecutive days off when it could have and should have been posted as consecutive days off. These two decisions could total seven years of out of schedule pay depending on who gets the consecutive days off bid. The grand total of all four decisions could exceed \$250,000.00.

These kind of cases can't be won with a few minutes of effort, it takes hours, days, and even weeks of work to succeed because we have the burden of proof. If you have a good case in these areas, take the time, the results are worth it. In fact even more important than the money is getting management to do it right through fear of the money. I don't care what they say, money talks, and our stewards need to know that.

Post hearing briefs were filed with each of these cases. If you want copies of them or copies

National Executive Board

Moe Biller
President

William Burrus
Executive Vice President

Douglas C. Holbrook
Secretary-Treasurer

Thomas A. Neill
Industrial Relations Director

Kenneth D. Wilson
Director, Clerk Division

Thomas K. Freeman, Jr.
Director, Maintenance Division

Donald A. Ross
Director, MVS Division

George N. McKeithen
Director, SDM Division

Norman L. Steward
Director, Mail Handler Division

Regional Coordinators

James P. Williams
Central Region

Philip C. Fleming, Jr.
Eastern Region

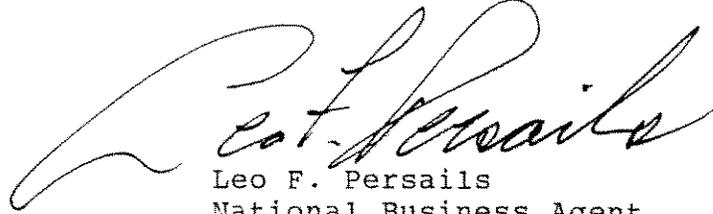
Elizabeth "Liz" Powell
Northeast Region

Archie Salisbury
Southern Region

Raydell R. Moore
Western Region

of the previous package please advise. The address is G-6193 Miller Rd., Suite 2, Swartz Creek, Michigan 48473, and the phone number is (810) 635-8033.

In Union Brotherhood,

A large, stylized handwritten signature in cursive script, reading "Leo F. Persails". The signature is written in black ink and is positioned to the left of the typed name.

Leo F. Persails
National Business Agent
Clerk Craft, Chicago Region

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS
UNION, AFL-CIO

GRIEVANT: P. Olds

POST OFFICE: Jackson, MI

CASE NO.: J90C-4J-C 91031281
C7C-4M-C 30920
(Promotion)

BEFORE: EDWIN H. BENN. Arbitrator

APPEARANCES:

For the U. S. Postal Service: Charles McAtee, Labor Relations Specialist

For the Union: Leo Persails, National Business Agent

Place of Hearing: Jackson, Michigan

Date of Hearing: July 19, 1992

Dates Briefs Received: July 29, 1994 (Service); August 12, 1994 (Union)

AWARD: The grievance is sustained. The evidence shows that the Service awarded a day shift Accounting Technician position to an employee with 10 years less seniority than Grievant even though there was only a one point difference between Grievant and the junior employee in one of nine rated categories on the Qualifications Rating Sheet for Best Qualified Positions as assessed by the Reviewing Committee (and only two points after weighting) and Grievant and the junior employee were similarly identical in eight of nine categories as assessed by the Selecting Officer. Nevertheless taking into account the due deference which must be given to Management's decisions, in this case it was arbitrary for the Service to conclude that there was an "appreciable difference" between Grievant and the junior employee under Article 33.2 so as to justify the awarding of the position to the junior employee. As a remedy, Grievant shall be entitled to the difference between what he earned and what he should have earned in the higher level Accounting Technician position for the period October 20, 1990 (the effective date of the awarding of the position to the junior employee) until February 19, 1994 (when the Accounting Technician position was reverted and Grievant assumed the successor position) as well as out of schedule pay for the period November 16, 1990 (when Grievant's former position was abolished) until February 19, 1994 for all days when Grievant had to work jobs with different hours than the day shift Accounting Technician position.



Edwin H. Benn
Arbitrator

Date of Award: September 4, 1994

I. ISSUE

Did the Service violate the Agreement when it did not award Grievant Philip Olds the best qualified position of Accounting Technician effective October 20, 1990? If so, what shall the remedy be?

II. FACTS

This dispute arises at the Jackson, Michigan facility and involves the awarding of a best qualified Accounting Technician position to an employee with 10 years less seniority than Grievant. The Accounting Technician's job in dispute was posted to accommodate the Electronic Time Clock system which was being installed at Jackson in 1990.

Effective October 20, 1990, the Service awarded the Accounting Technician Level 6 position (scheduled hours 0550 to 1400) to Martin Metheringham rather than Grievant. *See* Jt. Exh. 6. At that time, Grievant had been the Head Timekeeper at Jackson for nine years (scheduled hours 0600 to 1430—*see* U. Exh. 6) with a seniority date of April 8, 1968. Metheringham, who at the time held the position of General Clerk, Level 5, had a seniority date of June 17, 1978. *See* Jt. Exh 7.

As posted, the Accounting Technician Notice of Vacancy (Jt. Exh. 6) stated the duties:

MAJOR ASSIGNMENT: Computer input, and ability to maintain files of

required support documentation for the Electronic Time Clock system. Must perform these duties accurately, and independently.

MINOR ASSIGNMENT: Other duties as assigned within Administrative Finance unit.¹

To make the selections, the Service utilized the a Review Committee and a Selecting Officer. The Review Committee members were Acting Director of Finance Brown and Manager, Accounting and Budget James Schmalbach.² The Qualifications Rating Sheet for Best Qualified Positions (Form 1796) prepared by the Review Committee for Grievant and Metheringham (Jt.

¹ Delivery Retail Analyst James Hillen was responsible for implementation of the ETC system at Jackson. Hillen testified that he envisioned the Accounting Technician's job to be structured as 40% timekeeping responsibilities and 60% accounting functions. Metheringham testified that timekeeping responsibilities in the position consumed between two and four hours per day, but those times varied. Acting Director of Finance Donna Brown similarly testified that the position was not established strictly for timekeeping responsibilities because there was not enough work for a full time timekeeper.

However, contrary to the testimony of Hillen, Metheringham and Brown, from the face of the posting, the major area of responsibility clearly appears to be a timekeeping function although under the ETC. The plain reading of the posting will have to govern this dispute. *See e.g.*, Article 37.3.F.12 ("Normally, the successful bidder shall work the duty assignment as posted ..."). *See also*, the Step 2 denial (Jt. Exh. 2) where the Service states that "[t]his [ETC] system required an Accounting Technician, PS-06, best qualified position be posted ..." thereby further indicating that the new ETC system and not additional accounting functions was the driving force for the posting.

² Brown testified at the hearing. Schmalbach did not.

Exhs. 12(a), 13(a) showed the following differences between the two candidates for "Knowledge, Skills, Abilities, Experience & Other Requirements" [with highlighted]:

GRIEVANT

Identification of Requirements	Points	Measurements Used
Ability to maintain records, and prepare reports	3	Timekeeper
Ability to interpret instructions	3	Timekeeper
Ability to perform basic arithmetic computations	3	Timekeeper
Ability to use office machines such as calculator, adding machine, or any other equipment as appropriate	3	Calculator/typewriter at P.O.
Experience in:		
1) accounting, payroll, accounting machine operating	3	Timekeeper
2) maintaining or examining records	3	Timekeeper
3) other related work which provides knowledge of specialized accounting	2	Timekeeper
Six (6) months specialized experience related to the accounting technician position	1	Timekeeper
Ability to work independently	3	Timekeeper

METHERINGHAM

Identification of Requirements	Points	Measurements Used
Ability to maintain records, and prepare reports	3	DSIS/CDSS at P.O. Reports for own business
Ability to interpret instructions	3	DSIS/CDSS at P.O. Runs own business ³
Ability to perform basic arithmetic computations	3	DSIS/CDSS at P.O. Runs own business
Ability to use office machines such as calculator, adding machine, or any other equipment as appropriate	3	Some computer experience calculator/typewriter P.O. & own business
Experience in:		
1) accounting, payroll, accounting machine operating	3	Own business Some P.O. timekeeping
2) maintaining or examining records	3	DSIS/CDSS Reports for own business
3) other related work which provides knowledge of specialized accounting	2	Own business
Six (6) months specialized experience related to the accounting technician position	2	Runs own business
Ability to work independently	3	Runs own business

³ Metheringham had a batting cage business.

Then Supervisor Administration (and now Postmaster) Marla Gil was the Selecting Officer. Gil chose Metheringham over Grievant. Gil testified that in making the selection she used the Qualification Standards, the Form 991s, the Review Committee's scores on the Form 1796s, the employees' official

folders, their attendance records and further spoke with supervisors.

Gil completed her own set of Form 1796s for the Metheringham and Grievant (Jt. Exh. 12(b) and 13(b)) summarizing her assessments of the candidates which show the following [again, with differences highlighted]:

GRIEVANT

Identification of Requirements	Demonstration	Measurements Used
Ability to maintain records, and prepare reports	yes	timekeeping
Ability to interpret instructions	yes	
Ability to perform basic arithmetic computations	yes	
Ability to use office machines such as calculator, adding machine, or any other equipment as appropriate	yes	calculator in timekeeping
Experience in:		
1) accounting, payroll, accounting machine operating	yes	
2) maintaining or examining records	yes	
3) other related work which provides knowledge of specialized accounting	no	
Six (6) months specialized experience related to the accounting technician position	yes	timekeeping
Ability to work independently	yes	

METHERINGHAM

Identification of Requirements	Demonstration	Measurements Used
Ability to maintain records, and prepare reports	yes	DSIS/CSMDS
Ability to interpret instructions	yes	
Ability to perform basic arithmetic computations	yes	
Ability to use office machines such as calculator, adding machine, or any other equipment as appropriate	yes	
Experience in:		
1) accounting, payroll, accounting machine operating	yes	Own business/annex responsibilities
2) maintaining or examining records	yes	
3) other related work which provides knowledge of specialized accounting	yes	
Six (6) months specialized experience related to the accounting technician position	yes	
Ability to work independently	yes	

On Grievant's Form 1796 prepared by Gil (Jt. Exh. 12(b)). Gil further stated that Grievant's "attendance" was "poor - improving to fair" and his "attention to detail" was "poor - timekeeping errors-repeatedly". However, Gil testified that Grievant was not disciplined for attendance problems at that time. Nor was Grievant disciplined for allegedly making errors.

Metheringham's Form 1796 prepared by Gil (Jt. Exh. 13(b)) has the comments by Gil that Metheringham's "attendance" was "good" and that for "accuracy/attention to detail, Metheringham was "more responsible than Carrier supv. [I]f given job will complete. [E]xtensive use of computers-very accurate per W Callagh."

Gil testified that she selected Metheringham over Grievant because Metheringham had a good amount of computer knowledge, good attendance. Metheringham's supervisor spoke highly of Metheringham, Metheringham had more responsibility than some supervisors and he paid close attention to detail. With respect to Grievant, Gil testified that Grievant's attendance was "improving". Grievant could "do the job", but did not go out of his way to find other things to do, and Grievant worked independently "some of the time".

By letter dated October 19, 1990 (U. Exh. 1), Grievant's position was abol-

ished effective November 16, 1990. Grievant was then reassigned from days to nights (10:30 p.m. to 7:00 a.m.). Effective February 19, 1994 Grievant bid into a Level 5 Clerk's position with hours of 0600 to 1450. See U. Exh. 2. According to the Union, that position (ETC Timekeeper) replaced the Level 6 Accounting Technician's position held by Metheringham which was reverted as Metheringham was promoted into supervision.

III. DISCUSSION

A. The Merits

In relevant part, Article 33.2 states:

Section 2. Craft Promotions

When an opportunity for promotion to a craft position exists in an installation, an announcement shall be posted on official bulletin boards soliciting applications from employees of the appropriate craft. Craft employees meeting the qualifications for the position shall be given first consideration. Qualifications shall include, but not be limited to, ability to perform the job, merit, experience, knowledge, and physical ability. Where there are qualified applicants, the best qualified applicant shall be selected; however, if there is no appreciable difference in the qualifications of the best of the qualified applicants and the Employer selects from such applicants, seniority shall be the determining factor.

....

For purposes of this dispute, the key phrase is "... if there is no appreciable difference in the qualifications of the best of the qualified applicants and the Employer selects from such applicants, seniority shall be the determining factor."

The specific question in this case is whether there was an "appreciable difference" between the junior employee Metheringham and Grievant. If so, Grievant's ten years greater seniority did not warrant the awarding of the Accountant Technician position to Grievant.

Based on the evidence utilized by the Service at the time of the selection, I find no "appreciable difference" existed between Metheringham and Grievant so as to justify the Service's awarding the Accounting Technician's position to Metheringham.

Article 3.1(B) states the Service's managerial prerogatives "[t]o ... promote, ... [and] assign ... employees" Therefore, determining whether there was an "appreciable difference" between Metheringham and Grievant was a managerial determination on the part of the Service. As such, due deference must be given to that determination.

But, managerial determinations are not unfettered rights possessed by the Service which are immune from review. In my capacity as an arbitrator, it is not my function to second guess Management's determinations or to substitute my judgment for that of the Service. Article 3 makes it clear that the Service has great latitude in running its business—Management runs its business and not the Union or an arbitrator.

However, while Management decisions are not subject to arbitral review on a *de novo* basis, those decisions are subject to scrutiny on the limited basis of determining whether the Service acted in an arbitrary fashion.⁴ To determine the existence of arbitrary conduct, the question is whether the action had a rational basis.⁵

⁴ See *A-W-1012* (Tobin, 1973) cited by the Service at 5-6:

... Under promotion clauses of this type Arbitrators have held that in order to avoid seniority considerations in promotion cases it is necessary for the most qualified candidate to be substantially superior with respect to qualifications relative to other candidates.

* * *

When the Employer selects the best qualified applicant, and his decision is challenged, he must be able to prove that the selectee was substantially better qualified, or in the alternative that senior candidates were not qualified. This burden requires the Employer to show that he followed prescribed selection procedures, and that his selection was neither arbitrary, capricious or discriminatory.

....

See also, Elkouri and Elkouri, *How Arbitration Works* (BNA, 4th ed.), 462:

Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the "sole judge" of a matter, management's action must not be arbitrary, capricious, or taken in bad faith.

Compare, cases cited by the Service *C4C-4A-C 6940* (Dobranski, 1986) at 8 ("A qualified applicant who is not selected for such position and who wishes to challenge the selection of another employee through the grievance process has the burden of establishing through clear and convincing evidence that a violation of the provision occurred."); *C1C-4H-C 29207* (Roumell, 1985) at 11 ("the Union must bear the burden of proving that the grievant is the best qualified of all applicants applying for the position.")

⁵ See *South Central Bell Telephone Co.*, 52

I can find no rational basis for the Service's determination in this case that there was an "appreciable difference" between Metheringham and Grievant so as to justify the Service's awarding the Accounting Technician's position to Metheringham.

First, Grievant and Metheringham were assessed and evaluated by Management pursuant to Section 525 of the EL-311 Handbook.⁶ The

LA 1104, 1109 (Platt, 1969) ("... [A]ction is arbitrary when it is without consideration and in disregard of facts and circumstances of a case, without rational basis, justification or excuse").

⁶ The EL-311 provisions state, in relevant part:

525 Selection Procedures

* * *

525.13 Best Qualified Positions. The qualifications of the eligible applicants are reviewed, compared, and ranked. Then, on the basis of total qualifications, the best qualified eligible is identified and selected.

* * *

525.23 Rating.

525.231 For each employee being considered, prepare a Form 1796, Qualifications Rating, listing all relevant qualifications

* * *

525.3 Ranking

525.31 Determining Factor. ... If the position is one to be filled by the best qualified applicant, the Forms 1796 must then be arranged in rank order and selection shall be made from among the best qualified candidates.

525.32 Method of Ranking. A recommended method of doing the final ranking is to ascribe numerical values to each of the columns in part C of the form. The values should be determined prior to the posting by mutual agreement among the personnel officer, the appointing officer, and the official responsible for the function to which the position is assigned. Extra weight

Qualifications Rating Sheets for Best Qualified Positions (Form 1796) numerically scored by the Reviewing Committee for Grievant and Metheringham (Jt. Exhs. 12(a) and 13(a)) show that both Grievant and Metheringham were rated as "Applicant is Qualified". *Id.* Further, Grievant and Metheringham had *identical* scores in eight of the nine rating categories. The *only* difference between Grievant and Metheringham in those ratings appeared in the "Six (6) months specialized experience related to the Accounting Technician Position" category where Grievant received a "1" and Metheringham received a "2". Each category can receive between a "1" and "5" rating and further given that there are nine categories, the total possible score is 45. Before weighting (which yielded a two point differential—*see* note 7, *infra*), Metheringham received a "25" and Grievant received a "24". Thus, in the scoring by the Review Committee, the differences between Metheringham and Grievant was minimal.

Second, notwithstanding the lack of difference exhibited by the Reviewing

should be given to the elements checked in column B. The values should be put in writing and become part of the documentation of the selection process. After all the elements for all the candidates have been evaluated, the numerical values previously established should be given for each mark in section C and the total computed. The candidates may then be ranked in order of score.

Committee, even though the Selecting Officer Gil testified to Metheringham's superior qualifications, her written summations of Metheringham and Grievant do not square with the differences she spoke of in her testimony. Examining the Form 1796s completed by Gil shows that in the rated categories, again, the two were *identical* in eight of the nine categories—they only differed in the category addressing "Experience in ... other related work".

Differences in Gil's written assessment appear in the narrative section with respect to attendance (with Metheringham rated as "good" and Grievant rated as "improving to fair") and in an area of "attention to detail" (with Metheringham doing better than Grievant). Giving the Service the benefit of the doubt that I should take into account those assessments (which areas of concern are not specifically listed in the "Knowledge, Skills, Abilities, Experience, & Other Requirements" on the Form 1796), the Service's position that these areas were of real concern with respect to Grievant is diminished by the fact that no discipline of record exists for Grievant in either of these additional areas relied upon by Gil. If Grievant was as lacking in these areas as testified by Gil, one would expect to see some record of discipline.

"Appreciable" is defined as "considerable". *The Random House*

Dictionary Of The English Language (2nd ed.). There is no "rational basis" exhibited by this record for me to conclude that the one point differential between Metheringham and Grievant as documented by the Reviewing Committee, the one area out of nine as documented by the Selecting Officer and the difference in the additional areas of attendance and attention to detail when no discipline of record exists for Grievant in that type of alleged difficulty amount to a "considerable" or "appreciable" difference between Metheringham and Grievant. See *E7C-2N-C 22036* (Berk, 1991) at 13 (a "one point difference is not an appreciable difference in this case"); *C4C-4B-C 19308* (Fletcher, 1990) at 9 ("While not tied, a mere three point difference, in a rating system fraught with subjectivity, had ought not be deemed an appreciable difference"); *C7C-4L-C 20148* (Fletcher, 1991) at 6 ("We question if a two point difference, in a 28 point rating system fraught with subjectivity, attempting to measure seven items ... is an appreciable difference, which may accurately be valued, estimated or measured, with sufficient certainty so as to override seniority as the determining factor.").⁷

⁷ Even if the Reviewing Committee's "Grand Total of Points" are considered for Grievant and Metheringham (Jt. Exhs. 12(a) and 13(a) at p. 3) and noting that for the line "Divide the total of points by the number of requirements assigned points to find the applicant's point average" the Reviewing Committee used 2.7 for Grievant and

Without an "appreciable difference", under Article 33.2 "seniority shall be the determining factor" for selection. Grievant had ten years greater seniority than Metheringham. Therefore, Grievant should have been awarded the Accounting Technician position over Metheringham. A violation of Article 33.2 has been shown.⁸

B. The Service's Arguments

The Service's strong arguments that Metheringham had better skills than Grievant (Service Brief at 2-8) do not change the result. Clearly, there were distinctions between Metheringham and Grievant. However, given the virtually *identical* scores achieved by Metheringham and Grievant as found by the Reviewing Committee and the basically similar evaluation by the Selecting Officer as shown by Jt. Exhs. 12 and 13, those distinctions are still without "appreciable difference."

Metheringham testified at the hearing. To say the least, Metheringham is a most impressive individual and is clearly an asset to the Service.⁹ But here, the Service

is really asking *me* to evaluate Metheringham and Grievant and compare the two. That is not my function. My function is to look at how *the Service* viewed the candidates at the time the job was bid and to consider the information relied upon by the Service giving due deference to Management's rights under Article 3 to assign and promote. Therefore, how I compared Metheringham and Grievant is wholly immaterial.¹⁰ The objective evidence before me shows that the Service compared the Metheringham and Grievant in nine specific categories and, with little exception, those comparisons found the two candidates to be virtually identical.¹¹

¹⁰ See *CIT-4E-C 13308* (McAllister, 1983) at 10 cited in *CIC-4H-C 29207*, *supra* at 15 ("How I view the applicant's ability and background is not germane. This is a management function").

¹¹ The Service's reliance upon *C4C-4F-C 15291* (Erbs, 1986) (a case where the applicants had the same numerical score on the Form 1796 and the selection of the junior employee was upheld) is not persuasive. In that award, the arbitrator stated at 7:

The Union interprets the even score on the Form 1796 for the Grievant and Dragin as meaning that there was "no appreciable difference" in the qualifications of the two and therefore the Grievant's seniority is the tie breaker. However, the Arbitrator is not convinced that the sole factor in determining the best qualified is the score on the Form 1796. If that were the case the language of the contract could clearly have spelled that out with particularity. It did not, but instead referred to qualifications and in this Arbitrator's opinion although the scores on the 1796 are certainly very important they are not the only item to be considered when

2.3 for Metheringham, the "Grand Total of Points" yields scores of 56 for Metheringham and 54 for Grievant. Again, those numbers do not support a rational basis for a conclusion that there was an "appreciable difference" between the two candidates.

⁸ Given the outcome on the merits, the Union's other arguments are moot.

⁹ As earlier noted, Metheringham is now in supervision.

C. The Remedy

The remedy in this case is not a continuing one. Because Grievant was awarded the ETC Timekeeper position on February 19, 1994 which replaced the reverted Accounting Technician position, the Union recognizes that the "claim

"qualifications" are assessed and/or reviewed.

Putting aside that the arbitrator did not discuss the ramifications of the selection procedures in the EL-311 which are set forth above at note 6 and which are incorporated into the Agreement under Article 19, the facts in that case are much different than this case. In that case, the position was that of an Accounting Technician working in areas of budget and cost control. *Id.* at 1. According to the arbitrator, at 8-9:

Here there is no showing that the Grievant ever performed even a major position of the duties of the Accounting Technician position. Although he has worked as PSD Technician this job description, and even the Grievant's admission, indicates that he spent much of his career in a timekeeping function. Even the time he spent in the Finance Section on special duty was spent in a timekeeping function. On the other hand although Dragin [the junior employee] had not worked in the accounting field for some period of time he has had more general accounting experience in a more directly related area. This factor plus his educational background clearly give him an edge in the qualifications.

Thus, in the case before Arbitrator Erbs, although rated equally on the Form 1796, the job sought by the senior employee was clearly one in which the senior employee had no prior experience. That is not true here. Grievant had been the Head Timekeeper for nine years. Although called an Accounting Technician, the new position was in great part the replacement of Grievant's prior job as it would apply "for the Electronic Time Clock system". See Jt. Exh. 6. When Metheringham performed timekeeping functions before the ETC was installed, he was trained by Grievant. C4C-4F-C 15291 is therefore clearly distinguishable on the facts.

would end on 2/19/94". See Union Brief at 27. Therefore, the remedy shall be as follows:

First, the Accounting Technician position was a Level 6 position. Grievant's position at the time the Accounting Technician position was awarded to Metheringham effective October 20, 1990 was a Level 5. See U. Exhs. 6, 7. Grievant is therefore entitled to the differential in pay between the two positions for the period October 20, 1990 through February 19, 1994.

Second, the Union also seeks out of schedule pay for Grievant. That request is granted. Grievant's Head Timekeeper position—a day position—was abolished effective November 16, 1990 (see U. Exh. 1). Immediately thereafter, Grievant had to work on the night shift. Because Grievant should have been awarded the day shift Accounting Technician position effective October 20, 1990, all time worked by Grievant on shifts different than the day shift after his transfer to the night shift on November 16, 1990 must be considered as working out of what his schedule should have been. Under the circumstances, out of schedule pay is warranted from November 16, 1990 until February 19, 1994 for all time worked by Grievant on jobs with different hours than the day

shift Accounting Technician's position.¹²

¹² See C7C-4L-C 20148, *supra* at 6; C7C-4B-C 21559 (Witney, 1990) at 27; S7C-3V-21592 (Alsher, 1990) at 9; C7C-4Q-C 31257 (Goldstein, 1994) at 32; C4C-4A-C 3644 *etc.* (Epstein, 1987) at 11. See also, Section 434.611 of the ELM ("Out of schedule premium is paid to eligible full-time bargaining-unit employees for time worked outside of, and instead of, their regularly scheduled workday or workweek when employees work on a temporary schedule at the request of management."); the Step 4 decision in EIC-3W-C 36184 (1986) ("Those employees who were not timely placed in bid jobs consistent with Article 37.3F(2) shall be paid out-of-schedule premium for the interim time between the award and actual placement.").

Given the length of time involved in this dispute (approximately three and one-half years), I fully appreciate the potential monetary significance of an award of out of schedule pay to Grievant. But, in this case, I have no basis or authority to change that result. In light of the virtual identical assessments of Grievant and Metherringham and Grievant's ten years of greater seniority and Grievant's nine years as Head Timekeeper, there really was *no* practical reason for failing to award the Accounting Technician position (which was essentially another time-keeping position) to Grievant in 1990. Parties must be held responsible for the consequences of their actions. Just as an employee in a removal case must be deemed responsible for the consequences of his or her conduct with respect to the effects that loss of a job can have on the employee and the employee's family, so too must the Service be held responsible for its actions which are found inconsistent with the Agreement. The Union has made much of the fact that although a general document production request was made during the handling of the grievance by Local Union President and Steward Carol Phelps, the Form 1796s were not produced by the Service until shortly before the hearing. Those documents turned out to be the determinative evidence in this matter against the Service's position. Perhaps had those documents been produced earlier in the process, much, if not all, of the potential monetary liability now facing the Service could have been avoided. But, in any event, I now have no authority to change the result because the consequences of the Service's actions may prove to be monetarily significant.

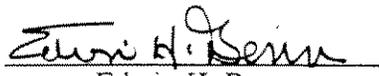
Grievant testified that during this period there were times when he was working on days,

IV. AWARD

The grievance is sustained. The evidence shows that the Service awarded a day shift Accounting Technician position to an employee with 10 years less seniority than Grievant even though there was only a one point difference between Grievant and the junior employee in one of nine rated categories on the Qualifications Rating Sheet for Best Qualified Positions as assessed by the Reviewing Committee (and only two points after weighting) and Grievant and the junior employee were similarly identical in eight of nine categories as assessed by the Selecting Officer. Nevertheless taking into account the due deference which must be given to Management's decisions, in this case it was arbitrary for the Service to conclude that there was an "appreciable difference" between Grievant and the junior employee under Article 33.2 so as to justify the awarding of the position to the junior employee. As a remedy, Grievant shall be entitled to the difference between what he earned and what he should have earned in the higher level Accounting Technician position for the period October 20, 1990 (the effective date of the awarding of the position to the junior employee) until

but he could not remember precisely when that was. It will therefore be for the parties in reconstructing Grievant's work record during the period in dispute to determine the precise amount of out of schedule pay due Grievant.

February 19, 1994 (when the Accounting Technician position was reverted and Grievant assumed the successor position) as well as out of schedule pay for the period November 16, 1990 (when Grievant's former position was abolished) until February 19, 1994 for all days when Grievant had to work jobs with different hours than the day shift Accounting Technician position.


Edwin H. Benn
Arbitrator

Dated: September 4, 1994