

BEFORE ARBITRATOR KATRINA I. BOEDECKER

In the matter of the arbitration)
of a dispute between:)
CLARK COUNTY,) ARBITRATION AWARD
Employer,)
and)
OFFICE AND PROFESSIONAL)
EMPLOYEES INTERNATIONAL UNION,)
LOCAL 11,)
Union.)
Melissa McLachlan Promotion
Grievance

Deputy Prosecuting Attorney Darryl D. Walker,
appeared on behalf of the employer.

Tedesco Law Group, by Katelyn S. Oldham, Attorney
at Law, appeared on behalf of the union.

JURISDICTION

The undersigned Arbitrator was notified on April 16, 2013, that she had been selected to hear a grievance regarding the challenge to the promotion of a bargaining unit member to the position of Senior Court Assistant over the grievant who has more seniority. The arbitration hearing was held September 6, 2013, in Vancouver, Washington.

The arbitration was conducted pursuant to the parties' June 14, 2012 through June 30, 2014 collective bargaining agreement. The parties submitted their post-hearing briefs to the Arbitrator by October 29, 2013.

STATEMENT OF THE ISSUES

The parties stipulated to the statement of the issues as:

1. Did the employer violate Article 8.3.3 of the parties' collective bargaining agreement when it hired Ashley Smith instead of Melissa McLachlan as Senior Court Assistant?
2. If so, what is the remedy?

The parties also stipulated that the matter was properly before the Arbitrator, since there were no procedural issues in dispute.

RELEVANT CONTRACT LANGUAGE**ARTICLE 8 - FILLING OF VACANCIES****8.3 Promotional Opportunities**

8.3.2 Employees may apply for open recruitments and will receive consideration if they meet all required qualifications. When the selection decision is between external and internal candidates and the knowledge, skills, and abilities of the candidates are substantially equal, preference shall be granted to internal candidates, first within the Department, then within the bargaining unit, then other internal candidates.

8.3.3 When the selection decision is between two (2) or more internal candidates within the bargaining unit who are entitled to preference under Section 8.3.2, bargaining unit seniority shall prevail where the qualifications, knowledge, skills and abilities of the candidates are substantially equal.

ARTICLE 22 - GRIEVANCE PROCEDURE

22.6 ... The arbitrator shall not have the power to add to, subtract from, or modify the provisions of this Agreement in arriving at a decision of the issue or issues presented, and shall confine his/her decision solely to

the interpretation, application, or enforcement of this Agreement. The arbitrator shall confine him/herself to the issues submitted for arbitration, and shall have no authority to determine any other issues not so submitted to him/her.

22.7 ... The losing party shall bear the fees and expenses of the arbitrator.

BACKGROUND

Melissa McLachlan was hired by Clark County for a full time position as the Washington State Support Registry Liaison in April, 1988. She promoted in the Clerk's Office through the positions of Customer Service Agent, Cashier, and then Court Assistant.

In 1999, McLachlan left her county employment to take a management job with a bail bonds agency. Her duties there included reporting to a board of directors; supervising a budget; hiring and firing staff; and handling the banking and accounting functions of the agency. She supervised up to nine employees.

In 2002, McLachlan returned to the Clark County Clerk's Office. She is currently a Judicial Proceedings Specialist. She is at the top pay step for the position. McLachlan is the most senior in the department.

In her current job as a Judicial Proceedings Specialist, McLachlan has routinely trained new hires and transfers. One of the employees that McLachlan trained was Ashley Smith, who later applied for the same promotional position as McLachlan.

Hiring Process

In September, 2012, County Chief Deputy Clerk Baine Wilson came to McLachlan to tell her that the incumbent Senior Court Assistant would be leaving. Wilson told McLachlan that the position should be "second nature" to her. Another supervisor encouraged Smith to apply. Smith had been with Clark County since April 2008; first as a Court Assistant I, then in November, 2008, she promoted to a Judicial Proceedings Specialist. Smith asked McLachlan to help train her for the Senior Court Assistant position; McLachlan did answer her questions. At the time of the hiring process, McLachlan had been doing arraignment duties for five years; Smith had been performing them for two months.

Human Resources Representative and Civil Service Examiner Leslie Harrington Smith posted the announcement for the open position of Senior Court Assistant in October, 2012. The position is the highest in the court assistant series. The position is a lead worker where the incumbent is to provide training, coordinate schedules and assign work to court clerks. Other duties include participating in the hiring process and conducting performance evaluations.

Harrington Smith reviewed the hiring process with Wilson. Both women thought it followed the normal process used to fill county jobs. The hiring process included: Submitting an application; passing a skills test; submitting a cover letter; passing a practical exam; and participating in a panel oral interview. Harrington Smith screened the applications and reviewed the interview questions. She asked McLachlan to explain the criminal court processes to her since she was unfamiliar with them.

The application included a two and one-half page "skills list." McLachlan showed years of experience or training in 76 of the skills listed. Smith listed 33 skills. For management experience, Smith reported that she had organized volunteers during a clothing drive while in college. Smith has never supervised any employees.

Nancy Campbell, a supervisor in the Clerk's Office, encouraged McLachlan to apply for the Senior Court Assistant position. She believed that McLachlan's skills and experience matched the position precisely. McLachlan did apply for the position. Based on the language of the collective bargaining agreement and past practice of how hiring occurred in the department, McLachlan believed that she would be given preference during the selection process because she had the most seniority.

The employer assessed each candidate's application, skills test and cover letter on a pass/fail basis. Of the seven candidates who took the practical exam, five passed. The scores were 88%, 83%, 85%, McLachlan scored 91%, and Smith scored 90%. The employer considered any candidate who received a 70% or higher on the practical exam to have passed.

Working Out of Class

For several shifts between October 1, 2012 and November 15, 2012, Wilson assigned McLachlan to work out of class as a Senior Court Assistant. She received out of class pay for performing above her Judicial Proceeding Specialist job. The parties' collective bargaining agreement directs that out of class pay will be earned only when 100% of the employee's shift is spent doing the higher level duties.

County Clerk Scott Weber complimented McLachlan on the job she did when she was assigned the out of class work. No one expressed any dissatisfaction with McLachlan's work when she performed the duties of a Senior Court Assistant.

The Panel Interview

The employer uses a booklet called *Recruitment Toolkit: A Guide for Clark County Hiring Managers*. The guide advises that it is important to make the candidate feel comfortable during an interview; the candidate should be welcomed and introduced to each panel member. The Guide also states that even though there are structured questions during the interview, "it may be necessary to follow the candidate's answer with a probing question to seek further information."

Wilson gathered most of the interview questions from the internet. The questions were designed to gain information about the candidate's leadership skills. The employer wanted a leader in the position that could move the department in a new direction. Wilson estimated that 70% of the Senior Court Assistant tasks are lead duties, while 30% involve data entry.

The interview panel for the Senior Court Assistant position had four members. Each panel member received an orientation guide and interview instructions. Each, also, was asked to sign a pledge that he or she would not be biased for or against any applicant.

At the start of her interview, McLachlan was told that the panelists would pretend that they knew nothing about her, her skills, or her past experience for the interview. The panelists took turns asking McLachlan questions. McLachlan felt uncomfortable during the interview. She did not sense that the

panelists were maintaining eye contact with her nor did they ask her follow up questions to her answers. She started making her answers shorter.

The employer used the applicants' scores from each interview panel member to rank the candidates.

One panelist was the best friend of an applicant, as well as being the Godparent to that applicant's child. That panelist rated that applicant in first place after the interview. McLachlan had hired a family friend of another panel member to do a construction job. The project did not turn out as McLachlan expected; it resulted in litigation. McLachlan and that panel member now had a strained relationship. A third panelist had encouraged Smith to apply; that panelist ranked Smith significantly higher than McLachlan. Wilson had first invited another person to be on the panel, but when that person disclosed that she would be in favor of McLachlan, Wilson withdrew the invitation.

McLachlan's score guides from her interview showed that she touched on the "anchor points" of each of the 18 scored questions. Union Business Representative Maureen Colvin reviewed the notes from the interview panelists during the processing of the grievance. She saw vastly different scores given to different candidates for the same noted answer. Additionally, one panelist gave an applicant a total score of 19.5 points, while another panelist gave that same candidate a score of 54 points.

Awarding the Promotion

Wilson ultimately decided to promote Ashley Smith to the Senior Court Assistant position. Smith had received top scores from each of the four panel members. The candidate who ranked in second

place had received two second place scores and one first place tie score. McLachlan was ranked third with no first place scores, one second place score, and three third place scores.

Wilson testified that the only time she would consider the seniority preference language in Article 8.3.3 when making a promotion decision would be if two candidates had the exact same, or nearly the same, score from the panel interview.

Wilson met with McLachlan on November 14, 2012 to inform her that she did not get the promotion. Wilson told McLachlan that she scored the highest on the written test of all of the applicants. Wilson acknowledged that McLachlan had the most experience of all of the applicants. Wilson expressed disappointment that McLachlan had not scored higher in the oral interviews. During this meeting, McLachlan learned for the first time that the panel interview was the only portion of the hiring process where the applicants were ranked against each other.

The union filed the grievance on November 14, 2012.

ANALYSIS

Burden of Proof

Since this is a non-disciplinary grievance, the union, as the grieving party, has the burden of proof to establish that the employer violated the language of their collective bargaining agreement. The employer finds this same proposition in *Nat'l Gypsum Co.*, 112 LA 248, (Nicholas, 1999) at page 255, "In matters of contract interpretation, the grieving party is saddled with the initial burden of proof." For a non-disciplinary grievance, I

require a "preponderance of the evidence" standard of proof. Under this standard, the union must establish that it is more likely than not that the factual events are as it asserts.

Requirements of the Contract Language

The language that the parties negotiated into Article 8.3.3 contains a seniority preference clause: "When the selection decision is between 2 or more internal candidates within the bargaining unit ..., bargaining unit seniority shall prevail where the qualifications, knowledge, skills and abilities of the candidates are substantially equal." There is nothing in the contract language that elevates the candidate's performance during the oral interview over the consideration of her "qualifications, knowledge, skills and abilities."

Seniority is a much cherished right of union members. Recognizing seniority in promotions ensures that a long term employee has a chance to advance to a higher classification so that she may continue to grow and develop while bringing her experience and knowledge of the department to the new job. A seniority preference clause curbs an employer's ability to make hiring decisions in an arbitrary manner. Recognition of seniority allows workers to gain job security rights based on length of service rather than favoritism. The employer's actions here jeopardized the seniority provision.

The employer's approach in this promotion, that it need only take seniority into consideration if two candidates score equally from the panel interview, is a departure from the plain language of Article 8.3.3. The employer contends that since McLachlan was ranked third from the oral interview, she was not a "substantially equal" candidate. I agree with the union's argument that one must

read the "substantially equal" language in conjunction with the entire contract Article. Thus, candidates are not to be measured in a vacuum with no other knowledge about them available to the panelists or to the hiring manager. Instead, all candidates' demonstrated and known qualifications, knowledge, skills and abilities must be considered. The employer's approach inappropriately isolates "substantially equal" from the rest of the language of the Article.

When the employer instructed the panel members to rank the candidates solely on the basis of each one's performance during the interview, it violated the contract. The contract language contemplates the candidates will have their qualifications, knowledge, skills, and abilities judged against each other. Only if the candidates are equal in those four areas, is the employer to turn to seniority as a tie breaker. Therefore, each of the four areas is to be judged. Each area is to be weighed and reviewed. The language contemplates an evaluation of actual, proven performance.

The employer asserts that its interview panel orientation guide requires that the panel members ignore all applicants' prior experience and demonstrated skills. The guidelines actually state: "Bias: preconceived judgment caused by past experience or teachings, usually based on insufficient knowledge. Keep an open mind." The caution is to avoid judgment based on "insufficient knowledge", not demonstrated abilities. The employer's interpretation of its guidelines conflicts with the language of Article 8.3.3; it negates all evidence of actual performance. If the employer wanted to apply its interpretation of its guidelines to this bargaining unit, it should have brought such a proposal to the bargaining table. Furthermore, the employer's approach here is in contravention to the notice it gave in the announcement for the

Senior Court Assistant position. Under "Qualifications" the announcement states, "All combinations of education, experience, and training that demonstrate the ability to perform the work will be considered." The announcement follows the direction of Article 8.1 Vacancies and Posting "... Such notice shall include the classification, salary, description of the duties of the position, qualifications, knowledge, skills and abilities and selection process. ..."

The job announcement also informed, "Oral Interview - The interview will be job related and many include, but not be limited to, the qualifications outlined in the job announcement." There is no notice that it will be the sole source of ranking the applicants.

Substantially Equal

The employer contends that it judged the applicants' qualifications, knowledge, skills and abilities on a pass/fail basis. It emphasizes that the oral interview was a crucial step in the process, geared to measure an applicant's leadership abilities.

Qualifications -

The employer was emphasizing leadership in the new Senior Court Assistant position. Smith has never supervised any employees. McLachlan supervised up to nine employees during her time at the private sector agency. Smith organized volunteers for a short term, project while in college. The employer approved of that as the requisite "supervisory" experience. Although, Wilson did testify that management experience is typically beyond what Smith listed. The union argues that the amount and level of supervisory experience is a critical difference between the two; McLachlan had been involved with hiring, day-to-day management, coaching, discipline and termination of employees. Smith had not even been

assigned to train new employees for the employer.

The employer contends that there is no test for leadership. That is why it relied on the oral interview for candidates to convince the panel members that they were each leaders.

McLachlan is one of the few court assistants who was heavily involved in training employees new to the department. Smith had done no training. In addition, McLachlan had significant supervisory experience in her private sector agency employment.

Knowledge -

The employer has used McLachlan to train new employees and transfers; it is reasonable to conclude that the employer is comfortable in her knowledge of the department. Although Wilson testified that the Senior Court Assistants were doing most of the training, McLachlan testified in rebuttal that she was still training newly hired Judicial Proceeding Specialists.

McLachlan's qualifications were superior to Smith's. She had the highest score of all of the applicants on the written practical exam.

Skills -

McLachlan listed over twice as many skills in her application than Smith did on hers.

Ability -

The record supports a finding that the employer had confidence in McLachlan's abilities. It assigned her to train new or transferred employees. It also assigned her to work out of class in the Senior Court Assistant position. The County Clerk complimented her on her performance out of class.

Conclusion -

The employer did not offer evidence that Smith had superior qualifications, knowledge, skills or abilities than McLachlan. Smith was superior only on her oral interview ranking.

The employer did not rebut the union's record that McLachlan was superior than Smith in qualifications, knowledge, skills and abilities. It merely stood on its theory that it could rank the applicants solely on their interview scores. The plain language of Article 8.3.3 does not support this theory.

Even if the employer believed that:

- Smith's supervision of volunteers in one short project (qualifications) was substantially equal to McLachlan's years supervising employees at the bail bond agency;
- Smith's 5 years of experience (knowledge) are substantially equal to McLachlan's 21 years;
- Smith's list of 33 skills are substantially equal to McLachlan's list of 76 skills; and
- Smith's 90% score on the practical exam (abilities) is substantially equal to McLachlan's 91% score;

then the seniority preference in the contract language should have been applied.

Panel Interview

The union argues that the panel failed to measure the relative qualifications, knowledge, skills and abilities of the candidates. It also contends that the panel was biased and arbitrary. It claims that the panel failed to adhere to the employer's own guidelines regarding recruitment.

The employer claims that the allegation of bias must fail since there is no evidence of bias in favor of Smith. It points out that all panelists have to sign a Panel Member Agreement that they will be unbiased during the hiring process. The employer believed that by "pretending" not to know anything about McLachlan, the panelists avoided bias.

The employer contends that all of the candidates had an equal opportunity to present their vision for the position during the interview. It advances that it was McLachlan's poor performance during the interview that led to her not being selected for the promotion. Her inability to convey her leadership skills to the panel was not due to a "rigged" or unfair process. McLachlan admitted that she did poorly in the oral interview.

The employer did show that Smith received four first place ratings, one from each of the four panel members. She was selected unanimously.

However, the union established that there were several personal relationships between panel members and candidates. One panelist was good friends with another applicant. Another panelist had had a falling out with McLachlan. A third panelist had encouraged Smith to apply; that panelist ranked Smith significantly higher than McLachlan. Since Wilson withdrew an invitation to a potential panel member when she discovered that the potential panelist would be in favor of McLachlan, she must have been sensitive to not having panelists with predisposed attitudes.

Wilson found out from McLachlan, after the interviews, about the personal connections between panel members and interviewees. McLachlan told her that when she saw the best friend/Godparent relationship with an interviewer and interviewee, and the inclusion

of a panelist with whom McLachlan had a strained relationship, she thought the panel was "stacked" against her. Wilson sought counsel from the human resources department. They concluded that since the personal relationships were not with Smith, Wilson could offer the promotion to Smith. Wilson did admit, however, that knowing of the relationships and seeing those interviewers on the panel could have negatively influenced McLachlan's performance during her interview.

The employer asserts that the union wants to control how the interview process should be handled and scored. To the contrary, I find that the union wants to enforce the negotiated language of the parties' collective bargaining agreement.

The employer argues that the promotional process it used in this case was the same as the hiring procedure that it has used for over five years with the union's knowledge and acquiescence. Harrington Smith reviewed all of the recruitments involving Office and Professional Employees International Union, Local 11 since 2009. She found 22 incidences where the most senior employee was not hired. In those cases, the union either did not file a grievance or did not pursue a grievance past the first step. Thus, the employer contends that the parties have a binding past practice that has become an implied term of the collective bargaining agreement. I find, however, that a union has the right to determine which grievances it wants to pursue to arbitration. If a union forgoes certain potential claims, it does not change the language in the contract.

Conclusion

The union has established, by a preponderance of the evidence, that the employer misinterpreted the language of Article 8.3.3 to allow it to rank applicants for promotion against each other only in one

aspect of the process - the oral interview. Then, only if the interview scores are the same or very close, would the employer use seniority preference language to award the promotion. This misinterpretation ignores the requirement to assess the candidates' qualifications, knowledge, skills and abilities. The language of Article 8.3.3 requires that these assessments must be done in such a way as to determine whether they are "substantially equal." Then the seniority preference is to be applied. This misinterpretation caused the employer to violate the collective bargaining agreement.

REMEDY

The employer must immediately promote Melissa McLachlan to the position of Senior Court Assistant. It must make her whole for any loss in pay or benefits, from the date that Ashley Smith began working in the position of Senior Court Assistant.

Under the language of **ARTICLE 22 - GRIEVANCE PROCEDURE** at **22.7** ... "The losing party shall bear the fees and expenses of the arbitrator." I find the employer to be the losing party.

AWARD

Any facts or arguments presented at the hearing or in briefs which are not cited within this Award, I found to be non-persuasive or immaterial. Based on the sworn testimony of the witnesses, the documents admitted into evidence, and the record as a whole, I award:

The grievance is SUSTAINED.

ISSUED in Chehalis, Washington, this 13th day of December, 2013.


KATRINA I. BOEDECKER, Arbitrator

CERTIFICATION OF MAILING

I certify that on the 13th day of December, 2013, I served the foregoing arbitration award upon the parties listed below, by U.S. postal service, **certified mail**, postage prepaid, a true, exact and full copy thereof to :

Mr. Darryl Walker
Clark County Prosecutor's Office – Civil Division
P.O. Box 5000
Vancouver, WA 98666-5000

Ms. Katelyn S. Oldham
Tedesco Law Group
3021 NE Broadway
Portland, OR 97232

I certify that on the 13th day of December, 2013, I served the foregoing arbitration award upon the party listed below, by U.S. postal service, postage prepaid, a true, exact and full copy thereof to :

Ms. Linda Gregg
Elections Coordinator – Mediation Assistant
Oregon Employment Relations Board
528 Cottage St. NE -- Suite 400
Salem, OR 97301-- 3807



Katrina I. Boedecker
Arbitrator