

ARBITRATION AWARD

BETWEEN:

NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION
AND GENERAL WORKER UNION OF CANADA
(CAW-CANADA)
(hereinafter called the "Union")

AND:

MARINE ATLANTIC INC.
(hereinafter called the "Employer")

GRIEVOR: James Murphy

COUNSEL: For the Union
Linda MacNeil

For the Employer

John F. Roil, Q.C.

ARBITRATOR: James C. Oakley

The arbitration hearing was held at Sydney, Nova Scotia on September 20, 2007. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

It was agreed that Raymond Lefrense, the incumbent in the position that was the subject of the grievance, was a person who could be affected by the outcome of the Award. The Union gave notice of the hearing to Mr. Lefrense advising him of his right to attend and participate at the hearing. Mr. Lefrense did not attend at the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Marine Atlantic Inc. and National Automobile Aerospace Transportation and General Worker Union of Canada (CAW-Canada), dated January 1, 2005 to December 31, 2007
- Consent 2 - Grievance Form dated July 20, 2006
- Consent 3 - Letter dated August 30, 2007 from Linda MacNeil, CAW-Canada to Raymond Lefrense giving notice of the hearing
- Consent 4 - List of lead hands and tradespersons
- Consent 5 - Seniority List dated April 19, 2007
- Consent 6 - Job posting for lead hand (qualified machinist) - closing date June 22, 2006 and job description for leading hand in the maintenance department dated April 21, 2004
- Consent 7 - List of dates and payroll records for James Murphy showing work as lead hand February 2, 2006 to August 23, 2007
- Consent 8 - James Murphy - lead hand interview questions and answers and scoring sheets

Consent 9 - Raymond Lefrense - lead hand interview questions and answers and scoring sheets

Consent 10 - Shannon Battiste - lead hand interview questions and answers and scoring sheets

Consent 11 - Lead hand Port Aux Basques scoring summaries

Nature of the Grievance

The Grievor was an unsuccessful applicant for the position of lead hand (machinist) in the Port Aux Basques maintenance department of Marine Atlantic Inc. The Grievor was senior to the successful applicant, Raymond Lefrense. The Employer decided that the Grievor was not the best qualified employee to fill the position under Article 11.12 of the Collective Agreement. The Union grieved the Employer's decision.

Collective Agreement

The relevant articles of the Collective Agreement are as follows:

Article 11 Bulletining and Filling Positions

11.1 Bulletins will be issued as required, for all vacancies where replacements are necessary, new positions, or where additional staff are required for an expected period of 30 working days or more, and posted in places accessible to employees affected on the seniority territory. A copy of each bulletin will be furnished to the Council of Unions and Local Union of the territory involved.

...

11.2 Bulletins will show classification, expected duration, location, rate of pay, closing date (which will be at least 14 days from the date of bulletin), qualifications and officer and location to whom application is to be made.

...

11.4 Bulletined positions will be awarded to the senior qualified employee(s) making application, in the prescribed manner, within the allotted time. Notice of such awards will be made within thirty (30) calendar days of the closing date of the bulletin and posted in places accessible to employees affected. Any appeal against appointment must be made in writing within 28 days from date of issue of award bulletin covering such appointment. The successful applicant will be required and permitted to take over the position without undue delay.

...

11.6 Temporary vacancies of less than 30 working days, and bulletined positions pending the assignment of the successful applicant, may be filled temporarily by the senior qualified employee immediately available. An employee who does not desire such assignment to a temporary vacancy of 30 working days or less will not forfeit any seniority, except that the junior qualified employee immediately available must protect such assignments in all instances. Upon completion of such temporary assignments employees will revert to their former position or status, or to another available temporary assignment for which they are senior and qualified.

...

11.10 An employee claiming a position in the exercise of seniority, who in the judgement of the Company cannot reasonably be expected to qualify to perform the duties required within a period of 30 service days or less, shall not be denied such position by Management without prior consultation with the Local Union Representative. An employee exercising seniority, who, in the judgement of the Company can reasonably be expected to qualify for the position claimed, shall be allowed a trial period which shall not exceed 30 calendar days, except that by mutual agreement between the Local Union and the proper officer of the Company, such period may be extended up to 90 calendar days, in order to demonstrate their ability to perform the work required.

Should an employee be denied a position being claimed in the exercise of seniority, or should they fail to qualify during a trial period, they and their authorized representative of the Local Union will be entitled to receive an explanation in writing from the proper officer of the Company, including the reason for the decision rendered, which shall be subject to appeal in accordance with the grievance procedure.

Where an employee is disqualified from holding a position at any time during the specified trial period, such employee will be returned to their former position. This will not necessitate additional bulletins.

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11.12 Forepersons and leading hand positions may be established as required. Temporary vacancies or positions of less than 30 working days shall be filled as required by the senior qualified employee immediately available on that shift. Vacancies or positions of 30 working days or more will be bulletined. Appointments to such positions shall be on the basis of the best qualified employee to fill the position. Where qualifications are equal, the greatest seniority within this collective agreement will govern. No seniority is established as Leading Hand. In case of staff reductions, employees filling positions of Lead Hand may be displaced by senior qualified employees who would otherwise be laid off.

Employees promoted to lead hand will have the necessary * qualifications and experience to be able to direct and supervise the work of a group of employees. The intention is for lead hands, while continuing work in their trade, to oversee and direct the work of groups of employees in specified shops or work areas. Appointments to leading hand positions of 30 working days or more will be made following interview and/or testing of the qualified applicants when bulletined.

* Unlicensed employees listed on Appendix "A" provided to the Union will be grandfathered at the lead hand rate when in that classification.

Evidence

The witnesses called by the Union were John Skinner, Local Union vice president and James Murphy, the Grievor. The witnesses called by the Employer were Michel Gratton, employee services officer and Barry Ferguson, maintenance officer.

The Grievor, James Murphy, was the unsuccessful applicant for the position of lead hand (machinist) in the maintenance department in Port Aux Basques. The responsibilities of the maintenance department in Port Aux Basques include maintenance of the buildings and transfer bridge, fuelling vessels and removing waste oil from vessels. The supervisor of the maintenance department is Barry Ferguson, maintenance officer. There is a crew of about 20 to 30 tradespersons, including carpenters, machinists, plumbers and electricians.

The Employer posted the following bulletin for the position:

MARINE ATLANTIC INC.
HUMAN RESOURCES DEPARTMENT

BULLETIN 06-04

29 May 2006

TO ALL EMPLOYEES HOLDING SENIORITY UNDER AGREEMENT "C"

Written applications will be received, by the undersigned, up to and including 22 June 2006, 1600 hrs. for the following position as per the terms of Collective Agreement "C".

Position: Lead Hand (Qualified Machinist) - 8 AM to 4 PM Monday through Friday, subject to operational changes and Article 2.3 (b)

Note: As noted in Article 11.12, award will be on the basis of the best qualified employee

Duration: Permanent

Location: Port aux Basques

Rate of Pay: 25.759/hour

Forward applications to: Barry Ferguson
Maintenance Building
Port aux Basques

The job description for lead hand in the maintenance department states as follows:

Marine Atlantic Inc.
Maintenance Port aux Basques
Leading Hand

Department: Maintenance

General Characteristics:

Employees are required to lead, guide and direct other employees in the proper and safe performance of their work. Such employees must interpret drawings, prepare

cost estimates, make sketches, work at heights and do administrative work. In addition, he is required to hold a Provincial permit or certificate to practice in his respective trade and must also hold an appropriate Driver's License with Air brake endorsement.

Qualifications:

Journeyman's Certification

Representative Activities:

Where this position reports to Management, this classification is considered to be a working position and the employee will work along with the general work population.

Tasks:

The Leading Hands' position will be required to plan and carry out tasks under the direction of the Plant Maintenance Supervisor/Officer and is to maintain Terminal and Vessels Maintenance requirements under the yearly planned maintenance program. This position will ensure that all time reports are reconciled and ensure compliance with respect to company policy and prescribed safety procedures. Computer skills are a requirement for this position.

Safety:

It is the responsibility of the incumbent in this position to ensure that he/she is familiar with the safety policies of the company and of their work area, the Canada Labour code (COSH) and to provide a clean and safe work environment for co-workers.

It is the responsibility of all managers and supervisors to ensure that the personnel they supervise are aware of and apply safety policies of the company and of their work area, have knowledge of the Canada Labour Code (COSH) and that they provide a clean and safe work environment for co-workers.

James Murphy testified that the job description accurately described the tasks of the lead hand. The Union did not dispute the contents of the job description or the job posting.

There were three applicants for the position. James Murphy was the most senior applicant. He had about 34 years seniority. The other applicants were Raymond Lefrense with 5 years seniority and Shannon Battiste with 4 years seniority.

John Skinner is an electrician in the maintenance department in Port Aux Basques and vice president of the Union Local. He filed the grievance on behalf of James Murphy. He testified that, in the past, the senior applicant was always awarded the position. He testified that the Union was concerned about the process followed by the Employer when it conducted interviews for the position.

James Murphy testified that his service date with the Employer was January 17, 1973 and his seniority date as a machinist was June 7, 1999. In 1999, he obtained his qualifications as a journeyman machinist. He testified that he has had prior experience working shifts as lead hand. He worked 26 days as lead hand between February 2 and October 31, 2006. On each of those days, he was paid at the lead hand rate. Mr. Murphy testified that he believed he performed well as lead hand and he was not informed of any complaints about his work. Barry Ferguson was his supervisor. If he was awarded the lead hand position his hourly rate would increase from \$24.362 to \$25.759 per hour. He considered himself to be the best qualified applicant for the position because he held a journeyman certificate and he had the greatest seniority. Mr. Murphy testified that soon after he applied for the position he heard there would be interviews. There had not been interviews before for similar positions and the position had been awarded to the senior applicant. When he attended at the interview he was permitted to ask for clarification of questions. He was told there would be a point system used to score the answers to the interview questions. He also completed a computer test using a computer in Barry Ferguson's office. Mr. Ferguson asked him to show his ability to use the computer. The computer test lasted 20 to 25 minutes. One or two days after the interview, Barry Ferguson informed him that he was not the successful applicant and that the points were very close.

Barry Ferguson testified that the role of the lead hand is to give direction to the crew. The duties were accurately described in the job description. The duties have not changed since the job description was prepared in 2004. Competence in the trade is indicated by a journeyman certificate. Mr. Ferguson testified that he did not feel comfortable conducting the job competition when the successful applicant would be working under his supervision. He asked Peter Russell, the maintenance officer in North Sydney, to conduct the interviews and assess the candidates. Mr.

Ferguson stated that he did not attend the interviews, but he prepared a computer skills test and assessed the computer skills of the applicants.

The interviews were conducted by Peter Russell and Michel Gratton, employee services officer in the human resources department. Michel Gratton testified that he prepared the interview questions. The questions were listed on a form to be used by the interviewers with spaces on the form following each question for the interviewers to make notes of the answers. Mr. Gratton testified that he and Peter Russell developed the interview questions for a March, 2006 job competition for a lead hand position in North Sydney. The interview questions were approved by Barry Ferguson for this job competition.

Mr. Gratton testified that the interview questions were behavioural descriptive type interview questions. A profile of the competencies required for the lead hand position was developed from a dictionary of competencies. Mr. Gratton testified that behavioural descriptive interviewing is a mainstream form of interviewing. Mr. Gratton has professional training in this area. He said the principle of this type of interviewing is that if a person can demonstrate a behaviour through past work experience, then there is a high likelihood that the behaviour will be consistently used. He developed the interview questions based on which behaviours were appropriate for the position. The questions were designed to elicit the best candidate. The same questions could be used in an interview for another position, including a management position, in which case a higher level response would be sought. The weighting of the questions was decided before the interviews. Each answer was scored out of five points and then a weighting of 1, 2 or 3 was applied to each answer to determine a total score of either 5, 10 or 15. The candidates were also assessed a score for suitability out of a possible 20 points. The maximum score for the interview was 125.

Mr. Gratton testified that Barry Ferguson asked Peter Russell to attend the interviews to ensure the process was impartial. Mr. Gratton testified that immediately following the interview, the two interviewers compared their notes of the responses and reached a consensus on the score to be awarded for each question. Mr. Gratton did not recall the length of the interviews or whether Mr. Lefrense's interview was longer than Mr. Murphy's interview. There was no time limit on the interviews. The notes made on the interview questionnaire form were used for the purpose of a reminder to the interviewer of the responses.

The interview questionnaire forms with the notes taken during the interviews and the scores for each of the applicants were entered as exhibits. The interview questions, followed by the behavioural competency related to each question (for questions 2 to 8), were as follows:

1. Please tell us about yourself. Please state your work experience and qualifications relevant to the position we are interviewing for. (Score to suitability).

2. To be successful, jobs have to be planned in advance. Please tell us of a time when you had to plan for a job and develop the plan to see it to completion.

...

Conceptual Thinking

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3. Sometimes we encounter customers who appear to be demanding. Please tell us about the most demanding customer you had to deal with.

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Customer Service Orientation

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4. People do not always see eye to eye on how to accomplish a task. Tell me about a time when you had a significant difference of opinion with someone, and you made an effort to understand their point of view.

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Interpersonal understanding

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5. A unified team contributes to a positive environment. Please give me your best example of a time when you helped foster a sense of teamwork and cooperation while working with others.

...

Team work and Cooperation

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6. Good working relationships can sometimes be difficult to maintain. Tell us about the working relationship that was the most difficult for you.

...

Self-control

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7. Accurately identifying all possible options before giving approval to a project is important. Please give us your best example of a time it was critical that you considered all possible options before endorsing a plan of action.

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Results orientation

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8. When working in a team setting, it is not always easy to motivate staff? Can you recall for us a time when you encountered a challenge in successfully motivating your staff?

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Leadership

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9. Based on the interview so far, please rate the following:

Self-Confidence

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Suitability:

Combination of attitude, presentability, perceived aptitude, communication skills, etc. A summary assessment of the degree to which the candidate reflects the ideal match in terms of perceived experience/know-how, responses to certain situational questions and the general impression resulting from their communication style and behaviour during the interview. (20 Points).

There was no weight assigned to question 1, but the answer could be considered when assessing suitability. The weight assigned to the remaining questions was 1 for question 3, 2 for question 7, and 3 for the other questions.

Mr. Gratton testified about the answers given to the interview questions and how the scores were determined for each applicant. For example, for question 4, Mr. Murphy was given a score of 3 for an answer stating that he understood the meaning and reason for what happened when he had an argument. Mr. Lefrense was given a score of 3.5 for stating that a job was completed and he understood a different point of view. For question 5, Mr. Murphy was given a score of 3 for an answer that did not show that he was soliciting input from others. Mr. Lefrense was given a score of 4 for an answer that showed that he was soliciting input from others about how to do a job. For question 6, Mr. Lefrense was assigned a higher score than Mr. Murphy because he expressed how he acted to calm others. For question 8, Mr. Lefrense responded to all the points to show organizational skills and he was assigned a score of 4 compared to 2.5 for Mr. Murphy. Mr. Gratton testified that Mr. Murphy did not demonstrate confidence in his own abilities to the same degree as Mr. Lefrense. For the suitability category, Mr. Murphy was given a score of 12 and Mr. Lefrense

was given a score of 14. The total score for the interview was 78.5 for Mr. Murphy and compared to 94.5 for Mr. Lefrense.

Barry Ferguson testified that to expedite the selection process he agreed to assess the computer skills of the applicants. He prepared a "Computer Skills Testing" form listing 7 categories to test, namely, understanding of terminology, comfortable navigating, email, word, excell, web, and outlook. There was a grid on the form showing that each item was assigned a score from 1 to 10. Mr. Ferguson testified that he interviewed each applicant to determine his computer experience. He asked each applicant to demonstrate his knowledge of various programs, such as word and excell, and to show they could navigate on the computer monitor using a mouse. Mr. Murphy demonstrated his acceptance of using computers on the job. He was given scores of 2, 3 or 4 out of 10 for each of the categories for a total of 24 points out of a possible 70 points, as shown on the "Computer Skills Testing" form. Mr. Ferguson testified that Mr. Lefrense was less knowledgeable about computers but was willing to learn. He assigned Mr. Lefrense the lowest possible score of 1 out of 10 for each of the 7 categories for a total of 7 points out of 70. The computer test results forms were attached as a separate sheet to the interview questionnaire. Mr. Ferguson testified that he did not place any of the marks showing a total score on the computer test forms. For example, he did not write on Mr. Murphy's form the numbers 24/70. Mr. Ferguson said the computer skills test was not meant to be a "big point" in the job competition. Mr. Ferguson said that the reason the job description for lead hand referred to computer skills was to give notice that lead hands needed to know something about computers.

Mr. Ferguson testified that the decision on the weighting of the computer skills test was probably made after the testing. A total of 7 points was assigned for the computer test. Mr. Ferguson said it was likely he made the decision in conversation with Peter Russell. Mr. Ferguson said that the total scores were not calculated so that Mr. Murphy would have the lowest score. There was a marking on Mr. Murphy's computer skills testing form showing the numbers $78.5 + 24 = 102.5$. There was a marking on Mr. Lefrense's computer skills testing form showing the numbers $94.5 + 7 = 101.5$. Mr. Ferguson did not know who placed those markings on the forms. The numbers "24" and "7" could be given meaning if the computer skills test was weighted out of a total of 70, with the result that the total points available for the interview together with the computer skills test would be 195. By assigning 7 total available points for the computer skills testing, the total points available were 132. By assigning a score out of 7 to the computer skills test, Mr. Murphy's total score was $78.5 + 2.4 = 80.9$ and Mr. Lefrense's total score was $94.5 + 0.7 = 95.2$. The points assigned for each

interview question and the computer testing and the total scores were shown on a recapitulation form that was prepared by the Employer and sent to the Union prior to the hearing.

Mr. Ferguson testified that leadership skills were important for the lead hand position. There could be complicated projects and the lead hand would be involved in the planning of the project. Mr. Ferguson testified that he knew Mr. Lefrense had experience in a leadership role because he had experience as the mayor of the Town of Isle Aux Mort.

Mr. Gratton testified that Mr. Ferguson did the computer testing and the results were sent to him. He did not know who placed the markings on the computer test sheets showing scores for the computer test out of a total of 70 points. If the computer test was scored out of a total of 70 points, then Shannon Battiste would have had the highest total score. Mr. Gratton testified that computer skills could be taught to a person and it was never intended that the computer test scores be weighted out of a total of 70 points. Mr. Gratton testified that the personnel files of the applicants were not reviewed in the job competition. The position was awarded to Raymond Lefrense as the applicant with the highest score. Mr. Gratton said he had no discussion with Barry Ferguson about trying to change the weighing of any of the questions. He said there was no computer test done for the North Sydney lead hand position, but Mr. Ferguson wanted a computer test done for the Port Aux Basques position because there would be a need for computer skills in the future.

The Employer advised the Arbitrator at the hearing that it would not be calling Peter Russell as a witness. The Employer advised that Mr. Russell's employment with Marine Atlantic had been terminated for cause.

Union Submission

The Union submitted that the Employer violated Article 11.12 of the Collective Agreement. The Grievor was relatively equal in qualifications for the lead hand position to the successful applicant, Raymond Lefrense. It was unfair and unreasonable for the Employer to rely solely on the interview score. The Employer did not consider the Grievor's total experience in the maintenance department or his experience working shifts in the lead hand position. There were no complaints about the Grievor's work as a lead hand. The Employer did not ask for references, did not review personnel files and did not give consideration to the Grievor's journeyman certificate. The Employer did not tell the Grievor that it would be relying solely on an interview. There had never been an

interview in the past in job competitions for the Port Aux Basques maintenance department. The Employer did not give any assistance to the Grievor in preparation for the interview. The interview questions were arbitrary, the weighting of the questions was flawed and the marking system was subjective. There should have been interview questions asking for responses to situational scenarios. The computer test marks were incorrectly weighted. When the computer test scores were weighted out of 70, the Grievor had a higher score than Mr. Lefrense for the combined interview and computer test scores. The test result showed Mr. Lefrense had no computer skills. The job description stated that computer skills were a requirement of the position. The Employer was unable to explain how the grading was placed on the computer test forms which led to a different result. The Union referred to arbitral text and case authorities. The authorities stated that a selection process was flawed where an employer relied entirely on interviews to the exclusion of other factors. The assessment tool must be fair. The determining factor of the interview could not be “selling oneself”, when that behaviour was not one of the qualifications for the job. The Union referred to *Cape Breton Health Care Complex and CAW Canada, Locals 4600 and 4603*, December 31, 2002 (Veniot), *CAW Canada, Local 4600 and Cape Breton District Health Authority*, April 26, 2004 (Ashley), *Fairview Home Inc. and Fairview Nurses MNU, Local 21* (1991) 21 L.A.C. (4th) 223 (Cherniack) and *St. Josephs General Hospital and CAW Canada, Local 1120* (2004) 126 L.A.C. (4th) 114 (Harris). The Union requested that the grievance be allowed and the Grievor placed in the lead hand position with compensation.

Employer Submission

The Employer submitted that the appropriate scope of review was for arbitrators to be deferential to management decisions with respect to ability and qualifications. An employees’s supervisors were in the best position to evaluate the employee. The arbitral cases referred to by the Union could be distinguished on the basis of the facts in each case, where the arbitrator found evidence of an arbitrary decision or unfair process. Under Article 11.12, seniority was a factor only where qualifications were equal. The qualifications were not equal in this case, as evaluated in the selection process. The interview process was not flawed. There was no evidence that the Grievor did not take the interview seriously. It was fair to evaluate leadership skills for the lead hand position. The interview questions were designed by a person with training and experience in preparing interview questions. The behaviours elicited by the questions were all relevant to the position. There was nothing else the Employer could have done to make the interview process more fair. The Employer was allowed to rely entirely on the result of the interview, where the interview

process was fair and the questions were relevant to the job. It was not reasonable for an arbitrator to interfere with the practice of consensus scoring of the interview questions. All applicants had the qualification of a journeyperson certificate. The work record of the applicants could not be considered at this stage of the proceedings in the absence of evidence. The Grievor's experience working occasional shifts as a lead hand did not mean that he was the best qualified applicant. There should be no prejudice against Mr. Lefrense because he had experience as a town mayor. There was no evidence with respect to the shifts worked as lead hand by the other applicants. The computer test results were given undue importance by the Union. The weighting of the computer test skills result was reasonable and consistent with the duties of the position. The numbers placed on the computer scoring sheets could not be attributed to anyone involved with the selection process and it was unreasonable to consider those numbers. The Employer referred to arbitral case authority, including *Marine Atlantic Inc. and National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 4285*, November 3, 2003 (MacDonald). The Employer asked that the grievance be denied. In the alternative, if the Arbitrator's decision was that the Employer was required to consider other factors in addition to the interview scores, then the appropriate redress would be to remit the matter to the Employer and reopen the job competition to all applicants.

Considerations

The Arbitrator will consider whether the Employer violated Article 11.12 of the Collective Agreement when it did not award the position of lead hand (machinist) in the maintenance department at Port Aux Basques to the Grievor, James Murphy. Article 11.12 states that appointments to lead hand positions shall be on the basis of the best qualified employee to fill the position, and where qualifications are equal, the greatest seniority will govern. The Grievor had more seniority than the successful applicant, Raymond Lefrense. The Arbitrator will review the decision made by the Employer and the process followed by the Employer to make its decision that Raymond Lefrense was the best qualified employee.

Article 11.12 is a relative ability type of article. Where this type of article is used, a junior employee who has greater ability or qualifications may be awarded a job over a more senior applicant. To succeed in a grievance, arbitrators have required a grievor to show that he meets the minimum qualifications for the job and is relatively equal to the successful applicant (see Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 6:3220).

The Arbitrator has considered the appropriate scope of review by arbitrators of management decisions with respect to ability and qualifications. In Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 6:3100, the authors make the following statement with respect to factors to consider in reviewing decisions on qualifications and ability:

On this understanding, it has been said that unless there is evidence of discrimination, arbitrariness, bad faith (as for example, bias in a selection committee), or the employer exercised its judgment unreasonably, arbitrators should be loath to interfere with management's decision. In the usual case, and particularly when the job in issue is a skilled and technical one, the issue is not viewed as whether the grievor in fact possesses the requisite skill and ability but rather whether the employer's decision as to those matters is reasonable in the circumstances. From the earliest awards it was said that the primary function of the arbitral review in these circumstances is to ensure that:

. . . the judgment of the company must be honest, and unbiased, and not actuated by any malice or ill will directed at the particular employee, and second, the managerial decision must be reasonable, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling.

Even on this view it is apparent that, except when the agreement leaves the employer's discretion completely unfettered, arbitrators have not restricted their inquiry to an analysis of the *bona fides* of the employer's motives. In addition, as the extract confirms, arbitrators have examined the merits of such decisions, at the time they were made, against a standard of reasonableness.

The above standard of review, known as the "reasonableness" standard, was applied in *CAW Canada, Local 4600 and Cape Breton District Health Authority*, April 26, 2004 (Ashley).

Arbitrators have also applied a "correctness" standard to review of management decisions on qualifications and ability. The Arbitrator refers to the discussion in *Re Island Telephone Company Limited and International Brotherhood of Electrical Workers, Local 1090* (1983) 8 L.A.C. (3d) 132 (Christie) at 141 to 143 as follows:

There are few issues more extensively considered in the arbitral jurisprudence than that of review by arbitrators of management determination with respect to qualifications, skill or ability. In the award of the board in *Re: Textile Workers Union and Lady Galt Towels Ltd.* (1969), 20 L.A.C. 382 (Christie), I expressed my view that any such management determination involves two decisions: first, the setting of a standard of qualifications, skills or abilities and second, the measurement of the employee, or employees, as the case may be, depending on the type of seniority clause in issue, against that standard.

...

The question of whether a particular employee “meets” the qualifications is, it seems to me, a fact to be determined from the evidence. My view has always been that the ultimate question is whether the employee is judged correctly against the standard established by management, but, as I stated in *Re United Brewery Workers, Local 173 and Carling Breweries Ltd.* (1968), 19 L.A.C. 110 as well as in *Lady Galt Towels* (p. 112):

“An arbitrator must, of course, realize that an employee’s supervisors are in the best position to judge his qualifications and an arbitrator should for that reason hesitate to substitute his own judgment for that of the company.”

The application of a correctness standard to review of management’s evaluation is accepted by arbitrators where it is consistent with the language used in the collective agreement. The standards of review of “reasonableness” and “correctness” are discussed in Mitchnick and Etherington, *Labour Arbitration in Canada*, 2006, at page 331 as follows:

The seminal decision on the standard of review to be applied by arbitrators in reviewing the employer’s evaluation of employee skill or ability is *Union Carbide Canada Ltd. and U.E., Local 523* (1967), 18 L.A.C. 109 (P.C. Weiler). Weiler, whose reasoning reflects the traditional reluctance on the part of arbitrators to take over the function of management, ruled that the employer’s assessment should not be interfered with unless it was dishonest, discriminatory, biased, actuated by ill-will, or unreasonable. The arbitrator must also ensure that, in arriving at its decision, the employer considered all relevant factors, and avoided considering any irrelevant factors.

Although the deferential approach advanced in *Union Carbide Canada* continues to be followed by some arbitrators, most recent awards have concluded that the proper standard of review in such cases is *correctness*, at least in the absence of any provision in the collective agreement to the contrary. This line of authority stems from the decision of the Ontario Divisional Court in *Great Atlantic & Pacific Co. of Canada Ltd. v. Canadian Food and Allied Workers Union, Local 175* (1976), 76

C.L.L.C. ¶ 14,056. The Court held that where the collective agreement provides for the selection of candidates for promotion, arbitrators have an obligation to ensure that the agreement has been complied with and cannot restrict themselves to deciding whether the employer has acted honestly and reasonably. . . .

A summary of the divergence between the standards of review - reasonableness and good faith on the one hand, and correctness on the other - and the rationale for each is found in *Maple Ridge (District) and C.U.P.E., Local 622* (1979), 23 L.A.C. (2d) 86 (Hickling). This decision is frequently cited in support of the application of the correctness standard. Arbitrator Hickling acknowledges, however, that even arbitrators who assert authority to review the correctness of a promotion decision often defer to the employer's opinion on the basis that management is better situated to assess an employee's capability or aptitude for the job.

The Arbitrator finds that a "correctness" standard of review is consistent with Article 11.12. The appropriate standard of review of the Employer's decision under Article 11.12 is whether the Employer acted fairly, reasonably, not in an arbitrary manner and correctly applied the Collective Agreement. The Arbitrator will consider the decision made by the Employer and also whether the process followed by the Employer was fair, reasonable and not arbitrary.

The process followed by the Employer was to assess the applicants using an interview and a computer skills test. The Employer developed a lead hand interview questionnaire using almost exclusively behavioural descriptive type questions. The behaviours intended to be elicited by the questions were conceptual thinking, customer service orientation, interpersonal understanding, team work and cooperation, self control, results orientation, and leadership. Barry Ferguson, the immediate supervisor of the lead hand position to be filled, believed that the behaviours and the related questions were all reasonably related to the duties to be performed. Each interview question was scored out of 5 and assigned a weight of 1, 2, or 3 to calculate a total score out of 5, 10 or 15. The interviewers also assessed self confidence based on the interview. The score for self confidence was given a weight of 3 meaning there was a total possible score of 15. Suitability was assessed based on responses to the questions and the general impression given by the applicant of communication style and behaviour during the interview. The total possible points for suitability was 20. A total of 125 points could be awarded for the interview. The Union has challenged the Employer's process with respect to the type of interview questions used, and the practice of the interviewers assigning a score based on consensus. The Arbitrator finds, on the basis of the evidence presented at the hearing, that the interview questions were reasonably designed to elicit relevant

behaviours, and the Grievor was given a fair opportunity to respond to the questions. There was no evidence that the Grievor was unprepared for the interview or did not participate meaningfully in the interview process. There was no evidence of bias in the interview process, or in the assessment of the Grievor's answers compared to the answers of Mr. Lefrense. There was no evidence that scoring by consensus operated unfairly against the Grievor in these circumstances. The scores from the interview process were not obtained in an arbitrary or unreasonable manner. The scores could be considered by the Employer when assessing qualifications for the position.

The Union submits that the Employer has unfairly awarded the position solely on the basis of the interview and did not give proper consideration to other factors, including computer skills, the Grievor's prior experience in the lead hand position and the Grievor's work record.

The Arbitrator will consider the factor of computer skills. The job description states under the heading "Tasks", the following: "Computer skills are a requirement for this position". To determine the qualifications of the applicants in this regard, the Employer conducted a computer skills test. The Union did not dispute the content of the computer skills test or the results of the test. The test consisted of an interview and a demonstration by each applicant of his knowledge and ability to use various computer programs. The candidates were evaluated in 7 categories and awarded marks for each category on a scale from 1 to 10, with 10 being the highest score and 1 the lowest score. The Grievor was assigned scores of either 2, 3 or 4 for each of the 7 categories for a total of 24 points out of a possible 70 points. The successful applicant, Mr. Lefrense was assigned a score of 1 for each of the 7 categories for a total of 7 points. Mr. Ferguson testified that Mr. Lefrense was willing to learn computer skills, but on the date of the test he had essentially no computer skills and he was assigned a score of 1 for each category because that was the lowest score available on the form. Thus Mr. Lefrense's total score of 7 out of 70 was the lowest possible score that could be awarded.

The Employer added the scores from the computer skills test to the scores from the interview to obtain the total overall score. When calculating the total score, the computer skills test score was divided by 10 so that the maximum score possible was 7 and the minimum score possible was 0.7. As a result, the total available points for the computer test was 7, which was considerably less than the weighted score of 15 for most of the questions on the interview questionnaire (five of seven questions were weighted at 15). Self confidence, which was assessed on the basis of the answers to the interview questions, was weighted so that the total available points was 15. Suitability, which was also assessed solely on the basis of the interview, was scored out of 20. The weighting of the

computer test result out of 7 is relatively low compared to the weight of each of the interview questions. The Arbitrator has considered the reason given by the Employer for the relatively low weighting. The Employer submitted that the requirement for computer skills was listed in the job description to let employees know that they might need computer skills in the future. However, the Arbitrator finds that the plain meaning of the job description is that having computer skills is a present requirement to perform the duties of the job. The Employer's decision regarding this factor appears to be contradictory to the clearly expressed requirements of the job description.

When considering the Employer's explanation for the weighting of the computer skills test score, the Arbitrator has considered the process followed by the Employer to decide on the weighting. Unlike the interview questions, where the weighting of each question was decided before the interviews, the weighting of the computer test score was not decided until after the employees had completed the computer test. In other words, it was not until after the computer test was completed and Mr. Lefrense had demonstrated essentially no computer skills, that it was decided to assign a relatively low weighting to the computer test result. There is no evidence that the computer test score weighting was deliberately manipulated to favour Mr. Lefrense. However, the fact that the computer test score weighting was decided after the computer testing was completed leaves an appearance that the results could have been manipulated to favour one applicant over another. There is an appearance of unfairness in favour of Mr. Lefrense and against the Grievor. The Arbitrator finds that the process was arbitrary because the weighting was not decided prior to the computer test being completed and there is no adequate explanation for the process followed or the decision on weighting. The appearance of unfairness about the computer test score weighting is also indicated by the fact that total scores were marked on the computer test sheets for Mr. Murphy and Mr. Lefrense as if the computer test scores were weighted out of a total of 70 points and not 7 points. When the computer test results are weighted out of 70, then Mr. Murphy had a higher score of 102.5 compared to Mr. Lefrense's score of 101.5 for the combined interview and computer test score. Although it was not proven that these markings on the computer test sheets were made by anyone involved with the selection process, the numbers are significant and may be considered by the Arbitrator. When the computer test score is weighted out of 7, Mr. Lefrense had a higher total score of 95.2 compared to 80.9 for Mr. Murphy. The low weighting of the computer test score favoured Mr. Lefrense. However, the low weighting of the computer test score does not give due regard to the job description, and the decision on weighting was made after the computer test results were known. In that regard, the selection process was unfair and arbitrary.

The other factors considered by the Arbitrator include the fact that Mr. Ferguson gave consideration to the experience of Mr. Lefrense as a town mayor which he believed demonstrated his leadership abilities. However, consideration of this factor also indicates that the process was arbitrary. The Employer submitted that the successful candidate was selected based solely on their total score and no other factor. However, the factor of prior leadership experience was considered for Mr. Lefrense. Also the Employer did not consider the occasions when the Grievor was temporarily assigned to the lead hand position or any reports on the performance of the Grievor during those assignments. If the Employer was willing to consider other factors for Mr. Lefrense, then it was arbitrary not to consider other factors for Mr. Murphy.

The Arbitrator finds that the selection process followed by the Employer was unfair and arbitrary. It follows that the Employer is not entitled to rely on the total scores calculated by the Employer to justify its decision under Article 11.12.

The Arbitrator has considered whether the appropriate redress is to award the position to the Grievor, or to remit the matter to the Employer for reconsideration according to a corrected process. According to arbitral authority, a position may be awarded to a grievor where the selection process is flawed, the evidence shows that the grievor was relatively equal to the successful applicant and there is a satisfactory reason not to remit the matter to the employer (*St. Joseph's General Hospital and CAW-Canada, Local 1120* (2004) 126 L.A.C. (4th) 114 (Harris), *Fairview Homes Inc. and Fairview Nurses MNU, Local 21* (1991) 21 L.A.C. (4th) 223 (Cherniak) and *Interior Health Authority and BCNU* [2004] BCCAAA No. 316 (QL) (Hope)). In this case, all the information required to compare the Grievor and the successful applicant is available to the Arbitrator. It is unnecessary to consider the qualifications of any other applicant, because the status of any other applicant is not an issue before the Arbitrator. There is no need for a new job competition. A new job competition would give an unfair advantage to the incumbent in the position. At this stage, the flaw in the process cannot be corrected by the Employer adjusting the scores, because any adjustment in weighting of the existing test results by the Employer would still be made with knowledge of the test results. The interview and computer test scores obtained by the Employer may be considered when comparing the qualifications of the Grievor with the successful applicant, Mr. Lefrense. The evidence shows that the Grievor was relatively equal to Mr. Lefrense. When the interview scores are considered together with the computer test scores, and due consideration is given to the fact that Mr. Lefrense had the lowest possible computer test score, the Grievor's qualifications are relatively equal to Mr. Lefrense's qualifications. The Arbitrator finds that the qualifications of the Grievor

were equal to Mr. Lefrense, within the meaning of Article 11.12. Article 11.12 states that seniority shall govern. The Grievor had greater seniority than Mr. Lefrense. Therefore he is entitled to be awarded the position as the senior applicant under Article 11.12.

Decision

The grievance is allowed. The position of lead hand (machinist) is awarded to the Grievor with full compensation.

DATED this 15th day of November, 2007.

James C. Oakley
Arbitrator