

**JOB POSTING
SUFFICIENT ABILITY CLAUSE**

FINDINGS AND DECISION IN A DISPUTE

**BETWEEN: HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND
LABRADOR (REPRESENTED HEREIN BY THE TREASURY BOARD)**

**AND: NEWFOUNDLAND AND LABRADOR HEALTH BOARDS
ASSOCIATION / LABRADOR-GRENFELL REGIONAL HEALTH
AUTHORITY**

(hereinafter referred to as “the Employer”)

**AND: NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC
AND PRIVATE EMPLOYEES (HOSPITAL SUPPORT STAFF)**

(hereinafter referred to as “the Union”)

RE: GRIEVANCES OF J. MULLALY, C. SIMMONDS AND V. PITTMAN

(hereinafter called “the Grievors”)

Appearances: For the Union: Fred Oates

For the Employer: Mark Gill

Witnesses: For the Union: Jacqueline Mullaly
Corina Simmonds
Viva Pittman

For the Employer: Genevieve Corbin
Sam Mansfield

Arbitrator/Mediator: Dennis Browne, Q.C.

The Arbitration hearing commenced at the Hotel North, in Happy Valley-Goose Bay, Newfoundland and Labrador, on June 11, 2008, and concluded June 12, 2008. At the commencement of the hearing, the parties agreed as follows: *

1. That the sole Arbitrator was acceptable to the parties and had jurisdiction to deal with the dispute.
2. That the Arbitrator would take written notes and in the event of conflict, these notes would prevail.
3. That the grievance procedure had been properly followed.
4. That the Arbitrator would remain seized of the matter for a period of sixty (60) days following the date of the Award in the event that any interpretation of the Award or its effect was necessary.
5. That witnesses would be excluded from the hearing.
6. That all parties likely to be affected by the outcome of the arbitration had received adequate notice. Interested Party Ronda Laing observed the hearing but did not wish to participate.
7. That Collective Agreement and statutory time limits for making the Award would be waived.

THE EXHIBITS

The following exhibits were entered by consent:

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| C1 | The Collective Agreement |
| C2A | Grievance Form – November 30, 2006 (Corina Simmonds) |
| C2B | Grievance Form – December 1, 2006 (Jacqueline Mullaly) |

* At the outset the Employer raised a preliminary objection.

- C2C Grievance Form – December 7, 2006 (Viva Pittman)
- C3 Agreed Statement of Facts – June 11, 2008
- C4 Resume – Jacqueline Mullaly
- C5 Resume – Viva Pittman
- C6 Resume – Corina Simmons
- C7 Employment Opportunity – Clerk IV – Permanent Full Time – October 20, 2006

Other Exhibits:

- JM1 Correspondence – Mullaly/Mansfield – October 24, 2006
- JM2 Employment Opportunity – Clerk IV Temporary – October 27, 2005
- JM3 Grievance Form – November 30, 2005
- CS1 Correspondence – Hodder/Simmonds – December 1, 2006
- VP1 Correspondence – Pittman/Mansfield – October 25, 2006
- GC1 Clerk IV – 0018 Classification – Pay Specifications
- SM1 Posting Cancellation – November 23, 2005

NATURE OF THE GRIEVANCE

In three individual grievances dated November 30, 2006, December 1, 2006, and December 7, 2006, the Union alleges that the Employer violated Article 15 and all other pertinent articles of the Collective Agreement. The Union is seeking full redress. The Employer denies any violation of the Collective Agreement.

THE FACTS

At the commencement of the hearing, the parties entered an Agreed Statement of Facts. The Agreed Statement of Facts is as follows:

AGREED STATEMENT OF FACTS

The Parties

1. The Labrador-Grenfell Health Authority (“the Employer”) is responsible for the operation of several public health care facilities in the province, including the Labrador Health Centre in Happy Valley-Goose Bay.
2. The Newfoundland & Labrador Health Boards Association (“NLHBA”) represents publicly funded health care employers in the province, including the Employer.
3. The Newfoundland and Labrador Association of Public Employees (“NAPE”) is a bargaining agent for hospital support workers with public health care employers throughout the province, including the Employer.
4. The parties (NAPE, NLHBA on behalf of the Employer) are signatories to a collective agreement dated May 4, 2004 (“the Collective Agreement”), and the parties agree to tender this document as a consent exhibit.

Background

5. Jacqueline Mullaly began work with the Employer on May 1, 1991 and was the applicant with the most seniority.
6. Viva Pittman began work with the Employer on August 16, 1993 and was the applicant with the second most seniority.
7. Corina Simmonds began work with the Employer on June 12, 1995 and was the applicant with the third most seniority.
8. Ronda Laing began work with the Employer on January 25, 1999 and was the applicant with the fourth most seniority.
9. From October 1, 2001 to January 7, 2007, Ms. Laing occupied the bargaining unit position of WPEO I in Child Youth and Family Services (CYFS) in Sheshatshiu.
10. On October 20, 2006, the Employer posted a permanent full-time Clerk IV CYFS position (“the Position”) within NAPE. The parties agreed to tender this document as a consent exhibit.
11. Ms. Mullaly, Ms. Pittman, Ms. Simmonds and Ms. Laing were applicants for the Position.
12. The Employer chose Ms. Laing as the successful applicant for the Position on December 1, 2006 and she started in that position on January 8, 2007.
13. From the Employer’s point of view, Ms. Laing met all of the posted qualifications for the Position.
14. From the Employer’s point of view, Ms. Mullaly, Ms. Pittman and Ms. Simmonds did not meet all of the posted qualifications for the position.

The Grievances

15. On November 30, 2006, Ms. Simmonds filed a grievance with the Employer based upon her being denied the Position. The parties agree to tender this document as a consent exhibit.

16. On December 1, 2006, Ms. Mullaly filed a grievance with the Employer based upon her being denied the Position. The parties agree to tender this document as a consent exhibit.
17. On December 7, 2006, Ms. Pittman filed a grievance with the Employer based upon her being denied the Position. The parties agree to tender this document as a consent exhibit.
18. The parties disagree on whether the grievors met the posted qualifications for the Position.
19. This Agreed Statement of Facts is not exhaustive. That is, the parties will call witnesses, introduce formal evidence and present arguments at the hearing.

Dated this 11th day of June, 2008.

The Agreed Statement of Facts was signed by Mark Gill on behalf of the Newfoundland and Labrador Health Boards Association, Sam Mansfield of the Labrador-Grenfell Health Authority, and Fred Oates of NAPE.

The parties called witnesses and there are other facts which emerged from the hearing.

The Employment Opportunity (hereinafter the "Job Posting"), which is the subject of this arbitration, states in part:

Clerk IV – Permanent Full Time
(CYFS – Regional Office – Goose Bay)

Reporting to the Regional Director for CYFS, the primary purpose of this position is to perform clerical duties in the CYFS Regional Office under the direction of the Regional Director.

Qualifications

- √ Graduation from high school supplemented by the successful completion of a two year college level business administration program;
- √ Minimum of two years experience in word processing; preferably with Microsoft Word
- √ Typing speed of at least 40 words per minute;
- √ Minimum of one year experience in electronic spreadsheets; Preferably with Microsoft Excel;
- √ Supervisory or office management experience;
- √ Experience with CRMS/CPS;
- √ Good oral and written communication skills are essential;
- √ Sound working knowledge of the programs and services provided through the Child Youth and Family services division of the Labrador-Grenfell Health which would have been acquired through direct work experience.

Duties and Responsibilities: (Included but not limited to)

- √ Manages the efficient administration of the Regional Office operations;
- √ Provides Administrative support to the Regional Director of Child, Youth and Family Services, Director in Region and the Director of Adoptions;
- √ Participates in the processing of adoption applications under the direction of the Director of Adoptions;
- √ Provides clerical support to regional office staff;
- √ Responsible for the office management functions association with the operations of the Regional unit CYFS division including regional communications, policy/document distribution and other support services both at the Regional office and District offices;
- √ Participates in the collection, examination, analysis and compilation of a variety of statistical and budgetary reports as required at the Regional, Corporate and Provincial level such as Child Tax Benefit, Alternative Living Arrangements and Out of Province Placements;
- √ Responsible for Regional payroll data entry and inquiries with respect to payroll issues;
- √ Responsible for tracking staff travel claims/invoices for the purpose of Provincial billing and reimbursement;
- √ Responsible for the reconciliation of client payments;
- √ Assists with the coordination of staff development/training sessions;
- √ Maintains LTA payroll expenditure reports and provides same to all Program Managers for review and reconciliation;
- √ Responsible for the policy and document distribution across all CYFS programs for the Region;
- √ Maintains and displays a high sense of professional ethics (confidentiality, worth of people, self-determination, respect for client, etc.);
- √ Other related duties as required.

The Employment Opportunity was posted October 20, 2006, with a closing date of October 26, 2006. The three Grievors applied in a timely fashion.

There was evidence of a previous job posting. On October 27, 2005, the Employer posted an Employment Opportunity for Clerk IV Temporary Full-Time (three months) and the location was to be the CYFS Regional Office. The job was reporting to the Regional Director for CYFS located at the Community Services Regional Union. This 2005 job posting stated as follows:

Clerk IV – Temporary Full-Time
(CYFS – Regional Office – Goose Bay)

Reporting to the Regional Director for CYFS located at the Community Services Regional Unit.

Qualifications & Experience Requirements

- Graduation from high school supplemented by the successful completion of a two year college level business administration program;
- Minimum of two years experience in word processing; preferably with Microsoft Word
- Typing speed of at least 40 words per minute;

- Minimum of one year experience in electronic spreadsheets; Preferably with Microsoft Excel.
- Supervisory or office management experience
- Good oral and written communication skills are essential.

DUTIES & RESPONSIBILITIES (include but not limited to):

- Manages the efficient administration of the Regional Office operations;
- Provides Administrative support to the Regional Director for Community Corrections, Child Care Services, FRS and Residential Services and the Director For CYFS, Innu Zone as required;
- Provides clerical support to 3 BMS/CMS staff and 5 Regional staff in addition to the supporting Regional Directors as noted above.
- Responsible for the office management functions associated with the operations of the Regional unit CYFS division including regional communications, policy/document distribution and other support services both at the Regional office and District office;
- Participates in the collection, examination, analysis and compilation of a variety of statistical and budgetary reports as required at the Regional, Corporate and Provincial level. IE CTB, ALA, OPP;
- Responsible for Regional payroll data entry and inquiries with respect to payroll issues.
- Responsible for tracking staff travel claims/invoices for the purpose of Provincial billing and reimbursement;
- Responsible for the reconciliation of client payments with respect to the Janeway Hostel invoicing;
- Assists with the coordination of staff development/training sessions within the Region.
- Maintains LTS/STA payroll expenditure reports and provides same to all Program Managers for review and reconciliation;
- Responsible for the policy and document distribution across all CYFS programs for the Region;
- Maintains and displays a high sense of professional ethics (confidentiality, worth of people, self-determination, respect for client, etc.)
- Other related duties as required.

This October 27, 2005, posting was cancelled by notice dated November 23, 2005.

Grievor Jacqueline Mullaly had worked in various positions for approximately fifteen (15) years. Most recently she had worked as an administrative assistant in the Employer's pharmacy department. This Grievor was screened out from the competition because she lacked stated job requirements - experience with CRMS/CPS and a sound working knowledge of the programs and services provided through the Child Youth and Family Services Division acquired through direct work experience. Neither had she conducted duties and responsibilities pertaining to the processing of adoption applications under the direction of the Director of Adoptions. CRMS/CPS were described by Ms. Mullaly as fairly new programs which could be learned like any other computer program. Ms. Mullaly

had no direct experience in working with Child Youth and Family Services but has a knowledge of what these services are. She received no interview because she had been screened out.

Grievor Mullaly acknowledges not working with CRMS/CPS, as these were in an implementation stage when she applied. She believes her work experience would give her a good basis for acquiring quickly the sound working knowledge of the programs and services provided through Child Youth and Family Services. The witness believes the CPS program is still being developed.

Grievor Corina Simmonds had worked with the Employer for approximately eleven (11) years when she applied for the job posting in 2006. At that time she had been a secretary to two Regional Directors. She had also worked in a variety of other positions with the Employer in the secretarial/administrative support field. She testified that she had general knowledge but no experience in working with CRMS/CPS, although she had some familiarity with the programs. This Grievor had worked in staff development but never had an opportunity to work in support in CRMS/CPS. There was no way for her to get the experience in CRMS/CPS unless she worked there and therefore she felt excluded. She made an effort to obtain the CRMS policies but was not provided a copy of the same by the Employer. She recalled receiving an interview for a Financial Accounting Clerk position. There was no interview in this case. She was familiar with some aspects of Child Youth and Family Services but had no sound working knowledge. She felt that after training for a short period of time that would be acquired.

Grievor Vina Pittman had worked some twelve years with the Employer. This Grievor confirmed the information contained in her resume. It is her position that her experience in working with the Employer in various positions would have qualified her for the job posting. However, she was informed by the Employer that she lacked the CRMS/CPS requirements and received no interview in reference to the job posting. The witness knows of no way to obtain a position which requires such experience unless a permanent employee was to apply for a temporary assignment in Child Youth and Family Services. She had no issue with the job posting until she was denied the position. It was also noted that she did not have the two year college level business administration program, but had acquired other jobs with the Employer without having that requirement. The two year business program as stated in the job posting requirements was not an issue previously when she applied for a position.

Genevieve Corbin took up the position of Regional Director for Child and Family Services in January 2006 and has been there for 2.5 years. The position was implemented under the Adoptions Act which requires a diversified staff reporting to her. The incumbent is accountable under legislation. The geographic jurisdiction includes areas covered by Grenfell on the North Coast and most of Labrador, with the exception of some zones. In reference to the job posting, the witness consulted with an incumbent as to duties and responsibilities and consulted with the Human Resources Department. The position is one of a major and primary support. The witness stated that CRMS refers to the Client Referral Management System and is a database. Knowledge of the database is critical as missing children are tracked and inquiries can come from other provinces. The program is provincially based. CPS is the Client Pay System designed solely for Labrador. All approvals on monetary issues go through there and the position requires a high degree of accountability. In terms of responsibilities for children, the incumbent is currently assisting in several inquiries. The incumbent is the point person.

Qualifications and duties in the job posting are based in part on classification and pay specifications for Clerk IV. Nothing in the Job Posting was established in an arbitrary manner. She understood the sufficient ability clause and seniority would prevail once qualifications were met. The Grievors did not meet the minimum qualifications, therefore seniority did not prevail and there was no requirement for interviews. She had no complaints concerning qualifications at that time. When she assumed her position in 2006, the Client Pay System (CPS) was already in place and that pay system is exclusive to this Employer.

There was an organizational review in 2006 following the Turner Inquiry. There is now increased scrutiny and a strengthened response to children requiring services in a timely manner. The Clerk IV position reflects these needs.

The witness believed that the policy manual for CRMS was online. The witness stated that these Grievors did not meet the minimum requirements of CRMS/CPS. Both are information systems and used by social workers. CRMS is a large information system and the scope of access to that information depends on the job. She stated that a thorough knowledge was required of the programs in order to obtain the position. The witness was unaware that there had been a previous job posting. CRMS was in place when she arrived to take up her new position. She had no preconceptions as to

who would apply or as to who would obtain the position. She had no contact with the Grievors. She is uncertain as to whether the incumbent received any training.

Sam Mansfield, the Employer's Regional Director for Human Resources, has primary responsibility for overseeing the job selection, as his duties include recruitment and staff selection. The October 2005 Job Posting was cancelled on November 23, 2005. The Employer found it was not required to post pursuant to Article 15.03(b)(i) of the Collective Agreement for a temporary position of less than thirteen (13) weeks. The position was to be temporarily assigned. The successful applicant for Job Posting JM2 had been temporarily assigned to the position for eight (8) weeks after JM2 was cancelled. The witness did not know if there was any training period for the temporary appointee at that time.

The witness testified that the difference between the JM1 posting of October 2006 and the JM2 posting of October 2005 was reflected in the testimony of witness Genevieve Corbin, in that the social work landscape had changed following the Turner report. New duties were required for the job as stated in the job posting. Interviews are not common with the Employer.

The Employer in this instance knew they were dealing with a sufficient ability clause. He believes that in this instance there may have been more grievances filed as there were thirteen applications but only three Grievors proceeded to this hearing. The Job Specification developed by Treasury Board for Clerk IV is used as a guide.

These are facts relevant to this case.

POSITION OF THE PARTIES

The Union

These are individual grievances of three senior employees who were denied the job of Clerk IV – Permanent Full Time as posted by their employer. The job went to a less senior employee. In these circumstances, the Union is alleging a violation of Article 15 of the Collective Agreement. The Union notes that Article 15.02 specifies the information which is to be carried on job postings. The

information or postings, including qualifications, may not be established in an arbitrary or discriminatory manner. The Union maintains unfairness in the job posting and in the processing of applications for these positions.

Article 15.04 stipulates the role of seniority in promotions and transfers. It is that Article which was ignored in this case.

Article 15.04 is a sufficient ability clause. If an applicant meets the minimum requirements for the position, seniority prevails. It is the Union's position that all three Grievors should have been offered the position in order of seniority. All Grievors were qualified and had experience with the Employer. Furthermore, the Grievors are entitled to a trial period in the new position pursuant to Article 15.05 of the Collective Agreement. Such a trial period allows the Employer to evaluate an applicant in the position prior to making that applicant permanent in such a position. The Employer and the employee therefore have an opportunity under Article 15.05.

These three senior Grievors were screened out of the job competition without the benefit of interviews. The Employer inserted into the job posting experience with CRMS/CPS and sound working knowledge of the programs and services provided through the Child Youth and Family Services Division of the Employer. All three Grievors were given the same reasons by the Employer in that they lacked these requirements for the position. It is the Union's position that the criterion at issue should not have been included in the job posting. By inserting experience with CRMS/CPS and requiring a sound working knowledge of the programs and services provided through the Child Youth and Family Services Division, the experience and abilities of these Grievors has been ignored. The Grievors have had experience in various hospital departments and equivalency should have applied in these circumstances. Based on the job posting, as devised by the Employer, no one in the bargaining unit with experience could apply. The evidence was that only two employees already working within Child Youth and Family Services would be qualified. The seniority provisions of the Collective Agreement are therefore being undermined because the Employer has inserted criteria in this job posting which denies senior employees even the right to be considered for the position.

It is clear what the Employer has done in this case. The process was flawed because unreasonable conditions were placed on the job posting. There were preconceived notions based on these

qualifications and the Article 15 provisions of the Collective Agreement which ensure promotion based on seniority have been ignored.

There was evidence that previous job postings for similar positions had no requirements for experience with CRMS/CPS and a sound working knowledge of the programs and services provided through the Child Youth and Family Services Division. Certainly, there was no mention of these requirements in a 2005 job posting. Article 4 requires that there be no discrimination with regard to any employee in the matter of hiring, promotion and transfer. By inserting new qualifications into standard postings, the seniority of employees working with this Employer has been undermined.

The Union made reference to various authorities in support of its position, including Brown and Beatty's Canadian Labour Arbitration and cases including: Newfoundland Association of Public Employees and Labrador Health Services Board Re: Olive Blake (Oakley) (1996, Unreported); Newfoundland Association of Public Employees and Dr. Charles A. Janeway Health Centre Re: Walter Bray (Thistle) (1986, Unreported); Newfoundland Association of Public Employees and Her Majesty the Queen in Right of Newfoundland Re: Union Grievance (Easton) (1980, Unreported); Terrington Consumers Co-Operative and Newfoundland Association of Public Employees Re: Policy Grievance (Cooper) (1989, Unreported); Toronto Public Library and C.U.P.E., Loc. 1996 [1989] 5 L.A.C. (4th) 192 (Burkett et. al.); and Sydney (City) and C.U.P.E., Loc. 933 [1992] 24 L.A.C. (4th) 349 (MacDonald).

As to the preliminary objection, the Union maintains its right to bring these grievances. The Union had no obligation to grieve the job posting.

It is the Union's position that these grievances should be allowed and the Collective Agreement applied.

The Employer

In this case, the Union bears the onus of proof on the balance of probabilities. For the Employer, this issue is not new. In this instance, the Grievors admitted to not having the qualifications as required by the Employer pursuant to the job posting. There has been no evidence of discrimination and no evidence of arbitrariness in establishing the requirements for the job posting. All applications were

reviewed and scrutinized fairly. The Grievor must possess the qualifications in order to get the job. The fact that these Grievors do not have such qualifications is supported by their own evidence.

The Employer has the right to post jobs pursuant to qualifications that have been established in a non-arbitrary manner. In this instance, the contents of the postings were fairly established. Because the senior applicants did not have the qualifications for the position, the job was awarded to the junior applicant, who had the requisite qualifications.

The Employer notes that there are important differences in the job requirements of 2006 which were not in existence in 2005. Following the Turner inquiry and ensuing legislative changes, the support staff for the Regional CYFS Director required greater proficiency. The new job posting reflected these changes. All of the qualifications stated in the job posting were relevant to the job. The Employer did not develop the posting in violation of Article 15.02. Here, management rights come into play. The Employer has the right to develop a job posting pursuant to its own requirements. There has been no discrimination or arbitrariness proven. The Employer acted consistently within past practice in reference to this job posting. Interviews were not necessary and neither were interviews usual. There is no dispute as to the successful applicant's qualifications. This is a sufficient ability clause and the Employer's decision should stand. The Union has not discharged its onus in this case.

The Employer made reference to a number in support of its position, including: Treasury Board and Newfoundland and Labrador Health Care Association and the Newfoundland Association of Public Employees Re: Grievance of Mary Twomey (Browne) (2001, Unreported); Treasury Board and Newfoundland and Labrador Health Care Association and the Newfoundland Association of Public Employees Re: Grievance of Deborah Laver-O'Neill (Browne) (2000, Unreported); Newfoundland Farm Products Corporation and Newfoundland Association of Public Employees Re: Grievance of Glen White (Browne) (1996, Unreported); Her Majesty the Queen in Right of Newfoundland and Newfoundland Hospital and Nursing Home Association and Canadian Union of Public Employees Re: Grievance of George Sweeney (Browne) (1996, Unreported); Her Majesty the Queen in Right of Newfoundland and Newfoundland Hospital and Nursing Home Association and Canadian Union of Public Employees Re: Grievance of Beverly Scott (Browne) (1996, Unreported); Newfoundland Association of Public Employees and Her Majesty the Queen in Right of Newfoundland (Treasury Board) – Waterford Hospital Re: Grievance of Melvin Kennedy (Thistle) (1989, Unreported); and Newfoundland Hospital and Nursing Home Association – Avalon Health Care Institutions Board and

Newfoundland Association of Public Employees Re: Grievance of David Healey (Kelsey) (1996, Unreported). The Employer also made reference to Brown and Beatty's Canadian Labour Arbitration.

The Employer made a preliminary objection. The Employer maintained that the Union ought to have grieved the contents of the Job Posting if these were in dispute after the job had been posted on October 20, 2006. Article 11.07 requires a grievance to be made within ten (10) calendar days of the discovery of the grievance. Article 11.02 requires a prompt grievance procedure. Because the Union did not file timely grievances within ten (10) calendar days of the Job Posting, these grievances cannot now proceed. The Union is in violation of Article 11.07 of the Collective Agreement. The preliminary objection should therefore be upheld.

It is the Employer's position that these grievances should be denied.

PRELIMINARY OBJECTION

At the commencement of the hearing the Employer raised a preliminary objection. The Employer objected that these grievances were untimely and did not comply with the Article 11 grievance procedures. The Employer alleged that the Union was essentially filing grievances concerning the job postings. The job had been posted October 20, 2006, and the grievances were not filed until November 30, 2006, December 1, 2006, and December 7, 2006, respectively. Article 11.07 stipulates that a grievance is to be filed in writing within ten (10) calendar days of the occurrence or discovery of the grievance. Thus, the Employer maintains that the grievances as filed failed to comply with Article 11.07 of the Collective Agreement.

The Union denied that the grievances ought to have been filed at the time of the job posting. The Union's position was that the grievances alleged violations of Article 15 of the Collective Agreement, and in particular Article 15.04 which pertains to promotions and staff changes. The grievances were filed after the Grievors failed to obtain the position of Clerk IV as described in the Job Posting. The Union notes that there is no dispute as to the timeliness of the grievances as these pertain to Article 15.04.

DECISION

An arbitrator, pursuant to Article 12.03, has a duty to determine procedure providing the parties are given a full opportunity to present evidence and make representations. Here, the parties had the

opportunity to call evidence relating to the preliminary matter when evidence was called on the substantive issue and to make representations on the preliminary issue during final submissions.

Having heard all of the evidence and considered the submissions of the parties pertaining to the preliminary objection, I am satisfied that the grievances alleging violations of Article 15 of the Collective Agreement were filed in a timely manner. The Union is disputing the Grievors' right to job promotions and staff changes as found in Article 15.04. The Union may have opted to file grievances in reference to Articles 15.01 and 15.02, but chose not to. If the Union had filed such grievances, these may have been premature as the outcome of the Job Posting had yet to be determined.

The Union cannot be faulted for awaiting the outcome of the Job Posting prior to filing these grievances. In cases alleging breaches of promotion and staff changes, where the focus is on a job posting, the contents of that posting usually come under scrutiny. I am not satisfied that the Employer has proven that the Union's decision to file grievances alleging a breach of the Article 15.04 was not timely. The Employer's preliminary objection cannot be sustained.

CONSIDERATIONS AND REASONS FOR THE DECISION

Articles relevant to these grievances include:

15.01 Job Postings

When a vacancy occurs or a new position is created, either inside or outside the bargaining unit, the Employer shall post notices of the position in accessible places in the Employer's premises for a period of not less than seven (7) calendar days. Copies of all postings are to be supplied concurrently to the local secretary.

15.02 Information on Postings

Notices of new positions or of vacancies inside the bargaining unit shall contain the following: title of position; qualifications; required knowledge and education; skills; wage or salary rate or range; and whether shift work could be involved. Such qualifications may not be established in an arbitrary or discriminatory manner. All job posting shall state "this position is open to male and female applicants".

15.03 Procedure for Filling Vacancies

- (a) No position will be filled from outside the bargaining unit until the applications of present employees have been fully processed.

- (b) (i) Where in the Employer's opinion, a temporary position is expected to exceed a period of thirteen (13) continuous weeks, or where a position exceeds thirteen (13) weeks, such position shall be posted in accordance with clause 15.01.
- (ii) Where a temporary position has a termination date, it shall not be extended by more than thirteen (13) weeks unless mutually agreed between the employee and his/her Employer.
- (iii) Where the employee declines an extension, the Employer shall not fill the position as per Clause 15.03(b)(i). The thirteen (13) week period shall commence when the employee vacates the position.

15.04 Role of Seniority in Promotions and Transfers

Both parties recognize

- (a) the principle of promotion within the service of the Employer;
- (b) that job opportunity should increase in proportion to length of service.

Therefore, when a vacancy occurs in an established position within the bargaining unit, or when a new position is created within the bargaining unit, employees who apply for the position on promotion or transfer shall be given preference on a total seniority basis, whether seniority is temporary or permanent, for filling such vacancy, provided that the applicant's qualifications meet the required standards for the new position. Appointments from within the bargaining unit shall be made within four (4) weeks of posting.

15.05 Trial Period

The successful applicant shall be placed on trial for a period of 325 working hours. Conditional on satisfactory service, the Employer shall confirm the employee's appointment after the period of 325 working hours. In the event that the successful applicant proves unsatisfactory in the position during the trial period, or if the employee is unable to perform the duties of the new job, he/she shall be returned to his/her former position, wage, or salary rate and without loss of seniority. Any other employee promoted or transferred because of the rearrangement of positions shall also be returned to his/her former position, wage, or salary rate, without loss of seniority. The parties may mutually agree, in writing, to extend the trial period. Where the Employer and the Union agree, the employee may revert to his/her former position prior to the completion of the trial period.

Here the Grievors are senior to the junior applicant appointed to the position as posted. At 6:0000, Brown and Beatty make reference to the importance of seniority as follows:

Seniority systems are an integral part of virtually every collective agreement. They define eligibility for a wide variety of monetary and fringe benefits provided for in collective agreements, and they determine an employee's entitlement to particular jobs in the context of promotions, transfers and layoffs. With all of the terms and conditions of employment to which they are linked, seniority provisions are designed to reward employees for longevity of service. The theory underlying such systems is to provide those employees possessing the longest record of service in the context of a layoff with the greatest job security and, in the context of a promotion, with the greatest potential for advancement. The extent to which a particular seniority provision secures such benefits will depend in large measure on the scope or definition of an employee's seniority, the manner in which the agreement provides for its application, and the extent to which it is qualified by such other considerations as skill and ability. Notwithstanding enormous variation in all of these matters in collective agreements, all arbitrators start from the premise that:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

Qualifications are at issue in this case. That is not uncommon. Brown and Beatty write at 6:3000:

As already noted, rarely do collective agreements provide that seniority is the sole criterion to be utilized by an employer in determining entitlement to a particular job. Seniority rights are almost always circumscribed temporally, geographically, occupationally and, as described in the preceding sections, they may only apply in certain defined contexts such as promotions and layoffs. In addition, virtually all seniority clauses contain the proviso that, before an employee can claim a position on the basis of his or her seniority, the employee must first show that he or she has the necessary ability, qualifications, etc., to do the job. If none of the applicants is capable of satisfying the requirements of the job, it is generally accepted that an employer is free to ignore the seniority provisions in an agreement and to appoint whomever it desires, whether from within its workforce or from the labour market, so long as it acts fairly and without discrimination.

Brown and Beatty at 6:3000:

Although every collective agreement is distinctive in some respects, typically seniority rights are qualified by requirements of skill and ability in one of two ways:

Two alternative themes are generally found in seniority articles. **Under one, seniority is qualified in greater or lesser degree by a requirement of ability or competence to**

do the required work. In such a case, a senior man who is equal to the job is entitled to it, although there may be a junior applicant who can do it better. The other theme involves a contest between competing applicants, and seniority governs only when their competence or ability is relatively equal. (Emphasis added)

The parties agree that Article 15.04 is what is commonly referred to as a sufficient ability clause – the first theme referenced above.

The burden of proof rests with the Union. Brown and Beatty in Canadian Labour Arbitration, at 3:2400, state:

The obligation of having the onus or burden of proof means the party bearing it will not succeed when, on the basis of the evidence adduced and argument presented, the result has not been pointed to one way or the other in the mind of the arbitrator. That is, for the party with the onus of proof to succeed, the scales must tip in its favour. However, where there are two conflicting versions of what occurred, the arbitrator must first resolve which one is correct before applying the foregoing principle. ...

In the allocation of the burden of proof, the general principle is that “the onus of proof in all cases rests primarily on him who asserts a claim to establish and prove it and not on the other side to disprove the claim”. And in grievance arbitrations, it is generally accepted that the Grievor has the ultimate burden to make out a breach of the collective agreement except in cases of discharge where the initial burden to prove a *prima facie* case is met by proving the collective agreement, the fact of employment, and the dismissal.

The scope of an arbitrator’s ability to review a management decision is limited. Brown and Beatty at 6:3100 state:

Notwithstanding the many variations in the type and language of seniority clauses that may be included in collective agreements, there has been relatively little dispute among arbitrators as to the general scope of their review of managerial decisions that are made according to any of the standard promotion and layoff regimes. In the first place, there is a consensus that regardless of the language of the agreement, the standard of arbitral review of managerial decisions that involve an assessment of the abilities of employees is less demanding than that used in discipline cases. As a general rule, arbitrators have been reluctant to interfere with managerial decisions of this kind unless there is evidence of arbitrariness, discrimination, bias and/or bad faith, or an indication that the employer’s judgment was unreasonable in some basic and significant respect. In the usual case, and particularly when the job 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 was reasonable in the circumstances. From the earliest awards it has been said that the primary function of an arbitrator’s review 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.

In most cases, arbitrators have not restricted their inquiries to analyses of the *bona fides* of the employer's motives. In addition, as the extract confirms, arbitrators have always examined the merits of such decisions at the time they were made against a standard of reasonableness. As summarized by one arbitrator, an employer's decision will be tested for its honesty, its completeness and its correctness under a test of reason. For others, a test of reasonableness centres on an assessment of whether management has deviated from the path of rationality or relevancy. Another formulation asks whether the decision was based on evidence that is so minimal that no employer, acting reasonably, could have arrived at that decision.

In quoting a decision from the Ontario Divisional Court, the authors state at 6:3100:

The board as a creature of the collective agreement must then see to it that the provisions of the collective agreement have been complied with; its role cannot be more or less than this. The honesty and lack of *malafides* in making the decision are factors to be taken into account. So, too, is the question of whether or not the employer has acted unreasonably. Indeed, in determining the "reasonableness" of the employer's decision, the board may go a long way to determine the issue submitted to it. However, once the collective agreement makes provisions as to the method of selection of employees for promotions, then the board must see to it that those provisions have been complied with and in so doing, it cannot restrict itself to determining whether the employer acted honestly and reasonably. If the board is not to make such a decision, then the parties in the collective agreement should ensure that management's right in this regard is unfettered.

Finally, Brown and Beatty state at 6:3100:

Although reasonableness and correctness are the standards against which an employer's evaluation of an employee's ability and qualifications are usually tested, in some cases it is claimed that a decision was arbitrary, discriminatory, biased and/or made in bad faith. Employees have prevailed when they were able to show that the employer did not apply its standards consistently, displayed favouritism or failed to even consider them for the job. Decisions that are not in conformity with human rights legislation will be found to be discriminatory as well.

The Job Posting for the position of Employment Opportunity Clerk IV – Permanent Fulltime Labrador-Grenfell (CYFS – Regional Office – Goose Bay) came under scrutiny during the hearing. I have reviewed Article 15 of the Collective Agreement. Article 15.02 requires information on postings to include the title

of the position, the qualifications, required knowledge and education, skills, wage or salary rate or range and whether shift work could be involved. The information on the job posting complies with Article 15.02 of the Collective Agreement.

In this case, the parties focused on particulars of the qualifications as found in the Job Posting. Specifically, two qualifications criteria were in contention – experience with CRMS/CPS and sound working knowledge of the programs and services provided through the Child Youth and Family Services Division of the Labrador – Grenfell Health which would have been acquired through direct work experience. The Grievors were not considered for the position due to these two factors.

The Grievors admitted lacking experience with CRMS/CPS as found in the job posting. CRMS refers to a client referral management system and is a database. CPS is a client pay system in use at Child Youth and Family Services in Labrador. Both are information systems used by social workers. The Grievors were also lacking a sound working knowledge of the programs and services provided through the Child Youth and Family Services Division of the Labrador-Grenfell Health, which would have been acquired through direct work experience. These were the reasons the Grievors were denied the position. The Union disputes that the above-referenced qualifications were legitimate requirements for the position of Clerk IV.

The two contentious qualifications were not included in a previous job posting for the position of Clerk IV at the Labrador Child Youth and Family Services offices in an employment opportunity posted in October 2005 (JM2). The Union has alleged an inconsistency on the part of the Employer in stipulating these new qualifications for the Clerk IV position. Also, the Union maintains that the Grievors ought to have been provided with a trial period to work in the position. Trial periods are referenced in Article 15.05.

The Employer denies any inconsistency in the job requirements as posted in October 2005 and the October 2006 job posting. The work of Child Youth and Family Services had become an issue during the so-called Turner Inquiry. The undisputed evidence of the Regional Director for Child Youth and Family Services and the Regional Director of Human Resources, who had primary responsibility for overseeing the job selection, is that the two new qualifications criteria were added to the requirements for the position of Clerk IV at the Child Youth and Family Services Regional Office - Goose Bay following the release and implementation of the Turner Inquiry Report.

The Turner Report was not entered into evidence; however, the directors' evidence as it pertains to the changes in the social work landscape following the report was not disputed by the Union. I accept the evidence that changes were made in the October 2006 Job Posting as a result of changes in the Child Youth and Family Services offices following the release of the Turner Report. I find that all of the qualifications in the October 2006 Job Posting reasonably reflected the requirements for the position of Clerk IV in the Child Youth and Family Services Regional Office – Goose Bay.

Given these findings, I am not satisfied that the two qualifications in dispute were unnecessary for the position of Clerk IV in the Child Youth and Family Services Regional Office – Goose Bay. There was no evidence of bad faith or that the Employer manipulated job qualifications for a particular result. I am satisfied that the Employer acted reasonably in changing the qualifications from those in the 2005 job posting.

I find that the Union has not discharged its burden in proving a breach of Article 15 and all other pertinent Articles of the Collective Agreement. In the result, I can find nothing in the evidence to suggest that the Employer has failed to abide by the provisions of the Collective Agreement.

However, I hasten to add that, while failing to prove a breach of the Collective Agreement in this particular case, the Union's concerns are nonetheless justified. If the Employer was to adopt a practice of particularizing special requirements which had not in the past been deemed necessary for the position of Clerk IV, it may be appropriate that such a position, with these additional responsibilities, be reclassified. The parties have recognized the importance of seniority in promotion and job opportunity, as is evident in Article 15.04. Whereas the evidence supports the Employer's case in this particular instance, as particularized in the evidence concerning the Turner Inquiry and the needs and requirements of the Child Youth and Family Services Regional Office following receipt of that report, that circumstance is unique. The Employer should be careful to recognize the importance of Article 15.04 to senior employees in job competitions.

Finally, the Union submitted that the Grievors ought to have been afforded a trial period working in the position. Article 15.05 does permit a trial period. The language of the Article does not stipulate a training period. The Grievors admitted to having no experience with CRMS/CPS and lacked a sound working knowledge of the programs and services provided with Child Youth and Family Services. While I have no doubt that the three Grievors are competent and capable, and would in time have

assumed all of the duties of Clerk IV as described in the Job Posting, there is no obligation in Article 15.05 of this Collective Agreement to train employees during a trial period.

DECISION

In conclusion, having carefully considered the relevant Articles of the Collective Agreement, all of the evidence and arbitral jurisprudence as it relates to this matter, I find that these grievances are denied.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 17th day of July, 2008.

Dennis M. Browne, Q.C. – Arbitrator/Mediator