

**SENIORITY  
JOB COMPETITION**

**FINDINGS AND AWARD  
IN A DISPUTE**

**BETWEEN:**

**NEWFOUNDLAND AND LABRADOR  
ASSOCIATION OF PUBLIC AND PRIVATE  
EMPLOYEES**

(hereinafter called the "Union")

**AND:**

**EASTERN REGIONAL INTEGRATED HEALTH  
AUTHORITY**

(hereinafter called "Eastern Health" or the "Employer")

**GRIEVOR:**

**TERRY WALSH**

**FOR THE UNION:**

**ED HOGAN**

**FOR THE EMPLOYER:**

**JAY NEVILLE, LL.B.**

**BEFORE:**

**W. JOHN CLARKE, C. Arb., C. Med., Sole Arbitrator**

**PRELIMINARY MATTERS**

The hearing of this matter took place in Carbonear on February 24 and 25, 2009 at the commencement of which 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 had been properly followed or requirements had been waived.
4. The Arbitrator would remain seized of the matter for a period of 30 days following publication of the Award in the event the parties could not agree on the interpretation of the Award or in the event there was a question of compensation arising from the Award.
5. Witnesses were excluded from the hearing until called upon to testify.
6. The time limits for filing the Award were waived.



7. Catherine Deering was a person potentially affected by the outcome of these proceedings and she had been notified. She did not appear when called at the commencement.

The following exhibits were entered by consent and identified as follows:

- C# 1 Grievance form dated June 17, 2008
- C# 2 Collective Agreement between the parties effective May 4, 2004 to March 31, 2008.
- C# 3 Job Posting for "Buyer II" position (email and "Repost" versions) closing May 2, 2008;
- C# 4 Job Posting for "Buyer II" position (email and "Repost" versions) closing March 23, 2008;
- C# 5 Application for position of Buyer II by grievor;
- C# 6 Job description of Buyer II
- C# 7 Job description of Buyer I
- C# 8 Memorandum of settlement of a grievance dated May 5, 1999;

The following persons testified under oath or affirmation and entered exhibits identified as follows:

**For the Union:**

The grievor, Terry Walsh, who entered the following:

- TW#1 Email correspondence re number of hours worked by grievor as a Buyer;
- TW#2 Transcript of grievor's marks in "General Purchasing" course from College of Trades and Technology dated June 2, 1982;
- TW#3 Transcript of grievor's marks in three year Public Administration program from Memorial University of Newfoundland, Extension Service dated May 13, 1977;
- TW#4 Letter dated June 24, 1998 from Manager, Human Resources of employer to Classification, Organization & Management Division of Treasury Board re request for classification review of Grievor's Storekeeper position;
- TW#4(1) Further correspondence re request at TW#4 dated June 24, 1998;
- TW#5 Request dated October 22, 1998 from Manager, Human Resources of employer to Classification, Organization & Management Division of Treasury Board;



Gordon Sheppard, who entered the following:

GS#1 Letter dated June 16, 1988 from Deputy Minister of Health to Director of Classification & Pay Division of Treasury Board requesting a classification review of various positions

**For the Employer:**

Ronald Johnson, who entered the following:

RJ#1 Resume of Ronald Johnson;

RJ#2 "Rural Avalon Employment Requisition" and attachments for Buyer II Position;

RJ#3 Email from Judy Roche reminding of "Capital Equipment approval/Requisitioning" email based program.

Marsha Hiscock, who entered the following:

MH#1 Resume of Marsha Hiscock

Judy Finn, who entered the following:

JF#1 Resume of Judy Finn

Marylou Walsh, who entered the following:

MW#1 Resume of Marylou Walsh

Marilyn Noseworthy, who entered the following:

MN#1 Resume of Marilyn Noseworthy.

**THE EVIDENCE**

The grievor is a storekeeper and has been employed at various locations of the employer for slightly in excess of 30 years. He began his employment in St. John's at various institutions operated by the employer and its predecessor entities and performed a number of functions. In 1984 he successfully applied for a storekeeper position at The Harbour Lodge in Carbonear where he remained for some 13 years until 1997 as its only

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storekeeper. He operated the store room; purchasing, receiving, checking and distributing materials. He reported to Gordon Sheppard, the business manager.

The grievor described the purchasing function. If the nursing unit needed supplies, depending on the value, he would order them. More valuable orders were prepared by the grievor but were signed by Mr. Sheppard, his supervisor. Daily supplies and all food orders were done independently by the grievor. The Central Purchasing agency in St. John's decided from where all purchases would be made. Purchases were done as a group by the Department of Public Works of the provincial government through a large quantity tendering process for a number of institutions. As an example the grievor explained that if the supply of a quantity of beans was awarded to a supplier, the grievor would place an order to the approved supplier. They would send an invoice which the grievor would check against quantities received and send this documentation to Mr. Sheppard who would then approve it for payment.

The grievor noted that he did not requisition medications which, at the time, was done through the local drug store. That ordering was done through the Nursing Department. He did not receive medications but did receive all other dressings and nursing supplies. He did order medical supplies which were as well done on tender through Central Supply for the entire province. These shipments were entered on a Kardex inventory system. The grievor also purchased such things as clothing requested by various nursing departments in senior's homes where clothing was provided to some residents. The grievor would check with various stores in the local area for availability and price. In such cases the grievor made purchase decisions based upon price and good availability. Larger purchases for such things as beds and mattresses were again made by Central Purchasing agency. There was a standing offer with various suppliers for the supply of capital items.

After the grievor had worked some 13 years as a storekeeper at the Harbour Lodge, the Stores Department there closed and that function was taken over by the Carbonear Hospital and its successors up to and including the current employer. The grievor was given a lateral transfer to that institution as a Storekeeper I. At that institution were: a stock handler, a storekeeper (the grievor), two buyers, (Jim Parsons and Marilyn

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Noseworthy) and a materials manager (Ray Noseworthy). The buyers' classification was Buyer I.

Shortly after his arrival at the new position, the grievor temporarily assumed the Buyer I position occupied by Jim Parsons and he did so on other occasions when Mr. Parsons was on leave. During this period of time the grievor checked supplies on a weekly basis and ordered from various suppliers both in St. John's and on the mainland. He ordered medical and surgical supplies, for example gloves, dressings and IV equipment as well as operating room supplies. When Mr. Parsons returned from leave, the grievor returned to his storekeeper position. If Ms. Quinlan/Noseworthy went on leave, the grievor would fill in for her as well. The grievor, in total, filled in for some 4100 hours as an inventory and non-inventory buyer. There were no Buyer II positions there at the time and the employees for whom he filled in were both Buyer I's. The grievor explained that there were two buyers, one purchased inventory goods and the other purchased non-inventory items which were purchased on a requisition basis. Ray Noseworthy retired approximately four or five years ago and was replaced by Ron Johnson for a short period. Marilyn Noseworthy was "upgraded" to a Buyer II after Mr. Johnson ceased being responsible for purchasing.

The first job posting seeking a permanent full time Buyer II had a closing date of March 23, 2008 and listed the following:

**"Duties:**

Responsible for procurement of supplies and capital equipment for Rural Avalon. Work involves the receipt and review of requisitions to ensure completeness and accuracy, as well as to determine compliance to existing guidelines and procedures; determines appropriate purchasing methods to use and takes action to finalize the purchase which may involve direct purchases, emergency purchases, and standing offer purchases. Training and supervision of staff is also a requirement of this position.

**Qualifications:**

1. High school graduation;
2. Three year diploma in Business Management (concentration in accounting or purchasing management) and/or Level III certification from Purchasing Management Association of Canada;

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3. Proficiency in Meditech Material Management System would be considered an asset;
4. Three years experience as a Buyer would be considered an asset.”

The fact that the position was then “Under Review” was not stated in the first posting for this position and it was re-posted with a new closing date of May 2, 2008. Applicants who had applied for the position the first time were not required to re-apply the second time. The grievor applied and provided the following relevant information on his pro-forma job application form:

He had previously worked for this employer;

He had successfully completed high school or equivalent;

He had attended the College of Trades and Technology between September 1968 and June 1969 doing an accounting clerk course from which he had graduated;

He had attended MUN (Extension) from September 1975 to April 1978 doing Public Admin. 3 years part-time;

He had done a Purchasing course offered by College of Trades & Technology for 8 weeks in the Fall of 1989;

He did not tick either of the boxes asking if he had any of the skills of Medical Terminology, Dictatyping, Computer Applications, CPR, Typing or Other;

He listed his employment history as consisting of:

-Government of NL as a clerk from September 1971 to October 1978;

-Government of NL as a Storekeeper I from November 1978 to August 1997;

-AHCI Board as a Storekeeper form August 1997 to present. His immediate supervisor was listed as M. Noseworthy, Materials Manager.

Gordon Sheppard was given as a reference.

Attached to the application were the following certificates:

-Newfoundland and Labrador College of Trades and Technology Extension Program Certificate awarded to the grievor on June 4, 1982 certifying the completion of a 27 hour extension course in General Purchasing.



- Newfoundland Hospital Association Certificate awarded on December 30, 1983 to the grievor certifying successful completion of Hospital Environment Basic course;
- Memorial University of Newfoundland Extension Service Certificate awarded in the Fall, 1977 to the grievor certifying that the grievor has completed and passed The Public Administration Program. This program consisted of a course in each of Principles of Accounting, Public Finance, Structure of Canadian Government, Public Administration-Principles and Practices, Principles of Communication and Personnel Management & Labour Relations;
- College of Trades and Technology Certificate of Vocational Education certifying that the grievor has on July 3, 1969 successfully completed a nine month course in bookkeeping.

The grievor explained that, although he did not mention it in his application, he was familiar with the Meditech system as you have to be in order to work within the department. The grievor was not interviewed for the position and could not get a satisfactory answer as to why not. He did not think that there were any interviews conducted in filling the position.

In reviewing his work experience, the grievor highlighted that he had been responsible for procurement of supplies and, on occasion, purchasing of capital equipment which is now handled through the St. John's office. He recalled one occasion where someone at one of the Homes requested a particular piece of equipment costing in the range of \$75,000. The grievor had prepared a purchase order but was told that it was not within his purview to order items of such value. The order had to be placed by Ronald Johnson, an interim manager. Such matters are now dealt with through St. John's through either on-line or paper requisitions. He noted that, as a storekeeper, he received goods, checked them against purchase orders and invoices and prepared a receiving report. As a temporary buyer he made direct purchases. In emergency situations he would order medical and IV supplies; he would call suppliers to check price and availability and have

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goods shipped immediately, sometimes having it flown into St. John's, sometimes having it sent directly by taxi if urgent. Many items were purchased through standing offers where goods had been contracted for pre-arranged prices and quantities; these were mainly inventory items. He also did not mention on his application the 4100 hours he had worked in a temporary capacity as a Buyer I.

The grievor said that it hit him hard when someone else was awarded the position especially when that person was junior to him. He reviewed the requirements for the Buyer II position and feels there is not a lot of difference between a Buyer I and a Buyer II position. He sees nothing in the Buyer II position that he cannot handle.

In cross examination, the grievor admitted only a vague familiarity with the Public Tendering Act and had never had any dealings with that Act. With respect to his accounting training he conceded having done two 30 hour courses but reasoned that there are only so many accounting principles and it mattered not if it took you three months or 3 years to get them. When questioned about the size of purchases that would have to be made as a Buyer II he replied that it did not matter if you are dealing with a \$10,000 purchase or a million dollar purchase, you have to get the best value you can. He does not have a Level III certification from the Purchasing Management Association of Canada.

He reviewed the various attempts which had been made in the past to have his position of Storekeeper I re-classified to a Storekeeper II classification but conceded that the efforts had not been successful. He also conceded that he had very little supervisory or training experience.

Gordon Sheppard worked for the employer and its predecessor for approximately 20 years as business manager at the Harbour Lodge where he was the grievor's direct supervisor. The grievor was the only person in the stores department at the time and did all commodities purchasing. Any capital purchasing was done by Mr. Sheppard. The grievor was an honest and hard worker who did his job well. Mr. Sheppard saw no reason why the grievor could not handle the Buyer II position. He was however, not sure that the

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grievor could train someone. He admitted that he was not that familiar with the Public Tendering Act. He could not recall having signed the application to have the grievor's position re-classified from a Storekeeper I to a Storekeeper II.

Ronald Johnson, the Director of Materials & Biomedical Equipment Support for the employer, testified. He has total responsibility for all purchasing, inventory and distribution for the employer. He reviewed the Buyer positions within the employer's organization. The Buyer I position handles routine purchases, is transactional in nature and involves issuing purchase orders for routine purchases under agreements. The Buyer II is more complex and involves purchasing items which are not subject to an agreement already. There may be a need to go to tender to develop specifications. There may be a process of qualifying bidders and tendering for the items required. People in this position are typically involved in complex purchases for expensive equipment such as mammography equipment which can have an individual cost of a half a million dollars. In such situations the Buyer works with people in the clinical department to develop specifications of the equipment required and with manufacturers to make as needed. Tenders may be called for this equipment for which specifications must be given and against which bids must be compared to see if they meet the requirements. A purchase order must then be prepared and the purchase expedited. There must be supervision arranged for the installation of the equipment.

To carry out the Buyer function a strong knowledge of the Public Tendering Act is required as is knowledge of guidelines to be followed in procuring professional services outside the Act. Buyers must work with stakeholders if purchases exceed \$100,000. There is a need to understand the stakeholders who need the services being purchased. There is accountability for the money spent. Buyers have to be accurate and make the right decisions; to do this they need the skills and training to meet the task. All such purchases are subject to various forms of audit including internal audits, compliance audits and audits by the Auditor General Office. There are only 13 buyers in the system; two Buyer III's, one permanent and one temporary, one permanent Buyer II and one other. All of the other buyers are classified as Buyer I's.

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The Buyer II in the Avalon Region is totally responsible for capital purchases. This is very technical and quite different from a straight purchase of commodities. The decisions made are more independent than those of a Buyer I. Few openings come available for the Buyer II position. To do the job of a Buyer II a strong knowledge of accounting and computer use such as spreadsheets is required.

Mr. Johnson was consulted with respect to the grievor's application for this position. He is a long time employee and Mr. Johnson wanted to do all he could to be fair to him. He had his staff go to the Human Resources Department to see if there was anything that could be done. They checked his qualifications and determined that the grievor did not meet them. Mr. Johnson at one time directly supervised the grievor. The grievor was a Storekeeper I at the time and filled into the Buyer I position when there was a temporary vacancy. He got them "through the hump" when there was no one else available. While he did not do the full complement of Buyer I activities, he did short stints which got them through. He would not have had any involvement with the Public Tendering Act.

Mr. Johnson reviewed the grievor's qualifications and compared them with the requirements of the position and concluded that they were not sufficient to meet the minimum requirements. While he acknowledges that the grievor is an excellent storekeeper and thoroughly understands the position he simply does not have the necessary skills to meet the Buyer II qualifications. If he had met the minimum qualifications he would have been awarded the position.

Marsha Hiscock, Manager, Human Resources Consulting Services testified that it is rare to conduct interviews for internal applicants for positions under this collective agreement as it is a minimum ability type clause whereby if the senior applicant is minimally qualified for the position for which they apply, they are awarded it. Ms. Hiscock had been asked to review the qualifications of the grievor to see if he met the qualifications required of the position. She reviewed the grievor's qualifications and determined that

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those were not what were required and he therefore did not meet the minimum requirements for the position.

Judy Finn the Regional Human Resources Officer testified. She had worked for the employer and its predecessors for approximately 31 years prior to her recent retirement. She reviewed the employment requisition for the position. She described the requisition as a standard employment requisition form. The position itself was a new one for the rural Avalon area. It provided the qualifications necessary and the salary scale. She also reviewed the job postings for the position and the resume which was submitted by the grievor. She had several conversations with coworkers who had experience with this position in St. John's and a lot of experience with the credentials. This assisted her in making comparisons between the credentials put forward by the grievor as compared to the credentials required for the position. She also spoke with the director and with Ms. Noseworthy who were the ones who wanted the position filled and who were familiar with the grievor and had worked with him.

Her conclusion upon her review was that the grievor did not have the three-year diploma which was required nor did he have a level III certification with the Purchasing Managers' Association. She was aware that the grievor had worked on occasions as a Buyer I but upon investigation found that it was relief type work and not the regular duties of a person in that position.

She noted that it was not unusual for applicants applying for positions within this union's bargaining unit to not receive interviews. It is a foregone conclusion based upon the wording of the collective agreement that if the senior person is qualified, they get the job automatically. In this case the grievor did not possess the minimum requirements for the position.

She testified that based upon the information she was given as to what is required for this position, the information on the job posting is a good reflection of the requirements. She reviewed certain old postings for the position and saw no difficulty with this one.

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Marylou Walsh testified. She is a 30 year employee who has worked in many classifications during her career and has a Bachelor of Commerce degree in Human Resources. She was asked to review different classifications and skills of individuals. She had researched and reviewed qualifications and was in the process of standardizing them. She chaired a competency working group involving different bargaining units and the skills required to do the job. She is normally contacted as a resource person as she has developed an interest in qualifications.

In her role she was contacted by Judy Finn with respect to the grievor. She was not involved in the hiring process herself but Ms. Finn was aware that Ms. Walsh has looked at course equivalencies before. She has recruited for Buyer II's many times. She reviewed the experience levels required for the Buyer I and Buyer II positions and reviewed and compared the various courses done by the grievor with the requirements in the job posting. In her opinion the courses in the grievor's resume were not equivalent to those required in the job posting. She conceded that some of the courses had some similarities but they had different emphasis.

She explained that occasionally people are temporarily assigned to positions but do not necessarily do a full scope of duties for that position even though they are paid at full rate of pay. She however had no details of the grievor's work experience. She reviewed his file only in regard to his qualifications. She said she has never hired a buyer without the PMAC designation or with the business management courses with the emphasis on accounting.

In cross-examination she reviewed the courses required for the Buyer II position and the course content which is required in order to fill this position competently.

Marilyn Noseworthy testified. She has worked with the employer for in excess of 30 years, was a Buyer I for in excess of 10 years, and a Buyer II for two years. She has a high school diploma, a Purchase Manager's course, frontline leadership training, word



processing certification and is currently the manager of material support for the Rural Avalon area where she has been for the past year.

When she became the materials manager she submitted a requisition for a Buyer II. She described the duties in that position as the processing of regular contracts, ordering, public tendering after writing specifications to calling approximately 20 to 25 vendors per year. The position will be responsible for capital procurement of non-inventory items for all of rural Avalon. There was a need to be familiar with various pieces of legislation and regulations. When she occupied the position of Buyer II she had to review the legislation and regulations, do up all the agreements and all of the tender documents. This was all typed by her and was a major part of her job.

She explained that capital procurement has evolved over the past 10 years such that they can purchase items between \$4,000 and \$10,000 but all items in excess of that amount must go to public tender. The job also entails responsibility for supervision on a day-to-day basis, payroll, input into payroll and review. She wrote the specifications for the tenders that are called. The position requires a great deal of independence as often there are no managers on the sites. There is a lot of analysis required. The individual is required to follow the Public Tendering Act for everything purchased. There is a need to deal with auditors at various levels including the office of the Auditor General. It was her view that there were many Buyer I's who could not do the Buyer II position unless they had been in that position for 10 years or more.

Ms. Noseworthy said that she was consulted on the grievor's application after the posting was up. She is the grievor's manager and supervisor. She explained that he had approximately 4100 hours temporarily assigned as a Buyer I while he was supervised by her. She explained that while he was paid as a Buyer I he was put in that position temporarily because of a workload increase and for a summer relief. They were behind on occasion and he was called upon to get the orders through which they were behind on. She explained the need to be involved in tender calling from start to finish. There must be a proper paper trail. The specifications must be unbiased and they cannot be written to

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suit one vendor or another. There is therefore a tremendous potential for liability on the organization and a high level of accountability in the Buyer II position.

It was Ms. Noseworthy's opinion that the experience that the grievor had would not constitute experience for a Buyer II position. There is a lot more responsibility in a Buyer II position, the work is more complex and involves supervising and payroll. A Buyer II does much specialty work involving all procurement for the whole of the employer.

In cross-examination, Ms. Noseworthy stated that she wrote the job description and it was signed by Mr. Johnson. She conceded that there had not been one done for that position before but she did a very broad generic job description for the Buyer II position. She regarded it as the minimum requirements. She used job postings from other parts of the employer's operation as a guide to preparation of this posting.

While the successful candidate had no experience as a Buyer I or as a stock handler, she had the necessary qualifications. She did also have payroll supervision, Public Tendering Act experience as well as experience with procurement. In Ms. Noseworthy's view, accounting was needed for capital works and the successful candidate had it. She did not look at the grievor's qualifications to see if they were equivalent because she would not know if they are. She merely looked at his experience. She was told that the grievor did not meet the qualifications for the position.

### **THE GRIEVANCE**

On June 17, 2008 the grievor filed a grievance which alleged:

"Violation of Article 15:04 (b) and any other pertinent Article of the collective agreement".

The grievor requested: "Full Redress".

The employer replied: "No violation."

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**THE COLLECTIVE AGREEMENT**

The relevant portions of article 15 of the collective agreement read as follows:

**Article 15-Promotions and Staff Changes**

. . .

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 postings shall state ‘This position is open to male and female candidates’.

. . .

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 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 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 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.

. . . . ”

**THE UNION’S POSITION**

The Union argued that the grievor was improperly evaluated and the subject position was given to a junior employee contrary to the provisions of Article 15.04 of the collective agreement. No interviews were conducted and the employer therefore could not have properly evaluated the candidates. The grievor was the senior applicant with the qualifications to do the job and it should have been awarded to him. He has spent periods of time in that position in the past filling in during periods of absence and therefore must be minimally qualified to perform the duties.

The union requested that the grievance be allowed.

**THE EMPLOYER’S POSITION**

The employer argued that under the provisions of Article 15.04 the applicant must meet the qualifications for the position, the grievor did not. The employer is obliged under the provisions of Article 15.02, when setting qualifications for a position to be non-discriminatory and to not act in an arbitrary fashion. It was neither arbitrary nor discriminatory in the setting of the qualifications in this case.

Decisions concerning the legitimate setting of those qualifications are the exclusive purview of the employer and should not be interfered with unless it is proven that they have been set in an arbitrary or discriminatory fashion. They have not been. The qualifications in this case are reasonable and relate to the position. It is not disputed that the grievor is the senior applicant but he does not meet the minimum qualifications for the position both from his educational background and equivalency. If no malice is shown, an arbitrator cannot interfere with management’s legitimate decision. The



employer acknowledges that the grievor is a hard worker, of good character and a gentleman but this does not speak of his qualifications. This is not an entry level position. It is very complex and involves large dollar value purchases which must be rationalized to the Auditor General.

### **FINDINGS AND CONSIDERATIONS**

Article 15.04 of the subject collective agreement is the type of seniority on promotion clause commonly known as a “sufficient ability clause”. As noted in Canadian Labour Arbitration (4th), (2008) Brown & Beatty (Canada Law Book) section 6:3210:

"With this type of clause, the evaluation that is made of the grievor's qualifications is against the legitimate requirements, the core duties and the responsibilities of the job. The senior employee will not be required to prove, nor will the employer be entitled to insist, that he or she can perform the job to perfection. Rather, reasonable ability to perform the required tasks is the benchmark for assessing the ability and the qualifications of such a person. However, the senior employee will be required to prove that he or she has sufficient present ability to perform the job without the need for a training period, unless the agreement specifically provides for such training."

It would seem that a natural place then to start in an evaluation of employer's conduct in this situation is to determine whether or not the job posting contained the legitimate requirements and core duties and responsibilities of the position.

Ronald Johnson, the Director of Materials and Biomedical Equipment Support reviewed the position in question and distinguished between the Buyer I and the Buyer II positions. The Buyer II position is a complex one involving purchasing items which are out of the ordinary. In such a position there is a need to call for tenders for specific equipment and to develop the necessary specifications. The position may involve a process of qualifying bidders. In order to perform this function a strong knowledge of the Public Tendering Act is required as is knowledge of the guidelines to be followed in procuring professional services which are outside of that piece of legislation. All purchases are subject to audits by various auditing bodies.



Marilyn Noseworthy, an experienced buyer and materials manager supported in many respects the testimony of Mr. Johnson. She described that the items purchased by this position involve capital items which were of a non-inventory type. In her view there was a need to be familiar with various pieces of legislation and regulation. There was also a responsibility for supervision on a day-to-day basis as well as various payroll functions. She also stressed the frequent interaction with various auditing bodies including the Auditor General.

The duties described in the job posting speak of the responsibility for procurement of supplies and capital equipment for the Rural Avalon area. It speaks of receiving and reviewing requisitions and ensuring completeness and accuracy. There is a function of determining compliance to existing guidelines and procedures and determining appropriate purchasing methods. The method of purchase may be direct purchases, emergency purchases or standing offer purchases. There is also a requirement for training and supervision of staff. While there is no specific requirement for intimate knowledge of the public tendering legislation there is a general reference to determination of compliance with existing guidelines and procedures. These are necessarily set forth in various pieces of legislation governing purchasing with public funds.

The definition of work of the Buyer II position as set forth in the job description is a more detailed narrative of the work requirement than that set forth in the job posting. This is to be expected given the different purpose of each document. It details the high level of purchasing experience required for that position. It as well notes that the duties are to be performed within government's existing purchasing guidelines and procedures.

While the job posting may seem in some respects to not exactly reflect the requirements of the position, I am satisfied that it provides a reasonable synopsis of the duties and responsibilities of the position.

Does the grievor possess the necessary qualifications and sufficient present ability to perform the job?

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The job posting requires high school graduation which the grievor has. It requires a three-year diploma in business management with a concentration in accounting or purchase management. This requirement can be substituted or supplemented by a Level III certification from Purchasing Management Association of Canada. Neither of these qualifications was listed on the grievor's application form. Much evidence was directed toward this issue in an effort to compare this requirement with the various accomplishments of the grievor. The comparison was made by several qualified witnesses and the unanimous conclusion was that the qualifications of the grievor did not measure up to this requirement. Having reviewed the testimony I am in agreement with that assessment.

Another qualification was proficiency in Meditech Material Management System. While this was not a requirement it was said to be considered to be an asset in an applicant. The grievor did not mention his proficiency in this system on his job application but explained at the hearing that he possesses such proficiency. I accept his assessment.

The final qualification is three years experience as a buyer. Again, this would be considered to be an asset and is not a requirement. Much testimony was given about the number of hours which the grievor had worked as a buyer, something in the order of 4100 hours. I am satisfied on the evidence, however, that while the grievor had worked a significant amount of time as a buyer, it was in a situation where he was making routine decisions in accordance with standing orders and doing what was required to keep the purchasing function active until the buyer returned. I would rate this as some experience as a Buyer but I would not be prepared to assign it three years of typical buying experience.

As noted by Arbitrator Thistle in NAPE and Waterford Hospital Corporation, (1989 – Hipditch, grievor, unreported) at page 19:

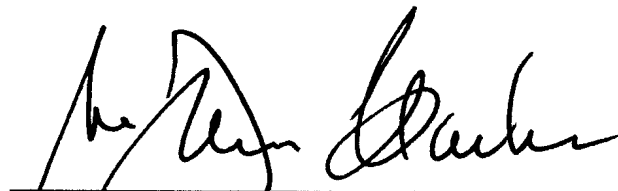
A handwritten signature in black ink, appearing to be the initials 'AT' followed by a stylized flourish.

"... Management has considerable latitude and an arbitrator will generally only refuse to honor the managerial decision where it can be shown the employer in bad faith manipulated the purported job qualifications in order to subvert the just claims of employees for job advancement or where the chosen qualifications bear no reasonable relation to the work to be done."

In the subject case there has been no allegation of bad faith manipulation of qualifications or otherwise. In fact, quite the opposite has been the case. The grievor appears to be a well respected member of the purchasing group and was spoken highly of by all witnesses who were familiar with his work and had worked closely with him over the years. This is simply a case of the qualifications of the grievor not matching the requirements of the position. Unfortunately for the grievor, I am in concurrence with the decision made by management. There has been no subversion on the part of the employer of a just claim by the grievor.

The grievance is therefore denied.

**DATED** at St. John's, Newfoundland and Labrador this 31st day of May, 2009.



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W. JOHN CLARKE  
SOLE ARBITRATOR