

Case: Patton #1

(Editor’s note: This award was scanned but the copy it was scanned from was poor so there may be some errors due to the scanning. We have tried to correct any scanning mistakes that we could find. Normally with such a poor copy we would not have spent the time trying to correct the mistakes but this award has good discussions about seniority, technology and burden of proof so it was worth the effort .)

ARBITRATION

University,

and

Union

INTRODUCTION

This dispute involves the failure to award one of two vacant Electronic Services Engineer positions to J PEACH) the most senior applicant and the only internal candidate.

On or about August 21, 2003, PEACH timely filed this grievance claiming violation of Sections 8,5 and 13.8 of the Agreement and the Approved Development Plan Letter on the basis he meets the minimum requirements, is equal to the other candidates, and has the most seniority. Joint Exhibit 3. The remedy requested is that PEACH be granted an Electronic Services Position and, in all ways, be made whole.

On October 22 and December 15, 2003, the Employer denied the grievance at steps two and three of the procedure.

On January 22, 2004, the Union timely filed a Demand for Arbitration with the American Arbitration Association (AAA)_

On August 17, 2004, the arbitration was conducted at the Employer's facility. Each party was afforded ample opportunity to present evidence and argument. Each party timely filed a brief. On September 29, 2004, upon receipts of the briefs, the AAA declared the record closed.

STATEMENT OF FACTS

Background

The University is a state university offering undergraduate and graduate programs.

The Association represents non-faculty clerical and technical employees at the University's campuses.

The grievance arose under the current Collective Bargaining Agreement, dated October 1, 2002 to September 30, 2005.

The Employment History of J. PEACH

On November, 2, 1980, the University hired J PEACH into the position of Laboratory Tech (T4 wage grade). In this position, he provides technical support for the sophisticated laboratory equipment of the science division and develops items for teaching demonstrations. PEACH has held this position throughout the tenure of his employment. His immediate supervisor has been MARY PEAR, the Director of Laboratory Support.

Lab Tech Duties

PEACH agrees that the following is an accurate list of his primary and secondary duties:

Primary Duties and Global Responsibilities:

- Repair or advise on repair of lab equipment, such as oscilloscopes, amplifiers, microscopes, and spectrometers.
- Oversee the operation of Parities loading dock
- fabricate parts as needed for repair
- Create and develop devices and equipment to serve as teaching aides

4 Managing the day-to-day operation of the wood and metal shops

- Carry out the weekly filling of liquid cryogenics into the NMR and other regular maintenance
- Work with Physical Plant, other departments and outside contractors
- Co-ordinate the delivery of packages throughout the science complex
- Inspect, assemble and/or test lab equipment
- Monitor literature and Internet for equipment and/or techniques to assist or improve the science departments' facilities
- Supervise student employees
- Other related duties as assigned_

Secondary Duties and Responsibilities:

4- Set up special functions and events

- Assist maintenance personnel
- Be aware of building safety
- Assist faculty and staff with the loading and unloading of supplies

Joint Exhibit S.

Minimal requirements for this position include a high school degree supplemented by a certificate from a two-year technical program and/or relevant experience and a minimum of three years experience repairing or maintaining sophisticated lab equipment. Joint Exhibit 5.

PEACH'S annual evaluations, indicate the following four major responsibilities:

1. Maintain and repair equipment and indent-Ants to the division
2. Make special items for outreach projects
3. Oversee the loading dock including the receiving of packages, facilitating the deliveries of gases and cryogenics and coordination with other units for temporary storage
4. Oversee use of shops and constructing teaching aids, display aids and other items as requested
5. Provide general assistance to departmental office with items in and out of storage or through loading docks.

Employer Exhibit 12_

At arbitration, PEACH testified that he works on the following scientific equipment: gas chromatographers, mass spectrometers, x-rays, scanning electron microscope, high performance liquid chromatography, nuclear magnetic resonance, incubators, water baths, MAC, IBM and Dell computer; and him and thermo printers. He has upgraded and/or repaired computer and system boards, imbedded computers, and laser disc players. On cross examination, PEACH explained that he spends about five to ten percent of his job running the machine and wood shops where he makes prototype scientific apparatus on lathes, mills, grinders, and welders. Another 1% of his time, PEACH runs the loading dock where scientific equipment is received. PEACH reports to about 200 professors and is responsible for the repair and replacement of their computers.. He spends 10% to 15% of his day working on about 10 to 50 "standalone" computers, i.e., those not connected to scientific instruments.

In contrast, PEAR testified that PEACH spends 50% of his time repairing scientific equipment and 50% of his time on the loading dock, in the machine and wood shop, and helping out where needed. She added that he *spends* a small percentage of repairing a few, stand-alone computers. Information Technology repairs most computers in the department. PEACH is not required to perform any record keeping work.

Annual Evaluations

On April 15, 2003, April 2, 2002, and March 1, 2002, PEAR rated his performance as either "meritorious" or "excellent." Employer Exhibit 18. At arbitration, PEAR testified that PEACH's strengths are his creativity, ability with electronics, and his supportiveness of departments. On the other hand, she described his weaknesses as interacting with others. In PEACH's 2001 evaluation, PEAR cautioned him to think before he spoke and in his 2001 evaluation, she described him as "argumentative." She explained that some interpret PEACH as putting them down. PEAR added, however, that PEACH does a fine job and she has to "mend fences" only occasionally.

Training

During his employment, PEACH has taken advantage of the "Approved Development Program" set forth in Appendix A of the Agreement. He submitted approval to take the following courses: Managing Multiple Priorities, Projects, and Deadlines, Introduction to Word, Introduction to MS Access, Scientific instruments, Bulk Mail, COT Training, Mail Handling Security, Webmaster, and GroupWise B-mail. Employer Exhibit 17. PEACH also took academic courses during 1990, 1991, and 1992. Employer Exhibit 16.

The Posting

On June 11, 2003, the Employer posted notices of two vacancies in the position of Electronic Services Engineer (ESE) within its Telecommunications Department. Joint Exhibit 4. These positions are classified as "EI" wage level positions. The posting listed the following the responsibilities of the ESE positions:

- Install, repair, and preventatively maintain microcomputers and peripherals and other equipment
- Assemble, install, repair, and maintain computers, audio visual and other electronic equipment
- Deliver and connect computer to peripherals and networks
- ❖ Assist in diagnosing and effecting repairs of network problems
- ❖ Provide technical assistance to users
- Special setups
- Supervise student employees.
- Backup support on distance learning systems, operations and problem determination
- Assemble and install data network problems
- Check installed equipment for proper operation
- Install and repair communication wiring/cables
- Operate computer assisted design equipment in support of data networks
- Monitor use of test equipment
- Provide technical assistance to users
- Ascertain malfunctions, diagnose defects, and repair
- Maintain data communication/fiber optic equipment and parts inventory/Lacer&
- ❖ Participate in training opportunities and study manuals

Joint Exhibit 4.

Required qualifications stated on the posting includes high school degree supplemented by a two-year degree in electronics or data communications or an equivalent combination of training and/or experience and a minimum of three years related experience in computers and peripheral equipment repairs. Joint Exhibit 4. Preferred qualifications include supervisory experience and experience in construction of wire plant for voice, data, fiber, and basic audio and video technology. Joint Exhibit 4.

Twenty-five candidates applied for the two positions, plus PEACH, the only internal candidate. He testified that he thought this job was "up his alley" because he likes working with computers and wanted a change of pace. PEACH never applied for the job in the past because he was never aware of a vacancy within the time frame of the posting. •

The Selection Process

C. TOPP, the Manager of the Telecommunications Department, was responsible for the selection process. He established an Interview committee consisting of himself and two non-managerial employees. The non-managerial employees were J. CANN, an ESE and a bargaining unit member, and G. GREEN, a Systems Analyst (a non-bargaining unit position) in the Telecommunications Department who had pre-Employer experience supervising specialists similar to the ESE positions. PEACH testified that he has good working relationships with TOPP and CANN.

TOPP also drafted a form for evaluating each candidate according to their years of experience and education or training in the following areas:

IBM PC	20 points
MAC	2.0 points
Printer	20 points
AV (audio-visual)	10 points
Network	10 points
OS (operating systems and application)	10 points
A+ certification	10 points

Employer Exhibit 19.

TOPP testified that having A+ certification for PC hardware and software support, although not listed as a required qualification, was an important qualification.

After reviewing all 25 applicants according to the above criteria, the interview team allotted points to their qualifications, ranked them, and selected the top six candidates for interview. Employer Exhibit 19. All of the six finalists, except PEACH, had scores ranging from 40 points to 80 points. PEACH's score was 20 points. Nevertheless, TOPP decided to grant him an interview in recognition of his status as being the only internal candidate and having high seniority.

TOPP created an interview sheet, which consisted of the above listed criteria and the following additional questions;

1. Recap hardware repair and training experience (IBM, MAC, and Printers!).
- 1 Other PC, MAC or Audio Visual experience (OS, application software, Network).
3. What process do you go thru when repairing equipment (i.e., issue trouble order, call customer, problem resolution, customer follow-up, document results)?
4. Do you consider yourself an independent type of worker or do you prefer directions and/or working as a team?

Employer Exhibits 21, 25, and 26.

Each team member scored each candidate. After all interviews were completed, the team totaled the points assigned to each finalist. The team also considered characteristics displayed by the interviewees during the interview and whether the interviewee had shown any interest in learning new skills. Of the candidates interviewed, PEACH received the lowest totaled score, 65 out of a possible 300 points. Employer Exhibit 22. In contrast, S. GRAPES and J. BOAT, the applicants ultimately selected, totaled the highest scores 240 points and 220 points, respectively. Employer Exhibit 22.

On July 28, 2003, TOPP signed two separate "Section Record For COT Position" forms advising the Human Resources Office that he recommended GRAPES and BOAT be awarded the vacant positions. Joint Exhibits 10 and 11.

On August 1, 2003, S. CARR of the Human Resources Department advised PEACH by telephone that he would not be offered the ESE position. PEACH asked the reason for that decision. According to

PEACH, CARR explained that he did not qualify regarding the criteria' of network experience,. CARR stated that she would contact TOPP for additional clarification. On the same date, PEACH e-mailed CARR a confirmation of their discussion. Union Exhibit 13.

M. BALL, the Director of Staff Relations, suggested to CARR that the University temporarily put the selection process on hold and allow PEACH an opportunity to present why he qualifies for the EI position.

On August 5, 2003, CARR called PEACH back and reported that TOPP told her PEACH did not have experience with IBM and MAC computers and printers, both ink jet and laser. CARR asked that PEACH forward to her a letter explaining his qualifications in those areas.

On the same date, PEACH advised the Association President of the situation. Union Exhibit 14. Grievance Chair C. PENN testified that after the interview process she asked CANN *why* the grievant was not selected. CANN replied that he was not the best qualified. PENN questioned how the interviewers rated PEACH'S 24 years experience. According to PENN, CANN stated that hiring internal candidates would result in "inbreeding, instead of new blood."

Sometime after August 5, 2003, PEACH forward the requested letter to CARR explaining his qualifications. Union Exhibit 12. Additionally, PEACH approached PEAR and asked for a letter in support.

On August 7, 2002, PEAR e-mailed CARR that PEACH works with computers, including MACs, controlling the instruments he repairs. PEAR stated that he "has been able to figure them all out." She added that the instruments also have printers, built-in and stand-alone, Union Exhibit 15.

By e-mail dated August 12, 2003, TOPP advised CARR of his response to PEACH'S letter. He stated that PEACH:

[B]rings nothing new to the process. He does not qualify for the PC Technician's position.

Employer Exhibit 23.

On. August 20, 2003, PEACH stated his case at a meeting attended by TOPP, CARR, BALL, PAPER, the Director, of Information Technology, and C PENN, the Grievance Committee Chair. During the meeting, they discussed PEACH'S qualifications and asked him questions about networking and equipment he had worked on. TOPP stated that the computers and printers PEACH worked on were not the "latest and greatest" TOPP also emphasized that he would stand by his decision, stressing that PEACH was not the most qualified because he "could not hit the ground running." TOPP pointed out that PEACH'S department did not have the newest equipment, in contrast to the Telecommunications Department, which does. PENN asked whether the University would grant PEACH a five-day trial period during which it could evaluate his ability to perform the ESE job. TOPP replied in the negative. PEACH offered to use five days of his vacation time to undergo training. TOPP still refused. According to PEACH, TOPP was "totally closed."

After the meeting the University administrators met to consider the grievant's presentation. They decided to reaffirm the decision not to offer PEACH the ESE position on the basis he lacked relevant skills and experience in areas crucial to the performance of required duties.

On August 21, 2003, CARR approved awarding the positions to GRAPES and BOAT. Joint Exhibits.10 and 11. On the same date, she informed the grievant of her decision.

POSITIONS OF THE PARTIES

The Association takes the position that the Employer violated the Agreement by failing to award an ESE position to PEACH (the most senior qualified candidate.) It reasons that the Employer violated Section 8.5 by failing to award PEACH one of the posted positions because his qualifications were equal to the two prevailing candidates and he was more senior than both. The Association contends that the Employer, by choosing PEACH as a finalist to be interviewed, recognized he possesses the necessary minimum qualifications and was as equally qualified as the successful candidates. It asserts that, if PEACH did not possess the minimum requirements, the Human Resources Office would have notified him, per contract, and given him the opportunity to elaborate upon his qualifications. The Association stresses that, in fact, PEACH was the superior candidate because he possesses the required skills, has performed "virtually every function of the disputed position," and is the most senior.

The Association also challenges aspects of the selection process. First, it maintains that the interview process lacked integrity because the Employer "operated on preconceived ideas of the capabilities of Mr. PEACH and failed to give him fair and unbiased consideration." Second, the Employer failed to notify PEACH that it considered him unqualified. Third, the Employer provided varied and inconsistent reasons for rejecting PEACH's candidacy. At one point, the Employer claimed PEACH lacked networking skills, later it maintained that he had no experience working on the "latest and greatest" equipment, and finally, it stated that PEACH did not have "enough" experience working on the "latest and greatest" equipment. Fourth, the interview team evaluated PEACH on criteria, which did not even appear on the posting. Fifth, the interviewers were biased. It points to CANN's statement to PENN that if the University hired internally most of the time, it "would face inbreeding."

The Association further argues that the Employer violated Section 13.8 by of the Agreement by failing to make reasonable efforts to "make available training opportunities to [PEACH] to improve existing skills or develop new skills so that [PEACH] may better serve the needs of the University." Additionally, the Association contends that the Employer "violated the trust and implied agreement of the Approved Development Plan Letter."

Finally, the Association asserts that it has never acquiesced in the Employer's interpretation of Article 8.5. The fact that few grievances have been filed on this issue and none taken to arbitration only demonstrates the choices made by individual employees.

The Employer denies any violation of the Agreement. First, it cites arbitral precedent that the Association carries the heavy burden of proving the University's decision was "clearly wrong" or "arbitrary and capricious." Thus, the Employer stresses, management has wide latitude to make hiring decisions, which arbitrators are reluctant to second guess and do not disturb if made in good faith. Second, the Employer contends that Section 8.5 reserves to management the right to fill vacancies with those it determines to be the more qualified candidates, whether external or internal. It notes that the contract language contemplates situations where the internal candidate is not selected and where there is no internal candidate. Third, the Employer contends that past practice shows that since 1999 the University has filled the majority of bargaining unit vacancies (58%) with external candidates. During the same period, the University has selected an external candidate over an internal candidate 56 times.

Fourth, the Employer maintains that Section 8.5 is not a "preference provision, [as argued by the Association] which entitles an internal candidate to a vacant bargaining unit position whenever that candidate (like Grievant in this case) is selected for an interview." No language supports the Association's interpretation. In fact, the newly negotiated second paragraph, which adds a procedure for considering internal candidates, confirms the administrator's discretion not to select the internal candidate. Further, the Employer points out that the Association has failed to object to the University's interpretation of Section 8.5. Finally, the Employer submits that the Association's interpretation must be rejected because it "requires an absurd construction." In short, no interviews would be needed once the internal candidate was granted one.

Fifth, the Employer asserts that its hiring decision was correct because Grievant is not qualified. He is not versed in the "latest and greatest" computer hardware and systems. In contrast, the prevailing candidates have credentials placing them "head and shoulders" above every candidate. Two out of three of the members of the interview team ranked Grievant "dead last" among all those interviewed. The Employer contends that Grievant's experience as a lab technician does not qualify him for the ESE position because it does not involve interacting with personal computers, printers or networking equipment,

Sixth, the Employer maintains that Grievant received "more than a fair opportunity to demonstrate" his qualifications. In fact, he was the "beneficiary of special consideration not granted to other applicants?" He was granted an interview and the conclusions of the interview team are "beyond reproach as the combined experience of its members make it a knowledgeable evaluative body." He received preferential treatment when the University placed the hiring decision on hold to grant him "an unprecedented opportunity" to state his case for promotion in a second interview before the decision-makers,

Seventh, the Employer asserts that it has no obligation to train Grievant into an ESE position, which is not an entry-level position. Section 13.8 allows for training when an employee's skills have become obsolete with respect to the employee's current job. The Employer stresses that it "cannot be required to help Grievant where he will not help himself." It points out- that he had never requested any training opportunities and did not become interested in the ESE position until June 2003.

ANALYSIS

The analysis of the primary issue of whether Section 8.5 was violated involves consideration of management's right to hire and promote and the degree to which Section 8.5 restricts these rights.

I will separately address each issue;

Section 3.2.1 – Management Rights

The initial consideration is the scope of management's right, as set forth in Section 3.2.1 of the Agreement.

University's Responsibilities: The University reserves and retains management rights and functions. Such rights, by way of illustration, include, but are not limited to:

C. The right to ...hire...promote...

This language clearly establishes that the Employer has the right to hire and promote employees. However, Section 32 (F) provides that management's rights are "subject to the terms and conditions of the Agreement."

Section 8.5– Seniority

Interpretation of the Third Paragraph

The most severe restriction upon management's right to fill a vacancy is spelled in the terms of a "strict seniority clause." This clause requires management to award the position to the most senior employee. Anymore, these clauses rarely appear in collective bargaining agreements. More often, the parties negotiate some type of a modified seniority clause, either a relative ability clause or a sufficient ability clause. Modified seniority clauses permit management to consider qualifications and seniority.

In this Agreement, the third paragraph of Section 8.5 of the Agreement states contains a modified seniority clause. It provides:

When two people are equally qualified for the vacant position, based on a current position description and satisfactory work and attendance, the more senior qualified staff member will receive the assignment.

The language of this provision constitutes a relative ability clause, which essentially means that the senior employee will be given preference, but only if he or she possesses qualifications equal to that of a junior employee or an external, non-employee candidate. Elkouri Elkouri, *How Arbitration Works*, DNA, 5th Edition at 873-875.

Under a relative ability clause, a comparison of the qualifications of candidates is necessary and proper to determine any contractual violation. *Id.* "Equally qualified" does not mean "exactly equal," but rather, "substantially equal." *Id.* One commentator has noted that the word "equally," as used in relative ability clauses:

Typically calls for rough equality rather than exactitude and gives preference to a junior employee only where that employee is clearly superior to a more senior employee_

St. Antoine, *The Common Law of the Workplace*, DNA, 1998, Section 5.9,

The relative ability clause in Section 8.5 is not to be confused with a "sufficient ability" clause, which would require management to give preference to the senior employee, as long as he or she meets the minimum qualifications of the position at issue. *id.* at 875. Under a sufficient ability clause, a comparison of the qualifications of candidates is not necessary. The only determination is whether the senior bidder can, in fact, perform the job.. If the senior bidder is competent, the job must be awarded to him or her regardless of how much more qualified another bidder may be.

In summary, the relative ability clause in Section 8.5 grants management the right to choose candidates based on qualifications. Seniority preference comes into play only where the qualifications of the senior candidate are substantially equal to those of the junior candidate. Thus, the relative ability clause grants preference based. on seniority, but only as a tie-breaker. It does not establish seniority as an absolute guarantee of being selected. See, St. Antoine, *The Common Law of the Workplace*, BNA, 1998, Section 4.12 and 5.9.

Interpretation of the Second Paragraph

The second paragraph of Section 8.5 makes clear that the parties intended that management grant 'special consideration to internal candidates. It states:

A review of all internal candidate applications will be conducted in the Human Resources Office. In the event that it is determined that an internal candidate does not meet the minimum qualifications for the posted position, such candidate shall be notified by the Human Resources Office and will be given the opportunity to elaborate on his or her qualifications. Candidates will be allowed two (2) business days to update their application packets, which will then be forwarded on the same basis as other qualified applicants to the selecting Officer for review., All applications shall be sent to the selecting official(s), Internal candidates, who meet the minimum qualifications as list, on the position posting shall be given an interview by the selecting official(s). The selecting official will determine which candidates meet the minimum requirements consistent with the job posting. In the event that the selecting official does not select to interview an internal candidate, the Human Resources will provide such individual(s) with the reasons for the non-selection.

This session provides internal candidates certain procedural rights in the selection process by requiring the Employer to:

- ' Review the applications of till intermit candidates,

- Notify any who do not meet the minimum qualifications;
- Provide candidates, so ratified, an opportunity to elaborate on qualifications and update application packets;
- Forward updated applications to the selecting officer for another determination of minimum requirements;
- Re-interview any internal candidates determined by the selecting officer to meet minimum requirements; and
- Notify any candidate, not selected for interview by the selecting officer, of the reasons far the non-selection.

In effect, these requirements grant internal candidates procedural advantages during the selection process,. including guaranteed consideration of their applications and a second chance to present their qualifications. However, like the third paragraph of Section 8.5, the second paragraph does not constitute a preferential hiring provision mandating the Employer to choose internal candidates over external candidates. In fact, the necessary implication of the requirement to notify internal candidates, who do not meet minim-um qualifications, is that the parties anticipated internal candidates could be rejected based on lack of qualifications.

The evidence does not support the Union's assertion that the Employer's granting the grievant both an initial interview and a second-opportunity interview establishes he is qualified for the position. Rather, the - uncontradicted evidence proves management granted these interviews to pay respect to his service and seniority. The second paragraph of Section 8.5 requires management to interview qualified candidates, but it does not prohibit management from extending courtesy to an internal candidate, who may fall short of the qualifications, but deserves attention.

Bargaining History and Past Practice

My interpretation of Section 8.5 is supported by evidence regarding bargaining history and past practice. Current ESE, CANN, who has been on the Association's bargaining committee, testified that he has never understood Section 8.5 to grant a priority to internal candidates. He stressed that, while this has always been a goal of the Association, the goal has not yet materialized,

BALL testified, without contradiction, that the University has routinely hired external candidates over internal candidates, Her testimony is confirmed by documentary evidence, Employer Exhibit 27 discloses the following data:

Year	Total number of external candidates hired	External candidate selected over minimally qualified internal candidate	Percentage of external candidates selected when minimally qualified internal candidate(s) applied
7/1/03-3/15/04	26	13	50%
7/1/02.6/30/03	27	7	26%
7/1/01-630/02	35	15	43%
7/1/00-6/30/01	57	12	21%
711199-630100	42	9	21%

This chart demonstrates that, increasingly since 1999, the Employer has preferred external candidates over minimally qualified internal candidates. Additionally, the Employer has filled four prior ESE positions with external candidates, although no internal candidates applied for any of these vacancies,

The Association has filed several grievances to protest this trend. However, none of the earlier grievants sought to pursue their grievances to arbitration. The fact that no grievances, regarding selecting external candidates over internal candidates, have been arbitrated permits the inference that, up until this grievance, the Association has been willing to accept management's interpretation and application of Section 8.5. See, *Great Falls Public Schools*, 108 LA 998, 1002 (Calhoun, 2002).

Burden of Proof

In cases involving contract interpretation, the union typically bears the burden of proving the contract violation alleged in the grievance. See, *Metra of Chicago*, 116 LA 754, 756 (Suntrup, 2002); *City of Mill Creek*, 116 LA 101, 105 (Gaba, 2001); and *Kaiser Foundation Hospitals*, 102 LA 83, 85 (Knowlton, 1993). However, in cases involving managerial action under the application of relative ability clauses, arbitrators have expressed different views regarding the burden of proof issues:

In some cases, such clauses have been interpreted as placing little restriction on the employer's discretion, thereby, in effect, placing the burden of proof on the employee. Under this approach, when the union challenges management's determination it must sustain the burden of proving discrimination, caprice, arbitrariness, or bad faith on the part of the employer in evaluating abilities.

In other cases, such clauses have been interpreted as strictly limiting the managerial judgment, and in effect, placing the burden of proof on the employer. Under this approach, the employer, when bypassing senior employees, must be prepared to show, by specific and understandable evidence that relates to the capacity to perform the job in question, that the junior employee *is* the abler.

In still other relative ability cases, an even heavier burden is, in effect placed on the employer, and the employer is required, when challenged, not only to show greater ability in the junior employee to whom it has given preference, but also to show the absence of discrimination and arbitrariness and the presence of good faith.

Some arbitrators utilize a burden-shifting approach, requiring the union to make an initial showing that the employee is qualified to perform the job in question. If the union meet its burden, the employer must then establish (e.g., through 'clear and convincing evidence') that the junior employee has materially better qualifications.

Elkouri & Elkouri, *How Arbitration Works*, 13NA,, 6⁻¹¹ Edition at 879-880.

I subscribe to the harden-shifting approach because it is most consistent with my view that each party bears the burden of proving its claim, whether that claim is a contract violation or a defense to a contract violation. The burden may shift, depending on the evidence, but both the initial burden and the ultimate burden rests with the Association. Where the Association has met its initial burden of proving the senior or internal candidate is qualified, the Employer must show the junior or external employee selected is more qualified. If the Employer meets this burden, the Association must introduce rebuttal evidence to show the senior / internal candidate is "equally qualified." If that rebuttal evidence is insufficient, the Association has failed its ultimate burden of proving a violation of Section 8.5.

The Arbitrator's Role

Apart from the technicalities of a shifting burden in relative ability cases, let me stress that I do not view the arbitrator's function to be that of selecting the candidate of my choice. As stated above, management has wide latitude .to determine qualifications, as long as it acts in good faith. An arbitrator's job is to focus on whether contractual criteria have been observed and to determine the presence of bad faith. See, *Dillon Stores*, 114 LA 891, 896-897 (Wang, 2000); *Inkster. Board of Education*, 112 LA 522, 525' (Allen, 1998); and *Nordson*, 104 LA 1206, 1209 (Franckiewicz, 1995).

What I find most persuasive are the remarks by Arbitrator Mark J. Glazer in a prior promotion case involving the same parties here (Grievance No. 108, MG Promotion, May 7, 2003). He stated:

An arbitrator's role in a promotion case such as this is limited to determining if the contractual criteria has been followed. I am not permitted to simply make an individual judgment as to who is better qualified.

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I agree with Arbitrator Glazer's statement and defer to his reasoning and conclusion.

Permissible Criteria for Determining Qualifications

Here, Article 8.5 sets forth the following three criteria: the current position description, satisfactory work and attendance.

When rejecting PEACH's candidacy, the Employer stressed he lacked the minimum qualifications for the ported vacancies. His work performance in the current job and his attendance were not expressed as a basis for rejecting his bid. Thus, the focus of this analysis turns on the qualifications set forth in the position description.

When determining qualifications, arbitrators recognize that employers have "considerable leeway in weighing the merits of various qualifications." St. Antoine, *The Common Law of the Workplace*, BNA, 1998, Section 4.12. This means that arbitrators permit employers to designate relevant qualifications and to rank and value them, as they deem fit. *Id.* Of course, as with *the* exercise of other aspects of managerial discretion, the decision must not be arbitrary, capricious, or discriminatory. *Id.*

Permissible criteria for determining a candidate's qualifications must be tangible, objective, and relevant to job duties and responsibilities. Typical criteria include experience, education, and supervisory opinion. Experience is not the same as seniority. Rather, it is the extent to which an employee has engaged in a particular job. Elkouri & Elkouri, *How Arbitration Works*, BNA, BNA, 6th E. at 889. As one arbitrator reasoned:

[O]the things being equal, the man who has had some experience on a job can become a competent employee in the classification faster than the man who has had no such experience.

Id.

The degree of education, and / or training is also pertinent to the determination of ability, but only to the extent that the education and training relates to actual job requirements. *Id.* at 9.03. In some cases, arbitrators have found that the superior and relevant education of one candidate could balance the superior and relevant experience of another candidate so that their overall abilities were substantially equal. *See, Lockheed-Georgia Co.*, 49 LA 603 (DiLeone, 1967).

Supervisory opinion can be very persuasive where the supervisor is familiar with the work performance of the competing bidders and the requirements of the job in question. *Id.* at 899. However, the supervisor must be able to articulate the basis of his opinion and support it with objective and specific evidence. *Id.*

Application to the Fact and Finding Regarding Section 8.5

Procedure

I find no evidence that the Employer violated the procedural requirements set forth in the second paragraph of Section 8.5. He was granted an initial interview. The team members were eminently qualified to assess his qualifications. TOPP has overseen the development of the ESE position over the years and has hired current and past ESE employees. CANN actually works the job. Bird has worked in a position similar to the ESE position at a prior employer and currently interacts with ESE employees at the University. There is no evidence any member of the interview team was biased in his or her assessment of the grievant's

qualifications. In fact, PEACH testified that he has good working relationships with both TOPP and CANN. The evaluating criteria, established by TOPP and utilized by the interview team, were reasonable and related to the job description. The selection process was held in abeyance to allow PEACH an opportunity to elaborate upon his credentials, in writing and in person. He was even granted a special Meeting to argue his qualifications.

Several challenges pressed by the Association deserve comment. First, it protests TOPP's fairness on the basis he has pre-conceived notions about PEACH. TOPP testified that it "was hard not to have preconceived ideas" after working with PEACH for 23 years. However, there is no evidence that TOPP harbored any pre-conceived bias or hostility against PEACH. Rather, he praised PEACH as being good at his job,

Second, the Association objects to the Employer using A+ certification as a criterion because it does not appear on the posting. The interview sheets prove that the interview team considered whether candidates possessed this certification. However, the fact that the team selected GRAPES, who does not possess this certification, proves it was not relied upon as a critical factor, but rather as a desirable factor.

Qualifications

I find the evidence insufficient to prove the Employer violated the third paragraph of Section 8.5 by selecting external candidates, rather than PEACH, the only internal candidate. The essence of the ESE position, according to both TOPP and CANN, is to service and repair personal computers (IBM's and MACs), operating systems and printers, to install audio / visual equipment in classrooms, to diagnose and repair network problems. PEACH lacked experience in these areas. The job description for his lab technician position does not require repair of computers, printers, or networking equipment. The focus is on lab equipment. Additionally, PEACH's job involves non technical duties such as coordinating of the loading dock and overseeing the wood and metal shops. The computers PEACH works on are incorporated into lab equipment. TOPP testified, without contradiction, that these "embedded" computers are different than the computers ESE employees work on. Although PEACH is responsible for some "stand alone" computers, these are older computers. His duties do not require maintaining or repairing the current generation of University computers, which is handled by the Information Technology Department. Additionally, the "standalone" computer work takes up only five percent of his time, by his own estimation. PEACH agreed that this responsibility represents a very small portion of PEACH's work time.

Because PEACH lacked ESE experience in the most up-to-date computer systems, he could not "hit the ground running." Regardless of whether the ESE position was entry level, the employee selected had to be immediately able to takeover the job duties. As TOPP stated, employees used to be able to work into the ESE position but those days are gone. The University has grown so much and the use of computers has increased so much, employees must be able to "jump in" ready to perform the work

PEACH impressed me as a highly intelligent, hard working, and devoted individual. I do not doubt that he possesses the innate capability to become an ESE after sufficient and specific training. However, the University has no contractual obligation to train PEACH to fill the ESE position or to provide him a trial period. Rather, the University has the right to select a candidate, who is able to "hit the ground running."

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In contrast to PEACH, both GRAPES and BOAT have prior relevant experience, which enabled them to "hit the ground running." GRAPES has a diploma in Electronics Engineering Technician from the ITT Technical Institute. In his prior jobs, he repaired IBMS, MACS, and printers, worked with networking systems, and did wiring. Joint Exhibit 8. Similarly, BOAT's prior job experience included being an IT Meld Technician and IT Engineer. In each position, he repaired and installed computers and printers and handled networking problems. Joint Exhibit 6.

Additional Issues

Section 13.8 - Technology

I find that the evidence is insufficient to prove violation of Section 13.8, which provides:

Technology. In the event that the expansion of new technology makes skills obsolete, the University agrees to make reasonable efforts to make available training opportunities to staff members to improve existing skills or develop new skills so that staff members better serve the needs of the University. Nothing in this Agreement shall be construed to limit the University's right to introduce new electronic technology,

The obvious purpose of this provision is to protect employees' job security in their current position in the face of technological advances. It does not promise to train every employee to be competent to fill every position within the University. To prove violation of this provision, the Association must show: (1) advances in technology, (2) which make an employee's skills in his current position obsolete, and, (3) the University did not make reasonable training opportunities available to overcome obsolescence.

Because there is no evidence that PEACH's skills have become obsolete due to technological advances in his current position, there is no violation of Section 13.8.

Appendix "A" —Approved Development Program

I find no evidence that the Employer violated Appendix A of the Agreement. The stated "Purpose of the Approved Development Program is 'to help encourage' Association staff members 'to take advantage of professional development opportunities.' Any program, which is directed at improving either non technical or technical job 'performance and awareness' is eligible for consideration as an approved development system. By the clear language of this provision, the Employer promises to support any employee's effort to undertake professional development. The Employer does not promise to take the lead and outline a plan for an employee's professional development. The initiative rests with the individual employee to seek approval of a development plan. No evidence even suggests the University failed to encourage the grievant in any plan he presented for his own professional development. In fact, the evidence indicates just the opposite. The University has approved the grievant's requests to take courses.

CONCLUSION

I conclude that the evidence is not sufficient to prove that the Employer violated Section 8.5 (or any other provision) of the Agreement by failing to award PEACH the ESE position in Information Technology. The Employer determined in good faith that he lacked the experience in handling state-of-the-art computers, printer, and networking systems. The evidence shows that PEACH was not "equally qualified" to the successful candidates, who possessed the necessary prior experience. Thus, PEACH'S seniority did not come into play as a tiebreaker. The Employer fulfilled all procedural requirements set forth in Section 8.5. The selection process was fair and unbiased. The evidence is not sufficient to prove violation of any other contractual provision.

AWARD

The grievance is denied.

Anne T. Patton