BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION	:	Case 11 No. 48171 MA-7531
and	:	
CITY OF SPOONER (POLICE DEPARTMENT)	:	

Appearances:
Mr. Gerald W. Gravesen, Business Agent, Wisconsin Professional Police Associ
Mr. Thomas Kissack, City Attorney, and Weld, Riley, Prenn & Ricci, S.C., Attorn

ARBITRATION AWARD

Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter the Association, requested that the Wisconsin Employment Relations Commission designate a member of its staff to arbitrate in a dispute between the Association and the City of Spooner, hereinafter the City, in conformance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on December 9, 1992 in Spooner, Wisconsin. There was no stenographic transcript made of the hearing. The parties submitted post-hearing briefs in the matter by January 20, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

Although the parties were unable to stipulate to a statement of the issues at hearing, the City, in its brief, substantively offered the same statement of the issues as offered by the Union at hearing. The issues to be decided may therefore be stated as follows:

> Did the City violate the parties' Labor Agreement when it promoted a less senior applicant than the Grievant to the Sergeant position in the Spooner Police Department? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1992-1993 Agreement are cited:

ARTICLE III - MANAGEMENT RIGHTS

The City possesses the sole right to operate the City government and all management rights repose in it subject to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

A. To direct all operations of City government;

. . .

C. To hire, promote and assign employees in positions with the City;

. . .

ARTICLE VIII - SENIORITY

Seniority, according to the terms of this agreement, shall consist of the accumulated paid service of the employees of the Spooner Police Department. The employee's earned seniority should not be lost because of absence due to illness, authorized leaves of absences, military service, when called up to federal service, selective service, or other emergency military service or temporary layoff. Seniority shall continue to accrue during absences covered by worker's compensation up to a maximum of two years.

. . .

ARTICLE XX - PROMOTIONAL PROCEDURE

It shall be the policy of the Employer to give consideration to the seniority of present employees when permanently filling job vacancies and promotional openings within the bargaining unit, and when scheduling shifts.

Job vacancies shall be posted on the bulletin board for ten (10) days after such vacancies. The job posting shall set forth the job title, hours, rate of pay, and a brief description of job requirements and qualifications desired.

Any such opening may be filled within thirty (30) days of the vacancy.

Any employee interested in such vacancy shall sign the job posting. Seniority shall be considered as part of the selection process.

An employee, upon being selected for such a vacancy, shall receive a probationary period of 180 working days during which time the City can reinstate said employee to his former position if deemed necessary. The employee may elect to return to his/her

former position at his/her former rate of pay within a thirty (30) day period, and shall suffer no loss of bargaining unit benefit.

BACKGROUND

The City maintains and operates the City of Spooner Police Department and the Association has represented all of the regular full-time and regular part-time law enforcement personnel with the power of arrest in the Department, excluding the Captain and the Chief, since 1987.

On August 1, 1992, the City posted the following notice of a vacancy for a sergeant position:

SPOONER POLICE DEPARTMENT

POSITION VACANCY

It is anticipated that the City of Spooner on recommendation of it's (sic) Police Committee may reinstitute the position of Police Sergeant. This is not to be construed as a commitment on the part of the City of Spooner, but should this position become available this will serve as the ten (10) day posting commencing this date August 1, 1992.

TITLE - **POLICE SERGEANT.**

HOURS - **MAY VARY DEPENDING UPON REGULAR WORK SCHEDULE.**

RATE OF PAY - **PER CONTRACT, PLUS AN ADDITIONAL $88.00 PER MONTH DESCRIBED AS "SERGEANTS PAY".**

JOB DESCRIPTION - **INCLUDING BUT NOT LIMITED TO THE ATTACHED SHEET ENTITLED JOB DESCRIPTION, POLICE SERGEANT.**

QUALIFICATIONS - **STATE CERTIFICATION.**
FIVE YEARS EXPERIENCE AS A POLICEMAN.
MEET BASIC PHYSICAL REQUIREMENTS.

ANYONE INTERESTED IN BEING CONSIDERED FOR THIS POSITION SHOULD INDICATE BY SIGNING THEIR NAME BELOW.

Attached to the notice was the following job description:

JOB DESCRIPTION

POLICE SERGEANT

The following is a general description relative to the duties of the police sergeant. It includes, but is not necessarily limited to the following:

1. Assist the police captain with the administration and supervision of the department. In the captains absence the sergeant will be responsible to carry on the duties of the captain.

2. Prepare the daily work schedule and keep it

posted for 30 days ahead of time.

3. Supervise and assist the patrolmen in their daily duties.

4. Develop, administer, and supervise the breathalyzer training and maintenance program.

5. Develop, administer, and supervise the firearms training and maintenance programs.

6. Be present at emergencies in the absence of the police captain.

7. Cooperate with outside departments called in for assistance.

8. Assist with patrol duties.

9. Receive and process personnel complaints.

The sergeant position had been discontinued since 1984 when the then incumbent in the position, David LaPorte, was promoted to the position of Captain. At the time of the posting, there were four full-time patrol officers in the Department and all four signed the posting. The Grievant, Officer Donald Esser, was the most senior of the applicants with 13 years in the Department.

On August 26, 1992, there was a joint meeting of the City's Personnel and Police Committees for the purpose of interviewing the applicants for the sergeant position and to make a decision as to who would fill the position. Present at the meeting were Mayor Paulson, Captain LaPorte and Aldermen Danklefsen, Heller, Mackie, Coquillette, Hanson and Cuskey. Each of the participants had a question to ask each of the applicants, and asked that same question in each of the interviews. The applicants were interviewed separately by the joint committee for 10-15 minutes each in closed session. Each applicant was allowed to explain why he was qualified for the position and to answer the questions. The applicant's personnel files were not considered, and only one applicant, Officer Ennis, presented a resume.

Following the interviews, the joint committee discussed the qualifications of the applicants, including their seniority in the Department, and asked questions of LaPorte about each of the applicants. The joint committee members were then polled and unanimously decided upon Officer Robert Andrea to fill the Sergeant position. Andrea had 10 years in the Department at the time, as compared to the Grievant's 13 years.

Approximately a month prior to the August 26th meeting Alderman Cuskey had asked Captain LaPorte if reinstating the sergeant position would be helpful and who he would recommend for the position. LaPorte had responded that he thought Officer Andrea would get along better with the other employes.

The promotion at issue in this case is the first position in the Department since the employes have been represented in collective bargaining, and the wording of Article XX, Promotional Procedure, in the parties' Agreement, has not been changed since their first agreement. Prior promotions in the Department to sergeant or captain in the past twenty-two years have all gone to the most senior man in the Department at the time, although other applicants, including outside applicants, were interviewed and considered. Neither party has proposed any change in the wording of Article XX since it was placed in their first labor agreement.

Officer Esser grieved the awarding of the Sergeant position to a less senior applicant. The parties, being unable to resolve their dispute, proceeded to arbitrate the matter before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association takes the position that the City violated the parties' Agreement, Article XX, Promotional Procedure, when it promoted an applicant less senior than the Grievant to the position of Sergeant. The Association notes that the language of Article XX has remained unchanged since it first appeared in the parties' agreement. That language states that:

> Seniority shall be considered as part of the selection process. . .

The Agreement is silent as to what other objective criteria are to be utilized in determining fitness and ability. The undisputed testimony of the Grievant was that the Association was satisfied with a system of promotion by seniority, and that promotional criteria had never been discussed in negotiations since the promotion language was included in the first agreement in 1987. He testified that it was his understanding that the parties had initially agreed that the promotion was to be by seniority consistent with past promotions. Captain LaPorte, called as an adverse witness by the Association, testified that all of the promotions he had received while in the Department were based on seniority. Further, all previous promotions were based on the principle of seniority as well and there is no evidence to the contrary.

While the agreement is silent as to what other criteria are to be utilized in determining fitness and ability for promotion, in this case the City promoted solely on the basis of the opinion of supervision through an interview committee comprised of elected officials of the City. The Association cites Elkouri and Elkouri, How Arbitration Works, Fourth Ed., in stating:

> While the opinion of supervisors regarding the ability of employes is considered important, and is entitled at least to some consideration, such opinion without factual support will not be deemed conclusive. (At page 630.)

The supervisor in this case is Captain LaPorte, who testified that he never documented his evaluations in the employes' personnel files, never counseled employes as to the results of his evaluations, has never shared with individual employes their respective strengths or weaknesses, and that his subordinates had no idea when he was conducting an evaluation interview and that he had never indicated to them what criteria would be utilized for future promotions, other than strict seniority. The three witnesses produced by the City to support its position that the Grievant was less qualified than the successful applicant, Andrea, were elected aldermen. None of them have occupations related to law enforcement and only one testified that he had performed some part-time work years ago for an area sheriff's department. One alderman testified that he felt the ability of the Grievant and Andrea were "equal and balanced", but that the Grievant's demeanor in the alderman's opinion, was not as satisfactory as that of Andrea and that Andrea had more common sense. However, he also testified that he had never observed either the Grievant or Andrea in a confrontational situation, but had based his conclusions on personal observations. That alderman also testified that LaPorte did not produce any supporting evidence to the committee as to why Andrea should be selected over the Grievant, nor did he inform the committee that the Grievant was currently the Department's Firearms Instructor.

As to the testimony of Alderman Cuskey, the Association asserts it should not be given any great weight. Cuskey admitted that he had pre-selection discussions with LaPorte even prior to the posting of the vacancy and that the substance of the discussions was that Andrea should be given the position of Sergeant. The Association asserts that the City has a duty not to act in an arbitrary or capricious manner. Here, the evidence indicates there is an element of improper conduct by Cuskey and LaPorte directed at all of the unsuccessful applicants for the Sergeant position. Their discussion was prejudicial to them as Cuskey was a voting member of the committee making the selection and it can also be implied that the committee received input from LaPorte as the supervisor. The Association cites Elkouri and Elkouri, as stating. . .

> . . .an even heavier burden is, in effect, placed on the employer, and he is required when challenged not only to show greater ability in the junior employe to whom he has given preference, but also to show the absence of discrimination and arbitrariness and the presence of good faith. (At pages 615-616).

The Association next asserts that the City cannot meet its burden of proof to justify that the less senior applicant was more qualified than the Grievant. The Association notes the job description for the Sergeant position (Joint Exhibit No. 6) and asserts that the Grievant presented undisputed evidence that he had experience in a number of those areas as a result of his past and present military experience. He also presented undisputed evidence that he was a Firearms Instructor for the Department and that during the course of his normal duties he has had occasion to cooperate with other law enforcement agencies and that he has on occasion received citizen complaints against fellow officers and that he has taken those complaints consistent with Departmental policy. Conversely, the City did not present any evidence whatsoever to establish that Andrea either met or had performed any of the prerequisites listed in the job description, rather, it relied upon unsupported testimony and the notes of the individual aldermen taken during the interviews of the applicants for the position. The Association cites Elkouri and Elkouri as stating that:

> It may be noted that the burden of going forward with the evidence may shift during the course of the hearing, after the party having the burden of persuasion presents sufficient evidence to justify a finding in its favor on the issue, the other party has the burden of producing evidence in rebuttal. (At pages 324-325).

It asserts that the notes of the aldermen are simply their opinions and they are not supported by any tangible evidence in the record. The Association again cites Elkouri and Elkouri as stating that allegations or assertions are not proof, and that mere allegations unsupported by evidence are ordinarily given no weight by arbitrators. (At page 325).

Regarding the City's objection to the introduction of the Grievant's resume, (Union Exhibit No. 1), the Association asserts that even informal records kept by a union or an employe may be given significant weight if the employer has kept no formal records of that activity, again citing Elkouri and Elkouri (At page 323). The City's representative had opportunity during the hearing to cross-examine the Grievant on the reliability of the exhibit, and to introduce or offer testimony from his personnel record or through Captain LaPorte, but chose not to explore any of those avenues, and left the Grievant's qualifications undisputed. Hence, the City's objection has no merit.

The Association notes that it mainly relies upon the language of Article XX and the long-standing past practice of promoting by seniority to support its position. With regard to Article XX, the Association notes that it provides for a probationary period of 180 working days during which time the City can reinstate the promoted employe to his former position if it is deemed necessary. That language infers that senior applicants should be given first consideration and gives the City a built-in avenue of protection by designating a probationary period to determine fitness and ability of the selected applicant. The Association asserts that there is a view in arbitration that:

> The Employer should grant the senior employe a trial period on the job, but not training, to demonstrate his ability if the test results. . .or other criteria used have been inconclusive in determining the ability of the senior bidder. Citing Elkouri and Elkouri (At pages 625-626).

The existence of the trial period language of Article XX supports the assertion that the parties intended to promote by seniority. The City had a whole panorama of avenues available to it to determine fitness and ability of the applicants, but chose not to rely on any of the accepted methods for doing so. Rather, the City chose to promote based upon the collective opinions of a well-intentioned committee comprised of individuals with no or minimal law enforcement experience. Their opinions were based upon a brief interview which included responses to a series of questions asked each applicant. There was no review by an evaluation committee, no personnel records, educational background or even consideration of related law enforcement experience. The City produced no evidence to support its contention that Andrea was superior to the Grievant in fitness and ability for the Sergeant position, other than the unsupported opinion of the committee members. The Association also notes that the City did not even produce the successful applicant to testify. Hence, it cannot be assumed that the successful applicant was the superior candidate.

The Association concludes that it is not the intent of the collective bargaining process and applicable law to utilize the grievance arbitration process to make new intent or subvert present contract language and past practice contrary to the current agreement and past practice. It cites Elkouri and Elkouri for the proposition that past practice is to be considered a primary factor and that the fact of unionization creates no basis for the withdrawal of conditions previously in effect. (At p. 843) As a remedy, the Association requests that the Grievant be given the position of Sergeant, including applicable retroactive pay and benefits back to August 28, 1992, and that the City be ordered to cease and desist from not following the terms of Article XX in the future.

City

The City takes the position that Article XX of the Agreement does not require it to promote the most senior applicant for a position, but merely requires that seniority be taken into consideration. It asserts that it complied with the requirements of Article XX in making the promotion at issue in this case.

In support of its position, the City asserts that the Association's contention that Article XX is essentially a "strict seniority" clause must fail. It cites Elkouri and Elkouri for the proposition that a strict seniority clause is far less prevalent than one that allows seniority to be taken into account along with other factors to determine fitness and ability for the position. (At page 610.) There is no wording in Article XX to the effect that seniority shall govern in making promotions, nor does the wording imply that seniority should be the only factor, or even the determining factor, in any given case. Although other criteria are not specifically set forth, the

wording of Article XX plainly suggests that seniority is but one criterion to be considered along with other relevant criteria.

The City also contends that there is no binding past practice present regarding Article XX. There has been one occasion prior to this and subsequent to the advent of the Union, where the senior applicant was chosen, and that falls far short of the requirement that it be "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Citing Celanese Corporation of America, 24 LA 168, 172 (1954). The fact that the most senior applicant was promoted in that one case does not prove anything, as the "most qualified applicant" and "most senior applicant" are not mutually exclusive. LaPorte may have been both the most qualified applicant and the most senior as well. It is also noteworthy that at the time, the City solicited applicants from outside the Department. Had the parties intended seniority to be the sole criterion, outside applicants would not have been considered.

Based on the above analysis, the City contends that Article XX must be viewed as a "modified seniority" clause as described in Elkouri and Elkouri. Within that classification, there are three sub-classifications. At one end of the spectrum, there is the "sufficient ability" clause under which the most senior applicant is awarded the position provided that he meets the minimum qualifications. At the other end of the spectrum is the "relative ability" clause which essentially allows the employer to select the most-qualified applicant with seniority to be the determining factor only if the relative qualifications are equal or substantially equal. Citing Elkouri and Elkouri (At pages 611-612). Article XX falls within neither of those two sub-classifications, rather it should be viewed as a "hybrid" clause, and, as such, both seniority and relative qualifications are to be considered. It differs from a "relative ability" clause in that its operative language contains no specific guidelines as to how to balance the factors of seniority and relative qualifications. In this case the joint committee undertook such a balancing process in awarding the Sergeant position to Andrea rather than the Grievant. In doing so, the City acted both within the letter and spirit of Article XX.

The City asserts that the committee's decision to promote Andrea over the Grievant to the Sergeant position was not arbitrary or capricious and should therefore be allowed to stand. In support thereof, the City cites the following from Elkouri and Elkouri:

> It seems clear that under "hybrid" clauses the relative claims of seniority and of ability must be determined by comparing and weighing against each other the relative difference in seniority of competing employees and the relative difference in their abilities. Thus, in comparing two or more qualified employees, both seniority and ability must be considered, and where the difference in length of service is relatively insignificant and there is a relatively significant difference in ability, then the ability factor should be given greater weight; but where there is a relatively substantial difference in seniority and relatively little difference in abilities, then the length of service should be given greater weight. To illustrate, Arbitrator I. Robert Feinberg, giving effect to both factors under a "hybrid" clause, held that a much better qualified junior employee should be given preference over a senior employee who could perform the job, since there was relatively little difference in length of service, thus making relative ability the determinative factor. Conversely, a senior

> employee whose qualifications were only slightly less but whose seniority was much greater than that of a junior employee has been given preference over the better qualified junior employee, the seniority factor determining the issue. (Footnotes omitted.) (At pg. 613).

The City contends that this is a situation where as a result of the comparatively small difference in seniority between the Grievant and Andrea, 13 and 10 years, respectively, the seniority criterion is less compelling than it would have been had a veteran of many years been pitted against a recent hire or outside applicant. Hence, the difference in relative ability takes on added importance. That is precisely why Andrea was selected over the Grievant. Every member of the joint committee who testified indicated that seniority was not overlooked, but that they debated long and hard over whether to award the position to the Grievant because he had more seniority than Andrea. It was ultimately concluded that Andrea was the "far better qualified" candidate for the position notwithstanding the Grievant's seniority. Absent contract language expressly limiting its rights, an employer possesses the inherent authority to determine an employe's qualifications for a given promotion, especially where the contract contemplates that both qualifications and seniority are to be considered, but is silent as to how the decision is to be made. Citing Elkouri and Elkouri, the City asserts that the employer's determination in that regard can only be overturned if it is deemed to be "arbitrary or capricious." (At page 613). Although not expressly set forth in Article XX, the "fitness and ability" factor is implicit within the overall scheme of that provision. Hence, the City's decision to award the Sergeant position to Andrea rather than the Grievant must be sustained, unless the committee's assessment that Andrea was the more qualified applicant of the two can be characterized as "arbitrary or capricious".

The City asserts there was nothing arbitrary or capricious about that assessment in this case. Common sense dictates that the second in command, i.e., the Sergeant position, must have the "people skills" necessary to gain and maintain the respect and confidence of both the public and the subordinate officers within the Department. That is especially true where, as was testified to here, the Department was at a low ebb in both regards at the time. Further, the assessment of Andrea's far superior "people skills" vis-a-vis the Grievant's, is not entirely subjective. Alderman Cuskey testified that complaints had been lodged against the Grievant in the past and that he had received a three-day suspension for insubordination. Other than opposing the reference to his prior discipline, there was nothing from the Grievant to rebut that negative assessment, and he relied only upon his seniority and the belated resume of his relevant work experience. The City asserts that is an inadequate showing for the purpose of the Association meeting its burden of proof that the City acted arbitrarily or capriciously in awarding the position to Andrea. Hence, the City requests that the grievance be dismissed as being without merit.

DISCUSSION

Contrary to the Association's contention, Article XX, Promotional Procedure, is not a "strict seniority" clause, either by virtue of its wording or by virtue of a past practice. The wording of Article XX states, in relevant part, that:

> It shall be the policy of the Employer to give consideration to the seniority of present employes when permanently filling job vacancies and promotional openings within the bargaining unit. . .
>
> . . .

> Seniority shall be considered as part of the selection process.
>
> . . .

That wording does not make seniority the sole criterion, it clearly only requires that seniority "be considered" in making promotion decisions, in addition to other factors that management will consider, but which are not set forth.

The Association also cites past practice in support of its position, however, the promotion at issue is the first that has occurred since the officers in the Department organized and became represented by the Association in 1987. Without commenting upon whether a practice predating 1987 would be binding upon the parties, and notwithstanding that a number of the promotions cited involved promotions to a management position (Captain), it is noted that the testimony of the Grievant and LaPorte regarding that alleged practice was only that the most senior employe ended up being promoted. Both conceded, however, that they were not aware of what factors were considered by management in making its decision in each case. As the City asserts, the "most senior" and the "most qualified" are not necessarily mutually exclusive categories. Alderman Mackie testified that for the promotion preceding this one - when LaPorte was promoted to Captain, there were other applicants for the position, including outside applicants, who were interviewed. That would presumably have been unnecessary if it had only been a matter of promoting the most senior applicant.

Having concluded that Article XX of the Agreement does not require the City to promote the most senior applicant, it is still necessary to determine whether the City violated that provision under the circumstances in this case. While the wording of Article XX only requires that seniority be considered, that requires a good faith consideration, and not just lip service. The testimony of joint committee members was that the seniority factor was discussed at length. There is nothing in the record to place that testimony in doubt. Although Alderman Cuskey concedes he asked Captain LaPorte who he would recommend for the Sergeant position if it were reinstated, the undersigned finds nothing ominous in asking the employes' immediate supervisor who he would recommend for a promotion. The Association questions the timing of their discussion, i.e., prior to the job being posted. There is, however, nothing in the record to indicate that discussion somehow later shaped the joint committee members' opinions before they interviewed the applicants and made their decision on who to promote. Both Aldermen Coquillette and Mackie testified they had no prior discussions with anyone about who should be promoted. LaPorte was also asked about the various applicants at the August 26th meeting when the decision was made and he responded.

Beyond requiring that seniority be given good faith consideration in making a promotion, Article XX does not, however, assign a weight to be given that factor. In determining whether seniority was considered in good faith, or whether the City instead acted arbitrarily in awarding the Sergeant position, it is necessary to review what the joint committee considered and the basis for its decision to promote Andrea. The evidence presented indicates that all four applicants were interviewed by the joint committee, were asked essentially the same questions relating to the position and concerns in the Department, and were all given the opportunity to make the committee aware of their relevant work experience, training and educational background. The members of the joint committee made some notes in that regard to aid them in making their decision and asked Captain LaPorte questions about the applicants, which questions he answered. The members of the joint committee then discussed the applicants. It appears that most of the discussion centered upon the qualifications and seniority of the Grievant and Andrea. The testimony of the three committee

members who testified was that most felt the qualifications and background of Andrea and the Grievant were more or less equal (both were in the National Guard and had similar backgrounds, although the Grievant had more time in the military), and there was some disagreement about how much weight to give seniority. The members were then polled, and they unanimously chose Andrea on the basis of what has been described as his "people skills". More specifically, the committee members referred to Andrea's ability to communicate and get along with the public and fellow officers better than the Grievant and his less confrontational manner with people. The aldermen credibly testified that they felt those qualities were important as they perceived the Department as having serious problems in regard to a poor public image and low morale. While they felt that the Grievant and Andrea were close to equal on their qualifications and seniority, they concluded that Andrea's "people skills" made him better qualified than the Grievant for the Sergeant position to a sufficient degree to outweigh the three-year difference in their seniority.

The Association's reliance upon the passage it cites from Elkouri and Elkouri regarding management's burden of proof in this situation is misplaced. That passage is in reference to a "relative ability" clause, as described in that text, i.e., a clause giving the senior employe preference if that employe possesses fitness and ability equal to that of the junior employe. 1/ The provision in Article XX requiring that seniority be only "considered" does not fit within that description and does not constitute a "relative ability" clause. Similarly, the Association's reliance upon Elkouri and Elkouri to support its contention that the presence of a 180 day "trial period" in Article XX indicates that the senior employe is to be given preference is also misplaced. The discussion in Elkouri and Elkouri, and the cases cited therein, involved contract provisions that required that the senior employe be given the job if he could perform the work or involved "relative ability" clauses, 2/ neither of which are present in this case.

Given that Article XX does not require that seniority be given greater or even equal weight compared to other factors that were considered, the above is sufficient to establish that the joint committee gave good faith consideration to seniority in this instance, and did not act in an arbitrary or capricious manner in awarding the Sergeant position to Officer Andrea, and, therefore, did not violate Article XX of the parties' Agreement.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 7th day of April, 1993.

By David E. Shaw /s/
David E. Shaw, Arbitrator

1/ Elkouri and Elkouri, at p. 611. Also, the Association cites only the most severe of several approaches described in Elkouri and Elkouri as having been utilized by arbitrators in deciding issues involving "relative ability" clauses. (See discussion at pp. 614-616).

2/ Elkouri and Elkouri, at pp. 625-626 and cases cited therein at footnotes 197 and 198.