BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL DRIVERS, DAIRY EMPLOYEES, WAREHOUSEMEN, HELPERS & INSIDE EMPLOYEES LOCAL UNION NO. 346	Case 224 No. 53833 MA-9468
and	
DOUGLAS COUNTY (HIGHWAY DEPARTMENT)	

Appearances:

Mr. Donald Bye, Attorney at Law, and Ms. Sarah Lewerenz, Attorney at Law, on the brief, appearing on behalf of the Union.

Mr. John Mulder, Douglas County Personnel Director, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on June 27, 1996, in Superior, Wisconsin. The hearing was not transcribed. Afterwards, the parties filed briefs and reply briefs whereupon the record was closed on August 23, 1996. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Whether the Employer violated the contract in bypassing the grievant (Todd Gehl) the senior applicant, for the promotional position of working shop foreman? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The parties' 1994-95 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 4

MANAGEMENT RIGHTS: The management of the County and the direction of the working force, including the right to hire, to suspend, or discharge for cause, to lay off employees because of lack of work, and all other rights relating thereto, except only as may otherwise be provided herein, are vested exclusively in the Employer.

. . .

ARTICLE 18

PROMOTIONS: 1. In making promotions and in filling job vacancies or new positions, preference shall be given those employees oldest in point of service, provided, however, that the qualifications and physical fitness of the employees being considered for the job are relatively equal. In judging employees' qualifications for the job, the following factors shall be considered:

(a) Ability to perform related work.
(b) Attitude.
(c) Aptitude.
(d) Versatility.
(e) Efficiency.
(f) Location in residence in relation to where work is to be performed.

NOTE: Employee shall reserve the right to move his residence to comply with subsection (f) as stated above.

. . .

3. The successful applicant shall have a thirty (30) day trial period in which to demonstrate his ability to perform the job. If during said period the Employer considers the employee unqualified, he shall be returned to his former position and rate of pay without loss of seniority rights.

. . .

> 5. It shall be the policy of the Employer to promote to supervisory positions insofar as possible from the ranks of the employees. Such positions shall be posted as stated herein, however, all applications shall be submitted in writing and each applicant shall be interviewed by the Highway Commissioner and/or the Highway Committee to determine their qualifications for the position to be filled if deemed necessary by the Employer. Seniority will be considered but may not necessarily be the deciding factor in filling supervisory positions.

. . .

FACTS

As one of its governmental functions, the County operates a Highway Department. The Union represents a bargaining unit composed of Highway Department employes.

One of the classifications in that bargaining unit is the working shop foreman. The working shop foreman position is the next-to-the-highest paid position in the bargaining unit. There are four such positions in the Department. This case involves a promotion to one of those positions. The individuals in the other three working foreman positions were all promoted from within. When they bid for the job of working foreman, each was the senior bidder.

In November, 1995, the Employer posted a vacancy for a working shop foreman. The working shop foreman oversees the mechanics in the Department's Superior highway shop who maintain and repair the Department's trucks, cars, and equipment such as dump trucks, loaders and graders. The shop foreman also orders parts and keeps track of the inventory. Historically, the shop foreman performed a substantial amount of hands-on mechanic work. Highway Commissioner George Palo envisioned the new working shop foreman doing less hands-on mechanic work than was previously the case and doing more managing of the shop. Palo testified he expects the shop foreman to resolve conflict among staff, deal with vendors, and recommend changes.

Four bargaining unit employes posted for the position: Todd Gehl, Dave Korhonen, Tim Beck and John Grymala. The hiring dates for these four employes are respectively 1986, 1987, 1990 and 1991. Thus, Gehl was the most senior applicant and Grymala the least senior applicant with Korhonen and Beck in between.

After the four employes bid on the position, the Employer announced its intention to

interview 1/ them. What made this announcement unique was that the Employer had never previously interviewed employes competing for an internal vacancy. The Employer had interviewed employes though who competed for management positions (i.e., non-bargaining unit positions).

The Employer's interview panel was composed of the following five people: George Palo, Victor Wester, Tim Erickson, Jodi Slick, and Candace Fitzgerald. Palo is the highway commissioner and head of the Department. Wester is the patrol superintendent and, in that capacity, supervises the working shop foreman. Erickson is the Department's accountant and works with the working shop foreman on inventory, record-keeping and accounting matters. Slick is the County's recycling coordinator; she has no work involvement with either the Highway Department or the working shop foreman. Fitzgerald is the County's assistant personnel director. Fitzgerald and Palo selected the other three interviewers. In addition to these five people, working foreman Dave Johnson sat in on all the interviews as an observer for the Union; he did not ask questions of the candidates however.

Prior to the interviews, Fitzgerald prepared a six-page document for the interviewers to use during the interviews. The first two pages of this document were questions to be asked of the applicants about their background and job experience. On the next three pages were seven categories which were designated as follows: planning, objectivity, resourcefulness, resolving conflict, adaptability, managing development and team playing. Each of these seven categories had a question or series of questions which related to same. For "planning", the questions were:

> What are your long and short-term plans for the Department? How would you begin to implement them? If you reached your goals, what would the Department look like when you were done?

For "objectivity", the questions were:

> Describe a situation at work where someone criticized you. How did you react or solve the issue?

1/ At the hearing, some union witnesses used the terms "test" and "interview" interchangeably. For the record, no "test" was given to the employe applicants in the normal sense of the word (i.e., a written or performance test). The undersigned surmises that the reason some union witnesses used the terms "test" and "interview" interchangeably was because in their view, the interview which the applicants went through was an oral test. However, in this Award, the term "test" will not be used; rather, the term "interview" is used. The interview is described later in this Award.

For "resourcefulness", the questions were:

> Describe a new idea or suggestion (about anything) you have made or would like to make to your supervisor. Explain that idea to us and tell us why you think it is a good idea and why it would work?

For "resolving conflict", the question was:

> Describe a situation when you had to help people with differing viewpoints reach a constructive solution.

For "adaptability", the questions were:

> What situations do you find most frustrating? How do you deal with them?

For "managing development", the questions were:

> As a working shop foreman, how would you decide what the major training and development needs of the people in your department are? How would you help them develop their skills?

For "team playing", the questions were:

> Describe a project that you worked on as a team member. How did you contribute to getting the work done?

Fitzgerald did not draft the above-noted questions herself. Instead, she selected them from a book of interview questions. The above-noted questions were taken from a part of the book which deals with "professional/managerial" jobs. The last page of the interview document contained the following additional questions:

> 1. Problem solving:
>
> A. The contracting of repair services has been a shop-related function. With that fact in mind, how and when would you as a shop foreman recommend and control the contracted services?
>
> B. How would you see the new garage impacting the shop operations and would you recommend any changes?

C. Do you find any merit in using generic parts over OEM parts?

2. Attention to Detail:

A. Do you think annual inspections of our rolling stock is a positive event? How would you accomplish annual inspections?

B. How will you implement data entry in the shop operations?

C. How will you manage shop overtime?

3. Organization:

A. What will be your strategy for assigning work and supervising the employes under your charge?

B. How do you see the department controlling inventory and improving parts management?

C. How do you see the role of the janitor as fitting in the shop operations?

4. Team Playing:

A. What is your feeling toward the use of quality circles for problem solving in the shop?

B. Do you see any value in leasing equipment annually and how would that impact the shop?

C. If you feel strongly about an issue, how would you address the teams to support your idea?

Palo drafted these questions himself.

Each candidate was then interviewed by the interview panel. In each interview, the interviewers asked the candidate all the questions on the six-page document just referenced. Working foreman Johnson, who sat in on all the interviews as an observer for the Union, testified that none of the candidates were hurried, cut off during their answer, or not allowed to answer a

question. As each candidate responded to the questions, the interviewers took notes of the candidate's responses on their copies of the document. The interviewers then rated the candidate on a scale of one to five (with five being highest) in the seven categories of planning, resourcefulness, managing development, objectivity, resolving conflict, team playing and adaptability. The candidates were not rated however on their responses to the questions on pages 1, 2 and 6 of the interview document (i.e., the questions about their background and experience and the questions which Palo drafted.) The interviewers scored the candidates independently and did not consult with each other about the candidates being interviewed. In the area of planning, the five interviewers gave Gehl an average score of 11, Beck an average score of 20, Korhonen an average score of 19, and Grymala an average score of 21. In the area of resourcefulness, the five interviewers gave Gehl an average score of 17, Beck an average score of 14, Korhonen an average score of 17, and Grymala an average score of 22. In the area of managing development, the five interviewers gave Gehl an average score of 10, Beck an average score of 18, Korhonen an average score of 20 and Grymala an average score of 22. In the area of objectivity, the five interviewers gave Gehl an average score of 9, Beck an average score of 15, Korhonen an average score of 16, and Grymala an average score of 16. In the area of resolving conflict, the five interviewers gave Gehl an average score of 11, Beck an average score of 18, Korhonen an average score of 17, and Grymala an average score of 18. In the area of team playing, the five interviewers gave Gehl an average score of 14, Beck an average score of 19, Korhonen an average score of 20, and Grymala an average score of 21. In the area of adaptability, the five interviewers gave Gehl an average score of 12, Beck an average score of 16, Korhonen an average score of 17, and Grymala an average score of 18. When these scores were totalled, Gehl received 84 total points, Beck received 124 total points, Korhonen received 126 total points and Grymala received 138 total points. Working foreman Johnson, who did not complete an interview document form or rate the candidates but attended the interviews simply as a union observer, testified that Gehl "did not interview well" while Grymala had a "fabulous interview".

After the interviews were finished, the interviewers gave their completed documents to Fitzgerald who then used a procedure known as the "paired weighting process" to compare the ratings given to the applicants by the five interviewers and quantify the comparisons. This was the first time the County used the paired-weighting process to compare ratings in the Highway Department. 2/ This paired weighting process worked as follows. In each of the above-referenced seven areas, the combined raw score of each applicant was compared to the combined raw score of each of the other applicants. The applicants who were rated the highest on the interview questions got the highest paired-weighting score. When this rating process was completed, it showed that Grymala had the highest paired-weight score of 105, Korhonen had the second highest paired-weight score of 65, Beck was next with a paired weight score of 45, and Gehl had the lowest score of the four candidates with a paired-weight score of 10. Seniority was not a factor in determining the score. Thus, Gehl did not receive any points under this paired-weighting process for being the senior applicant.

2/ The County had used this process in other departments.

The Employer concluded from the above-noted paired weighting score that Grymala demonstrated the greater qualifications to be working shop foreman so it awarded him the job effective December 11, 1995. As previously noted, this was the first time a working shop foreman position was not awarded to the most senior bidder. Gehl subsequently grieved his not being awarded the position.

The record indicates that Gehl has been a mechanic with the Department for nine years. He is the Department's senior mechanic. Because of his status as senior mechanic, he has filled in as the acting working shop foreman when the working shop foreman went on vacation. Additionally, after Grymala assumed the position of working shop foreman, Gehl began filling in for him on Mondays when Grymala was not scheduled to work. At the time the working shop foreman position was filled, Gehl worked by himself without supervision in the Department's Hawthorn shop as a premium mechanic. A premium mechanic goes out into the field and works on equipment when it breaks down. Gehl has been evaluated twice in his nine years with the Department. These evaluations rated him as "competent" which is the highest of the three ratings on the evaluation form (the other two ratings being "requires improvement" and "unsatisfactory".) Gehl has an Associate degree in auto mechanics from the local technical college. By his own admission, Gehl was nervous at the interview and did not do well.

The record indicates that prior to being appointed working shop foreman, Grymala had been a mechanic in the Department for four years. His job evaluations are not contained in the record. Besides his job with the County, Grymala has another job with another employer where he works as a shop foreman overseeing five employes. Grymala is certified in truck inspection and completed half of a one-year welding program.

POSITIONS OF THE PARTIES

Union

The Union's position is that the County's actions violated the contract. It makes the following arguments to support this contention.

To begin with, the Union sees this case, in part, as a past practice case. Consequently, it makes the argument traditionally made in such cases, namely that a binding past practice exists which the Employer unilaterally changed. According to the Union, two different practices are applicable here: one concerns interviews and the other concerns promotions. With regard to the former, the Union contends that the practice is that interviews are not conducted for bargaining unit positions. To support this premise, it notes that this was the first time the Employer ever interviewed applicants for a bargaining unit promotion. The Union avers that since the Employer interviewed the applicants, it violated this practice. With regard to the latter, the Union contends that the practice concerning promotions is that promotions in the Department have always been

based solely on seniority. To support this premise, it notes that the other three working shop foremen were all senior bidders. The Union believes this practice underscores the value which the parties have historically placed on seniority in making promotions. It therefore asserts that since the past practice is that promotions are made by seniority, and Gehl was the senior bidder, Gehl should have been awarded the position pursuant to the parties' past practice. Since he was not, and the Employer did not award the position strictly by seniority, the Union believes the Employer violated this past practice.

The Union argues in the alternative that if the Arbitrator finds for some reason that the foregoing two practices do not exist or control, the Employer has still violated the contract.

To support this contention, the Union starts by making the following arguments about the interview process which occurred here. First, the Union asserts that the Employer's decision to interview the applicants was a unilateral change which should have been addressed at the bargaining table. Second, the Union contends that this particular interview was not job-specific, and therefore could not possibly have resulted in a determination of whether the applicants had relatively equal qualifications. To support this premise, it notes that the scored questions were developed by a person who knows nothing about the shop and furthermore relate to managerial positions. It also notes that the questions which the highway commissioner developed were not scored. It also notes that two of the five interviewers were from outside the Highway Department. According to the Union, this shows that the interview committee was stacked with people who were unfamiliar with the work of the shop foreman and therefore unqualified to decide if the applicants were relatively equal. Third, the Union submits that during the interview itself, Gehl and Grymala gave the same substantive answers to many of the questions. To support this premise, the Union cites the questions relating to resourcefulness and both candidates' response. As the Union sees it, Grymala was rated higher than Gehl on this and other questions simply because the interview panel was impressed by what the Union characterizes as Grymala's "glibness" and "ingratiating verbal manner." The Union then characterizes the interview as nothing more than a "public speaking test". According to the Union, the Employer should not have given a "public speaking test" for a mechanic foreman job. Fourth, the Union asserts that after the interview was over, the Employer did not do any follow-up to determine whether the answers which Grymala gave in the interview reflected his ability to supervise the shop. It specifically notes that the Employer did not investigate whether Grymala's claimed supervisory status at the outside employment was authentic and whether he was doing a good job in that role. It also notes that the Employer did not follow up to determine how Gehl did on those occasions when he served as acting shop foreman. It also submits that the Employer did not follow-up on the statement Grymala made during the interview that his "greatest weakness" was his "short temper". According to the Union, a short temper would be an impediment to being a good working shop foreman. Fifth, the Union asserts that the scoring method which the Employer used to rate the scores (i.e., the paired-weighting system) unnecessarily increased the disparity in the applicants' scores.

Next, the Union argues the Employer did not follow the factors listed in Article 18, Section 1 when it decided who to promote. According to the Union, when the County was judging the applicants' qualifications, it completely ignored the factors listed in Article 18 Section 1 (i.e., ability, attitude, aptitude, versatility, efficiency and location) and instead created and used its own factors (i.e., how the candidates performed at the interview). The Union reads the phrase "relatively equal" to mean that the applicants' qualifications do not need to be exactly equal in order for seniority to be considered. The Union argues that the facts show that Grymala is not substantially superior to Gehl; rather, the two have relatively equal qualifications. To support this premise, it cites the record testimony that both employes can fix anything in the Department. The Union then asserts that Gehl's qualifications exceed Grymala's, citing the fact that Gehl has more working experience in the Department than Grymala does and that Gehl has an Associate Degree in auto mechanics whereas Grymala does not. According to the Union, these facts show that Gehl's formal qualifications, training and education are equal to, or superior to, Grymala's. The Union therefore argues that since Gehl is "relatively equal" to Grymala, Gehl should have been awarded the job.

Finally, the Union avers that if there was any question about Gehl's ability to do the job, the Employer is protected by Article 18, Section 3 which requires the promoted employe to serve a 30-day probation period.

In sum then, the Union contends that by not selecting Gehl for the working foreman position, the Employer violated Article 18. In order to remedy this alleged contractual breach, the Union asks that the grievance be sustained and Gehl awarded the job in question.

County

The County's position is that its actions did not violate the contract. It makes the following arguments to support this contention.

To begin with, the County disputes the Union's assertion that this is a past practice case. With regard to the first alleged practice concerning interviews, the County acknowledges that prior to the instance involved here, it never interviewed employes competing for a bargaining unit promotion. In the County's view, this fact (i.e., that it had never previously interviewed employes bidding for a bargaining unit promotion) does not preclude it from doing so here. In support thereof, it notes there is no language in the agreement which specifically prevents it from interviewing. The County asserts that given the absence of same, it has the right under the Management Rights clause to interview candidates if it so desires. With regard to the second alleged practice concerning seniority, the County acknowledges that when the other three working foreman positions were filled, the individuals who filled those positions were the senior bidders. However, as the County sees it, seniority was not the deciding factor in their promotions. According to the County, the decision concerning who to promote in those three instances was based on facts which are not contained in this record. The County argues in the alternative that

even if seniority was the deciding factor in those three promotions, the County never agreed that promotions in the Department would be based solely on seniority or waived the contractual language dealing with promotions. According to the County, Article 18, Section 1 clearly specifies how promotions will be made in the Department. The County believes that given the existence of clear contract language, there is no need for the Arbitrator to look to any alleged past practice. Consequently, the County believes any alleged past practice concerning the non-use of interviews and promoting the senior bidder are not controlling here.

Next, the County argues it did not violate the language just referenced (Article 18, Section 1) when it made the promotion in question. The County asserts that this provision, which it characterizes as a "relative ability" clause, gives it the right to determine the qualifications of applicants. As the County sees it, that provision does not place any restrictions on it in terms of how it determines the qualifications of applicants and their "relative ability".

The County then goes on to note that the way it compared the "relative abilities" of the four applicants in this specific instance was by using an (oral) interview process. It makes the following arguments in defense of the interview process it used here. First, as previously noted, the County admits this was the first time it interviewed applicants for a bargaining unit promotion. Be that as it may, the County believes it never waived its management right to do so. In support thereof, it calls the Arbitrator's attention to the fact that there is no language in the contract which prohibits it from conducting interviews. That being so, the County contends it had the right to interview the applicants to determine their qualifications. Second, the County contends the interview process which it used was both fair and related to the job. It emphasizes that it was not looking to fill the shop foreman position with the best mechanic; rather, it wanted the person who was most able to manage the shop. According to the County, the interview questions which the applicants were asked required them to communicate thoughts and ideas; not just talk or be glib. In its view, communication of thoughts and ideas is an important part of the working shop foreman's job. The County objects to the Union's characterization of the interview process as a "public speaking test". As the County sees it, the questions which the candidates were asked in the areas of 1) planning, 2) objectivity, 3) resourcefulness, 4) resolving conflict, 5) adaptability, 6) managing development and 7) team playing gave each applicant the opportunity to show that they could, respectively, 1) take the lead in planning to reduce job overhead, 2) maintain objectivity, 3) identify projects and prioritize workloads, 4) resolve conflicts, 5) be adaptable, 6) train staff and 7) be a team player. The County therefore contends its interview process was not arbitrary, capricious or discriminatory. Third, the County asserts that the method which it used to rate the scores from the interviews (i.e., the paired-weighting system) was not unfair. In the Employer's view, this process was an objective way to compare the scores and quantify the comparisons. The County then cites the applicants' scores to show that Grymala had the highest score and Gehl the lowest. Fourth, responding to the Union's contention that the County did not "follow up" after the interviews, the County asserts that no follow-up was needed. In its opinion, this was because Palo and Wester already knew the applicants. Additionally, with regard to the fact that Grymala said during his interview that his greatest weakness was his temper, the County simply notes that

Grymala's temper had never been a problem before.

Finally, the Employer contends that after it compared the employes' qualifications as quantified by their paired-weight score, it concluded that Grymala had the greater qualifications and awarded him the job. In the Employer's view, Gehl's qualifications were not "relatively equal" to Grymala's so Gehl's seniority was not the determining factor. The County argues that seniority does not even enter the picture in promotion situations unless the applicants are "relatively equal". According to the County, that was not the case here.

In conclusion then, the County argues that by selecting Grymala for the working shop foreman position, it did not violate Article 18. It therefore requests that Gehl's grievance be denied and that he not be awarded the working shop foreman position.

DISCUSSION

The factual context for this matter is as follows. The Employer posted a vacancy for a working shop foreman position and four employes bid on same. The Employer then interviewed the candidates. During the interviews the interviewers rated the applicants in seven specific areas. Afterwards, the Employer used the "paired weighting process" to compare the ratings which were given to the applicants by the interviewers. The results of the paired weighting process were that Grymala got the highest score. The Employer concluded that since Grymala got the highest score, his qualifications were greater than the other applicants. The Employer then awarded him the job. Gehl subsequently grieved his nonselection. Gehl was the senior applicant and Grymala was the least senior applicant.

At issue here is whether the County complied with the contract or violated same when it awarded the working shop foreman position to Grymala. The Union contends that the County violated both past practice and the contract by awarding the job to Grymala. The County disputes those assertions.

In contract interpretation cases such as this, the undersigned normally focuses attention first on the contract language and then, if necessary, on evidence external to the agreement such as an alleged past practice. In this case though, I have decided to structure the discussion so that this normal order is reversed. Thus, I will first address the alleged past practices. My reason for doing so is as follows. If I addressed the contract language first, and found it to be clear and unambiguous, there would be no need to look at the alleged past practices for guidance in resolving the dispute. Were this to happen, the case could be decided without any reference whatsoever to the two alleged past practices. The obvious problem with this is that the Union sees this case, in part, as a past practice case. I have therefore decided to utilize this format so that the Union's past practice contentions are not dodged.

Past practice is primarily used or applied in the following circumstances: 1) to clarify

ambiguous language in the parties' agreement, 2) to implement general contract language, 3) to modify or amend apparently unambiguous language in the agreement, or 4) to establish an enforceable condition of employment where the contract is silent on the matter. In order to be binding on both parties, the practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

The Union contends the Employer violated two different practices by its conduct here. The first alleged practice concerns interviews and the second concerns how promotions are made. Each is addressed below in the order just referenced.

The alleged practice concerning interviews can be said to involve category (4) referenced above. This is because there is no language in the contract concerning interviews for bargaining unit promotions. 3/ According to the Union, the practice is that interviews are not conducted for bargaining unit promotions. To support this premise, the Union notes that prior to the promotion involved here, the Employer had never interviewed employes vying for a bargaining unit promotion. The Union seeks to have this alleged "practice" supplement the contract so as to be binding and an enforceable condition of employment.

Based on the rationale which follows, I find that the fact that the Employer had not previously interviewed employe applicants who posted for bargaining unit promotions does not establish a binding past practice which prohibits the County from interviewing employe applicants. The Union's underlying theory that this constitutes a practice overlooks the fact that not every pattern of conduct amounts to a binding past practice, particularly when the pattern of conduct arises from the exercise of a management right. That is precisely the case here. The fact that employe interviews had never been conducted previously was not the result of bargaining but rather the Employer's unilateral act. The Employer had previously decided that it did not need to interview competing employes to determine their qualifications. Such was its contractual right. The Employer had the right to make this decision because it had reserved to itself, via the Management Rights clause, the right to determine whether to interview to determine the qualifications of employe applicants. This means that the fact that there had never been employe interviews before for promotions to bargaining unit positions was the product of the Employer's management prerogative. Said another way, it arose from the exercise of a management right. Since no practice exists which prohibits the County from interviewing employe applicants, it follows that the Employer did not violate a practice when it interviewed the employe applicants herein.

3/ There is language in the contract though concerning interviews for non-bargaining unit positions, namely Article 18, Section 5.

Attention is now turned to the second alleged practice which concerns how promotions are made. According to the Union, the practice is that promotions in the Department have always been based solely on seniority. As support for this premise, the Union notes that when the other three working foreman positions were filled, the person who was awarded each position was the senior bidder. The Union contends the Employer violated this practice because it did not award the position to the senior bidder here.

This alleged practice can be said to involve category (3) referenced above. This is because the alleged practice arguably differs from the relevant contract language. The contract language will be analyzed in detail later. Here, though, suffice it to say that the contract language does not require the County to fill vacancies on the basis of strict seniority. As just noted though, the Union contends that the practice is that vacancies are filled by strict seniority. The Union essentially asks the Arbitrator to overlook the contract language and apply the alleged practice instead. If the undersigned were to accept the Union's past practice argument on promotions, this would in effect nullify express contract language. The problem with this is that usually when past practice conflicts with express contract language, the contract language governs over the practice.

That said, the undersigned is persuaded that in this particular instance, the alleged practice and the contract language can be reconciled. As previously noted, the Union relies on the fact that when the other three working foreman positions were filled, the person who got each job was the senior bidder. While this evidence certainly shows that in those three instances the most senior bidder was awarded the promotion, that evidence does not establish that the position was filled solely on the basis of seniority. In those three instances, the senior bidder could also have been the more qualified applicant. That being so, the record evidence does not establish that the senior bidder was promoted over more qualified junior applicants. Consequently, the undersigned is not persuaded that the record evidence concerning past promotions establishes that the parties have a past practice which conflicts with the pertinent contractual language. Given the foregoing, it is held that the Employer did not violate a past practice when it did not promote the senior bidder herein.

Having so found, attention is now turned to the Union's contention that the Employer's actions violated the contract. Both sides agree that the contract language applicable here is Article 18, Section 1. It provides:

> In making promotions and in filling job vacancies or new positions, preference shall be given those employees oldest in point of service, provided, however, that the qualifications and physical fitness of the employees being considered for the job are relatively equal. In judging employees' qualifications for the job, the following factors shall be considered:

(a) Ability to perform related work.
(b) Attitude.
(c) Aptitude.
(d) Versatility.
(e) Efficiency.
(f) Location in residence in relation to where work is to be performed.

NOTE: Employee shall reserve the right to move his residence to comply with subsection (f) as stated above.

My analysis of this language follows. As previously noted, this provision does not require the County to fill vacancies on the basis of strict seniority. Instead, it specifies that in making promotions "preference shall be given" to the senior applicant if that person's physical fitness and qualifications are relatively equal to the physical fitness and qualifications of the junior applicants. I read this modified seniority clause to mean that a senior applicant is entitled to the promotion if his physical fitness and qualifications are relatively equal to those of the junior applicants. However, if the senior applicant's physical fitness and qualifications are not relatively equal to those of the junior applicants, the Employer does not have to give preference to the senior applicant. Thus, when the applicants' qualifications are not relatively equal, the more qualified candidate is entitled to the job regardless of seniority. It is implicit from this provision that it is the Employer, and not the employe, that looks at the applicants' physical fitness and qualifications and makes a comparison of same. The provision then goes on to specify that in comparing the applicants' qualifications, the Employer is to consider the following six factors: ability, attitude, aptitude, versatility, efficiency, and location. The provision does not give any direction though as to how these six factors are to be applied, nor does it give any guidance as to the relative importance or weight to be given to these factors either separately or in combination. Additionally, it is unclear how education and experience (factors which traditionally are considered in determining qualifications) fit into the above-referenced categories, if at all.

In this particular case, the parties did not offer any evidence concerning the criteria of physical fitness, nor did they make any arguments concerning same. Since the parties essentially ignored this criteria, the undersigned will do likewise.

Attention is now turned to the criteria of qualifications. In the analysis which follows, I have decided to structure the discussion as follows: the first part reviews the interview which was conducted and the second part reviews the method which the Employer used to determine the relative qualifications of the applicants herein. These topics will be addressed in the order just referenced.

As previously noted, the County decided to interview the competing employes to help it determine their qualifications. The Union raises a number of arguments about the interview which was conducted here. These arguments are addressed below.

First, the Union contends that the Employer's decision to interview the applicants should have been addressed at the bargaining table. Based on the following rationale, I find it was unnecessary for the Employer to do so. As previously noted, there is no contract language here which prohibits the Employer from interviewing applicants. Given the absence of any express contractual prohibition against same, it follows that the Employer has the right, via the Management Rights clause, to interview competing employes. Interviews are a device employers traditionally use to help them determine qualifications. Since the Employer has the management right to conduct interviews, it was not required to negotiate with the Union prior to exercising its right to interview the applicants herein.

Next, the parties dispute whether the questions which were asked at the interview were job-specific. The County contends that they were while the Union disagrees. The questions which were asked can be divided into three groups: the background and work experience questions, Palo's questions, and the questions pertaining to the seven categories. I find that the questions which were asked of the applicants about their background and work experience (i.e., the questions on page 1 and 2 of the interview document) were job-related. Such questions are routinely asked at interviews. I am also persuaded that the questions which Palo drafted (i.e., those questions on page 6 of the interview document) were job-related. In so finding, it is noted that the parties have differing views about the nature of the job of working shop foreman. In the past, the position's incumbent performed a substantial amount of hands-on mechanic work. When the Employer decided to fill the position this time though, it envisioned certain changes occurring in the job, to wit: the new working shop foreman doing less hands-on mechanic work and doing more managing of the shop. Consequently, the Employer was not looking to fill the shop foreman position with the best mechanic. Rather, it wanted someone with strong communication skills who could resolve conflict among staff, deal with vendors effectively and recommend changes in the department. If that is what the Employer wanted the next working shop foreman to do, it could ask questions which related to same. It is therefore held that the questions which Palo drafted pass muster as being job-related. The final group of questions (i.e., those found on pages 3-5 of the interview document) dealt with the following seven categories: planning, objectivity, resourcefulness, resolving conflict, adaptability, managing development and team playing. Without deciding the matter, it is assumed for the purpose of discussion that these questions were job-related.

Third, attention is turned to the responses which applicants Gehl and Grymala gave to the questions noted above. While the Union contends that Gehl and Grymala gave the same responses to many of the questions, the record evidence does not support that contention. In my view, the interview documents show they gave different responses to the questions. Overall, the interviewers felt that Grymala was able to communicate his responses to the questions far more effectively than Gehl. Although the Union attributes this to Grymala's "glibness" and "ingratiating verbal manner", those characterizations are not supported by the record evidence.

Fourth, the Union challenges the fairness of the interview panel as well as the rating process which the Employer used after the interviews. With regard to the former, suffice it to say that the undersigned is not convinced that the interview panel was stacked with people who were unfamiliar with the work of the shop foreman. In my view, there are no red flags with either the composition of the interview panel or how they comported themselves during the interviews. With regard to the latter, it is noted that during the interviews the candidates were rated by the interviewers on their responses to some questions and not rated on others. Specifically, they were rated on their responses to the questions dealing with the seven categories identified above and were not rated on their responses to either Palo's questions or the work experience questions. Although I certainly question why the Employer did this (i.e. rate some responses and not others), the Union did not prove there was anything inherently unfair with same. Additionally, the County went to great lengths after the interviews were completed to compare the ratings given to the applicants by the interviewers and objectively quantify the comparisons. The process which the Employer used (i.e. the paired weighting process) has not been shown to be unfair, arbitrary or capricious. That being the case, I find that it passes muster.

Attention is now turned to a review of the method which the Employer used to determine the relative qualifications of the applicants herein. As previously noted, Article 18, Section 1 gives the Employer the right to determine the qualifications of the applicants. In judging each applicant's relative qualifications, the Employer has contractually bound itself to consider the following six factors: ability, attitude, aptitude, versatility, efficiency and location. What happened here, though, is that when the Employer judged each applicant's relative qualifications, it did not use the six factors just listed. Instead, the County used seven different factors. The seven factors which the County used were: planning, objectivity, resourcefulness, resolving conflict, adaptability, managing development and team playing. Insofar as the undersigned can tell, the Employer created these seven factors out of thin air because there is no reference to any of them in Article 18, Section 1. Said another way, the Employer invented seven new factors to determine qualifications. The Employer asserted at the hearing that the seven factors which it created and subsequently used to determine the applicants' relative qualifications were subsumed into the six factors listed in Article 18, Section 1. However, other than making this blanket assertion, the Employer did not show how the six contractual factors were subsumed into the seven factors which the Employer actually used. For example, the County did not show how contractual category (a) (i.e., ability to perform) corresponds with any of the seven factors it created and used. The same point can be made for the other five contractual categories. If the Employer had shown that the seven categories which it created and used to determine the applicants' relative qualifications were identical to the six contractual categories, the undersigned could have accepted the contention that the contractual factors were subsumed into those actually used. However, the Employer offered absolutely no proof that such was the case. As a result, it is held that the contractual factors for determining qualifications were not subsumed into those which the Employer actually used. Since the factors which the Employer used to determine qualifications were different from those in the contract, it is held that the Employer failed to follow the

procedures specified in Article 18, Section 1 for determining qualifications.

Having so held, the next question to be addressed is what impact this finding has on the instant promotion. Specifically, should the County's failure to use the factors contained in Article 18, Section 1 to determine the applicants' relative qualifications result in the reversal of its actions? I find that it should. In my view, the County's contractual breach was not *de minimus*, so a remedy is necessary. The remedy found appropriate under the circumstances is as follows. First, Grymala's selection as working shop foreman is overturned because his selection was based on a flawed process. Second, it does not automatically follow from this finding that Gehl gets the job instead simply because he was the senior bidder. As noted above, the Employer does not have to give the job to the senior bidder based on seniority alone. Additionally, Gehl is not entitled to a trial period in the job either because the trial period referenced in Article 18, Section 3 is for "the successful applicant" selected pursuant to Article 18, Section 1. Third, since the Employer did not determine the qualifications of the applicants in accordance with the factors specified in Article 18, Section 1, it is necessary to do the selection process over so that a shop foreman can be selected from an unflawed process. This time, when the Employer determines the qualifications of the applicants, it must use only the six factors contained in Article 18, Section 1.

The following summarizes the major points of this Award. In making future bargaining unit promotions, the Employer can interview the applicants. During the interview, it can ask the applicants job-related questions. Also, during the interview, the interviewers can rate the applicants. Afterwards, the Employer can use the paired-weighting process to objectively compare the ratings. Finally, when the Employer makes its determination as to the relative qualifications of the applicants, it must use only the six factors contained in Article 18, Section 1.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The grievance is sustained. The Employer violated the contract when it filled the position of working shop foreman because it did not determine the qualifications of the applicants by using the six factors specified in Article 18, Section 1. It does not follow from this finding however that the grievant (Todd Gehl) gets the job instead because he was the senior applicant. Since the Employer did not determine the qualifications of the applicants by using the six factors specified in Article 18, Section 1, it is necessary to do the selection over. Therefore, in order to remedy this contractual breach, the County is directed to discard the working shop foreman promotion and determine the qualifications of the four original applicants again, this time using the six factors listed in Article 18, Section 1. Whoever is selected is to be paid at the applicable rate retroactive to the original filling of the position (December 11, 1995).

Dated at Madison, Wisconsin, this 29th day of January, 1997.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator