

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**ONEIDA COUNTY COURTHOUSE,  
LOCAL 158, WISCONSIN PROFESSIONAL POLICE ASSOCIATION**

and

**COUNTY OF ONEIDA, WISCONSIN**

Case 152  
No. 59652  
MA-11366

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Appearances:

**Mr. Mark R. Hollinger**, Katarincic and Hollinger LLC, Attorneys at Law, 205 East Wisconsin Avenue, Suite 330, Milwaukee, Wisconsin 53202, appearing on behalf of Oneida County Courthouse, Local 158, Wisconsin Professional Police Association, referred to below as the Association.

**Mr. Carey L. Jackson**, Personnel Director, Oneida County, Courthouse Building, P.O. Box 400, Rhinelander, Wisconsin 54501-0400, appearing on behalf of County of Oneida, Wisconsin, referred to below as the County.

**ARBITRATION AWARD**

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve grievance 00-392, filed on behalf of the "Oneida County Courthouse Employee's Association." The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 6, 2001, in Rhinelander, Wisconsin. No transcript of the hearing was prepared. The parties filed briefs and waived the filing of reply briefs by September 11, 2001.

### ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Does the doctrine of claim preclusion govern grievance 00-392?

If not, did the County violate Article 6 of the Collective Bargaining Agreement when it awarded Kim Gauthier the position of Social Services Aide?

If so, what is the appropriate remedy?

### RELEVANT CONTRACT PROVISIONS

#### ARTICLE 6 – SENIORITY – PROMOTIONS – RECLASSIFICATION – LAYOFF

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Section C: Department Seniority: The principal of departmental seniority with ability and qualifications shall govern in promoting, demoting, transferring, filling vacancies and new positions. Departmental seniority shall apply in any office having two or more Association employees.

Section D: County-wide Seniority: The principal of the County-wide seniority with ability and qualifications shall govern in filling jobs or vacancies and new positions not filled by employees within the department. County-wide seniority shall govern layoffs, recalls after layoffs and vacancies, providing the remaining employees are capable of performing the available work.

Section E: Whenever a vacancy arises or a new position is created which would be under union jurisdiction, the County will post a notice of such vacancy or new position on the union bulletin board for a period of five (5) working days. This posting shall include job qualifications and wage scale. At the end of the five (5) working day posting, the County will remove the notice and the job will be filled within five (5) working days. Employees on vacation or sick leave will be notified of job postings by the Association. Present non-probationary employees who meet the minimum qualifications and abilities as defined in the job description within the bargaining unit shall be given preference before any new employee is hired. An employee who is selected to fill a posted position cannot

post for another job at the same or lower rate for a period of six (6) months, except for health reasons. The posting procedure shall apply to vacancies in all deputy positions so that consideration may be given to employees within the Courthouse; however, the elected official shall have the right to appoint the deputy of his/her own choice. A copy of job postings shall be mailed to the secretary of Local #158.

...

Section G: Whenever the County finds it cannot follow the principal (sic) of seniority, the question is subject to grievance procedure between the County and the Association.

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#### ARTICLE 7 VESTED RIGHTS OF MANAGEMENT

Section A: The right to employ, to promote, to transfer, to discipline and discharge employees, and to establish work rules is reserved by and vested exclusively in the Oneida County Board through its duly appointed Personnel Committee and duly appointed department heads. (The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure).

#### BACKGROUND

The Association filed grievance number 00-392 on November 10, 2000 (references to dates are to 2000, unless otherwise noted). The grievance form cites Article 6 as the “**BASIS OF GRIEVANCE**”, and states the following under the heading “**REMEDY**”: “Comply with Article 6, Section C of the current collective bargaining agreement.” The form states the following under the heading “**DESCRIBE THE GRIEVANCE:**”

#### ISSUE:

Did Oneida County violate Article 6, and any other applicable provisions of the parties 1998-2000 collective bargaining agreement by failing to fill a vacancy in the Department of Social Services with applicants from within the Department? If so, what is the proper remedy?

**FACTS:**

In filling a vacancy within the Social Services Department, the County selected an employee from outside the Department. Two applicants from within the Department are both qualified and have greater Departmental seniority than the employee selected for the position.

The vacancy referred to in the grievance is for the position of Social Services Aide.

The County posted the vacant position on October 25, and removed the posting on November 2. Three employees signed the posting: Kirsten Kronberger; Kim Gauthier and Jill Butzlaff. The parties stipulated the seniority of these employees thus:

Jill Butzlaff worked in the Register of Deeds Department and had no “departmental seniority” in the Social Services Department as of November 2, 2000.

Kim Gauthier was hired on June 21, 1999, and had worked in the Department of Social Services since she was hired through the date of the posting on November 2, 2000. Thus, her “county-wide” and Social Services “departmental seniority” began as of June 21, 1999.

Kirsten Kronberger was hired on March 25, 1998, and had worked in the Department of Social Services since she was hired through the date of the posting on November 2, 2000. Thus, her “county-wide” and Social Services “departmental seniority” began as of March 25, 1998.

The Personnel Department reviewed the personnel files of each applicant and determined that each applicant met the requirements of the position “on paper.” The posting lists the “essential duties and responsibilities” of the position thus:

- Completes monthly action sheets for payment of services.
- Provides information and advice to clients, short of counseling.
- Obtains information by client and provider interviews relevant to authorization and certification of purchased services.
- Completes redetermination of client eligibility and extent of need for services, information systems or services provided.
- Maintains record of change in clients/providers status; provides and assists in completion of forms, reports and statistical analysis.

- Makes referrals to and coordinates services with community organizations.
- Assists social workers as assigned.
- Keeps clear and accurate information using checklist for necessary forms and information.
- Monitors condition of client homes and families, evaluates client program satisfaction.
- Coordinates holiday donation programs.
- Any other duty as assigned.

The posting states the “qualifications” for the position thus:

- Knowledge of office practices and procedures, terminology and equipment.
- Knowledge of Agency rules, regulations, policies and procedures.
- Ability to type 60 wpm and operate a 10 key calculator efficiently.
- Ability to use computer hardware, software and accessories.
- Ability to compile, analyze, record and assemble data and information in meaningful and effective manner.
- Ability to maintain confidentiality of Agency files and information.
- Good verbal and written communication skills.
- Good English skills.
- Good business math and bookkeeping skills.
- Must be able to evaluate situations and make good independent decisions based on practice and procedures.

The posting states the required “education and/or experience” thus:

- High school degree or equivalent.
- One year post high school education with course work in sociology, psychology, administrative assistant or secretarial science.
- Two years work experience in an office environment.
- Valid Wisconsin Driver's License.
- Must have or be able to obtain MA case manager certification within the probation period.

The matter was then referred to the Social Services Department, which established an interview schedule for the three applicants.

A panel of three Social Services Department managers, chaired by Rose Dryden, the Social Work Supervisor, interviewed the three applicants on November 6. At the start of the interview, the panel presented each applicant with the following printed list of questions:

1. What factors are most important to you on a job?
2. What are some things in your current or past position, which you feel you have done particularly well?
3. What would you say is your strongest and weakest asset that you would bring to this job?
4. What are your computer experiences in terms of:
  - A. Hardware used:
  - B. Software used:
  - C. Databases used:
5. What work experience or education have you had in working with families, individuals or special populations?
6. Suppose you are out to lunch with friends and they ask you about a case that you have knowledge of. How would you respond to their questions?
7. How do you organize your work when you have more to do than time allows?
8. Why do you feel we should hire you for this position?
9. In accordance with the Americans With Disabilities Act, are you able to perform all the essential functions/duties required for the position of Social Services Aide? If you are not, please identify which essential function(s) you are unable to perform and identify any accomodation(s) (sic) which you feel may be necessary to help you perform the essential function/duty.
10. When would you be available for employment?
11. Are there any questions you would like to ask of the committee or is there anything else you would like to share with us?

The panel members were expected to rank the answers of each applicant to the first eight questions on the following numerical score: "1 - Inadequate;" "2 - Adequate"; "3 - Good"; "4 - Excellent"; and "5 - Outstanding". Dryden collected the scores generated by the panel and delivered them to the Director of the Social Services Department, Paul E. Spencer, Jr.

After reviewing the panel scores, Spencer chose Butzlaff, thus prompting grievance 00-392. In a formal response to the grievance, dated December 18, Spencer stated the County's position thus:

The Social Services' position is that following the posting, Personnel determined those applicants who are eligible to be considered further for the position. Interviews are conducted to determine their ability and qualifications. Based upon ability, qualifications and seniority, the position is then awarded to the highest ranking applicant.

During the processing of the grievance, however, Spencer concluded that Gauthier, unlike Kronberger, was qualified for the position. Because Gauthier, unlike Butzlaff, had departmental seniority in the Social Services Department, he determined that the initial preference for Butzlaff was erroneous, and awarded the position to Gauthier.

The balance of the background is best set forth as an overview of witness testimony.

### **Thomas Bahr**

Bahr has served as the unit's chief spokesman since late 1995. He headed the bargaining team that negotiated the parties' most recent labor agreement. Those negotiations neither changed nor addressed any change to Article 6.

Bahr noted there is, in his experience, no precedent for the County using a selection process to determine the most qualified applicant without regard to seniority. From his perspective, the labor agreement and past practice demand that the County select the most senior intra-departmental applicant, provided the applicant is qualified. Spencer did not take the position during the processing of the grievance that Kronberger was not qualified. Bahr understood Spencer's position to be that Gauthier scored higher on the interview, and thus was preferable. This tracked a 1997 dispute involving the filling of a Typist position. In that case, Spencer selected Julie Petraitis, an employee from outside of the Social Services Department, over Judy Zarm, an employee working in the Social Services Department. The Association grieved the action. In that case, Spencer reversed his decision during the processing of the grievance, asserting in a May 7, 1997 memorandum, that the two applicants "can be considered equally qualified." Bahr did not formally oppose this assertion, but testified that his position was that Zarm should have been selected because she met the minimum qualifications for the position.

### **Kirsten Kronberger**

Apart from a brief trial period in a position in the District Attorney's office, Kronberger has worked for the Social Services Department. She noted she learned through a November 7 letter that she would not receive the Social Services Aide position. The letter did not, however, state any reasons for the denial.

She stated that she meets or can meet every item required in the “education and/or experience” section of the job posting. Beyond this, she testified in some detail that she meets each item demanded by the “qualifications” section. More specifically, she testified that she has a Associate’s degree with at least two years experience with the department. Her coursework included business math. When last tested, she typed at the rate of one hundred words per minute. She has almost six years of prior experience working in an accounting office. She used a computer, software and peripherals in that office. She works as a Typist, within the Social Services Department, and fills in for the receptionist as needed. This demands communication and filing skills on her part. Beyond this, Social Workers rely on her to edit and to proof their written work. At no point in the hiring process did any County manager inform her she was not qualified for the job.

She estimated her interview lasted from seven to ten minutes. She assumed the panel was aware of her qualifications and past work within the Social Services Department, if for no other reason than that the Personnel Department had already passed on her qualifications. She affirmed that the panel provided her the list of questions and relied on her to answer those questions, without prompting or assistance. Nor panel member asked her to clarify or to amplify any of her responses.

### **Rose Dryden**

Dryden has served as a supervisor in the Social Services Department for eight and one-half years. She testified that Kronberger took no more than five minutes to complete her responses to the list of questions. Dryden did not feel her responses satisfactorily addressed the questions, and added that the panel did not know her background or qualifications prior to the interview. In Dryden’s view, the responses did not constitute proof she was qualified, and possibly indicated she assumed the panel already knew her background.

Dryden added that the interview was, consistent with past practice, a “non-interactive interview.” Prior to the start of the interview process, Dryden asked each applicant if they had any questions. After that, each applicant read and answered each question. The panel asked no questions beyond those provided the applicants, but could ask clarifying questions. Kronberger’s responses, in her view, were so brief that they permitted no clarification questions from the panel. She knew little of Kronberger’s qualifications prior to the interview, and knew little more after it. In her view, the non-interactive process was designed to restrict the substance of the interview to the listed questions.

She added that she was not aware of any minimum score on the interview that could yield a “passing” score. She did not know if the County assigned a particular value to the interview as a portion of the selection process. The panel scored each interview, and she passed the scores on to Spencer, who did not participate in the interview. Spencer had Dryden check



into the references listed by each applicant, and also asked Dryden of her general impressions of the applicants. The decision to rank the applicants was Spencer's. She believed he used the interview scores to determine the most qualified applicant, and was unaware what, if any, factors Spencer considered other than the interview.

Dryden stated that Kronberger's interview took five minutes, Gauthier's took at least fifteen, and Butzlaff's took about thirty. The interview schedule was set to permit up to thirty minutes for each applicant.

### **Carey Jackson**

Jackson has served as Personnel Director since 1987. The non-interactive interview process was in place prior to this. The process, in his view, was "fair and open." It was designed to be sterile from an interviewer's perspective, but wide open from an applicant's. Beyond this, the process precluded panel members from straying into not job-related or potentially illegal areas of inquiry. Jackson stated that the Personnel Department determined those applicants who met the listed requirements of the posting, then forwarded that list to the hiring department. After the interview, the Personnel Department played no role in the selection process. Spencer made the ultimate selection.

Further facts will be set forth in the **DISCUSSION** section below.

## **THE PARTIES' POSITIONS**

### **The Association's Brief**

The Association states the issues for decision thus:

Did the Employer violate Article 6 (Seniority – Promotions – Reclassification – Layoff), Sections C and D of the Collective Bargaining Agreement, when it failed to promote Kirsten Kronberger to the position (of) Social Services Aide?

If so, what is the proper remedy?

After a review of the evidence, the Association argues that the "County stipulated that the arbitrator has subject-matter jurisdiction, and that the Arbitrator has the authority to interpret the 1991 decision." Arbitral authority establishes that one arbitration award can have "preclusive effect" on another only if the parties, facts, contract language and evidence are the same.

A review of the Crowley award establishes that it “is not controlling in this case because the circumstances of this grievance differ from those decided by Arbitrator Crowley.” In this case, the County acknowledges that Kronberger is “qualified on paper,” but argues that she was not qualified based on the “non-interactive interview.” If the interview is to be determinative, then the County was obligated to notify Kronberger prior to the interview. She wrongfully assumed that her interviewers knew her qualifications, only to find out after the fact that she was expected to detail them during the interview.

More significantly, a review of Kronberger’s qualifications establishes that she was qualified to assume the posted position. In the grievance before Crowley, the grievant could not demonstrate fundamental qualifications. Beyond this, Crowley addressed applicants asserting only County-wide seniority. Here, Kronberger’s superior departmental seniority is undisputed.

Article 6, Sections C and D establish that an applicant must possess the minimum qualifications for a posted position. The labor agreement does not contemplate the County selecting the most qualified applicant. The County’s attempt to read Article 6 to permit it the unilateral authority to determine the most qualified applicant effectively reads seniority out of existence. Any doubt on this point is addressed by the County’s resolution of the Zarm grievance in 1997. The Association contends, however, that the language of Article 6 is too clear to permit such doubt. County and departmental seniority cannot be “governing” if seniority plays the role of “a tie-breaker in the most rare of circumstances.”

It follows, according to the Association, that the County “violated the contract by failing to promote Kirsten Kronberger to the position of Social Services Aide.” The Association requests that she “be made whole for any and all wages and benefits which she would have received but for the County’s violation of the contract, and that the County cease and desist from such further contractual violations.”

### **The County’s Brief**

The County states the issues thus:

1. Is this grievance arbitrable based on the doctrine of Res Judicata, in light of the Crowley Award? If this grievance is found to be arbitrable, then
2. Did the County act appropriately and consistent with the collective bargaining agreement in filling the Social Services Aide position?

A review of the evidence establishes that the Association successfully grieved the County’s initial selection of Jill Butzlaff to fill the Social Services Aide position. After a review of the initial grievance, the County agreed that one departmental applicant, Kim Gauthier, had the seniority

and qualifications sufficient for the position. On February 2, the county promoted Gauthier to the position, thus meeting “the remedy sought by the Association in grievance #00-392.”

The Association, however, “introduced an entirely new issue into the process” at hearing by asserting Kronberger had to be selected. Arbitral precedent establishes that this “completely circumvents the grievance process.” To accept the Association’s view “will have a chilling effect on future grievance discussions due the creation of mistrust and uncertainty.”

Nor can the Association’s view of the merits of the revised grievance be accepted. If the personnel department’s certification of a list of applicants establishes qualifications, then there is no basis for an interview. This view cannot be accepted without violating twelve years of past practice that “clearly shows that the County has been conducting oral interviews and that the County has promoted employees based on ability, qualification and departmental seniority.” Such action has included promoting less senior employees and outside applicants. No testimony introduced at hearing can rebut this practice.

Beyond this, the “selection process has already been arbitrated and decided in the County’s favor.” The process has continued essentially unmodified since 1991, and should not be overturned. Kronberger’s testimony at hearing cannot overcome this award. She received the chance to detail her qualifications in the interview process, and failed to do so. Her interview took five minutes, while the other applicants took from fifteen to thirty minutes. Kronberger’s answers at the interview “were not thorough.” Her testimony at hearing cannot become a second interview.

The Association’s attempt to discredit the interview process should not be accepted. That the process is non-interactive is not a flaw. The interview process is valid, fair and job-related as the Crowley award establishes. Commission precedent establishes that arbitration awards should be given res judicata effect. The facts of this grievance mirror those before Crowley, and the County’s decision to promote Gauthier is reasonable. It follows, according to the County, “that the grievance (must) be dismissed in its entirety.”

### **DISCUSSION**

I have essentially adopted the County’s view of the threshold issue to the merit of the grievance, and the Association’s view of the issue on the merits. The Wisconsin Supreme Court has determined the “res judicata” doctrine is more aptly stated as “claim preclusion”, *NORTHERN STATES POWER CO. V. BUGHER*, 189 WIS.2D 541, AT 550-551 (1995). I have altered the County’s statement of the threshold issue to reflect the Court’s preference. I have altered the Association’s to reflect that Sections C and D are not the only provisions of Article 6 bearing on the resolution of the grievance. Beyond this, I have altered the Association’s to reflect that the grievance questions the role of seniority in the filling of the vacancy. This focuses on the selection of Gauthier rather than the rejection of Kronberger.

There is arguably a distinction between claim preclusion as applied by a court or by the Commission as a legal matter and as applied by an arbitrator as a contractual matter. At hearing, the County considered whether the Crowley award relieved it of its duty to arbitrate grievance 00-392. As the issue stated above reflects, the County has asserted the doctrine as a matter of contract.

Practically speaking, there is little difference between the legal and contractual application of the doctrine. The Commission has stated its view of the law thus:

Res judicata effect will be given the prior award (relieving the obligation to arbitrate the grievance) where the subsequent grievance is shown to share an identity of parties, issues and material facts. (Citations omitted) MORAINÉ PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, DEC. NO. 22009-B (WERC, 11/85).

The contractual application of the doctrine is stated thus in Elkouri & Elkouri, How Arbitration Works, (5<sup>th</sup> ed., 1997) at 610:

A well-reasoned and well-written arbitration opinion has persuasive qualities where it is “in point” with the current subject matter; however, to be given preclusive effect it must be between the same parties, must invoke the same fact situation, must pertain to the same contractual provisions, must be supported by the same evidence, and must concern an interpretation of the specific agreement before the arbitrator.

Either formulation demands an identity of parties, issues and facts. Article 6 has not changed since ONEIDA COUNTY (COURTHOUSE), MA-6717 (CROWLEY, 10/91), and the parties are the same. As the County phrases the issue on the merits, the issues are the same, and can be taken to be the same for the purpose of addressing the threshold issue.

The weakness in the County’s argument is that grievance 00-392 and MA-6717 do not involve an identity of fact. Under either party’s view of Article 6, the underlying grievances are distinguishable on their facts. This is because Article 6 demands the application of “seniority with ability and qualifications” to the filling of a vacancy. Inevitably, the evaluation of an applicant’s seniority, ability and qualifications must be made on a case by case basis. Even though the same classification is at issue, the applicants, with their differing seniority, ability and qualifications are not. However the relevant portions of Article 6 are interpreted, the parties drafted them to be applied on a case by case basis.

Against this background, there is no identity of fact, and claim preclusion is inapplicable. This does not mean the Crowley award has no bearing on grievance 00-392. Rather, it means its force is persuasive, not binding.

It is thus necessary to address grievance 00-392 on its merit. The interpretive conflict between the Association and the County is closer than perhaps it should be. Each party asserts diametrically opposed views of the same language. Both suffer from fundamental flaws. The difficulty is to reconcile those flaws to the facts posed here. Prior to an examination of the language to be interpreted, some background on the flaws is appropriate.

The County's view is flawed by the lack of evidence on how management personnel evaluated seniority. Dryden and Jackson testified that Spencer made the hiring decision, but Spencer did not testify. Jackson testified that the Personnel Department made the determination that each applicant was qualified for an interview, then turned the matter over to the Social Services Department. Thus, as of the time of the interview, the County had made no apparent evaluation of the seniority of any of the applicants. Dryden testified that the panel scored the interviews, then passed the results to Spencer. The interview questions do not expressly include an evaluation of the seniority of any or all of the applicants. Dryden indicated Spencer asked her how she reacted to the applicants. She also noted the hiring determination was his alone. She felt he used the interview process to identify the most qualified applicant. The County chose not to have Spencer testify, and not to put the respective scores of the applicants into the record. In sum, as of the selection of Butzlaff, there is no evidence that the County made any evaluation of the applicants' seniority. Standing alone, this evidence warrants granting the grievance.

The evidence does not, however, stand alone. Before addressing this point, it is necessary to address the flaw in the Association's argument. Ignoring, for the moment, the dispute regarding the Crowley award, the Association argues that the Personnel Department's evaluation of the paper requirements of the applicants established that Kronberger met the qualifications for the position. Thus, her superior intra-departmental seniority demands that she receive the position. The Association thus reads Article 6, Sections C and D to demand that "departmental seniority . . . shall govern in . . . filling vacancies." The flaw in this argument is that the language reads "departmental seniority with ability and qualifications shall govern in . . . filling vacancies". The Association's view reads the reference to "with ability and qualifications" out of existence. Nor does it address this flaw to assert that the "ability and qualifications" reference means simply "with the minimum ability and qualifications to meet the posted job requirements." The language of Article 6, Sections C and D do not clearly rank the factors of seniority, ability and qualifications. Thus, the Association's contention that the language should read "seniority governs provided the applicant meets the minimum qualifications of the job posting" has no evident basis in the language. More significantly here, the parties used a reference to "minimum qualifications and abilities as defined in the job description" in Article 6, Section E. This reference is limited to granting a preference to "(p)resent non-

probationary employees . . . within the bargaining unit” who are competing for a vacancy with “any new employee”. That the parties expressly included this reference in Article 6, Section E makes it unpersuasive to conclude it should be implied in Article 6, Sections C and D.

The interpretive quandary is that the County, as of the selection of Butzlaff, demonstrated no consideration of seniority. The Association, however, asserts a reading of Article 6, Sections C and D, which permits no consideration of ability or qualifications. What priority is to be given to each factor poses a troublesome issue. As the Association urges, the structure of the first sentence of Article 6, Sections C and D may make the reference to “ability and qualifications” subordinate to “(t)he principal (sic) of . . . seniority”. However, the full difficulty of that issue is not posed here, since grievance 00-392 poses two diametrically opposed views. On this record, the County’s view is preferable.

Grievance 00-392 squarely hit the flaw in the County’s argument by asserting it had disregarded the seniority rights of two intra-departmental applicants. Spencer’s December 8 response potentially highlighted the flaw in the Association’s argument by noting that “ability, qualifications and seniority” dictated the ultimate selection. As noted above, however, there is no evidence that the County evaluated seniority by selecting Butzlaff. The County, however, altered this selection by choosing Gauthier. As of Gauthier’s selection, it is apparent that the County did evaluate intra-departmental seniority. This did not, as the County asserts, resolve the grievance, since the grievance cited two intra-departmental applicants. However, at this point, the conflict between the County and the Association no longer turned on whether the County failed to evaluate County-wide seniority against intra-departmental seniority. Rather, the dispute became whether the County evaluated the selection criteria properly.

Against this background, the Association’s reading of Article 6, Sections C and D is unpersuasive. It affords no apparent role for County evaluation of ability or qualifications beyond a determination that an applicant meets the minimum qualifications of a posting. This view affords no persuasive alternative to the County’s application of Article 6 in this case.

The primary difficulty with the Association’s view is that it lacks a basis in the language of Article 6, Sections C and D. As noted above, those sections specify three factors that govern the filling of a vacancy: “seniority”, “ability” and “qualifications”. Nor is the Association’s view that the County is restricted to a determination of minimum qualifications supported by other agreement provisions. As noted above, the express mention of “minimum qualification and abilities as defined in the job description” in Article 6, Section E, is restricted to competition between unit and non-unit employees. Thus, its sole role is between those applicants with seniority and those with none. That the parties expressly created this limitation makes it unpersuasive to imply it in Sections C and D.

Other evidence favors the County's view over the Association's. While the County overstates the binding force of the Crowley award, its persuasive force must be acknowledged. The Association made the "minimum qualifications" argument before Arbitrator Crowley that it advances here, see MA-6717 at 4. Arbitrator Crowley rejected it, see MA-6717 at 6, 8. The claim preclusion doctrine does not give this award binding force, but to adopt the view of the contract advanced by the Association in this grievance would effectively overturn the Crowley award. This undercuts the fundamental purpose of arbitration, which is to grant finality to contractual disputes. As noted above, Crowley's rejection of the "minimum qualifications" view of Sections C, D and E of Article 6 is well founded on the language of those sections, and should not be lightly brushed aside.

Evidence of past practice is of limited assistance, but will not support the Association's view of Article 6 over the County's. The binding force of a past practice is rooted in the agreement manifested by the bargaining parties' conduct. The settlement of the Zarm grievance supports either party's view of grievance 00-392, and affords only rough guidance on their areas of agreement. It is evident that Spencer acknowledged that he failed to properly apply intra-departmental seniority by selecting Petraitis over Zarm. The settlement fails, however, to afford definitive guidance beyond this. Spencer's May 7, 1997 memo makes it clear he did not agree with the Association's "minimum qualifications" view of Article 6, Sections C and D. Nor will that memo establish any agreement that seniority prevails only where qualifications are equal (see May 7, 1997 memo at paragraph 1). Bahr's testimony establishes that the Association never agreed to this view. Ultimately, the "seniority prevails only where ability and qualifications are equal" view is no better rooted in Article 6, Sections C and D than is the Association's "minimum qualifications" view. Each view seeks to clearly prioritize the three factors. Article 6 does not.

The County has demonstrated that the "non-interactive interview" process has a long history, and has resulted in the selection of applicants whose qualifications and ability overcame the seniority of competing applicants. This evidence affords support for the County's view that it must weigh the three factors on a case by case basis. It also affords some support for the interview process as a means to evaluate "ability and qualifications". As the County asserts, this evidence makes it unpersuasive to adopt the Association's view of Article 6, which would deny any meaning to the interview process. Beyond this, however, it affords little guidance.

The limits of this conclusion bear some discussion. The Association's criticism of the non-interactive interview process has considerable persuasive force. However, the interpretive issue is not whether the County has selected the best means to evaluate ability and qualifications. At a minimum, the interview process treated all three applicants in the same manner, thus affording each the same opportunity. Kronberger's assumption that the panel was aware of her qualifications did not serve her well. Gauthier and Butzlaff did not make the same assumption, and were rewarded by the panel. Gauthier's superior seniority to Butzlaff has prevailed. A

single bad interview does not necessarily render Kronberger unqualified to be a Social Services Aide. However, it can serve as a basis to favor Gauthier for this vacancy. Article 6 demands some means to evaluate qualifications and ability on a case by case basis. The labor agreement makes the determination the County's, not an arbitrator's. To overturn the interview process in this case, some fundamental contractual flaw must be demonstrated. That Kronberger made an assumption not made by the two successful applicants falls short of this mark. To conclude otherwise in effect grants Kronberger a second interview.

This should not be read to overstate the persuasive force of the County's position. Two factors prevent the absence of Spencer's testimony from being fatal to the County's view of the grievance. The first factor is that Spencer selected Gauthier over Butzlaff, thus demonstrating active consideration of intra-departmental seniority. The second is that the interpretation of Article 6 advanced by the Association eliminates County evaluation of ability and qualifications as demanded by Article 6. The County's proof that seniority received active consideration makes its view of the selection process preferable to the Association's, which denies meaning to two of the three cited factors.

In the absence of these unique factors, the County's view of Article 6 would have no basis. If the selection process is to culminate in the decision of a single individual, that individual must be able to account for the weighing of each factor demanded by Article 6, including seniority.

### AWARD

The doctrine of claim preclusion does not govern grievance 00-392.

The County did not violate Article 6 of the Collective Bargaining Agreement when it awarded Kim Gauthier the position of Social Services Aide.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 20th day of September, 2001.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

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