

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL 346

and

DOUGLAS COUNTY HIGHWAY DEPARTMENT

Case 248

No. 61425

MA-11934

Appearances:

Mr. Timothy W. Andrew, Brown, Andrew & Signorelli, P.A., Attorneys at Law, appearing on behalf of the Union.

Mr. Frederic P. Felker, Corporation Counsel, Douglas County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2002 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear the grievances of Leslie Chandler and John Autio. A hearing was held on October 31, 2002, in Superior, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by December 24, 2002.

ISSUE

The parties ask:

Did Douglas County violate the collective bargaining agreement when it promoted Keith Armstrong to the position of working supervisor? If so, what is the appropriate remedy?

CONTRACT LANGUAGE

ARTICLE 18

PROMOTIONS: Section 1. In making promotions and in filling job vacancies or new positions, preference shall be given the most qualified senior employee.

Section 2. All job vacancies or new positions shall be posted on the bulletin board ten (10) days prior to filling said vacancy or new position so that each interested employee may have an opportunity to apply. Such notice shall state the prerequisites for the position to be filled and said prerequisites shall be consistent with the requirements of the job. Employees shall apply for the vacancy or new position in writing, and only those applicants who meet the prerequisites will be considered.

...

Section 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 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.

BACKGROUND

The County posted a bargaining unit position called working supervisor (Outside Foreman) (Hawthorne Location) on March 22, 2002. Several employees signed the posting. The County awarded the position to Keith Armstrong, who has less seniority than the two Grievants, Leslie Chandler and John Autio. Chandler's seniority is listed as 11/19/79, Autio's seniority is listed as 10/26/87, and Armstrong's seniority is listed as 11/28/95.

The job posting states in relevant part:

General Job Functions: An employee in this class is responsible for supervising a work crew of laborers and equipment operators in the construction, repair and maintenance of County roadways. The work involves coordinating the use of equipment and materials, and directing a work crew in the completion of projects assigned. Duties include inspecting road conditions in a patrol district and identifying maintenance requirements. The work is performed under the general direction of a Patrol Superintendent. Maintains

records of equipment hours per operator and materials used on maintenance projects. Reviews and evaluates the work performance of equipment operators and maintenance workers. Supervises and enforces all safety regulations and practices. Reports on maintenance projects in progress and identifies problems or requirements. Operates oil distributors, sandhoppers and snowplows. Performs related work as assigned.

Requirements of Work: Considerable knowledge of methods, materials and equipment used in construction, repair and maintenance of highways. Ability to operate and effectively supervise the operation of motorized road maintenance equipment. Ability to effectively implement oral and written instructions. Ability to effectively supervise the work of subordinates. Ability to establish effective working relationships with subordinates and supervisors. Applicants must have a way to be contacted during inclement weather pr as demanded by various situations.

Minimum Qualifications: High School Diploma or equivalent. CDL Required (Minimum – Class B). (Please indicate on your application form the classification CDL you hold.)

The County also has a job description for the working supervisor that is similar to the posting. The job description calls for supervisory duties that would include recommending appointments, promotions, discharges, suspensions and transfers. However, the actual job duties for the working supervisor did not include recommending appointments, promotions, discharges, suspensions and transfers. In addition, the Highway Commissioner, the Patrol Superintendent and the Shop Superintendent established desired qualifications for the position which were not posted but are the following:

1. Desire and ability to provide leadership
2. Desire and ability to be assertive in a tactful manner
3. Strong work ethic with ability to lead by example
4. Positive attitude toward departmental direction and operations
5. Ability to make important decisions based on sound judgment and a logical common sense approach
6. Ability to interact with others in respectful and courteous manner
7. Demonstrated willingness to accept constructive criticism
8. Willingness to accept role as member of management team; willing to place the departmental goals ahead of union loyalties
9. Strong code of honesty
10. Desire supervisory role because feel that can benefit the County rather than what the position can do for the individual (i.e. monetary easier duties,...)
11. Willingness to change the “status quo”

12. Open to change and willing to be part of making changes
13. Commitment to the County operations over personal ambitions
14. Willing to accept orders and direction from management while providing positive input
15. Possess relevant ideas on ways to improve efficiencies of operations
16. Previous work experience in supervision
17. Basic computer skills
18. Favorable comparison to an established baseline for thinking style and behavioral traits measured by a standardized profile assessment questionnaire

Highway Commissioner Paul Halverson testified that the above desired qualifications were based on deficiencies in the position in the past. He wanted to make some changes and improvements to the position. The desired qualifications match up with the interviews and past performance, according to Halverson. Halverson testified that he relies on feedback from employees, and he had been hearing that employees weren't getting the right kind of leadership. More coordination was needed to provide the right tools for the job. Halverson thought lack of coordination was a major problem. Also, he had heard that people on crews were not doing the job right, not following policies, not doing preventative maintenance on equipment, and not getting out of their portals on time. He had asked the working supervisors to report back to him if employees were not performing as required, and they told him that they would not report on their co-workers. Working supervisors knew who was not performing preventative maintenance but would not report it to management. Consequently, Halverson saw a major deficiency in the position and he wanted a person who would report employees to management.

Shop Superintendent John Grymala had been in his position for six months. He has worked under the working supervisor in the past and has experience with the position, at least as being subordinate to the working supervisor. He felt that the working supervisor needed good leadership skills and to be able to work under stressful conditions, such as snow storms. The working supervisor has to operate the equipment and fill in when not enough employees are available. Grymala testified that the person in that position does not need a lot of experience in a snowplow. Grymala has worked with Chandler, Autio and Armstrong.

The Patrol Superintendent is Victor Wester, and he testified that the Department's management set up the desired qualifications because liability is getting greater and there is a need for people doing accurate work. He stated that when they are looking for people, they want them to take the job a step up. The working supervisor job is getting more complicated, according to Wester. The signage must be correct, the flagging must be correct, the lights must be working on the trucks, etc. The County can be sued if someone gets hurt. The Department of Natural Resources wants culverts in the right elevation and trout must be able to navigate streams. Wester testified that he doesn't have some of this knowledge required by the DNR, but that a technician works with them. He testified repeatedly that the demands would be greater than on the former working supervisor, that he would be asked to do more, that the successful applicant needed to take the job a step higher.

Wester helped Halverson set up the desired qualifications. He felt they needed someone that had good public relations skills. The computer skills relate to the budget, and the Department needs to know how much each job costs. Much of the computer work is data entry work.

Halverson considered three primary components in the selection process. One was the behavioral and characteristic profile questions. The second was the actual interviews by a panel of three departmental employees and one representative from the Human Resources Department. The third component was past performance, behavior, attitude and personality. An applicant qualification summary was made following the selection process in preparation for a challenge to the decision or an arbitration case.

Halverson testified that the three components of the profile assessment, the interview questions, and past performance were the only three components considered during the selection process. Halverson was aware that the contract called for the most qualified senior employee to be awarded the position, but he thought that if two candidates had equivalent qualifications, they would hire the most senior applicant.

The County's Human Resources Department was involved in the process of developing qualifications for the position. The Department recommended that a profile assessment be used as a tool in measuring qualifications. Michelle Kimball is a business services coordinator for a non-profit private organization that provides a web-based hiring, recruitment and retention system for local employers. The organization receives government funding for its projects, such as the one here to assist northwestern Wisconsin employers with potential hiring and retention issues. Employers in focus groups said they were looking for "soft skills" which means thinking, behavioral and occupational styles. Employers felt they could train people for the hard core technical skills. A test that has been developed has several questions. Then profiles were developed for thinking styles, occupational interests and behavioral traits.

In developing the profile assessment, supervisors or human resource personnel first fill out a questionnaire before the applicants take a test in order to compare applicants to previously successful employees. Halverson and Grymala took the questionnaire, along with two other employees from other counties. There were several questions, and the responses were meshed into a baseline to determine the type of person the Employer was looking for. Then a long test was given, and each applicant's answers was given a numerical value that could fall within the baseline or outside of it, either above or below it. Applicants all took the test at the same time in the same room. There is a distortion scale that deals with how candid and frank the applicant is while taking the assessment. In Chandler's case, the distortion scale rendered his results of the profile assessment invalid and the results were not used in looking at criteria of selection for his application.

Halverson was concerned that he was throwing out about one-third of the results by not using the occupational interests component of the test. So he developed a grid to try to use the results of the test and keep it valid while dumping the portion he did not want. Kimball

reviewed Halverson's grid after the testing, and she thought his method was fair and consistent. Halverson wanted high scores in thinking style traits and behavioral traits except for independence, where he wanted a low score, because he wanted a team approach rather than someone working in a highly independent manner. For example, in Autio's profile assessment, he was too independent, and he was marked down on the grid for that. He was above the baseline by four points, so he was given four points off the top score on that element in the grid.

Despite Autio's low score on the grid for the independence factor, he was only three points apart from Armstrong on the total score. Chandler's score could not be used because of the distortion factor. His answers showed a distortion that made the assessment invalid. The County did not use Chandler's profile assessment in the selection process due to the distortion factor.

Autio had a 95% match with the thinking style pattern and an 88% behavioral traits pattern match. He had an 87% overall match for the position. His answers were all within the baseline for the County's requirements, except for independence and objective judgment, where his results were higher than the established baseline. In other words, he was too independent, and his objective judgment – the ability to think clearly and be objective in decision-making – was better than the baseline.

Armstrong had a 79% match with thinking style pattern and had a 68% behavioral traits pattern match. He had a 73% overall match for the position of outside foreman.

The profile assessments accounted for one-third of the criteria for selection of a candidate. The interviews made up another one-third.

Kay Mattson is a human resource specialist with the County and was involved in the hiring process for the working supervisor. She worked with Halverson on the interview questions and prepared a packet for the interview panel members with the job posting, the applications, and the questions. The interview panel consisted of Highway Commissioner Halverson, Patrol Superintendent Victor Wester, Shop Superintendent John Grymala and Mattson. The applicants were given ample time in the interview process and were not cut off short in their answers. In some cases, the interview panel members gave them some hints to elicit more answers.

The interview had only three questions that related to specific situations that the Highway Department encounters. Other questions were standard questions used in other jobs as well as questions that came from the profile assessments. The first questions were suggested from the profile assessments to explain why they scored the way they did on the assessments. The panel scored applicants from one to five points on each question, with five points as the highest score. They scored the answers after all the interviews were completed, and they did not discuss their scores with each other while rating the answers. Mattson used the job description in scoring responses. Mattson did not know the candidates as well as the other panel members.

Mattson recalled that Autio was doing a great job of responding to questions until he was asked if he would report back to management regarding a problem with a co-worker. Autio said he would not be comfortable with that, and Mattson thought that he would need that skill for a supervisory position. Mattson noted that in Chandler's interview, he was incorrect on a process to follow for calling out employees during a winter storm, and she thought he should have known the process since he had been with the Department for a long time. Mattson was impressed with Armstrong when he explained that he had leadership training in the military and received awards for being in that program. However, Mattson rated Chandler with a number three for the question on calling out employees as well as rating Armstrong with a three for the question that led to his explanation about leadership training.

Mattson testified that the questions did not track the requirements on the job posting, because it was an internal posting and all the candidates would already meet the requirements. At least half of the interview focused on the "soft skills" described by Kimball. While Kimball thought one-third of the hiring process should focus on technical skills, Mattson had no knowledge of how the technical skills were judged but left that matter to the Highway Department supervisors.

John Grymala testified that Autio did not have good answers to the behavioral trait questions. Grymala was looking at the technical end of the job and looked to see how applicants would use their background at the Highway Department. Grymala found Autio's answer to the question regarding an absent Patrol Superintendent was not a good answer. He thought that anyone who had been on the Department for awhile should be able to answer that question. However, Grymala rated Autio high scores on the next two questions that dealt with emergencies and calling out people. He rated Autio low on the last two questions – he recalled that Autio didn't think about the position until he was driving over for the interview that day.

Grymala testified that Chandler did not give much explanation to his answers to questions, that he answered questions briefly. He rated Chandler only "one" on the question on how to call out people on a winter weekend, because it lacked detail. He originally thought that Chandler gave the wrong answer, though he admitted in testimony that he may have given the correct answer. Grymala thought that when asked – what makes you the best candidate – that applicants would sell themselves at that point. Chandler said he had 20 years of experience and should be selected before a junior man. Grymala found Armstrong's interview interesting, especially that he had leadership in the military and computer skills.

In Chandler's interview, Wester thought he would not be good with figures, and the working supervisor needs to figure things such as how many truckloads will be needed to finish the job. When asked about calling out employees for a snow problem on the weekend, Wester rated Chandler low because he wanted an answer of "the senior man." Chandler answered that he would call the person who has the section, since he is the most senior person anyway. Wester admitted that this probably was a bad question because the senior man already takes care of that section of highway. Wester thought Chandler knew the call out

procedure, and in fact, Chandler had challenged the Department as a Steward representing someone. Wester thought Chandler did not answer questions quickly or seemed indecisive. When applicants were asked what made them the best candidate, Wester was looking for the answer from that would say that the applicant could take the job step higher, not just that he had been there for 20 years.

Wester thought Autio did a relatively good job during his interview, but he was disappointed with the interview at the end of it. Wester wanted someone that would address problems in the field or else bring it back to the management. When he was asked if he could report infractions by co-workers, he responded that it was management's responsibility and not something he could do. Wester testified that he has not had foreman in the past that would support him or back him up when he was trying to address problems. Wester strongly wanted a working supervisor that would deal with employee problems. He was also disappointed when Autio was asked why he wanted the position, and he told the interview panel that he had not given the position much thought.

Wester noted that he had to coax Autio to respond in a more positive way about work he had performed at a hot mix plant. Wester was impressed with Autio's work on the project and had to remind him of it during the interview.

Armstrong came into the interview with a very positive attitude, Wester stated, along with some suggestions to make some changes. Wester was impressed that Armstrong had eight weeks of leadership training in the military. Wester thought Armstrong was accurate and thorough in the interview. Armstrong understood the position and where it stood in management. Armstrong was also willing to discuss employee problems in the field. Wester gave Armstrong some low scores but was a relatively low scorer in general. Wester was concerned that Armstrong would have some trouble with figures, and he was aware that the profile assessment showed Armstrong low on numerical ability.

Halverson was impressed with Autio's work on the hot mix plant. He thought that Autio would be argumentative with the crew, however, and he did not like Autio's answer about leadership when Autio said that it would be fun to tell somebody what to do. He particularly did not like Autio's comment that he hadn't given much thought to the job or why he could be the best person for the job. When asked – what would you do if an employee were violating County policy – Autio said first that he should bring it to management's attention, but then added that he doesn't want to be an informant. That was an area that Halverson wanted to change in this position.

Regarding Chandler's interview, Halverson thought he did not understand the implications of the Department's budget. He noted that Chandler had worked overtime on his own without permission in the past. Halverson thought Chandler gave a good answer regarding the position's role in management. He testified that he thought Chandler knew the process but he still questioned whether he would have the ability to do it. Given Chandler's past history with his temper, Halverson did not like Chandler's answer that he would "try" to stay in control in stressful situations.

Halverson admitted that the question calling out help on Highway 13 was not a good question, because Daryl was the most senior person in that portal and was assigned to that route. The applicants could answer Daryl – and it would not reveal whether they answered Daryl because he was the most senior or because he was assigned to that route. The correct answer is the most senior person. Halverson then asked about Highway 2 in order to get the answer he was after. Chandler answered that question incorrectly, according to Halverson. Halverson also noted that Chandler had no computer skills. The working supervisor has to generate daily reports on a computer. Halverson said that computer skills were very important. When asked why he should be selected, Chandler's theme was that he had been here over 20 years and should be selected over someone younger. Halverson said that everyone was given an opportunity "to sell themselves" as to why they should be selected.

Halverson scored Armstrong significantly higher than Chandler and Autio. He noted that Armstrong wanted to lead by example, that he would work with the group, that it was a hands on position. Armstrong gave a strong answer to the role of authority in the workplace and gave ideas for improvement of how authority could be better respected. Halverson liked his answer about trying to confront a co-worker with an issue first before reporting it to management. Halverson thought Armstrong answered the scenario questions well, that he understood the call out language. He also liked Armstrong's computer skills. When asked what makes him the best candidate, Armstrong had an answer that Halverson scored high. Halverson noted his leadership school in the military. Armstrong was the only one that had any supervisory experience, according to Halverson.

After Armstrong was found to be the top candidate, Halverson and the supervisors had a second interview with him regarding his temper. They were aware that Armstrong had had some words with others in the past. They brought him in to discuss his temper and were assured by him that it wouldn't become an issue. Halverson did not discuss Chandler's temper with him, though he noted on his qualification summary that Chandler has a history of bad temper. Mattson acknowledged that it was not common for the County to conduct a second interview in selecting a candidate for a position.

After the interviews were completed, management discussed past performance as its final component. Chandler has been working for the Highway Department since 1979. He is currently an Equipment Operator I. He started as a Laborer, then became an Equipment Operator II, and has been an Equipment Operator I for that last five or six years. The main duties of his position include snow plowing, maintaining roads, brushing, paving, culverts, mowing, ditching, etc. Chandler has worked on all the kinds of crews and has operated all of the equipment except for a new paver. He has worked at three out of the five locations that the Highway Department operates. He has led small crews when a working foreman is not on the scene and has given oral instructions to other employees.

Chandler was promoted to the working foreman position in 1995. He decided he wanted to go back to being an operator at that time. He testified that he did not feel he was

ready for that job then but he feels he is ready to take this promotion at this time. Chandler has been a Union Steward for over 15 years and has run for that position in an election every two years. Some of those elections have been contested, although not since 1995.

Wester noted that while Chandler has some excellent points, there have been disciplinary problems with him in the past. Wester has told Chandler not to do something and yet Chandler was doing it later. Chandler has asked Wester a lot of questions, and some of them have been trivial, according to Wester. Chandler is a hard worker and will try to do everything he is asked to do. Wester testified that Chandler does not get along with the guys in his portal, and that some employees don't want to work with him. Wester thought that Chandler was not the most tactful person. In one instance, Wester told him not to plow a parking lot at a tavern. However, Chandler cleared the lot after being given the direction not to do it. Chandler took a grader out in the bird sanctuary to plow snowdrifts without permission. Wester thought Chandler had made progress controlling his temper. Chandler is a faithful worker and will stay to the end to help out. Wester determined that Chandler is not ready for this position at this stage. Wester had not given Chandler any discipline for those items mentioned above and had given him very favorable performance evaluations in the past.

Halverson has talked to Chandler twice about his temper. The previous Highway Commissioner also talked to him about his temper. Halverson testified that there has been improvement in this matter.

John Autio has worked for the Highway Department for 15 years and is an Equipment Operator I. He has worked at two different shop locations. Like Chandler, he can meet the requirements of the job posting and job description and holds all the qualifications. He can operate different pieces of equipment, such as the dozer, excavator, backhoe, autotrack, front-end loaders and trucks. Autio once tipped over a rubber tire backhoe into a ditch, and the equipment was minimally damaged. He was not disciplined for it and was not reprimanded for negligence. Autio has trained new employees on operating equipment. He has also led small work crews on projects and gets along well with other employees. Autio took a basic computer course but does not use a computer regularly.

Grymala testified that his recollection of Autio's work history included the his feelings that Autio has his own opinions, that Autio might argue the point about the way he wanted things done, that he didn't want supervision, and that he didn't seem to want to be a leader. Grymala felt that Chandler has trouble making decisions, didn't work well in a team and that he would rather be working by himself, and that he didn't get along well with some of his co-workers.

Wester testified that he was surprised that Autio posted for the job, since Autio likes to work in small groups, has strong opinions, and likes to do a job in his way. When Autio understands a job well, he does not want anyone around, but when it gets to be a tough situation, he wants some decisions made, according to Wester. In the interview, he told the

panel that he didn't want supervision around and didn't need them. Wester thought that Autio would not work well with larger groups because the working supervisor has to take charge and tell them what to do. Wester recalled that Autio went to a hot mix plant training seminar and learned how to put a tube in a silo that reduced the separation in the silo. He nominated Autio for the Employee of the Quarter award for his work on the hot mix plant. His work made a marked improvement in the materials being put out.

All the applicants had the minimum qualifications of the position in dispute, which include a high school diploma and a CDL. All can fulfill the requirements of work stated on the job posting. Armstrong did not have the same exposure and experience that Chandler and Autio had for the outside work, such as paving, plowing, etc. Armstrong worked primarily inside as a mechanic and would have knowledge of running all type of equipment. Wester testified that he had seen enough to know that Armstrong could handle the equipment, and they weren't looking for another equipment operator for this position. Wester assigns the operator and the work.

Grymala testified that the applicant would need some technical knowledge but that some of it could be learned through training. He thought that Armstrong's knowledge of equipment in some instances would be greater than that of the Grievants' because he worked in the mechanic shop. All equipment is tested and run outside, and Armstrong might know more about the equipment. Grymala testified that as long as the working supervisors have a basic understanding of equipment, they don't need much more technical expertise. He has not seen working supervisors operating a lot of equipment. Grymala testified that someone working inside in the shop would not get the same experience in understanding the outside work as well as those working on those outside jobs.

Wester noted that Armstrong did a good job in the shop when the State gave the County some sanders that had to be fitted into their trucks. Armstrong took a lot of flack for taking on this project and making the sanders work. He also worked on a backhoe with a maze of wiring down the center column, tearing it apart and putting it back together, which is a hard task to do.

Wester was aware that Armstrong had some problems with his temper in the past. Wester also wanted to know that Armstrong would stick around if he got the job, because he had heard that Armstrong stated he might move back to New York. When called in about his temper, Armstrong assured management that it would not be an issue. He also told them that he would not be moving to New York.

Halverson did not rely on past evaluations and was not aware that the performance appraisals existed. Autio received favorable evaluations and commendation letters and was nominated for employee recognition programs. Halverson did not believe the amount of experience employees had on equipment was as important as a minimal working knowledge of it. Halverson relied primarily on Wester and Grymala for his knowledge of the past performance of the applicants. He felt that Autio was quiet and shy, which would not make for good leadership qualities.

Grymala recommended that Armstrong be selected because he met most of the job qualifications. He did not believe it was a close decision between Armstrong and the other candidates. Wester found Armstrong to be the best candidate after observing him for the last five years and feeling that he would be able to improve the position. Halverson thought that Armstrong had the ability to think quickly. Halverson found that Armstrong had most of the desired qualifications.

Wester testified that seniority or longevity did not enter into his consideration. If it had been close call in the selection of the successful candidate, Wester would have looked at seniority as a factor. Wester testified that if everything were equal, they would have looked at seniority. He thought that the contract language required them to look at seniority only if things were equal pursuant to an arbitrator's decision, but he acknowledged that contract language had changed since the arbitration award. When the other working foremen were promoted, they were the senior bidders, according to the facts of an arbitration award (Co. Ex. #37) issued by Arbitrator Jones in 1997. The contract language regarding promotions in that award is different than the current contract language. Wester thought that the County tried to eliminate consideration of seniority in contract talks but was unable to do so.

Grymala was sent to a computer training program by the County when he got his promotion to Shop Superintendent.

Management was aware that both Chandler and Armstrong had certain personal problems that may or may not have had an impact on their work performance.

Other facts will be noted in the Discussion section below.

THE PARTIES' POSITIONS

The Union

The Union contends that the collective bargaining agreement requires equal consideration of both seniority and qualifications. Article 18 requires that when making promotions, preference must be given to the most qualified senior employee. The words "most qualified" and "senior" both modify the noun "employee" equally in Article 18. Therefore, the two factors of "most qualified" and "senior" are on equal footing in determining which employee receives preference. The County's selection of Armstrong can only stand if the County gave fair and reasonable consideration to both seniority and qualifications. The evidence proves that the County did not give such fair and reasonable consideration to either seniority or qualifications in making its promotion decision.

Highway Commissioner Halverson responded to the grievances in a letter to Teamster President Hayes on June 17, 2002, citing three primary components considerations - 1) behavioral and characteristic profile questionnaire, 2) actual interview by three departmental

employees and one representative from the personnel department, and 3) knowledge of past performance, behavior, attitude and personality. At the hearing, Halverson was asked if there were additional factors or considerations used by the County in making the promotion decision, and he strongly and repeatedly stated that no other factors were considered. The later attempt to rehabilitate his testimony should be disregarded by the Arbitrator. Only after the Union's theory of the case was clear to the County and after numerous breaks, only then did Halverson allege that the County considered seniority in making the working foreman decision. Wester was also asked whether seniority entered into the promotion decision, and he replied that he did not think so, that the main thing was qualifications.

During the interview, Chandler was asked why he should be selected and he replied that he had been with the County more than 20 years and should have the opportunity to try the job. Halverson and Wester were disappointed that Chandler believed his seniority with the County was an important consideration, and both gave him a "2" on a five-point scale for that answer. The Union submits that this hostility towards Chandler for even mentioning his length of service makes it clear that those making the hiring decision thought seniority should be disregarded. Halverson and Wester were not happy with the current working supervisors but had never told them that they were dissatisfied with their job performance. The County appears to think that the current working supervisors were selected by seniority and are doing a poor job, and therefore, Chandler or Autio will also do a poor job. The Department's management has failed in its role to train, counsel and discipline, if necessary, the current working supervisors. Based on the single fact that the County did not follow the labor contract's requirement to consider seniority in selecting a working supervisor, the selected of Armstrong cannot stand.

The County's determinations of qualifications were not fair or reasonable. The behavioral and characteristic profile questionnaire was ill conceived and did not measure success at performing the duties of the job in question. To the extent the profile is relevant, Autio performed significantly better than Armstrong did. The interview was little more than a public speaking contest and was biased.

The Union submits that several questions on the profile assessment were irrelevant. Halverson still contended that the scoring on behavioral traits was an important consideration in selected in a working supervisor. The County asked no written questions regarding job skills or technical knowledge, despite the job being a hands-on practical job involving careful coordination of equipment, materials and employees. Autio did much better on the written tests than Armstrong and was a 95% match with the desired thinking style pattern for the outside foreman position, while Armstrong was a 79% match. Autio was an 88% match with the behavioral traits desired, while Armstrong scored only a 68% match. After those results were received, Halverson manipulated them to make it appear that Armstrong performed better than Autio on the written tests. He determined that the working supervisor should not be an independent person - the category where Autio scored a perfect 10. Thus, Autio was reduced four points because of his independence score. The County cannot change the rules in the middle of the game - it put its reliance upon the profile assessment and cannot - after the fact - manipulate it to support the hiring of a less senior candidate.

The Union asserts that the interview was not an accurate way to measure qualifications and the results were likewise manipulated. The applicant qualification summaries were prepared in anticipation of a grievance and were to justify the selection of Armstrong. The interview ignored questions about the necessary qualifications for the job. The follow-up questions to the written test suggested by Profiles International were irrelevant to determining the likelihood of success for a working supervisor. While the job posting lists the first requirement as "Considerable knowledge of methods, materials, and equipment used in construction, repair and maintenance of highways," those topics were not addressed during the interview process. Only 6 out of 18 questions were the same for all applicants. Scoring was not contemporaneous with the interviews and was done after all the applicants had been interviewed. The question about calling out help in a winter weekend was scored subjectively, with Grymala giving Armstrong a perfect five and giving Chandler a one, despite almost identical answers. The Union argues that little weight should be given to the County's interview scoring.

The Union further contends that the County did not fairly consider the past performance, behavior, attitude and personality of the Grievants. The County ignored past performance appraisals and commendations. Chandler and Autio's extremely favorable performance appraisals were not considered. The County people testified that both Chandler and Armstrong have had issues in the past with their tempers. Halverson was brought back for a second interview, and his temper was no longer a concern. In contrast, the County mentioned that Chandler's temper was a reason for his non-selection, even though he was not counseled or given a second chance to discuss that issue in a second interview. The County also said it was looking for an applicant who would be able to subordinate his Union loyalties. Chandler has been a Union Steward for a number of years, and it is both improper and illegal to punish him because of his Union involvement.

Chandler testified about his ability to do the various functions listed on the job description. He has worked on every type of crew in the Highway Department. He knows how to run every piece of equipment and has trained and assisted new employees in running equipment. He has led small groups or crews on projects. His qualifications for the job cannot seriously be questioned in light of his previous appointment to the job in 1995. Chandler testified that he was appointed to the working foreman job in 1995, but felt the job was not right for him at that time and he elected to go back his former position. If Chandler was qualified seven years ago, he is only more qualified today.

The Union finds the County's criticism of Chandler to be contradictory and suspect. Despite giving Chandler a poor score on the call out question, Wester agreed that Chandler knows the call out procedure, and further testified that Chandler is a very hard worker. The criticism of Autio also makes little sense. Halverson thought Autio was a slow thinker, but Autio had higher test scores than Armstrong. Grymala criticized Autio for not making decisions on his own, while Halverson's criticized Autio for being too independent. The County can't have it both ways. Autio is also the only applicant to take a computer course to better himself.

The Union notes that Armstrong has little experience out in the field, since most of his work was in the shop as a mechanic. Armstrong did not perform as well as Autio on the written tests and performed especially poor on the math component of the test. Armstrong's work history is hardly unblemished and he has had personality conflicts in the past with co-workers and has a fairly quick temper.

The Union concludes by stating that the language in Section 18.1 is a hybrid modified seniority provision requiring consideration and comparison of both seniority and relative ability. 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. Where there is a relatively substantial difference in seniority and relatively little difference in abilities, then length of service should be given greater weight. In this case, Chandler has nearly three times the seniority and Autio nearly twice the seniority of Armstrong. Even if Armstrong were deemed better qualified, unless he was found to be significantly better qualified, arbitral precedence supports awarding the position to Chandler, or in the alternative, Autio.

The County

The County first reviews the job description and notes that the work requirements include a considerable knowledge of methods and equipment as well as the ability to operate motorized road maintenance equipment. However, the job description does not require more than the ability to do so. It does not require the working supervisor to be an accomplished or experienced equipment operator. The County also notes that during the arbitration hearing in this matter, Halverson was called to testify adversely and he was not asked how seniority was factored into the selection process when asked if there were only three components considered in the promotional process. The Union also raised an inference that one of the desired qualifications – willing to place departmental goals ahead of Union loyalties – makes seniority a negative factor. However, Halverson testified that he would not hold a Union stewardship role against an applicant. While Chandler was given the position of working supervisor in 1995, it was never brought out how long he held that position and Halverson was not aware of it. Chandler stated he did not remain in it so he could go back as an equipment operator.

The County argues that the language of Article 18, Section 1 is not the clearest or best language to avoid grievances such as this one. But the County notes that it is useful to address what it does not say. First, it does not say the most qualified employee. It also does not say the most senior qualified employee. Were that the case, it would be difficult to argue that neither of the Grievants had the minimal qualifications for the job of working supervisor. But the contract language does not read that way, and it is clear that the County is authorized by that language to consider the relative qualifications of individual applicants in making promotions. In Article 18, Section 5, it requires seniority to be considered but states that it may not be the deciding factor.

The County points out that the contract language was changed since the issue was arbitrated in 1997. That language stated: "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." That contract went on to list the qualifications to be used, which were limited to ability to perform related work, attitude, aptitude, versatility, efficiency and location and residence in relation to where work is to be performed. At best, the current contract language might be construed to mean that the most senior employee would get the promotion if his job qualifications were relatively equal to those of the less senior applicants.

The County does not take the position that seniority should not be a factor in making a promotion. However, it has the right to evaluate the relative qualifications of promotional applicants as a management right and it has considerable flexibility in what it considers to be qualifications for a particular job. The County put in an enormous amount of time, thought and effort in the selection process. The Highway Commissioner, his Patrol Superintendent and his Shop Superintendent all agreed on a list of desired qualifications for the job, and all three were in a position to establish criteria for the job.

The County states that it is well settled that testing for a promotion or to fill a vacancy must meet four criteria. First, testing must be specifically related to the requirements of the job. Secondly, the testing must be fair and reasonable. Thirdly, the testing must be administered in good faith and without discrimination. Finally, the test results must be properly evaluated. The Union argues that the testing involved was not job related because it did not measure specific technical knowledge involved in the job. The Union also wanted it to weigh experience in operating heavy equipment, which was not heavily weighed in the selection process.

The County asks – whose right is it to establish job selection criteria? The County has the right to establish what criteria are most important in evaluating qualifications for a position. No testimony indicated that Armstrong did not have sufficient knowledge and experience in equipment operation to do the job. Had the vacancy been for an equipment operator, experience in equipment operation would be considered more heavily. This vacancy was for a working supervisor, who must have the ability to operate motorized road maintenance equipment and effectively supervise the operation of such equipment. He must be able to implement oral and written instructions effectively. He must be able to supervise the work of subordinates effectively. He must be able to establish working relationships with subordinates and supervisors which are effective. Great emphasis is placed on supervisory skills, leadership skills and people skills, which are not only elevated in importance over the ability to operate equipment but are also indispensable to the position. In order to measure such skills, the profile assessment evaluation was used.

Halverson then established his own weighting system for the profile assessment results. He disagreed with the desirable profile for "independence" used by the profile assessment. That ended up working to the detriment of Autio. But that does not make the profile assessment unfair. The employer does not have to accept the quantified results of the profile assessment at face value. The profile assessment was a tool. It counted roughly one-third in the evaluation of potential candidates, with the interviews also weighted about one-third. Again, the interview questions were heavily weighted towards soft skills rather than more technical, job related knowledge. The interview questions were generated in those areas where a candidate fell outside the scope of the desired profile. That gave the candidates a second chance to rehabilitate themselves in areas that might have worked to defeat their opportunity for a promotion. While the Union may argue that this is unfair, the County replies that it promotes fairness.

The County notes that the final portion of the evaluation process consisted of the past performance of the candidates on the job. Halverson relied heavily upon the input of his Patrol Superintendent and his Shop Superintendent. All three were in agreement that Armstrong was the best candidate for the job and did not think that the decision between Armstrong, Autio and Chandler was close. Autio specifically said he would not enforce the rules of the department, that it was management's job.

The County takes issue with the Union's objection regarding Halverson's testimony on seniority. There is no evidence in a court of law which would allow an attorney to call a witness adversely to present his opponent's case and thereby foreclose the opponent from making his own case based upon asked and answered objections. This type of objection has very little place in an arbitration hearing where the rules of evidence do not even apply. It is not the County's position that seniority is not a consideration for promotions within the Highway Department. Unfortunately, the contract language does not provide much guidance. At best, it would justify promoting the senior employee where qualifications were otherwise relatively equal. The Union offered no evidence of any contractual interpretation more favorable to them than that. If there is any difficulty with the process, it was that the only two candidates whose qualifications can be said to have been relatively equal belong to the two most junior applicants. Neither of the two Grievants was relatively qualified for the position based upon established criteria set forth by the Department.

The County asserts that it took great care to evaluate the supervisory abilities of each candidate as carefully and as fairly as possible. The decision was not made by one individual alone but by three individuals taking into account the profile assessment results, interview results and past job performance and job history of each individual. While the evaluation process may not have been perfect, there is no perfect way to measure supervisory skills. The Employer used every tool at its disposal to adequately and fairly measure the qualifications which were determined to be most important to the position. The process was more than adequate to establish Armstrong as a far superior candidate for the position than the two Grievants.

DISCUSSION

The types of modified seniority clauses are well described by Elkouri and Elkouri, How Arbitration Works, 5th Edition, pages 838-841 (1997). The first type of clause described is the “relative ability” clause where qualifications of employees bidding for a job are necessary and proper and seniority becomes a determining factor only if the qualifications of the bidders are equal, or relatively equal, or substantially equal. The County argues that this is the type of clause and interpretation that is called for in this case. As stated in its brief at page 27, “At best, such language would justify promoting the senior employee where qualifications were otherwise relatively equal.”

However, the parties had a “relatively equal” clause in their contract and negotiated it out of the contract. When Arbitrator Jones heard a case in 1997, the parties’ contract stated:

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.

Significant to this case, the parties changed the above language to provide that the **most qualified senior employee** would be given preference for a job. They discarded the relatively equal language for the “most qualified senior” language. This language is more akin to the third type of modified seniority clause as described by Elkouri and Elkouri, or a “hybrid” clause that requires consideration and comparisons of both seniority and relative ability. The current language is clearly not the second type of modified seniority clause, where minimum qualifications are enough under a sufficient ability. The parties agreed that they would consider both “most qualified senior.” Thus, the parties, in changing from the relative ability clause to the hybrid clause, changed the considerations in filling job vacancies or promotions.

The reference to “senior employee” must have some meaning in the contract. Thus, the two standards of qualifications and seniority need to be considered together, and if the difference between employees is not substantial, then seniority must govern. See NATIONAL COOPERATIVE REFINERY ASSOCIATION, 64 LA 1104 (ARB. EDES, 1975). The weight of one factor must be measured against the weight given to the other factor, according to Arbitrator Cahn in PLAINVIEW-OLD BETHPAGE DISTRICT, 62 LA 333, (1974). Arbitrator Rifkin stated in ELKHART COMMUNITY SCHOOLS, 91 LA 601 (1981), “Where seniority substantially favors one employee over another . . . and the employer has agreed to consider seniority as one of two basic factors in employment decisions, then seniority may not be discounted or given a less important role.” Also, Arbitrator Turks stated in BRITISH OVERSEAS AIRWAYS CORP., 61 LA 768 (1973):

The relative factors of seniority and qualifications must be determined by fairly and objectively comparing and weighing against each the relative difference in the seniority of the competing employees and the relative difference in their abilities or qualifications.

To illustrate, a junior employee whose seniority is slightly less than that of a more senior employee but whose qualifications are much greater must be awarded the promotion since with respect to the two separate and distinct factors of equal weight and decisive force, the substantial differential in qualifications outweighs the slight differential in seniority.

On the other hand, a senior employee who could perform the job although his qualifications or abilities may be slightly less than that of a more junior employee but whose seniority is much greater must be awarded the promotion over the slightly better qualified junior employee since the substantial differential in seniority outweighs the slight differential in qualifications.

The Arbitrator believes that Grievant Chandler is the employee who fits the final paragraph of the above quote, that he is a senior employee who could perform the job although his qualifications or abilities may be slightly less than those of Armstrong's. There can hardly be a dispute that Chandler can perform the job – after all the County actually promoted him to that same position once before!

Several things are wrong in this selection process, despite the County's lengthy efforts to pick the right person for the position of working foreman. First of all, the County gave **no consideration to seniority** and did not believe it had to unless it deemed candidates to be relatively equal in qualifications. As noted above, this was the old test, the old language that was negotiated out of the contract. Halverson testified that the seniority of Chandler and Autio would have been considered if their qualifications had been equivalent to Armstrong's, but that Armstrong's qualifications were head and shoulders above the other two at issue here. The "head and shoulders" test is appropriate for the "relative ability" clause of the former contract language, but not with the current hybrid clause which would require consideration of both qualifications and seniority. The failure to consider seniority at all is a major flaw in the County's case, and it alone is enough to overturn the decision to pick a junior employee for the job. For example, Halverson spent considerable time putting a grid together and placing numerical values on the profile assessment, but he put no time in considering what weight seniority should have or giving it any numerical value at all.

The County claims it has considered seniority but there is no real evidence that it ever considered seniority as a factor to be weighed in the mix of other factors. The Arbitrator has searched the record intensely and found that seniority was never given any weight in the process. Since the parties changed their contract language, the County should have known that it was no longer operating under a "relative ability" clause where seniority would kick in only when and if the candidates were relatively equal in qualifications.

Giving the County the benefit of the doubt for the moment – it could still argue that Armstrong's qualifications were much greater than Chandler's or Autio's. However, the only qualification that appears much greater is Armstrong's ability to conduct a great job interview.

If this were a sales job, it might be relevant. However, this is a working foreman's position, and the folks rating the interviews were overly impressed by a more talkative and energetic candidate in the interview process. The scoring grid for the interviews shows that Halverson scored Armstrong very high, much higher than the other panel members. Armstrong was given a total of 76 points by Halverson, with the lowest score by Wester being 31 points lower at 45, and then Grymala giving him a 55 and Mattson a 60. The spread between Wester's score and Halverson's is significant because it skews the interview scores. Moreover, as the Union points out, even when Chandler and Autio gave the right answers to the questions, they were not always given the correct amount of points for their correct answers. The Union makes an excellent point when it states that the interview process was a "public speaking test." The County needed to focus on the job for which they were interviewing candidates.

Both Autio and Chandler possess the requisite qualifications for the position, and the County cannot create a moving target with qualifications to get the candidate it most prefers. For example, the County appears to have given some consideration to the fact that Armstrong had more computer skills than the other two Grievants, but computer skills were never listed on either the job posting or the job description. If the County deemed that to be important, it would have listed it in job posting as part of the qualifications or requirements of work. While the County believes that the technical skills could be learned or the successful applicant could be trained in that area, it fails to explain why the computer skills could not likewise be learned. In other words, the County tends to say – on one hand, if you have low technical skills but good computer skills, we'll teach you the technical end of the job; but if you have good technical skills and low computer skills, that weighs against a candidate. This seems to be a misplaced value – the job posting and job description do not require good computer skills. Candidates were never informed that the County was looking for computer skills in this position. The County sent Grymala to a computer training program when he was promoted to Shop Superintendent. That was in the same Department.

Another example – the County appears to place great emphasis of what it calls "soft skills" – which were defined as thinking, behavioral and occupational styles. However, when it tested for such skills through the profile assessment, the leading candidate of the three people in this grievance was Autio, not Armstrong. Autio had a 95% match with the desired thinking style pattern for the job while Armstrong had a 79% match with the thinking style pattern for the job. In the behavioral traits, Autio scored an 88% match compared to Armstrong's 68% match. (Chandler's results were distorted and were not used.) Autio had an 87% overall match for the position while Armstrong had a 73% overall match. Yet Halverson found a way to discount Autio's profile assessment by pulling out the independence factor, stating that he did not want someone too independent, a place where Autio had a very high score. So the County discounted the results of its own profile assessment in such a way as to render results it wanted rather than the results the test produced.

Further, the County fails to show how "soft skills" are as relevant to the position as other qualifications that it lists on its job description and posting. Its procedure would be more valid for hiring a supervisor or a position out of the bargaining unit. It appears that the County

wants a supervisor that would be aligned with management, while at the same time, paying the position in the working supervisor or outside foreman position and having that position stay in the bargaining unit. The County could have created a true supervisory position, but this hybrid that it appears to have created is – by the parties’ own agreement – a position that remains in the bargaining unit. The County is certainly free to create a supervisory position that is out of the bargaining unit. But on one hand, the County wants a working supervisor that is a member of the management team, while agreeing that this is still a bargaining unit position. It stated as much in the list of desired qualifications which were not posted - #8 was a willingness to accept a role as a member of the management team. It wants a working supervisor that can make decisions but not be too independent. It wants a working supervisor that can take the job to a higher level without posting specific requirements for that higher level. And it wants a working supervisor that will report to management about other employees who break the rules or don’t do the job right, a working supervisor who is aligned with management rather than the Union, but the position remains in the Union. Tall task.

Because the County failed to take seniority into consideration and weigh it along with qualifications, its decision to promote Armstrong violates the collective bargaining agreement. The County has not proven by clear and convincing evidence that Armstrong is the most qualified and that his qualifications are much greater and outweigh Chandler’s much greater seniority. The County found Chandler qualified in the past, and he is still the most qualified senior employee within the meaning of the collective bargaining agreement.

AWARD

The grievance is sustained. The County violated the collective bargaining agreement when it promoted Keith Armstrong to the position of working supervisor. As a remedy, the County is ordered to immediately offer the position of working supervisor to Leslie Chandler and to make him whole by paying him wages and benefits lost from the date it promoted Armstrong to the position. The Arbitrator will retain jurisdiction until April 15, 2003, solely for the purpose of resolving any disputes over the scope and application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 21st day of February, 2003.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator