

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WINNEBAGO COUNTY DEPARTMENT OF HUMAN SERVICES EMPLOYEES,
LOCAL 2228, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL
EMPLOYEES,
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

WINNEBAGO COUNTY, WISCONSIN

Case 405
No. 68158
MA-14141

Appearances:

Mary B. Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, appearing for Winnebago County Department of Human Services Employees, Local 2228, Wisconsin Council of County and Municipal Employees, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

John A. Bodnar, Winnebago County Corporation Counsel, 448 Algoma Boulevard, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, appearing for Winnebago County, Wisconsin referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement, which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Chris Tylka-Olesen, who is referred to below as the Grievant. A hearing on the grievance was conducted in Oshkosh, Wisconsin on October 8, 2008. No transcript was prepared of the hearing. The parties completed the briefing schedule on January 2, 2009.

ISSUES

The parties stipulated the following issues for determination:

Did the County violate the collective bargaining agreement when it failed to award the Grievant the position of Community Support Program (CSP) Professional?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I **MANAGEMENT RIGHTS**

Through its management, the Employer retains the sole and exclusive right to manage its business, including . . . the right . . . to hire, transfer, promote . . . its employees . . .

ARTICLE 11 **JOB POSTING**

. . .

The job requirements, qualifications and salary range shall be part of the posting. Regular employees who have passed their probationary period and who desire to apply for such vacant position are to make application in writing through the Department of Human Resources.

The Employer shall determine the qualifications of the applicants. If, in the opinion of the Employer, two (2) or more applicants for a single vacancy are in all respects equally qualified to fill such vacancy, it shall be filled by the employee among such equally qualified applicants having the longest continuous service within the Human Services Department. If, in the opinion of the Employer, one (1) of such applicants is better qualified to fill such vacancy than any other applicant, it may be filled by such better qualified applicant. . . .

QUALIFICATIONS DISPUTES. If there is any difference of opinion as to the qualifications of an employee, the Employer or the Union may take the matter up for adjustment through the grievance procedure. . . .

BACKGROUND

The grievance form states a “Qualifications Dispute” focusing on Article 11. The position is CSP Professional, in the Community Support Program. The CSP provides comprehensive outpatient support services to County residents with a persistent and severe mental illness. The open position was in the Neenah office of the Human Services Department. The CSP team includes seven professional and two non-professional positions.

ESSENTIAL DUTIES:

1. Establishes a partnership relationship with consumers that emphasizes their abilities over their disabilities by providing direct services which include: assertive community treatment, case management, job support, crisis intervention, psychological assessment, counseling, problem solving, activities of daily living, and psychosocial rehabilitation which is provided primarily in the community.
2. Supervises delivery and monitoring of consumer prescription and, when necessary, over-the-counter medications.
3. Develops and implements individualized consumer treatment plans created in partnership with consumers that encourage hope, empowers the consumer to assume more direction of their own treatment in the recovery process by assessment, skill development, supportive education, counseling, and supportive case management.
4. Intervenes, consults, and collaborates with other agencies and providers to coordinate professional care and treatment with the consumer's consent.
5. Provides vocational support to consumers of the CSP which includes vocational assessment, development of support plan, limited job coaching, transportation to/from work when necessary, consultation with employers, job development contacts, and other services as directed to support persons with severe psychiatric disorders to work in the community.
6. Attends and participates in daily meetings intended to schedule/organize anticipated consumer contacts throughout the course of the day. Acts as Day Manager when scheduled, which develops the daily schedule for all team members, provides "lead" responsibility to assure delivery of services to consumers, provides available crisis response, performs "backup" supportive counseling contacts to consumers on a walk-in or crisis basis.
7. Collaborates with other Team members comprising a core support group delivering and coordinating services to individuals. Each staff is anticipated to be "lead" staff for approximately 15-20 clients (or more as assigned), but be prepared to provide services to essentially all consumers of the work group.

8. Prepares and maintains reports, documentation, correspondence, other clinical records, and other administrative responsibilities as assigned by supervisor.
9. Provides and/or coordinates transportation services for consumers as needed.
10. Assesses and monitors program in/with community adjustment, medications, vocational status, activities of daily living, physical and dental health, family relationships, alcohol and other drug issues, living situation.
11. Provides limited on-call back-up capacity to evening staff in the event of psychiatric crisis emergency.
12. Performs other related duties as assigned. . . .

KNOWLEDGE, SKILLS AND ABILITIES:

1. Must possess State Certification requirement, including a Bachelors degree in a human service field such as social work, nursing, or psychology and either 1,000 or 2,000 hours of supervised work with persons with a chronic mental illness, depending on type of degree.
2. Must possess a valid Wisconsin driver's license and ability to meet the county's insurance requirements.
3. Prefer experience in working with a variety of clients in community settings.
4. Ability to establish and maintain effective working relationships with consumers and co-workers.
5. Demonstrated knowledge and ability to work with persons with a severe and persistent mental illness.
6. Possess good organizational and communication (verbal and written) skills.
7. Demonstrated ability to work effectively with other professionals, resources, clients and the public. . . .

SPECIAL REQUIREMENTS:

1. Must produce evidence of meeting or exceeding the minimum automobile liability insurance requirements contained in the Winnebago County Travel Ordinance (currently \$100,000 for each person for bodily injury, \$300,000 for each occurrence for bodily injury, and \$50,000 for each occurrence for property damage).
2. Ability to work a flexible schedule to meet consumer needs.

The Grievant and one other bargaining unit member signed the posting for this position. At the same time the County posted the position, it published a notice of vacancy on the internet as well as in newspapers. Rachel Kelbert and six non-bargaining unit applicants responded to the County's external solicitation for applicants for the position.

The County interviewed the two internal applicants and Kelbert, ultimately selecting Kelbert for the position. The County interviewed the Grievant and the other internal applicant on February 18, 2008. Karon Kraft, the County's Human Resources Director, and James Travis, the Director/Coordinator of the Neenah CSP, conducted the interviews. In an e-mail to Travis and Kraft, dated February 19, 2008 at 8:45 a.m., the Grievant raised a number of points and thanked them "for the opportunity to interview for the CSP Professional position." In an e-mail of the same date, at 11:45 a.m., Kraft noted, "Do you want me to break the news to her that we are moving on to interview the external candidates?" The Grievant responded in an e-mail to Kraft of the same date, at 11:44 a.m., which states, "Hi Karon, I think you hit reply all on accident . . . I just got this email." Kraft responded on the same date at 11:48 a.m., thus:

You are correct – I did hit the reply all button in error. I would have preferred to break this news to you in person tomorrow when I am in Neenah,, however, that is not possible now. We will be interviewing external applicants for this open position this week.

The Grievant responded in an e-mail of the same date at 11:57 a.m., thus:

Thanks for letting me know karon . . . just so I am clear, am I still being considered for the opening along with external candidates, or is that not known at this time?

Kraft responded at 12:01 p.m., "The first round of interviews yielded no internal match for the position, so we are now moving on to the external applicants." In response to the Grievant's questioning whether she would receive a written response in addition to the e-mail chain, Kraft noted, "You will receive a letter in the mail." The "written response" came in a letter to the Grievant from Kraft, dated February 22, 2008, which states:

. . . After carefully considering the qualifications of each applicant, we have determined that another applicant's skills and qualifications match the requirements at this time.

While you were not selected for this position, we wish to encourage you to apply for future position openings

The parties stipulated that the Grievant has completed her probationary period and had greater seniority than the other internal applicant. There is no dispute that she has no history of discipline and has received satisfactory or better performance reviews throughout her employment with the County.

The posting questioned by the grievance is not the first CSP Professional vacancy the Grievant applied for. She has twice signed postings for a vacant CSP Professional position. The County's notice of her non-selection to the posting preceding that questioned by the grievance came in a letter to the Grievant dated December 26, 2007, which states:

. . . After considering all of the internal candidates' qualifications, including yours, it has been determined that another county employee's skills and qualifications better match our requirements at this time.

While you were not selected for this position, we wish to encourage you to apply for future position openings for which you feel interested and qualified for. . . .

In each application preceding the grievance, the internal applicant that the County selected for the CSP Professional position had greater seniority than the Grievant.

The interviews with the two internal and one external applicant each started with an identical "Case Scenario", followed by the question, "What would you identify as 2 major themes to address in the first 30 days?" The two internal applicants were then asked the following slate of questions:

2. Describe your most difficult case you have been involved in. What were the challenging features of the case? What did you do when you got stuck?
3. In what ways or practices do you believe you've demonstrated the practice of "recovery"?
4. What kind of work environment your best work?
5. What portions of your current job are the least desirable?
6. What are the major issues confronting a person with a severe and persistent mental illness?
7. What attracted you about this transfer?

8. Why hire you instead of the other candidates we are interviewing?

12. Have you had any conflicts in your professional experience? How did you address them?
13. What is your role as a CSP Professional?
14. What is the role of the CSP Supervisor?
15. How can I help you do your most effective work?

Kelbert was asked the following slate of questions:

2. Describe your most difficult case you have been responsible to provide services for. What were the most challenging features of the case? What did you do when you “got stuck”?
3. What is your interpretation of the concept of “recovery”?
4. What kind of work environment or situation facilitates your best work?
5. What kind of person (or personal characteristics) do you work best with?
6. What kind of person (or personal characteristics) is the most difficult for you to work with?
7. What kinds of work hours are you interested in maintaining?
8. From your perspective what are some of the major issues/problems confronting a person with a severe and persistent mental illness?
9. What experience do you have working with persons with a severe and persistent mental illness?
10. Where do you see yourself in 5 years? What do you anticipate is a length of time you would commit to this position with Winnebago County?
11. Why should we hire you instead of the several other candidates we are interviewing who also possess strong characteristics?
12. What experience(s) do you have developing employment opportunities for disable persons?
13. What would you consider to be essential features of job development?
14. What kind of documentation are you accustomed to complete?

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

Mary Beth Gehrke

Gehrke has served as a County employee for roughly seventeen years, and is currently employed as an Economic Support Specialist in the Long Term Support Unit of the Human Services Department. She has served the Union in a variety of positions, including Treasurer, Executive Board Member and Steward.

Agreement language governing postings has been in effect since the 1990's. She reads that language to grant a disputed position among equally qualified employees to the applicant with the greatest seniority. External applicants have no seniority and thus cannot compete

selected Kelbert. Travis explained to her that he viewed the internal applicants as qualified, but when Kraft informed him that there were outside applicants, they determined to expand the process beyond the bargaining unit.

Chris Tylka-Olesen

The Grievant graduated from Medford Area High School in May of 1998 and received a Bachelor of Science Degree from the University of Wisconsin at Green Bay (UWGB) in May of 2003. She majored in Psychology and minored in Human Development and Music. She was first hired by the County as a Mental Health Technician in the Summer of 2003. The Mental Health Technician works in a support role to CSP case managers. She left that position in the Spring of 2004. After leaving County employment, she worked as a CSP Case Manager for Taylor County. She left Taylor County to return to the Oshkosh area, taking employment as a Vocational Services Employment Specialist for Clarity Care. She returned to County employment in December of 2005 as a Financial Employment Planner. Between July of 2007 and January of 2008, she served as a Clerk/Receptionist/Screenener before returning to the Financial Employment Planner position, which she occupied at the time of the posting questioned by the grievance. She has been a Human Services Department employee throughout her tenure as a County employee.

The Grievant noted that she possesses all of the “Knowledge, Skills and Abilities” demanded of the CSP Professional position under the governing job description. Her educational, internship, and jobs have exposed her to a variety of clients served by the Human Services Department. She has worked directly with individuals with autism and with varying levels of severity of mental illness. Her work for Taylor County as a CSP Case Manager involved her in a variety of functions from crisis management to consultation with County Department Heads overseeing the legal and custodial needs of individuals suffering from mental illness. Taylor County had less staff available to address these needs and she performed a greater variety of duties than that expected of County employees, who fill more specialized roles.

For her interview, Travis provided her with a written summary of the case scenario, which he then read at the interview. He noted to her that there were no “right or wrong answers.” Her current position does not necessarily require her to work with individuals with mental illnesses, although her financial oversight duties expose her to the same clients that the CSP Professional position works with. She did not share her volunteer activities with Kraft and Travis during the interview. She is not a certified Social Worker.

The Grievant noted that she left Taylor County because her husband had returned to Oshkosh to work and it was easier for her to find employment there than for her husband to find work in Taylor County. The unusual stress of that position reflected more the fact that she personally knew many of the clients than the inherent stress of the work involved. The CSP Position is her “goal position”.

James Travis

Travis supervises three outpatient mental health support services programs in the Neenah office. Travis and Kraft conducted the three interviews noted above. Each lasted between thirty and forty-five minutes. In his view, Kelbert was notably more qualified than the other two applicants for the CSP Professional position. She had a Master's degree in Social Work, while the Grievant had a Bachelor's degree with a Psychology major. Kelbert was a certified social worker with extensive experience with mental health care issues. Her experience, unlike the Grievant's, was continuous over the past three years. Beyond this, Kelbert's interview responses were better. She was more detailed and substantive in her responses to the questions. Her past work and volunteer experience with the care of individuals with mental health issues was deeper than the Grievant's. She performed the same type of work demanded of the CSP Professional position during her employment with Outagamie County. Kelbert saw the mental health care field as "her passion" in significant part because of her family history. Travis did not sense the enthusiasm for the field from the other two applicants. Kelbert submitted two videos that she produced. One, done for UWGB, regarding handicap accessibility issues, was so well received that UWGB used it as a basis to secure a grant to enhance the accessibility of its campus facilities. The promotional aspect of this effort is relevant to the CSP Professional position and was not paralleled by the experience of either of the other two applicants. Her work in that area was not determinative of the qualifications' issue, but did play a role. Travis was aware of the Grievant's experience in CSP related work, but did not see her experience in Taylor County as a direct benefit to the more specialized work expected by the County for a CSP Professional.

Travis thought each of the three applicants was minimally qualified, but Kelbert was clearly more qualified than either of the internal applicants. Travis and Kraft screened the applications of the six external applicants, and determined Kelbert's was the most promising. Thus, they interviewed her. The interview went so well that they saw no reason to interview any of the remaining external applicants. The predecessor employee in the CSP Professional position had an MSW degree.

Travis was familiar with Kelbert prior to her application for the CSP Professional position, because she served an internship in the Neenah office from October of 2006 through July of 2007. The internship was in the type of work performed by the CSP Professional position. Travis supervised the internship.

Kraft, as the Director of Human Resources, exercises the final authority in all hires. Travis has been involved in two prior hiring processes. One was for a Mental Health Technician, and resulted in the hire of the employee who became the internal applicant for the CSP Professional position other than the Grievant. In that hire, there were external applicants, whose qualifications Travis reviewed prior to selecting the internal applicant. The other hire involved a Psychiatric Nurse position, for which there was no internal applicant. In his view, outside applicants merit consideration where there was no internal applicant or where the

as minimally qualified for the CSP Professional position, but he was disappointed in her interview. The County publishes vacancies externally at the same time it posts them internally and reviews all applications prior to a hiring decision.

Karon Kraft

Kraft has served as Human Resources Director since September of 2007. She was disappointed with the Grievant's interview, finding her responses superficial and "canned." Kraft understood the Grievant to have left Taylor County due to the stress level of the position, and doubted whether this indicated a long-term commitment to the work demanded of a CSP Professional. She and Travis reviewed their notes from the interviews of the internal applicants before deciding to interview the external applicants. Kelbert was manifestly the most qualified of the external candidates and they started with her.

After the interview, Kraft decided Kelbert was "absolutely" more qualified than the internal candidates. Kelbert's education, work and life experience all denoted a complete commitment to the mental health care field. Her knowledge of substantive case issues was superior to the other applicants. Unlike the interviews of the internal candidates, Kelbert's interview showed a passion for the care issues faced by the CSP Professional.

The labor agreement does not set a "minimum qualifications" standard, but permits the County to review all applicants, using seniority only where candidates are equally qualified. Candidates include, and in the past have included, external applicants along with internal applicants. Kraft was not aware, prior to Kelbert's interview, that she had served an internship under Travis' oversight. The "requirements" reference in the Grievant's rejection letter reflected that the County viewed Kelbert as the most qualified applicant, and did not reflect a failure on the Grievant's part to meet the position's minimum qualifications.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union notes that the governing labor agreement provisions create a "relative ability standard". It is not the application of that standard which the Union questions, but its application to a question of qualifications between an internal and an external candidate. The Union characterizes the County's application of the agreement to an external applicant as "illogical" and one that "makes no sense."

WINNEBAGO COUNTY, MA-12153, DEC. NO. 6534 (Gallagher, 6/03), has no bearing on the issue because, in that case, "both applicants were internal applicants." Travis acknowledged that the Grievant was qualified, and this resolves the matter, since the external applicant has no seniority rights to exercise. Prior hiring from external applicants has no bearing here, since each instance involved situations where there either was no qualified

Detailed review of the governing position description establishes that the Grievant meets “all the required qualifications for the CSP Professional position.” Her “work history and performance evaluations” confirm this, as well as her commitment to the job. That she was once passed over for the position in preference to a qualified internal applicant with greater seniority underscores this. Point by point analysis of the interview questions reflects “highly subjective” hiring criteria. Detailed review of the interview process establishes that the applicants were not treated the same and that the external applicant was given the benefit of an internship with Travis. This has contractual dimensions beyond the interview process, since awarding the position to the Grievant would produce the contractual trial period in which the Grievant could work with Travis.

Viewing the record as a whole, the Union concludes that the County acted “in an arbitrary and/or capricious manner when it failed to award the position to the grievant.” It follows that “the grievance (should) be sustained”; that the Grievant should “be awarded the CSP Professional position”; and that the Grievant should “be made whole for any and all lost wages and benefits.”

The County’s Reply

After a review of the evidence, the County contends that the “standard by which the arbitrator is to judge the evidence and arguments in relationship to this case” is established by four grievance arbitration awards: WINNEBAGO COUNTY, MA-6305, DEC. NO. 4303, (Houlihan, 12/91); WINNEBAGO COUNTY, MA-9931, DEC. NO. 5618, (Knudson, 1/98); WINNEBAGO COUNTY, MA-10815, DEC. NO. 6035, (Levitan, 3/00); and WINNEBAGO COUNTY, MA-12153, DEC. NO. 6534 (Gallagher, 6/03). These awards establish that County determination of an individual’s qualifications to fill a position will be overturned only if “there is a clear demonstration that such a decision was made arbitrarily, capriciously or . . . in bad faith” and that this standard “is applicable to non-employee applicants in competition with presently-employed collective bargaining member applicants.” Judicial precedent establishes that a determination cannot be characterized as “arbitrary or capricious” if “reasonable minds could arrive at the same conclusion” given “the facts presented.”

Application of this standard to the facts establishes that Kelbert “is clearly better qualified to fill the position of Community Support Program Professional” than the Grievant. Kelbert has a graduate degree in Social Work, the Grievant does not. The Grievant has no relevant experience in the CSP Professional position with the County and her prior experience was with another County in “a generalist position with a small case load.” Kelbert’s commitment to the field is demonstrated by her personal production of a DVD regarding handicap accessibility that generated a significant grant to UWGB. Her internship with the County underscores that unique commitment. Her performance during the interview process, even if considered subjective, was superior to the Grievant’s. There are, then, objective and subjective bases to underscore the validity of the County’s determination that Kelbert was significantly more qualified for the position than the Grievant.

Viewing the record as a whole, the County concludes that the grievance should be denied. Any other conclusion awards the Union through arbitration a result that should be achieved through collective bargaining. If the grievance is granted, the County asserts that “the Arbitrator (should) find that Winnebago County did not act in bad faith in relationship to this matter and thus (should) not order any back pay”.

The Union’s Reply

The arbitration awards cited by the County have no bearing on the grievance. Houlihan and Knudson each reviewed cases in which there was a single internal applicant. Knudson in fact declined to apply his reasoning to a competition between an internal applicant with an external applicant. The Levitan award concerns bumping rights. The Gallagher award addressed two competing internal applicants. The only factor the awards have in common is that each individual Arbitrator affirmed an employer determination of the lack of a needed qualification. The Grievant has no such deficiency.

That the Grievant was not employed “in a professional type position” at the time of her application has no bearing on her qualifications. She has continuously applied for CSP Professional positions, thus establishing her own commitment. County characterization of her prior experience “is a slap in the face.” There is no evidence to support a finding that the County places more demands on its Social Workers than does Taylor County. In fact, in Taylor County, the “job responsibilities were greater and the caseload was higher than Winnebago County.” Kelbert’s production of promotional videos “is irrelevant.” The Union concludes by reasserting its remedial request from their initial brief.

DISCUSSION

The stipulated issue poses an almost entirely contractual issue regarding the application of Article 11. As the background set forth above shows, a dispute on qualifications tends to be fact-driven. However, this dispute turns more on contract interpretation than on fact resolution. If, as the Union argues, the seniority preference of Article 11 is triggered by a competition among applicants who meet a position’s minimum qualifications, then there is no significant factual basis to question the grievance’s merit. If, however, the County is correct that Article 11 permits it to evaluate the qualifications of all applicants, internal and external, granting seniority preference only if it determines qualifications are equal in all respects, then there is no significant factual basis to support the grievance.

The denial of the grievance reflects my view of Article 11 and, in light of the arguments, demands some explanation. The Union’s position is well-stated and the ease of stating a conclusion should not be taken for ease in reaching it. Putting aside the interview portion of Kelbert’s selection, the record establishes an objective basis for the County’s conclusion that she brought notably higher qualifications to the CSP Professional position than the Grievant. Kelbert is a certified Social Worker with a Masters Degree. The presence of the

Professional had a Masters Degree. Kelbert has continuous service involving the provision of services to individuals with needs akin to the client base served by the Neenah office. Through her internship, she had the luxury of direct experience with CSP Professional work under Travis' supervision. Her experience, including the promotional videos noted above; her history of volunteer work; and her family history, point to a level of involvement in the field that is singular, without regard to a comparison to the other two applicants. It remains singular in comparison to the other applicants. County determination that she possessed superior qualifications is reasonable.

This should not obscure the force of the Union's position. The Union persuasively notes that the County's determination is colored by more subjective considerations, including an interview process that was not uniform among the applicants. It can be noted that the slate of questions asked of the internal applicants was not sequentially numbered, and the County interviewed only one of the external applicants, choosing the one who had served an internship under Travis. This, with the problematic e-mail exchange, lends the appearance that the result was "wired".

These fact-based concerns obscure the interpretive issue regarding the operation of Article 11. Determination of this issue is not fact-sensitive on this record. Whether or not the Grievant's interview responses showed the same "passion" for the field or whether her life experiences are the equal of Kelbert's has limited bearing on the application of Article 11. In my view, Travis and Kraft understated the Grievant's desire for the position and the quality of her experience. This is, however, irrelevant to the application of Article 11 because Travis and Kraft acknowledged the Grievant met the minimum qualifications of the position. Without regard to any factual dispute, this acknowledgement is sufficient to justify the Grievant's claim for the position over Kelbert if that is what Article 11 demands.

The Union argues this is precisely what Article 11 demands, because it is a "relative ability" clause which cannot logically be extended to external applicants. Under this view, any minimally qualified internal applicant must be favored over any external applicant, however highly qualified. This argument has force but is not, in my view, a persuasive reading of the terms of Article 11. Union reference to a "relative ability" clause has support in Elkouri and Elkouri, *How Arbitration Works*, (6th ed., 2003) at Chapter 14, Section 7. The Union's application of the "relative ability" clause, however, treats Article 11 more as a "sufficient ability" clause. Whether or not it assists in the interpretation of contract language to create a broad category, this application of the clause is not well rooted in the terms of Article 11. They specifically reserve the determination of the qualifications of "two (2) or more applicants for a single vacancy" to "the opinion of the Employer". Standing alone, this language calls for some deference to the Employer's determination. More significantly, the reference does not stand alone. Rather, to trigger the exercise of seniority rights, the determination must be that competing applicants for a single vacancy "are in all respects equally qualified to fill such vacancy". The use of "in all respects equally qualified" without any modifier such as "relatively" or "substantially" to the "equally qualified" reference underscores that Article 11

grants considerable discretion to the County in the determination of qualifications.

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The most forceful portion of the Union's argument is that this determination, however stated, cannot be applied to an external applicant under the labor agreement. The evidence indicates that Travis and Kraft felt obligated to consider internal applicants before external applicants, which supports the Union's view. This ignores, however, that the County solicited external applicants at the same time it posted the position internally and that what evidence there is on the point indicates this has been County practice for some time. It also ignores that the grievance challenges Kelbert's selection over the Grievant rather than County solicitation of external applicants.

More significantly, the view strains the terms of Article 11. Regarding the determination of qualifications, Article 11 states, "The Employer shall determine the qualifications of the applicants." The reference to "applicants" rather than to "employees" supports the County's view that it must make a qualification determination prior to any consideration of seniority and can do so among all applicants, internal and external. A unit or a non unit individual who shows interest in a position can be an "applicant", but no "applicant" can be an employee until or unless hired into the unit. The reference to the placement of "such better qualified applicant . . . over any other applicant" underscores this distinction. This is further underscored by the reference to breaking a "tie" between "two . . . applicants for a single vacancy (who) are in all respects equally qualified". The tie breaker is to fill the position with "the employee among such equally qualified applicants having the longest continuous service". The specific reference to "employee" and the more general reference to seniority underscores that among equally qualified applicants, the qualified internal applicant (the employee) must be favored over any qualified external applicant. The use of "an employee" in the "QUALIFICATIONS DISPUTES" section of Article 11 underscores this. Reference to "applicant" would connote a dispute could extend to an internal or external applicant. Use of "employee" underscores that a grievable dispute must involve a unit employee. Strictly speaking, the issue posed by the grievance is not Kelbert's qualifications, but the Grievant's, and more specifically whether the Grievant was sufficiently qualified to have seniority rights to the position awarded by the County to Kelbert. In sum, the contract language favors the County's view that it considers all applicants in a qualifications determination that precedes application of seniority rights.

Beyond this, the Union's reading of Article 11 cannot account for how the County is to fill vacancies where there is no, or no qualified, unit applicant. It is evident that the County has in the past solicited external applicants and it is undisputed that the County considers them in any case in which there is no qualified internal applicant. The Union's argument reads "applicant" as "employee", urging that the agreement is silent regarding external applicants and that this silence precludes recourse to an external applicant if there is any minimally qualified employee applicant available. Article 11 may be ambiguous, but it is not silent and the Union's reading of Article 11 strains its terms. Even if Article 11 was silent, the governing terms and what evidence there is of practice favor the County's view.

Before closing, it is appropriate to tie the conclusions stated above more closely to the

the guidance should not be overstated. Consistent use of an “arbitrary and capricious” standard by past arbitrators must be respected. As noted above, the County’s conclusion that Kelbert had greater qualifications for the CSP Professional position was reasonable. This more than meets an “arbitrary and capricious” standard. Whether this standard offers any more clarity to the terms of Article 11 than labeling its terms a “relative ability clause” is debatable. Ultimately, it is the terms of that provision that must be given meaning, and Article 11 does not refer to “relative ability”; to “arbitrary”; or to “capricious.” None of these terms directly address the strongest portion of the Union’s position, which is that Article 11 does not permit the County the latitude to favor an external applicant over a minimally qualified internal applicant. In my view, the check on potential abuse of the broad deference due the County under Article 11 lies in making sure a specific qualifications’ determination regarding internal and external applicants does not undercut seniority rights.

More specific analysis of the awards affords no greater guidance. As the Union properly points out, each is distinguishable from the grievance. Significantly, even though Arbitrator Knudson used an “arbitrary and capricious” standard, his decision notes, “it is not necessary for the undersigned to reach the question of whether the County has the right to select a more qualified applicant from outside the unit over a qualified applicant from within the unit” DEC. NO. 5618 AT 4. That is the crux of the interpretive difficulty posed by the grievance. This underscores that recourse to an “arbitrary and capricious” standard is no substitute for application of the terms of Article 11 to a specific fact situation. The Houlihan award indicates that the County considered external applicants at the time it considered an internal applicant, see DEC. NO. 4303 AT 4. This underscores testimony that the County has a history of opening positions to internal and external applicants at the same time, making a qualifications determination prior to the operation of seniority. The point is, however, not clearly established in the award as it was not central to the issue posed.

My statement, “what evidence there is of practice favors the County’s view” does not establish a binding past practice regarding the determination of qualifications between external and internal applicants. The source of the binding force of past practice is the agreement manifested by the bargaining parties’ conduct over time. Here, there is no solid evidence of Union agreement to the County’s action to favor an external over an internal applicant. The Knudson award, in its summary of the parties’ positions, underscores the absence of any such Union agreement. Absence of a binding past practice complicates resolution of the grievance because the governing terms of Article 11 are ambiguous. What evidence there is to address the ambiguity favors the County. The terms of Article 11 favor its view, and what evidence of practice there is points to consistent County conduct over time. That conduct does not establish agreement, but supports a conclusion that the parties have yet to bargain a contrary result. The governing language remains ambiguous, and must turn on case-by-case litigation until clarified through collective bargaining.

The Union aptly notes that some testimony appears “a slap in the face” regarding the Grievant’s qualifications. Arguments concerning “minimum qualifications” are contractual,

significantly more qualified than the Grievant that her seniority rights do not come into play. Put more factually, in a competition for a single position, it is probably inevitable that some testimony will undercut one applicant. The discussion above has stays away from more subjective portions of the qualifications' determination. More objective components of that determination are sufficient to ground the County's high opinion of Kelbert's qualifications. This does not demand a low opinion of the Grievant's. The Award is not grounded on a failure on the Grievant's part. Rather, it turns on Article 11, which limits the exercise of her superior seniority to those applicants who "are in all respects equally qualified." County determination of the superiority of Kelbert's qualifications is reasonable on this record.

AWARD

The County did not violate the collective bargaining agreement when it failed to award the Grievant the position of Community Support Program (CSP) Professional.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 19th day of February, 2009.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator