DECISION:

There are both a significant number of legal issues and factual determinations which arise in the matter and about which there is considerable disagreement between the parties. As well, some of the issues which arose in this case relates to views expressed during the testimony of the members of the bargaining unit. As a result, the decision will also address all issues in order to ensure clarity.

The first area to be canvassed is the meaning of the "Application of Seniority" provision which is identical in both the Outside Workers and Foreman/Sub-Foremen Agreements:

> Application of Seniority
>
> (a) Application of Skill, Knowledge and Ability
>
> In making appointments, promotions, transfers and demotions, the skill, knowledge and ability of the employees concerned shall be the primary consideration, but where such qualifications are equal, seniority shall be the determining factor.

In practical terms, there are three types of promotion clauses found in collective agreements. The two principal ones are the "threshold" or "sufficient ability" provisions on one hand and the "competitive" or "relative ability" clauses on the other. The two types are succinctly described by Arbitrator Laskin in *Westeel Products Ltd.*, 11 L.A.C. 199, at p. 199:

> Two alternative themes are generally found in seniority articles. Under one, seniority is qualified in greater or lesser degree by a requirement of ability or competence to do the required work. In such case, a senior man who is equal to the job is entitled to it, although there may be a junior applicant who can do it better. The other theme involves a contest between competing applicants, and seniority governs only when their competence or ability is relatively equal.

There is also a third type of clause found in some collective agreements and it is referred to as a "hybrid" clause. Those provisions require the consideration of merit (and other such factors) and seniority at the same time but that type of clause is not of concern in the present circumstances.

It is readily apparent from the actual grievance form giving rise to this dispute, as well as from the testimony of the Union witnesses, that the Grievor and the Union representatives feel that seniority should be the deciding factor in job competitions at the City of Burnaby. However, it is readily apparent that the provision in the Collective Agreement is a "competition clause", under which the Employer gets to select the most capable individual, based on "skills, knowledge and ability" and the seniority of an individual only comes into consideration if candidates are determined to be "relatively equal": *Nanaimo (City) Alder Grievance),* [2000] B.C.C.A.A.A.No. 266 (Kinzie); *Burnaby (City),* [2000] B.C.C.A.A.A. No. 428 (McPhillips); *Delta (Corporation)* 21 C.L.A.S. 137 (McPhillips); *Health Sciences Association of Alberta,* April 27, 2009 (Wallace); Brown and Beatty, *Canadian Labour Arbitration,* Fourth Edition, Canada Law Book, para 6:30000; Mitchnick and Etherington, *Labour Arbitration in Canada*, Lancaster House, at p. 327.

To be clear, the position of the employees and the Union representatives is incorrect. Under this Agreement the senior person is not awarded the position if he is qualified for the position.

A related matter which was raised during the testimony of the witnesses is the method of determining what is "relatively equal". The accepted practice in this relationship is that a differential of 15 must be established (as opposed to the previous standard of 10) but it is the basis for the calculation which separates the two sides. In my opinion, the general arbitral view is that comparisons are done on a percentage basis and the evidence indicates that this is the approach which has always been used by the City. As a result, the use of a differential of 15% to establish whether there is a material or discernable difference between the candidates is not a breach of the Collective Agreement.

The next matter involves the degree to which arbitrators should question the assessment of managers in these types of decisions. *Brown and Beatty, supra*, observe, at para/ 6:3100, as follows:

> 6:3100 The Cope of Arbitral Review
>
> Notwithstanding the many variations in the type and language of seniority clauses that may be included in collective agreements, there has been relatively

> little dispute among arbitrators as to the general scope of their review of managerial decisions that are made according to any of the standard promotion and layoff regimes. In the first place, there is a consensus that regardless of the language of the agreement, the standard of arbitral review of managerial decisions that involve an assessment of the abilities of employees is less demanding than that used in discipline cases. As a general rule, arbitrators have been reluctant to interfere with managerial decisions of this kind unless there is evidence of arbitrariness, discrimination, bias and/or bad faith, or an indication that the employer's judgment was unreasonable in some basic and significant respect. In the usual case, and particularly when the job is a skilled and technical one, the issue is not viewed as whether the grievor in fact possesses the requisite skill and ability but, rather, whether the employer's decision as to those matters was reasonable in the circumstances. From the earliest awards it has been said that the primary function of an arbitrator's review is to ensure that:
>
> > … the judgment of the company must be honest, and unbiased, and not actuated by any malice or ill will directed at the particular employee, and second, the managerial decision must be reasonable, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling.
>
> (footnotes omitted)

On that topic, Mitchnick and Etherington, *supra*, have this to say, at pp. 330 – 332:

> It falls within the ordinary exercise of the employer's management rights to fix the requisite qualifications for a vacant position, as well as the relative weight to be ascribed to the various qualifications in selecting the successful candidate. Accordingly, as stated in the leading case of *Reynolds Aluminum Co. Canada Ltd. and I.M.A.W., Local 28* (1974), 5 L.A.C. (2d) 251 (Schiff), the appropriate standard of arbitral review of management's decisions in this regard is comparatively narrow. Arbitrator Schiff held that the stipulated qualifications should not be interfered with unless the employer has manipulated them in bad faith to subvert the legitimate claims of employees for job advancement, or the qualifications themselves bear no reasonable relation to the work to be done.
>
> …
>
> The seminal decision on the standard of review to be applied by arbitrators in reviewing the employer's evaluation of employee skill or ability is *Union Carbide Canada Ltd., and U.E., Local 523* (1967), 18 L.A.C. 109 (P.C. Weiler). Weiler, whose reasoning reflects the traditional reluctance on the part of arbitrators to take over the function of management, ruled that the employer's assessment should not be interfered with unless it was dishonest, discriminatory, biased, actuated by ill-will, or unreasonable. The arbitrator must also ensure that, in arriving at its decision, the employer considered all relevant factors, and avoided considering any irrelevant factors.
>
> Although the deferential approach advanced in *Union Carbide Canada* continues to be followed by some arbitrators, most recent awards have concluded that the proper standard of review in such cases is correctness, at least

> in the absence of any provisions in the collective agreement to the contrary. This line of authority stems from the decision of the Ontario Divisional Court in *Great Atlantic & Pacific Co. of Canada Ltd., v. Canadian Food and Allied Workers Union, Local 175* (1976), 76 C.L.L.C. para. 14, 056.
>
> …
>
> A summary of the divergence between the standards of review – reasonableness and good faith on the one hand, and correctness on the other – and the rationale for each is found in *Maple Ridge (District) and C.U.P.E., Local 622* (1979), 23 L.A.C. (2d) 86 (Hickling). This decision is frequently cited in support of the application of the correctness standard. Arbitrator Hickling acknowledges, however, that even arbitrators who assert authority to review the correctness of a promotion decision often defer to the employer's opinion on the basis that management is better situated to assess an employee's capability or aptitude for the job.
>
> Similarly, in *Ivaco Rolling Mills Ltd. and U.S.W.A., Local 7940* (1997), 69 L.A.C. (4th) 1, Arbitrator Adell noted that arbitrators, including those who have opted for the correctness standard, are generally reluctant to interfere with management's evaluation of the relative ability of applicants for a posted position.

The following remarks by Arbitrator Doucet in *Riverview (Town)*, 248 L.A.C. 4th 369, at pp. 407 – 8, are apposite here:

> As stated by the authors Brown and Beatty in *Canadian Labour Arbitration* at section 6:3100, there has been relatively little dispute among arbitrators as to the general scope of their power of review of managerial decisions when it involves an assessment of the skills and abilities of employees. As a general rule, arbitrators have been reluctant to intervene in such cases unless there is evidence of arbitrariness, discrimination, bias or bad faith or an indication that the employer's judgment was unreasonable in some basic and significant aspect. In applying this standard, arbitrator have perceived the scope of their power of review to be of two parts: (i) arbitrators must make a determination as to the requirements of the job and assess the reasonableness of the standards or criteria utilized by the employer in making its judgment as to the relative abilities of the applicants; (ii) having made that determination, the arbitrator must then assess the manner in which the employer applied those standards to each applicant. Arbitrators have generally rejected the idea that their function in such cases is in the nature of an appeal. They will rather defer to management's application of the relevant criteria for a particular job where it is established that they applied these criteria fairly, honestly, without malice or ill will, and in conformity with the Collective Agreement.

Therefore, deference must be accorded by an arbitration board to the decision of management in these assessments and the analysis is to be focused on whether the employer operated in a good faith and reasonable manner: See also: *Burnaby (City), supra; Delta (Corp.), supra; Board of School Trustees of School District No. 88 (Terrace)*, 9 L.A.C. (4th) 432 (Kelleher); *Health Labour Relations Association of B.C.*

(Princeton General Hospital), 32 L.A.C. (3d) 35 (Hope); *British Columbia Institute of Technology* [1993] B.C.C.A.A.A. No. 381 (Bluman); *Greater Victoria Water District* [1997] B.C.C.A.A.A. No. 304 (Kinzie); *Nanaimo (City) (Meagher Grievance), supra*.

The next matter involves the legal burden of proof. The jurisprudence is clear that the legal burden ultimately rests with the Union to establish a breach of the Collective Agreement. From an evidentiary perspective, the Union has an obligation to establish a *prima facie* case and then the evidentiary burden shifts to the employer to establish there is what has been variously described as a substantial, discernible, material or demonstrable difference between the candidates: *Health Labour Relations Association of British Columbia (Princeton General Hospital)*, 32 L.A.C. (3d) 35 (Hope); *British Columbia Ferry Corp.*, [1981] 2 W.L.A.C. 336 (Black); *Burnaby (City)*, [2008] B.C.C.A.A.A. No. 428 (McPhillips); *Langara College*, [2011] B.C.C.A.A.A. No. 27 (Hall); *University of British Columbia*, 5 L.A.C. (3d) 69 (Munroe); *Halifax (City)*, 19 L.A.C. (4^{th}) 392 (Outhouse).

Therefore, with those general parameters established, we now turn to the first of the two principle submissions of the Union which is that the method of assessment of the candidates by the City was fatally flawed. In my view, there are two interrelated issues in that regard. The first relates to the factors which were considered by the panel in assessing the candidates and the second was the panelists' sole reliance on the interviews to make those assessments.

The Collective Agreement requires that an assessment of "skill, knowledge and ability" be made with respect to each of the candidates. However, what in effect happened in the present case is that it was only the latter trait which was evaluated. The evidence indicates that skill and knowledge were taken into account in shortlisting the candidates but once that process was complete, those factors became irrelevant and the sole determinant became ability, which was judged on the performance in the written test and the oral interview. Indeed, the panelists expressly acknowledged in their testimony that the written test and interview were about assessing "ability" and were not concerned with skills or knowledge. This approach also corresponds to the evidence given by Ms. Stinson who testified the interviews at the City focus on "ability" because that quality is difficult "to verify on paper". I generally accept that latter point of view but the problem

then becomes how skill and knowledge were assessed if the candidates' score is based only on "ability". In that regard it should be noted that although certain categories in the "Rating Factors" did refer to experience, technical and skills, but the nature of the questions asked were designed to discover only how the candidate responded in giving his answers.

As indicated above, the related issue is the reliance on the interview to the exclusion of other available information. The Union asserts that where an employer places excessive reliance on the interview process, particularly in situations where the grievor has experience working in the particular position, that process will be found to be flawed: *British Columbia (Workers' Compensation Board)*, [1989 B.C.C.A.A.A No. 593 (Hope); *Halifax (City)*, 19 L.A.C. (4th) 392 (Outhouse); *University of Toronto*, 52 L.A.C. (4th) 387 (Burkett); *Langara College, supra*.

On that point, the City submits that this interview process has been in place for many years and the City offers preparation courses on paid time for employees to learn how the behavioural interviewing process operates. The Employer makes these points in its written submission, at pp. 4 – 5:

> The classroom session starts with an overview of the procedure of the interview: the length, the panel, the questions, and the type of answers the panel is looking for. The meaning of "skills, knowledge and ability" is reviewed and examples of each are provided. A sample posting is used as an example, and the class reviews how the panel would structure questions for such a position – for example, that ¾ of the questions would focus on the "ability" portion of the posting, such as how to motivate staff members and conflict resolution experience. The class is instructed to use the STAR method to answer questions: provide a specific Situation or Task you have done in the past related to the question, describe the Action you took and the Results you achieved. Individuals are provided with a sample question and answer, then the class is split up into groups of three – an interviewer, interviewee and observer – to practice answering questions.
>
> However, the interview preparation does not end with the conclusion of the classroom session: staff members are told to continue practicing what they learned in the session. Mere attendance at the classroom session will not guarantee an individual a good interview – they must actively work on their skills by going home and practicing by sitting down with family members and colleagues to review questions and answers. Staff members are instructed that they must practice if they wan to have a strong interview.
>
> It is a common misunderstanding that an individual that is comfortable "talking" will do better in an interview and therefore get a position. The classroom session

> highlights that the individual must have some experience to back up their answers.
>
> The interview with the City focuses on the "abilities" portion of "skills, knowledge and ability" as abilities are often difficult to verify on paper.

It is submitted by the City that when higher level and supervisory skills are as important as they were in this competition, many of the qualities to be considered are subjective and the interview was an appropriate way to assess them: *Burnaby (City), supra; Mohawk College*, 245 L.A.C. (4th) 316 (Bendel); *Nanaimo (City), (Meagher Grievance)*, [1992] B.C.C.A.A.A. No. 320 (McPhillips); *Nanaimo (City) (Alder Grievance)*, [2000] B.C.C.A.A.A. No. 266 (Kinzie).

There is a significant volume of arbitral jurisprudence expressing serious reservations about the reliance by an employer solely on an interview process. While it is generally accepted that an interview can play a significant role in assessing candidates, arbitrators have continually cautioned about an interview being the lone determinant of an employee's chance of advancement in an organization and, in my opinion, those concerns are well founded in the present circumstances.

For example, in *University of Toronto, supra,* Arbitrator Burkett offered an extensive analysis of the problem of reliance on interviews, at paras. 5 – 11:

> 5 The University takes the position that the grievor's performance in the interview was "so bad" that regardless of whether or not references were obtained from his supervisors or a check done on his work history, he proved himself not suitable for the position. I am reminded that this lead hand position requires a significant degree of interpersonal skill; skill, which, it is submitted, the grievor lacked. The University cites the grievor's belligerent and confrontational attitude, the unsatisfactory answers he gave to Mr. Reynolds questions along with his inability, to relate in any meaningful way to Ms. Luker. I am reminded that all of the candidates were presented with the same written test. The University relies on the following awards in support of the proposition that when assessing candidates for a lead hand position it is entitled to emphasize leadership and interpersonal skills: *Re: Reynolds Aluminum Co. Canada Ltd. and International Molders and Allied Workers Union Local 28* February 27, 1974 5 L.A.C. (2d) 251 (S.A. Schiff); *Re: York University and York University Staff Association,* July 13, 1992 27 L.A.C. (4th) 403 (N.V. Dissanayake); *Re: General Freezer and United Steelworkers, Local 7455,* June 20, 1974, 6 L.A.C. (2d) 296 (O.B. Shime); *Re: Manitoba Telephone System and Communication & Electrical Workers of Canada*, November 2, 1988 2 L.A.C. (4th) 136 (D.E. Bowman); *Re: Oil, Chemical & Atomic Workers Local 9-14 and Polyiner Corp. Ltd.* , March 1 – 2, 1972 24 L.A.C. 277 (J.D. O'Shea).

6 The University takes the position that it was entitled to rely on the grievor's conduct during the interview as evidence of his ability to relate to others and as evidence of his ability to handle stress. The following awards are cited in support of this position: *Re: Public Utilities Commission of City of Sault Ste. Marie and Canadian Union of Public Employees, Local 3,* December 2, 1994 44 L.A.C. (4th) 286 (K.A. Hinnegan); *Re: Corporation of the City of Ottawa and Canadian Union of Public Employees, Local 503,* September 1, 1988 1 L.A.C. (4th) 60 (I.G. Thorne).

The University asks me to find that it assessed all of the candidates on the basis of the same criteria using the same process and that it correctly concluded that the grievor was not suitable for the position.

7 Article 27.01 is commonly referred to as competition clause, under which the qualifications of the candidates for a position are assessed one against the others and only where qualifications are relatively equal is seniority relied upon. Under this particular clause the employer is required "to use all available information to determine which employee is most suitably qualified". The purpose of this requirement (which would nevertheless apply if not expressly incorporated) is to ensure that all candidates are placed on an equal footing by having all of the available information relevant to the selection considered by the decision-makers. Failure by the decision-makers to consider all available information in respect of any one candidate, in circumstances where the candidates must compete against one another, must necessarily nullify the process.

8 Apart altogether from requiring the candidates to take a written test when only one of the four was fluent in English and apart altogether from the fact that one of the panel members absented herself from one of the interviews when it was her impression of the grievor at his interview that caused her to reject his application, this process was fundamentally flawed. It was fundamentally flawed by reasons of the panels decision not to consider the grievor's seventeen year work history, including the most recent two years in a lead hand position. The panel, by their own admission, relied exclusively on the interview performance of the grievor in finding him unsuitable while at the same time, it had prior work related recommendations before it in deciding that the other candidates were suitable and otherwise qualified.

9 The members of the interview panel relied solely on the interview of Mr. Kyriakopoulos to conclude that he lacked both the judgment and the interpersonal skills necessary to be a lead hand caretaker working in the student residences. While the cases cited by the University stand for the proposition that these attributes can be assessed in an interview, they do not stand for the proposition that the assessment of these attributes should be restricted to performance in an interview. As Arbitrator Cherniak was careful to observe in re Fairview Home Inc. (supra):

> Interviews cannot and should not be used however as a complete method of assessment. The ability to conduct oneself during an interview is only one facet of an employee's abilities, and often it is not a particularly significant or relevant facet. So much depends unfortunately, on the ability of the interviewer to go beyond the surface

> impressions in the artificial atmosphere of an interview and probe deeply into the applicant's vision and knowledge.
>
> 10 The arbitrator went on to comment that the employer should have considered the work history of the two applicants as shown through their performance appraisals and should have spoken with their supervisors. Arbitrator Brandt reached essentially the same conclusion in his Kenora Roman Catholic Separate School Board award, (supra).
>
> 11 The members of the interview panel in this case readily conceded that in determining that the grievor was unsuitable they relied solely on his performance in the interview. Their failure to look beyond the interview is, as I have found, a fatal flow. In circumstances where an employee has 17 years of unblemished service, has 2 years of service at the same level as the position for which he is applying, has obvious difficulty with the language and was agitated at the time of the interview, it is not difficult to understand why the members of the selection panel should have looked beyond the interview. If they had done so and discovered that in his seventeen years of service he had consistently got along with his colleagues and supervisors and if they had done so and been told that in his two years as a lead hand he had demonstrated good judgment and leadership skills, as they might have been told had looked beyond the interview, they may have come to a different conclusion in assessing his suitability.

Similarly, in *Halifax (City), supra,* Arbitrator Outhouse concluded it was improper to rely exclusively on an interview and indicated that there are more reliable ways to assess an employee. He stated, at para. 45:

> The promotional board's evaluations of dependability, initiative and attitude are vulnerable to much the same criticism. They were based entirely on the interview and no effort was made to assess whether the candidates, every one of whom were employees of at least seven full years' standing, had demonstrated over the course of their employment that they were in fact dependable, showed initiative and displayed a good attitude. These are attributes which can be evaluated much more reliably based on the extended work history of an employee than on the basis of an oral interview. This is particularly the case where, as here, the questions put to the candidates relating to dependability, initiative and attitude were of an academic or theoretical nature and were better suited to test the ability of an applicant to cope with the interview process than to ascertain whether he was dependable, possessed initiative and had a good attitude.

In *Greater Niagara Hospital,* 60 L.A.C. (4th) 289, Arbitrator Devlin adopted much the same rationale, at p. 305:

> There is no question an interview may be a useful tool in assessing applicants for a job vacancy. Moreover, in this case, we have no doubt as to the sincerity of Ms. Bryson's effort to find a process which was consistent, fair and unbiased. Nevertheless, as pointed out by the Association, the B.B.I. depends largely on an applicant's ability to recall and recount appropriate anecdotes and the applicant's mark may vary based on the nature of the anecdote selected … In any event, as noted by the Association, there are a number of awards in which it

> has been held that it is inappropriate for an employer to rely solely on test scores or interview results. Instead, it has been determined that a balanced assessment requires a consideration of all relevant factors, including test and interview results, on-the-job performance, related courses and performance appraisals.

In *British Columbia (Workers' Compensation Board), supra,* Arbitrator Hope made a number of salient observations about the limitations of the interview process, at paras. 57 – 59 and at para. 91:

> 57 In that subjective process, it was clear that eight years of actual experience in an equivalent position could have great weight or marginal weight depending on how the applicant was perceived by the panel members in the interview process. That is, actual experience was not given any weight independent of the interview process. It was weighted exclusively on the basis of how applicants were perceived by the panel members in the interview process. As with education, the employer, having isolated experience as a relative factor, was bound to weigh that factor in a manner that fairly addressed the abilities and qualifications of the applicants for the disputed position. The conclusion reached by the two panels in this dispute on the factor of experience raised a question about the suitability of the approach.
>
> 58 That approach might be described in the vernacular as measuring how individual applicants "came across". The process included evaluation of such individual and idiosyncratic traits as eye contact, body language, composure, apparent verbal skills, self-confidence and other behavioural characteristics. Those traits were assessed by the panel members as a means of projecting how individual applicants might respond to the rigours of a position that has an adversarial potential and which requires judgment and well-developed communicative skills. But, with great respect to the panel members, their approach was apparently insensitive to the fact that the grievor's experience was direct, not related, and that any negative impression he made in the interview should have been carefully weighed against and reconciled with his performance record as a claims adjudicator.
>
> 59 The result of the approach of the panel members was that they did not evaluate each applicant's experience, they evaluated the applicant's performance in the interview and sought to interpolate that performance as the common denominator in the experience equation …
>
> …
>
> 91 It is apparent that he interview process, because of its pervading subjectivity, is extremely vulnerable to first impression bias. The process loses its objectivity when the panel fails to cleave to a consideration of factors directly related to the abilities and qualifications of the applicant for the position in question. Further, the process loses its reasonableness when the panel, for whatever reason, gives consideration to factors irrelevant to the question of abilities and qualifications or where the panel members ignore or diminish the significance of factors relevant to that essential question. Here we are of the view that the panel, in the selection and application of the criteria, failed to give appropriate weight to the grievor's lengthy and apparently satisfactory experience or to reconcile the assessment of the applicants with their personnel records.

In the same vein, in *Langara College, supra,* Arbitrator Hall reviewed a number of the authorities dealing with the reliance on interviews and discussed some of the shortcomings. He stated, at paras. 11 – 19:

> The *WCB* award was published several years ago, but it continues to reflect the state of the arbitral case law in British Columbia. See, for instance, *FortisBC -and International brotherhood of Electrical Workers, Local 213,* [2007] B.C.C.A.A.A. No. 52 (Munroe), 89 C.L.A.S. 29; and *Re Abbotsford Police Department and Teamsters Local Union 31* (2008), 179 L.A.C. (4th) 305 (Coleman). Another example is *Re Newnes Machine Ltd. and I.W.A.-Canada, Local 1-417* (1996), 53 L.A.C. (4th) 431 (Munroe), where the earlier award attracted these observations:
>
> > ... in *Re British Columbia (Workers' Compensation Board) and Workers' Compensation Board Employees Union* (1989), 4 L.A.C. (4th) 141 (Hope), the arbitration board commented on the "extreme vulnerability" of the interview process to "first impression bias". The arbitration board in that case was not critical of the process itself (nor am I in this case). But where, as here, the qualifications of the disputed position are subjective to an appreciable degree, it is imperative that the persons responsible for making the selection "... give appropriate weight to [the senior employee's] lengthy and apparently satisfactory experience [and] to reconcile the assessment of the applicants with their personnel records" [at p. 168]. (p. 440)
>
> We acknowledge the College's longstanding (and apparently unchallenged) practice of interviewing candidates in comparable circumstances. However, we also note that the College has been cautioned previously about not relying on interviews alone. We refer here to the award in *Langara College -and- Canadian Union of Public Employees*, Local 15 (1997), 50 C.L.A.S. 455 (Devine), where it was plainly stated:
>
> > I do agree with the Union that the Employer cannot rely on the interview alone. It has to take into account the Grievor's work history: see *Re: University of Toronto and CUPE, Loc 3261* (1996), 52 L.A.C. 4th 387, at 392 (Ontario, K.M. Burkett). . . .
>
> The College allows that the interview "did play a significant role" in the selection of Ms. Indseth. From our perspective, the only logical conclusion to draw from the agreed facts is that the interview was the basis for the Selection Committee's decision. Put somewhat differently, there are no other facts to support a conclusion that Ms. Indseth's ability to perform the job was superior to the Grievor's ability by a substantial and demonstrable margin. Rather, the other facts suggest that the respective abilities of the two candidates were relatively equal, particularly when one recalls their performance reviews (admittedly, completed several years prior) and the results of the 2008 interviews. In terms of the latter, the seemingly disparate outcomes from the two interview processes for the same position held less than one year apart underscore the concern in the arbitral authorities for the potential of interview performance being incomplete and/or overshadowing actual ability: see *Abbotsford Police Department*, at para. 95. The College stresses the Selection Committee's knowledge that the Grievor and Ms. Indseth had both performed the position satisfactorily in the past, and points to paragraph 27 of the Agreed Facts:

> 27. The Selection Committee acknowledged that both candidates had performed the duties of Senior Cashier satisfactorily when holding theposition on a temporary basis.
>
> The College additionally submits that the candidates' ability to perform the job was assessed based on what can be read into their responses to the interview questions. Paragraph 27 states only that the prior satisfactory performance of both candidates as Senior Cashier was "acknowledged" by the Selection Committee. There is nothing in the Agreed Facts which states expressly that the candidates' prior performance was actually considered during the Committee's deliberations and, if so, indicates how their ability in the position factored into the selection of Ms. Indseth. …

In *Nanaimo (City) (Alder Grievance), supra,* a case relied on by the Employer in these proceedings, Arbitrator Kinzie was faced with complaints from the Union concerning bias and the interview process. He denied the grievance but in the process identified that the panel had taken other matters into consideration in its scoring of the candidates. He stated, at para. 24:

> In addition to the 10 questions, the applicants were also scored on their interview preparation, their applications and resumes, whether their education met the requirements for the position, whether they satisfied its experience requirements, and whether they met the training requirements. Each of these five categories as well as the ten questions were assigned 10 points.

In *Mohawk College, supra,* the employer had initially determined that the grievor was not qualified for a position based on her resume but decided to interview the grievor to be certain that was correct and ultimately decided that was the case. Arbitrator Bendell reviewed the process which had been undertaken and observed, at paras. 29 – 30:

> On several occasions, arbitrators have questioned whether the use of an interview as the exclusive selection tool can enable an employer to make a valid assessment of an employee's qualifications for a job. *In North York General Hospital v. Service Employees International Union, Local 1 (Liongco Grievance),* [2008] O.L.A.A. No. 1, I had occasion to review some of the caselaw on this question. I stated the following (starting at paragraph 40):
>
> Arbitrators have cautioned several times that, while interviews can be a valid selection tool, it is important that the interview be designed to bring out whether the applicants meet the requirements of the job. The criticism, valid in my view, has been made that interviews tend to favour applicants who (to use the vernacular) can "talk the talk", and that the questions asked often do not probe the

> applicants' true ability to perform the work, merely their ability to articulate interesting or insightful ideas about the job.
>
> For example, in *Re Fairview Home Inc., supra, [Re Fairview Home Inc. and Fairview Nurses M.N.U., Local 21* (1991), 21 L.A.C. (4th) 223 (Cherniack)] arbitrator Cherniack said the following (at page 235):
>
> > An interview can be an artificial assessment of an applicant's ability to talk, to charm, or to use words that the interviewer clearly wants to hear. The ability to be articulate, or the state of being excited about the prospect of becoming a charge nurse, does not necessarily prove an ability to be a good charge nurse.
>
> Despite the general hesitation on the part of arbitrators in endorsing interviews as an exclusive selection tool, I am satisfied that, in the present case, reliance on the interview was fair and reasonable. The selection committee, chaired by Ms. Drost, had concluded, on a review of the grievor's application, that she lacked the formal educational qualifications specified in the job poster (a conclusion not challenged by the union), and had decided to interview her for the purpose of assessing whether, as envisaged in the job poster, a combination of her education and experience could be considered the equivalent of the required educational qualifications. In assessing her experience, the committee chose to focus on what she had learned in her time as a Customer Service Assistant. In other words, it was concerned, not just with the quantity of her experience, i.e. the length of time she had worked in this environment, but also with the quality of that experience, including its pertinence to the job being staffed. Undertaking that inquiry, in my view, was in full conformity with the "outline of the basic qualifications" stated in the job poster (Article 17.1 of the collective agreement). An interview was a reasonable method of evaluating the quality of the grievor's experience in relation to the duties of the job for which she had applied. I am not persuaded that the selection committee erred by failing to seek out other information about the grievor.

In *Health Services Association of Alberta, supra,* Arbitrator Wallace expressed similar opinions, at paras. 34 – 5:

> 34 Within this framework, the only issue in this case is whether the Employer's opinion that Ms. Camat was not relatively equal to Ms. Berube, despite the close scores, was a reasonable one. We adopt the view of Arbitrator Moreau, in a selection grievance involving these parties and a predecessor collective agreement, that the structured interview and resulting scores were a "key" evaluation tool, but not the "be all, end all" by which management could reach its decision: *Canadian Blood Services v. HSAA (Amin Grievance)* [2001] Alta. G.A.A. 01-022 paras. 61.

Finally, there are the comments of Arbitrator Doucet in *Riverway (City), supra,* wherein he stated, at p. 411:

> The interviews definitely played an important role in the selection process. The interview is generally recognized as the selection device most widely employed by management in selecting a candidate for a job. There is also no question about the employer's right to use this procedure to select job applicants. But at the same time, many arbitrators have held hat undue reliance on an employee's interview performance creates a fatal flaw in the selection process. Excessive emphasis on the interview has often come at the expense of a more balanced consideration of other relevant factors, such as work history, past training, performance appraisals, comments of supervisors and coworkers, and test scores. (See, Mitchnick and Etherington, *Labour Arbitration in Canada*, Second Ed., Lancaster House, page 460; *Headwaters Health Care Centre and OPSEU, Local 227 (Kenney), Re (supra); and Ottawa (City) and Ottawa-Carleton Public Employees Union, Local 503 (Webb), Re (supra).)*

At a theoretical level, it is conceivable that a proper testing and interview process could be designed to address all of the factors that are relevant in a job competition but that was definitely not the situation here. In the case of the written test, the questions were not designed to discover whether a person had technical skills or knowledge but rather how a candidate would handle certain situations. As acknowledged by the panelists, it was an exercise in assessing "soft skills". Certainly, that was even more the case in the interview portion of the competition.

As a result, the process used by the City of Burnaby in the present competition suffers from the very deficiencies identified in the authorities above. The scoring process used here focused solely on ability and did not take into consideration the factors of skill and knowledge, including such matters as the job performance of the employees (Mr. Turpin and Mr. Duifhuis have a combined 32 years of experience with the City on which assessments could be made), qualifications, commendations or the training courses taken. As an example, Mr. Duifhuis testified he has had extensive experience as an acting subforeman. It may be, as the City claims, that that role was simply created to generate a pay premium while the individual continues to work on the tools but some objective assessment of his experience in the acting role should have been undertaken.

The City has argued that *Burnaby (City) (Laverge Grievance), supra*, is analogous to the present case. In terms of the legal principles to be applied, that is correct. However, the factual matrix there was different. That dispute was decided based on a agreed statement of facts and there was no oral testimony presented. The Award states, at para. 26:

> In conclusion, there appears to be a measurable difference between the candidates on the basis of actual prior experience in the job in question, leadership courses taken, and the interview results. Therefore, based on the limited evidence before this Board, there is no basis to conclude that the Employer exercised its discretion in a bad faith, unreasonable or incorrect manner. To cite Arbitrator Hamilton from *Board of School Trustees of School District No. 88 (Terrace), supra*, at P. 30, "an honest, unbiased and reasonable procedure applied equally to all potential applicants; using relevant criteria and weightings allows little room for arbitral interference". On that logic, there are no grounds for arbitral interference in this case and therefore, Mr. Lavergne's grievance must fail.
>
> …
>
> We turn next to the interviews which were conducted of the candidates. This position is a supervisory one and the job posting states that the work includes activities such as "plans, assigns, coordinates and may participate in work of crews, … relieve foremen, cooperates with other foreman … may interview and select new employees, motivates and disciplines employees as required …" These types of positions require interpersonal and communication skills and where factors such as these are important interviews can generally be quite useful and appropriate in obtaining information on which to make assessments about individuals: *Acadian Platers Company Ltd.,* 68 L.A.C. (4th) 344 (Knopf); Medical Services Association, [1994] B.C.C.A.A.A. No. 374, October 11, 1994 (Kelleher); *Royal Alexandra Hospital* , 10 L.A.C. (4th) 173 (Ponak); *City of Winnipeg*, 12 L.A.C. (4th) 231 (Freedman). However, generally the tests should not be the only factor in the differentiation of the candidates: *City of Winnipeg*, 12 L.A.C. (4th) 231 (Freedman); *Re Inglis*, 22 LA.C. (2d) 175 (O'Shea); *Workers' Compensation Board of British Columbia*, 4 L.A.C. (4th) 141 (Hope); *Medical Services Association*, October 11, 1994 (Kelleher).

The key points in that decision for our purposes are that other factors were also considered (prior job experience, courses taken) and that interviews are appropriate mechanisms to assess some of the factors on which the candidates are being judged, for example "ability".

Therefore, as indicated above the real problem in these circumstances is that skill and knowledge were not assessed in the written test or the interview itself nor were they canvassed by some other method. Factors such as work performance, job experience, commendations, education or courses taken were never taken into account in any way by the panel.

In conclusion on this point, I have no difficulty with the notion that interviews may be a perfectly valid way to assess certain characteristics such as "ability" which is defined in *Brown & Beatty*, *supra*, as follows:

> Arbitrators have generally recognized that ability goes beyond mere mechanical aptitude and may include considerations as varied as an employee's dependability, reliability and responsibility, leadership qualities, …. accident and absenteeism record, stability, ability to withstand mental stress, or to get along with colleagues, interest in the work …. And his initiative energy and good temperament. All of these factors will become relevant factors of assessment where they can be demonstrated to actually reflect upon the employee's ability to perform the job in question.

However, interviews alone are generally not an appropriate vehicle to assess other considerations such as skill and knowledge, where content of resumes, qualifications and work performance can also be taken into account.

Therefore, in my opinion, the fatal flaw in this job competition process was that the City did not consider all the contractual criteria and further, in failing to do so, relied solely on an interview scoring system.

The second principal submission of the Union is that in the circumstances of this case there were numerous and serious deficiencies within the interview process itself.

In that regard, the Union asserts first that there was a high degree of subjectivity in the scoring process in that the scoring was based on "overall impressions". As a result, there existed here a "first impression bias": *British Columbia (Workers' Compensation Board), supra.* In its written argument, the Union submits, at pp. 10 – 11:

> The evidence in this case revealed that scoring based on overall impression of the response to each question was an integral, albeit troubling feature, of the interview scoring procedure. Although questions were assigned "look fors", many of these were general and subjective in their own right ("Scope of example", "demonstrate leadership ability" and "clearly and professionally communicated" for example). The "look fors" did not correlate with the number of points assigned to each question and did not serve, and were not designed to serve, as objective scoring criteria. Instead, panelists were instructed to follow a general "Scoring Rating Scale" which provided for every question to be scored on a scale from 0 to 5 (each question thus arbitrarily assigned 5 points). Questions could only be assigned a score in whole numbers, with 0-1 being "not acceptable" (and the difference between "0" and "1" being a matter of entirely subjective judgment), 2 being, overall, "needs improvement", 3 being, overall "proficient", etc. The "look fors" may or may not correlate with the overall rating, as indeed the nature of the questions may involve candidates providing a good answer with none of the anticipated "look fors" or an answer that "needs improvement" overall despite mentioning several.
>
> This process, being based on a subjective overall impression of the answer to each question inevitably leads to variability in scores, including between answers that appear substantially similar, and between panelists scoring the same candidate on the same answer.

> All of the scores are completed at he end of the interview, after an "overall impression" of the candidate has been formed. The manner and communication style of the candidate can contribute significantly to this "overall impression" bias (and, in fact, was an explicit "look for"). At the same time, a single response or comment that was received positively or negatively, including a single poorly chosen phrase, could solidify an overall impression. This was apparent in the evidence form the interview panelists regarding Mr. Duifhuis.
>
> Moreover, this subjective "overall impression" scoring, with often arbitrary factors distinguishing a one point difference on a particular question, was vulnerable to differences being further exaggerated by the fact that only whole numbers from 0 to 5 could be assigned, and in turn these were often multiplied by a weighting factor based on the percentage weight a particular "competency" the question happened to be placed into.

The second interview flaw, according to the Union, is that there was a high degree of subjectivity even in the written test which had the same subjective nature and quality as the oral interview. The Union argues the following, at p. 12; of its submission:

> It is evident from the tests that (a) the writing skills of the applicants was likely to derive a higher score, regardless of the skills, knowledge and ability of the applicant, (b) like many of the oral interview questions, the questions themselves were often interpreted in different ways between the candidates, sought general "soft skill" responses, and were vulnerable to subjectivity in scoring; and (c) that the variability in the scores allowed for one or two points to differentiate substantially similar answers.

The Union's third process concern is that the appraisal of objective information was deliberately excluded from the process and that candidates were not prompted to detail known experience. It is asserted that behavioural interviews really demonstrate superior skills at dealing with interviews and do not favour the "candidate with superior knowledge or skills" but rather the individual with the "ability to communicate past experience in a compelling way".

The fourth area of discontent for the Union is that any concerns about the candidates were not put to them so that they could be addressed. It is asserted that any matters which were later discussed and considered by the panelists in their deliberations ought to have put to the candidates during the interviews: *Atomic Energy*, [2002] C.L.A.D. No. 65 (Chapman).

The fifth complaint is that the discussion and alteration of scores by the panelists after the interviews exacerbated the problems of subjectivity and overall first impression bias. In that respect, the Union submits, at pp. 13 – 14:

> While there was some attempt by the City to suggest that this process allows panelists to ensure that they did not miss anything important in their own notes of a candidate's answer, and make an appropriate adjustment if they did, it is apparent from the evidence that most instances of a score adjustment did not involve adding a point based on discovering something in the answer that was missed. Rather, scores tended to be changed on much more intangible bases, either due to the perspective of another panelist regarding a candidate or his answer, rather than any new information. In fact, scoring changes were as likely to involve the removal of a point, rather than adding a point because something had been missed, after being persuaded by another panelist that the original "overall impression" score was too high.
>
> This did not improve the quality of the scoring in this case. Instead, it caused the already subjective "overall impression" scoring to be influenced by the particular subjective impressions of other panelists. Examples emerged in the evidence where it was apparent that information from outside of the interview process, on an entirely ad hoc basis, was brought into the discussion, depending, for example, upon what information about the candidates Dave Lau decided to bring forward at the time of the discussion. A candidate who was viewed favourably overall could have the "scope of example" approved and expanded upon, or conversely criticized as in the case of Mr. Duifhuis. As the overall impression of a candidate shifted, scores on a number of questions could easily be moved up or down by a point. The scoring of Mr. Turpin provides a stark illustration of this problem.

The final issue from the Union's perspective is that all these factors contributed to a strong risk of a distortion of individual scores due to bias or strong personal predispositions and resulted in an "infection of other panelists" during the panel discussions: *University of British Columbia,* [1982] B.C.C.A.A.A. No. 247 (Munroe).

The Union argues at p. 14 of the written submission:

> The Employer's reliance on abstract interview answers and subjective scoring, without any assessment or scoring of objective information, is ultimately a flawed way to determined whether there is a material difference in the actual skill, knowledge and ability of two candidates. Worse, as the evidence in this case has revealed, it introduces the risk that a panelist with a strong personal predisposition in favour of one candidate, or against another (or both) may skew the outcome toward his choice.
>
> The scores originally given by Mr. Lau to Scott Turpin reflect this problem. The original score assigned by Mr. Lau to Scott Turpin was 73.75. The next highest score, unadjusted, was 56.8. The percentage difference between these scores is 29.8%. The difference between Mr. Lau's original score and the lowest original score, 46.4, was 58.9%.

> Simply put, Mr. Lau's scores for Mr. Turpin were grossly exaggerated. Mr. Lau was well aware that a junior candidate needed to exceed the scores of a more junior candidate by 15% or more. Accordingly, he scored Mr. Turpin inordinately high. In the absence of any questions testing specific knowledge, which could be scored objectively, and with the scoring of the behavioural questions largely based on overall impression, it was easy for Mr. Lau to score highly (even if he did so unconsciously) and defend his scores to the other panelists. The fact that Mr. Lau had to make a number of downward adjustments to the incumbent's scores when the panelists conferred is an indication of the problem, but certainly did not correct it. By discussing and at times adding information to defend his high scores, Mr. Lau successfully persuaded other panelists to increase their scores by a cumulative total that exceeded his own reductions by more than two points.
>
> The inference is unavoidable. Mr. Lau was influenced in his scoring, and influenced by others, by his pre-existing preference for the incumbent. This was pushed further forward by a bias against the senior candidate. A process that was already subjective and vulnerable to an overall interview impression bias departed entirely from a fair assessment of the skills, knowledge and ability of the candidates to perform the duties of the job.

For its part, the City asserts that there were no problems with the interview process in this job competition. The City makes the following points in its written submission:

> 17. When the City needs to fill a position a selection panel is formed. The panel works together through the selection process. The panel typically consists of an individual from Human Resources and at least two supervisors of that position. In a trades role, the foreman is on the interview panel as they are the direct supervisor and their input in the selection process is important.
>
> …
>
> 20. The job posting for the position is created with input from the panel. The original job posting comes from HR, where it is created based on the class specifications document for the position. The posting is a high level advertisement for the position – it is not as detailed as the class specification, but provides an overview of the tasks and skills necessary for the position. The department checks the posting and HR reviews it a second time to make sure it meets the City's requirements for postings. When the job is posted individuals submit their applications to HR.
>
> 21. The panel develops a rating factors document for each competition, which is put together in consultation with the department and HR to determine which competencies are important for the role. The competencies come from the posting, the class specifications, the meeting with the department and the HR representatives understanding of the role. The weighting is determined with the department and must add up to 100% - higher ratings are allocated to the areas of the job that more important. HR starts the process by sending a draft to the department, then there is communication back and forth to come up with the appropriate rating factors. Specifically, when creating the rating factors

document the sequence is a meeting between HR and the department to discuss the competencies and set out the titles, then the panel forms the verbal interview questions ….

23 Interview questions are developed with input and review from the panel. The focus of the interview is on behavioural questions. Interviews may consists of both written and verbal questions.

24. The written component is designed to test more technical aspects of the position, and is therefore drafted by the department, although it is reviewed by HR. The written test also provides the candidates with an opportunity to reflect on answers to questions that may be more difficult to provide in a verbal interview.

25. For the verbal interview, the City aims for 10 – 14 questions as it has been determined that is a manageable number of questions for an interview. The verbal questions are created by the department with consultation with HR.

26. Procedurally, the candidate enters a room with the panel. The interview begins with HR letting the candidate know how the interview process works – that they may have a question repeated, that they may skip a question and come back to it if they need more time to think of a response, that the panel rotates asking questions, that the panel is taking notes to help remember the responses, that there will be some wrap up questions at the end an dhow long the entire process will take.

27. When a candidate does not provide a fulsome answer to the question, the panel will probe by asking if they want the question repeated or asking if there is anything they wish to add. The HR representative will go out of their way to ensure that someone is provided ample time and opportunity to provide an answer.

28. Specific clarification question are not asked in order to be fair to all the candidates. Every candidate receives the same questions and the same opportunity in answering the questions. For example, the panel will not state "that's not good enough example, provide another one".

29. The marking sheet for both the written and verbal questions have "lookfors" – points that the interviewer looks for in the candidates' answers. However, these look-fors are not a checklist – a candidate does not receive a mark for touching on each look-for. As the interviews focus on behavioural questions, the examples provided by the candidates vary too widely to have a concise list of each element the answer must touch on. Instead, the look-fors act as a guideline.

…

33. Following the individual scoring, the panel comes together to discuss the answers. This is not consensus scoring – the discussion is based on human resources best practices for recruitment. A multi-person panel is in place and the panel discusses their recollection of the candidates' answers together to ensure each member understands the responses provided. In particular, the City wants to ensure that a panel member did not miss part of the candidate's response to a question. For example, HR is not always clear on technical issues such as

acronyms or department specific knowledge, and HR can provide insight into other competencies such as leadership and customer service. No member is required to change their answer – they only do so if they feel that the discussion brought to light information that warrants a change.

…

Selection

110. Following the scoring of the candidates' written tests by Mr. Choi and the scoring of the interviews by the Panel, the scores were collected by HR. HR calculated the scores and the differential between the candidates. The scores for the Grievor and Mr. Turpin were as follows:

(a) The Grievor:
(i) Mr. Ng: 42.9
(ii) Mr. Choi: 44.9
(iii) Mr. Lau: 43.3
(iv) Ms. Knapton: 43.8
(v) Total: 174.9

(b) Mr. Turpin:
(i) Mr. Ng: 57.8
(ii) Mr. Choi: 54.2
(iii) Mr. Lau: 62.7
(iv) Ms. Knapton: 53.4
(v) Total: 228.1

111. The differential between Mr. Turpin's and the Grievor's scores (calculated by the formula: high-low/lowx100) equaled 30.4%.

112. After removing Mr. Lau's scoring for the candidates, the differential equals 25.7%.

It is also asserted by the City that the process used in this job competition was fair to all the candidates and that there was no bias on the part of the panelists in this case:

In the case at bar there was an honest, unbiased and reasonable job competition procedure that was applied equally to all potential candidates, and their evaluation used relevant criteria and ratings. A four person panel was created to prevent bias in the interview; the interview documents were carefully crafted per human resources best practice and reviewed following standard City procedure; each candidate was given the same opportunities in both the written test and verbal interview as they were asked the same questions and provided with the same amount of time to answer the questions.

Further, the Sub-Foreman role is of a supervisory nature, with the Sub-Foreman spending at least 30% of the time dealing with matters involving supervision of the crew members. As supervisory capacity can be subjective in nature, an interview is an appropriate evaluator for assessing such qualities as communication and interpersonal skills. When assessing such characteristics, considerable deference must be paid to the assessment of management.

…

> Concerning bias, the Union has alleged that Mr. Lau was biased against the Grievor. There is no evidence of any bias. You have heard testimony that Mr. Lau is an experienced tradesman, with experience at both the sub-foreman and foreman level. He is also a former member of the Executive of the Union. You heard testimony that City panels often include the foreman for a trades role, as they have important knowledge and experience relating to crew position. The City submits that, following *Alder,* Mr. Lau as the Grievor's supervisor knows about his work habits and attributes, however, this should not disqualify him from participating on the Panel.
>
> You have heard testimony that Mr. Lau and Mr. Choi jointly recommended the Grievor for the opportunity to take a leadership course in 2009. You heard testimony that when reviewing the initial shortlist of candidates Mr. Lau, along with Mr. Ng and Mr. Choi, recommended that the Grievor be interviewed, but not Mr. Turpin. The City submits that the above is evidence that Mr. Lau is not biased against the Grievor in favour of Mr. Turpin, and that his inclusion on the Panel was completely reasonable.
>
> …
>
> In the interview process, the Union has alleged that Mr. Lau deliberately scored the Grievor lower and Mr. Turpin higher to manipulate the job selection process so Mr. Turpin would be awarded the position. Further, the Union has alluded that Mr. Lau, knowing about the 15% relatively equal City policy, specifically scored Mr. Turpin excessively high so that, although he lowered Mr. Turpin's scores substantially in the discussion following the interview, he could influence other Panel members in the discussion to raise their scores. The City submits that attributing such Machiavellian motives to Mr. Lau is preposterous. The City submits that when reviewing the actual final scores of the candidates, Mr. Lau's scores for the Grievor are not substantially different from the scores that Ms. Knapton, Mr. Ng and Mr. Choi awarded. Similarly, there is consistency in the scores awarded to Mr. Turpin from all panel members. As set out above, there is a 30.4% difference in the candidates' scores. Even when Mr. Lau's scores are removed, a 25.7% difference remains. The City submits that Mr. Lau's scoring of the Grievor was not biased.

With respect to allegations of bias, the Employer submits that it is clear from the testimony of the Union witnesses that the issue for them is one of seniority and these employees feel that Mr. Duifhuis should have been awarded the position on that basis alone; thus, in the view of the Employer it was their testimony that was affected by bias. On the other hand, Mr. Lau, as the Grievor's supervisor, was of the view that Mr. Duifhuis was an "ok" carpenter who worked slowly and was a reluctant decision maker and that has been established on the evidence.

Finally, the Employer argues that Mr. Duifhuis did not take the interviewing courses offered by the City seriously and it is his own responsibility that he did not perform well in the interview.

In my opinion, there are a number of issues to be addressed with respect to the various claims set out above. The first relates to the allegation of "bias". In *Nanaimo (City) (Alder Grievance)*, Arbitrator Kinzie offered, at para. 73, these observations including a reference to the decision by Arbitrator Munroe in *UBC, supra:*

> The Union next submits that an objective assessment did not occur in this case because one of the panel members, McCaw, was biased against the grievor based on his activities as a shop steward and safety representative. It relies on University of British Columbia, supra, where the Board concluded that a selection panel member was biased against the grievor in that case and concluded that the selection process was flawed for that reason. In reaching that conclusion, the board referred to the test of bias used in cases of such allegations against judges and arbitrators. It expressed the view that such a test could not be used in circumstances of employer members of selection panels. The board's comments continued:
>
> > Managers know their employees. They know something about their training, talents, work habits, leadership attributes, etc. They are not hereby disqualified from making judgments affecting the careers of their employees. What is required is honest reflection, an honest appraisal within the parameters of the collective agreement. That is more than an avoidance of complete dishonesty. It implies as well a genuine preparedness to be influenced and persuaded by the facts as they are revealed during the selection process – even though those facts may not buttress any preconceived notions".
>
> (pp. 73 – 74)

In the circumstances of the present case, it is my conclusion that the evidence does not disclose bias on the part of the panel in the process of identifying the shortlist criteria or in the weighting of that criteria. I also reject the Union's claim that there was "bias" in Mr. Turpin being subsequently added to the list (when it went from six to nine employees) as this was done on instructions from the Human Resources Department to ensure all employees were given an opportunity to be successful in the competition. Indeed, if bias had been operating at that juncture, it would have been engineered so that Mr. Turpin's name was included on the original list.

I also conclude that the use of the Scoring Rating Scale, the creation of both the written test and the interview questions as well as the process of shortlisting the candidates do not disclose any objectionable actions on the part of Mr. Ng, Mr. Choi or Ms. Knapton, who were the individuals involved in making those decisions. In my view, these steps were all done in good faith and the process which was undertaken was a very reasonable one.

I am also not prepared to draw negative conclusions from the way the City used "look fors" in the scoring, the fact that it employed a behavioural interview, or whether it used "individual" or consensus scoring. Those are very complex areas and there was insufficient evidence presented on which to determine whether those practices were appropriate.

Turning to the testing and interviews, there seems to be some inconsistencies with particular grades and it appears there may have been different marks given for similar content. However, that is to be expected to some degree in such a subjective and human assessment process. As one example, the grades given to Mr. Duifhuis and Mr. Hutchinson on question 3 of the written test seem somewhat uneven. A second example would be the scores related to the questions in the oral interview concerning plumbing and how the grading was determined. However, there is certainly not enough of that type of evidence to conclude this was fatal to the interview process. It should be noted that Mr. Duifhuis himself admitted in his testimony that he did not feel he performed very well in his interview.

I will add one minor caveat to the effect that the Employer claims in its submission that the written test is designed to deal with the more "technical aspects" of the job but that is not apparent as the test used in this competition was very subjective in nature (unlike with the test for the sub-foreman position in the painting department which was placed into evidence).

However, there remains one very serious concern and that is with respect to the impact of Mr. Lau on the overall scoring process. When one looks at the unweighted scores from each of the interview questions, it is apparent Mr. Lau's grades for Mr. Turpin were significantly out of line with those of the other panelists. This is not a situation of a hard marker/easy marker where one person just naturally ranks everyone higher or lower than other panelists. Mr. Lau's grades for Mr. Duifhuis were in the exact range of the others – he was at 31, Mr. Ng at 31, Mr. Choi at 34 and Ms. Knapton at 32. But the range for Mr. Turpin was Mr. Lau at 44, Mr. Ng at 39, Mr. Choi at 35 and Ms. Knapton at 34. If one looks at the initial grades (before the panelists' discussion) the gap is even more pronounced: Mr. Lau was at 51, Mr. Ng at 39, Mr. Choi at 31 and Ms.

Knapton at 29. In my view, this extreme variance gives rise to serious concerns about what occurred in the scoring process. I wish to emphasize that there is no basis on the evidence to conclude Mr. Lau intentionally went out to sabotage Mr. Duifhuis; rather, this was a subjective process in which predispositions or preconceptions, for example, a subconscious support of Mr. Turpin, apparently skewed the scoring results unfairly.

There is also the related matter of the changes in the scoring of the candidates. Mr. Lau's opinion seems to have had a profound impact on at least two of the other panelists. Moreover, these changes often came about after information was supplied by Mr. Lau which had not been discussed in the interview itself. While the candidates were not permitted by the City to refer to other material (e.g. resumes) during the interview, the panelists were able to talk about matters such as how complex the examples were and whether the candidate had accurately described certain events. (If those types of assessments about candidates were going to be considered and weighed, then in my view those matters should also have been raised with the candidates so that they were given an opportunity to respond.) Put another way, if other information about the candidates is going to be considered, and that is likely a desirable outcome, then it must be done objectively and transparently.

Therefore, to that extent, I conclude the interview process itself was unfair in these circumstances and that also constituted a "fatal flaw" in the competition.

With those conclusions having been drawn, the matter of remedy arises. The Union has requested that the job competition be voided and that Mr. Duifhuis retroactively be awarded the position of sub-foreman and be made whole.

In some circumstances, it might be appropriate to award the position to a grievor, for example, if there existed "a mass of evidence which places (the board) in a position to ascertain whether, in the final analysis, there was a violation": *University of British Columbia, supra,* at para. 22. However, that is not the situation here. This is not a case where conclusions such as those arrived at by Arbitrator Hope in *British Columbia (Workers Compensation Board), supra,* can be drawn:

> Having concluded that the employer was in breach of the agreement, we turn finally to the question of remedy. A question arises as to whether we should refer this matter back to the employer or determine the issue. We agree with the wealth of arbitral authority that an arbitrator is not equipped to perform the

> selection process, particularly where that process involves a competition in which the discretionary exercise of judgment is required. See Brown and Hartt Arbitration @ pp. 30-33. But here the board is not called upon to perform the selection process or to risk substituting its decision for that of the employer.
>
> Here there is no question that the grievor has the ability and qualifications necessary to perform the position. We are satisfied on the evidence that the employer, in both competitions, failed to meet the prima facie case that the grievor's lengthy and apparently satisfactory experience demonstrated that his abilities and qualifications were substantially equal to the successful junior applicants. Moreover, the evidence supports the finding that the grievor would have been selected if the employer's own criteria had been followed and if the grievor had been given credit for his actual experience in an equivalent position.
>
> This is not a case where a question arises as to whether the grievor has the abilities and qualifications to perform the work. Nor is it a case where the facts raise a concern as to the relative abilities and qualifications of the applicants. The objective implications with respect to the grievor's abilities and qualifications arising from his lengthy experience and the assessment of his performance in the position contained in his personnel file compel the conclusion that he succeeded in meeting the criteria established in the collective agreement.

Such a remedy might also be called for where there is a "sufficiency clause" in a collective agreement and the evidence demonstrates that the senior employee was qualified. However, in the present case, we are dealing with a competition clause and it certainly has not been established on the evidence that Mr. Turpin is not materially or discernably better than the Grievor or vice versa. In fact, there was little or no information presented concerning Mr. Turpin's skill and knowledge or the level of his work performance.

As well, there were other candidates involved in this job competition for the subforeman position and those employees may also have been affected by the shortcomings which have been identified in this Award.

I acknowledge that the passage of time makes a rerun of this job competition difficult: *University of British Columbia, supra; British Columbia (Workers' Compensation Board), supra.* However, it is not an impossibility and, in my opinion, fairness requires that it be done. Therefore, as awkward as it may be for the parties, I order that the job competition for the position of sub-foreman be rerun.

I also commend to the parties the following remarks of Arbitrator Chapman in *Atomic Energy of Canada Limited, supra*, at para. 103:

> It is of course very difficult to ever rerun a job competition in a way which will respect the interests of all concerned, including the incumbent who is essentially an innocent victim of the process in the same way as the grievors. If there is any other way to remedy the breach of the collective agreement I have found, which would take into account the interests of all affected and be acceptable to the employer and the union, then I would of course encourage the parties to explore it and would of course be available to assist in that regard.

If the parties can find another way to remedy this breach, that might be beneficial to all concerned.

AWARD:

For all of the above reasons, the grievance is upheld. The City of Burnaby is hereby directed to repost the position of Sub-Foreman – Trades in the Facilities Management Group and undertake a new job competition.

I will remain seized to deal with any issues that may arise with respect to the interpretation or implementation of the terms of this Award.

Dated this 27th day of July, 2015.

"David McPhillips"

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David C. McPhillips
Arbitrator