

disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard John Miller, was mutually selected by the Employer and the Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services ("BMS"). A hearing in the matter convened on October 26, 2007, at 9:30 a.m. at the BMS, 1380 Energy Lane, Suite 2, St. Paul, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties filed post hearing briefs which were received on November 20, 2007, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

ISSUE AS DETERMINED BY THE ARBITRATOR

Did the Employer violate the provisions of the Collective Bargaining Agreement when it selected Jef Yang over Mary C. Zanmiller to fill the EDSS Grant Coordinator vacancy?

STATEMENT OF THE FACTS

The facts are not in serious dispute. The Employer owns, maintains and manages approximately 5,900 residential housing

units and administers approximately 4,800 Housing Choice Voucher/ Section 8 public housing certificates in and for the City of Minneapolis. MPHA employs approximately 300 managerial, supervisory, administrative and maintenance employees. MPHA is a public employer within the meaning of the Minnesota Public Employment Labor Relations Act. (Minn. Stat. § 179A.03, Subd. 15 as amended).

The Employer has a collective bargaining relationship with the Union and has entered into a current Collective Bargaining Agreement for the period January 1, 2007 through June 30, 2009. (Joint Exhibit #1). The Contract governs the terms and conditions of employment for clerical, technical and professional employees. The Union represents approximately 100 clerical, technical and professional employees.

The Grievant, Mary C. Zanmiller, began her full-time employment with the Employer on May 3, 2004, and is employed in the Employer's Leasing and Occupancy Department as an Eligibility Technician. The Grievant is represented for purposes of collective bargaining by the Union.

Jef Yang began his full-time employment with the Employer on March 31, 2005, and is employed in the Employer's Resident Initiatives Department as its Economic Development Supportive Services ("EDSS") Grant Coordinator. Prior to his employment in

the Employer's Resident Initiatives Department, Mr. Yang was employed in the Employer's Leasing and Occupancy Department as an Eligibility Technician. Like the Grievant, Mr. Yang is also represented for purposes of collective bargaining by the Union.

On December 19, 2006, the Employer announced that it intended to fill a vacancy in its EDSS Grant Coordinator job classification (Joint Exhibit #9), and that it would accept applications for the position from internal qualified candidates (Joint Exhibit #8). The Announcement of Vacant Position lists the Required Knowledge, Skills and Abilities as follows:

1. Bachelor's degree in Human Services, Housing, Public or Business Administration or related field.
2. Ability to plan, organize, evaluate and coordinate the work required by the EDSS grant.
3. Previous experience in managing a budget for project or program.
4. Two years experience as a job counselor or related position in the employment and training setting or experience as a case manager in human services or employment services setting.
5. Experience in collaborating with, negotiating agreements with, and/or managing performance of other agencies and vendors.
6. Successful experience working one-on-one with individuals to assist them to achieve their goals and maximize their personal assets.
7. Demonstrated understanding of the specific needs and concerns of low-income people from diverse racial and cultural backgrounds.
8. Effective oral and written communication skills. Ability to write high quality reports and correspondence and to develop information materials for participants and project partners. Ability to plan and present workshops or information sessions to a diverse audience.

9. Proficiency with using a PC for word processing and spreadsheet applications.
10. Ability to manage contracts and monitor vendors to ensure completion.
11. Must be available flexible hours (including evenings and weekends, when necessary) for meetings with participants.
12. Must possess a valid driver's license and have access to an automobile.

(Joint Exhibit #8).

The Announcement of Vacant Position lists the Desirable Qualifications as:

1. Experience with public housing, Section 8, and other affordable housing programs and their operations.
2. Additional technical or professional training in related subjects such as counseling, budgeting, project management, grant management, HUD/related federal grant requirements.
3. Desired knowledge of HUD's grants implementation requirements.
4. Experience as a recipient of public assistance and resident of assisted housing.
5. Knowledge of/experience with Minnesota laws and regulations regarding welfare reform and MFIP-S.
6. Proficiency with PC database applications.
7. Advanced degree in Business or Public Administration, Housing, Human Services, or related field.

(Id.)

The Grievant and Mr. Yang applied for the position; no other internal or external applications were received. The vacant position is directly accountable to Evelyn LaRue, the Employer's Director of Resident Initiatives with a "dotted line" reporting relationship to Ms. Shannon Hartfiel, the Employer's Asset Operations Manager for its Heritage Commons facility.

Ms. LaRue and Ms. Hartfiel jointly interviewed both candidates on January 31, 2007, from prepared questions. The Grievant was the first candidate to be interviewed, followed immediately by Mr. Yang. The interviewers independently scored the candidates' responses for each question. Mr. Yang scored considerably higher than the Grievant. (Employer Exhibit #5). The candidates were also required to participate in typing, clerical and math tests. The Grievant scored higher on the typing and clerical tests, while Mr. Yang scored higher on the math test. (Employer Exhibit #1).

The Employer then selected Mr. Yang, the less senior of the two candidates, to fill the vacant EDSS Grant Coordinator job position. The Grievant was notified of that adverse decision by the Hiring Manager's Selection/Non-Select Form prepared by the interviewers on February 9, 2007. (Union Exhibit #14). The interviewers stated on the Hiring Manager's Selection/Non-Select Form the following as to suggestions for the Grievant's improvement:

From review of application packet and the interview, Ms. Zanmiller has limited grant writing experience yet she possesses excellent skills and abilities related to writing - analytical abilities, etc. Great candidate - looking for more recent experience in group interactions which is similar to working with resident councils.

(Id.)

The Union filed a grievance on March 15, 2007, contending that the Employer violated the provisions of the Collective Bargaining Agreement at Articles 7 (Non-Discrimination) and 16 (New Regular Jobs and Vacancies). (Joint Exhibit #2). The Union requested that the Employer's decision to promote Mr. Yang be rescinded and that Ms. Zanmiller be awarded the position. In the alternative, the Union requested that Ms. Zanmiller be compensated as if she held the EDSS Grant Coordinator position. (Id.)

A Step II grievance meeting was held between the Parties' representatives on March 30, 2007. (Union Exhibit #20). On April 12, 2007, Ms. LaRue denied the grievance. Her Step II response states in relevant part:

A full review of Mary Zanmiller's application was discussed during this meeting along with her educational background and her responses to our interview questions, While Mary has earned a Masters degree (which is a higher level of completed education than the selected candidate), the educational requirements for the posted position is a Bachelor's degree which both competing candidates have earned.

We selected the other candidate (Mr. Jef Yang, another internal applicant) based upon his demonstrated ability and experience working as a community liaison and with diverse groups and populations. Mr. Yang was able to articulate his knowledge regarding the work to be performed, his skills, and his abilities in a clear and concise manner, with far greater detail, and with far greater confidence than Ms. Zanmiller did. We were heavily influenced by these factors and concluded that Mr. Yang was the best suited candidate for the position.

We do not agree that the provisions of the Labor Agreement were violated when we selected Mr. Yang to fill the EDSS Grant Coordinator position and, specifically, while we can understand Ms. Zammiller's disappointment in not being selected for the position, we want to assure her that our selection decision was not in any way related to her age or to any other protected class status. For these reasons, the grievance and the requested remedy is denied.

(Joint Exhibit #3).

On April 26, 2007, the Union notified the Employer that it was advancing the grievance to Step III of the contractual grievance procedure. (Joint Exhibit #4). The grievance was denied by Thomas A. Streitz, MPHA Deputy Executive Director, on May 30, 2007. (Joint Exhibit #5). He stated *inter alia* that "[m]aking a selection decision between two quality candidates for promotion is never easy. It requires careful and good judgment." (Id., page 2, paragraph 4).

On May 31, 2007, the Union announced that it was advancing the grievance to arbitration which is Step IV under the contractual grievance procedure. (Joint Exhibit #6). The Arbitrator was then selected by the Parties. (Joint Exhibit #7).

UNION POSITION

The Grievant has equal if not superior qualifications than Mr. Yang, who was selected for the EDSS Grant Coordinator vacancy and, therefore, seniority should have been the deciding factor in filling this position pursuant to Section 16.01 of the Contract.

The Announcement of Vacant Position lists the Desirable Qualifications. The Grievant's resume emulates the desirable qualifications listed on the job announcement.

The Employer admits that the candidates had equal qualifications since the Grievant had a Master's degree while Mr. Yang had only a Bachelor's degree. In addition, both candidates had limited grant writing experience which confirms that the candidate's qualifications were equal. As such, the Grievant should have been awarded the EDSS Grant Coordinator position based on her greater seniority than Mr. Yang pursuant to Section 16.01 of the Contract.

The Union would not have considered bringing a grievance to arbitration if the Hiring Manager's Select/Non-Select Form had stated that the Grievant was not selected to fill the vacancy due to not having grant writing and group interaction experience. However, the Hiring Manager's Select/Non-Select Form states that the Grievant has limited grant writing experience and her group interaction experience is not recent. This is not true since the Grievant's resume proves that she has grant writing experience and qualifications, along with group interactions. In fact, since the Grievant trained Mr. Yang for his previous job confirms that she is a teacher and has great interaction skills to help another to succeed.

The Union can agree that the oral interview is helpful in making a determination but it should not be the chief determining factor. Candidate's qualifications are the chief determining factor in selection.

It is clear from the Employer's grievance responses that qualifications were not used as the chief determining factor in the selection for the EDSS Grant Coordinator position. They erroneously used the interview statements to determine qualifications of the candidates.

The Union requests that the grievance be sustained and the Employer be ordered to immediately honor the terms of Section 16.01 and offer the EDSS Grant Coordinator position to the Grievant.

EMPLOYER POSITION

There is not a scrap of evidence in the record to suggest that the Employer discriminated against the Grievant because of her age.

If the qualifications of two competing candidates for promotion are not equal, the observance of seniority in the selection process is not required under Section 16.01 of the Contract.

The Employer considered both candidates' education, training and experience. They also considered both candidates' test

scores and they considered both candidates' performance in their interviews. The use of interview results as one of the "factors" under Section 16.01 does not violate this relative ability selection provision. Moreover, if the Parties had meant to require selection decisions to be made solely on the basis of education, training, and experience, they would have said so. Instead, they required in Section 16.01 equality among "all the factors considered" before the use of seniority in selection process is observed.

Based upon the foregoing and the record evidence in these proceedings as a whole, the Union has failed to demonstrate that the Employer violated the provisions of the Collective Bargaining Agreement when it promoted Mr. Yang to the EDSS Grant Coordinator job classification. The grievance has no merit and it must be denied.

ANALYSIS OF THE EVIDENCE

The resolution of the instant grievance hinges on a determination as to whether the Employer violated the Collective Bargaining Agreement by failing to award the Grievant the promotional position of EDSS Grant Coordinator. The filling of vacancies is controlled by Contract language contained in Article 16, New Regular Jobs and Vacancies, Section 16.01, Posting, as follows:

All bargaining unit positions to be filled on a regular basis will be posted on the Employer's bulletin boards in all departments and locations for not less than seven (7) calendar days. The posting will indicate the number of jobs to be filled, the job title, classification and salary range, location and a final date after which bids will not be accepted. Qualifications for various positions will be the chief determining factor in selection. However, where all factors considered are equal between employees of the Employer, selection shall be on the basis of seniority.

Seniority is probably the most sacred right an employee gains under a collective bargaining agreement. It is utilized in invoking what is often considered a latent, if unexpressed, need of employees and it is often employed to demonstrate the value of concerted activities as opposed to standing alone against management. The continued evolution of seniority pits the employee struggling to secure more rights for more tenured employees and the employer attempting to avoid a burdensome seniority system that inhibits the extreme shuffling of employees in the workplace. In this regard, the Arbitrator must balance the interests of the Employer against those of the Bargaining Unit employees, and analyze the "costs" of seniority to both the Employer and the Union in light of the Contract language in Section 16.01.

There are two basic types of seniority provisions. The more rigid type requires the recognition of strict seniority -- that is, the employer must give preference to the employee with the

longest continuous service without regard to any other considerations. The principal thesis underlying this approach is that, as between a junior employee of superior qualities and a senior employee of lower qualities, the latter should override the needs and concerns of the employer's business in its efficient operation.

The more usual provision is a "modified seniority" clause that is written so as to serve the basic aims of seniority, while recognizing other factors, which basically involve the "fitness and ability" of the employee, in determining preference in employment. Such factors may include skill, ability, aptitude, competence, efficiency, training, physical fitness, judgment, experience, initiative, leadership, and the like.

The Contract language in Section 16.01 provides that "[q]ualifications for various positions will be the chief determining factor in selection. However, where all factors considered are equal between employees of the Employer, selection shall be on the basis of seniority." This Contract language falls under the modified seniority clause. Specifically, this language is classified as a "relative ability" clause which provides that senior employees shall be given preference if they possess qualifications equal to that of junior employees. As a result, qualifications of employees bidding for the job are

necessary and proper, and seniority becomes a determining factor only if the qualifications of the bidders are equal.

The Union's paramount argument is that since the Grievant, as well as Mr. Yang, met the "qualifications" stated in the Announcement of Vacant Position under the headings of Required Knowledge, Skills and Abilities and Desirable Qualifications, the Grievant, being more senior than Mr. Yang, should have been awarded the EDSS Grant Coordinator position. The Union's argument fails to recognize that the Contract language in Section 16.01 allows the Employer to consider "all factors" in the selection of a candidate for a vacant position and not simply those enumerated in the Announcement of Vacant Position under the headings of Required Knowledge, Skills and Abilities and Desirable Qualifications.

Arbitrators have frequently held that employers are entitled to observe many "factors" when selecting employees for promotion under a "relative ability" contract provision such as the one the Parties have agreed to in Section 16.01. In fact, in determining fitness and ability under such contract provisions, they confirm that a wide variety of "factors" are commonly and properly considered. The use of such factors as tests, experience ratings, the factually supported opinions of supervision, educational background, the personal characteristics of the

employee, to name a few, are all affirmed. Elkouri and Elkouri How Arbitration Works, Fourth Edition, 1985, BNA, pp. 617-618.

Arbitrators have also frequently held that management is entitled to use any method to determine qualifications so long as the method used is fair and non-discriminatory. Elkouri and Elkouri, pp. 613-614. Management's determination is subject to challenge by the Union on the basis that the evaluation process and/or the decision derived from the process itself was arbitrary, capricious, discriminatory, clearly wrong, made in bad faith or contrary to the Contract. Monstanto Research Corp., 39 LA 735 (1962); Trans World Airlines, Inc., 40 LA 697 (1963).

With regard to the use of interviews as a selection factor, an arbitrator correctly observed that interview results...

...may have a bearing on fitness and ability if they are fair and related to the job to be performed. Therefore, an employer may, under a "relative ability" clause, properly select a junior employee with a few months experience over a senior employee with several years of experience, on the basis of "superior" performance during an interview.

Kroger Co., 89 LA 1307 (1987).

While a candidate's education, training, and experience found in the candidate's resume is important in any selection process, the oral interview is also an important selection factor. The oral interview allows the interviewers to ask relevant questions about job-related qualifications that the

candidate might or might not possess that cannot be established by merely reviewing a candidate's resume regarding education, training or experience. That is why employers are allowed to interview candidates before making selection decisions.

Employers have adopted a number of strategies to overcome the potential drawbacks in interview selection procedures. Some of the strategies include selecting individuals for the interview team who are familiar with the jobs being filled, structuring the interviews in order that identical questions are asked of each applicant in precisely the same order, and evaluating the interviews as close to the conclusion of the actual interview as possible.

In the instant matter, the Employer utilized these strategies. The interview team, consisting of Ms. Hartfiel and Ms. LaRue, had many years of experience and familiarity with the EDSS Grant Coordinator position. In fact, the vacant position is directly accountable to Ms. LaRue with a "dotted line" reporting relationship to Ms. Hartfiel. Further, prior to the interviews, written questions with point values for the interviews questions were determined from the Oral Interview Form. (Employer Exhibit #3). Six interview factors under the Oral Interview Rating Form that are to be assessed by the interviewers include the candidate's ability to communicate (self-expression), self-

confidence, work relationships with other employees, ability to learn, work attitude, and overall qualifications. (Id.)

The interviews were structured so that identical questions were asked of the Grievant and Mr. Yang in precisely the same order. Finally, each candidate was evaluated immediately following his or her interview conclusion, with each interviewer independently scoring the specific candidate before the next candidate was interviewed.

The total score for the Grievant was 75 points from Ms. LaRue and 69 points from Ms. Hartfiel, compared to 93 points from Ms. LaRue and 95 points from Ms. Hartfiel for Mr. Yang. (Employer Exhibits #5, #7-#10). At the hearing, both interviewers testified that the Grievant's performance in the interview was not impressive. They testified that the Grievant was often "unfocused" in her answers to questions, often had to be drawn back to the subject matter at hand, and generally "unresponsive" to the structured interview questions. The interviewers, on the other hand, were quite impressed with Mr. Yang. They testified that Mr. Yang distinguished himself in the interview, having diligently prepared for it in advance by researching the funding sources and requirements for the position, and was able to articulate his knowledge regarding the work to be performed, his skills, and his abilities in a

clear and concise manner, with far greater detail, and with far greater confidence in the interview than was observed by the Grievant.

Clearly, and rightfully so, the Employer relied upon the oral interview in its decision to appoint the EDSS Grant Coordinator position to Mr. Yang, rather than the Grievant. In fact, the Grievant recognized the importance of the interview in the hiring process when, at the Step III grievance meeting, she stated to MPHA Deputy Executive Director Streit, "If we didn't have an interview, there would be no question as to who was more qualified." (Joint Exhibit #5, p. 2).

The Grievant alleged at the hearing that she was denied the opportunity to fully discuss her past work experience in the interview, and that her interview was significantly shorter than Mr. Yang's interview. The Grievant's assertion that her interview was shorter than Mr. Yang was refuted by the testimony of both Ms. LaRue and Ms. Hartfiel. It is clear from their testimony that the interviews were approximately the same duration in length, and the Grievant was given every opportunity to answer the questions and discuss her past and present work experience during her interview. The Grievant was never told by the interviewers that she needed to hurry her answers or discussion even after Ms. Hartfiel answered one or more cell

phone calls about her husband's recent death. In fact, Ms. Hartfiel forewarned the Grievant before her interview even started that she was expecting one or more phones calls. Clearly, the Grievant was given all of the time necessary to answer the questions and engage in discussion about her past and present work experience.

There was absolutely no showing by the Union that the Employer's interview process was other than fair and impartial. The Employer's interview process was careful, thoughtful, objective, and fair. The use of interview results as one of the "factors" in the selection decision does not violate the relative ability selection provision contained in Section 16.01 of the Contract. Mr. Yang's performance in the interview process reveals compelling job-related qualifications that were not possessed or revealed by the Grievant in her interview. Consequently, it would be unreasonable to conclude that the candidates have "equal" qualifications and the position should have been awarded to the Grievant based on her greater seniority.

In this case, the Employer considered a number of "factors" required under Section 16.01 before making its decision to award the EDSS Grant Coordinator position to Mr. Yang. The Employer considered both candidates' education, training and experience (including grant writing and group interaction), along with the

candidates' test scores and interview scores. If the Parties had meant to require selection decisions to be made solely on the basis of education, training and experience, they should have stated this criteria in the Contract. Instead, the Contract language in Section 16.01 is clear and unambiguous by requiring equality among "all the factors considered" before the use of seniority in the selection process is observed.

Clearly, both the Grievant and Mr. Yang were quality candidates for the promotional vacancy. While Mr. Yang was able to demonstrate his qualifications more clearly and convincingly than the Grievant in the interview phase of the Employer's selection process, and was the best candidate for the position by virtue of the interview process, is not a condemnation of the Grievant. To the contrary, the Grievant is a valued member of the staff, and her denial of the EDSS Grant Coordinator position is not an expression of any dissatisfaction with her current job performance.

Article 7, Non-Discrimination, of the Contract prohibits unlawful discrimination in employment on the basis of an employee's age. The Union argues that because the Grievant was asked to describe her "more recent" experience in the interview that the Employer declined to promote her because of her age. In order for an age discrimination claim to be sustained, the Union

must prove, with clear and convincing evidence, that the Employer had a proscribed motive in avoiding the promotion of an age-protected candidate. There is not a scintilla of evidence in the record to suggest that the Employer discriminated against the Grievant because of her age by not awarding the EDSS Grant Coordinator position to her. No such evidence exists and, therefore, the allegation must be dismissed.

AWARD

Based upon the foregoing and the entire record, the grievance is hereby denied.

Richard John Miller

Dated November 30, 2007, at Maple Grove, Minnesota.