

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**Horizon Milling LLC, A Cargill Foods  
Company**

**Employer,**

**and**

**Bakery, Confectionery, Tobacco Workers  
And Grain Millers International Union**

**Union.**

**OPINION AND AWARD  
(Contract Interpretation/Job Bid)  
FMCS Case No. 100325-55125-3**

**September 7, 2010**

**A. Ray McCoy  
Arbitrator**

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**Appearances**

For the Employer

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For the Union

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## Jurisdiction

The arbitrator has jurisdiction to resolve this matter pursuant to the Horizon Milling LLC, A Cargill Foods Company and Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTWGM) Local 22, Effective April 1, 2010 to March 31, 2013.

(Hereinafter “Agreement” or “Jt. Ex. 1”) Article VII, Grievance Procedure, Section 7.4 states:

“A decision of the arbitrator will be final and binding upon the Company and the Union. The arbitrator will have no power to add to, subtract from, or modify any of the terms of this Agreement or any agreement made supplementary hereto, nor to establish or change any wage rates.” (Agreement at p. 5)

The Union filed the grievance on March 8, 2010. The Parties processed the grievance through all relevant steps outlined in the Agreement and notified the arbitrator of his selection by letter dated May 7, 2010. The Parties selected July 13, 2010 for the hearing of this matter. The hearing took place on that date at the Americinn located at 38675 14<sup>th</sup> Avenue, North Branch, Minnesota 55066. The Parties agreed that the matter was properly before the arbitrator. The Parties had a full and fair opportunity to present their cases including the introduction of documents and the examination of witnesses.<sup>1</sup> After presentation of their respective cases, the Parties elected to submit letter briefs in lieu of closing arguments. The Parties agreed that briefs would be exchanged via regular mail on July 30, 2010.

The Union submitted its letter brief by regular mail postmarked July 19, 2010. The Employer submitted its letter brief by regular mail postmarked July 30, 2010 as agreed. The Union’s letter brief summarized its case as presented during the hearing of this matter. As a result, the arbitrator is confident that the Employer did not gain any advantage assuming receipt of the Union’s brief in advance of the agreed upon date for the exchange.

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<sup>1</sup> The Union did not call any witnesses. Mr. Ockenfels, the Union Business Agent presented the Union’s case in his opening statement. The Union introduced eight exhibits during its statement of the Union’s position. Mr. Randy Drevecky, shop steward, Ms. Pam Griffith, Grievant, Mr. Bruce Peglow, BCTGM, Local 22 vice president and Mr. Ron Mohrland, BCTGM, Local 22 president attended but did not participate in the hearing. The Employer called two witnesses. They were Mr. Michael Ginal, Facility Manager and Mr. Gary Olson, Quality Manager. Also in attendance on behalf of the Employer were Ms. Jennifer O’Hara, paralegal and Mr. Alvin Johnson, summer associate. The Parties also introduced four joint exhibits.

### **Issue**

The Union described the issue as one requiring the interpretation of Article VIII, Section 8.2 which states “If ability and qualifications are sufficient and equal among competing employees, seniority shall prevail.” Specifically, the Union asked the arbitrator to determine whether the words “sufficient and equal” should be interpreted to mean “sufficiently equal.” The Employer said the issue to be decided is whether it violated the collective bargaining agreement when it awarded Wayne Sandbakken the integrated pest manager/safety coordinator position.

### **Relevant Contractual Provisions**

#### **ARTICLE VIII. SENIORITY**

Section 8.2 In all cases of promotions, transfers, reductions in force, and recalls to work, the company will give full consideration to ability and qualifications including but not limited to, physical fitness, attitude, safety and job performance, experience, dependability including absenteeism and tardiness record, job knowledge and skills. If ability and qualifications are sufficient and equal among competing employees, seniority shall prevail. Seniority will be recognized on a plant-wide basis.

### **Background**

Horizon Milling LLC is a joint venture between Cargill and Cenex Harvest States. (Hereinafter referred to as “Employer” or “Horizon Milling”) Horizon Milling is a flour milling operation that produces baking mixes for markets in the United States and Canada. Horizon Milling is located in Rush City, Minnesota. The bargaining unit has twenty-two members who are responsible for production and maintenance at the facility. The bargaining unit is represented by the BCTGM Local 22. Horizon Milling created a new position responsible for pest control and safety at the Rush City facility. The Employer decided to name the position the integrated

pest manager/safety coordinator. The Employer posted the position in February 2010. Two bargaining unit members applied for the position, Ms. Pam Griffith and Mr. Wayne Sandbakken. Ms. Griffith has more seniority than Mr. Sandbakken. The Employer used a newly created rating form to evaluate the two applicants. The rating form used a five point scale with “1” being the lowest and defined as “rarely demonstrates expectation” and “5” being the highest possible score meaning the applicant “consistently exceeds expectation.” The applicants were rated on criteria required by the Parties’ Agreement. The Agreement requires the Employer, in all cases of promotions or transfers to give full consideration to ability and qualifications including, but not limited to, physical fitness, attitude, safety, job performance, experience, dependability including absenteeism and tardiness record, job knowledge, and skills. The Employer added three additional criteria. They were computer skills, strong process owner and multi-task capabilities. The three additional criteria were not included on the posted position description. Both applicants were independently evaluated and assigned ratings on each of the above criteria by two managers, Mr. Ginal, the facility manager and Mr. Olson, the manager to whom the new integrated pest manager/safety coordinator would report.

One manager gave Ms. Griffith a score of 30 and Mr. Sandbakken a score of 32. The other manager gave Ms. Griffith a score of 36 and Mr. Sandbakken a score of 41. The managers then met and agreed that Mr. Sandbakken was more qualified than Ms. Griffith and awarded him the job as the new integrated pest manager/safety coordinator. The Union filed a grievance on behalf of Ms. Griffith asking that the Employer’s decision be reversed and that Ms. Griffith be awarded the position.

## **Positions of the Parties**

### Union's Position

1. Ms. Griffith should have been awarded the integrated pest manager/safety coordinator position based on the last sentences of Section 8.2 of the collective bargaining agreement which we understand means seniority prevails when candidates are sufficiently equal to the tasks.
2. The Employer has always awarded the position to the most senior employee.
3. Because the posting for the new position stated that persons applying for the integrated pest manager/safety coordinator position would be required to “learn and perform” the duties of the newly created position and Ms. Griffith was capable of learning and performing the duties and was more senior than Mr. Sandbakken, she should have been awarded the position.
4. The rating system used by the Employer did not fully consider candidate Griffith's performance reviews. The Employer used a scoring grid developed this year to evaluate the candidates and gave little consideration to the semi-annual performance reviews.
5. The Employer selected a candidate who has three documented warnings for poor attendance in December 2007, September 2008 and March 2010.
6. The physical fitness score provided to candidate Sandbakken should be discounted because the posting does not include a requirement that the successful candidate be able to lift a certain number of pounds.
7. The scores of the two candidates are sufficiently equal and therefore the more senior applicant, Ms. Griffith, should have been awarded the position.
8. Ms. Griffith is at least sufficient and equal to Mr. Sandbakken when the semi-annual performance reviews for each are taken into full consideration as required by Article VIII, Section 8.2.
9. The Union request the arbitrator award the position of integrated pest manager/safety coordinator to Ms. Griffith.

## Employer's Position

1. This is a question of contract interpretation. The Employer selected the most qualified candidate after taking into consideration the ability/qualifications criteria listed in Article VIII, Section 8.2 of the collective bargaining agreement.
2. The Employer adhered to the plain language of the Agreement. The phrase "sufficient and equal" does not mean "sufficiently equal."
3. Two supervisors independently evaluated the candidates for the new integrated pest manager/safety position and found them both to be sufficient but not equal. Since they were not equally qualified it was not necessary to consider which of the two candidates had greater seniority.
4. Seniority is used as a tie breaker when candidates are equally qualified for the position.
5. The Employer complied with the relevant language and therefore did not violate the Agreement.
6. The clear and unambiguous language of the Agreement gives the Employer the right to select an employee with greater abilities and qualifications unless that selection is arbitrary, capricious, discriminatory, or in bad faith. The arbitrator, therefore, should review the Employer's decision to hire with an eye toward determining whether that decision was arbitrary, capricious, discriminatory, or in bad faith.
7. In order for the arbitrator to reverse the Employer's decision, he must find that the decision was so far removed from the normal range of business judgments that a reasonable person in comparable circumstances would not reach the same conclusion.
8. The Union bears the burden of proving that the Employer's evaluation of abilities was clearly wrong and of persuading the arbitrator that the Employer had no justifiable basis for reaching the conclusion that it did. The clause at issue provides the Employer with broad discretion to determine which employee possesses greater abilities and qualifications to perform the job.
9. The Employer was within its rights to select criteria for the grid to decide which

candidate had more abilities and qualifications for the position.

10. The Employer has the right to identify criteria beyond the ones listed in the Agreement that it felt were critical for the success of the person appointed to the new position. Those three criteria were computer skills, being a strong process owner and having multi-task capabilities.
11. Adding these three criteria was properly within management's discretion and the three criteria were clearly job related.
12. The Employer had a justifiable basis for awarding the position to Mr. Sandbakken.
13. Mr. Sandbakken received a higher rating for physical fitness and the new position does impose physically demanding tasks upon the person holding the position. Mr. Sandbakken was rated higher on attitude. Here attitude was measured by the extent to which each candidate showed loyalty to the Employer under difficult circumstances.
14. Mr. Sandbakken agreed to continue working at the Employer's other locations during a shutdown of the Rush City facility while Ms. Griffith chose to wait for the facility to reopen.
15. Mr. Sandbakken took the initiative to elevate the Employer's behavioral safety training program to a new level for the Rush City facility and received a significantly higher rating in part because of that prior work on safety issues.
16. Mr. Sandbakken's job prior to being awarded this new position was more complex than the one performed by Ms. Griffith. The performance reviews each received reflects as much.
17. Mr. Sandbakken earned a higher rating in the experience category because he had significant computer skills that were a key component of the new position. Ms. Griffith does not possess strong computer skills and was advised that securing computer skills training might help her compete for promotions in the future.
18. Mr. Sandbakken was also rated higher in the category of "strong process owner." Here the Employer compared Mr. Sandbakken's involvement in the behavioral safety training program to that of Ms. Griffith. Mr. Sandbakken demonstrated his ability to shift between different roles whereas when faced with similar demands, Ms. Griffith became frustrated.

19. The ratings reflect the fact that Mr. Sandbakken was far more qualified than Ms. Griffith.
20. The grievance should be denied.

## **OPINION AND AWARD**

### Sufficient and Equal vs. Sufficiently Equal

As stated above, the Union seeks an interpretation of the phrase “sufficient and equal” found in Article VIII, Section 8.2 of the collective bargaining agreement. The Union argued that the phrase should be interpreted to mean that when the ratings of applicants are “sufficiently equal” seniority must be applied in order to determine which applicant is entitled to the position. The Union did not offer any evidence to support its position. The Union’s only argument on this point was that seniority had always been used when filling positions in the past. In short, the Union argued that the Parties’ past practice has been to recognize seniority as the determining factor when an opportunity arose such as the new position in this case. That argument does not assist with the interpretation of the phrase “sufficient and equal.” Also, the Employer is free to break with past practice and pursue another course more strictly in keeping with contractual language. The Employer made clear that it was in the process of moving towards hiring practices that promised to yield the most qualified applicant as opposed to the most senior.

The interpretation the Union seeks cannot be justified given the language and context. The phrase “sufficient and equal” is designed to reward the employee/applicant who has served the Employer for the greater length of time. However, it only comes into play when the skills and abilities of the applicants are equal. It is designed to be the determining factor when two applicants for a position are so closely matched that one can find no other genuine distinguishing factor upon which to base the hiring decision. The interpretation urged by the Union begs the question why the Parties did not choose the phrase “sufficiently equal” if that is what they meant. “Sufficiently equal” suggests there is a difference between the applicants in terms of skills and abilities. The Union’s interpretation could require the Employer to actually ignore what might be important significant differences in the skills and abilities of the applicants in favor of seniority. The Parties instead agreed upon the phrase “sufficient *and* equal.” By connecting the two words

with “and” the Parties agreed to a phrase that requires two conditions be met before seniority must be applied to determine the outcome of the hiring process. The Employer must first determine that the applicants are “sufficient” which generally means the applicants meet the minimum requirements of the job or are sufficiently skilled to be trained to do the job in question. If that condition is met, then the Employer must compare the applicants’ skills and abilities. If there are only insignificant differences between their skills and abilities then the two conditions are met and seniority must be used to make the selection. “If ability and qualifications are sufficient and equal among competing employees, seniority shall prevail.” The word “sufficient” does not modify the word “equal” as the Union insists. To interpret this contractual language one need only give the words their plain and ordinary meaning. The Parties agreed upon the phrase “sufficient and equal” and the leap from those words to the phrase “sufficiently equal” requires acrobatics beyond the scope of the arbitrator’s authority.

### The Selection Process

The question remains whether the Employer violated the Agreement by awarding the integrated pest manager/safety coordinator position to Mr. Sandbakken. The Agreement requires the Employer to give full consideration to each applicant’s skills and abilities. More specifically, it requires the Employer to consider each applicant’s physical fitness, attitude, safety and job performance, experience, dependability including absenteeism and tardiness record, job knowledge and skills. (Agreement at p. 6) As the Employer urged, the arbitrator will review the process with an eye toward determining whether the decision was arbitrary, capricious, and discriminatory or in bad faith. The posted position description read as follows:

“Persons applying for this job posting will be required to learn and perform the following duties. Qualified person will be required to at times work weekends and overtime as needed. Internal and external training with travel required.

**Attend Cargill Food Safety Training**  
**Owner of IPM Documentation and Scheduling**  
**Owner of MSS Sheet Completion Tracking**  
**Issue all Sterile Zone Permits**  
**Responsible for Coordinating Pest Control Activities with Plunkett’s**

**Attend Cargill Safety and Loss Control Training**  
**Attend OSHA 10 Hour Safety Training**  
**Attend RCI Super User Training**  
**Responsible for RCI Related Documentation**  
**Participate in Monthly Safety Committee Meetings**  
**Participate in Monthly Plant Safety Inspections**  
**Issue all Safe Work Permits At Location**  
**Lead all Contractor Safety Orientations**  
**Complete Contractor PJHA Documentation**  
**Lead Minimum (2) Monthly Safety Meetings Per Year**  
**Attend Facilitator Training at BST Headquarters**  
**Attend Annual Horizon Users Conference**  
**Active Observer at the Facility” (Jt. Ex. 3)**

The position description does not spell out what qualifications, if any, are required to do the job. There is simply no way for the applicants to know what skills the Employer finds essential to the successful performance of the duties of this position by reading the position description. The only clear and plain message of the posting is that whoever is selected will be required to learn and perform the listed tasks. There are no minimum or preferred requirements included in the posting. However, the Employer’s rating form demonstrates that it did have requirements in mind. The rating form developed by the Employer required raters to evaluate the candidates in the following areas:

- Physical fitness
- Attitude
- Safety
- Job Performance
- Experience
- Dependability (Attendance)
- Job Knowledge
- Skills/Computers (Data Base/Spreadsheets)
- Strong Process Owner
- Multi Task Capabilities

The first seven criteria on the rating form are drawn from the Agreement. The last three criteria were added by the developers of the rating form. It is not clear whether the form was developed after the deadline for bargaining unit members to express an interest in the position or prior to the posting. One would assume that had the rating form been prepared in advance of the posting then the last three criteria would have found their way into the official job posting. Doing so would have alerted potential applicants to the essential requirements or at least given them some means of determining their chances of being selected. For example, the Employer argued in its post-hearing brief, that computer skills are of “critical importance” to the new position and that the duties of the position require “extensive computer knowledge.” (Er. Brief at p. 7) Failure to include a clear and unambiguous statement of this requirement in the position description as posted represents a major flaw in this hiring process. The Union implied that Ms. Griffith, the Grievant, relied upon the language of the posting that said the person hired would be required to *learn* the duties of the position.

The Union pointed to the results of the ratings of the two applicants to support its position that the process was not fair or accurate in terms of assessing the skills and abilities of the two applicants. Specifically, the Union pointed to the rating results for both applicants on the physical fitness and dependability/attendance criteria. The Union argued that since the position description did not inform applicants of the requirement that they be able to lift a certain number of pounds, it did not make sense to award more points to the male applicant. In short, the Union, without labeling it as such, claimed that the rating with regard to physical fitness in this instance represented gender bias in as far as the Employer awarded more points to the male on the physical fitness criteria based on no discernable evidence of a difference between the applicants. Using criteria such as physical fitness without connecting it to an essential job function opens the door to claims of discrimination based on gender, age, disability and possibly other protected categories. The Parties’ Agreement includes the Employer’s promise of nondiscrimination. See Article VI, Section 6.1. The Employer obligations under the nondiscrimination article of the Agreement extend to this hiring process. The Employer, therefore, is required to make sure that its hiring procedures do not intentionally or unintentionally discriminate against bargaining unit members.

The arbitrator agrees that given the fact that the applicants were not informed of the relationship between the essential functions of the job and physical fitness, it doesn't make sense to provide either candidate with an advantage in this area. Both applicants are and have been physically fit enough to carry out the duties of their respective positions over the years without complaint from the Employer.

The arbitrator is mindful that the Parties agreed to language that commits the Employer to consider physical fitness when seeking to fill a promotion, transfer bargaining unit members from one position to another or even when making decisions regarding who should be recalled to work. Here, the Employer did not have a test designed to provide concrete information about the physical fitness of each applicant as it relates to the duties of the integrated pest manager/safety coordinator position. The obligation to give full consideration to physical fitness imposes a burden on the Employer to first explain what kind of physical demands the new position calls for and then to have a method of assessing the fitness of each applicant in order to make an appropriate comparison. The Employer failed to come close to the obligations imposed upon it in this regard. Therefore, to award the male more points given the facts presented here can only be said to be arbitrary.

The evidence also revealed a discrepancy with respect to the manner in which the raters evaluated the applicants on dependability/attendance. The Agreement calls for the Employer to give full consideration to dependability including absenteeism and tardiness. The first rater awarded Ms. Griffith a "4" in the category of dependability/attendance and awarded Mr. Sandbakken, the successful applicant a "3" in the same category. The second rater awarded Ms. Griffith a "3" for dependability and awarded Mr. Sandbakken a "2" in that category. Testimony revealed that the Employer had given Mr. Sandbakken warnings regarding tardiness in 2007 and 2008. On March 15, 2010, after the posting for the new position was taken down and the review process underway, the Employer issued Mr. Sandbakken a written warning for tardiness on six occasions between December 2009 and March 2010. In addition, the written disciplinary warning stated that Mr. Sandbakken had simply not shown up for work on February 28, 2010, just days after the posting for the new position came down. (Union Ex. 8)

Both raters were obviously aware of the disciplinary action yet one rater gave Mr.

Sandbakken a “3” on dependability/attendance. As one of the raters testified a “3” on the rating scale means that the applicant “consistently demonstrates expectation” in that category. To award Mr. Sandbakken a “3” given these facts is simply contrary to the Employer’s official record of discipline for that applicant and entirely unreasonable.

In other words, the raters could not have given full consideration to the attendance records of each applicant. If they did in fact give careful consideration to the attendance and disciplinary records of the two applicants, then the arbitrator would have to conclude that at least one of the two raters intentionally gave Mr. Sandbakken a higher score on dependability/attendance than his record warranted. The raters testified that after conducting their independent evaluations they met to discuss their ratings and to select the best applicant. However, neither provided testimony that explained this glaring discrepancy. Absenteeism and tardiness are obviously of great importance to the Employer as evidenced by Article IV of the Agreement which reflects a promise extracted from the Union to “actively combat absenteeism and any other practice which restricts efficient operation of the Plant.”

Given the availability of official documents such as performance appraisals and disciplinary records, the Employer’s rating of the successful applicant with regard to physical fitness and dependability/attendance can only be described as arbitrary, capricious and unreasonable. The Agreement requires the Employer to give “full consideration” to ability and qualifications. The phrase “full consideration” means nothing if it does not require the Employer to at least accurately reflect the performance evaluations of the applicants in making the hiring decision. Full consideration under these circumstances required careful scrutiny of the performance evaluations of each applicant.

A summary review of each applicant’s most recent performance review gives the arbitrator more than ample grounds to hold that the Employer did not give full consideration to the abilities and qualifications of each applicant. The Employer uses a rating system to conduct performance reviews that includes most of the same categories used in rating the applicants for the newly created integrative pest manager/safety coordinator position. The Union introduced Ms. Griffith’s most recent performance appraisal into evidence at the hearing. The arbitrator requested Mr. Sandbakken’s performance appraisal since it was unavailable at the time of the

hearing. The Employer submitted Mr. Sandbakken's most recent performance review with its post-hearing brief. The date of both performance reviews was March 9, 2009.

Ms. Griffith's supervisor awarded her a mid-year point total on all criteria of 102 out of a possible 108. Mr. Sandbakken's supervisor gave him 74 points out of a possible 108. Ironically, Mr. Sandbakken's earned 4 out of 8 possible points in the area of safety practices while receiving 8 out of 8 for his involvement in safety programs. On its face, it appears that while Mr. Sandbakken was involved in the Employer's safety program his actual work habits or safety practices were in need of improvement.

The Employer said in its post-hearing brief: "Because safety is a core component of the new job, which requires that the individual manage the safety program at the Rush City mill, Mr. Sandbakken's *superior* qualifications and rating in this category carries significant weight." (Emphasis added) (Er. Brief at p. 6) Mr. Sandbakken also earned 6 out of 8 possible points in the food safety category. Ms. Griffith, on the other hand earned 8 out of 8 in both safety practices and involvement in the Employer's safety program. In addition, Ms. Griffith earned 8 out of 8 in the area of food safety. If safety is indeed a core component of the new position, the raters missed an opportunity to select the applicant with the best safety record.

Both applicants were supervised and their performance evaluations completed by the same manager, Mr. Waters. Mr. Waters played no role in the rating or selection of the new integrated pest manager/safety coordinator. The raters never mentioned the use of performance reviews or any discussions with Mr. Waters prior to making their decision. Mr. Ginal testified that he and Mr. Olson evaluated the applicants "as we knew them." In other words, they relied upon their impressions of each applicant as opposed to the performance records.

Mr. Sandbakken, the applicant chosen to be the first integrated pest manager/safety coordinator, earned 6 out of a total of 12 possible points in the category of job knowledge according to his most recent performance appraisal. Ms. Griffith, on the other hand, received 12 out of 12 possible points in the category of job knowledge on her most recent performance appraisal. Nevertheless, the raters concluded that both applicants were equally matched in the area of job knowledge. How they arrived at this conclusion is simply baffling. One of the raters testified that both applicants were "pretty good in their respective jobs." Either the raters

determined that the official employment records of the applicants, namely their performance reviews and disciplinary records should be ignored or given little if any weight.

Either way, the Employer clearly failed to fully consider the skills and abilities of the two applicants. In order to evaluate the two applicants and to demonstrate that the process used in that evaluation satisfied the contractual obligation to fully consider the relevant criteria, the Employer should have used the performance appraisals. According to the testimony of the two raters, they instead relied on their own personal views which obviously were contradicted in significant ways by the applicants' performance appraisals.

The Employer's response to the numerous flaws in the rating process is simply inadequate. First, the Employer argues that Mr. Sandbakken held a more complex job than Ms. Griffith. While that seems true, it doesn't explain why the Employer is so determined to promote an employee who was clearly having mediocre success in fulfilling his current job requirements to perform an even more complex job. Secondly, the Employer argues that the three criteria added to the new rating form, computer skills, strong process owner and multi-task capabilities were of far greater importance than even job knowledge. (Er. Brief at p. 7)

In other words, Mr. Sandbakken's mediocre evaluation, particularly regarding his rating on the job knowledge criteria did not harm his chances during the rating for the new position because he possessed superior skills on the three critical criteria added by the Employer. However, a careful examination of both applicants in this area calls into question the Employer's conclusion on this point. For example, both raters awarded Ms. Griffith a score of "3" on the criteria of computer skills. A "3" means that the applicant "consistently demonstrates expectation." Ms. Griffith therefore has more than the necessary computer skills to do the job. The Employer made this determination, as far as the record shows, without administering a test to either applicant or making any real determination as to the true scope of each applicant's computer skills. Given that the position description does not mention this critical need for computer skills, the arbitrator can find no basis for distinguishing between the two applicants in this area either. According to the Employer, Mr. Sandbakken has prior work experience at 3M and as the owner of a computer software firm. The Employer also said that Mr. Sandbakken was always using the computer and refining his computer skills and knowledge of the Cargill

computer system.

None of this background tells us much about Mr. Sandbakken's computer skills in relationship to the duties of the position or in comparison to Ms. Griffith's computer skills as they relate to the duties of the new position. The reason is because the Employer did not describe computer skills as an essential function of the integrated pest manager/safety coordinator position in the first place. When the record is examined as a whole, the successful applicant, Mr. Sandbakken, did not have the better safety record and was not nearly as dependable as Ms. Griffith. While, Mr. Sandbakken's computer skills are apparently good so are Ms. Griffith's. But the relative strengths and weaknesses of the computer skills of the applicants cannot accurately be assessed since computer skills as an essential function of the job are not spelled out in the position description.

The Employer said that Mr. Sandbakken was a strong process owner. The arbitrator understands the term "process owner" to mean the extent to which an applicant demonstrated an ability to assume responsibility for a task and follow through on it. The Employer argued that Mr. Sandbakken received a higher score only because of his leadership in the behavioral safety training program. Mr. Sandbakken is said to have taken the program to new heights. Ms. Griffith, on the other hand, was considered a lesser "process owner" because while she too led the behavioral safety training program at one point, she decided to quit her leadership role. According to the Employer, it was difficult and frustrating for her.

What stands out here is that the two raters found Mr. Sandbakken's attention to safety training and leadership so compelling yet his own daily supervisor found his attention to safety practices so limited as to award him only 50% of the possible points on his performance review in that category. To illustrate just how unreliable the raters' conclusions were regarding Mr. Sandbakken's "process owner" skills, we need only turn to his official performance review. That review shows that Mr. Waters refused to give any points to Mr. Sandbakken for setting and following through on personal objectives in his job as assistant miller. Mr. Sandbakken was assigned a score of "0" in the personal objectives category by his supervisor. Mr. Ginal, the facilities manager, signed off on Ms. Griffith's performance review. Therefore, he had the opportunity to read and understand Mr. Sandbakken's lack of ability or willingness to own

personal goals in his role as assistant miller. Mr. Waters awarded Ms. Griffith a score of “12” out of a possible “12 points for her ability to set and accomplish personal objectives. Once again, the unreliability of personal observations from raters who did not supervise the applicants on a daily basis but only observed them as they moved through the facility in the performance of their duties makes clear that the Employer failed to give full consideration to the relevant criteria as called for in the Agreement.

What is at stake here is a bargained for advantage for more senior members of the bargaining unit when a promotional opportunity becomes available. To allow the Employer to blind-side both the applicant and the Union with requirements not included in the position description puts that bargained for advantage at risk of being undermined. To use a rating process that is based on the personal observations of the raters as opposed to official documentation of performance or assessment directly related to the essential functions of the newly created position deprived Ms. Griffith of a real opportunity to demonstrate that her skills and abilities were both sufficient and equal.

In light of the foregoing, the arbitrator finds that the Employer failed to fully and accurately consider the skills and qualifications of Ms. Griffith and arbitrarily and unreasonably inflated the scores of Mr. Sandbakken. The Agreement imposes a burden on the Employer to create a hiring process free of unfairness, arbitrariness and bias. The Employer failed to meet that burden. As a result, its decision to hire Mr. Sandbakken must be overturned as contrary to the facts and the Agreement. If we eliminate the points unfairly awarded to Mr. Sandbakken in the areas of physical fitness, dependability/attendance, safety, job performance, job knowledge, computer skills, strong process owner and attitude, there can be no doubt that Ms. Griffith’s employment record shows her to be the superior applicant. Even assuming the two applicants are equal once the unfair advantage provided to Mr. Sandbakken is removed Ms. Griffith, by virtue of Article VIII, Section 8.2 of the Agreement, is still entitled to the position. The arbitrator acknowledges that the Employer has “substantial leeway” in identifying appropriate job requirements and evaluating candidates. The standard applied here does not undermine management rights but is applied so as to determine whether management exercised its rights in a manner consistent with the Agreement.

## **Award**

The Grievance is GRANTED. The Employer is required to reverse its decision with regard to Mr. Sandbakken and install Ms. Griffith as the Integrated Pest Manager/Safety Coordinator. Furthermore, the Employer is required to make Ms. Griffith whole by paying her the difference between what she earned in her current position and what she would have earned had she been properly installed in the new position. The relevant period in terms of calculating the back pay award is from the date the new position was awarded to Mr. Sandbakken through the date of this award. The arbitrator retains jurisdiction to clarify any confusion created by this award and/or to resolve any disputes with respect to the implementation of the award.

Respectfully submitted

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A. Ray McCoy  
Arbitrator

Dated: September 7, 2010