

**IN THE MATTER OF ARBITRATION BETWEEN**

AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL  
EMPLOYEES COUNCIL 65 AFL-CIO  
And its affiliated Local 1450

and

CITY OF MOORHEAD, MINNESOTA  
Employer/City

OPINION AND AWARD

Contract Interpretation  
Promotion Grievance  
David DeLong, Grievant  
BMS Case Number 11 PA 0712

Award Dated: February 23, 2012

Date and Place of Hearing:

November 10, 2011 Continuing to  
December 19, 2011  
Offices of the Employer  
Moorhead, Minnesota

Date of Receipt of Post Hearing Briefs:

January 27, 2012

**APPEARANCES**

For the Union:       Teresa L. Joppa, Staff Attorney  
AFSCME Council 65  
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Moorhead, MN 56560

For the Employer:   Brandon M. Fitzsimmons, Attorney  
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Saint Paul, Minnesota 55103

**ISSUES**

Did the City violate the Collective Bargaining Agreement when it denied the Grievant the position of Crew Chief in the Streets Department? If so what shall the remedy be?

**WITNESSES TESTIFYING**

Called by the Union

David DeLong, Grievant  
Heavy Equipment Operator

Tyler Johnson,  
Truck Driver

Juan Coronado,  
Truck Driver

Timothy John Schmidt,  
Sanitation Operator

Doug Person,  
Sign Maintenance

Randy Cyr,  
Truck Driver

Called by the City

David Weidner,  
Retired Street Foreman

Charles Markee,  
Former Crew Chief

Chad Martin,  
Operations Director

Loren Fliflet,  
Public Works Division Manager

Noel Nyborg,  
Engineering Technician  
President Local 1450

William Stolt,  
Crew Chief – Streets

Jean Thompson,  
Director of Human Resources

**ALSO PRESENT**

On Behalf of the Grievant

Ginger Thrasher,  
AFSCME Council 65

On Behalf of the City

No others were present

**JURISDICTION**

The issue in grievance was submitted to James L. Reynolds as a sole arbitrator pursuant to the provisions of Article 7.5 of the Collective Bargaining Agreement between the parties and under the rules of the Bureau of Mediation Services of the State of Minnesota. The parties stipulated at the hearing that the grievance had been processed through the steps of the grievance procedure without resolution and was properly before the

Arbitrator for a decision. The parties also stipulated that the Arbitrator had been properly called.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs submitted to the Arbitrator by each party. The briefs were received by the agreed upon deadline as amended. With the receipt of the post hearing briefs by the Arbitrator, the record in this matter was closed. The issue is now ready for determination.

**STATEMENT OF THE ISSUE**

The parties stipulated at the hearing that the issue in this case is :

Did the City violate the Collective Bargaining Agreement when it denied the Grievant the position of Crew Chief in the Streets Department? If so what shall the remedy be?

The grievance [Employer Exhibits 9 and 26] was filed on December 13, 2010 and reads in relevant part as follows:

List applicable violation: Article 19.4, Article 19.6 [sic] and any other applicable Articles.

Adjustment required: Fill position with member of Bargaining Unit and make the Grievant whole

The Employer responded at Step III of the grievance procedure on January 28, 2011. It denied the grievance stating that it had complied with Articles 18.4, 18.6 and 19.5 of the Collective Bargaining Agreement. It noted that all four of the City employees who applied for the Crew Chief position worked or were expected to work more than 67 workdays in 2010, were members of the bargaining unit at the time they applied for the

position, met the qualifications of the position, took the requires tests and received a passing score for the position. It further noted that Mr. DeLong did not meet all the criteria of Article 18.6 because he did not have the supervisory experience required of the position, and did not have the required skills to perform certain essential functions and responsibilities of the position. Finally, the City noted that it exercised its management right to select the individual to fill the position based, collectively, on the factors provided in the labor agreement, and the individual hired for the position was more qualified than Mr. DeLong.

## **RELEVANT LANGUAGE FROM THE COLLECTIVE BARGAINING AGREEMENT**

### ARTICLE 6 – Employer Authority

6.1 The Employer retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to establish work schedules, and to perform any inherent managerial function not specifically limited by this Agreement.

6.2 Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish, or eliminate.

### ARTICLE 7 – Employee Rights – Grievance Procedure

\* \* \* \*

#### 7.5 Arbitrator’s Authority

A. The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this agreement. ...

B. The Arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. ...

ARTICLE 14 – Seniority

14.1 Employee seniority shall be determined by length of continuous service with the employer in a position identified in Article 2.1 and 2.1 of this Agreement.

14.2 Position Criteria:

\* \* \* \*

B. Job Qualifications: Qualifications specified in job descriptions are defined to mean entry-level qualifications. Such qualifications shall be relevant to the stated essential functions and responsibilities as well as other responsibilities (secondary duties), and State licensure requirements, if applicable. Qualification shall be determined by objective criteria and capable of being validated by training, experience and/or licensure.

\* \* \* \*

ARTICLE 18 – Job Postings – Promotions

18.1 All vacancies for job classifications listed in Article 2 of this Agreement shall be posted within thirty (30) days after the Employer determines that a vacancy exists. ...

\* \* \* \*

18.4 Those employees working for more than sixty seven (67) work days in a calendar year and who are members of the bargaining unit will be permitted to apply during the internal posting period outlined in Section 19.1 [sic] above, providing they meet the qualification, take the required tests, if any, and receive a passing score for the full-time position being posted.

18.5 The Employer has the right of decision in the selection of employees to fill posted jobs based on seniority, qualifications, abilities and experience. The employer shall determine whether an employee is qualified for the position applied for, subject to employee appeal through the grievance procedure.

18.6 The Employer and the Union agree that permanent job vacancies above the entry level within the designated bargaining unit shall be filled based upon promotion from within the bargaining unit provided the applicant:

A. Has the necessary job relevant qualification to meet the standards of the job vacancy.

B. Has the ability to perform the duties and responsibilities of the job vacancy, and,

C. Successfully completes the promotional trial period.

\* \* \* \*

ARTICLE 19 – Trial Periods

19.1 All promoted, reassigned and transferred employees shall serve a six (6) month trial period. During the trial period a promoted, reassigned or transferred employee may be returned to the employee’s previous position at the sole discretion of the Employer.

\* \* \* \*

**FACTUAL BACKGROUND**

The Employer is a municipal corporation chartered under the laws of the State of Minnesota. It provides a range of municipal services to the residents and visitors to the City including as is relevant to this grievance, street repair and snow plowing. The Union is the exclusive bargaining representative of the employees whose job classifications are listed in Appendix A of the Collective Bargaining Agreement. The parties have had a collective bargaining relationship for many years. The Collective Bargaining Agreement that is controlling in this case became effective on January 1, 2009 and continued in full force and effect through December 31, 2011. For all relevant times the Grievant was covered by its provisions.

The Grievant is employed by the City as a Heavy Equipment Operator assigned to the Street Department of the Street/Fleet/Sanitation Division. He was hired by the by the City in 1991 as a part-time employee, and became a full time employee on August 17,

1998. At the time he was hired as a full time employee his position was that of a Truck Driver. On March 19, 2007 he was promoted to a position of Equipment Operator. He continues to hold that position at the present time.

On November 24, 2010 the City posted a vacancy for the position of Crew Chief – Streets. The essential functions of that position include, *inter alia*, working with the Division Manager as an assistant and assigning daily work tasks in association with the Division Manager. The Crew Chief also makes recommendations for discipline to the Division Manager, serves as lead worker on various street maintenance operations when directed by the Division Manager and fills in for the Division Manager during his absences. The Crew Chief job description also provides that the employee in that position exercises limited supervision over assigned personnel.

The Grievant and three other employees indicated an interest in the Crew Chief – Streets position in response to the job posting. The other employees expressing an interest in the position were Juan Coronado, Tyler Johnson, and Chuck Markee. The Employer established an interview panel consisting of Operations Director Chad Martin, Division Manager Loren Fliflet and Noel Nyborg, an Engineering Technician and President of the Local Union. A series of questions to be asked of the internal applicants for the Crew Chief – Streets position was developed and a weight was assigned to each question. Each of the four internal applicants was individually interviewed by the panel and asked the questions that had been prepared earlier. Each member of the panel rated the response of each applicant to the questions asked. A numerical score for each applicant was

developed by each member of the interview team. The scores by each member of the interview team were then totaled as the final figure of merit for each applicant. The result of the interview scoring process ranked the applicants as follows:

Chuck Markee  
Tyler Johnson  
David DeLong  
Juan Coronado

Employer witnesses testified that the two top scoring applicants had scores within approximately one percent of each other. The Grievant's score, on the other hand, was approximately 12 percent less than the top scores. Mr. Coronado's score was approximately 22 percent below the top scores. Upon conclusion of the interview process the position was offered to Mr. Markee. Shortly after his selection, however, Mr. Markee left the employment of the City. The position of Crew Chief – Streets was then offered to Mr. Johnson, but he declined.

At that point, the City decided to advertise outside for additional applicants. On January 2, 2011 an advertisement was placed in print media and eight applicants who responded to the advertisement were interviewed. The Grievant did not apply through the external application process. The same interview panel that was used for the internal applicants was used for the external applicants, and the same questions were used. Interviews of the eight applicants took place on January 20 and 21, 2011. The total scores of the external applicants ranged from 285 to 251 points. Mr. Stolt, with the highest score of 285 points was offered the position and he accepted. He began working for the City on February 7, 2011.

The Union had earlier filed the instant grievance on December 13, 2010 when no internal applicant was selected for the Crew Chief – Streets position. The Union moved the grievance to step four of the grievance process on January 27, 2011. The City Manager denied the grievance on January 28, 2011, and it was moved to arbitration where it was heard on November 10, 2011.

## **POSITION OF THE PARTIES**

### **Position of the Union**

It is the position of the Union that the grievance be sustained, the position awarded to the Grievant and he be made whole. In support of that position the Union offers the following arguments:

1. The labor agreement requires that the City consider seniority, qualifications and abilities in determining which internal applicant gets an open position. The contract also requires that when a position above an entry level position is open, the internal applicant gets a six month trial period to prove himself so long as he or she has the necessary job relevant qualification to meet the standards of the job vacancy, has the ability to perform the duties and responsibilities of the job vacancy and successfully completes the promotional trial period.
2. Grievant DeLong should have been given a trial period in the position as Crew Chief because he has the necessary job qualifications, has the ability to perform the job, and because he was the senior candidate for the job.
3. The Grievant is well qualified to hold the position of Crew Chief because has an extensive list of licenses and certification or has specialized training in the operation of wide range of equipment. Additionally, he has a college degree and experience with the City performing a wide variety of duties and served in many positions within the Street Department, including serving as lead man on many projects or routines. He has also trained many of his co-workers on their jobs.

4. The Grievant has an easy going personality, yet is serious and conscientious in his approach to his work. He has led work crews and is well liked by his co-workers. They testified that he is qualified and deserving being given the chance to hold the Crew Chief position. His job evaluations show that his supervisors agree that he is a good employee.

5. The Employer's claims at the arbitration hearing that the Grievant was a bad employee for having filed grievances in the past or for having one or two minor accidents with a snowplow in 20 plus years of work are disingenuous. The City's claims that he was lazy or disliked by his co-workers are untrue and not were considered in the interview process used by the City. Those claims were rebutted by the Union's witnesses.

6. Instead of valuing the Grievant's leadership abilities, and forthrightness about job safety and proper work methods, they have disparaged him for those qualities. He was the senior applicant for the open Crew Chief position and he has the necessary job relevant qualifications. He has demonstrated the ability to perform all the duties and responsibilities of the job vacancy by being assigned the lead man positions routinely many, many times over the years. He should have been given the opportunity to successfully complete the six month promotional trial period for the Crew Chief job.

7. The Grievant should be awarded the position, be permitted a six month trial period at the end of which the City must make an honest and fair assessment of his performance in that role.

### **Position of the City**

It is the position of the City that it has fully complied with the Collective Bargaining Agreement and the grievance should be denied. In support of its position the City offers the following arguments:

1. The Union has the burden to show that the City has violated the Collective Bargaining Agreement and has failed to meet its burden.

2. The City exercised its management right to determine that Mr. DeLong was not qualified or able to perform the Crew Chief – Streets position. The clear language of Articles 6.1, 18.5 and 18.6 establishes the City's management right to determine who is able or qualified to be promoted to a position. Under the promotion provision the City has the right and responsibility to determine in a rational manner, the qualifications of a position and whether they are met by a bidder.

3. The City reasonably exercised its management right through its hiring process. The City developed a set of interview questions that measured the applicants' experience, problem solving, prioritizing of tasks, assigning tasks, asking directions and reporting problems. The interviewers took notes during the interviews, scored the applicants' responses and discussed the applicants following the interviews. The Grievant scored well below the top scoring applicants.

4. The Grievant asserts that he should have been offered the position initially based on his seniority. Seniority, however is not considered in promotions under the labor contract. Article 18.6 allocates no points for seniority, it is only a factor as a tiebreaker if scores are close and City has hired less senior candidates for positions in the bargaining unit.

5. The Grievant also asserted that the City had some Union related animus against him. There was no evidence presented to support that claim.

6. The witnesses called by the Grievant who testified that his co-workers had encouraged him to apply for the position did not provide evidence to support that claim. The witnesses testifying on behalf of the Grievant were not supervisory employees and most had an interest in not stating anything negative about him since they have to continue to work with him. All the supervisory employees who testified in this matter concluded that Mr. DeLong was not able or qualified to do the supervisory job of Crew Chief.

7. The Crew Chief position is a supervisory position which the Grievant was not qualified or able to perform. In 2010 the City added more supervisory responsibilities to this position. Mr. DeLong should not be promoted to the Crew Chief position because he lacks supervisory experience, he is a poor employee, and had interview results.

8. There would be negative consequences if Mr. DeLong was promoted to Crew Chief. Morale and productivity of the crews and management would be negatively impacted. In addition, the current Crew Chief who has performed well in the position for nearly a year would be demoted even if Mr. DeLong were promoted for just a trial period. Such negative consequences support denial of the grievance and the Union's requested remedy.

9. The City fairly and reasonably exercised its management right in determining that Mr. DeLong was not qualified or able to be Crew Chief. He should not be promoted to the position. The matter is wholly without merit because of Mr. DeLong's lack of supervisory experience, poor performance, negative personal characteristics and poor interview results. The grievance should be denied in its entirety.

## ANALYSIS OF THE EVIDENCE

The controlling contract language is found in Article 6 and Article 18 of the Collective Bargaining Agreement. Article 6 reserves to the City broad managerial rights. It is reasonable that the selection of personnel for promotion would be well within those rights subject to limitations that may be imposed by other Articles of the labor agreement. Article 18 establishes some such limitations. At Article 18.4 the parties have agreed that internal employees may apply for posted internal vacancies provided they meet the qualifications, take the required tests, if any, and receive a passing score. Clearly that language is a first screen for eligibility to be considered for the open position. The language specifically states that its purpose is to define which employees may apply for posted internal vacancies. It cannot be read to mean that the employee will be selected for the opening.

More substantive language is found at Article 18.5 and 18.6 of the agreement. Article 18.5 makes the initial declaration that the “Employer has the right of decision in the selection of employees to fill posted jobs based on seniority, qualifications, abilities and experience. The Employer shall determine whether an employee is qualified for the position applied for, subject to employee appeal through the grievance procedure.” The language clearly and unambiguously states that the *Employer* makes the decision regarding the selection of an employee to fill a posted vacancy based on *seniority, qualifications, abilities and experience*. The Employer will make the decision, but it must base that decision on the four factors of seniority, qualifications, abilities and experience.

Article 18.6 provides further guidance as to the intent of the parties in relation to how promotions are to be handled. It states that vacancies constituting a promotion will be filled from within the bargaining unit provided the applicant has the necessary job relevant qualifications and has the ability to perform the duties and responsibilities of the job. It goes on to provide that the selected employee also must successfully complete the promotional trial period. Of course, before an employee can engage in a promotional trial period, he or she must be selected. The language of Article 18.6 clearly shows that the parties agreed that vacancies will be filled from within the bargaining unit *if an applicant has the necessary qualifications and abilities*. Article 18.5, however, reserves to management the right to determine if an employee is qualified and has the needed abilities.

In making a determination of qualifications and ability, however, the Employer may not act in an arbitrary or capricious manner. It must show that it determined qualifications and ability based on some rational, job-related criteria. Article 18.5 goes on to state that the selection must be based on seniority, qualifications, abilities and experience. What is not stated, however, is what weight is to be assigned to each of these. The language merely states that selection must be based on the four parameters of seniority, qualifications, abilities and experience. How those four factors are to be used by management to make the selection is not stated. The Employer testified at the hearing that it made its selection decision based on qualifications, abilities and experience and only if applicants were essentially equal on those factors did seniority enter in to the decision.

A review of promotional clauses found in collective bargaining agreements indicates that such clauses can be grouped into three basic categories: “relative ability clauses”, “sufficient ability clauses”, and “hybrid clauses” [See How Arbitration Works, Elkouri and Elkouri, 6<sup>th</sup> Ed. BNA p.873]. Under a “relative ability clause” the senior employee would be selected if his/her ability was approximately equal to that of junior employees. These clauses are referred to as “relative ability” clauses because the ability of the applicants is compared and seniority becomes a determining factor only if the abilities of the bidders are approximately equal. The “sufficient ability clause” provides in general that the senior employee will be given preference if he/she possesses the minimum ability qualifications for the job. Under those clauses comparisons between applicants is unnecessary and improper. The third type of promotional clause is the “hybrid clause”. That type of clause requires consideration and comparison of *both* seniority and ability of the applicants. Under such clauses arbitrators will require that “fair and reasonable” consideration be given to both factors, although the weight to be assigned to each may vary. The language of Article 18.5 shows that the parties intend that the selection process for employees to fill posted jobs give consideration to both seniority and elements of ability. In the case of promotions, as is present in the instant case, however, the language of Article 18.6 controls. It is important to note that Article 18.6 makes no reference whatsoever to seniority in filling positions that constitute a promotion. That is a fundamental difference between Article 18.5 and Article 18.6. Having specifically provided for consideration of seniority in Article 18.5, a reasonable person would expect that the parties would have made some mention of seniority in Article 18.6 dealing with

promotion positions if that had been their intent. Inasmuch as no reference is made to seniority in Article 18.6, it must be concluded that it was not the intent of the parties to provide for consideration of seniority in the selection process for a promotion position.

It is noted [Employer Exhibit 25] that the contract language relative to selection of employees to fill vacant positions has not always been in the form found in the current Collective Bargaining Agreement. As shown in Employer Exhibit 25 the Grievant filed a grievance in 1998 asserting that the City violated the Collective Bargaining Agreement in making a selection of an employee to fill a vacancy in the Sanitation Truck Driver position. The language that was then in effect that was referenced in the City Manager's response to the grievance [Article 19.1 and Article 19.5 of the then current labor agreement] reads as follows:

Article 19.1

The senior qualified employee making application shall be given first opportunity to fill the vacancy. The Employer shall determine whether an employee is qualified for the position applied for, subject to employee appeal through the grievance procedures.

Article 19.5

The Employer has the right of decision in the selection of employees to fill posted jobs based on qualifications, abilities, and experience.

That contract language shows that in at least 1998 the parties intended that the concept of "sufficient ability" be used to select employees to fill vacancies. The current contract language shows that the parties must have negotiated and agreed to subsequent language that reflects the concept of a "hybrid" style of selection that considers both seniority and ability. As previously noted, however, the weight to be assigned to seniority and

elements of ability is not specified. More directly on point, the language of the current Article 18.6 makes no reference at all to seniority as a factor in the selection of an employee to fill a job constituting a promotion.

A careful review of all the exhibits and testimony entered into the record of this case shows that the Grievant has many years of applicable experience, that he was particular about safety and quality concerns. Those things are to his credit. The Employer offered a great deal of testimony to show that the Grievant had some shortcomings related to initiative and productivity. It was also shown that he had received some relatively minor discipline over the years he worked for the City. This anecdotal evidence is not deemed sufficient to disqualify the Grievant for the Crew Chief position, however.

What is of greater concern is the supervisory nature of the Crew Chief position. The record shows that the Crew Chief position involves substantial supervisory duties including, *inter alia*, planning and prioritizing work, recommending discipline and filling in for the Division Manager when he is absent. The record does not contain evidence that the Grievant had that experience and skill set. It is clear that the City, in exercising its right to define the duties and responsibilities of the Crew Chief job, had reasonably specified that supervisory skill and experience was needed.

In making the selection process it is essential that the Employer not act in an arbitrary or capricious manner. Its actions must be reasoned and based on valid criteria of selection. Here the City utilized a reasonable selection process. It developed an objective set of

questions to be used in the interviews. Examination of the questions showed that they were clearly and reasonably related to the duties and responsibilities of the Crew Chief position. No evidence is found that the qualifications and skill sets established by management for the Crew Chief position were contrived to create a barrier of entry for the Grievant or any other bargaining unit employee. A panel of two representatives of management and one bargaining unit employee conducted the interviews of both the internal and external candidates. Following discussion, the panel unanimously selected Mr. Markee, who had the highest score in response to the questions. When Mr. Markee left the employment of the City Mr. Johnson was selected based on his second place score which was close to that of Mr. Markee. The record shows that the Grievant's score was substantially lower than Mr. Johnson's. When Mr. Johnson elected to not accept the position offered, the City went outside the City to locate additional candidates for the Crew Chief position. Given the gap between the Grievant's score and that of Mr. Markee and Mr. Johnson a reasonable person could conclude that the Grievant was properly found to not have the necessary qualifications and abilities to perform the duties of the Crew Chief position.

The selection of an applicant from outside the City and the bargaining unit obviously meant that he would come to employment with the City with no seniority whatsoever. The fact that Mr. Stolt, the selected Crew Chief, had no seniority and the Grievant had many years of seniority with the City compels analysis of the evidence to determine if Mr. Stolt's selection constituted a contract violation on the basis of his lack of seniority with the City. Article 18.6 provides the needed contractual guidance. That section of the

labor agreement specifies that promotions shall be made from within the bargaining unit provided the applicant has the necessary job relevant qualifications and has the ability to perform the duties and responsibilities of the job. Objective consideration of Mr. DeLong's background by the interviewers found that he did not. Moreover, and importantly, Article 18.6 does not require consideration of seniority as a selection criterion for jobs that constitute a promotion. Accordingly, the record compels a finding that the City properly went outside to recruit applicants for the Crew Chief position, and that Mr. Stolt's lack of seniority with the City does not cause a contract violation.

Article 7.5 of the Collective Bargaining Agreement limits the Arbitrator's authority. It provides that the Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this agreement. The Arbitrator must comply with that contract requirement regardless of his own personal views regarding the case. To sustain the grievance in this case the Arbitrator would have to add to Article 18.6 a provision for seniority as a factor in selecting employees for promotions. No such provision exists there now, and the Arbitrator would exceed his authority by adding such a provision to that Article.

For all the above cited reasons the grievance must be denied.

**AWARD**

**IN THE MATTER OF ARBITRATION BETWEEN**

AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL  
EMPLOYEES COUNCIL 65 AFL-CIO  
And its affiliated Local 1450

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CITY OF MOORHEAD, MINNESOTA  
Employer/City

OPINION AND AWARD

Contract Interpretation  
Promotion Grievance

David DeLong, Grievant

BMS Case Number 11 PA 0712

Award Dated: February 23, 2012

Based on the evidence and testimony entered at the hearing, the grievance and all remedies requested are denied.

February 23, 2012

Dated: \_\_\_\_\_

James L. Reynolds

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James L Reynolds,  
Arbitrator