

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 61
(GREATER VICTORIA)

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION
GREATER VICTORIA TEACHERS' ASSOCIATION

S. DeVries – Filling Qualifications Grievances

ARBITRATOR: Christopher Sullivan

COUNSEL: Keith E. W. Mitchell
for Employer

Gretchen Brown
for Union

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The parties agree I have jurisdiction to hear and determine the matter in dispute. The case involves two grievances filed by the Federation alleging the Employer violated the Collective Agreement in failing to appoint Steven DeVries to two separate teaching positions for the 2017 school year for which he was the senior candidate and had qualifications equal or superior to those of the successful junior candidates. One was for a .857 FTE posting at Esquimalt Secondary School and the other was for a .714 FTE posting at Reynolds Secondary School. The Employer disputes the matter of Mr. DeVries' qualifications being equal or superior to those of the successful applicants.

The relevant Collective Agreement language regarding the posting and filling of vacancies is contained in Article E.20.6, which provides as follows:

All vacancies shall be filled in the following manner, save and except for the application of Articles E.21.2 above, E.21, E.22, C.23.1, D21.5 and C.26.12:

- a. All members of the bargaining unit are eligible to apply for all vacancies.
- b. Board personnel shall review all applications from continuing contract teachers. From such applications, the applicant with the greatest seniority as defined in Article C.2 shall be given preference, provided that (s)he possesses the qualifications as set out in Article C.21 of this Agreement. Where a junior teacher is selected, her/his ability to perform the teaching position shall be demonstrably higher than more senior candidates.
- c. If no suitable teacher on a continuing contract of employment has applied, the Board shall consider teachers-on-call who applied, on the same basis as for continuing contract teachers, before external applicants are considered.
- d. Vacancies shall be filled no later than five (5) teaching days following the closing date for applications, where qualified internal applicants have applied.

Article C.21 of the Collective Agreement defines qualifications as follows:

1. In this Agreement “necessary qualifications” in respect of a teaching position means the possession of a valid teaching certificate for the Province of British Columbia and a reasonable expectation that the teacher can perform the duties of the position based on the following criteria:

- a. Relevant teaching experience in the subject or teaching area.
- b. Relevant educational preparation.
- c. Relevant qualities such as: the teacher’s commitment, temperament, experience, less formal training, and past performance.
- d. Evidence of ability to perform the duties of the position in a satisfactory manner.

2. It shall be the responsibility of each teacher to ensure the Human Resource Services Department has on file the appropriate documentation substantiating necessary qualifications as defined in Article C.21.1 (L.C.6.1) above.

The .857 FTE position at Esquimalt High was comprised of teaching three blocks of musical theatre, one block senior jazz band, one block junior jazz band and one block R&B 9-12. The breakdown on the job posting for this position provides:

- Musical Theatre 9-12
- R&B Band 9-12
- Jazz Band (linear) 9/10
- Stage/Pit/Theatre Tech 9-12

The Esquimalt posting contained the following “Additional Qualifications”: ‘Educational prep and/or experience in Music (Band)’; and “Educational prep and/or experience in Theatre”. The posting also contained the following “Abbreviated Job Description”:

- Directs students of varying abilities to perform vocals for production.
- Direct both R&B and Jazz Bands, comprised of students Gr. 9-12.
- Coordinate and facilitate student involvement in a major Spring theatrical performance.
- Responsible for stage direction, pit orchestra and theatre tech, including teaching students different aspects of theatre tech.
- Work with Fine Arts Dept. to continue to develop and grow music program at Esquimalt.
- Blocks occur before/after school – schedule may include lunch.

There were eleven applicants for the Esquimalt position and the Employer made the decision to interview the top four by seniority, which included the Grievor, Lena Palermo, Katy Kerr, and Kaehlen Allison. Ms. Allison was awarded the position after Ms. Kerr accepted the position at Reynolds. The Grievor was the senior candidate by a substantial margin.

The .714 FTE position at Reynolds comprised of: Musical Theatre (3 blocks linear) 9-12; Choral (linear) 9-12; and Strings (linear) 9-12. The Reynolds posting contained the following “Additional Qualifications”: “Educational prep and/or experience in Music (Choral/Strings)”. There were thirteen applicants for the Reynolds position and the top three by seniority were interviewed: the Grievor, Matt Russell, and Ms. Kerr, with Ms. Kerr receiving the position.

The job selection process used by the Employer for both postings involved a review of the submitted online applications, and interviews for the top shortlisted applicants. The interviews took place in the middle of June 2017. In both cases the interviewers, who testified at these proceedings, asked the questions and recorded the

responses on a form opposite the questions, and then tallied these scores. For the Reynolds' posting answers were assigned numeric values from one to four for each response; for the Esquimalt posting a scale of one to five was used.

For the Reynolds position, interviews were conducted by Esquimalt Principal Tom Aerts, Vice Principal Heather Brown, and Vice Principal at another school, Gillian Braun. The questions developed and asked for the Reynolds position were as follows:

1. The music department is very important to the Reynolds community. Discuss how you are able to develop and maintain a collaborative relationship with departmental colleagues given that all of your courses will be taught outside the timetable.
2. Tell us about the strategies you have used with large groups to quickly develop rapport and relationships with students?
3. Tell us about the methodologies or strategies you have used that help your struggling learners to develop, articulate and share their thinking and learning.
4. Please distinguish between assessment of learning, assessment for learning and assessment as learning and provide examples of how you have used each in your classroom.
5. Retention of students within a program is something that is important to us at Reynolds. Think of a time you have worked hard to retain a student in a program and describe the strategies you used.
6. Tell us about a situation where you were in conflict with a colleague. How did you take the lead in resolving this conflict?
7. At Reynolds we have three R's: responsibility, respect and relationships. Please describe how your classroom reflects these goals on a daily basis.
8. This is a multi-faceted job with the main component being musical theatre. Please outline your experiences in directing a school musical.
9. Another facet to this position includes being the choir conductor. The choir program has expanded significantly over the past few

years. What will you do on purpose to maintain and promote the continued growth of the program?

10. Is there anything else you would like to share with us or ask?

For the Esquimalt position, interviews were conducted by Principal Tammy Renyard, and Administrator Barry Janzen. The questions for the Esquimalt position were as follows:

1. Tell us about yourself.
2. Describe the importance of a thriving music program in relation to school culture.
3. What strategies will you or have you employed to build numbers and overall quality of a music department.
4. A typical instrumental music class will have a wide range of student ability. Describe your approach to such a class.
5. Jazz and R&B bands – describe your approach to teaching improvisation.
6. Often music teachers are driven by the approach of an upcoming performance. How will your class balance performance with curricular outcomes?
7. Describe your approach to student assessment in the context of a music and/or musical theatre class. How can your assessment strategies encourage musical growth and understanding?
8. Think of a time you were struggling to connect with a student. What were some strategies you used to build rapport and engage the student in learning?
9. Working within a music/fine arts department requires a lot of teamwork and communication. Tell us about a situation where you were in conflict with someone. How did you take the lead in resolving this conflict?

10. There are many trends and issues in education today. What are you most passionate about and what are you doing to ensure that you remain current in your practice?
11. What strategies do you/will you use to leverage technology for learning in your music classes?
12. What strategies will you use to empower students in the preparation and execution of productions in a high quality theatre venue?
13. What training and experience would you say has prepared you to support the varied requirements and demands of theatre management and technical support?
14. There will be around sixty students in theatre production/musical theatre. What experiences have you had to lead full scale school productions.
15. Biggest Challenge?

For both sets of interviews the interviewers stated they both recorded the answers given at the time and then reviewed their notes and then assigned numeric values, which were tallied. Regarding the Reynolds posting the successful candidate, Ms. Kerr, received a total score in the low 30s out of 36, while the Grievor had scores in the low 20s.

Regarding the Esquimalt posting, the successful applicant, Ms. Allison received a total of 57 points for her answers from Ms. Renyard and 56 from Mr. Janzen for an average of 56.5. Ms. Kerr received an average of 55.5; and the Grievor received 40.5. Although Ms. Allison received the highest score, Ms. Kerr was initially offered the position because of superior seniority to that of Ms. Allison. Ms. Kerr declined it because she accepted the Reynolds' posting and then Ms. Allison was offered it and she accepted.

The interviewers were called as witnesses and they explained the intentions behind the development of their questions in terms of applicability to their particular

circumstances. The interviewers testified as to what they wrote down from the interviews, how scores were developed, conclusions reached and hiring recommendations made.

Evidence was led by the Union regarding the Grievor's educational background and work history. By all accounts he is a keen teacher with a strong background in music. He holds a Bachelor of Music with a Major in Music Education and Minor in Voice from the University of Victoria in 2010; a Bachelor of Education (Secondary) from UVic in 2011; and a Master's of Arts in Music (Band Conducting). The Grievor studied music through the Royal Conservatory of Music program and has attained certain levels of proficiency in the following areas: Vocal Performance (Associate of the Royal Conservatory of Music) Theory/Composition (Associate level in progress), Violin (completed grade 8) and Piano (grade 8 in progress as at time of hearing). The Grievor is also a trained and proficient player of acoustic and electric guitar, bass guitar, drums, percussion, trombone and trumpet. In addition to teaching and performing the Grievor has also been very involved with the production side of musical theatre and other performances.

The Grievor's work history indicates he was hired by the District as a Teacher-On-Call in May 2011. He posted into a temporary position at Arbutus Middle School teaching Band, Strings, Drama, Choir and Gifted from September 1, 2011 to April 5, 2012 replacing a teacher on maternity leave. From April 10, 2012 to June 30, 2012 the Grievor was involved in a strings program. From September 1, 2012 to June 30, 2013 the Grievor taught Musical Theatre at Mount Douglas Secondary. While at that school he directed a full musical theatre production of Guys and Dolls. During the 2012-2013 school year, the Grievor also taught Band, Strings, and Choral at Rockheights Middle School and Choral and Strings at Cedar Hill Middle School. During the 2013 school year the Grievor taught Strings, Choral, Band, Music and Cedar Hill Middle School. During that school year he also taught Strings at Quadra Elementary and Strings at Reynolds Secondary. During the 2014 school year the Grievor taught Music at Strawberry Vale

Elementary and Strings at Reynolds. During the 2015-2016 and 2016-2017 school years the Grievor taught Music at Victoria West Elementary, Strings at Quadra Elementary and Strings and Concert Band at Lansdowne Middle School. In January 2017 the Grievor was assigned a further part-time continuing position teaching Drama at Cedar Hill Middle School. As at the time of the hearing the Grievor possessed continuing contracts teaching Drama at Cedar Hill Middle School and Strings at Quadra Elementary.

By all accounts the Grievor has performed very well in all his positions and has always received positive feedback from administrators. He has requested to have his teaching formally evaluated but to date this has not occurred. The evidence also indicates that in April of 2018 he sought from the Employer to have formal recognition of certain qualifications through teaching experience. Such was approved for middle school Drama, but was denied for “Musical Theatre” and also “Gifted” as these were “not recognized” by the Employer. In an email dated April 18, 2018 to Teacher Qualifications the Principal of Mount Douglas Secondary School confirmed the Grievor “taught Musical Theatre for one year at Mount Douglas from September 2012 to June 20, 2013.”

The evidence indicates there have been relatively few postings for secondary music positions since the time the Grievor began work with the Employer until present. All of the secondary positions that have come up have been filled by teachers with more seniority than the Grievor.

The evidence reveals that over the Grievor’s six years in the District he has applied for many positions and where he was the senior qualified applicant (discounting those who declined positions), he had always been granted the position. The Grievor had never been interviewed prior to being granted a position. The evidence indicates that this Employer very infrequently used the interview process for filling positions and it only happened around five or seven times during the year in question, with two of them involving the Grievor.

SUMMARY OF ARGUMENTS

On behalf of the Union, Ms. Brown argues the Employer failed to carry out a fair and reasonable review of the Grievor's application and abilities as is necessary to comply with its Collective Agreement obligations in relation to both the Esquimalt and Reynolds' positions. The Employer failed to give meaningful consideration to the Grievor's relevant teaching experience, educational preparation, relevant qualifications and other evidence of ability. The Employer failed to review relevant material in the Grievor's personnel file, and does not appear to have given meaningful consideration to the qualifications described in the Grievor's application forms. The Employer erred in relying exclusively or unduly on the interviews that were conducted. The Employer unreasonably relied on scores assigned to the responses to interview questions and these scores were not a reliable assessment of the Grievor's qualifications or abilities.

Ms. Brown asserts the Employer failed to give preference to the Grievor as the senior applicant as required by the post and fill provision and also the seniority provision of the Collective Agreement. The Employer selected the junior applicants despite the fact that their ability to perform the teaching positions in question were not demonstrably higher than the Grievor's.

In support of its arguments the Union cites the following authorities: *Nanaimo School District No. 68 v. Canadian Union of Public Employees, Local 606*, [1985] B.C.C.A.A.A. No. 289 (Germaine); *Fairview Home Inc. v. Fairview Nurses (Manitoba Nurses' Union, Local 21)*, [1991] M.G.A.D. No. 68 (Cherniack); *Elgin County Roman Catholic Separate School Board v. London & District Service Workers' Union, Local 220*, [1992] O.L.A.A. No. 5 (Rose); *Castelgar School District No. 9 v. Castelgar Teachers' Association (Tarnowsky Grievance)*, [1995] B.C.C.A.A.A. No. 517 (Keras); *British Columbia School District No. 18 (Golden) v. Golden Teachers' Association*, [1996] B.C.C.A.A.A. No. 599 (Bruce); *Surrey School District No. 36 v. Surrey Teachers' Association (McDonald Grievance)*, [1998] B.C.C.A.A.A. No. 578 (Glass); *Chilliwack School District No. 33 v. British Columbia Teachers' Federation (Lenardon Grievance)*,

[2001] B.C.C.A.A.A. No. 241 (Korbin); *Sudbury Regional Hospital v. Ontario Public Service Employees Union, Local 659*, [2003] O.L.A.A. No. 531 (Brown); *British Columbia Government and Service Employees' Union v. Canadian Office and Professional Employees' Union, Local 378*, [2008] B.C.C.A.A.A. No. 38 (Gordon); *Saanich (District) v. Canadian Union of Public Employees, Local 374*, [2008] B.C.C.A.A.A. No. 80 (Sullivan); *Surrey School District No. 36 v. Surrey Teachers' Association (Rothery Grievance)*, [2008] B.C.C.A.A.A. No. 181 (Burke); *Telus Communications Inc. v. Telecommunications Workers' Union*, [2008] C.L.A.D. No. 383 (Sullivan); *British Columbia Public Schools Employers' Association v. British Columbia Teachers' Federation (Qualifications Grievance)*, [2012] B.C.C.A.A.A. No. 175 (Sullivan); *Burnaby (City) v. C.U.P.E., Local 23*, [2015] B.C.C.A.A.A. No. 76 (McPhillips); *Ontario Nurses' Association v. Women's College Hospital*, [2016] O.L.A.A. No. 72 (Trachuk); and *Toronto Civic Employees Union, Local 416 v. Toronto (City)*, [2018] O.L.A.A. No. 103 (Kanee).

On behalf of the Employer, Mr. Mitchell argues the Employer properly appointed the successful applicants at Reynolds and Esquimalt, respectively, in accordance with Article E.20.6(b). While the successful applicants were both junior to the Grievor, their abilities to perform the duties of the teaching positions were shown to be demonstrably higher than those of the Grievor. Counsel points out seniority is not determinative in the selection process where the junior candidate's ability is demonstrably higher. In the present case the difference in ability is substantial.

Mr. Mitchell asserts the Employer properly assessed selected candidates using interviews and the information provided in the applications submitted. The Grievor acknowledged the interview questions were fair in relation to the job, and he was given every opportunity to give fulsome responses. Mr. Mitchell states that for Reynolds position the evidence shows clear superiority for Ms. Kerr especially in the area of Musical Theatre, which was the focus of the position. For the Esquimalt job, he points out Ms. Allison had more Musical Theatre experience and also greater educational

training in this area. The Grievor has no such educational preparation in Musical Theatre.

In support of its arguments the Employer cites the following authorities: Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. (paras. 6:3000 and 6:3220); *Great Atlantic & Pacific Company of Canada Ltd. v. Canadian Food & Allied Workers Union, Locals 175 and 663*, [1979] O.L.A.A. No. 25 (Weatherill); *Ottawa Hospital v. O.P.S.E.U.*, [2002] O.L.A.A. No. 991 (Kaplan); *APS Architectural Precast Structures Ltd. v. Construction and General Workers' Union, Local 602*, [1993] B.C.C.A.A.A. No. 196 (Kinzie); *Board of School Trustees of School District No. 47 (Powell River) v. Powell River District Teachers' Association (Listener and Shuttleworth Grievances)*, (December 7, 1990) A-370/90 (Smith); *Greater Victoria Water District v. Canadian Union of Public Employees, Local 528*, [1997] B.C.C.A.A.A. No. 304 (Kinzie); *Lethbridge (City) v. C.U.P.E., Local 70*, [1990] A.G.A.A. No. 12 (McFetridge); *Tribune (Division of Cariboo Press Ltd.) v. Communication Workers of America, Local 226*, [1989] B.C.C.A.A.A. No. 588 (Chertkow); *Board of School Trustees of School District No. 36 (Surrey) v. Surrey Teachers' Association (McDonald Grievance)*, (December 10, 1998), X-204/98 (Glass); *Chilliwack School District No. 33 v. British Columbia Teachers' Federation (Lenardon Grievance)*, [2001] B.C.C.A.A.A. No. 241 (Korbin); *Sault Ste. Marie (City) Public Utilities Commission v. C.U.P.E., Local 3*, [1994] O.L.A.A. No. 124 (Hinnigen); *Pope and Talbot Ltd. (Harmac Pulp Operations) v. Pulp, Paper and Woodworkers of Canada, Local 8*, [2006] B.C.C.A.A.A. No. 95 (Kinzie); *Nanaimo (City) v. C.U.P.E., Local 401*, [2000] B.C.C.A.A.A. No. 266 (Kinzie); *Surrey School District No. 36 v. C.U.P.E., Local 728*, [1998] B.C.C.A.A.A. No. 464 (Munroe); and *Mission School District No. 75 v. Mission Teachers' Union*, [2004] B.C.C.A.A.A. No. 135 (Kinzie).

DECISION

Having carefully considered all of the facts surrounding the grievance together with the parties' respective arguments I determine that the grievance in relation to the

Reynolds position cannot succeed but that the grievance in relation to the Esquimalt position must.

Under the terms of the parties' Collective Agreement, senior teachers are expressly entitled to preference for job postings, and it is incumbent on the Employer to show that the "ability" of a successful junior applicant "to perform the teaching position" is "demonstrably higher than more senior candidates". In the present case the Union has shown the Grievor to have at least as much ability to teach in the Esquimalt position vis-à-vis Ms. Allison who was selected and not called as witness at these proceedings. Suffice to observe both the Esquimalt and Reynolds positions had a strong Musical Theatre component with either three out of five blocks or six blocks in this subject.

The evidence supports a conclusion that the Employer's selection process for both schools was significantly flawed, primarily due to on the lack of consideration for anything other than the interviews which, particularly for the Esquimalt position, provided little if any objective information about the applicants' respective abilities to perform in the job. To the extent the Employer represented it also considered the applications submitted, such consideration was cursory at best. The Employer did not review or consider information contained in one's personnel file to substantiate or provide further insight into the candidates, nor did it contact references. The Employer did not inform candidates it would not be considering information from their Human Resources file, despite the express reference in Article C.21.2 to the effect that it is the teacher's responsibility to ensure the Human Resources Department has that information on file.

Despite the flaws regarding the selection process for the Reynolds position, the evidence led at these proceedings indicates the successful junior applicant for that position, Ms. Kerr, possessed significant experience teaching this subject that far surpassed that of the Grievor, and supports a conclusion there was a demonstrable

difference between the two in terms of their ability to perform in the job. The ultimate decision was proper and therefore this particular grievance cannot succeed.

Regarding the Esquimalt position, however, the evidence did not show a demonstrable difference in ability between the successful applicant Ms. Allison and the Grievor. While the Employer asserts Ms. Allison indicated she was much stronger than the Grievor in the area of Musical Theatre, it appears such a conclusion is based on an overly favourable assumption made by the interviewers about the nature of one of her particular experiences. As noted above this was an area the Grievor had sought recognition of his qualifications due to having worked for a year in such a position but was advised it was not so recognized because the District stated it did not recognize such. The Grievor's application, under the heading "Relevant teaching experience in the subject or teaching area expressly mentions this experience: "Mt. Douglas Secondary School, Musical Theatre, Sept-June 2012/13".

In any event, no tangible distinction is apparent in relation to the Grievor and Ms. Allison that would warrant the same conclusion as was reached for the Reynolds position and the selection of Ms. Kerr. The evidence at best might support a conclusion that Ms. Allison may have performed better at the interview by including a few more detailed examples in some of her answers. On the evidence there is no indication she was demonstrably better in terms of her ability to perform in the position than the Grievor.

In arriving at this decision, I agree with the Employer that even "small" differences in candidates' relative abilities can be significant when the position in issue is a skilled as opposed to unskilled position. This principle is explained by arbitrator Weatherill in *Great Atlantic & Pacific Company of Canada Ltd. and Canadian Food & Allied Workers Union, Locals 175 and 663, supra*:

In Re Lady Galt Towels Ltd. and Textile Workers Union, (1969), 20 L.A.C. 382 (Christie), the board adopted the view that the test of "relative equality" is really one of determining whether or not one employee is more

qualified than another by a “substantial and demonstrable margin”. We would agree with this, subject always to the qualification that the determination is to be made having regard to the particular job in question. While we imagine that differences between employees must always be “demonstrable” if they are to be relied on, the notion of what is “substantial” margin of difference is, like the notion of “relative equality” itself, one which calls for judgment in relation to the relevant circumstances. While a small difference between individuals might not be substantial or significant with respect to some unskilled job, a small difference could well be substantial and significant in relation to a more complex task. It is a matter of judgment.

In *Ottawa Hospital and OPSEU, supra*, arbitrator Kaplan described the principle as follows:

It is true enough that the difference between the two candidates seems small, and for some positions a difference of 6 per cent (or even much greater) would not be sufficient to support a conclusion that two candidates were not relatively equal. In my view, for more complex, responsible and highly skilled positions, a narrower difference between two candidates may be justifiable. Put another way, for more senior and skilled positions, the margin of allowable difference justifying the conclusion that the two candidates are not relatively equal may be narrower than for less senior, less demanding positions.... I am led to conclude that the difference between the candidates considering the requirements of this particular job and all other relevant criteria, is such that that two candidates were not relatively equal.

Arbitrators have also recognized that the employer is in the best position to determine the attributes necessary for a job and to assess such attributes. In the absence of specific collective agreement language an arbitration board does not have the authority that an employer should have emphasized one selection criteria over another. In *City of Lethbridge v. CUPE, Local 70, supra*, arbitrator McFetridge commented on this matter in the context of an argument that the factor of past experience should have been emphasized over interview and examination results:

For the union argument to succeed this board would have to rule that the employer should have emphasized experience rather than the other selection criteria used in the process. We do not think we have the authority to do so. We agree with arbitrator Ponak concerning the proper scope of arbitral review in cases such as this. In the *Sirias* grievance, *supra*, he stated at p. 8:

It is not the board's purpose, nor intention, to second-guess the employer. Management is in the best position to determine the attributes necessary for job applicants and to assess such attributes. Nevertheless the board is justified in scrutinizing the procedures used to ensure that they have been carried out in a manner which is reasonable, fair, and unbiased. The rationale is discussed in *Re Edmonton Public Schools and CUPE, Loc. 474*, (April 7, 1987), unreported (Ponak), at p.10:

Regardless of the relative weights attached to the competence and seniority, the measurement of competence must be carried out in a manner which is reasonable in the circumstances (Brown and Beatty, *Canadian Labour Arbitration*, 2nd ed. (1984), para. 6:3100, p. 298) and involves a fair, appropriate and unbiased procedure (E.E. Palmer, *Collective Agreement Arbitration in Canada*, 2nd ed. (1983), p. 544). This means, among other things, that factors relevant to the determination of competence are considered, that irrelevant factors are not considered, and that the same type of information is elicited for each of the applicants. This is not to suggest that the procedure must conform to some ideal or academic notion of perfection. Rather, it simply must ensure that, within reason, each of the applicants is given the same opportunity to have their competence evaluated. Otherwise, the competition among candidates cannot be considered a proper competition.

It is well established that the Employer is entitled to appropriate deference in relation to its assessment of qualifications under a competitive job selection provision. In *Greater Victoria Water District and CUPE, Local 528, supra*, arbitrator Kinzie stated:

With respect to promotions, the parties' collective agreement calls for a competition to be held amongst the qualified internal applicants....

In carrying out this competition, the Employer must act in a fair and reasonable manner. Its determinations concerning the qualifications, experience, and skills and abilities of the competing internal applicants must be objectively related to the requirements of the job. However, the judgment of the Employer's supervisory personnel conducting the competition is entitled to arbitral deference given they are in the best position to judge the qualifications, experience, and skills and abilities of the competing applicants....

In *Board of School Trustees of School District No. 47 (Powell River) v. Powell River District Teachers Association (Listener and Shuttleworth)*, *supra*, arbitrator Lynn Smith, as she then was, described the assessment of a teacher's relative qualifications under a competitive clause involves consideration of a number of factors, stating:

...I have concluded that the Collective Agreement requires me to determine whether the successful external candidates were demonstrably better qualified than the temporary teacher appointees to perform the duties of the respective vacant positions. If not, there was a breach of the Collective Agreement. In making this determination, an arbitrator must pay appropriate deference to the professional judgment of the School District personnel who were making the decisions, and recognize that a great many factors need to be weighed and balanced in a decision about whether or not to offer a position to a given teacher at a given time. The qualifications for the position are not up for review, and those qualifications may be both objectively and subjectively determined (that is, the assessment may not only be based upon academic training, years of experience, and evaluations by administrative officer, but also upon less tangible factors such as collegiality, creativity and so on).

It is widely recognized that the interview can be an extremely important tool for assessing qualifications. In *Board of School Trustees of School District No. 36 (Surrey) and Surrey Teachers' Association (McDonald Grievance)*, arbitrator Glass described the selection process under the collective agreement as consisting of two-steps: an assessment of candidates' "paper qualifications", followed by interviews of the short-listed candidates. The arbitrator explained the candidates' applications are first assessed to arrive at a short-list of those that appear to possess the necessary qualifications for the

position, and the short-listed candidates are then interviewed. He found the purpose of the interview is to determine applicants' actual skills and knowledge relative to the "necessary qualifications and the "selection criteria" for the position. Arbitrator Glass held that this interview process is even appropriate even if only one applicant has been short-listed, stating:

When the Board receives applications under Article 33.61, it reviews the application forms which have been submitted pursuant to Article 33.51 and Article 33.52. As I have already pointed out, the collective agreement requires that applicants should provide not only details with respect to their qualifications and experience but also details with respect to their skills.

The Board may conclude then, consistently with the collective agreement choose to proceed with an interview, to verify that the skills claimed or implied by that sole applicant in the application are in fact present. By skills, I include practical know-how, and ability to apply and put into practice the things which had presumably been learned in completing a Master's degree or other training.

In the present case the interview was conducted fairly in terms of being standardized, with all candidates being asked the same questions and having the opportunity to expand upon their responses to each question. In *Chilliwack School District No. 33 v. British Columbia Teachers' Federation (Lenardon Grievance)*, *supra*, arbitrator Korbin commented favorably on this approach as follows:

I am also satisfied that the interview process was conducted properly with a view to determining qualifications and abilities of the respective candidates for the disputed position.

The interview process was designed to allow each candidate an opportunity to convey her own particular qualifications and abilities in relation to the job in question. A standardized list of questions was developed to ensure a fair process. On the evidence the Selection Committee sought to create a situation whereby all candidates received exactly the same opportunities in the interview process. In each interview, Mr. Latham asked exactly the same questions and no candidate was asked any follow-up questions. There

were no time limits placed on answers, and candidates were invited to elaborate on their responses to each question.

These comments have application to the present case and support the Employer's use of the interview process to assist in the assessment of applicants. In the cases before arbitrators Glass and Korbin, however, the interview process was not the sole means by which information was received, but rather there were other elements such as reference checks and other matters. In the *Chilliwack School District* case the interview results counted for 40% of the selection process; a review of resume and supporting documentation counted for 30%, as did references. In the *Surrey School District* case, the grievor was found not to possess the relevant practical experience sought.

In the present case, while the interview questions were fair and relevant to the positions, they were not comprehensive enough to reasonably assess abilities to perform the position. As a general observation there is a visible disconnect between the scores and comments of the interviewers and the educational qualifications and teaching experience of the respective interviewees. There is no indication the interview addressed many areas relevant to the selection decision and scores were not assigned for any of the following substantive areas: seniority; academic coursework and other training; teaching experience and other relevant experience; and proficiency of the applicants in the relevant areas. Administrators appear to have made their recommendations for hiring without fully considering these factors. The process used was unreasonable to the extent it did not at all appropriately assess the abilities of the candidates as required under the Collective Agreement.

Arbitrators have recognized problems inherent in selection processes that are based solely or almost solely on interviews. In *Fairview Home Inc.*, *supra*, arbitrator Cherniack had opportunity to comment on a selection process where interviews were used as the sole basis of comparison. The arbitrator stated:

62 An interview can be an artificial assessment of an applicant's ability to talk, to charm, or to use the words that the interviewer clearly wants to hear. The ability to be articulate, or the state of being excited about the prospect of becoming a Charge Nurse, does not necessarily prove an ability to be a good Charge Nurse.

63 An interview can be, in the hands of a skilled interviewer a tool to assess applicants; but it should not be the only method of assessment....

66 Interviews cannot and should not be used, however, as a complete method of assessment. The ability to conduct oneself during an interview is only one facet of an employee's abilities, and often is not a particularly significant or relevant facet. So much depends, unfortunately, on the ability of the interviewer to go beyond the surface impressions in the artificial atmosphere of an interview, and probe deeply into the applicant's vision and knowledge....

70 This point is made clear by Arbitrator Hope in dealing with a case in which an applicant's eight years of actual experience in an equivalent position were discounted in an interview process:

...(A)ctual experience was not given any weight independent of the interview process. It was weighted exclusively on the basis of how applicants were perceived by the panel members in the interview process.... The conclusion reached by the two panels in this dispute on the factor of experience raised a question about the suitability of the approach.

That approach may be described in the vernacular as measuring how individual applicants "came across". The process including evaluation of such individual and idiosyncratic traits as eye contact, body language, composure, apparent verbal skills, self-confidence and other behavioral characteristics. Those traits were assessed by the panel members as a means of projecting how individual applicants might respond to the rigours of a position that has an adversarial potential and which requires judgment and well developed communicative skills. But, with great respect to the panel members, their approach was apparently insensitive to the fact that the reversed experience was direct, not related, and that any negative impression he made in the interview should have been carefully weighted against and reconciled with his performance record as a claims adjudicator.

71 The Fairview Nursing Home had a wealth of information open to it, and could have used the interview process to add to that information, and to

allow the applicants to correct, and enlarge upon, or explain their history with the employer and to provide a sense of future possibilities.

72 The employer did not use the interview any that creative way. In effect the interview became a test, without any notice being given to the applicants that they would be tested and what aspect they would be tested...

73 The employer used the interview as a sole method of comparing the two employees, and in doing so it acted unfairly and unreasonably.

In *Elgin County Roman Catholic Separate School Board v. London & District Service Workers' Union, supra*, arbitrator Rose had opportunity to comment on the role of interviews in assessing qualifications, stating:

29 ...It seems to me that in judging the qualifications, ability and experience of the grievor, the panelists' focused on the grievor's interview performance rather than on her prior work experience, notably her three years at St. Joseph's High School. The thrust of the interview was on hypothetical questions and situations; relatively little attention was placed on the grievor's current job and she was not asked whether there were any complaints about her work performance. There appears to have been no serious examination of her secretarial experience prior to working at St. Joseph's High School. In all of the circumstances, it appears the panelists largely ignored the best indicator of degree force skills, namely for her three years' experience with the School Board.

In *British Columbia Government and Service Employees' Union v. Canadian Office and Professionals Employees Union, Local 378, supra*, arbitrator Gordon had an opportunity to comment on a selection process that was based primarily on the results of interviews. Candidates application forms and resumes were not given any substantive consideration. The arbitrator noted a review of the personnel file would have identified relevant information. Arbitrator Gordon stated:

89 ...Interviews may help employers to assess candidates' attitudes towards the posted position, as a method for probing candidates' future

abilities by way of posing hypothetical problems. At the same time, undue reliance on interview results as the selection tool has led many arbitrators to find selection processes fatally flawed. A balanced assessment of all objective factors including prior work experience, passed training and education, performance appraisals, comments of supervisors and coworkers, test scores, etc., must be undertaken, and such factors must not be unreasonably ignored or diminished in weight. Where other relevant information is available, interview results should not be unduly relied on in reaching the selection decision. See *WCB*.

95 The Employer had numerous sources of relevant objective information available to it. The grievor's application and attached resume contained considerable information attesting to past work experience and educational achievements which were directly relevant to the requirements of the new supervisory SDC position: supervising clerical staff including interviewing and hiring; developing new procedures, formats, and forms for efficient office operation; troubleshooting and training staff prioritizing and competing work demands; adapting to conflicting deadlines; and, training and education relating to business communication skills, industrial relations, personnel administration, leadership and supervisory skills. Yet, on the evidence, the grievor's application and resume were not investigated in any meaningful way during the selection process...

96 In my view, a balanced assessment of all objective factors called for a further exploration of degree for prior supervisory experience and related education/training. This did not occur largely because the interview panel decided not to probe for a deeper understanding of the information provided by the candidates in answer to the interview questions. This finding bears no imputation on the bona fides of the interview panel. On the contrary, the evidence satisfies me that the non-probing approach was adopted as a well-intentioned attempt to ensure consistency and fairness as between candidates, and as between the three sets of interviews. Unfortunately, the result of this approach was that candidates were effectively assessed on the basis of their performance during the interview call rather than on the basis of a thorough and balanced consideration of all the relevant factors.

Management is certainly entitled to a high degree of deference in exercising its discretion to select teachers, however it cannot do so in a manner that is arbitrary, discriminatory, in bad faith or otherwise unreasonable. In the present case using interviews may well have been a helpful tool in determining the abilities of the respective

applicants, but it was unreasonable for such to effectively comprise the sole means for doing so.

In the present case there appears to have been no regard given to the substance of the interviewees' respective backgrounds, despite reference to these as contained in the application forms. Such a basic, and not very time consuming, review would have shown the Grievor to be a highly regarded and enthusiastic music teacher, with very good comments from those describing his teaching and abilities. As noted above, Article C.21.2 of the Collective Agreement expressly provides the teacher shall have the responsibility of ensuring the Human Resources Department has the appropriate substantiating documentation in support of one's "necessary qualifications", and there was no indication given to the interviewees – the Grievor in particular – that this material should have been brought to the interviews otherwise it would not be taken into account. The information in the material held by the Human Resources Department speaks directly to significant matters relating to one's abilities as defined in Article C.21.1: relevant teaching experience in the subject or teaching area; relevant educational preparation; relevant qualities such as: the teacher's commitment, temperament, experience, less formal training, and past performance; and evidence of ability to perform the duties of the position in a satisfactory manner.

I appreciate the point-based scoring used by the interviewers was not meant to arrive at a simple mathematical calculation about the respective candidates, but it is apparent from what was written down as responses to the questions that there is little to differentiate Ms. Allison with those of the Grievor – certainly not a "demonstrable" difference as required under the relevant Collective Agreement language. The term "demonstrable" suggests a difference that would be apparent to others, and this does not exist in the present case between these two teachers in regards to the Esquimalt position.

To be clear, the evidence shows there was little if any substantive assessment of any of the applicants, and what appears to have been complete reliance on interviews that

were conducted. There was also reference to the assessment of applicants including a review of applications submitted, however there was no review of applicants' personnel files, notwithstanding the applications may have included references to matters contained in those files. As noted, candidates were not informed that the interview would essentially be the sole means of assessment, nor were they informed any information they wanted to be considered should be brought to the interview, despite the reference to in Article C.21.2 to the teacher being responsible for ensuring the Human Resources Department had this information, which it did in the present case.

The relevant post and fill selection provision of the Collective Agreement contained in Article E.20 expressly provides the applicant with "greatest seniority as defined in Article C.2 shall be given preference, provided that (s)he possesses the qualifications as set out in Article C.21 of this Agreement. Where a junior teacher is selected, her/his ability to perform the teaching position shall be demonstrably higher than more senior candidates." On the evidence there is no indication at all that the Grievor was given any preference in relation to any matter, and that there is no objective basis for a conclusion that the ability of the successful junior applicant met the standard of being "demonstrably higher" than that of the Grievor, with much greater seniority.

A brief review of the Grievor's file indicates he possesses many years of teaching experience, with his work being spread over multiple schools teaching a full range of music and theatre related classes. This has resulted in him working with a wide range of learners in a full range of music subject. I find it was not reasonable for the Employer to have ignored the Grievor's experience in assessing his qualification. The Collective Agreement recognizes a proper review of qualifications requires a meaningful look at one's teaching experience in terms of assessing ability to perform the duties of a position. The parties have also recognized that the value of experience is reflected in the salary scale, which involves consideration of only two matters: level of academic achievement and number of years teaching experience.

It is not in the circumstances reasonable for the Employer to assert it did not know what the Grievor's teaching experience was, or what abilities he demonstrated during that experience. The Employer is the supervisor of the Grievor's teaching and as such has direct knowledge with respect to the range of duties assumed and the abilities displayed during that teaching. The Grievor provided the names of references to contact and there was no follow up on this. The Employer's conclusions about the Grievor's teaching practice was not at all in keeping with the abilities he appears to demonstrate on a daily basis as an employee.

On the information readily available to the Employer the Grievor's teaching experience, educational preparation, relevant qualities and evidence of ability to perform the duties of the position all indicate he was highly qualified in every respect.

An objective review of the information surrounding the Esquimalt selection shows that while Ms. Allison is qualified, she had far less teaching experience than the Grievor, a lower level of academic preparation, and much lower seniority. The Grievor's documented relevant skills and experiences exceed Ms. Allison's in almost every respect (Ms. Allison had taken an university course on the subject and the Grievor had not). Nothing in the Ms. Allison's application or personnel file reveals any indication of demonstrable superiority over the Grievor in relation to the posted position. It is difficult to ascertain how the interview process that was undertaken provided information that could have reasonably demonstrated that Ms. Allison had higher abilities.

In arriving at my conclusion, I agree that, generally speaking, job applicants must bear the consequences of attending an interview unprepared, unable, and/or unwilling to sell themselves in terms of impressing upon the interviewers why they should receive the job they seek. It is generally the responsibility of an applicant to provide all relevant information to the Employer during the application and interview process. Where an applicant fails to provide relevant information given the opportunity to do so, a grievance claiming that the Employer has improperly assessed the applicant will not succeed. In

Sault Ste. Marie (City) Public Utilities Commission and CUPE, Local 3, supra, arbitrator Hinnegan rejected the union's argument that the Employer had improperly assessed the grievor based on "incomplete information". The board found that the grievor had ample opportunity to provide relevant information in the application and interview but had failed to do so, stating:

24 In the instant case, the complaint is that the grievor was assessed on incomplete information; but, how that can be said to be attributable to the process used here, given the opportunities afforded the candidates to provide information, is somewhat difficult to appreciate in the circumstances. The grievor had ample opportunity both on the job bid and at the interview to provide the panel with his qualifications and any other background information he deemed appropriate. As the union acknowledged, he failed miserably on both counts but there was not suggestion that that was due to his inability to express himself, either in writing on the application or verbally at the interview. Indeed, the manner in which he was able to express himself and his position at this hearing gave no indication of any deficiency in that regard on its part.

25 Rather, with respect to the interview, he said that he did not see any need to attempt to "sell himself" to the panel members in that he considered that they already should have had everything they needed to evaluate him so he made no attempt to do so. One can only, then, speculate as to what he thought the purpose of the job interview was.

26 He acknowledged, likewise, that he also submitted a poor job application in that he had applied for the same job in 1992 and he assumed that everything would be the same. He gave that also as a reason for not reading the job posting notice or obtaining the selection criteria. Therefore, although expressly invited to do so on the job bid form, he said that he did not bother to supply the panel with all the information he could have pertaining to his qualifications for the job.

27 A serious job candidate surely must bear some responsibility and accountability in the selection process and, if the information before the election panel was incomplete in any significant respect, the conclusion is unavoidable that the grievor was the author of his own misfortune in that regard. It would seem that, at least in part, the grievor's attitude was due to his erroneous assumption from the outset that he was entitled to this position and would be appointed to it solely on the basis of his seniority. As indicated earlier, that is not the case on the language of this collective agreement....

These comments have some application to the present case and I accept the Grievor should have prepared more for the interview with a view to “selling himself”. However, the present case does not appear to be one where the Grievor performed extremely poorly in an interview, but rather appears to be one where he did not provide, or elaborate sufficiently on, examples from his teaching experiences, which the interviewers appeared to be looking for.

Further, it must also be pointed out that in the *Sault Ste. Marie* case applicants were informed to bring material they wanted to have considered and relevant information was not available through other objective sources, which differs from the present circumstances. On this point the board in *Sault Ste. Marie* stated:

28 ... (I)t perhaps bears repeating that had there been evidence adduced at the hearing of relevant information available through other objective sources, such as referred to earlier, but not sought or considered by the panel, that may well have called into question the assessment of the grievor on the applicable criteria and, potentially the selection decision made. However, there being no such evidence before us, there is no basis for our interfering with the decision which was made....

In the present case the online application form did not provide an opportunity for candidates to add attachments and, as noted above, no one was advised to bring material they wished to have considered. Unlike the *Sault Ste. Marie* case, information was readily available to the administrators in the present situation and it was reasonable for the candidates to believe such would be considered as it was directly relevant to their applications.

For the foregoing reasons, the present circumstances warrant a determination there has been a violation of the Collective Agreement. As explained above, I deny the grievance in relation the Reynolds position and uphold the grievance in relation to the

Esquimalt position. The circumstances in the case warrant the Grievor's appointment to the position and I am inclined to make this order however, given sensitivities to continuity during the school year, I remit the precise matter of the Grievor's placement for the current school year to the parties for resolution and remain seized with jurisdiction to make a final and binding order on this matter if the parties cannot agree. This is not a case where a re-do by the Employer is in appropriate as it often is. Just as it is apparent Ms. Kerr was the correct selection for the Reynolds position, the evidence led at these proceedings supports a conclusion that the Grievor is the correct candidate for the Esquimalt position. I also remit the precise remedial monetary calculations to the parties and remain seized with jurisdiction to address any dispute that may arise out of the implementation of this decision.

It is so awarded.



Christopher Sullivan