

**IN AN ARBITRATION**

BETWEEN:

**GREATER VANCOUVER REGIONAL DISTRICT**

(the “Employer”)

AND:

**GREATER VANCOUVER REGIONAL DISTRICT  
EMPLOYEES’ ASSOCIATION**

(the “Union”)

AND:

**VINCENT LAUNDER**

(the “Intervenor”)

Dispute: Francesco Cimino /  
November 1995 Maintenance  
Mechanic II job competition

Board Chair: Rod Germaine  
Employer Nominee: Michael Zora  
Union Nominee: Arthur Pape  
For the Union: David Tarasoff  
For the Employer: Alan J. Hamilton  
For the Intervenor: Michael J. Weiler &  
Clare B. Hauer

Hearing: December 4 & 5, 1996,  
March 5, 7, 12 & 25 and  
July 4, 1997; Vancouver, B.C.

Award: October 31, 1997

**AWARD**

## Introduction

On October 23, 1995 the Employer posted a vacancy in the position of Maintenance Mechanic II, Operations & Maintenance, Water District.

The grievor, Mr. Francesco Cimino, was one of fourteen employees who applied for the position. He was already a Maintenance Mechanic II (“MM2”), but not in the Water District. He works in the Sewerage and Drainage Division.

Mr. Vincent Launder, who is junior to Mr. Cimino, was another of the applicants. At the time he was a Water System Worker I in the Water District. The position of Water System Worker I (“WSW1”) is lower-rated than the position of MM2.

The job selection process was governed by a “relative ability” clause. The relevant portion of Article 4.03, Seniority Promotions, is this:

In the case of promotions, where two or more equally qualified applicants are involved, the senior applicant shall be promoted. If the senior applicant is not selected, the reason why he did not obtain the position will be given to him or to his union representatives if so requested by the applicant.

Both Cimino and Launder were interviewed. Cimino was not short-listed. Launder was ultimately selected and promoted to the vacant position in late November, 1995.

Mr. Cimino felt he was entitled to the position and he grieved. On his behalf, the Union argues the Employer breached the collective agreement when it selected Launder instead of Cimino. Specifically, the Union contends Mr. Launder did not meet the minimum qualifications for the MMZ position and the selection process was flawed. More generally, the Union argues the breach is an aspect of a glass wall which the Employer has erected between the Sewerage &

Drainage Division (“S&D Division”) on the one hand and the Water District on the other.

The Employer denies any breach of the collective agreement. It also denies that it has constructed any barriers to transfers from the S&D Division to the Water District.

Mr. Launder attended at the commencement of the hearing and was informed of his right to intervene and participate as a party. After some hesitation, he elected to participate. He was granted adjournments to retain and then to instruct counsel.

### Facts

The grievor earned a certificate in pipefitting in Italy in 1968, and worked in the plumbing and pipefitting trade in Germany for two and one-half years before migrating to Canada in 1971. He completed a four year apprenticeship in plumbing and earned the inter-provincial trade qualification in 1981. He earned a formal trade qualification in sprinkler fitting in 1983. Mr. Cimino has since supplemented his qualifications with special and refresher certifications in the plumbing code, welding, pipefitting layout of mild steel and industrial hydraulics. He has also successfully completed a number of related courses which are noted in his “Profile Report” maintained by the Employer. The last of these was a 45 hour course at British Columbia Institute of Technology (“BCIT”). The subject was pumps used in the Water department. He had previously completed a course at BCIT on sanitary pumps. Both courses were taught by Mr. Amzad Ali, who is now a General Foreman, Operations & Maintenance, Water District, and about whom more will follow.

Mr. Cimino commenced work for the Employer on March 14, 1988. His first position was Labourer on a Project Crew in the S&D Division. From there he was promoted to MM2 in the Water District in August of 1988, but did not

successfully complete the probationary period in that position. He was transferred to a Sewerage and Drainage Worker I position in March of 1989, and then promoted to MM2 in the S&D Division on August 31, 1992. He currently works on the Mechanical Crew in the S&D Division.

Mr. Launder's seniority date is April 29, 1991. He started working part-time at the Capilano Fish Hatchery when still in high school, and worked full-time at the Hatchery for two years after he graduated. He commenced his employment with the Employer as a Labourer on a field crew in the Water District. He transferred to a Labourer position on the Mechanical Crew in the Water District in September of 1991. He successfully bid on a WSW1 position in September, 1992, but was retained on the Mechanical Crew for a further year. As we have said, he was a WSW1 at the time of the disputed posting.

Mr. Launder abandoned an apprenticeship in Electricity and Industrial Electronics in 1990, choosing instead to focus on hydraulics and other courses more closely related to the Employer's water systems. He has successfully completed a series of courses, most of which were offered at ECIT. At the time of the competition for the MM2 position in the Water District, he was progressing toward a millwright's trade qualification.

The body of the posting on October 23, 1995 read as follows:

DUTIES

Provide minor maintenance to equipment (pumps, valves, etc.) following established schedules and procedures.

Assist tradesmen in the maintenance, repair and overhaul of a variety of equipment within the Water District.

Work as part of a small crew (steel crew) as required

## REQUIREMENTS

Minimum Grade 10 education. Drivers' license and health certificate for watershed entry.

Ability to operate power and pneumatic tools.

Physically fit.

Demonstrated mechanical ability.

Must be able to work in confined spaces.

Demonstrated safety awareness/training in GVRD OH&S Policies and Procedures,

A minimum of two years experience in pipefitting and plumbing work (cutting, threading, layout), equipment maintenance and simple repairs.

That language is very similar to the general job description for the MM2 position.

The vacant position was on the Mechanical Crew. It is one of two crews under the supervision of the Mechanical Supervisor. The other is the Steel Crew. Mr. Ali was the Mechanical Supervisor at the time of the posting. He described the two units as technical crews which provide support and assistance to the field crews.

The function of the Mechanical Crew is to perform maintenance on Water District equipment and to repair and overhaul that equipment, as well as provide assistance to field crews in emergencies and as may be required from time to time for other reasons. Mr. At testified that approximately 80% of its work is in the field, with the balance being performed in the shop. The Crew is headed by a trades foreman holding the position of Maintenance Mechanic IV ("MM4"). The Crew includes other MM4s, all of whom are qualified millwrights. The other members of the Crew work with the MM4s in order to assist them. They include

MM2s, employees in the Maintenance Mechanic III (“MM3”) position and, possibly, Labourers,

The MM2 position in question is not restricted to working as a member of the Mechanical Crew. The incumbent is frequently assigned to assist other crews in the Water District. He or she may be assigned to assist the Steel Crew. It is responsible for maintenance and repair of valves, pump chambers, buildings and other equipment of a less technical nature. Mr. Ali’s evidence is that approximately 95% of its work is in the field, It does not include trades persons, but does include two MM2s

The incumbent in the contested MM2 position is also commonly assigned to assist field crews. The Water District is divided into six areas, each with its own operations or field crew which is called a District Crew. They are comprised of a District Officer, an Assistant District Officer and five or six employees in the positions of WSW1 or Water Service Worker II (“WSW2”). The District Officer will often assign a member of the District Crew to assist the Mechanical Crew or the Steel Crew when it is working in the District Crew’s area.

The obvious difference between the Water District and the S&D Division is the product with which they are concerned. The Water District is concerned with the distribution of potable water, while the S&D Division is concerned with the removal of waste water, There are other differences The Water District system involves much higher pressures, which in turn necessitates different kinds of valves and equipment, The valves in the Water District are mostly vertical, while those in the S&D Division are mostly horizontal. The higher pressures in the Water District system create a safety issue, while the risk of infection from waste water creates a different kind of safety issue in the S&D Division.

Another difference is relevant to the issues at hand. We have described the manner in which the posted MM2 is assigned to other crews in the Water District. In contrast, as a MM2 on the Mechanical Crew in the S&D Division, Mr. Cimino spends essentially all of his working hours assisting a MM4. As he put

it: “We are a pair”.

Mr. Cimino would prefer to work in the Water District. He testified he has long wanted more work with “water pumping systems”. Asked why, he referred to the extra degree of care required in the S&D Division because of the risk of infections from waste water. Whether or not that is the full explanation, there is no dispute between the parties over the application of Article 4.03, Mr. Cimino is already a MIM2 but it is common ground that the collective agreement language governing promotions applied to the selection process.

Mr. Cimino’s application for the posted position is dated November 2, 1995. He testified that he drafted a paragraph explaining the reasons for his application but, for purposes of legibility, he had his daughter type it for him. He testified she “summarized” his notes, and in his view she made a mistake. Since he was already a MM2, he testified she should not have included statements to the effect that he was looking forward to the opportunity to “learn about mechanical maintenance” and he wanted to “learn and experience working in the Water Distribution and O&M of Waters Systems”, But his own original notes were introduced into evidence as well, and they also contained references to his expectation that he would learn “about water distribution and O&M of water system”.

Mr. Launder submitted his application for the MM2 position on November 3, 1995. As we have said, there were fourteen internal applicants The most senior of them was the only other MIV2 who applied. The remaining applicants had less seniority than either the grievor or Mr. Launder) but they included two MM4s from the S&D Division. The twelve applicants with at least six months’ seniority were invited to an interview.

The interview team consisted of Mr. Ali and Mr. Harold Clark, Personnel Officer, As we have said, Mr. Ali was the Mechanical Supervisor at the time and was therefore responsible for the Mechanical Crew on which the new MM2 would work. He has been with the Employer for more than 17 years and is an accomplished individual. He was the Mechanical Supervisor for seven years. He

is a certified millwright, and a certified industrial mechanic. He has earned a certificate in management maintenance systems and is a qualified member of the Tribologist and Lubricant Engineers Association of North America. He also holds a diploma in education and is working toward a degree. He is a part-time instructor at BOLT in computer technology and in a number of courses provided for qualification recognized by the British Columbia Waste and Water Association. In 1996 he authored a text for one of those courses entitled "Introduction to Flow Control Device; Training Manual for Operators in Water & Waste Water Industry".

Messrs. Ali and Clark conducted the interviews over the course of two days, November 24 and 28, 1995. Each interview lasted about 30 minutes. The interviewers had prepared questions on a printed form which they completed for each of the candidates. The forms contained certain "technical" questions designed by Mr. Mi, as well as other questions designed by Mr. Clark. The forms they completed in relation to Messrs. Cimino and Launder were introduced into evidence. When the interviews were completed, Messrs. Clark and Mi reviewed the results, and short-listed four names. Mr. Cimino's was not among them. Mr. Launder's was at the top of the list. After further discussion, the four were ranked. Mr. Launder was the only candidate they recommended.

The essence of Mr. Ali's evidence was that Mr. Launder had more experience with the water system, he had taken more relevant courses, he demonstrated better knowledge in the interview, he would require much less time to train because he could already do the job, he was more obviously a team worker, and he demonstrated a stronger ambition to succeed. The form used by Messrs. Clark and Mi to record their recommendation provided a space for them to give their reasons. The space was left blank. But, in his cross examination, Mr. Ali testified the reason was that Mr. Launder "was the most qualified" and his experience in the Water District was determinative in this regard.

### General principles

Neither the Employer nor the Intervenor contested the Union's submission that the determination of the dispute requires consideration of whether the Employer correctly applied the terms of the collective agreement: *Gearmatic Co., A Division of Paccar of Canada Ltd* (September 20, 1984), unreported (Larson), at pp. 13 to 20; *Board of School Trustees of School District No. 68 (Nanaimo)* (1985), 19 LAC. (3d) 176 (Germaine); *Workers' Compensation Board of Brush Columbia (1989)*, 4 L AC. (4th) 141 (Hope), at pp. 163-4. *Nanaimo Regional Hospital* (September 20, 1977), unreported (MacIntyre), at p. 10; and *Mount Sinai Hospital* (1991), 13 L.A.C. (4th) 230 (Haefling), at pp 248-9. In other words, it was not suggested that the board's jurisdiction is confined to issues of reasonableness, arbitrariness, discrimination and bad faith.

The parties' agreement concerning the applicable principles did not extend to the question of whether management's decision is entitled to a degree of deference. The Union submitted there is no longer any basis for an arbitrator to give any such deference. The Union argued arbitrators should take the approach followed in discipline or discharge cases. Counsel dismissed the validity of even a limited degree of deference, and submitted the proper approach is the same even if the contract language seems to give management a discretion or the authority to make subjective assessments in relation to employee' qualifications.

The Union offered no authority to support this proposition, and we consider it too rigid. We agree the key issue is whether the employer correctly applied the collective agreement. But the consensus of most arbitrators seems to be that the decisions taken by management in discipline and discharge cases are subject to much closer scrutiny than their judgments in seniority/promotion disputes.

The overriding consideration must be the precise language of the parties' agreement. Where the collective agreement states that the outcome depends on the "opinion" of management, for example, an arbitrator who declined to extend

some deference to the judgment of management would be departing from the parties' negotiated regime. We also consider it appropriate to extend some deference to management's assessments of employees and related judgments. It is not a matter of abstract or intrinsic industrial justice. It is less complicated than that. As a simple and practical reality, management is normally in a better position to evaluate employees than an arbitrator.

Absent bad faith, an arbitrator should not lose sight of that fact when deciding whether management erred. See *Brown & Beatty, Canadian Labour Arbitration* (3rd ed.), at page 6-39, *Board of School Trustees of School District No. 68 (Nanaimo)*, *supra*, at page 18; *Cue Datawest Ltd.* (November 23, 1992), unreported (Chertkow), at page 27; and *District of Kitimat* (February, 1991), unreported (Kinzie), at page 19.

There was some argument in relation to the onus of proof in cases such as this. It is settled that a trade union bears the initial onus of proof. The parties also agree that if the trade union satisfies that onus, the effect is to shift the onus to the employer to prove the junior employee is demonstrably superior. But what is the nature of the trade union's initial onus? In addition to establishing that the grievor is senior, must the Union prove the grievor meets the minimum qualifications for the job or is it required to show the grievor is relatively equal to the junior employee?

The Union contends the initial onus is to prove the grievor is qualified and able to do the job. It makes a strong argument. To require proof of relative equality is to place virtually the entire onus on the grievor or trade union in relation to a matter which is largely within the knowledge of the employer. In order to establish relative equality, the trade union will usually have to show the junior incumbent is not demonstrably superior. But that is precisely the principal issue. Since the decision to prefer the junior applicant is the employer's, it would seem more appropriate to place the principal onus on it.

However, the authorities cited by the Union are not generally supportive. In *Workers' Compensation Board, supra*, Arbitrator Hope stated the onus shifts when "...an applicant establishes *prima facie* that he or she is the senior applicant and that his or her qualifications are relatively equal to those of competing applicants" (p. 165). Brown & Beatty, *Canadian Labour Arbitration* (3rd ed) seems consistent with that view: see page 6-51. *Board of School Trustees of School District No. 68 (Nanaimo), supra*, as counsel concedes, does not decide the point. In *Universal Engineering & Tool Works, Division of Cline Associates London Ltd* (1990), 16 L.A.C. (4th) 214 (Palmer) the dispute turned on contract language which permitted the employer to look outside the unit if no application from the workforce "is considered acceptable". It was held that language required the employer to first consider whether applicants from the bargaining unit met "... the minimum requirements to fill the job" (p. 216). That analysis has no application to a competition between two current employees under a relative ability clause.

There is support for the Union's position. But it was considered and rejected in *Prince George Senior Citizens Housing Society* (1987), 27 L.A.C. (3d) 410 (Kelleher) at 4 17-8. Fortunately, we need not make any determination of the issue. The Employer does not assert the Union has failed to satisfy the initial onus resting on it. From the outset the Employer has accepted the onus. As counsel put it in his opening statement: "The Employer accepts the onus to establish a demonstrable difference between the two candidates". The Employer was tempted to revise this position by the Union's contention that Mr. Launder did not possess the minimum qualifications. The Employer considered reciprocating on the basis of Mr. Ali's evidence that Mr. Cimino would require substantial training in order to be capable of performing the vacant MM2 job. But the Employer resisted the temptation, and maintained its position that Mr. Launder was the "discernibly" better candidate.

### Minimum qualifications

The first critical issue, then, is whether the appointment of Mr. Launder was

contrary to the collective agreement because he - the junior applicant - did not meet the minimum qualifications. Counsel cited *York County Hospital* (1937), 30 LAC. (3d) 314 (Haefling) which involved an analogous grievance under a relative ability clause. It was held the junior employee did not possess two of “the prerequisite experience and skill requirements for the job” (327). Arbitrator Haefling observed:

I accept the rationale in the authorities... [citations omitted]. that an employer may not ignore its own job specifications in selecting and appointing a successful job applicant, and when the posting specifically states that “preference will be given to candidates who bring certain background qualifications, in my view, that undertaking can not simply be disregarded. since the incumbent lacked certain qualifications while the grievor in fact has ... [them], ... it cannot be said that the grievor and the incumbent were “relatively equal” so that seniority became the deciding factor. (p. 127)

The Union also relied on *Mount Sinai Hospital, supra*. The provision in question in that case prescribed selections based on “skill, ability, experience and qualifications”. Where those factors were “relatively equal” seniority would “govern” (p. 239). The posting stipulated a minimum level of experience and the successful junior employee did not possess that qualification. The majority award rejected the employer’s argument that the posting was merely “informational” (p. 251). It held “.. the posting notice operates as a two-way screening mechanism through which, on the one hand, employees are able to decide in the first instance whether or not to apply for a particular position, and on the other hand, an employer is able to decide whether to accept or reject applicants” (p. 251). It was the view of the majority that, “...once having determined and published the position requirements on a job posting, it is not open to an employer simply to alter the position requirements at will during the currency of the posting and selection

procedures, unless such changes were made known and the position re-posted” (p. 251).

We accept these authorities. They seem to us to be an important corollary of the Employer’s right under the collective agreement in this case. As counsel for both the Employer and the Intervenor have emphasized, a relative ability clause entitles the Employer to appoint the best candidate. The precise language of this contract does not even qualify the threshold requirement by the usual reference to “relative” equality. Article 4.03 limits the Employer’s scope to select its choice of candidate only to the extent that it cannot appoint a junior employee over a better qualified senior employee. In other words, the parties have agreed the Employer’s interest in maximum efficiency outweighs the value of employees’ seniority. Where an employer enjoys that protection of its operational needs and interests, it is appropriate that an arbitration board ensure the selection and appointment processes conform to the collective agreement and to process principles which are fair to the employees affected.

Did Mr. Launder meet the minimum qualifications specified in the posting? The focus of the Union’s argument is the last of the “Requirements” listed in the job posting:

A minimum of two years experience in pipefitting and plumbing work (cutting, threading, layout), equipment maintenance and simple repairs.

Very nearly the same qualification appears in the job description:

A minimum of two years experience in pipefitting and plumbing work (cutting, threading, layout), pump maintenance and simple repairs, use of cutting torch.

The Union says the grievor’s qualifications in this respect are unimpeachable. (In addition to his formal plumbing and sprinkler fitting trade qualifications, and his further training courses, he is already a MM2. The job description, the

Union emphasizes, does not distinguish between a MM2 in the S&D Division and a MM2 in the Water District.

In contrast, at the time of the competition, Mr. Launder held the “semi and unskilled” position of WSWI. It is essentially a labourer’s job, as confirmed by such specific duties as cleaning brush, cutting grass and removing debris He had held that job and the Labourer job before it for over four years. Since both of those jobs involved a minimum of plumbing and pipefitting work, the Union submits it was impossible for him to have accumulated the requisite two years’ experience in this respect. Thus, the Union argues, the grievance must succeed on the basis that Mr. Launder was simply not qualified to apply and therefore could not be demonstrably superior to Mr.Cimino,

The Employer urges the board to consider the actual job described by the posting and the evidence in relation to it, not the generic job outlined in the job description. The Employer relies on Mr. Launder’s evidence that he has over two years’ experience with plumbing and pipefitting, and submits that the real substance of the dispute is whether Mr. Launder was the demonstrably superior applicant.

On behalf of Mr. Launder, it was argued that the Union’s challenge to Mr. Launder’s minimum qualifications is ill-considered and even disturbing. It was suggested that if a sole application were denied on the same ground, the Union certainly would have grieved. But it is submitted that in any event Mr. Launder’s evidence establishes that he had the required level of experience.

The board accepts the proposition that the dispute is over an appointment to a particular job, not the broad and representative position referred to in the job description, The emergence of specific jobs involving particular duties or skills within the terms of broad-banded job classifications is not uncommon. And, it is expressly contemplated by the job description in this instance. After the heading “Duties”, the job description notes in parenthesis that: “The duties described

hereunder are intended to be representative of the position and are not to be considered as all-inclusive”. The parties thus expected specific jobs to develop within the larger description. At one point in his evidence, Mr. Cimino himself recognized the job description did not adequately define the MM2 job on the Steel Crew.

It was therefore proper and appropriate for the Employer’s selection process to relate the applicants to the vacant MM2 job in the Water District. As Arbitrator Kinzie said in *District of Kitimat* (February, 1991), unreported, the selection is properly made by measuring ... [the applicants] against the actual requirements of the job” (p. 13).

Mr. Launder testified the actual pipefitting and plumbing requirements for the MM2 job he has performed since January, 1996 are much less demanding than the same requirements in the WSW1 job he held prior to the competition. He agreed with Mr. Ali’s estimate that approximately 10% of the WSW1 job would involve pipefitting and plumbing, and his evidence is that perhaps 1% of the MM2 job is devoted to that kind of work. We have no other evidence of the actual requirements of the MM2 job, but that is not the precise point in issue. The focus of the Union’s submission is his previous experience, not the extent of the pipefitting component of the job. That is because it is his experience which determines whether Mr. Launder met the express minimum requirement in both the posting and the job description for “two years experience in pipefitting and plumbing work (cutting, threading, layout)”.

If that language was intended to stipulate a minimum of two years’ of full-time pipefitting and plumbing, the Union’s contention would necessarily succeed. Mr. Launder gained a little experience with small pumps in his job at the Capilano Fish Hatchery. He acquired much more relevant experience in the jobs he held with the Employer from May, 1991 to late-1995: Labourer on a field crew assisting WSWIs and WSW2s; Labourer on the Mechanical Crew assisting MM2s, MM3s and MM4s; and WSWI. Mr. Ali testified that these jobs involved

8 to 10 or 12% pipefitting and plumbing type work, although the amount actually performed by Mr. Launder was dependent upon the supervisor and the others he was assisting.

Mr. Launder did not disagree with Mr. Ali's estimates of the proportion of pipefitting and plumbing work performed by the various crews, but he was adamant that he had done as much "hands on" pipefitting and plumbing work as anyone on the crews with which he worked. We do not doubt it. Mr. Launder evinces estimable enthusiasm, ambition and determination. He articulated his philosophy rather convincingly: "You want to stand out so you move up". But, even if he exploited his opportunities as effectively as possible, he could not have accumulated the equivalent of two years' fulltime experience in pipefitting and plumbing work. At best, his experience might have added up to something like 8 or 10 months of that work,

Contrary to the Union's submission, however, that is not the end of it. As we have indicated, the Union's position assumes the stipulated minimum requirement refers to full-time experience. That assumption rests upon an interpretation of the language of the job posting and the job description. We do not with the First, it would be a somewhat unusual requirement for-the equivalent of one-half of an apprenticeship. .Second, it is contrary to the nature of the MM2 job and, for that matter, other Water District Operations & Maintenance jobs. Pipefitting and plumbing skills are obviously important to any work involving a water distribution system. But the work is not restricted to pipefitting and plumbing. The trade of millwright is more important for the work on the Mechanical Crew. It includes a component of pipefitting and plumbing, but consists of much more. Third, in any event, as the Union emphasized, the MM2 position does not require trade level skills. MM4 is the trade level job in the range. It would thus be inappropriate and unnecessary to require two years' full-time experience in pipefitting as a prerequisite for the job.

Most importantly, however, the language contained in both the job description

and the job posting does not bear the interpretation implicit in the Union's position. We quote again the fill requirement:

A minimum of two years experience in pipefitting and plumbing work (cutting, threading, layout), equipment maintenance and simple repairs.

Given the context, including the actual requirements of the job, it becomes evident that pipefitting and plumbing are but two of the mix of skills in which the applicant is required to have two years' experience. The others are equipment maintenance and simple repairs. There is no indication of what proportion of the two years must have been in pipefitting and plumbing.

When the specific requirement is considered in context, Mr. Launder's experience takes on much greater weight. He does not meet the requirement by a wide margin, but he undoubtedly had more than two years' experience in work which involved the combination of skills specified. It is safe to say the "two-way screening mechanism" (*Mount Sinai Hospital, supra*) did not break down in this instance. Mr. Launder was entitled to consider himself qualified and LIP the Employer was entitled to give his application valid consideration. It cannot be said that the Employer, having posted the position, altered the requirements during the currency of the posting. The Union's initial complaint about the appointment of Mr. Launder therefore fails.

### **The process allegations**

The Union's submission is that the process leading to the appointment of Mr. Launder was flawed in four respects. First, it is the Union's submission that the Employer failed to fairly consider the grievor's experience and qualifications because the selection process was dominated by a single one-half hour interview. Second, the Employer failed to assess interview performance according to any objective system of grading or weighing the results. Third, to the extent the Employer considered anything outside of interview performance, it gave undue con

sideration to working experience in the Water District. Fourth, to the extent the Employer considered anything beyond the interview, undue consideration was given to a dated incident of alleged misconduct which was not the subject of any timely disciplinary response.

It will be convenient to begin with the last of these complaints. Unlike the others, it warrants only brief consideration. According to the grievor, his failure to complete the probationary period for a MM2 position in the Water District in 1988 and 1989 was attributable to a personal conflict with his supervisor at that time. The Employer took the position that those events are not an issue because it did not rely on them in any way in the selection process. Indeed, although certain documents related to the unsuccessful probation remain in Mr. Cimino's personnel file, it was the Employer's assertion that Messrs. Ali and Clark were not even aware of those events,

The Union says that Messrs. Ali and Clark became aware of the grievor's 1988 difficulties with his supervisor during the interview. The argument is that, having learned of the problems in 1988 between Mr. Cimino and his supervisor, those problems must have influenced the selection. The Union submits it is "ludicrous" that those events would be given any significance since Mr. Cimino was never disciplined and he "obviously gets along well enough in S&D Division"

The evidence of Mr. Ali was less than satisfactory in this respect. He testified all of the questions asked during the interview were of some significance, including the question with respect to the elements of teamwork. But he insisted Mr. Cimino's disclosure of his previous difficulties was of no significance because Mr. Cimino was not even short-listed. He explained that it was Mr. Cimino's answers to the technical questions which prevented his name from being placed on the short list. It was Mr. Ali's evidence that the issue of Mr. Cimino's ability to work with others would have become a factor only if he had made it to the short list.

This explanation seems slightly contradictory. But the Employer does not dispute the Union's characterization of the grievor's difficulties with his supervisor in 1988 and 1989. We therefore accept that it would be unfair to the grievor if those events did constitute an obstacle to his application. The problem with the Union's argument is that it assumes that, because Messrs. Ali and Clark knew of the grievor's problems in 1988 and 1989, those events must have influenced the Employer's decision not to appoint Mr. Cimino. We do not accept that logic. We recognize that the Union faces a difficult burden of proof in this respect. But there is no evidence at all to contradict Mr. Ali's

Further, if Mr. Cimino's ability to get along with others at work was a factor which worked against him, it need not have been based on events in 1988 and 1989. He agreed that during his interview he said he was having trouble getting along with "a couple of mechanics" in the S&D Division. In these circumstances we are not prepared to infer that the process was flawed by reason of consideration improperly given to dated conduct which was not treated as misconduct at the time. That factor would have added little to the relevant analysis.

We return then to the first three allegations of a defective selection process. The Union's attack on the prominence given the interview in the selection process is founded on strong authority. In *Workers' Compensation Board, supra*, the grievance succeeded because the employer had "... substituted performance in the interview for an assessment of the abilities and qualifications (p. 166). In *Victoria General Hospital* (1991), 21 L.A.C. (4th) 185 (Stone) the interview was found to be indirect and irrelevant. Arbitrator Slone held "... the only thing that the interview measured was the ability of the individual to perform in an interview setting and to convey a desirable image of "himself or herself" (p. 195). In *City of Winnipeg* (1990) 1.2 L.A.C. (4th) 231 (Freedman) the employer relied on a test to make a selection under a sufficient ability clause. The test was not unfair but it was held the employer did not discharge its obligation to "...consider all relevant indicators of ability" (p. 240). As Arbitrator Freedman said.

No doubt test results, especially from a test as carefully put together as this one, are very significant indicators of ability. But there are other indicators and when the... [employer] effectively disregards those other indicators because of a failure to achieve the pass mark on the test, the... [employer] has not properly evaluated the applicants.

The Union argues the Employer made the same mistake in this case. It relied upon the results of the interview to the exclusion of employment history and other indications of the grievor's qualifications.

We accept the force of the Union's criticism. Mr. Ali acknowledged that he did not even review the personnel files of the candidates. The selection turned entirely on the interview. The questions used for the interview were largely valid in the sense that they canvassed subjects relevant to the MM2 job. But they were necessarily selective and limited; they did not canvass a representative range of knowledge and skills. Some were incapable of any right or wrong answer. Question 10, for example, was: "What are some of the things in a job that are important to you?". The Union was particularly concerned about question 11 in response to which Mr. Cimino disclosed his 1988 problems with his supervisor. It was this: "Sometimes it is difficult to work with others. Describe to us a situation where you had a conflict/disagreement with co-workers and how you dealt with it." Further, on an overview of all of the questions, they appear weighted toward the knowledge and skills related to the field work of the District Crews. That seems to be borne out by the questions on flushing pressure regulator valves, pump tender responsibilities, and repairing leaks.

The most important of these shortcomings must be the inherent inability of an interview based on 13 questions to canvass all of the knowledge and skill necessary for the competent performance of the MM2 job. It was impossible for the interview to allow for adequate consideration of the applicants' qualifications in the sense intended by Article 4.03. We interpret the provision to require consideration of every possible qualification relevant to the job being filled: i.e., experience, ability, knowledge, skill, aptitude, employment record, etc.

Further, as the Union contends, we agree Mr. Launder had an advantage in a process totally dependent upon an interview, He is a more outgoing and expressive individual who is likely to excel in an interview,

We also accept the validity of the closely related second complaint regarding the selection process. No attempt was made to objectively assess or weigh the answers given to the interview questions. It was not exactly a test of the candidates, but the interviewers completed a form by noting the candidate's answers and their own comments. In the absence of a method or any attempt to assign relative importance or value to the answers or to tabulate the results in an organized manner, the process was necessarily extremely subjective, The weakness inherent in such an approach was compounded by the extensive reliance placed on the interview.

The process was therefore undoubtedly flawed. But that conclusion does not necessarily mean the grievance must succeed. We are mindful of the remarks of Arbitrator Slone in *Victoria General Hospital, supra*. Having concluded the process was "utterly unsuited" to demonstrating superior qualifications; he said that the evidence in the hearing had nevertheless established the junior incumbents were demonstrably and substantially superior to the grievor, he would have been inclined to dismiss the grievance on the basis that no miscarriage of justice occurred. See pages 1.98 and 199. That principle may not be applicable in even' case See fir example *Nanaimo Regional General Hospital, supra*, at pages 10, 11, and 14, Whether it is appropriately invoked in this case is very much connected with the remaining complaint regarding the process. That is because the remaining complaint goes to the crux of the Union's case in support of Mr. Cimino's grievance.

The remaining complaint is the source of the Union's contention that the Employer has constructed an invisible barrier to movement from the S&D Division to the Water District, The Union says that, to the extent the Employer took into account anything more than performance in the interview, the Employer

failed to recognize the value of the grievor's experience in the S&D Division and gave excessive emphasis to experience in the Water District. The expertise of Mr. Ali it is submitted, resulted in an assessment which was "technical in the extreme", based to an inordinate degree upon the esoteric differences between S&D Division equipment and Water District equipment. The equipment is not different in principle, and Water District valves and other equipment could be easily mastered by an employee with the background, experience and qualifications of the grievor. The Union cites *Board of School Trustees, School District No. 88 (Terrace)* (1989), 9 L.A.C. (4th) 432 (Kelleher); *Nanaimo Regional General Hospital, supra*, and *Universal Engineering & Tool Works, Division of Cline Associates London Ltd.* (1990), 16 L.A.C. (4th) 214. The effect of the Employer's emphasis on Water District experience, it is submitted, is to "ghetto-ize" the S&D Division.

The premise of the Union's position is that the grievor demonstrates his ability to perform the job by holding the same position in the S&D Division. From the grievor's perspective, that premise has two implications. First, he considers himself able to step into the MM2 position on the Mechanical Crew in the Water District. In re-examination, Mr. Cimino expressed that sentiment in this way: "My philosophy is that a MM2, whether in Sewers or Water, is the same, - a little different equipment but basically the same." Second, Mr. Cimino considers himself considerably more qualified than Mr. Launder who is much younger, who is much less experienced generally and who did not possess any trade qualifications at the time of the competition. He testified he would not have grieved had he felt there was only a minor difference between Mr. Launder and himself. But he was "really mad" because in this instance "there was a huge difference between the two". Elsewhere, he testified: I have more years of experience in plumbing and pipefitting and welding, not only ... [with the Employer] but otherwise too, I'm not against Vince, but he's just a kid ..."

The Union's perspective is that Mr. Cimino's failure to succeed in the posting is simply representative of the problems faced by employees who wish to

move from the S&D Division to the Water District. It considers the significance attributed to working experience in Water District to be the source of the problems. The significance accorded that experience is excessive and without any valid basis in practice. It relies upon the evidence of Mr. Dale Bindley who is a MM4 in the S&D Division. He was promoted to that position from a MM3 job in the Water District some four years ago. He testified that the differences between the work in the two systems is relatively easy to bridge. As he put it: "If Franco Cimino can work side-by-side with a tradesman to disassemble a pump in Sewers, he can in Water". Mr. Tom Hengen is a MM4 in the Water District, His evidence was that experience in the Water District is important, but he agreed in cross-examination that he had been able to make the transition from private industry to the Water District with relative ease.

On a review of all of the evidence, we are unable to agree that the differences between the S&D Division and the Water District are minor and of little importance to an experienced S&D Division MM2 with plumbing and pipefitting trades qualifications seeking to move to a Water District MM2 position. The evidence does not bear out that premise. First of all, it overlooks the point that the single job description for the MM2 position encompasses different specific jobs. The MM2 job on the Mechanical Crew in the Water District is very different from the MM2 job performed by Mr. Cimino on the Mechanical Crew in the S&D Division. The MM2 in the Water District, as we have said, involves potential assignments to the Steel Crew and District Crews. In either of those assignments, but particularly with the Steel Crew, the incumbent will be called on to work independently. That is in contrast to the MM2 job performed by Mr. Cimino who spends most of his time working closely with a MM4.

In addition to the differences in the two MM2 jobs. there are other differences hatran between the S&D Division and the Water District. Of course the two operations have much in common. But they are also significantly different. We have already referred to the major distinctions; product, pressure, equipment and safety issues.

Although the evidence was technical in nature, it is possible to be somewhat more specific. There is little or no dispute over the prevalence of automated butterfly valves in the Water District. There are few or none of those valves in the S&D Division. Pressure regulator valves (“PRVs”) are found in the Water District but not the S&D Division. The incumbent in the contested MM2 position tests butterfly valves independently from MM4s. The incumbent also assists in the installation and repair of those valves. Flushing PRVs is routinely performed by the District Crews) but the incumbent will be involved as a member of the Steel Crew in the event repairs are required or water content increases the need for flushing. The evidence is that butterfly valves and PRVs occupy most of the time of the MM2 on the Water District Mechanical Crew.

There is other equipment in the Water District which is not found in the S&D Division: hydraulic variable speed clutches, turbine generators, and turbine driven pumps. More repairs are effected “under pressure” in the Water District than in the S&D Division. Also, because of the nature of the product, there are standards and specifications unique to the Water District system.

How serious are these differences? is “a pump a pump”, as Mr. Bindley asserted, or are the distinctions significant? We are not prepared to consider the question in the abstract. It must be answered in practical terms, having regard to the circumstances of this particular dispute. On the evidence of Mr. Ali, the differences are extremely important. He testified that a person in Mr. Cimino’s job, even with Mr. Cimino’s qualifications and experience, would take several months to learn to test butterfly valves, flush PRVs and become familiar with the other equipment and procedures which he has not encountered in his MM2 job in the S&D Division. With respect to PRVs in particular he stressed the crucial importance of knowledge and competence because an error maybe damaging to the water system. Mr. Ali emphasized the 36-hour course on-valves offered at BCIT provides only the beginning of the requisite understanding He spoke of the necessity for training, although it is not clear whether he actually meant an extended period of familiarization with on-the-job instruction.

Mr. Ali's evidence is generally supported by that of Messrs. Launder and Hengen, although they focused particularly on the time it would take to become sufficiently familiar with PRVs to be given the responsibility to flush and repair without supervision. In contrast, Bindley testified that learning to flush a PRV "is not a big deal - someone on the crew can show you and then you can do it safely".

The actual need for instruction or training probably lies somewhere between these two extremes. We are inclined to accept that Mr. Ali inflates the amount of time which is required to achieve a safe working knowledge of the butterfly valves, PRVs and other Water District equipment and procedures. The level of working knowledge to which we refer is of course that required of a MM2 position on the Mechanical Crew. Even Mr. Ali agreed in an unguarded answer in cross examination that one of his estimates of the required training time was an "extremist" position. His tendency to over-estimate the burden for someone from outside the Water District is probably due to his expectation that others will want to acquire the level of knowledge and expertise he possesses. We do not consider that to be necessary for the competent performance of the MM2 job in question.

At the same time we are also satisfied that more will be required than is implied by Mr. Bindley's casual dismissal of the differences in the equipment. Mr. Cimino agreed he has not worked on a butterfly valve but testified that: "If you can work on a Honda, you can work on a Toyota". We find that he underestimates the learning curve he will face when he successfully bids on a job in the Water District. In that respect, neither the grievor nor the Union asserts that the grievor's brief experience in the Water District in 1988 and 1989 provides him with current knowledge of the Water District's system, equipment or procedures.

We emphasize that we intend no criticism of Mr. Cimino. On the contrary, we are impressed by his pride in his trades expertise, pride in his work and desire to progress, But even he appreciates that he is not in a position to walk into the

job in question. His application form expressly recognized that he has something to learn. In cross examination, he agreed he would require some training on PRVs, although he does not think it will be difficult. He also testified that he will take the courses offered at BCIT on valves and regulators, as well as the two water system distribution courses when he has secured a job in the Water District. His willingness to take those courses implies his awareness of their value to him. We have no doubt those courses would better equip him to perform a job in the Water District. That being so, the fact he has not completed them reflects to some extent on his qualifications for the disputed MIM2 position.

That brings us to a comparison of Mr. Cimino with Mr. Launder, and the vital question of whether Mr. Launder's experience in the Water District assists him. As a Labourer on the Mechanical Crew and then a WSW1 in the field, he has acquired four years' exposure to and experience with the equipment and procedures with which Mr. Cimino is unfamiliar. That experience gives him a knowledge of the water distribution system which Mr. Cimino does not possess. Mr. Cimino himself recognized the importance of Water District experience. He was not successful in an earlier posting for a Water District MM3 position. He agreed that one reason he did not grieve was that the successful candidate, a District Officer, had more experience in the Water District.

It is apparent that Mr. All regards the MIM2 job on the Mechanical Crew as a natural progression from the WSWI position in the field. He described the positions as "interchangeable". Mr. Bindley's evidence confirms the proximity between the two. Asked in cross examination what the differences between the two positions are, he answered "Not a hell of a lot..., you prove your ability before you move to MM2"

We conclude that any employee in the position of WSWI or WSW2 would have the opportunity to obtain an advantage over a S&D System employee in a competition for a Water District MM2 job Mr. Launder no doubt took maximum advantage of that opportunity. We accept his evidence, and that of Messrs. Ali

and Hengen, that his eagerness and determination enabled him to actually perform most or perhaps even all of the responsibilities of the MM2 on the Mechanical Crew. He volunteered to perform as much work as he could, and to assist the MM2s, MM3s and MM4s as often as he could. He had many opportunities to do so as a Labourer in the Mechanical Crew. In addition, as a WSW1, he had more opportunities whenever he was assigned to assist either the Steel Crew or the Mechanical Crew engaged in work in his District, He asked questions of the more experienced employees and especially the qualified trades persons with whom he was working. On that basis, we accept as essentially accurate the note made by Mr. Ali on the form he completed during the interview. The final question of the form was: "Why are you the best candidate?" Mr. Ali's noted the answer included: "I have done the job for a year".

We refrain from concluding that Mr. Cimino required formal training which Mr. Launder did not, That was not the exact issue before the board, and the evidence does not permit a reliable determination in that regard. But all of the evidence we have summarized permits only one conclusion with respect to the issue for determination. The working experience of Mr. Launder in the Water District did provide him with an important and significant advantage over Mr. Cimino. Contrary to the Union's submission, that experience was not given unwarranted consideration. Because of that experience, and Mr. Launder's willingness to extract the most benefit from it, we conclude the Employer has established that Mr. Launder was a demonstrably and substantially superior candidate for the vacant MM2 job.

The real advantage provided by experience in the Water District distinguishes this case from those cited by the Union. In each of those cases, the employer over-emphasized some particular experience which was not of real assistance to the junior employee in comparison with the grievor. For the reasons we have set out, that is not so in this case.

As a consequence, the Union is correct to perceive an obstacle to employees

who seek to transfer from the S&D Division to the Water District. In a competition with an employee from the Water District, the S&D Division employee will face the problem of overcoming the advantage provided by working in the Water Division. It is not an insurmountable obstacle. Mr. Bindley was able to recall a small number of employees who successfully moved from the S&D Division to the Water District. But the obstacle will remain as long as the relative ability language of the collective agreement gives the Employer the opportunity to choose the best qualified employee. If the Union considers it a significant problem, it must seek its recourse at the bargaining table.

### Conclusion

In summary, we conclude that the successful junior employee, Mr. Launder, did possess the minimum qualifications for the vacant position which were stipulated in the posting.

We have also found the selection process was flawed by virtue of the excessive reliance placed upon an interview and the subjectivity with which the results of the interview were considered. However, the parties provided this board with a large volume of evidence concerning the vacant position, the grievor and the junior employee who was appointed to the position. That evidence has enabled the board to determine whether the Employer's selection of the junior employee was correct under the collective agreement.

We are persuaded that working in the Water District is valuable experience for the posted position. The Employer did not accord excessive weight to that experience. We conclude on all of the evidence that the Employer has proven the junior employee it selected was demonstrably and substantially superior to the grievor, primarily because of his experience in the Water District. Since the only other candidate from the Water District was junior to the successful candidate we also conclude the selection of Mr. Launder was correct. In the circumstances, we

decline to require the Employer to conduct the posting again in spite of the flaws in the process it followed. See *Workers' Compensation Board*, supra; and *Board of School Trustees, School District No.88 (Terrace)*, supra, at page 443

The grievance is dismissed

Dated at the City of Vancouver, Province of British Columbia, the 31st day of October, 1997

(original signed)

Rod Germaine Chair

"Mike Zora"

Michael Zora, Employer Nominee

Mr. Pape dissents from this award.

His dissenting opinion is attached.

Arthur Pape, Union Nominee

