

## LABOR &amp; EMPLOYMENT

## Arbitration Decisions



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**Labor Arbitration Decision, Bay Area Rapid Transit, 139 BNA LA 1506**Pagination  
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Decision of Arbitrator

In re BAY AREA RAPID TRANSIT [Oakland, Cal.] .and SERVICE EMPLOYEES  
INTERNATIONAL UNION LOCAL 1021

April 17, 2018

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**BNA Headnotes****LABOR ARBITRATION****SUMMARY****[1] Promotions - Oral interview process - Qualifications - Seniority - Back pay**[▶ 100.70 ▶ 100.559505](#) [\[Show Topic Path\]](#)

Transit district violated the CBA, which awards promotions based on “qualifications and [d]istrict date-of-hire seniority,” when it failed to award grievant promotion to the first of two material expediter positions. Grievant was not deemed qualified due to her oral interview and this process was deeply flawed and failed the test of reasonableness, as it improperly substituted interview panel members in the middle of the process and conducted interviews months apart; lacked consistent, explicit guidelines for scoring; far exceeded the CBA’s two-week timeline, and improperly required that a candidate be “highly qualified” to pass. The fact that the grievant twice passed the written test for the position indicates that she was qualified, and she must be awarded the position retroactively with back pay, without bumping other bargaining-unit members.

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For the employer-Amelia Sandoval-Smith, staff attorney.

For the union-Alan Crowley (Weinberg, Roger, & Rosenfeld), attorney.

PAUL D. ROOSE, Arbitrator.

**OPINION AND AWARD IN ARBITRATION PROCEEDINGS PURSUANT TO A  
COLLECTIVE BARGAINING AGREEMENT****Andrea Harden Promotion  
PROCEDURAL BACKGROUND**

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was mutually selected as the arbitrator from a list of arbitrators contained in the parties’ CBA. The matter was heard on January 23, 2018 in Oakland, California.

The parties stipulated that the matter was properly before the arbitrator. The parties also stipulated that the arbitrator retains jurisdiction over the implementation of the remedy in the

event that the arbitrator grants in whole or in part the remedy sought by the union.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties [\*1507] were ably represented by their respective representatives. The Union chose to conclude its presentations by oral closing statement. The Union's attorney did so at the conclusion of the hearing with the court reporter present, but without the presence of the arbitrator or the Employer. The Employer chose to conclude its presentation by written brief. The brief was received by the arbitrator on March 26, 2018.

### ISSUE

The parties were unable to agree on a statement of the issue in this matter. The Union proposed the issue in its opening statement as follows:

Whether the district violated the contract by requiring internal candidates to test beyond minimum qualifications for the position, and requiring them to interview for promotional positions in the clerical subunit?

Whether the district breached the collective bargaining agreement by denying internal candidate, Andrea Harden, the 6417 bid from 2016 for the material expeditor position because she wasn't "highly qualified"?

Whether the district breached the contract with respect to the 7222 bid in June of 2017 by giving preferential treatment to the other internal candidate, Man Cheung, over Andrea Harden?

If so, what is the appropriate remedy?

The Employer formulated the issue in its opening statement as follows:

If the District violated the collective bargaining agreement by using well-established past practice of testing and interviewing candidates to determine if they are qualified candidates as required by the bidding process.

The arbitrator's formulation of the issue statement in this matter is as follows:

1) Did the Employer violate the CBA by denying Andrea Harden promotion to material expeditor in 2016 and 2017?

2) If so, what is the proper remedy?

### RELEVANT CONTRACT PROVISIONS

**Labor Agreement Representing Employees in the Maintenance and Clerical Subunit of the Joint Council: Bay Area Rapid Transit District and Service Employees International Union Local 1021 - July 1, 2013 - June 30, 2017**

#### 1.5 - Beneficial Practices

A. Rules or regulations or practices within the scope of representation affecting employees beneficially will not be changed without mutual agreement, provided that District Management has accepted the past practice over a reasonable period of time as an established practice that is unequivocal, clearly enunciated and acted upon ...

#### 18.1 - Equal Opportunity

There shall be no discrimination in the application of provisions of this Agreement. In recognition of such, the parties are committed to ensure these provisions are applied equally to all employees without regard to race, color, religion, handicap, sex, sexual orientation, age or national origin ...

#### 24.3 - System-Wide Bidding

All employees are eligible to bid on open positions posted system-wide in accordance with this section based on qualifications and District date-of-hire seniority.

#### 24.4 - System-Wide Position Award

B. All job openings shall be posted within two weeks of the job opening. Awards shall be made within two weeks of the closing of the posting. The successful bidder shall commence new assignment within two weeks of the award. Should the District fail to make the new assignment within the specified two week period, the affected employee will be compensated at the applicable rate for the awarded position for all hours worked thereafter until the move, pursuant to bid, has been completed.

#### 27.1 - Position Assignment

##### A. Temporary Vacancy

1. For the first sixty days of any temporary vacancy, the District may upgrade any employee [\*1508] from the next lowest classification in the Department with District date-of-hire seniority and qualifications to govern, and will not be obligated to post such opening for bid ...

#### FACTS

##### The Grievant Works as a Senior Expeditor Clerk IV in the Systems Maintenance Department:

The Grievant was hired in January 2001 into the position she held at the time of the arbitration hearing - senior expeditor clerk. She had been with the systems maintenance department since 2003. On her promotion application in 2016, she described her clerk skills and duties as follows:

Skilled in researching suppliers and acquiring bids for contracts which best fits the needs of the department. Research suppliers, request for quotes (RFO), analyzing, and recommendation. Preparation of Purchase Requisitions and processes using (PeopleSoft). Monitors the Systems Maintenance department calibration documents and procedures to ensure all equipment and tools are maintained properly, and are within the BART Maintenance and Engineering Standard Operations and Procedures. Monitors all Systems Maintenance Electrical and some Mechanical equipment to ensure calibration; which ensures maintenance safety. Skilled at making an independent judgement with excellent results. Maintains working relationship with vendors to ensure an expeditious delivery of department supply requests. Excellent documentation and record keeping skills.

Beginning in 2013, the Grievant began working on an upgrade basis in the material expeditor role "off and on," according to her testimony. She recalled that sometimes she received upgrade pay while the material expeditor was on leave, and sometimes when the material expeditor was present.

I just kind of like to help, and I would ask [material expeditor Melissa Demilio] "Are there any things that you need assistance with?" And she would say, "Sure. Can you do this or can you update the spreadsheet. But if I was doing something that was a long period of time I would let my supervisor know, because I kept track of everything, and [supervisor Mary Steeves] would say "You get upgrade pay for that."

When two material expeditor positions opened up in other departments in 2016, both Ms. Demilio and Ms. Steeves encouraged the Grievant to apply. <sup>1</sup> The Grievant recalled that Ms. Steeves told her that she would be "great for the job."

##### On August 22, 2016, Two Material Expeditor Positions Were Posted and the Grievant Submitted an Application:

In 2016, train control split off from systems maintenance to form its own department. Management made the decision to create a new material expeditor position to go with the new department. In addition, a material expeditor position became vacant in the traction power department.

The Grievant described the material expeditor position as follows:

The material expeditor did more performance with sending out parts, purchasing equipment parts. They did a lot of interaction with the

vendors. They also performed the job duty of creating requisitions and writing out requisitions. Going out for quotes from the vendors. That's a big difference between my job and their job.

Richard Watson is superintendent of traction power, wayside electrical, for the District. He described the importance of the material expeditor in his department, as follows:

In traction power, the material expeditor finds parts. Finds hard-to-find parts. We have a lot of equipment that's from the 1960s, 1970 design. They're not made anymore, so it's really important that they network and understand the process of getting parts - parts that are just not made anymore ...

A lot of the parts that I have ... will hold up revenue. And what I mean by "hold up revenue," cause delays and shut down lines. Shut down trains. It's extremely important that a materials expeditor has a vast network of resources to get these parts.

The posting, numbered #6417, closed on September 9, 2016. The District decided to screen both internal and external candidates for minimum qualifications. Those who were considered minimally qualified were given a time slot to take a written exam followed by an oral interview.

Antoinette Conteh is a talent acquisition manager for the District. She oversees hiring, including hiring people into positions covered [\*1509] by the CBA with the Union. She testified that the District administers tests for positions in order to "show proficiency in the subject matter of the job." Most of the time, she stated, the District uses written exams created by Donnoe & Associates, Inc., an outside consultant. However, in this instance, the District used an exam created by operations management and the District human resources department. Ms. Conteh testified as follows:

We were working with Donnoe at the time, trying to create - they didn't have a stock test. The material expeditor was kind of unique to us, as in BART ... so we sent him the job description, and they said, "Well, this will take time to work on." So while they were working on that, the recruitment was moving on. So ... we didn't use the Donnoe test at that time.

The written test was a ten-question multiple choice exam. The District decided to consider seven out of ten to be a passing score. "70 percent is considered a validated industry standard for passing, within testing and selection processes in talent and acquisition," Ms. Conteh stated.

The use of the oral interview was to test for skills that the District did not believe would be properly tested by a written exam. Ms. Conteh put it this way:

... you also have the demands of the job that involves the soft skill and those are things that are not necessarily testable ... the other competency, which is collaboration with various departments to procure.

The questions and suggested answers for the oral interviews were created, again, by a collaboration of staff persons from operations management and human resources. "[W]e actually sat down and pulled from a bank of questions, measuring various soft skills based on the job description," Ms. Conteh testified. Both written exam and oral interview questions were sent to the District's Office of Civil Rights <sup>2</sup> for concurrence prior to finalization.

The oral interview consisted of six questions. Each question was given a maximum point score of ten points. However, each question had a different number of "ideal answers" listed on the scorers' sheets, as follows:

Question 1 - 9 answers

Question 2 - 4 answers

Question 3 - 3 answers

Question 4 - 6 answers

Question 5 - 6 answers

Question 6 - 4 answers

Nothing in the record indicated that the raters were given written or oral instructions on how to weight the various "ideal answers." Yet Mr. Watson stated that "a lot of these answers are weighted." He testified as follows:

I take the notes, I listen to what they say and I jot down notes. And then every time they hit a certain spot ... that they understood this, there's a mark. And then what you do - that's not necessarily the number of

points that equal the points given ... It's a matter of understanding each bullet point.

In reference to question six, where "safety" is one of four ideal answers, Mr. Watson stated that "safety is the most important." The score sheet instructions do not assign additional weight to safety over the other three suggested ideal answers.

Mr. Watson also testified that raters are allowed to talk with each other before finalizing their scores, but "nothing's going to sway my score."

The scorers' sheets for the oral exam each listed a point range scale as follows:

Point Range 0-4: Not Qualified

Point Range 5-7: Adequately Qualified

Point Range 8-10: Highly Qualified

The District decided that the written test scores would be added to the oral exam scores to make a total maximum possible of 70 points. The District decided that 70% of those 70 points (49 points) would be required to be considered to have passed the combined written and oral exam.

The District chose a three-person panel to conduct the oral interviews:

Richard Watson, assistant superintendent for traction power

Colby Barry, superintendent for train control

Mario Gutierrez, assistant superintendent for train control [\*1510]

The interviews for posting #6417 were conducted on two dates. On October 7, 2016, the District tested and interviewed four internal candidates.<sup>3</sup> On January 26, 2017, the district tested and interviewed one internal candidate and four external candidates.

A spreadsheet created by the District for the arbitration hearing indicated that Mr. Watson, Mr. Barry and Mr. Gutierrez interviewed all nine candidates. However, original source documents that came to light at the hearing showed that the three original panelists did interview the Grievant and other internal candidates. However, the external candidates (including the two individuals eventually offered the positions, candidates # 7 and #9) were in fact interviewed by Mr. Watson, Mr. Gutierrez, and Mr. Watson's assistant superintendent Mr. Leslie Lagdamen.<sup>4</sup> Mr. Barry did not participate in those interviews of external candidates.

District witnesses had conflicting explanations for this substitution. Ms. Conteh testified that Mr. Watson had to "go out on a call and he couldn't be a part of" the external candidate interviews. "His assistant was available," Ms. Conteh stated. Ms. Conteh briefed Mr. Lagdamen and then sent him in to be a part of the three-person panel for the external candidates, she stated. Mr. Lagdamen had not been present for the internal candidate interviews.

When asked why Mr. Watson's name and signature appeared to be on the scoresheets for candidates 7 and 9, Ms. Conteh testified as follows:

... Richard Watson was not the one who was there. Leslie took his place ... Colby Barry was there. He was the ... superintendent for the whole systems maintenance.

Mr. Watson initially testified that he couldn't recall if he was present on the panel for all of the 6417 interviews. "When I can't make it due to operational needs, I do have a backup. I have Leslie do this." However, when shown his writing and signature on the worksheets, he affirmed that he had been present for the interviews of the two successful external candidates.

The original documentary record confirms that superintendent Barry, not assistant superintendent Watson, was absent for the two selected candidates' interviews. The record is also clear that the interviews with the successful external candidates took place three and a half months after the interview with the Grievant and three other internal candidates.

#### **The Grievant Was Tested and Interviewed for the Positions on October 7, 2016:**

The Grievant was the first candidate tested on that Friday. Her written exam was at 7:30 AM. She correctly answered seven of the ten multiple choice questions. At 8:30 AM, she sat for her oral interview with Mr. Barry, Mr. Watson, and Mr. Gutierrez. Of the three, she testified that she had previously worked with only one - Mr. Barry. "I assisted him," she testified, when she was upgraded to material expeditor.

The Grievant's average scores from the panel ranged from a low of 5.5 on three questions (considered in the "adequately qualified" range on the scorers' sheet) to an average score of 8

on question 2 (considered “highly qualified” on the scoresheet). Question 2 was the following:

The Material Expeditor works directly with staff, management, foreworkers and other department members. Give an example of when you worked cooperatively as a team member to accomplish an important goal. What was the goal or objective? What were the results?

The grievant received an average score of 8 on question 2.

Question 6 was the following:

You have been given 2 projects to be completed today. You have time to complete only one of those projects. What factors would you consider in determining which project you would complete?

In Mr. Watson’s notes on the Grievant’s answer, he wrote the following:

*Priority - who assign it*

*Would - willing to stay to get both projects done*

Mr. Watson gave the Grievant a score of 5.5 on this question. When asked on direct examination [\*1511] to explain this score, he testified as follows:

... there was no mention of safety. I would have liked to get something on ... which one is safety related. You know ask more questions.

On January 26, Mr. Watson also rated the two successful outside candidates on Question 6. His notes on candidate 7 were as follows:

*Req. come from (for Info) Supervisor Advice, Ask for Assistance*

Mr. Watson gave candidate 7 a score of 9 out of 10 on this question.

Mr. Watson’s notes on candidate 9 were as follows:

*Talk with Requestors, find out deadline, Negotiate. Ask for assistance, OT (work)*

Mr. Watson gave external candidate 9 a score of 7 on this question.

Mr. Watson testified that he looks at the resumes of all candidates prior to interviewing them. He also was questioned about the significance of working in a temporary upgrade position as it relates to qualifications for the permanent position. The following exchange took place on direct examination:

Q: If a person is in a temporary upgrade for that position, does that make them qualified for that position?

A: No it does not. Temporary upgrade is done by union seniority. It’s not done by skill level; it’s done by seniority.

Mr. Watson also testified that candidate 9, as result of this promotional process, was hired into his department as a material expeditor. He testified that he does not know where she worked prior to being hired at the District, nor what prior jobs she held.

#### **The District Offered the Positions to Two Outside Candidates:**

On January 12, 2017, the Grievant received an unsigned email from the BART Human Resources Department.<sup>5</sup> The email stated, in relevant part, that “your interview scores did not meet the passing point for the selection process.” The email also offered her the opportunity for a “debriefing” session with human resources personnel.

The Grievant availed herself of the opportunity for a debriefing session. Attending the meeting on behalf of the District were talent acquisition manager Conteh and labor relations representative Pamela Trawick. The Grievant brought with her Union shop steward Joanna Alvarez.<sup>6</sup>

At the debriefing meeting, the District gave the Grievant a form that included the rating scale and criteria and how she scored on each question posed during the oral interview. She learned that she was considered “pass - adequately qualified” on five of the six questions, and “pass - highly qualified” on one of the questions. She also learned from this document that, on the written test, she was considered “pass - adequately qualified.”

The document states “the minimum pass score for the combined process was 70% or 49 points.” The Grievant, as she learned later during the processing of her grievance, received 43

points, or 62%. Yet the debriefing document lists her as "Pass" for each of the oral questions and for the written exam. She testified that "we basically wanted to understand how could I pass and be adequately qualified and still not qualify for the position."

She recalls that the District representatives at the meeting explained that "someone that was more qualified was wanted for the position."

After the January 26 interviews, the District offered the two material expeditor positions to two external candidates, candidate 7 and candidate 9. Candidate 7 achieved an overall score of 89% on the combined written and oral. Candidate 9 was scored at 80%. Candidate 9, however, did not pass the written test, getting only 6 of 10 answers correct. Candidate 9 accepted the offered position, but candidate 7 declined.

#### **The Union Filed a Grievance on February 13, 2017:**

The Union filed the grievance, alleging that the "District violated the contract by failing to promote the grievant to Material Expeditor." The Union grievance was filed directly to the third step of the procedure and asked for the [\*1512] following relief: "Cease and Desist. To be made whole."

As summarized below, the Grievant applied again for a material expeditor position in 2017 and was again denied. The parties agreed to consolidate that matter into the original grievance. Both matters are properly before the arbitrator.

#### **On March 15, 2017, the District Re-Posted One of the Two Material Expeditor Positions Because It Had Never Been Filled:**

Because one of the two external candidates declined the offered position, the District re-posted the material expeditor position in the train control department, as opening #7222. Once again, the Grievant applied for the position. The posting closed on April 7, 2017.

The District conducted the second screening process in a manner different from the one in 2016, in several ways. First, the District used a written exam created by the outside consultant, Donnoe & Associates, rather than one created by the District. The District administered that exam to internal and external applicants who met the initial screening criteria (on a date that was not part of the record of the arbitration hearing.)

Second, the District screened out candidates who did not pass the written exam. They were not allowed to move to the next phase of the oral interview. In the 2016 recruitment, candidates who did not pass the written test were still allowed to move into the oral exam phase.

A third difference between the 2016 and 2017 processes was in the composition of the interview panel. Originally, the #7222 panel was composed of three members, like the #6417 panel. However, Ms. Conteh testified that only two managers conducted the interviews. She explained as follows:

One of the panel members, if I remember correctly for this particular one, had a ... family emergency, so [it] ended up being two panel members.

One of the #7222 panel members, Mario Gutierrez, had been on the #6417 panel. The other #7222 panel member, Douglas Kennedy, was not on the #6417 panel.

#### **The Grievant Applied, Was Re-Tested and Was Interviewed on June 27, 2017:**

On June 6, the Grievant was notified that she passed the Material Expeditor Test and she was scheduled for an oral interview. The Grievant received a score of 88% on the Donnoe-created written test.<sup>7</sup>

The oral interview, again, consisted of six questions with a possible score of ten on each question. The District considered 70% of the 60 points, or 42 points, to be a passing score. The Grievant was rated at an average score of 39 points, thus not passing the oral interview.

#### **The District Offered the Position to an Internal Candidate with Less Seniority Than the Grievant:**

Expeditor clerk Man Cheung applied for the position. His seniority date was 12/17/2012. He passed the written exam with a 92% score and was given an average score of 50 on his oral interview. The District offered Mr. Cheung the vacant material expeditor position in the train control department, and he accepted it.

### Both Parties Introduced Evidence of Past Practice:

The Union placed in the record a 1999 letter from SEIU BART Chapter President Dennis Kaczor to BART labor relations. The subject of the letter is "Clerical sub-unit testing." The letter, in relevant part, states that "The Union will not be in agreement regarding any written test for current employees."

It was stipulated that the Kaczor letter was distributed to the Union shop stewards. No evidence was in the record as to how BART responded to the letter, or even if it did respond.

The Union also introduced three grievances, filed in 2010, 2016, and 2017 respectively. The grievances challenged the rejection of promotional bids from current employees for clerical positions. Union vice-president Rhea Davis testified that the 2010 grievance is "still hanging out there." She offered no testimony about the outcome of the latter grievances, [\*1513] only stating that the issue of qualifications for promotions has been an "ongoing conflict" for the last eight years.

The Employer countered with the testimony of human resources analyst Conteh. She testified that she had handled "over 50" recruitments into SEIU-represented positions since she had been at BART (her start date at BART was not in the record.) Ms. Conteh stated that, for clerical / professional positions, the District uses a standard procedure. That is the procedure that was utilized in the #6417 and #7222 recruitments.

### UNION'S POSITION

The Union argues that the District has violated the contract by requiring internal candidates to test beyond minimum qualifications and to be orally interviewed. This is a private-sector type selection process that the parties did not bargain for. The Union believes that the contract only requires current employees to fill out an application. If minimally qualified, current employees should be selected for the position based on seniority.

The District may argue "past practice," but the Union contends that no past practice evidence was presented that supports the District's position. The Union has consistently opposed BART's practice of testing internal candidates for promotional positions.

BART has violated the agreement also, the Union adds, by creating a promotional process that exceeds two weeks.

The Union points out that the process developed by BART for clerical and professional positions is very different from the process used to fill vacancies in the maintenance subunit.

The Union has consistently opposed the District utilizing written exams. As evidence, the Union cited the letter written by the Union chapter President to BART Labor Relations in 1999.

The Union also cites an arbitration award from arbitrator Gerald McKay in 2000. In that award, the arbitrator characterizes BART's position in the grievance as follows: "The District does not dispute that positions within Local 790's bargaining unit are awarded to the senior qualified bidder, period." The contract language is still the same as it was when arbitrator McKay issued his award.

Assuming, arguendo, that the arbitrator in this matter finds that the District is permitted to test internal applicants, the Union contends that the Grievant should have been considered as having passed, using the District's own scoring system. She was rated "adequately qualified," yet denied the promotion.

The Union argues that the interview process is not objective, but highly subjective on the part of the panel members. The Union is concerned that "managers will invent criteria to make it harder for internal candidates to qualify for positions."

The Union posits that the Grievant's history of performing well in an upgrade status should have been viewed as a relevant factor.

The Union asks that the arbitrator order the District to cease and desist from applying the contract in such a way that applicants are required to show more than minimum qualifications for promotional positions. The Union asks the arbitrator to order the District to cease and desist from posting a bid that external candidates can apply for at the same time as internal candidates. The Union also asks the arbitrator to order the district to cease and desist from taking more than two weeks to award bids.

The Union asks the arbitrator to make the Grievant whole by awarding her the promotion and paying her what she would have made as a material expeditor beginning two weeks after the testing process. The award should include any overtime she would have worked, and interest at the usual rate awarded in public sector cases.



### EMPLOYER'S POSITION

The District contends that the grievance is untimely, because the District was using a promotional practice that it had been using for twenty years without challenge from the Union. The Union withdrew earlier grievances on related matters.

The District argues that it did not violate the agreement by testing and interviewing candidates to verify qualifications. This is a fundamental management right that accompanies its mandate to run an effective transit system.

The District cites a 1984 BART arbitration award from arbitrator Adolph Koven. In that award, the arbitrator found that the District has a right to "determine whether an applicant [\*1514] for a bid job possesses the minimum qualifications for the job, absent a strong showing from the Union that its decision was unreasonable, discriminatory, or otherwise clearly improper for some other reason."

The District also cites a 1992 award from arbitrator Alexander Cohn where the arbitrator concluded that "unless negotiated away, management has the right to both establish reasonable qualifications (including MQs) and make the selection from among the qualified applicants. Generally, where such standards are reasonable and uniformly enforced, arbitrators will honor them as an exercise of legitimate management discretion."

The District contends that the management has no duty to bargain management's recruitment procedures, contrary to what the Union asserts.

The District asserts that its testing procedure is the only way to authenticate knowledge, skills and abilities. Its tests are objective and unbiased. The District uses an established process validated by an outside agency and reviewed by its Office of Civil Rights for transparency and equity.

The District argues that it followed the process required in the CBA, only turning to outside candidates when it determined that no qualified current employees applied.

The District has an established past practice of conducting promotional recruitments in this manner, it asserts. The Union has not contested the practice, so it must stand.

The Union has failed to show that the Grievant was qualified for the position, the District argues. Temporary upgrades cannot be used to demonstrate qualification. Temporary upgrades, the Employer argues, are awarded by seniority not skill level. The Grievant admitted she did not perform the full scope of the material expeditor job when she was upgraded. The testimony of Mr. Watson should be credited as to why the Grievant was not qualified.

The Employer argues that the Union has not met its burden in this case, and that the grievance should be denied as untimely and lacking in merit.

### DISCUSSION

#### The Grievance Was Timely Filed:

The Employer has raised a claim that the grievance was not timely filed. It did so, not based on the date of filing relative to the date of denial of the promotion to the Grievant. Rather, its timeliness claim relies on a theory that the promotional practice employed by the District is twenty years old, and the Union has never challenged it until this time. The Union has contested that characterization of the Union's past actions.

The undersigned views this as an individual grievance on behalf of an individual member of the Union's bargaining unit. It was not properly presented as a class grievance challenging a promotional policy. As noted in the following discussion, the arbitrator confines his opinion, award and remedy to the individual fact circumstances of this case.

Whether or not the District is correct that the Union failed to challenge the District's promotional practices in the past, the Union is clearly doing so now in the instant case as they apply to this Grievant. It has done so through the timely filing of a grievance. That matter is properly before the arbitrator.

#### The Employer Has Constructed a Sound Promotional Bidding System that is Consistent with the Language of the CBA in Broad Outline:

An analysis of this case begins with the succinct and relatively unambiguous promotional standard negotiated by the parties. Bargaining unit employees may bid on open clerical and professional positions based on "qualifications and District date-of-hire seniority."

The District has interpreted that phrase in a general manner that is favorable to the Union. On the face of it, "qualifications" and "seniority" are placed on the same level of importance in the CBA phrase. The District reads the language as allowing it to determine the qualifications necessary for any given bargaining unit position. If the District deems an employee or employees qualified, then the District asserts that seniority is the sole factor used to decide to whom to award the promotion. [\*1515]

Assuming that the Union advocates for the fostering of a seniority-based promotional system, alternative ways of interpreting this phrase might be less advantageous to the Union. The District, for example, could take the position that seniority must be balanced against the degree of qualification to determine the promotional outcome. Such an interpretation could lead to the awarding of a position to a less senior unit member considered "highly qualified," even though both were deemed "qualified."

The CBA language itself is, perhaps purposefully, ambiguous. The District has chosen an interpretation that is relatively straightforward and deferential to the role of seniority.

The Union has asked the arbitrator to find that the District violates the CBA when it administers a written exam and/or oral interview to current employees in promotional processes. The undersigned declines to issue such an award. The Union did not meet its burden on this record that promotional testing, per se, violates the CBA.

The Union also asks that the arbitrator find that the District must adhere to the two-week time limit, regardless of the promotional process. The undersigned concurs. The language is clear and unambiguous: "Awards shall be made within two weeks of the closing of the posting." Whatever system the District employs to screen internal and external candidates, it must be completed and the position properly awarded in two weeks.

The District clearly did not adhere to the two-week time frame in the instant case. The posting closed on September 9, 2016. Yet the position was not awarded until January 2017 or later. How this breach impacts the instant case will be discussed in the remedy discussion below.

**While Management Makes the Initial Determination of How to Measure Qualifications, that Decision is Subject to a Basic Test of Reasonability:**

Arbitrators consistently grant the employer the right to establish qualifications for bargaining unit positions. They also recognize the right of the employer to evaluate employee applicants and determine whether or not they meet the qualifications set by the employer.

This point of view is reflected in both the Koven and Cohn arbitration awards cited by the District and also the McKay award cited by the Union.

The charge of an arbitrator in this type of case is, among others, to determine whether the Employer's method of determining qualification was reasonable. The arbitrator should not second-guess the Employer on the technical aspects of the job qualifications. He or she is not a content expert. That certainly holds true for the job of material expeditor, the subject of this dispute.

The Union asks that the arbitrator find that written examinations for promotional positions violate the CBA. The undersigned, as noted above, is unwilling to make that determination. Common sense dictates that a written exam, provided that it is reasonably based on the actual knowledge needed for the position, can help determine whether an employee is "qualified" under the CBA.

However, it is an accepted practice for neutral arbiters to review the promotional process in its entirety to determine whether the employer achieved its stated goal of determining "qualifications" under the CBA. In the case of the material expeditor promotion of 2016, the District's process fell short on many levels.

**The Written Exam Was an Adequate Instrument for Determining Qualifications:**

The Employer went to some length to provide documentation and testimony about the value of using its outside consultant for promotional exam materials. The weight of that evidence was somewhat persuasive. This advantage for the Employer's case disappeared when it came out in the remainder of the hearing that the outside consultant's test had not been used in the first posting.

What is notable, in this regard, is that the Grievant scored much better (88% versus 70%) on the second exam, devised by the outside consultant, than the first exam, created by BART management.

Nothing in the record indicates that the written exam was, on balance, anything other than fair, objective, and an accurate measure of qualifications. In the case of the first exam, the Grievant

and one other internal candidate passed the exam. In the case of the written [\*1516] exam for the #7222 posting, the Grievant and at least two other internal candidates passed.

The test questions were not in evidence at the arbitration hearing. But the results point toward a conclusion of objectivity.

**The Method of Determining Qualifications by Oral Interview in the Material Expeditor Process Was Deeply Flawed to the Point of Repeatedly Violating the CBA:**

It is dauntingly challenging to use oral interviews under the language negotiated by the parties in their CBA. If the District chooses to do so, it must go to great lengths to create a process that is scrupulously fair. It is important to emphasize here that, had the District relied on the written exam alone, the Grievant would have been awarded the position.

The oral interview made the difference between the Grievant being promoted or not being promoted, by a slim margin. She missed the cut-off by 6 points out of 49. She received an overall score of 62% rather than the 70% required. The oral interview process used by the District to fill the two positions lacked consistency, transparency, and objectivity on many levels.

The following is a recitation of aspects of the oral interview process that violated the CBA:

**1) The District improperly substituted interview panel members in the middle of the process.**

Mr. Barry interviewed the internal candidates. Mr. Lagdamen arrived as a substitute for Mr. Barry during the external candidate interviews. This substitution, in and of itself, constitutes a serious blow to the objectivity of the process. An oral interview panel inevitably compares the qualifications of the candidates when listening to applicants' answers. Mr. Lagdamen, who sat in on the panel for its interview with both successful candidates, did not have the benefit of having previously interviewed the Grievant and the other internal candidates.

Human resources representative Conteh testified that she briefed Mr. Lagdamen on the interview process prior to his participation. If true, this does not go nearly far enough to overcome the panel rotation problem and create a "level playing field" for the internal candidates versus the external candidates.

What makes this breach even more problematic is that Mr. Barry, the highest-ranking BART official on the panel at that time, was the individual missing from the external candidate interviews. Presumably, he had the big picture of the role of the material expeditor across departments. Had he rated the external candidates lower than the other panel members, this could have resulted in no one passing. The positions would have had to be re-posted.

The panel membership changed over the three-month promotional process. The District's explanation for how and why this happened shifted during the arbitration hearing. To make matters worse, district witnesses contradicted each other about even the straightforward issue of who indeed sat on the interview panel on various days.

A summary document prepared by the Employer for the hearing and offered into evidence obscured the material fact that the panel composition changed. The undersigned was, to put it mildly, taken aback when it emerged that this document was wrong. Individuals were listed as having conducted interviews that they did not conduct. The undersigned gives the District the benefit of the doubt that this incorrect document was an honest mistake. Nonetheless, this document problem underscored the fundamental flaws in the District's approach to this promotion.

The substitution of oral interview panel members during the middle of a recruitment is a serious violation. It alone could be the basis of overturning the District's promotional decision in this instance.

**2) Candidate interviews were improperly conducted months apart.**

Even had the panel composition remained consistent, the time gap introduced another serious flaw. As noted above, the panel members are inevitably, and properly, mentally comparing the answers of the candidates to assess qualifications. To expect a panel member to accurately recall an interview conducted three months earlier, when interviewing additional candidates, is highly unrealistic. This lag between [\*1517] interviews is unfair to all the candidates.

The time frame created by the CBA is a reasonable one. All interviews, if there were to be interviews, should have been conducted within a two-week period.

**3) The panel scoring system lacked consistent guidelines for panel members.**

As noted in the chart created by the arbitrator, the number of "ideal answers" for each question varied. Yet each of the six questions was worth ten points. No written instructions were in evidence as to how many points panel members were to give each "ideal" answer. No instructions were in evidence about whether or how the panel should give additional weight to certain answers. If panel members were given oral instructions along these lines, they were not in evidence.

This absence of scoring guidelines created the appearance, if not the reality, of unacceptable subjectivity in the process. The testimony of the one management panel member who testified at the hearing underscores the need for these guidelines. Mr. Watson's testimony about giving added weight to certain ideal answers relative to others is not supported by any guideline in evidence.

Assistant superintendent Watson also testified about deducting points from the Grievant because she did not give certain ideal answers. Yet points were not deducted from the external candidates, even though those same ideal answers did not appear in his interview notes for them.

These are not trivial or de minimis issues in this dispute. The Grievant came quite close to an overall passing score. A few additional points awarded to the Grievant on one or two questions could have resulted in her being promoted. Alternatively, a few points deducted from the outside candidates could have resulted in no successful candidates and the need to re-post.

To avoid any appearance of bias, a transparent and objective scoring system is a necessary component of any oral interview the District chooses to administer under the CBA language. Such a system was not in evidence in the instant case.

**4) The Information to Be Considered by Panel Members Was Not Made Explicit:**

Mr. Watson testified that he consulted with the other panel members prior to finalizing his scoring of the candidates' answers. Yet he testified that he was not "swayed" by the other raters' scores.

For BART employees to have confidence in the oral interview system, if one is to be used, it must be consistent and transparent. Either panel members are encouraged to consult with the other panel members prior to determining their scores or they are not. They must be clearly instructed on whether to permit themselves to be "swayed" or not. Whatever system the Employer devises must be equally applied to all internal and external candidates.

Mr. Watson's testimony in this regard raises doubts in the mind of the undersigned as to whether the panel was given clear instructions in this regard. At minimum, it is apparent that, if there were instructions on opinion-sharing, they were not provided in writing.

**5) The District Used Terminology in the Oral Exam Process that Contradicts the CBA:**

The term in the contract used to determine eligibility for promotion is "qualifications." It is not "highly qualified." (Nor is it "minimally qualified," as the Union interprets it.)

The oral interview scoring sheets used a scoring metric that violates the CBA. It uses the term "adequately qualified" for a scoring range of 5 to 7. "Adequately qualified," in plain English, is a synonym for "qualified." Yet under the District's scoring system, someone who was "adequately qualified" did not achieve a high enough score to pass. Under the District's scoring system, one had to have been "highly qualified" to pass.

In her debriefing, the Grievant and her Union representative questioned why she was considered "adequately qualified" but not promoted. Her question is directly on point. Any scoring system used by the District for written exams or oral interviews must mirror the language of the CBA. **[\*1518]**

**6) The Process Went Well Beyond the Two-Week Time Period Specified in the CBA:**

The record was devoid of evidence on why the #6417 recruitment and position-filling took three and a half months. No evidence of any effort on the part of the District to seek a time limit extension from the Union was in the record.

If the District is to utilize written exams and / or oral interviews, it must do so in a manner that comports with the CBA time limit of two weeks from the closing of the posting until the awarding of the position.

This breach, alone, would probably not have been sufficient basis to grant the Grievant's grievance with the result of awarding her the position. However, it does affect the remedy of this matter, as noted below.

**The Fact that the Grievant Passed the Written Test for the Position Twice Indicates that She Was Indeed Qualified:**

For the six reasons noted in the prior section, the District repeatedly violated the CBA in the manner in which it conducted the promotional process for material expeditor #6417. Since that was the process that resulted in the Grievant being initially denied a promotion, the next question is one of remedy.

It does not necessarily follow that, since the process was flawed, the Grievant should be granted the position. The preponderance of the evidence must also be that she was indeed qualified for the position. Based on the fact pattern of this case, she was indeed qualified. She is to be granted the promotion.

First, no evidence was in the record that a qualified employee more senior to her applied. Second, she proved through her score on the written exam that she was qualified. Her qualification was re-confirmed when she passed a material expeditor written exam a second time in June 2017. That time, she passed by a higher score of 88% on an exam created by an outside consultant.

The undersigned concurs, to some degree, with the Employer's contention that temporary upgrade is not proof of qualification for the permanent position. However, the Employer has gone one step too far by inferring that the Grievant was upgraded only because of "union seniority." This characterization belittles the Grievant's achievement. The fact is that the CBA uses nearly identical language for upgrades as for permanent promotion: both are based on qualifications and seniority. No one testified directly about why the Grievant was upgraded. The undersigned assumes that she was afforded this status on multiple occasions due, at least in part, to her knowledge, skills and abilities.

Had it not been for the flawed process that violated the CBA, she would have been promoted and in place as a material expeditor no later than September 23, 2016. The remedy will include the Grievant's retroactive promotion.

**The Issue of Whether the CBA Was Violated in the 2017 Material Expeditor Posting Is Rendered Moot by the Finding of a 2016 Violation:**

Since this award finds that the Grievant was improperly denied a promotion in September 2016, the issue of whether the District violated the agreement in the handling of posting #7222 is moot.

However, certain aspects of that second posting shed additional light on the 2016 violation. The District continued its questionable practice of altering the interview panel composition. Originally set up as a three-person panel, the District went with two panel members when one had a last-minute emergency. This last-minute change creates the impression of a somewhat haphazard process.

Second, the District changed the way in which it scored the process. It first administered the written exam, screening out those who failed to pass. Then it scheduled oral interviews for those who did pass. No explanation was in the record for why this change in procedure was put into place.

Finally, the time between the closing of the posting was well over the two-week CBA requirement. The process took at least two and a half months.

All these irregularities in the #7222 process underscore the problems inherent in the way the District administers bargaining unit promotions. They reinforce the reasons for the finding of a violation in the #6417 process and issuance of an award on behalf of the Grievant. [\*1519]

**The Grievant Must Be Awarded the Classification Retroactively Without the Disruptive Effect of Bumping on Other Bargaining Unit Members:**

Arbitrators have different approaches to remedies after a finding of improper denial of a promotion. Some order that the grievant be placed in the position they should have been awarded, resulting in the displacement of the employee who is in the position.

Some arbitrators have remanded the issue of remedy back to the parties in the hope that the parties will find a way to balance the rights of the grievant and the rights of other bargaining unit employees. The view of the undersigned is that the parties have retained the arbitrator to make a decision and not to send thorny remedial issues back to the parties.

The view of this arbitrator is that the Grievant should not bump the incumbent. That individual, also a bargaining unit member, was an innocent beneficiary of a position to which he or she was not entitled. That individual presumably gained the position through the Employer's error, not through any deceit or malfeasance of his or her own.

The Employer, not another bargaining unit member, should pay for the contract breach. The consequence of this award is that the Employer may have to carry an additional material expeditor on its payroll for some period of time. If so, that is not an inappropriate outcome for this clear contract violation.

The drawback to the no-bumping remedy is that it was the position, not just the higher salary resulting from promotion, that was denied to the Grievant. Not immediately placing her in the position she should have been awarded is an injustice. However, this injustice must be weighed against the disruptive effect of bumping and its potential impact on faultless employees. On balance, the undersigned favors the more gradual approach to implementing the remedy.

Accordingly, the remedy includes retroactive placement of the Grievant in the material expeditor classification. The remedy is a continuing one, in that the Grievant is to be placed in the first available vacant material expeditor position, systemwide. If more than one material expeditor position opens up at the same time, the Grievant is to be allowed her choice of positions.

While the Grievant is in the status of material expeditor without position, she will continue to work in her present position. During the period before she is permanently placed in a material expeditor position, the Employer may use her to fill temporary material expeditor vacancies as it sees fit. When the Grievant is filling temporary vacancies, she will be owed no additional compensation since she will already be receiving material expeditor pay.

An additional component of the remedy is to award the Grievant retroactive status in the material expeditor classification. The retroactivity must include back pay and any other benefits the Grievant would have enjoyed in the higher-level position had the CBA not been violated. Based on the contractual requirement to fill vacancies within two weeks of the close of the bid, her back pay begins two weeks after the bid closing date.

The Union has asked that the Grievant receive interest on back pay. Based on the totality of circumstances in this case, that request is granted. Interest is not nearly sufficient to erase the nineteen months the Grievant has been denied a promotion for which she was qualified and to which she was entitled under the CBA. But it is one of the few remedial tools available to an arbitrator of disputes arising under a collective bargaining agreement.

#### **The Remainder of the Remedy Requested by the Union is Denied:**

The Union has asked for various "cease and desist" remedies. This award does not order the District to cease and desist any general practices. The grievance was not constructed as a class grievance challenging a policy or practice on a general level. The remedy is designed solely to right the wrong inflicted on the Grievant.

Nonetheless, the arbitrator is confident that the District will study this award carefully and consider the potential consequences of continuing the problematic practices identified in the instant case. Arbitrators have varied approaches to these promotional issues. Some might even read the CBA in a manner that would result in a different outcome. Many would arrive at the same conclusion as the undersigned. Hopefully, this arbitration award [\*1520] and others will help the District reexamine its promotional practices for bargaining unit employees and lead to positive reforms.

#### **AWARD**

1. The Employer violated the CBA when it failed to award the Grievant Andrea Harden a promotion to a material expeditor position in September 2016.
2. The Employer is ordered to immediately place the Grievant in the material expeditor classification. The Grievant is to receive the pay and benefits of the material expeditor classification going forward.
3. The Grievant is to be made whole for all lost pay and benefits, retroactive to September 23, 2016. Back pay shall include interest at the rate currently utilized by the California Public Employment Relations Board for back pay awards.
4. If any material expeditor position is currently vacant, the Grievant is to be placed immediately in that position. If more than one material expeditor position is currently vacant, the Grievant is to be given her choice of the positions.

5. If no material expeditor positions are currently vacant, the Grievant shall remain in her current assignment until a vacancy occurs. When a vacancy occurs, she shall be placed immediately in that vacant position. If more than one material expeditor position becomes vacant at the same time, the Grievant is to be given her choice of the positions.

6. Under no circumstances will any regular incumbent employee be bumped out of his/her current position in order to implement this arbitration award.

7. If the Grievant is retained in her current assignment while waiting for a material expeditor position to open, management may utilize the Grievant to fill temporary vacancies in the material expeditor positions.

8. The arbitrator retains jurisdiction over the implementation of the remedy.

Date: April 17, 2018.

**fn 1**

Neither Ms. Demilio nor Ms. Steeves testified at the hearing.

**fn 2**

No one from the Office of Civil Rights (OCR) testified at the hearing. The parties stipulated that, had the Program Manager from the OCR testified, she would have testified that OCR reviews all of the selections for candidates and promotions in the district, and she reviews those based on guidelines that require that they meet all the Equal Employment Opportunity rules and guidelines that prevent disparate impact and discrimination in hiring and promotional practices.

**fn 3**

The date of these interviews was not clear from the record. The raters' scoresheets give the date as 09/07/2016. However, the Interview schedule given to the raters indicates the date as Friday, October 7, 2016. Mr. Barry and Mr. Watson signed and dated their sheets as 10/7/16. Mr. Gutierrez signed and dated his sheet as 9-7-16. The preponderance of the evidence is that the interviews took place on 10/7/16.

**fn 4**

Mr. Barry, Mr. Gutierrez and Mr. Lagdamen did not testify at the hearing.

**fn 5**

No explanation was in the record why the Grievant received this email three months after her interview and two weeks before the second round of interviews.

**fn 6**

Neither Ms. Trawick nor Ms. Alvarez testified at the hearing.

**fn 7**

The record did not include specifics about the #7222 written exam, such as how many questions were on the exam.



