

LABOR & EMPLOYMENT

Arbitration Decisions

**Labor Arbitration Decision, Santa Clara Cnty., 139 BNA LA 1689**Pagination
* BNA LA

Decision of Arbitrator

In re COUNTY OF SANTA CLARA and SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 521

May 16, 2019

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BNA Headnotes**LABOR ARBITRATION****SUMMARY****[1] Promotions - Qualifications - Seniority ▶ 100.70 ▶ 100.56** [\[Show Topic Path\]](#)

Santa Clara County, California violated its collective-bargaining agreement with a Service Employees International Union local by failing to promote the most experienced of two grievants to a position as a senior child-support officer, and instead selecting a candidate with less seniority than either of the grievants, Arbitrator Paul D. Roose held. According to Roose, a supervisor on the interview panel credibly testified that, in effect, the senior grievant and the less senior selectee had "relatively equal" qualifications and that seniority was not considered. Because this grievant was later promoted to another open senior CSO position, Roose awarded her the pay differential between the two positions for the period from her first application until she was finally promoted, along with an adjustment in her seniority date.

For the company-Jeffrey Gaskill, labor relations representative.

For the union-Paul Pfeilschiefter (Weinberg, Roger, & Rosenfeld), attorney.

PAUL D. ROOSE, Arbitrator.

**OPINION AND AWARD
IN ARBITRATION PROCEEDINGS PURSUANT TO A COLLECTIVE BARGAINING
AGREEMENT
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 24 and February 15, 2019 in San Jose, 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 if the arbitrator grants a remedy.

The parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective

representatives. The Union made an oral closing statement on the record after the conclusion of the proceedings on February 15, 2019, in the presence of the court reporter and union representatives. The Employer filed a written brief. The brief was received on April 19, 2019 and the matter was submitted for decision.

ISSUE

The parties were unable to agree on a statement of the issue in this matter. The Union did not propose a statement of the issue.

The County stated the issue as follows:

Did the County violate Section VI C of the 1982 Departmental Agreement between the District Attorney's Office (Child Support Services) and SEIU when they did not promote the most senior candidates as a voluntary transfer to the position of a Senior Child Support Officer?

The parties ceded to the arbitrator the authority to formulate an issue statement. The arbitrator's formulation of the issue statement in this matter is as follows:

Did the Employer violate the CBA when it failed to promote Ann Marie Aviles and Francine Gonzalez from the position of Child Support Officer II to the position of Senior Child Support Officer in May 2016? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS AND RULES

**Agreement Between County of Santa Clara and Service Employees International Union Local 521 -
June 22, 2015-June 16, 2019
Article 6 - Personnel Action
Section 6.13 Lateral Transfers**

When making a lateral transfer or demotion to another class, an application review by the Personnel [*1690] Director shall be deemed an appropriate qualifying examination for workers in instances where a qualifying examination is required. If otherwise qualified under this provision and the only prohibition to lateral transfer is the salary of the new class, it shall be deemed to be a lateral transfer if the move from one classification to another does not exceed fifteen percent upward range movement.

District Attorney's Departmental Agreement - Santa Clara County - SEIU Local 715

II. Seniority:

A. Seniority shall be defined as days of accrued service (DOAS) in any coded classification within the classified or unclassified service within the Department ...

C. Seniority shall be asserted by classification by DOAS.

VI. Voluntary Transfers:

A. All coded departmental vacancies to be filled shall be posted at each work location for a period of five days.

B. Those eligible to be considered for transfer to fill a vacancy first are those who bid from one work unit to another work unit within a given division; secondly, from the department.

C. In considering the qualifications of the candidates, Management shall use as criteria experience in like assignments, seniority within the office and the department, a candidate's quality and quantity of work in current and past assignments. In the event the foregoing is relatively equal, the senior employee shall be selected. Bypassed senior worker(s) may challenge the determination through the grievance and arbitration procedure of the Collective Bargaining Agreement between the County and Local 715, Service Employees International Union.

D. Posting for vacancies resulting from the selection of a person under "A" (above) shall cease after one additional posting period.

E. Current work units are attached for informational purposes.

Re: D.A. Family Support Division - Work Unit

Pursuant to the District Attorney's Departmental Agreement Section VI C, the following are work units in the Family Support Office effective January 1, 1989:

Accounting

Clerical Support

Mail Desk & Records

Tax Intercept & Quality Control

Telecommunications (Comm Center, PBX, Receptionist)

Team 1

Team 2

Team 3

Team 4

Team 5

County of Santa Clara Ordinance Code**Sec. A25-81. "Transfer" defined.**

As used in this chapter, "transfer" means movement of an employee to a new position in the same class or a different class where the salary range of the new class does not exceed the salary range of the original class by more than ten percent or the percentage specified in a memorandum of understanding which applies to the employee prior to the transfer.

FACTS**The Grievants, at the Time of the Grieved Events, Worked as Child Support Officer (CSO) IIs in the Department of Child Support Services:**

The Department of Child Support Services (DCSS) was created in the 1990s. Prior to that, it had been a division of the District Attorney's Office. DCSS now consists of three divisions - Establishment, Enforcement, and Legal. Bargaining unit members represented by SEIU Local 521 (the successor union to SEIU Local 715) work in all three divisions.

The Establishment division is broken into three work units: case initiation, establishment Team A, and establishment Team B. The issues of this grievance concern the case initiation unit (CIU).

At the time of the events leading up to the filing of the grievance, Ann Marie Aviles (hereafter known as Grievant One) worked as a CSO II in the CIU. She began working at the County in 1997 as a legal secretary. She became a CSO I in 1999, then a CSO II a year later. The County computes seniority as Days [*1691] of Service (DOS) in a classification. ¹ At the time of the grieved events, Grievant One had 4,767 DOS in the CSO II class.

Two and a half years after the filing of the grievance, Grievant One applied for and was selected for a Senior CSO position in the department. She began serving in that position at the end of December 2018. She received a 5% pay increase when she promoted to Senior CSO from CSO II.

Francine Gonzalez (hereafter known as Grievant Two) also worked as a CSO II in the CIU. She started with the County as a CSO I in 2000, promoting to CSO II in 2001. At the time of the grievance, she had 4,743 DOS as a CSO II. She is less senior than Grievant One.

Both Grievants Applied for a Senior CSO Position in the Case Initiation Work Unit in June 2016:

In 2016, a notice was posted indicating "Voluntary Transfer Opportunities Between Teams/Units." ² The notice, dated May 9, 2016, read in relevant part as follows:

The Establishment Division has 1 vacant Senior Child Support Officer Position available for voluntary transfer. This position is located on:

- Case Initiation Team - One Opening (Supervisor: Samantha Klinger)

Posted per Departmental Agreement

This position is posted per the Departmental Agreement provision VI. Voluntary Transfer, section:

A. All coded departmental vacancies to be filled shall be posted at each work location for a period of five days.

Criteria for Selection

Per the Departmental Agreement, when considering an employee for a voluntary transfer "Management shall use as criteria experience in like assignments, seniority within the office and the department, a candidate's quality and quantity of work in current and past assignments. In the event the foregoing is relatively equal, the senior employee shall be selected."

Note: This is a 1st posting for voluntary transfer - Martin, 00030867 ³

No one applied for the Senior CSO position based on this posting. When asked why she didn't apply at this step in the process, Grievant One testified as follows:

... when one Senior CSO wants to move to another Senior CSO position ... it gives the ability to do like musical chairs. Like if you're a senior CSO on Team 1 and you want to come to CIU, this is your opportunity. It says "Come on over."

On May 31, 2016, Division Manager Lori McKeown sent out an email to "All DCSS Users" with the subject "Transfer/Lateral - promotional opportunity Senior CSO (A&CIU)." The memo reads in relevant part as follows:

The Senior Child Support Officer position is posted on Neo-Gov/SCC website under Transfer Opportunity. The openings are in CIU and on Team A. If you are interested in applying for these positions, you must submit your application through Neo Gov.

On the County's website (Neo-Gov) a Job Bulletin was posted on May 27, 2016. That posting was entitled "Senior Child Support Officer - Transfer." The posting indicated the following, in relevant part:

Transfer is defined as the movement of a current coded County employee to a new position in the same class or different class, where the salary of the new class does not exceed the salary range of the original class by more than ten percent or the percentage specified in a memorandum of understanding which applies to the employee prior to the transfer.

These two full-time Senior Child Support Officer positions are located at the Department of Child Support Services ...

Both Grievants filled out applications at this stage for the Case Initiation Unit position. ⁴ Ten individuals applied for the two open positions.

Both Grievants Were Interviewed by a Three-Person Interview Panel:

Division Manager McKeown was designated by the County as the "hiring manager responsible for filling both vacancies," according to her testimony. She testified that an interview panel "was created" to interview candidates for the positions. That panel consisted of the following individuals:

Narjeet Randhawa - Supervising CSO, Establishment Team A

Samantha Klinger - Supervising CSO, CIU

Mariana Lopez - Legal Support Supervisor

A list of twelve questions was created for the panel. No testimony was offered as to who wrote the questions or why the questions were selected for inclusion. Questions included the following:

1. Briefly describe what you have done to prepare yourself for a Senior CSO position and how do you think you would contribute to the team in this role?

2. What do you think are the most important qualities of a Senior CSO and why?
 3. What are the five Federal performance measures and which ones are directly impacted by the Establishment unit?
 4. What motivates you at work and how do you motivate your team members to achieve more?
 5. You are asked by your Supervisor to review/audit 50 random cases from your team for accuracy with following the policies and procedures in place and you find errors in over half of them. How will you proceed? ...
12. Why should we hire you for this position?

On June 22, 2016, the panel interviewed Grievant Two. Grievant One was interviewed on June 23. Also applying for the positions were CSO II Juanita Virgilio (8,204 DOS) and CSO II Monica Carrillo (2,770 DOS). Several other employees also applied.

Legal Division Supervisor Lopez testified at the hearing.⁵ She was called as an employer witness. She testified to her role on the panel as follows:

We [the panel] interview the candidates ... we sit down and we discuss what we thought about the candidates, and then we come to a consensus of who we want to extend an offer to.

Ms. Lopez testified that she rated Ms. Virgilio, Ms. Carrillo and Grievant One as the top candidates. She stated that Ms. Carrillo stood out among the three. "I felt like she had leadership experience that I felt other candidates didn't have," she testified.

As for Grievant One, Ms. Lopez stated that she "came across as very knowledgeable." Ms. Lopez testified as follows:

I liked the fact that she had a bachelor's degree. I think she was one of the only candidates that had the bachelor's degree, so to me that stood out.

Ms. Lopez stated that she did not recommend Grievant Two: "she did not stand out to me."

On cross-examination, Supervisor Lopez testified that she did not consider seniority in evaluating the candidates. When asked why, she answered as follows:

I personally feel that when I was here, I didn't have seniority, and I felt like I did a very good job. So, I didn't feel that seniority should matter.

Ms. Lopez testified that the panel met with Ms. McKeown and recommended the three candidates (Virgilio, Carrillo and Grievant One) to her. "We came to a consensus," she testified, "because we thought they were the best."

Ms. Lopez testified that the panel did not use a scoring system and did not put their recommendations in writing.

The Employer Selected Less Senior CSO II Monica Carrillo for the Promotional Transfer Position:

Ms. McKeown's testimony differs at least in emphasis from that of management witness Lopez. Ms. McKeown, also called as an employer witness, testified that she met with the panel after the interviews were conducted. She testified as follows:

They [the panel] came in and they said that they were very impressed with one particular candidate, and that that candidate was Monica Carrillo. And then all three of them began to explain to me ... why they were impressed with Monica Carrillo. And then they also mentioned that they were leaning towards Juanita Virgilio. So they were basically - they were recommending to me hiring of those two candidates: Monica Carrillo and Juanita Virgilio. [*1693]

And at that point, I may have asked, or they may have told me who the next person would have been, and they said it was Ann Aviles.

Ms. McKeown selected Ms. Carrillo for the CIU Senior CSO position. She gave the following reasons:

... what we were looking for was someone that could step into the senior child support officer role that had responsibilities with lead duties or lead assignments before, and she was a lead office specialist at social services within this county. And then she was also a lead in the court unit as a lead legal clerk here for quite a while, and I listened to all the input that they had from their interview, and they [the panel]

felt that she would be someone that could step in, take over from the supervisor when needed, because that's often required of senior child support officers.

The Union Filed a Grievance Claiming the Grievants Were Improperly Bypassed:

On August 4, 2016 the Union filed a grievance naming Grievants One and Two as the "more senior Workers" bypassed for the Senior CSO positions. As remedy, the Union asked that the two Grievants be made whole, including an award of the disputed positions. It is that grievance that is now before the arbitrator.

UNION'S POSITION

The Union argues that the plain language of the agreement was violated by the County's actions. The contract requires a two-step process, and the County skipped the second step of making the positions available for employees within 15% of the job opening salary.

The Union asserts that the County's own witness admitted that one of the Grievants, Ann Marie Aviles, was considered equal to the candidates selected. Ms. Aviles' seniority should have then been considered and was not.

The contract is not ambiguous, the Union contends. The Union asks that the arbitrator award full back pay to both Grievants, reinstate their seniority to where they would have been had they been fairly considered under the agreement, and order any other remedies the arbitrator deems proper.

EMPLOYER'S POSITION

The County contends that witnesses testified that the posting was done properly as a "class to class" posting. It is "undisputed" that it was a class to class posting. When no one from the same class applied, the posting was properly put out countywide.

The right to hire is a basic management right, the County argues, and Ms. McKeown exercised that right properly.

The County does not believe that Section VI C of the departmental agreement applies to the hiring decision made. If it does apply, however, the Union would have to have proven that "experience in like assignments, seniority within the office and the department, a candidate's quality and quantity of work in current and past assignments" were relatively equal. The Union did not.

The Employer asks the arbitrator to deny the grievance and all requested remedies.

DISCUSSION

The CBA Definition of "Transfer" Must be Applied to the Departmental Agreement to Understand the Meaning of its Voluntary Transfer Section:

An analysis of this grievance begins with a careful reading of the contract language. The key section is in the departmental agreement, but it must be read in conjunction with the countywide agreement.

The relevant section is titled "voluntary transfer." Vacancies are to be posted for five days. Implied, but not made explicit, in this passage is that interested individuals may apply within that five-day period.

Paragraph "B" specifies those who are eligible to transfer, ranking them in a one-two order. First are those who would like to transfer from one work unit to another work unit within the division. In other words, those who must be considered first are those who already work in the division of the posted vacancy. The divisions are not spelled out in the agreement, but unrebutted testimony confirmed that three divisions currently exist - Establishment, Enforcement, and Legal.

Second to be considered are those who work in the department (DCSS) but in another division of the [*1694] department.⁶

The Employer has made the key assertion throughout these proceedings that only those individuals already in the same classification as the posted vacancy are eligible to apply at this stage of the process.⁷ These are "class to class" postings, the County postulates. However, nowhere in the departmental agreement does this phrase "class to class" or a similar concept appear. Nothing in the "voluntary transfer" section of the agreement supports the County's reading.

Fortunately for the sake of contractual clarity, "transfer" is defined elsewhere. The countywide agreement spells out that it "shall be deemed to be a lateral transfer if the move from one classification to another does not exceed fifteen percent upward range movement." This is unambiguous contract language. A transfer is a move to a position that is no more than fifteen percent higher in pay than the individual's current position.

Reinforcing this view of the CBA is the above-cited ordinance code defining transfer.

Paragraphs A and B of Section VI of the departmental agreement must be read with this transfer definition in mind. Those eligible to apply under those paragraphs are employees at the same pay rate or those at pay rates up to 15% lower than the sought-after position. In the instant case, CSO IIs should have been considered eligible to apply under this provision for the senior CSO vacancies, since such a promotion results in a 5% increase in pay.

Applying this transfer definition when reading paragraphs A and B sheds light on the significance of paragraph C. If, as the County asserts, these transfers are supposed to be limited to "class to class" applicants, the qualification requirements in paragraph C seem unnecessary. If this section were only about Senior CSOs moving laterally within the department to another work unit or division, why would extensive qualifications screening be required? And why would "bypassed senior workers" be given an opportunity to challenge the selection through the grievance procedure?

The entire "voluntary transfer" section of the departmental agreement becomes more decipherable when read as an opportunity for bargaining unit members in the department to seek out within-department promotional opportunities.⁸

The Grievants applied for the disputed positions via a countywide process that is, apparently, not covered by the CBA. Had the CBA been followed, the Grievants should have been allowed to apply for the positions under the provisions of the departmental agreement. The remainder of the analysis of this grievance is whether either or both Grievant's rights were violated under paragraph C of Section VI of the departmental agreement.

Grievant One is the Only Individual Who Has Standing for a Potential Remedy in this Bypass Grievance, Since She Was Senior to Grievant Two:

The record is clear that Grievant One (Ann Marie Aviles) has more relevant seniority than Grievant Two (Francine Gonzalez). The departmental agreement is explicit that "bypassed senior worker (s)" may challenge transfer determinations through the grievance procedure. While Grievant Two is senior to the individual (Monica Carrillo) who was granted the promotion, she is junior to Grievant One.

Only one position is in dispute in this grievance - the CIU Senior CSO job. As indicated in the footnote on page five of this decision, evidence was presented about a second senior CSO position filled at the same time. However, for the reasons cited in the footnote, neither Grievant has standing to claim a violation of the CBA in the awarding of the second senior CSO position.

Grievant Two was subjected to the same improper process as Grievant One. However, [*1695] even with a correct process in place, she would not have received a promotion since the more senior Grievant One applied for the same position. Therefore, Grievant Two is not eligible for a remedy in this grievance.

The Outcome of the Arbitration Hinges on the Issue of Whether the Qualifications of Grievant One Were "Relatively Equal" to the Qualifications of the Less Senior Candidate Selected:

Paragraph C of Section VI of the departmental agreement clearly describes the steps management is required to take in making transfer decisions. They are to consider "experience in like assignments," "quality and quantity of work in current and past assignments," and "seniority within the office and the department."

The next phrase in the agreement is important - if "the foregoing is relatively equal" seniority shall prevail. The "foregoing" in that clause refers to "experience" and "quality and quantity of work." The word "relatively" means, in this context, "approximately" or "roughly." The use of the word "relatively" apparently reflects an understanding by the bargaining parties that no two individuals have the exact same work experience. Seniority is to be the deciding factor if the qualifications of the less senior employee are not clearly superior to that of the more senior employee.

The process that Grievant One and Ms. Carrillo went through was not well-suited to determining which employee should have been promoted under the provisions of the CBA. The questions posed by the interview panel were primarily geared to the candidate's knowledge of the vacant position's job responsibilities rather than the candidate's own work history.⁹ The record did indicate that Ms. Carrillo had some experience in a lead role in other departments and divisions. However, Grievant One clearly had more experience in child support services.

What tips the balance of the evidence toward the Grievant, in this case, is the credible testimony of the interview panel member Lopez. The arbitrator's view of supervisor Lopez' credibility derives from the fact that she was called to testify as a management witness, yet she

testified, at least in part, against the interests of the Employer in this grievance proceeding. It should also be noted that she was the only panel member who testified. Her testimony evaluating the Grievant's performance stands unrebutted by the views of any other panel member.

Her testimony also rang true to the undersigned because she testified that she did not consider seniority in her recommendation, based on her personal work history. Despite this viewpoint (arguably improper due to the language in the departmental agreement), Ms. Lopez nonetheless recommended Grievant One for promotion. Finally, her testimony was convincing about her recommendation of Grievant One for the additional reason that she candidly admitted she did not recommend Grievant Two. It was evident from her testimony that she was not tailoring her statements in any way to please either side of the dispute.

The gist of Ms. Lopez' testimony is that she and the other panel members recommended three candidates for the two positions - Ms. Carrillo, Ms. Virgilio, and Grievant One. She testified credibly that she thought Grievant One "stood out" because of her bachelor's degree. Ms. Lopez testified credibly that the panel recommended all three candidates in a meeting with Ms. McKeown.

Ms. McKeown recalled the meeting with the interview panel differently than Ms. Lopez did. She testified that the panel recommended Ms. Carrillo and Ms. Virgilio. She remembered that the panel ranked Grievant One behind the other two candidates. No written records or scoresheets exist to help resolve the discrepancy between the two accounts of the meeting. For the reasons noted in the preceding paragraphs, I find the testimony of Ms. Lopez on this point more credible than that of Ms. McKeown.

The only panel member who testified, Ms. Lopez, said that she recommended all three candidates for the senior CSO positions. This is strong corroboration that Grievant One was [*1696] "relatively equal" to the less senior employee, Ms. Carrillo, promoted into the CIU Senior CSO position. As such, the County violated the CBA when it failed to promote Grievant One to the CIU Senior CSO position in June 2016.

The Appropriate Remedy is Shaped by the Union's Request Concerning Ms. Carrillo and by the Fact That Grievant One Was Promoted into a Senior CSO Position Subsequent to the Filing of the Grievance:

The Union made it clear from the outset of these proceedings that this was not a grievance against Ms. Carrillo. The Union is not seeking to displace Ms. Carrillo from her current position. The undersigned would be inclined, in any case, to a remedy that leaves Ms. Carrillo in place. Ms. Carrillo was the unwitting beneficiary of management's contract violation.

Also factoring into the appropriate remedy in this instance is that Grievant One, at the time of the arbitration hearing in this matter, successfully applied for and was awarded another Senior CSO position. She had been working in that position since December 2018.

Therefore, the remedy will only address making Grievant One whole during the time between when she should have been promoted to senior CSO and the date when she received her promotion.

AWARD

1. The Employer violated the CBA when it failed to promote Grievant One, Ann Marie Aviles, to the Senior CSO position in the case initiation unit in June 2016.
2. The Employer shall pay Grievant One the difference between her CSO II pay and Senior CSO pay from the date she should have assumed the Senior CSO position in 2016 until the date she was promoted to a Senior CSO position in 2018.
3. Grievant One's Days of Service seniority date in the Senior CSO classification shall be adjusted as if she had received the promotion in 2016.
4. The arbitrator retains jurisdiction over the implementation of the remedy.

Date: May 16, 2019.

fn 1

DOS is also referred to as days of accrued service (DOAS) in the departmental agreement.

fn 2

The record included evidence and testimony that a second Senior CSO position was posted at the same time. That second position was in Establishment Team A. The record was incomplete as to whether Grievant One or Grievant Two applied for this second position. In any case, that Senior CSO position was awarded to Juanita Virgilio. Ms. Virgilio has greater seniority than either Grievant. The awarding of that position to Ms. Virgilio is not being challenged by the Union in this grievance. The record was devoid of evidence of any prior transfer postings in the department.

fn 3

No evidence was in the record as to the meaning of "Martin, 00030867."

fn 4

The applications submitted by the [*1692] Grievants were not in evidence.

fn 5

Neither of the other two panel members, Ms. Randhawa and Ms. Klinger, testified.

fn 6

The undersigned arbitrator does not read this as a requirement to do two separate postings. Instead, it seems that it could be covered by a single application process in which candidates within the division will be considered first. However, the issue of one or two postings was not fairly presented by the facts of this dispute, and the parties may want to revisit that issue in light of this award.

fn 7

The Employer argued that these grieved vacancies were handled in the same manner as past transfers, first offering them to department employees in the same classification as the vacancy and then going countywide. However, no other examples of this practice were put into evidence. Nor were prior examples cited of less senior employees being selected for vacancies without objection by the Union. Even had prior instances come to light, this would not have precluded the Union from deciding to challenge the practice in this instance based on the contract language.

fn 8

In the instant case, the classification of the Grievants and of the positions they were seeking were both in the SEIU local 521 bargaining unit. This award confines its analysis and determination to this fact set. It does not necessarily apply to potential scenarios involving classifications outside the bargaining unit.

fn 9

The County may want to forego the use of an interview panel under similar situations in the future. The departmental agreement lends itself more to a more objective review of the applicant's personnel file, including performance evaluations. "Experiences in like assignments" can be determined from the applicant's application and possible follow-up questions posed to the applicant. An interview with the applicant's supervisor to supplement performance evaluation information on the metric of "quality and quantity of work" might be an information-gathering technique that would be consistent with the CBA.

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