

LABOR & EMPLOYMENT

Arbitration Decisions



Labor Arbitration Decision, Bay Area Air Quality Mgmt., 2020 BL 542743, 2020 BNA LA 1467

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OPINION AND AWARD IN ARBITRATION PROCEEDINGS PURSUANT TO A COLLECTIVE
BARGAINING AGREEMENT

In the Matter of a Controversy Between

Bay Area Air Quality Management District, Employer

and

BAAQMD Employees' Association, Union

Hiring Procedures

April 22, 2020

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Case Summary

LABOR ARBITRATION

SUMMARY

[1] Promotions - Hiring procedures - Discrimination ▶ 100.70 ▶ 100.33 [\[Show Topic Path\]](#)

The Bay Area Quality Management District violated its CBA with the BAAQMD Employees' Association when it allowed a second round of interviews for the Senior Staff Specialist position in the Technology Implementation Office, as this deviated from the CBA's explicit requirement of one standardized interview of all candidates and the presence of a HR person in the interviews, and a question about work/life balance was

inappropriate, if not legally impermissible. The grievant, a female in the final four group of candidates, would have been selected had it not been for the second interview, as she was the only candidate to receive an "outstanding" rating on three of the standardized five questions, and she was disadvantaged by the inappropriate question. Removal of the selectee and redoing the interviews would be unnecessarily disruptive and punish the innocent beneficiary of the contract violation; he will therefore remain in the position, the grievant will be compensated as if she had received the promotion, and she must make a reasonable effort to apply for similar vacant positions.

APPEARANCES:

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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. The matter was heard on January 7, 2020 in San Francisco, 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.

Both 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 parties chose to conclude their presentations by written brief. The briefs were received by the arbitrator on April 3, 2020.

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 parties' MOU by conducting a second interview for the senior staff specialist program lead vacancy in the technology implementation office in approximately March 2019 and, if so, what is the appropriate remedy?

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

Did the District violate section 16.01 of the MOU with regard to its hiring process for the senior staff specialist position in the technology implementation office by affording the final candidates an additional meeting with the supervisor in the department.

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

- 1) Did the Employer violate the CBA when the technology implementation office manager, in March 2019, conducted interviews with final candidates for a senior staff specialist position vacancy in his department?
- 2) If so, what is the proper remedy?

RELEVANT CONTRACT and POLICY PROVISIONS

Memorandum of Understanding Between Bay Area Air Quality Management District and Bay Area Air Quality Management District Employees' Association — July 1, 2017 - June 30, 2019
ARTICLE XVI METHOD OF FILLING VACANCIES
SECTION 16.01 PROCEDURES

1. ANNOUNCEMENT PROCEDURE. When a bargaining unit vacancy exists, the Human Resources Officer (HRO) will prepare and distribute a position announcement for the vacancy. The announcement will normally be posted on the electronic (e-mail) Personnel Bulletin Board as well as on each floor's bulletin board. The announcement will be delivered by mail or by insertion into the employee's pay envelope. The position[*2] will be opened for at least 10 working days. The bargaining[*2] unit vacancy announcement will include the opening date, minimum qualifications required, the criteria to be used to screen applicants, the weight which will be given to the panel interview, and a statement that the District may choose to utilize these procedures or any other selection procedure deemed appropriate as determined by the HRO and Hiring Manager, if the qualified applicant pool does not include any bargaining unit employees.

6. ORDER OF FILLING VACANCIES

A. FIRST PRIORITY...

B. SECOND PRIORITY. For regular employees, transfer, promotion, or return from leave of absence granted for non-medical reasons. To fill a vacancy in the second priority category, the procedures specified in this Section shall be used.

The Hiring Manager shall have the right to determine whether a second priority order for filling vacancies shall be promotional or open. In the event the recruitment is open, bargaining unit employees have the opportunity to apply and compete for the vacant position with the outside applicants.

8. QUALIFIED APPLICANT POOL - PROCEDURE. The following procedure shall be used to determine the qualified applicant pool. In an open recruitment, all qualified District employees shall be interviewed by the Hiring Manager and Steps A, B, and C will not apply to those District employees. When there are five (5) or fewer qualified applicants, Steps A, B, and C will not apply.

D. As a result of the combined scores, the Hiring Manager in the presence of the HRO will interview the top five (5) applicants. In open recruitments the Hiring Manager will interview all qualified District employees. The Hiring Manager and the HRO will develop the interview questions and rating criteria. The Hiring Manager shall ask the predetermined interview questions of every candidate and evaluate the candidates based on the predetermined selection criteria. Based on the answers to the prepared questions, the Hiring Manager may

pursue further lines of inquiry, which will draw out further information about the candidate's qualifications or abilities that relate to the vacant position. The Hiring Manager shall document in writing the extent to which each applicant possesses the desirable qualifications. The Hiring Manager shall score each candidate consistent with the scoring criteria. The Hiring Manager shall review the scoring of each candidate with the HRO or designee. At the conclusion of all the interviews, the Hiring Manager shall forward his/her scoring sheets, notes and recommendation of the selected candidate to fill the vacancy to the HRO or designee. The hiring recommendation shall be forwarded to the HRO[*3] for certification as to process and procedure. Once the HRO certifies the process and procedure the hiring recommendation shall be forwarded through the chain of command to the EO for approval. Any determination not to approve a Hiring Manager's recommendation[*3] shall be in writing. If the hiring process and procedure is not certified by the HRO, the recommendation shall not be forwarded to the EO and the HRO shall take the appropriate steps to ensure the recruitment and selection process conforms to the procedures specified in this Article. Any determination not to approve the Hiring Manager's recommendation shall be in writing and shall provide a detailed explanation of the reasons for the determination, and must be approved by the EO. This document, and any correspondence concerning the document from the Hiring Manager or from any other manager in the chain of command applicable to the hiring decision, shall become part of the record of the hiring decision.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT ADMINISTRATIVE CODE LAST REVISION 11/27/2000¹

Division III Personnel Policies and Procedures

Section 13 Method of Filling Vacancies

13.1 Recruitment and Selection of Employees

(f) HIRING MANAGER. The hiring manager is the District employee primarily responsible for evaluating candidates to fill a given vacant job position, and for recommending to the APCO that a particular individual be hired or promoted to fill the position...

(2)

(iii) All interviews shall be conducted in accordance with the procedures set forth in Section III-13.7

13.7 Interview Procedure (Revised 6/7/95)

(a) In evaluating the qualifications of candidates for a position to be filled, the hiring manager shall consider all relevant education, work experience, supervisory experience and lead experience which is required for successful job performance.

(e) After each interview, the hiring manager shall document in writing the extent to which each applicant possesses the desirable qualifications. The hiring manager should take notes during each interview, and soon as possible after the interview is completed, should write specific comments about each candidates' qualifications and should summarize his or her observations and impressions of the candidate.

FACTS

The District Conducted a Hiring Process in the First Quarter of 2019 to Fill Two Vacant Bargaining Unit Positions: Both positions were vacant Senior Staff Specialist (Program Lead) jobs. One was in the Technology Implementation Office (TIO) and the other was in the Strategic Incentives Division (SID). Both positions are in the BAAQMDEA bargaining unit. Both recruitments included external as well as internal candidates.

The subject of the instant grievance is the process used for filling the TIO position.

Nine external candidates applied and were[*4] deemed qualified to sit for an oral exam for the positions. Eight of those participated in the required exam. Six external candidates were invited to move forward to the hiring interview stage, but one withdrew.

Nine internal candidates, members of the BAAQMDEA bargaining unit, were deemed qualified and[*4] invited to participate in the hiring interviews. Two withdrew, leaving seven internal candidates.

Chengfeng Wang is a manager in the SID. He was designated by the District as the hiring manager for the SID vacancy.²

The District Designated the Technology Implementation Officer as the Hiring Manager for the Senior Staff Specialist Position in the Technology Implementation Office:

Ranyee Chiang is the director of meteorology and measurement for the District. At the time of the events leading to this grievance, she was the technology implementation officer. She was designated as the hiring manager for the TIO vacancy.

For the sake of efficiency, the District decided to combine the interviews into a single process for both vacancies. The combined interview panel consisted of Ms. Chiang, Mr. Wang, and Regina Soo, a human resources analyst.³ Ms. Soo was designated by human resources manager Judy Yu to act as the representative of the human resources office during the interviews.

As the hiring managers for the two positions, Ms. Chiang and Mr. Wang had the joint responsibility to develop the job descriptions and interview questions. They did so in coordination with Ms. Soo. Ms. Chiang also received input on the job announcement and interview questions from Derrick Tang, manager in the TIO, and from other District management personnel.

According to Ms. Chiang, Ms. Soo's role in the interviews was as follows:

She would welcome the applicants who were interviewing, explaining the process to them. She also kept track of time to make sure we had time to cover all the questions and was there to observe.

The three-person panel conducted the 45-minute interviews on March 7, 8 and 13, 2019. Mr. Wang and Ms. Chiang took turns asking each candidate five scripted questions and took notes on the answers.⁴ Each score sheet had a section at the bottom of the form where the interviewer could rate the applicant's answer as "not acceptable," "average," "above average," and "outstanding."

The definition of "outstanding" is included on the ratings sheet, as follows:

Candidate demonstrates high knowledge & ability to succeed on the job.
Response is clearly communicated, complete, and addresses all aspects of the question.

The definition of "above average" is as follows:

Exceeds expectation. Response is well-communicated. Candidate demonstrates competency to perform well on the job.

The final four candidates were Amy Dao, Rebecca Fisher, Mark Tang and Chad White.⁵ The following chart indicates how hiring manager Chiang rated them at the time of the hiring interviews.

Candidate	Mark Tang	Chad White	Rebecca Fisher	Amy Dao
Question 1: "Please tell us about[*5] yourself and why you are interested in this position."	Above average	Above average	Outstanding	Above average

Candidate	Mark Tang	Chad White	Rebecca Fisher	Amy Dao
Question 2: "Based on your understanding of the programs and goals of the TIO and SID, what do you think are the most important expertise areas and skills you have that would help you succeed in this position?"	Outstanding	Outstanding[*5]	Outstanding	Outstanding
Question 3: "Tell me about a work situation in which you were responsible for multiple projects competing for your time."	Above average	Above average	[Blank]	Above average
Question 4: "Please describe a situation in which you were assigned a project and you noticed that there were additional issues beyond what your supervisor had considered..."	Above average	Above average	Above average	Above average
Question 5: "What would your past or current team members say are three most important qualities that make you an effective, valued coworker..."	Above average	Above average	Outstanding	Outstanding

Under question 1, the interview form includes the following:

Criteria:

- Experience / coursework in the following:

- Technical feasibility / evaluation
 - Data analysis, finance, cost analysis
 - Program, grant, or contract management
 - Air pollution and greenhouse gases
 - Engineering
-
- Discusses experience relative to the position
 - Discusses position relative to professional goals
 - Articulate and concise communication
 - Motivation is aligned with position
 - Interested in learning and advancing career

Ms. Chiang was asked on direct examination if the ratings were used "to determine...who gets hired." She responded as follows:

I also used the criteria that are listed above right underneath the question as well. So it's a combination of the criteria and the ratings, as well as the fit with the applicant's experience and the role that we're looking for.

She further testified that she preferred Chad White to other finalists because he ...had more experience with industrial facilities, working both in an academic setting and in a practical setting. His experience at the air district as well was more closely aligned with working with some of the Bay Area industrial facilities.

On cross-examination of Ms. Chiang, the following exchange took place:

Q: The third question for Rebecca was not rated. What's that about?

A: That was an oversight on my part. During the interview, I am focused on listening, jotting down notes, and so I missed it.

Q: All right. The reason I'm asking is because of all the candidates, Rebecca Fisher was the only one who had three outstanding ratings out of the five questions, one above average, and then we don't know, yet she was not one of your two top candidates.

A: She wasn't one of my two top candidates because...I rated her outstanding on a number of her responses to questions because she is very concise and clear and addresses the question in her responses. I'm also looking at criteria that are listed at the tops of each of these pages in order[*6] to assess the fit. And Amy Dao and Chad White both had more directly related experience that would allow them to perform the job from the beginning.

On cross-examination, the following exchange took place:

Q: Is it your understanding as the hiring manager that you're required to hire whoever has the highest ratings down here that you've checked?

A: I don't know of any such requirement.

Q: Okay. What do these ratings[*6] mean to you?

A: To me they are a rating of how they — how the candidates responded to the question. Literally, that's it.

Ms. Chiang also testified that she had the candidates' resumes at the hiring interview.⁶

At the conclusion of the interviews, Ms. Chiang and Mr. Wang discussed the candidates' interview performance. Ms. Chiang testified that she rated external candidate Amy Dao as her top choice. She rated internal candidate Chad White second, followed by internal candidates Mark Tang and Rebecca Fisher even at numbers three and four. No written record was in evidence that reflects these rankings.

According to Ms. Chiang's testimony, Mr. Wang also rated Ms. Dao as his top choice for the SID vacancy. Ms. Soo contacted Ms. Dao, who told Ms. Soo that she preferred the SID position. Ms. Dao was later offered and accepted the SID position.

Technology Implementation Office Manager Derrick Tang Was Provided an Opportunity to Interview the Top Four Candidates Before the Hiring Decision was Made:

Mr. Tang, no relation to job candidate Mark Tang, was to be the direct supervisor of the successful candidate for the TIO position. According to Ms. Chiang, Derrick Tang was not available during the hiring interviews. She testified as follows:

...in order to set up a team that's collaborative and working together, I wanted to make sure that the potential person we were hiring had a chance to meet more people on the team and that Derrick had a chance to talk with the top candidates as well.

On March 13, 2019, Ms. Chiang, Mr. Wang, and Ms. Soo met with the final job candidate at 11 AM. At 2:36 that afternoon, Ms. Chiang sent an email to Derrick Tang. The email begins with the following sentence:

I can talk more about my thoughts about pros and cons after you meet with them, in alphabetical order:

Amy Dao

Rebecca Fisher

Mark Tang

Chad White

On cross-examination of Ms. Chiang, the following exchange took place:

Q: Did you work in any way with Derrick to determine questions that he should ask candidates?

A: For his meetings, I don't know.

Q: And you don't remember if you gave him any advice on what questions to ask?

A: I don't remember what we talked about verbally.

Q: Did you give him your evaluation sheets?

A: I did not.

Q: Do you know whether he reviewed your evaluation sheets before he —

A: I don't think he reviewed the evaluation sheets from the hiring interview.

Manager Tang testified that he did not discuss the merits of the four top candidates with Ms. Chiang prior to his interview with them. Mr. Tang contacted Regina Soo and asked her to assist him in[*7] scheduling follow-up interviews with the four candidates.

Ms. Soo sent Derrick Tang an email on March 14 with the tentative schedule for 45-minute interviews with the four candidates on March 20 and 21. Ms. Soo's email concludes with the following:

I will have the candidates meet with you directly as HR does not need to participate in this part of the process.

In preparation for the interviews, Manager Tang created a list of seven questions. Question 1 was "Tell me[*7] about your career. How would you describe how it's grown, gotten you to where you are?" Question 5 was "What does work/life balance mean to you?"

He first interviewed internal candidate Mark Tang. As the candidate answered questions, Derrick Tang took notes on the question sheet. He also asked follow-up questions. For the second interview, with Ms. Fisher, Manager Tang added three questions to the original seven. He testified that he did so in order to incorporate follow-up questions he had asked during Mark Tang's interview into the primary question list.

In the question list for Ms. Fisher's interview, he added the following to the "work/life balance" question: "How do you maintain it." Next to this question, Mr. Tang wrote "interpersonal." In his notes below the list of questions, he wrote "won't donate time."

For the third interview, Mr. White, the question list had expanded to eleven. And for the final interview, with Ms. Dao, thirteen questions were on Mr. Tang's list.

For the "work/life balance" question, Mark Tang's sheet had the word "Maintain?" written next to it. None of the other note sheets for the other candidates had any notation next to that question. No other notes are discernible on the Tang, White and Dao sheets that relate to possible answers to the "work/life balance question."

On March 22, Manager Tang wrote an email to Ms. Chiang. It stated, in relevant part:

I interviewed Mark, Rebecca, Chad and Amy. Chad would be my top choice. I do think Amy would be strong, but I had the sense that she still preferred SID after our conversation. Of course that works better for Karen [SID manager Karen Schkolnick] too. I shared my opinion with Karen and asked that she wait until Monday, when I have a chance to confirm with you, before she sends out a hiring memo.

The District Awarded the Position to Internal Candidate Chad White: On March 27, 2019, Ms. Chiang sent a memo to BAAQMD Executive Officer Jack Broadbent recommending that Mr. White be offered the position in TIO. The memo includes the following paragraph:

My recommendation is the result of an Open recruitment in which I worked closely with the Human Resources Office. This process involved a review of the minimum qualifications, review of the responses to the supplemental questionnaire, a panel interview, a written-in-person examination, and a hiring interview.

Based on our evaluation, Mr. White has the most relevant qualifications and experience to perform the duties of the position...

If you approve this recommendation, I propose that Mr. White be offered[*8] the Senior Staff Specialist position at his current salary level.

Mr. White was offered and accepted the position. He started his new position with the District on May 6, 2019 at Step E of the salary range for Senior Staff Specialist (Program Lead), which was \$10,317.84 per month at that time. The placement, according to the letter he received, was in accordance with MOU Article VII, 7.02 (2).⁷

Witnesses Testified to Prior Occasions on Which[*8] Second Interviews Were Utilized: Judy Yu is the human resources manager for the District. She has worked in the department since 2003. She has been involved in more than one hundred recruitments for positions within the District.

Ms. Yu testified that, over the past three or four years, the District has included second interviews in the hiring process "at least a dozen" times. She testified as follows:

Typically it's...either the hiring manager's superior or the subordinate. Usually someone who would supervise the — select the candidate or someone who oversees the whole division or office.

Ms. Yu stated that the EA has never raised a concern about this practice.

Virginia Lau was president of the Association at the time of the grievance filing. Beginning in 2011, she was a shop steward and then vice-president of the EA before her elevation to president in 2018.

Ms. Lau testified that she could recall only one case in which an additional interview was used for hiring. She testified as follows:

There's only one that I'm aware of, and it was for Christianne Riviere who is a principal planner. And I was informed of that by the manager who hired her after she was hired for three years, that they had done additional interviews with her only when she was an external candidate.

The Union Filed a Grievance Alleging that the District Violated the MOU by Allowing the Second Round of Interviews: On May 8, 2019, the Union filed a grievance about the hiring process used in the selection of the TIO senior staff specialist, alleging a violation of MOU Article 16.01. The Union asked for a cease and desist remedy, vacating the hiring decision and redo the second interviews to include all internal candidates and with the presence of human resources personnel.

It is that grievance that is now before the arbitrator.

The Contract Section Governing this Matter was Amended in 2000: William Saltz is a BAAQMD employee and labor consultant to the Union. He was on the Union's bargaining teams during the 1990s and beyond. Mr. Saltz stated that a substantial change in hiring procedures was negotiated by the parties in the late 1990s. He testified as follows:

Instead of referring to the admin code, we negotiated an updated process that we felt was more fair and allowed for more predictability and consistency from one interview to the next. And we wanted to make sure — we insisted, in fact, that HR be present during the final interview to make sure that the process was followed during the final interview.

The 1996 - 1999 contract was placed into evidence. The section on filling vacancies[*9] incorporates by reference the administrative code. It does not describe a detailed process akin to the language in the current CBA.

Subsequent to the Grievance Filing, the Parties' Amended the Contract Language Cited in the Grievance: The parties signed a one-year extension to the 2017-2019 agreement in August 2019. The agreement included a new section immediately following 16.01.8D, as follows:

D. Additional Steps — Subsequent to Step C[*9] (Hiring Interviews), the District may utilize additional selection procedures consistent with the provisions of Division III, Section 13 of the District's Administrative Code Personnel Policies and Procedures. Proposed changes to this policy that are within the scope of bargaining will not be implemented without first bargaining in accordance with MMBA requirements.

According to human resources manager Yu, the new section was added to allow "these follow-up interviews after the hiring interview." It was, she said, "to clarify our current practice."⁸

UNION'S POSITION

The Union argues that the District did not follow the clear hiring procedure in the MOU. The process is designed to involve HR at every step of the process. "It is thus unacceptable for an HR representative to have been altogether absent from Derrick [Tang]'s interview process, and the lack of consistency was evident," the Union's brief states.

The Union contends that the questions posed by Mr. Tang were inappropriate. "The follow-up interview questions in comparison to those asked during the hiring

interview were less objectively tied to hiring criteria," the Union posits. And the question about work-life balance "bears resemblance to those cautioned against by the EEOC because they can lead to disparate treatment against individuals with caregiving responsibilities," the Union asserts in its brief.

The Union argues that Mr. Tang's questions were inconsistent from candidate to candidate, and this is "why the MOU provides for predetermined questions judged against predetermined criteria, and follow-up questions based only on the candidate's responses, and the presence of HR to insure consistency."

The Union asserts that no past practice of allowing second interviews existed. "The District and EA did not establish a past practice of allowing follow-up interviews because any changes were not clear, consistent, or acceptable," the Union's brief argues. Further, "after the EA filed the instant grievance, the parties amended the MOU to allow follow-up interviews to all qualified candidates, showing there was no accepted past practice altering the MOU." Ms. Yu's testimony that the changes were needed to "clarify certain practices" is confirmation that no accepted practice existed.

The management rights clause does not apply, the Union contends, because that right is "subject to the provisions of [the MOU]."

The appropriate remedy is "to follow the procedures in place at the time of hiring," the Union contends. Rescinding[*10] the hiring of Mr. White and complying with the hiring procedures will not deprive Mr. White of his rights. Mr. White "will be able to compete for the vacated position through a fair and contractually compliant procedure," the Union asserts.

The Union asks the arbitrator to sustain the grievance and that "the hiring process at issue should be declared 'null and void.' As a remedy, White should[*10] vacate the senior staff specialist program lead position, and the District should conduct the hiring process according to Section 16.01 of the MOU then in place, with no additional interviews."

EMPLOYER'S POSITION

The Employer argues that "the district did not violate section 16.01(8) of the MOU by having an additional meeting after the hiring interview." "Nothing in the language of the Hiring Procedures section of the MOU prevents the Hiring Manager from considering additional information following the Hiring Interview," the District writes in its brief.

The District argues that the hiring manager should seek out additional information, and that is what Ms. Chiang did by requesting Mr. Tang to meet with the top candidates. EA's contract interpretation leads to the "absurd result where there can never be an additional meeting between the candidate and the Department, after the Hiring Interview," the District adds.

The District posits that a past practice of conducting additional interviews was established by the testimony at the hearing.

The Employer argues that the EA's grievance demand to include all internal candidates in a redone set of interviews would lead to nonsensical results. The hiring manager had already rejected all candidates except the top four prior to Mr. Tang meeting with them.

The District contends that "the outcome would have been the same regardless of whether the top four candidates had a separate meeting with the Direct Supervisor." Ms. Chiang had already determined that Ms. Dao and Mr. White were her top two.

The remedy requested by the Union is punitive and outside the scope of arbitral authority. "This requested remedy would not only punish the District, it would also punish EA's own member. This requested remedy is also far beyond the scope of arbitral

authority, as any action taken to remove a public employee from his position must comply with due process requirements. There is simply no precedent for a remedial award that strips a for-cause employee of his employment without any due process," the District asserts in closing brief.

The District asserts that the new language negotiated in the MOU resolves this issue into the future, as it allows second interviews.

The Employer asks the arbitrator to deny the grievance in its entirety.

DISCUSSION

The CBA Includes Detailed Procedures for Hiring / Transfer / Promotion: The parties, in the early 2000s, negotiated extensive and explicit procedures governing promotion of EA bargaining unit members. These are not optional or recommended procedures[*11] — they "shall be used," according to the preamble to Section 16.01(8).

A side-by-side comparison of the language in the policy manual and the language in the CBA reveals a consistent theme. When the parties expanded the contract language, they assigned a prominent role in the hiring procedure to the employer's human resources department. The HRO (human resources officer)[*11] or designee is mentioned seven times in that section of the CBA. Human resources personnel are required to be involved in the development of interview questions, the interviews themselves, and the evaluation of candidates' interview answers.

In the contracts prior to 2000, that incorporated the policy manual by reference, the human resources (or personnel) officer played a limited role, only assisting in developing interview questions.

The significance of this change was reinforced in the arbitration hearing through the testimony of Mr. Saltz. No conflicting evidence emerged about this CBA modification.

The CBA, by Detailing One Type of Structured Interview, Excludes Other Interviews: The CBA does not have to explicitly include the clause "no other interviews may be conducted" for the contract reader to determine that additional interviews are not allowed. The obvious care the parties have taken to create a fair, transparent and detailed promotional process is undermined by the use of a second interview.

The nature of the second interviews conducted by Mr. Tang underscores the reason for the detailed requirements in Article 16.01(8). In critical ways, Mr. Tang's interviews deviated from the norms established in the CBA. He did not consult with HR in the development of his interview questions. As a result, questions were inconsistent among candidates. And one question, about work / life balance, was arguably an impermissible question that could be challenged on the grounds of discrimination. If not legally impermissible, it was at least inappropriate.

The other way in which the second interviews deviated from the negotiated procedure was in the absence of an HR representative, or even a second individual, in the interviews. It goes without saying that conducting one-on-one promotional interviews is a practice fraught with peril for any employer. The undersigned arbitrator assumes the parties had a reason to contractually agree to include HR in job interviews. Using a second interview that excludes HR is a prima facie violation of the agreement.

The Negotiation of New District Rights in Hiring Procedures in the Successor Agreement is to Be Read as Confirming that Restrictions Existed Under the Prior Language: The negotiations that took place after the filing of this grievance stand as additional evidence that the hiring interview in 16.01(8) was an exclusive and mandatory procedure. The parties, at the apparent request of the District, added language in 2019 that allows for "additional selection procedures" to be utilized[*12] by the District. According to the testimony of HR manager Yu, the language was added for "clarification."

The undersigned concludes that the District was at least uncertain about whether it had the right to conduct second interviews under the prior agreement (the one under

which the instant grievance was filed). This conclusion reinforces the point that the [*12] conducting of a second interview for the TIO position was a contract violation.⁹

The need to add language to "clarify" the agreement also undermines the District's contention that a past practice existed of allowing second interviews. The District has not established through the preponderance of the evidence that a consistent, clear, and mutually agreed-to practice existed.

The District Violated the CBA When it Conducted a Second Round of Interviews: The District has characterized Ms. Chiang's invitation to Mr. Tang to conduct follow-up interviews as an appropriate way to gather additional information for her to make her decision. Indeed, asking Mr. Tang for his opinion on her four top candidates would have been completely proper.

Mr. Tang could have provided that input based on reading the candidate resumes. He could have learned from Ms. Chiang how the candidates performed in their hiring interviews. He could have provided input based on his personal knowledge of the candidates. Such input could have been delivered in writing or in a meeting between Ms. Chiang and Mr. Tang.

Where the District's actions crossed the line into a contract violation is when Mr. Tang conducted his own interviews with the candidates. The CBA defines how interviews are to be conducted. The second interview by Mr. Tang was outside contractual boundaries negotiated by the parties. It is notable that Ms. Chiang's letter to Executive Officer Broadbent recommending Mr. White for the position details the process used to make the decision. Her letter neglects to mention the second round of interviews.

The District violated the CBA when it conducted a second round of interviews for the TIO senior staff specialist position in March 2019.

Assigning a Remedy Begins with the Question of What Would Have Happened Had the District Not Violated the Agreement: Ordering a remedy is the most challenging aspect of this arbitration award. Remedy deliberations in cases of alleged contract violation always begin with the "what if" questions. What if the contract had not been violated? What would have happened? Was any bargaining unit member harmed by the violation? If so, is there any way to make that person(s) whole for the harm inflicted? Can a make-whole remedy be devised that does not unduly harm other bargaining unit members or unnecessarily disrupt the operation of the enterprise? The labor-management community generally accepts the premise that arbitrators have broad authority to craft appropriate remedies that take these factors into account.

The contract violation in the instant case was the conducting of the second set [*13] of interviews by Mr. Tang. Without those improper interviews, Ms. Chiang would have made her hiring decision without the influence of Mr. Tang's interview results. What would that decision have been?

Ms. Chiang testified consistently and confidently that she would have selected Chad White even without the input of Derrick Tang. If this were found to [*13] be the case, no remedy would be necessary. Given the post-grievance change in contract language, a cease-and-desist violation of the contract would not be a valid remedy. Conceivably, the arbitrator could find that the contract had been violated but still order no remedy.

However, as detailed in the next section, the contemporaneous evidence draws into question the assertion of Ms. Chiang that she would have selected Mr. White. Ms. Chiang's testimony at the hearing must be viewed in the context of the documentary evidence developed at the time of the events.

The Preponderance of the Evidence is that Hiring Manager Chiang Would Have Selected Rebecca Fisher Had it Not Been for the Derrick Tang Interviews: Manager Chiang's testimony was relatively consistent that she had made her top choices of Amy Dao and Chad White prior to Mr. Tang's interviews. However, there were loopholes and missing pieces, as follows:

1) Ms. Chiang's email to Derrick Tang on March 13 appears to be a continuation of earlier pertinent emails that were not in evidence. This omission raises the question in the mind of the neutral as to whether additional emails might have revealed a less definitive rating on the part of Ms. Chiang prior to the Tang interactions. It also raises the possibility that Mr. Tang was attempting to dissuade Ms. Chiang from a direction she was leaning on the candidates.

2) Gaps in Ms. Chiang's recollection weaken the employer's case. She did not recall whether she had input into Mr. Tang's interview questions. And she "didn't think" that Mr. Tang had reviewed her ratings sheets from the hiring interviews. She clearly recalled that she had not provided the sheets to Mr. Tang. But the implication of her testimony is that she did not know if HR had provided those same sheets to Mr. Tang.

The key evidentiary weakness in the District's case that Ms. Dao and Mr. White were Ms. Chiang's top candidates prior to Mr. Tang's second round of interviews is the lack of contemporaneous documentation. No emails were in evidence that Ms. Chiang had ranked her choices, either to HR or to anyone above her in her reporting structure. No contemporaneous notes to that effect were in evidence.

In fact, the only contemporaneous documentation that exists is the rating sheets on the four candidates. Those are summarized by the arbitrator on page seven of this opinion and award. Those ratings clearly point to Ms. Fisher as Ms. Chiang's top candidate coming out of the hiring interviews.

Ms. Fisher received "outstanding" (highest possible) ratings on three of the five questions. Ms. Dao had two "outstanding" ratings and Mr. White[*14] and Mr. Tang only one.

In her testimony, Ms. Chiang downplayed the significance of these ratings, stating that she gave Ms. Fisher high scores "because she is very concise and clear and addresses the question in her responses." The definition of "outstanding" on the ratings sheets does include a sentence[*14] on how effectively the candidate communicates. But, importantly, it also serves to rate the candidate on his/her job readiness: "Candidate demonstrates high knowledge & ability to succeed on the job."

In contrast, the definition of "above average" (the rating given to Mr. White by Ms. Chiang on four of the five questions) includes the sentence as follows: "Candidate demonstrates competency to perform well on the job." The undersigned arbitrator questions whether Ms. Chiang really preferred a job candidate whom she considered "competent" over one with "high knowledge and ability."

Ms. Chiang also defends her purported preference for Mr. White by asserting that she weighted his job experience higher than Ms. Fisher and Mr. Mark Tang. This assertion is weakened by two factors. One, the resumes of the candidates were not in evidence at the arbitration hearing. If the Employer wanted to bolster Ms. Chiang's argument that Mr. White had better job experience, they could have introduced the supporting evidence of the candidates' resumes. They did not do so.

Second, the first question asked of the candidates in the hiring interview addresses the precise issue of their job experience. The phrase "experience / coursework in the following" precedes a list of the job skills required for the position. The rater is prompted to determine whether the candidate "discusses experience relative to the position."

Ms. Chiang rated Ms. Fisher "outstanding" on question 1. She rated Mr. White as "above average." This contemporaneous rating is more persuasive evidence than Ms. Chiang's uncorroborated testimony nine months later.

The Second Interviews Included an Inappropriate Topic That Disadvantaged Candidate Fisher: The undersigned believes that HR, if given the opportunity to review Derrick Tang's questions, never would have allowed the question about "work/life balance." The record is not clear on how exactly Mr. Tang asked this question. However

phrased, this question has a high probability of opening areas of discussion such as marital status, parenting obligations, and willingness to work overtime (when that is not a listed job requirement). These are not appropriate avenues of inquiry in a job interview.

Mr. Tang's notes about Ms. Fisher's interview confirm the inappropriateness of this question. He made, apparently, no notations for any of the other three candidates about their answers to this question. For Ms. Fisher, he wrote "interpersonal" and "won't donate time." These notes should set off alarm bells for any human resources professional. Why did the manager write that? Did Mr. Tang's question[*15] prompt Ms. Fisher to say something to the effect that she would not bring work home with her? Why did that issue come up, and what did Mr. Tang think about her answer? Was it his reason for rejecting her?

These unanswered questions underscore the importance of having an HR representative participating in a job interview. It is an illustration[*15] of why the parties have negotiated this participatory role in their CBA.

The conclusion of the undersigned is that Mr. Tang asked inappropriate questions, at least to Ms. Fisher, and that her answers probably put her at a disadvantage relative to the other candidates.

The Remedy Requested by the Union of Redoing the Interviews Would be Unnecessarily Disruptive and Punish the Innocent Beneficiary of the Contract Violation:

The Union has asked that Mr. White be returned to his prior position and the hiring process be redone without the second round of interviews. Mr. White was the beneficiary of a contract violation, but he had no role in instigating or supporting that breach. It would not be proper to remove him from his position in TIO.

The undersigned also agrees with the District that redoing the process would likely end in the same result as the status quo, especially given Mr. White's eleven months already in the position.

A "cease and desist" order is not called for in this instance, either. The contract language has changed. The Employer is already required to abide by the contract. Adding a general order would serve no purpose.

The Appropriate Remedy is to Compensate Ms. Fisher as if She Had Received the Promotion in May 2019:

For the reasons stated above, the preponderance of the evidence is that, if not for the CBA violation, Ms. Fisher would have been awarded the TIO Senior Staff Specialist position. Union representative Lau testified that, to the best of her knowledge, that position would have been a promotion for Ms. Fisher had she gotten it. Ms. Lau's testimony stands uncontradicted.

Candidate Mark Tang was also deprived of his contractual rights through this hiring process. However, only the single position in TIO was at stake. The preponderance of the evidence is that Ms. Fisher, not Mr. Tang, would have been awarded the position. Therefore, Mr. Tang is not entitled to a remedy.

The appropriate remedy, then, is to retroactively compensate Ms. Fisher as a senior staff specialist. Regrettably, such compensation will not fully make her whole for the impact of the contract violation. She was improperly deprived of the TIO position itself, not just the accompanying compensation.

Her higher compensation should begin on the date Mr. White assumed the position, May 6, 2019. She should be compensated as if she were a senior staff specialist for the duration of her employment with the District.

For Ms. Fisher to continue to receive senior staff specialist compensation after the issuance of this arbitration award, Ms. Fisher must make a reasonable effort to apply for vacant[*16] senior staff specialist positions (or positions paid higher than senior staff specialist) in her field of expertise within the District. If the District believes that Ms. Fisher is not making such a reasonable effort, the human resources manager may contact the EA president and the parties shall meet and confer on the topic. If they are unable[*16] to

reach agreement on this issue, they may contact the arbitrator who retains jurisdiction over the implementation of the remedy.

AWARD

1. The Employer violated the CBA when it conducted additional interviews for the senior staff specialist position in the technology implementation office in March 2019.
2. Applicant Rebecca Fisher should have been awarded the position.
3. The appropriate remedy is to leave Chad White in the TIO senior staff specialist position and compensate Ms. Fisher as if she had received the promotion in May 2019.
4. To continue to receive the senior staff specialist compensation, Ms. Fisher must make a reasonable effort to apply for vacant senior staff specialist positions (or higher-paid positions) in her field of expertise within the District.
5. No other remedy is ordered.
6. The arbitrator retains jurisdiction over the implementation of the remedy.

Paul D. Roose, Arbitrator

Date: April 22, 2020

fn 1 The only version of the Administrative Code in evidence at the arbitration was the one cited here, with a revision date of 11/27/2000. However, in the Employer's post-hearing brief, a more recent version dated 9/18/2002 was cited. That newer version has the phrase "all the qualified candidates may be referred directly to the hiring department for consideration in a selection interview or other selection procedure." It is that "other selection procedure" clause that the parties refer to in their closing briefs.

fn 2 Mr. Wang did not testify at the hearing.

fn 3 Ms. Soo did not testify at the hearing.

fn 4 Mr. Wang's interview notes and ratings were not in evidence.

fn 5 Ms. Dao and Ms. Fisher did not testify at the hearing.

fn 6 The candidates' resumes were not in evidence at the arbitration hearing.

fn 7 The apparent discrepancy between the recommendation of maintaining Mr. White at his current salary level and the offer letter invoking the section of the contract that has to do with salary levels upon promotion was not clarified in the record. In unrebutted testimony, Association President Lau testified that this was a lateral move for Mr. White, not a promotion. She also testified that, for Mark Tang and Rebecca Fisher, it would have been a promotion.

fn 8 No Union witness testified to the 2019 contract amendment.

fn 9 The parties should not read into this arbitration award a finding that the hiring procedure of March 2019 would necessarily have been allowable under the new 2019 contract language. Not just any "additional procedure" used in future cases might be found contractually sound by a neutral, given[*17] that the base language detailing the hiring procedure remains in place. The same concerns about consistency and involvement of HR would most likely emerge in a new case.

