BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

CITY OF ROCHESTER, MINNESOTA
PUBLIC UTILITY BOARD

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 949

BMS Case No. 08-PA-0597
Grievant

APPEARANCES:

Frank Madden & Associates, by Pamela R. Galanter, appearing on behalf of the City of Rochester, Minnesota.

JURISDICTION:

The City of Rochester, Minnesota, referred to herein as the City or the Employer, and International Brotherhood of Electrical Workers, Local 949, referred to herein as the Union, are parties to a collective bargaining agreement effective January 1, 2005 thru December 31, 2007, which shall continue thereafter from year to year, unless either party notifies the other of its desire to change or terminate the agreement in accord with Article 8 of the collective bargaining agreement. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on April 16, 2008 and May 16, 2008 in Rochester, Minnesota. The parties, both present, were afforded full opportunity to be heard. Replies briefs were filed in this matter, the last of which was received on June 20, 2008. On July 14, 2008, the parties agreed to extend the time line for issuing this decision.
STATEMENT OF THE ISSUE:

Did the Employer violate Article 13 of the collective bargaining agreement when it promoted applicants other than the Grievant to the Shift Foreman position in October 2006 and in July 2007? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 3

MANAGEMENT RIGHTS

It is understood that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Rochester Public Utilities in all of its various aspects, including, but not limited to, the right to direct the working forces; to plan, direct, and control all the operations and services of the department; to determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; to assign employees; to schedule working hours and to assign overtime; to determine whether goods or services should be made or purchased; to hire, promote, demote, suspend, discipline, discharge; to lay off employees due to lack of work or funds; to make and enforce rules and regulations; and to change or eliminate exiting methods, equipment or facilities. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Employer, the adoption of policies, rules, regulations, and practice and furtherance thereof, and the use of judgment in connection therewith shall be limited only by the specific and express terms of this Agreement. The above rights, responsibilities, and prerogatives are inherent in the Public Utility Board and Common Council through its management by statutory and charter provisions and cannot be subject to any grievance or arbitration proceeding except as specifically provided for in this Agreement.

ARTICLE 11

GRIEVANCE PROCEDURE

A grievance is defined as a complaint raised by an employee against the Employer or a complaint raised by the Employer against the Union involving the interpretation or application of a specific provision of this Agreement, or a claim by an employee that the Employer has taken disciplinary action without just cause.

A. Employee Grievance

...  

Step 5

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The arbitrator shall consider only the specific issue presented to him or her and shall have no power to add to, subtract from, or modify in anyway, the terms of the Agreement. The arbitrator’s decision shall be rendered within 30 days of the close of the hearing or submission of written briefs by the parties, whichever is later.

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ARTICLE 13
EMPLOYMENT

A. Posting Procedure
1. Without limiting the authority of Management to advertise for outside recruiting, all new positions and all vacancies declared by Management in existing positions within the bargaining unit shall be posted within the employer’s facilities for a minimum of seven (7) working days.

B. Bidding Procedure
1. Members of the bargaining unit who wish to apply for a bargaining unit posting may do so by completing a City of Rochester employment application and providing it to Human Resources prior to the closing date of the posting.

2. After the closing of a posting period, the Union Business Manager or his designee may obtain a list of applicants who are employees within the bargaining unit.

3. Applicants who are members of the bargaining unit shall be informed of the disposition of their application.

C. Regular Appointments
1. It is intended that priority be given to present bargaining unit employees when filling vacant positions within the bargaining unit.

2. It is also intended that the most able and qualified individual for such positions be appointed to such vacant positions and that selections will take into account work attitude and performance records.

3. Present bargaining unit employees who apply for bargaining unit openings in accordance with this article must have the abilities and qualifications set forth in the Employer’s published classification and position descriptions before they will be considered for the position.

4. To establish that they are the most able and qualified individual for a vacant position, the employee must not only meet the minimum qualifications for the vacant position as set forth in the Employer’s published classification and position descriptions, but they must demonstrate that their qualifications and abilities are greater than those of any other qualified candidates from the bargaining unit.

5. Qualifications and abilities will be determined by Management through evaluation of the candidate’s experience and training and/or Management may elect to utilize job related tests, such as oral, written or on the job examinations to determine qualifications and abilities. If such tests are to be utilized, it shall be so noted on the job posting bulletings, including a description of the types of test(s) to be utilized, the general area each test will cover, and the weight to be given the test results in the selection process. The Union Business Manager or other authorized representative of the Union may be present during testing sessions.

6. After consideration of 1 through 5 above, if no one qualified candidate establishes that their qualifications and abilities for the position exceed those of the other qualified candidates then seniority shall prevail in appointments on the priority basis outlined in 7 and 8 below.
7. When it is established that seniority shall be the determining factor in selection, the regular employee with the greatest bargaining unit seniority who is working within the division when the opening exists, shall be appointed first.

8. If a qualified candidate cannot be selected under 7 above, the regular employee with the greatest bargaining unit seniority in the department, who presently holds a position which is not within the division when the opening exists, shall be second in line.

9. The above criteria may be modified to the extent necessary to comply with any equal employment opportunity plan established in compliance with federal or state requirements.

10. When an employee transfers to or is promoted within the bargaining unit, such transfer or promotion shall not be regarded as permanent until a six (6) month probationary period has passed. The employee, however, may use earned sick leave, vacation and other benefits during this six (6) month period.

11. Whenever a regular employee is transferred or promoted within the bargaining unit, they shall carry with them any accumulated sick leave, vacation benefits and bargaining unit seniority. In case the promoted or transferred employee fails the six (6) month probationary period, they shall be given the opportunity of returning to their former position at its current rate.

OTHER RELEVANT DOCUMENTS:

Posted Shift Foreman Position Description – August 23, 2006

Knowledge, Skills, and Abilities

Ability to exercise good judgment during emergencies  
Ability to review and interpret generation schedules and engage equipment to comply  
Ability to communicate clearly and concisely in writing and verbally  
Ability to work independently  
Ability to make quick, accurate decisions within time restraints  
Ability to train operating personnel  
Ability to provide direction  
Ability to communicate effectively  
Knowledge of electrical equipment and plant systems  
Ability to use specialized process control, SAP, and other software required in this role  
Extensive skills in proper start-up/shut-down of all equipment associated with the plant’s operations  
Strong trouble-shoot and diagnostic skills  
Strong interpersonal skills  
Strong external and internal customer service orientation

Posted Shift Foreman Position Description – May 30, 2007
Knowledge, Skills, and Abilities

Ability to exercise good judgment during emergencies
Ability to review and interpret generation schedules and engage equipment to comply
Ability to communicate clearly and concisely in writing and verbally
Ability to work independently
Ability to make quick, accurate decisions within time restraints
Ability to train operating personnel
Ability to provide direction
Ability to communicate effectively
Knowledge of electrical equipment and plant systems
Ability to use specialized process control, SAP, and other software required in this role
Extensive skills in proper start-up/shut-down of all equipment associated with the plant’s operations
Strong trouble-shoot and diagnostic skills
Strong interpersonal skills
Strong external and internal customer service orientation

Plant Operator Position Description as of 08/05

KNOWLEDGE, SKILLS & ABILITIES:

Knowledge of safety practices pertaining to the operation of boilers and related auxiliary equipment
Ability to work independently and exercise good judgment in analyzing work priorities
Ability to learn power plan operations and safely operator (sic) equipment and systems
Ability to learn the duties of the Shift Foremen to be used on a relief basis
Ability to work in team environment

SPECIAL REQUIREMENTS OF THE POSITION:

Thorough knowledge of safety practices pertaining to the operation of power plant equipment is required. Must have good understanding of turbine-generator operation and purpose of related auxiliary equipment. Must be thoroughly familiar with electrical systems within the plant and understand individual component functions.

PROMOTION FROM THIS POSITION WOULD NORMALLY BE TO:

Shift Foreman

BACKGROUND AND FACTS:

The Employer and the Union are parties to a collective bargaining agreement covering electric, water and steam production, distribution and maintenance employees employed at
the Rochester Public Unity power production facilities. The Grievant, an employee of this facility, was hired by the Employer as a plant attendant in 1981, became an auxiliary operator in 1982; an assistant operator in 1983, a first relief operator in 1994 and is currently a plant operator, a position he has held since 1998. As a first relief operator and as a plant operator he filled in as a shift foreman when asked and had approximately 3,000 hours’ experience as a shift foreman by 2006 when he applied for promotion to shift foreman.

On August 23, 2006, the Employer posted a shift foreman opening. The Grievant applied for the position and was one of four employees interviewed for the position. Following the interviews, the Grievant, who had been a plant operator for over eight years at the time, was passed over and the position was awarded to an employee who had been a plant operator for less than one year. When the Grievant learned that he had been passed over, he called the Human Relations Generalist to find out why and was told that the group had left the choice to the Plant Manager because he was the manager of the department.

The Employer’s decision to deny the promotion to the Grievant was grieved. On October 18, 2006, the Grievant and his Steward met with management to discuss the grievance and during that meeting the Grievant accused the Plant Manager of disliking him and stated that the Plant Manager had told other employees that he would never promote the Grievant. At that time, the Plant Manager denied having ever made such a statement.

On May 30, 2007, the Employer posted another shift foreman vacancy. Two employees, one of whom was the Grievant, were interviewed for this position. This interview was conducted by the same Plant Manager and the same Human Relations Generalist who had participated in the first interview and the Manger of Power Resources who had been hired in January 2007. Again, the Grievant was bypassed in favor of another applicant who had been a plant operator for approximately one year. This management decision was also grieved and both grievances are now before this Arbitrator.

ARGUMENTS OF THE PARTIES:

The Union argues that management failed to promote the most qualified and senior employee twice even though the collective bargaining agreement requires management to
promote the most able, qualified person taking into consideration performance record, attitude and seniority. Further, it charges that management failed to fairly and objectively evaluate the Grievant when it failed to follow established procedural requirements for selecting and evaluating applicants and when it allowed a manager with a longstanding vendetta against the Grievant to play a critical role in selecting who would be promoted without considering his bias.

As proof of its assertions, the Union cites first that, in violation of Article 13, Section C, Subdivision 3 of the contract and 2001 memo from then General Manager, management failed to properly screen applicants during the first interview and stated on the summary rating forms that all four candidates met minimum qualifications for the position although at least one of them did not have the minimum-required experience. Next, it declares that management violated the contract when it failed to consider the Grievant’s full record when it considered the Grievant’s performance and, instead, relied upon the Grievant’s two most recent performance evaluations. It continues that not only were the last two evaluations prepared by the Plant Manager who was biased against the Grievant but that the other interviewer relied upon concerns voiced by that Manager and allowed him to make the decision as to who would be promoted. The Union continues that by allowing this Plant Manager to select those to be interviewed for the 2006 position; by using an interview panel that included no other person who had worked with the Grievant or who had expertise or experience to evaluate the Grievant’s technical knowledge and skills other than the Plant Manager and by considering only biased evaluations prepared by the Plant Manager during the interview, management gave the Plant Manager the “means to make good on his repeated threats to block” the Grievant’s promotion to foreman and he did that. Further it declares that given the Plant Manager’s bias against the Grievant and his “oft-repeated threats to block” the Grievant’s promotion he should not have been given a leadership role in evaluating the Grievant as a candidate for the 2006 vacancy and that had the interview been conducted by neutrals the interview committee would

1 The Union rejects the Employer’s effort to discount the Plant Manager’s bias against the Grievant by stressing that the Plant Manager did not repeat his threats in their presence, stating that although management acknowledged that the Plant Manager had admitted making such statements, management, without any investigation, accepted the Plant Manager’s assertion that the threat was an isolated one made in the heat of the moment. Further, it charges that the assertion was not an isolated incident and relies upon evidence that it believes shows the Plant Manager made the statement several times and is biased.
have found the Grievant not only the most senior employee who applied for the position but the most qualified for the position.

The Union continues that the same tainted selection process used in 2006 was used in 2007 when the position again became available and that, once again, despite notice that the Plant Manager had been “dishonest” regarding his bias against the Grievant, he was included in the make-up of the interview panel and was most influential in deciding who would be promoted. It adds that although the Manager of Plant Resources was a participant in the interview, his “newness on the job”; his lack of contact with the Grievant and HR’s failure to provide him with the Grievant’s complete records, by necessity, made him rely upon the Plant Manager’s assessment of the Grievant.

The Employer argues, however, that under its Management Rights provision in the collective bargaining agreement it has the inherent right to determine the qualifications and abilities of candidates seeking a promotion. It also argues that the Union failed to meet its burden to prove that management violated Article 13, Section C of the contract when it twice determined an applicant for a promotion to shift foreman other the Grievant was most qualified and promoted that applicant.

Citing Article 3 of the collective bargaining agreement, the Employer maintains that the broad management rights provision combined with Article 13, Section C of the contract grants it the right to determine which candidate is the best qualified. Further, it declares that there is no contract provision that limits how it will evaluate a candidate’s experience or training or that sets forth the criteria that must be considered. And, finally, it asserts that its “evaluation of the candidates in both 2006 and 2007 was fair and objective” and that the Grievant “failed to demonstrate greater qualifications than the successful candidates” in the areas of leadership; communication or interpersonal skills and in motivation.

In addition, the Employer rejects the Union’s argument that the Plant Manager drove the candidate selection process and “manipulated” the process to ensure that the Grievant was not selected for the promotion. Continuing, it states that there was no evidence that the Plant Manager showed any animosity toward the Grievant during the Grievant’s interviews or during discussions with the interview committee after the interviews had been completed. The
Employer also states that there is no evidence that the Plant Manager attempted to persuade the interview committee to not select the Grievant. Further, the Employer rejects any Union argument that the Grievant was “unfairly denied the promotions based on the City’s consideration of his inattentiveness” which resulted in the 2001 boiler explosion or that he was treated disparately for over generation declaring that the Grievant was disciplined because he showed “a pattern of carelessness and/or inattentiveness to the job”.

And, finally, the Employer rejects the Union’s assertion that the Grievant’s 2003 and 2006 performance evaluations were not fair stating that both shift foremen only disagreed with certain comments in the evaluation and that the evaluations are signed by the Plant Manager’s supervisors who “do not simply rubber stamp the evaluations”.

With respect to its argument that the Union has failed to meet its burden of proof, the Employer states that while the Union’s witnesses testified to how hard the Grievant works and to the Grievant’s technical skills and abilities the Union failed to show that the Grievant was able to communicate clearly and concisely in writing and verbally; that he was able to make quick, accurate decisions within time restraints; that he was able to train operating personnel; that he was able to communicate effectively or that he had strong interpersonal skills – leadership abilities both applicants awarded the promotions demonstrated. It adds that it is not required to show that the applicants awarded the positions are the most qualified employees but that the Union is required to show that the Grievant was the most qualified applicant in these selection processes and that if the Arbitrator rules otherwise, the ruling would represent a modification of the terms of the collective bargaining agreement and the Arbitrator would exceed the granted authority.

**DISCUSSION:**

Article 13 C. of the collective bargaining agreement provides that when there is a vacant position, it shall be the intent of the parties to give priority to present bargaining unit employees; that the most able and qualified individual shall be appointed to the vacant position

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2 As support for its position, the Employer cites School Service Employees Local 298 and Robbinsdale Area Schools, BMS Case No. 98-PA-374 (Wallin, 1998) in which the Arbitrator stated that disparate treatment occurs when
and that work attitude and performance records will be considered in determining who is the most able and qualified individual. In addition, this article states that the most able and qualified individual must show that they meet minimum qualifications for the position; that his or her qualifications and abilities are greater than other qualified bargaining unit applicants; that the Employer will determine qualifications and abilities through evaluation of the candidate experience and training and/or through job-related tests,

3 and that the most senior employee working within the division shall be selected if the qualifications and abilities of those qualified bargaining unit employees are equal.

In essence, Article 13 is a “modified seniority” provision and is much like a “relative ability” clause. Generally, under a relative ability clause, seniority prevails when the qualifications and abilities of the competing applicants are substantially equal. In this dispute, the Employer asserts that, twice, a junior applicant was selected because his qualifications and abilities far exceeded the qualifications and abilities of the Grievant. When such assertions are made arbitrators, generally, require the employer to show that the bypassed senior employee is less able than the selected junior employee. In this case, however, under Article 13 C. 4., the burden of proof lies with the passed over more senior employee.

While the Employer argued that nothing in the contract restricts its right to decide how to evaluate the candidate’s experience or training or the criteria that must considered, the Union does not challenge the tool the Employer used to assess the relative abilities of the employees engage in the same conduct under the same or substantially similar circumstances but are treated differently.

3 This provision further establishes that if the Employer opts to use job-related tests, that decision must be noted on the job posting bulletings and the notice must include a description of the types of tests to be utilized; the general area each test will cover and the weight that will be given in the selection process to the test results. In addition, the Union Business Manager or other authorized Union representative may be present during the testing sessions. In this dispute such tests were not utilized and, therefore, will not be considered in determining the reasonableness of Management’s actions.

4 This article also states that if a qualified candidate who meets all of the criteria identified in this paragraph cannot be selected, the most senior employee in the department who presently holds a position that is not within the division shall be second in line for the appointment.

candidates nor does it challenge the Employer's right to consider attitude and work performance. Instead, it argues that the Employer was arbitrary and capricious when it assessed the Grievant's qualifications and abilities. Essential to its argument is that the Employer allowed the plant manager who had a known bias against the Grievant to determine who would be promoted for both of the posted positions.

Arbitrators have long recognized that the Employer has the right to determine job requirements; to assess candidate qualifications, and to select the candidate to be promoted in compliance with negotiated contract provisions. There are limitations on that right, however. First, the procedure followed by the Employer when making a selection must not be arbitrary or capricious. Secondly, the standards for comparing the applicant's qualifications must be established in good faith; must be applied fairly and impartially, and the decision that a junior applicant is better qualified must not be made unreasonably. Further, arbitrators, including this one, have held that Employer's identified qualifications must be based on objective and reasonable criteria related to the job's duties and responsibilities and that the determination of which applicants are qualified must depend upon factual considerations, not subjective factors, that properly measure the applicant's ability and qualifications to perform the specific job. Arbitrators have also held that if other criteria are utilized, the Employer must be able to show that the criteria are a valid indicator of successful job performance.\(^6\)

There is no question that the Employer has the right to determine how it will decide the qualifications and abilities of those who apply for a promotion. The only restrictions to this right imposed upon the Employer is that it may not promote an employee who does not meet the minimum qualifications for the vacant position and that it may not elect to utilize a job-related test without giving notice; without describing the type of test to be used; without identifying the general area each test will cover, and without identifying the weight that will be given to the test in the selection process.\(^7\)

In this dispute, although the selection process adopted by the Employer complied with the restrictions imposed by the collective bargaining agreement; met the test of

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\(^7\) Ibid., pps. 27-17 – 27-20.
reasonableness and was intended to guarantee fairness, evidence in the record sufficiently establishes that the plant manager was biased against the Grievant; that he was determined to not allow the Grievant to be promoted, and that his bias significantly affected who was selected after the first position was posted and, again, after the second position was posted.

It is undisputed that there was a boiler explosion in 2001 which caused the plant manager to lose his boiler license for 30 days and that he blamed the Grievant who was on duty that night for having caused him to lose his license. It is also undisputed that following this explosion, the plant manager was known to have said more than once and to a number of employees that the Grievant would never be promoted as long as he continued to be the plant manager. When the plant superintendent heard about the plant manager’s remarks, he confronted the plant manager and after advising him that such remarks were inappropriate instructed him to not make such statements again. Despite these instructions there is credible evidence in the record which indicates that the plant manager continued to make such statements well into 2006 as is demonstrated by the fact that the plant manager felt compelled to bring the subject up to the individual being interviewed for the manager of plant resources position in late 2006 who was ultimately hired for that position in 2007. Despite knowledge of this statement and attitude expressed by the plant manager, both the plant superintendent and the manager of plant resources stated that they believed the plant manager when he said he could be objective in dealing with the Grievant and continued to allow the plant manager complete discretion in evaluating, disciplining and interviewing the Grievant without questioning his objectivity. As a result, this bias continued and spilled over into the interviews, although the other interviewers declared they saw no bias on the plant manager’s part during the interviews and in the plant manager’s evaluations of the Grievant reviewed by those who selected the applicant to be promoted.

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8 This conclusion is further supported by Union Exhibit 19, a document signed by ten employees stating that each had heard the plant manager state that as long as he was employed by the utility he would not promote or move the Grievant to a higher position. The Employer objected to admission of this document as hearsay and it was admitted with the proviso that the Employer could investigate whether the employees actually signed this document and submit evidence to the contrary if there was evidence to the contrary. Not only was there no further challenge to the document but the statement is a fair reflection of the testimony regarding the plant manager’s knowledge of the statement given by management in this hearing.
Evidence of bias during the first interview lies in the fact that the plant manager selected four applicants to be interviewed, two of whom did not meet minimum qualifications for the position, even though the collective bargaining agreement states that any candidate selected must meet the minimum qualifications for the position\textsuperscript{9} and in the fact that these unqualified and less-experience applicants received overall higher ratings than the Grievant, even though experience is a high indicator of ability.\textsuperscript{10} These ratings become even more suspect when it is realized that although three people participated in the interview, only two of them were responsible for the ratings given each of the applicants, one of whom was the plant manager who has openly expressed a bias against the Grievant. The other was the Human Resources Generalist who generally deferred to the plant manager when a rating was assessed.\textsuperscript{11} Given this apparent bias when the ratings for the two unqualified applicants is considered, it cannot be concluded that the ratings given the successful applicant, who had far fewer years experience in the plant operator position than the Grievant and even fewer hours of experience as a shift foreman than the Grievant, were objectively determined.

This same bias significantly affected the selection of the successful applicant in the second interview as well, as is evidenced by the fact that an applicant with less than six months experience as a plant operator and almost no hours as a fill-in shift foreman and far fewer years of experience with the utility than the Grievant, is rated higher than the Grievant, just as the other applicants in the first interview had been. Further, it is telling to note that the Grievant, in both interviews, was given a “less than average” score in the areas of interest, adaptability, dependability and conscientiousness with no concrete factors cited as cause for these scores. While one of the interviewers, the Manager of Plant Resources who had been with the utility

\textsuperscript{9} Although the Human Resources Generalist testified that it has been their practice to interview such candidates, her testimony is contradicted by a memo from the Human Resources Department issued in 2001 which advised all departments that “only those applicants meeting minimum requirements are to be considered for an interview”.


\textsuperscript{11} The Human Resources Generalist, one of the interviewers in this interview, testified that only she and the plant manager rated the applicants and that she did defer to the plant manager for his technical expertise, as she often does with the hiring manager. In addition, she stated that during the discussion of each criterion rated “one of us would say ‘thinking average’” and she would gravitate to that too. This is clearly evidence that the plant manager would suggest the rating and the Human Resources Generalist would concur.
approximately six months at the time of the interview, stated that he had given the Grievant a lower score because of workplace incidents, there is no evidence that the information he had gathered on those incidents came from anyone other than the plant manager or that the incidents were serious enough to warrant significant discipline. Further, although both the Human Resources Generalist and the Manager of Plant Resources indicated they had also relied upon the Grievant’s evaluations in arriving at the scores they had assigned the Grievant, neither questioned the accuracy of the evaluations although both knew that evaluations had been completed by the plant manager and that the Grievant had refused to sign them asserting that he had been unfairly evaluated.

While one must question why the Grievant did not grieve an unfair evaluation, evidence of the unfairness is apparent not only when evaluations by supervisors other than the plant manager involved in this dispute are reviewed but when it is recognized that at least one shift foreman advised the plant manager that he had been unfair in his 2003 evaluation of the Grievant and two shift foremen advised the plant manager that he had been unfair in his 2006 evaluation of the Grievant. Although the Employer pointed out that the evaluations submitted by the Grievant were selective – 1982-1999, no evidence to contradict those positive evaluations, except for the Grievant’s first evaluations in 1981, were submitted. The absence of such contradictory evidence is indication that the Grievant’s submitted evaluations more accurately represent his performance record and that the 2003 and 2006 evaluations completed by the plant manager reflect his bias against the Grievant as a result of the 2001 boiler explosion. In many of the evaluations prior to 2003, the supervisory comments frequently included “good work attitude”; “cautious”; concerned about plant safety; “well organized”; “good communicator”; “good understanding of basic plant operations”; “always interested in his job”; “works well with co-workers”, etc. It is only after the plant manager began to evaluate the Grievant that he was told that he has a hard time working with others; that the shift has a hard time following his leadership; that he needs to take better notes; that
he fails to recognize problems, and that he needs to understand the plant equipment better.\textsuperscript{12} This significant change in comments and far lower scores on the Grievant’s 2003 and 2006 evaluations, without any counseling or disciplinary action, are highly suspect given the plant manager’s repeated assertion that the Grievant would not be promoted if he had anything to do with it.\textsuperscript{13}

One could argue that all of the above findings are subject to speculation, however, the most persuasive evidence of this bias lies in the fact that the plant manager, although apparently available to the Employer, did not testify and, consequently, did not deny any of the allegations made by the Union and the Grievant. Although other Employer witnesses testified that they had not observed bias on the part of the plant manager, the plant manager’s failure to appear at the hearing and to provide informed testimony is the strongest evidence that his testimony would have been unfavorable to the Employer’s assertion that there was no bias against the Grievant.\textsuperscript{14}

A conclusion that the interview scores given the Grievant reflects a bias that caused the Employer to be arbitrary when it decided to not promote him, in itself, is not sufficient evidence to order the remedy sought by the Grievant without the Grievant proving that his qualifications and abilities were equal to or greater than those of the two individuals who were promoted as is required by Article 13 of the collective bargaining agreement. That burden of proof has also been met, however. Proof that he should have been promoted lies in the evaluations submitted by the Union prior to the two which reflect a strong bias against the Grievant; in the undisputed testimony of his co-workers regarding the Grievant’s abilities, in the fact that the Grievant has held the plant operator position for over eight years and, most

\textsuperscript{12} In both the 2003 and 2006 evaluations and in a few other evaluations the Grievant was told that he needed to work his penmanship but it is obvious that his “poor” penmanship created no significant problems since there is no evidence of any problems such penmanship created and there is no evidence that the Grievant received any disciplinary action as a result of his “poor” penmanship.

\textsuperscript{13} It is noted that the Grievant was given a verbal reprimand by the plant manager for over-generation in March 2007 but that this is the only disciplinary action taken except for a two-day suspension issued by the same plant manager when the boiler exploded in 2001.

importantly, in the fact that he has had more than 3000 hours of experience on a fill-in basis as a shift foreman.

As stated earlier, previous evaluations of the Grievant’s work performance indicate that the Grievant has performed at an above-average level and that his attitude and ability to work with others has been viewed favorably by those who supervised him prior to the plant manager.\textsuperscript{15} Further the record indicates that during the eight years the Grievant has been a plant operator the Grievant has performed his work well\textsuperscript{16} and the duties he is required to perform are a strong indication of his ability to be a shift foreman. As a plant operator he is required to have a thorough knowledge of safety practices pertaining to the operating plant equipment; a good understanding of the turbine-generator operation, and a thorough familiarity with the plant’s electrical systems. He is also required to be able to work independently and to exercise good judgment in analyzing work priorities and to be able to work in a team environment. These skills are many of the same skills required in the shift foreman position and the job description for this position indicates that promotion to shift foreman would be the normal promotion.

Even more crucial to concluding that the Grievant is better qualified than those who were promoted is the fact that he has served far more hours as shift foreman than either of the two who were promoted. While the Employer argued that all plant operators are required to fill in, the record establishes that the Grievant has served as shift foreman on a fill-in basis for more than 3000 hours - over 2000 of them between 2000 and 2006 – while the two were promoted had been a shift foreman far fewer times than the Grievant. Given this fact, it can only be concluded that management viewed the Grievant’s work as a shift foreman favorably and believed him to be able to perform the work well or he would not have been assigned this work.

Accordingly, based upon the record, the arguments and the discussion above, it is

\textsuperscript{15} From 1982 to 1994, the period covered by the evaluations, the Grievant, with the exception of his 1982 evaluation consistently received an overall above-average score. In 1982, his score was average.

\textsuperscript{16} While he was disciplined twice during those eight years, both disciplinary actions were issued by the plant manager and were not issued until after the boiler explosion had occurred, the incident which triggered the plant manager’s bias against the Grievant.
concluded that the Employer violated Article 13 of the collective bargaining agreement when it promoted two applicants who were less senior to the Grievant to the position of shift foreman and the following award is issued.

AWARD

The grievance is sustained. The City is ordered to award the Grievant a foreman position and to make him whole for any wages and benefits lost between the time the successful applicant in the first interview was promoted to shift foreman and the time the Grievant is awarded this position. The Arbitrator will retain jurisdiction for the purposes of resolving any disputes over implementation of this remedy.

By: ______________________________________
    Sharon K. Imes, Arbitrator

August 4, 2008
SKI