

## In the Matter of the Arbitration

between Washington Federation of State Employees  
("Union"), on behalf of grievants Keith Peterson and  
Richard Bowman,

and

Washington State Department of Enterprise Services  
("DES" or "Department").

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Findings,  
Discussion and  
Award.

Case Numbers:	American Arbitration Association case No. 01-19-0004-0798. Arbitrator's V15.
Representing the Union:	Gregory Rhodes and Younglove & Coker, P.L.L.C., PO Box 7846, Olympia, Washington 98507-9268.
Representing WSNA:	Amee Tilger, and the Attorney General of the State of Washington, 7141 PO Box 40145, Olympia, WA 98504-4167.
Arbitrator:	Howell L. Lankford, NAA, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	Remotely, via Zoom on June 23, 2020.
Witnesses for the Union:	Todd Stidd, Roc Zimmerman, Jaymin Kapsandi, Keith Peterson and Richard Bowman.
Witnesses for the Department:	Jeffrey Whitehead, Yvone Knutson, Phillip Person, and Scott Kibler.
Post-hearing Briefs submitted:	By both parties by email on August 26, direct to the arbitrator with copies to AAA.
Date of this award:	September 8, 2020.

Both of the grievants are in their 60s, and both are long-term employees of the Capitol Campus Carpentry/Paint Shop which is part of Buildings & Grounds (B&G). A first-line supervisor position opened up for that shop, and both of the grievants applied. They were among the five finalists for the opening, but the Department chose an outside applicant in his early forties and also created two additional Departmental supervisory positions (one permanent and one temporary) for two additional outside finalists who are also in their thirties or early forties. The Union alleges the Department violated the contract's prohibition against discrimination on the basis of age. The parties stipulate that the issue presented in this arbitration is, Did the Employer violate Article 2 or 4 of the collective bargaining agreement (CBA) in its hiring of a Carpentry/Paint Shop Supervisor, and if so, what is the appropriate remedy?

There are no issues of substantive or procedural arbitrability, and the parties agree that the burden is on the Union to show, more likely than not, that the Department violated the CBA as alleged. The parties agreed to conduct the hearing remotely by Zoom, and that hearing was orderly. Both parties had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. Both parties submitted timely post-hearing briefs, and those have been carefully considered.

## FACTS

DES administers the 486-acre Capitol Campus in Olympia, Washington. The campus is the site of some fifty buildings, including the historic State Capital Building itself and several buildings which are protected as historical. Many State agencies, boards, and commissions are officed on the Campus. Those agencies, boards and commissions are essentially tenants of DES, and DES property managers deal with them in that regard; but DES also supplies the B&G employees who maintain, repair and occasionally make necessary alterations on the Campus buildings. That work requires a variety of technical skills including carpentry, painting, electrical, plumbing, HVAC, etc., and B&G includes employees with all of those skills. The work also requires special interrelational skills for dealing not only with DES property managers but with the managers and representatives of the many agencies, boards, and commissions officed on campus. There is no dispute on this record that in the past the Department has routinely promoted from within when filling first-tier supervisory positions in B&G.

Until relatively recently, B&G was organized in geographic zones with employees in each of the several crafts assigned to each zone. DES changed from that organization to the current arrangement of craft shops, each with its own first-line supervisor. That organizational change met some resistance and dissatisfaction among the various crafts at the time.

The Carpentry/Paint Shop first-line supervisor announced his upcoming retirement, and in January, 2019, DES began recruiting to fill that position. The current, 2017-2019 Collective Bargaining Agreement (CBA) does not include any seniority preference in hiring for such a supervisory position, but it does require advance internal posting of the opening; and the January 22, 2019 posting set out clearly this explanation of “**Who we are looking for**” (bold in the original):

“We are looking for a highly motivated person that enjoys a fast-paced environment in a progressive organization that embraces changes and continued improvements to processes and effectiveness. You’ll need to be an energetic team player that is a great listener and personnel motivator that promotes different ideas and innovative ways to creative thinking that inspires the team to make changes to existing processes and new ways of doing business...”

There were many applications, and DES reduced the field to five finalists to be interviewed. Both of the grievants were among those five. After that interview, the finalists met with the members of the shop and with the manager immediately over the open position. The Union’s challenge in this case focuses on the initial interview, and to get a reasonable picture of that interview we need to consider the paper applications of the five finalists, the composition of the initial interview panel, and the questions and answers that made up the interview itself.

***The five finalists.*** We begin with the two grievants. *Mr. Peterson*, one of the grievants, was sixty years old at the time of his interview. He has been a professional carpenter for his entire 40+ year career and had been a B&G employee for eight years at the time of the interview. He has extensive experience in working with the tenants of the campus and in working on the campus buildings, including many of the protected historical buildings. The Department agrees that he is a highly skilled technician of long experience. The resume he submitted with his application showed that he had worked as a carpenter in a family-owned firm from 1978 to 2009 (and had been the owner from 1995 to 2009) doing “all construction duties from ground to finish.” He had continued that work for another firm from 2009 until he joined DES in 2012. *Mr. Bowman*, the other grievant, has been a B&G employee for the last 18 years (except for a 2.5 year period when he was laid off and temporarily recalled to a mail room position). He was 61 years old at the time of the interview and was the only one of the five candidates interviewed who actually held a union journeyman card. He also has some experience in plumbing.

The successful applicant for first-line supervisor of the Carpentry/Paint shop was DW, who was not and never had been a State employee. There is no dispute that he is less than 40 years old. His State employment application showed that since 2014 he had been the “Facilities Manager” for a company in Tacoma; from 2012 to 2014 he had been

“Regional Maintenance Director” for over 2,500 units in 15 different properties, responsible for the training and oversight of a maintenance staff of 15 or more and negotiating with vendors and exercising input in the budgeting process; and from 2010 to 2012 he had been Maintenance Supervisor over four technicians in an apartment complex; from 2009-2010 he had held a similar position.

After the interview for Carpentry/Paint shop supervisor, DES created two new supervisory positions for the other two applicants who had interviewed. One of those positions went to CS, who also had no State experience. He was about 40 years old. Since 2016 he had been employed as a “Project Manager” for a construction company, managing “7-10 projects at a time in various stages with total contract values of 4+ million” (quoting his application). From 2002 to 2016 he had been self-employed as a general contractor. The other newly-created supervisory position went to a current B&G employee, TS. He had been a B&G employee in various capacities for over 10 years and he too was also under 40 years old. His letter of interest stressed his experience with B&G customers, his “excellent customer service skills.” It is fair to say that his letter of interest rang every major bell set out in the open position announcement: “Being a team member in Big 3's journey has helped me acquire skills necessary to reach our agency's overall mission by implementing incremental processes that supports [sic] Customer Satisfaction, Team Member Satisfaction, and Financial Health...perform well under pressure delivering high quality results while following DES's strategic and financial plan and strive to successfully fulfill our agency's goals to provide customers, owners, and stakeholders the best service and results possible.”

***The composition of the interview team.*** There is no dispute that for prior front-line supervisor openings the interview teams have commonly included the supervisor of the open position (i.e., the second-line supervisor/manager), and the interviews in this case followed that pattern by including Jeffrey Whitehead, the Maintenance and Repair Superintendent. But in the past these interview teams also included at least one peer front-line supervisor (e.g., the Carpentry / Paint supervisor for an open HVAC supervisor opening). In this instance the rest of the team was composed of higher level managers. Yvone Knutson is the Deputy Assistant Director of DES for the Capital Campus; Phillip Person is a DES Facilities Senior Planner; and Scott Kibler is the DES Assistant Director of B&G.

***The interview questions.*** The interviews consisted of 14 questions that were drafted in advance. The panel members divided those questions and each interviewer asked the same questions of each of the candidates. None of those 14 questions dealt with the “hands on” part of the position, i.e. none dealt with carpentry and painting. These were the interview questions:

- 1) Please tell us about yourself and your experience.
- 2) The two driving principles for B&G are to communicate before, during and after performance of work and provide timely delivery. Please describe your communications process.
- 3) Change is a big part of the B&G way of business moving forward. What do you do to deal constructively with changes.
- 4) What do you perceive will be the biggest challenge [in] this role?
- 5) What ideas do you have [for] service delivery and what improvements would you make to improve it?
- 6) What is your performance management style?
  - a) Please provide an example of a difficult situation you had to resolve.
- 7) Standards, Metrics and performance measurement are the way of business at B&G. What Standards, Metrics and performance measurements have you used or would you implement in the Carpentry/Paint shop?
- 8) Part of this position will require management of tenant improvement/construction projects. What is your experience with project management?
- 9) DES & B&G have three goals, customer satisfaction, team satisfaction and financial health. How will you use these goals in the establishment and sustainability of the Carpentry/Paint shop?
- 10) This position will enforce safety practices campus wide including contractors. What actions would you take if you came across personnel working in an unsafe manner? What would you do to keep this from happening again?
- 11) If offered this position what goals do you have for you and the team in 6 months, 1 year and 2 years?
- 12) Currently there is not a formalized QC/QA program within B&G and the Carpentry/Paint shop. What steps would you take and what would a QC/QA program look like to you?
- 13) Why do you believe that you are the person that we should select for this project?
- 14) How do you celebrate success?

Each interview ended with an invitation for questions from the applicant.

The Union filed a grievance and sought copies of the interview questions and of the notes taken by the interviewers. Among those notes were Mr. Kibler's notation under question #1—"Tell us about yourself and your experience."—"60 yrs old." Faced with those notes the Union proceeded to arbitration claiming discrimination on the basis of age.

## DISCUSSION

***The contract language and the law it incorporates.*** Section 2.1 forbids discrimination on the basis of age. When collective bargaining agreements forbid discrimination on bases already addressed by case law or statutes, the parties usually

understand that they are extending a grievance arbitrator's jurisdiction to include the application of those statutes.<sup>1</sup> In the case at hand, DES concedes that the Union established a prima facie case under Washington law: the grievants were qualified and applied for the promotion and the Department gave it to younger applicants. That requires the Department to explain why it chose the younger applicants. And even when the Department has offered a nondiscriminatory reason, the Union may still argue—and try to prove—that the offered reason is just a cover for age discrimination. If the Union establishes that age was a “substantial factor” in the Department's choice, then the grievance must be upheld. *Scrivener v. Clark College*, 181 Wash.2d 439, 447 (2014), citing prior cases.

***Additional evidence of discrimination.*** There is no direct evidence of age discrimination here. But direct evidence of discrimination is extremely rare: employers seldom testify or put in writing their determination not to hire older workers, or ethnic minorities, or females, etc. Discrimination claims almost always have to be established on the basis of circumstantial evidence. In this case, however, the Union offers a snapshot of a white board after a managers' meeting addressing problems for B&G. That whiteboard seems to list factors that are “getting in the way,” and includes an “aging workforce.” Managers are expected to be aware of such workforce demographics for purposes of planning; but the Union is certainly correct in pointing management's awareness of coming problems as a result of a current aging workforce is a potential motive for age discrimination in hiring decisions.

The Union argues that there is additional circumstantial evidence of discrimination here apart from the simple fact that the job went to a younger applicant. Most particularly, the Union focuses on one of the five scoring/note sheets filled out by the members of the hiring committee, i.e., the notes made by Mr. Kibler. The Union argues that those notes show discrimination against the grievants in at least five respects.

First, Mr. Kibler alone noted Mr. Peterson's age after Mr. Peterson volunteered that information in responding to a question about his experience. The Union argues (Post-hearing Brief at 5-6) that Mr. Kibler's notation fit right in to the Department's

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<sup>1</sup>It has been several years since I thoroughly reviewed reports of arbitrators interpreting such language, but at that time almost all of the reported cases concluded that the parties intended the arbitrator to apply the protected class law in effect where the agreement was made. One or two cases addressed the question of whether changes in the law after the bargaining of the contract were also included in the parties' understanding. The few reported cases in which the arbitrator did not take such language to incorporate the external law were chaotic: if that is not what such contract language means, there are no guideposts for interpreting it.

uncontested concern about the aging workforce in B&G and that DES “was disinclined to consider Mr. Peterson or Mr. Bowman as viable candidates for the position because they were concerned about an aging workforce.”

Second, the Union points out (Post-hearing Brief at 7) that Mr. Kibler alone noted Mr. Peterson’s mention of a “a woman being ‘hot’ in the sophomoric, appearance-oriented version of that word.” There is no dispute that no one on the panel explored what such an apparently inappropriate reference might mean. Buildings crews sometimes get complaints about building temperatures, but, the Union argues, Mr. Kibler immediately took such a reference in its least acceptable light without asking about it.

Third, the Union argues (Post-hearing brief at 8) that when Mr. Bowman noted that the Department had a long way to go in accomplishing its goals, Mr. Kibler—and only Mr. Kibler—wrote that he had claimed those goals were unattainable. Mr. Kibler agreed at hearing (Tr. 248:8-14) that his sense of Mr. Bowman’s comments was an interpretation rather than a quote.

Fourth, the Union points out (Post-hearing Brief at 9) that all the other panel members noted Mr. Peterson’s comment, “I’m qualified and I will give you my best;” but Mr. Kibler noted “I think I’m qualified and I’ll give it a shot.”

Finally (Post-hearing Brief at 9), the Union notes that Mr. Kibler alone wrote a note “no experience” with project management despite Mr. Peterson’s forty years of experience.

DES, on the other hand, argues (Post-hearing Brief at 12 & 13) that it “had legitimate, non-discriminatory reasons for not selecting either of the Grievants...” and that its stated reason cannot be seen as pretextual.

***The Department’s announced revision of the Carpenter/Paint Shop supervisor position.*** The Department very explicitly announced in advance what it was looking for in the new Carpentry/Paint Shop supervisor. In a nutshell, it announced that it was looking for someone with project management experience who was friendly to procedural change. DES made it as clear as it possibly could that its overarching goal in filling the vacant Supervisor position was to have someone who would not only accept the coming change but would manage possible employee push-back. That announced hiring goal appears repeatedly in the interview questions: #3 asked how to deal constructively with change; #5 asked for ways to *improve* service delivery; #7 asked for ideas about new performance standards; #7 asked for the applicants’ projected goals; and #12 asked for ideas about a quality control / quality assurance program that B&G did not yet have.

There is no dispute that the zones-to-shops change was not well received by the employees. The Department was about to implement its next organizational change, the shift to formal work-orders. The Department's justification for its choice of a Carpentry / Paint first line supervisor rests on that history. If we look at the old (2011) *position description* for this Supervisor position alongside the brand new (2019) *vacancy posting* for this opening, the Department's shift in emphasis becomes clear.

*The 2011 position description's* opening paragraph begins "This is a working supervisor position" and focuses on supervision of the the employees of the section. The second paragraph begins, "The incumbent independently functions as a fully qualified journeyman to perform skilled installation, maintenance, and repair work..." and spends the rest of the substantial paragraph listing the skilled work in question. The listing of the Duties of the position begins with 80% for managing "day-to-day operations of the Carpenter & Paint Shop" beginning with,

Supervises skilled Carpenters, Painters and semi-skilled Utility Workers in performance of Carpenter and Paint repair, maintenance and tenant improvement work in DES owned assets. Performs daily work scheduling of all preventive maintenance, service orders and tenant improvement work using tools approved by B&G. Communicates performance goals to the team. Ensures that staff follow B&G guiding principles to include communicating before, during and after work. Ensures work is completed in accordance with approved DES B&G standards & metrics. Coordinates with Trade Supervisors, Program Managers, Asset Managers, and Tenant Facility Coordinators to accomplish these tasks. Monitors shop budget, work orders and purchases to ensure that expenditures are documented correctly and do not exceed revenues. Initiates corrective action plans for budget control when necessary based on these reviews.

Only 5% of the work is described as "Administrative: "Attend B&G Leadership Team, Team Results, construction, and safety meetings..." And only 10% as "Human Resources" including

Provide daily interface with assigned staff, balance Civil Service rules, collective bargaining agreements, morale and DES mission, vision, values and goals as expressed in its Strategic Clarity and Enterprise Planning Documents. \*\*\*

*The current posting* sets a vastly different tone. Unlike the position description, the posting does not mention this being a hands-on supervisor position and does not detail the sort of skilled work performed by the shop, by B&G, or by the position in question.<sup>2</sup>

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<sup>2</sup>The posting includes a bullet list of thirteen "DUTIES," which begin "Supervises...", "Performs...scheduling...", "Communicates...goals...", "Ensures work completed...", [cont.]



**Who we are looking for:**

We are looking for a highly motivated person that enjoys a fast-paced environment in a progressive organization that embraces changes and continued improvements to processes and efficiencies.

You will need to be an energetic team player that is a great listener and personnel motivator that promotes different ideas and innovative ways to creative thinking that inspires the team to make changes to existing processes and new ways to do business. \*\*\*

**Why you would want this job:**

You will be in a division that is progressive in nature, as B&G is on the forefront of the Lean concepts, continual change, and the Big 3 (Customer satisfaction, Team satisfaction and financial health). You will be a strong leader to your group inspiring change and providing quality services to our customers. \*\*\*

**Who we are:**

At the Department of Enterprise Services you will join a team that encourages creativity and works smarter. We do not believe in the notion, “this is how we have always done it”, instead we actively embody, “how can we do it better?”

*Conclusion.* In short, the position posting made it clear that DES was looking for a supervisor who was downright friendly to organizational and methodological change. Mr. Peterson and Mr. Bowman were intimately familiar with how the supervisor *had worked in the past*, and their interview responses were aimed at that position. The two successful outside applicants had no intimate knowledge of how the position had worked in the past, and they oriented their applications and interview responses to the position announcement; and the one successful internal applicant also carefully tailored both his written application and his interview responses to that posting. Section 4.1 of the CBA makes it clear that the employer “will determine... the skills and abilities necessary to perform the duties of *the specific position* within a job description.” In this case the Department did not in any way hide the ball; DES made it clear just what skills and abilities it was looking for. Those skills and abilities were within the bounds of the position description, but they certainly changed the focus of that description. The three successful applicants tailored their applications and interview responses to the new posting, and, unfortunately, the grievants applied for the position as it had been filled in the past rather than as the Department had announced they were going to fill it this time. Mr. Peterson testified that he had let his job record speak for him, but he had no State

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[cont.] “Coordinates...,” “Monitors shop budget...,” “Timecards...,” “Ensures all overtime...,” “Completes...evaluations...,” “Provides clear and actionable feedback...,” “Addresses staff performance issues...,” “Sets and represents DES core values...,” and “Keep staff members informed about DES and B&G priorities, processes and procedures.”

record of supervisory experience; and Mr. Bowman testified that he said in the interview he was not comfortable with change; and DES had clearly announced that that was not a characteristic it was looking for in this supervisory position.

That intentional change in direction also underlies the composition of the interview panel, which the Union found to be suspicious (Post-hearing Brief at 6).<sup>3</sup>

Typically, the highest-ranking member of a hiring panel for this level of position would be the Maintenance Superintendent. [Tr. 53:15-20.] The Assistant Director's and Deputy Assistant Director's participation in this hiring panel reflected Executive Management's concern with reshaping the workforce.

Ms. Knutson acknowledged that she was on the hiring panel ... because they were putting "extra attention into hiring some good-change management" [Tr. 158:3-8.] ...

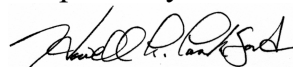
The Union argues that "change management" is code for younger workforce.

But "change management" is not a code word for anything at all on this record. Change management was announced repeatedly, as the overarching goal of the Department in filling this Supervisor position. The Department announced a legitimate, nondiscriminatory reason for choosing as it did—and announced it in advance—and despite Mr. Kibler's embarrassing notes, the Union did not show that age played any role in the selection of the Carpentry/Paint Supervisor. The grievance must be dismissed.<sup>4</sup>

## AWARD

DES did not violate the collective bargaining agreement in filling the Carpentry/Paint Shop Supervisor position. The grievance is dismissed.

Respectfully submitted,



Howell L. Lankford, NAA

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<sup>3</sup>The Union's Post-hearing brief has it almost right: "Ultimately, it could be argued that if DES Executive Staff wants to value talking about management and articulating metrics over actual proficiency in doing the job, this is their right. They may end up with an entire workforce that can precisely gauge efficiency metrics but can't hand a door; but mismanagement is always toe employer's prerogative." We need the "almost" because this was, after all, a supervisory position.

<sup>4</sup>A separate grievance addressed the filling of the two new supervisory positions.