

IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

NORTH ISLAND COLLEGE

(the "College")

-and-

NORTH ISLAND COLLEGE FACULTY ASSOCIATION

(the "Association")

(Selection of Dean, Academic Programs)

ARBITRATOR:	John B. Hall
APPEARANCES:	Adriana F. Wills, for the College Carolyn Askew, for the Association
DATES AND PLACE OF HEARING:	April 11, 12, 13, 25 & 26 and May 29, 2007 at Courtenay, British Columbia
DATE OF AWARD:	June 25, 2007

AWARD

I. INTRODUCTION

The Association disputes the College's decision to appoint John Belshaw to the excluded position of Dean, Academic Programs. The Association says the College should have instead appointed Richard Stride who also applied for the position, and is a member of the bargaining unit. Dr. Belshaw was an external applicant. The Association relies on Article 15.16.3 which gives its members priority over external applicants in postings for administrative positions:

15.16.3 MOVEMENT OF FACULTY BETWEEN FACULTY AND ADMINISTRATIVE POSITIONS

- (a) In the event that members of the Union apply for positions within Administration, the Union members shall have priority over external applicants, provided they meet the criteria of the job description of the position, including qualifications and experience.

It is common ground that the College did not give effect to this provision during the selection process leading to the appointment of Dr. Belshaw. It saw Article 15.16.3 as a "dormant clause" which had never been applied to postings for administrative positions. The College maintains it has always sought to appoint the best applicant for a particular position, and says the Association has never taken issue with that approach. Thus, the College asserts the Association is estopped from relying on Article 15.16.3 in this case. Alternatively, even if the provision applies, the College argues Mr. Stride did not have the qualifications and experience required for the position.

The Association submits there is no evidentiary basis to support the College's claim of estoppel. Its primary argument is that Article 15.16.3 creates a substantive right for internal applicants which was breached when the College failed to appoint Mr. Stride. The Association also says the selection process was not fair or reasonable, and was in fact

biased. It submits Mr. Stride met the criteria of the job description, including the qualifications and experience, and should be awarded the position.

II. THE SELECTION PROCESS

The College serves a large geographic area, and has evolved over time as an institution. More specifically, there has been a shift from distance learning to more traditional classroom learning. The College currently offers typical community college programs, including adult basic education, university transfer courses, and trades training.

Dr. Martin Petter has been the Vice-President, Education at the College since early 2001. He testified the College has experienced the most change of any community college in the Province during recent years. Some of the change has been positive; for instance, enrollment in some areas such as trades and health has increased. However, the College has not been successful in maintaining a sufficient number of students in its academic and university transfer courses. The potential consequence is that the College will lose Ministry funding. While the Association criticizes enrollment figures introduced through Dr. Petter, I accept the basic point that there has been a significant decline in critical areas.

This context was very much in Dr. Petter's mind when it became known that Brigid Walters would be retiring as Dean of Academic Programs. Dr. Petter testified that the College needs Deans who are very much attuned to what is happening in the post-secondary system; who can embrace and lead change; and who can demonstrate strong leadership to try and improve the existing situation. These and other factors influenced the criteria he developed for selecting the new Dean. They also influenced the criteria he developed for selecting a new Dean of Health, Human Services & Applied Business Technology -- a position which the College needed to fill at the same time.

For the position now in dispute, Dr. Petter began with a "generic" job description for Dean he had revised in 2003. It lists the Duties and Responsibilities under six major

headings: Educational Leadership and Management; Management of Human Resources; External Liaison; Budgeting; Employee Relations; and Planning. Dr. Petter's evidence elaborated on the Deans' role as "educational leaders of their divisions" and I have no reason to question his view of the position being crucial to the College. The last section of generic job description identifies the following points under the heading "Qualifications - Skills, Knowledge, Abilities and Experience":

- A minimum of a graduate degree in a related discipline or the equivalent in business or industry experience.
- Significant experience appropriate to the division, with certification in a technical or specialized field if required.
- 5 - 7 years of leadership and management experience in a community college setting. Instructional experience and knowledge of education at the post-secondary level, preferably at a community college.
- An extensive knowledge of community college objectives, operations and administrative and organizational structures.
- A working knowledge of governance models and related management approaches.
- Considerable knowledge of budgetary processes, including the development and administration of budgets.
- A working knowledge of administration of collective agreements.
- Strong interpersonal skills, including communication (written and oral), negotiation, mediation, and conflict resolution skills.
- An ability to express views, ideas, and facts effectively both orally and in writing.
- A commitment to collaborative and consultative processes.
- A demonstrated ability to deal with individuals at all levels in a variety of consultative and collaborative processes that may be college-wide, divisional or interdivisional.
- A demonstrated ability to deal with executive officers, government officials, agency representatives and colleagues from other colleges.
- Strong information literacy and computer skills.

Dr. Petter worked with Ms. Walters to develop a job posting which reflected his view of current realities and the critical elements of the position. It listed the following

as “Required Qualifications”:

Appropriate master’s level or higher educational qualifications in a relevant field, augmented by senior-level instructional and administrative experience in post-secondary education;

A sound understanding of contemporary educational issues and trends combined with innovative ideas and strategies for enhancements;

Demonstrated full array of administrative qualities including excellent organizational, interpersonal and communication skills;

You should be noted for your integrity, creative ideas, and your ability to foster and manage change;

You should have a track record of getting things done, and the ability to function effectively in a team-based environment;

Successful experience in strategic planning and other planning processes as well as providing leadership in a unionized organization is critical.

The draft job posting was reviewed by Jennifer Holden, the Director of Human Resources, before the position was advertised on the College’s website as well as nationally. The posting is dated February 27, 2006 and closed on April 7, 2006.

The President’s office issued invitations to the persons asked to sit on the selection committee. The committee was established in accordance with the College’s usual procedures, and consisted of the following persons: Dr. Petter; Dr. Holden; outgoing Dean Walters; Maggie O’Sullivan, another Dean; Kristie Schrader, assistant to the Dean of Academic Programs; Jeff Brett, a support staff representative; and Christine Hodgson and Jim Muldowney, two faculty representatives.

The College received 55 applications for the position, including 6 from internal candidates. One of the external applicants was Dr. Belshaw who had been contacted by Dr. Petter and invited to apply. Dr. Petter explained at arbitration that he had invited individuals to apply for a prior posting, and will need to do so in the future because of increasing competition for suitable candidates and the fact the College cannot afford a consultant. Dr. Petter knew Dr. Belshaw because they had both worked in the same department at another institution several years earlier. Contrary to the Association’s

submissions, I find nothing untoward about Dr. Petter's invitation to Dr. Belshaw to apply for the position.

Dr. Petter, Dr. Holden and Ms. Walters created an initial shortlist comprised of 15 external applicants and all six internal applicants. One of the internal applicants later withdrew, leaving 20 persons on the list. Dr. Petter testified the 15 external applicants met the minimum qualifications, and he believed it was important for all of the internal candidates to be considered by the selection committee. An email exchange in mid-April between Dr. Petter and Dr. Holden records their mutual assessment that "none of the [six internals] would be on my shortlist".

The selection committee members were asked to review the applications of the shortlisted candidates but were not given any specific criteria. They were, however, provided with the job posting and had access to all of the remaining applications. According to Dr. Petter, the generic job description for the Dean position was not provided to the committee; it may have been available on the College website, but it was not reviewed by any of the committee members beyond those who had developed the posting.

The first meeting of the whole selection committee was on April 24, 2006. Dr. Petter had prepared a document which became his speaking notes at the meeting. He read from the document but did not distribute copies. Dr. Petter outlined the process which the committee would follow, with the outcome being a recommendation to the President. His general remarks emphasized the committee's selection would be a "very important appointment in the life of [the College]" with Deans being the "lynch pins" and key intermediaries between administration and faculty. The document also listed various "qualifications and qualities" which Dr. Petter had developed from the job description, and had earlier reviewed with both the President and Dr. Holden (reproduced as in the

original):

POSTING lists the following

- Masters level or higher degree
 - ✓ *Masters is acceptable, but doctoral work and some experience of research would be ideal.*
- Senior-level instructional and administrative experience in post-secondary ed.
 - ✓ *Ideally this would be someone who has experience of working in an exempt administrative position, as a manager, associate dean, or dean: However, someone with an exceptional record as a chair would also merit serious consideration.*
- Sound understanding of contemporary educational trends
 - ✓ *We're looking for someone who has an educational philosophy; who understands the role of community college in BC.*
- Innovative ideas and strategies for enhancements
 - ✓ *A creative thinker and problem solver.*
- Demonstrated full array of administrative qualities inc:
 - Excellent organizational skills
 - Excellent interpersonal skills
 - Excellent advocacy skills
 - Excellent communication skills
- Noted for your:
 - Integrity
 - Creative ideas
 - Ability to foster and manage change
 - ✓ *Must recognize and welcome the need for continuous change, and must be able to enable others to changes that may not always be welcome.*
- Track record of getting things done
 - ✓ *This is vital. We need someone who can execute - who understands what it take to see something thru from start to finish*
- Ability to function effectively in team-based environment
 - ✓ *Also critical - someone who not only can function in this kind of environment, but prefers to (esp imp re: role as member of Deans' Council)*
- Successful experience in strategic planning and other planning processes
 - ✓ *Someone who understands the challenges of planning, who can both define broad strategies and identify specific actions appropriate for achieving them.*
- Providing leadership in an unionized organization

- ✓ *Perhaps the most important qualification of all: a person who can command respect, who can set directions, and who can motivate others.*

The committee members were asked to write down their top 3 or 4 candidates on a piece of paper and the results were recorded by Dr. Holden on a whiteboard. This was Dr. Petter's idea as he wanted the committee to get to "the strongest candidate". Some candidates had the support of several committee members. According to Dr. Petter, it was fairly obvious that two external applicants (Dr. Belshaw included) and one internal applicant (Mr. Stride) would be interviewed. He suggested another internal applicant should be added to the list as not everyone on the committee might be aware of what the individual had been doing at the College. Thus, the committee narrowed the list to four applicants who would be interviewed.

Dr. Petter testified it was "a matter of process" to consider all internal applicants at the April 24 meeting. His speaking notes in relation to those candidates read in part: "no assumptions made about relative strength of apps". Dr. Petter agreed in cross-examination that all of the internal applicants met the minimum qualifications for the posting; however, he did not recall saying those words during the meeting. He was then directed to notes from the meeting which record him saying: "meet the minimum qualifications for this position so we have brought the 21 (including five internal) to the table". Dr. Petter stated he had been talking about all of the candidates brought to the table, and agreed they all met the minimum requirements.

Dr. Holden had previously prepared some sample interview questions to be used by the selection committee based on the "behavioural" approach typically used by the College. The committee members were asked to comment on the questions and make suggested changes. Following the meeting, Mr. Muldowney asked Drs. Petter and Holden for "a rather clear and somewhat succinct identification of senior management's view of the direction for [the College]"; it was his view that the person the committee recommended to the President needed to fit with this "vision" of the College. Mr. Muldowney testified he wanted clarification to help think about the candidates and who

was “best suited” to the role. This prompted Dr. Petter to send to all members of the committee a two-page document he had prepared headed “Vision of Academic Programs Division”. The document included the statement that “[I]t is also essential the Dean have a strong commitment to building a culture that promotes and supports student success, scholarly activity, new program development, community linkages and accountability”. One of the suggested changes to the interview questions made by Dr. Petter was a question on “scholarly activity and research”.

The four remaining candidates were advised by Dr. Holden that they would be interviewed by the selection committee on May 8, 2006. They were also asked to make a presentation of no more than 10 minutes on the following theme: “Based on your vision of the role of Dean, Academic Programs, what educational philosophy, values and abilities would you bring to this role?” Dr. Holden later finalized the interview questions, provided the final version to the selection committee, assigned questions to each member, and set the schedule for the interviews.

I heard extensive evidence regarding the interviews of Dr. Belshaw and Mr. Stride, and was provided with the notes made by several committee members on the question sheets from the interviews. The details need not be recounted at this juncture. When all of the interviews had been completed, the committee met and quickly narrowed the field to the two candidates. Ms. Hodgson was called to testify at arbitration by the Association, and stated they both had “very strong” interviews. In her opinion, there was no consensus after the interviews about who should be recommended; rather, there were comments like “Wow, what a great problem to have two strong candidates”. She was not comfortable making a decision at that point, and believed two other members were in the same position.

Mr. Muldowney was called at arbitration by the College, and stated he felt during the discussion after the meeting that committee members were still in the process of trying to come to a firm decision as to which candidate was most appropriate. Mr. Muldowney said he had found Mr. Stride’s resume to be “severely lacking” but was very

impressed with his interview. From Mr. Muldowney's perspective, the only area where Mr. Stride was incomplete was experience at the level of Dean or other post-secondary experience at the management level. He recalled in cross-examination that the selection committee was suitably impressed with the presentations and answers from each of the two "strong candidates". He was uncomfortable making a choice at that time.

Dr. Petter referred in his evidence to a straw pole taken after the interviews. He said it was very clear the committee agreed two candidates had done well, and that they wanted to continue to look at those candidates. He initially stated in direct evidence that Dr. Belshaw met all of the requirements for the position but Mr. Stride did not. Dr. Petter identified several areas during his testimony where he regarded Mr. Stride as lacking in experience and qualifications. The most important was the lack of "actual administrative experience at the senior [exempt] level which brings with it a host of other competences". Dr. Petter agreed in cross-examination that the committee had two strong candidates but said they were "not necessarily qualified". He explained the members were looking for ways after the interviews to make the final selection, and also to determine whether Dr. Belshaw was still interested given his stated desire to continue a teaching role. Dr. Petter admitted to not expressing his view that Mr. Stride did not fully meet the qualifications, and said he approached the process looking for the strongest candidate.

Other aspects of Dr. Petter's cross-examination indicate he placed greatest weight on three factors. First, he wanted someone with a doctoral degree -- although he characterized this as ideal but not essential. Second, he wanted a commitment to supporting research and scholarly activity. Finally, and most critically, he was looking for exempt administrative experience. In that regard, Dr. Petter conceded neither Dr. Belshaw nor Mr. Stride had the 5-7 years of leadership and management experience stipulated in the generic job description.

As indicated, the committee had some concern Dr. Belshaw might no longer be interested in the position given a question he had asked during the interview about teaching. It was agreed Dr. Petter would pursue this concern. He sent an email to

committee members on May 10, 2006 confirming Dr. Belshaw's continued interest after speaking directly with the candidate.

Given the selection committee's discussion after the interviews, Dr. Holden suggested the two remaining candidates each be asked to take an internet-based personality profile assessment through a firm called "Caliper". Dr. Holden had used this tool in prior competitions. Information from the Caliper website indicates the profile is a "personality assessment instrument that objectively quantifies an individual's competencies, and identifies candidates with the strongest potential" and "has been validated by more than four decades of research". However, the profile is "just one piece of the hiring process and should be treated as such".

Both Dr. Belshaw and Mr. Stride completed the Caliper assessment. The results were initially provided verbally to Dr. Holden and included a conclusion regarding each candidate. Caliper's assessment of Dr. Belshaw as a match to the Dean position was qualified, while there was no qualification for Mr. Stride. Dr. Holden later received more comprehensive written reports dated May 12, 2006 which also included Caliper's conclusions regarding each candidate. The College requested and received revised reports which omitted the conclusions.

The written reports were never provided to members of the selection committee. It met on May 12 and Dr. Holden conveyed the information she had received verbally; however, she did not inform the committee members of Caliper's conclusions regarding each candidate. Dr. Holden explained in her evidence that the College never gives the written Caliper reports to selection committees although she believes it is appropriate to give them the "broad brush". It is additionally her regular practice to request two written reports from Caliper: one which contains the match conclusion and one which does not. If requested, she will give the latter report to a candidate and let them speak with the Caliper consultant.

Dr. Holden described Caliper's conclusions in assessment reports as "high level recommendations" which she will review with the hiring manager, in part for purposes of future coaching. She discussed Caliper's conclusions regarding Dr. Belshaw and Mr. Stride with Dr. Petter. He did not have any problem with the qualification expressed regarding Dr. Belshaw. Indeed, Dr. Petter testified he regarded what Caliper saw as potential weaknesses to be strengths for the Dean's position. Further, he felt someone could come to Caliper's conclusion based on the generic job description but the College wanted "a particular Dean for a particular time". Dr. Petter added he felt it would be going too far to share Caliper's conclusion with the other members of the selection committee, and believed there was a danger of it being misleading because the report has a "quasi-scientific look".

Dr. Holden conveyed the essence of Caliper's verbal report when the selection committee met on May 12, 2006. Two members, Ms. O'Sullivan and Mr. Muldowney, were unable to attend the meeting. According to Ms. Hodgson, after the summary of the Caliper report, she remarked to the effect that both candidates were equal. Dr. Holden replied "yes and no", and then Dr. Petter began speaking about why he preferred Dr. Belshaw. Regardless of how the discussion proceeded, there is no dispute a majority of those in attendance had expressed a preference for Dr. Belshaw by the end of the meeting. Only Ms. Hodgson supported Mr. Stride, while at least one committee member abstained. Dr. Holden agreed to canvass the two absent members, and later reported by email to the entire committee on May 15, 2006:

As discussed at our Friday afternoon meeting, I talked to Jim Muldowney over the weekend. Jim confirmed that his preference for the position of Dean, Academic Programs is John Belshaw. Jim has based his decision on his assessment that John Belshaw will bring more experience to the position and he is optimistic that John Belshaw will bring his knowledge and experience in academic programs to North Island College and build close relationships with the faculty.

Jim Muldowney acknowledged Richard Stride's application and he is hopeful that the College keeps Richard on the radar as he thinks Richard also has much to offer the College.

Maggie O'Sullivan has also confirmed that she is in favour of John Belshaw for the position.

The members of the Committee are indicating stronger support for John Belshaw's application, *though we are fortunate to have two strong applications from differently qualified applicants*. In terms of the position of Dean, Academic Programs, John has a Ph.D., a strong background in teaching in an Academic Program at a community college, turned university college turned University. He is used to change and the change process from both a faculty, a chair and a Dean's perspective. He has a strong background in publications, understands scholarly research and activity as it applies to a teaching and learning environment and he has previous experience as a Dean.

The next steps include briefing Lou Dryden on our progress, contacting John Belshaw to seek permission to check references, assigning reference checks to the committee members and finally, to produce a report with the Committee's recommendation to Lou Dryden.

I will be in touch with you at the end of the day to explain the reference checking process and to assign names to each of you. John Belshaw has provided approval for each of us to participate in a reference checking process. (emphasis added)

Mr. Muldowney indicated his agreement at arbitration with the italicized passage in this email. Dr. Petter likewise agreed in cross-examination that Mr. Stride was a "strong candidate".

The reference checks were carried out in accordance with the College's "360 degree" format, and were all favourable. The result was a recommendation to the President that Dr. Belshaw be appointed to the position. His appointment was confirmed in a letter dated May 30, 2006.

Drs. Petter and Holden met with Mr. Stride to inform him of the College's decision. Dr. Holden led the discussion and informed Mr. Stride the College regarded him as "administrative material" and had potential plans for his future. However, at this time, the committee had decided to go with the other candidate. Nothing was said regarding Mr. Stride's qualifications. More specifically, he was not told he lacked administrative or leadership experience.

III. HISTORY AND ESTOPPEL

Article 15.16.3 was included in the parties' first Collective Agreement negotiated during late 1992 and early 1993. Both the Association and the College led evidence of the negotiations (the provision was numbered differently at the time but there has not been any material change in the wording). It appears far greater attention was directed to a related provision -- now Article 15.16.1 of the Collective Agreement -- which gives administrators the right to teach, subject to certain provisions.

Dennis Broad was a member of the Association's bargaining committee during 1992-93 and testified the College was supportive of language which allowed faculty to move to a management position provided they had the qualifications. He did not recall any controversy over the concept, and saw the two provisions as "complementary". Mr. Broad agreed in cross-examination that internal applicants (i.e. Association members) had to meet the criteria of a position, including qualifications and experience; he also agreed the negotiation of Article 15.16.3 was always subject to the right of the College President to make an appointment.

Dr. Holden testified the parties spent considerable time on Article 15.16.1 during the first set of negotiations. She called Article 15.16.3 a "quid pro quo" to the right of administrators to teach, and said the College constantly reminded the Association that the President has the right to appoint. She also thought the College rested on the requirement that an internal applicant had to meet the qualifications and experience required for a position. Dr. Holden added "there would have been alarm bells go off on the employer side" if the College had believed someone who met the bare qualifications and experience would get a job; however, there was no discussion along this line during collective bargaining.

I have determined the bargaining history does not provide any basis for departing from the text of Article 15.16.3 when one applies the usual tests regarding the permissible use of extrinsic evidence. The somewhat surprising fact which emerges from the

evidence is that this term was negotiated in the parties' first Collective Agreement but never re-visited until the present dispute. It was Dr. Holden's unchallenged evidence that the Article had no effect on how the College selected applicants -- it continued to appoint the "best person" for a position. Indeed, Dr. Holden testified she "forgot" about the provision and said it was never raised in later negotiations.

The College introduced a binder of documents from various postings over the years for excluded positions where there had been internal applicants. The College noted there had been faculty members on the selection committees for many of these postings. In one posting, an unsuccessful internal candidate had been a member of the Association's bargaining committee during the initial round of collective bargaining.

I have determined that this evidence regarding prior postings does not assist the College's reliance on estoppel. My reasons include the fact that the postings in evidence appear to be a selective collection and not an exhaustive compilation of all relevant postings since Article 15.16.3 was negotiated. But even if that is an inaccurate description, I am not able to determine whether any of the unsuccessful internal applicants were qualified for the various positions. Indeed, in at least two circumstances (Competition Nos. 05:A:01 and 05:A:02), Dr. Holden testified the internal applicants did not have the technical skills being sought by the College. In the former competition, none of the internal applicants were interviewed because they were not qualified. Mr. Broad gave evidence about another posting (Competition No. 05:A:06) where two internal applicants did not have the necessary qualifications. Thus, there would not have been grounds in any of those competitions to allege a breach of the Collective Agreement. Dr. Holden additionally testified she was not sure if there had been a faculty representative on some of the selection committees and, in any event, she would expect members of selection committees to keep the identity of internal applicants confidential. Finally, while Article 15.16.3 obviously applies to all administrative positions, there has only been one occasion since 1993 where the College has hired an external applicant as a Dean. I was not told whether there were unsuccessful internal applicants for that posting.

The thrust of the Association's position in response to the College's estoppel argument is that it was unaware of past circumstances where Article 15.16.3 might have been invoked. The Association did not receive formal notice of postings and was not advised of any internal applicants. Nonetheless, Mr. Broad conceded postings were displayed on bulletin boards and latterly on the College's website. He was also aware some faculty had unsuccessfully applied for excluded positions; however, he stated no member had ever complained about not being hired for an administrative position and the Association had never grieved.

Dr. Holden testified she was surprised when she heard the Association's evidence at arbitration regarding its lack of knowledge about the selection process and the College's failure to apply Article 15.16.3 of the Collective Agreement. She referred to the transparent nature of past competitions, the involvement of faculty representatives on selection committees; and the number of faculty who had applied for excluded positions. She said it wasn't a secret the College was not applying the provision when selecting applicants for administrative positions, and there had been lots of opportunity for discussion if there were concerns (e.g. at labour/management meetings). Dr. Holden added Article 15.16.3 never came up in local bargaining until after the present dispute, and stated: "It was like a clause that became dormant over the years -- we did not pay attention to it and I don't know how we lost sight of it".

It was Dr. Holden's evidence that when she returned from an overseas vacation in late March 2006 "the organization was alive with 15.16.3". She was asked to look into it by the College's President, and recalled telling him "we'd forgotten about it"; that is, her review indicated the clause had been dormant and had not been talked about. Dr. Holden sent the following message by email on April 2 to the President and Dr. Petter:

I've reviewed Article 15.16.3 and I have to admit the clause has never been raised by anyone before. In 1991, the first two deans were hired before the collective agreement was signed. The next Dean was hired when John Meagher resigned and we had internal candidates at that time but the clause was not mentioned. Our next restructuring resulted in four

new deans being appointed. Our current competition has attracted competition.

For me, the most important words in Article 15.16.3 are:

....."[shall have priority over external applicants], provided they meet the criteria of the job description of the position, including qualifications and experience."

I will check to see if the job description of the Dean is attached to the posting on the link. I asked for this to happen before I left.

I have read the posting and while it is quite general in its description of criteria, it does ask for senior administrative experience. I don't think department chair responsibilities are equivalent to senior administrative experience.

In accordance with Article 3.2.3, the President shall appoint two faculty to serve on the Selection Committee for recruiting senior administrators.

While some people will read "priority" as the most important word, my reading is that "provided they meet the criteria of the job description of the position, including qualifications and experience" as being significant.

The provision was raised in the context of the present posting before Dr. Belshaw was appointed. There is some indirect evidence of it being raised as well in the contemporaneous posting for Dean of Health, Human Services & Applied Business Technology where an internal applicant was selected. In terms of this posting, Ms. Hodgson approached Dr. Holden after the selection committee had met on April 24. Article 15.16.3 had been brought to Ms. Hodgson's attention a week earlier by Bill McConnell, the Association's President. She approached Dr. Holden after the meeting with a photocopy of the provision and asked when it would be addressed in the selection process. According to Ms. Hodgson, Dr. Holden replied it was not something the committee needed to worry about. Dr. Holden recalled in her evidence telling Ms. Hodgson that the provision had never been raised before.

Dr. Holden testified about another brief discussion she had regarding Article 15.16.3 towards the end of April with Jim Anderson, who at the time was the Association's Vice-President and responsible for Collective Agreement administration.

He asked about the provision, and she said it looked like the clause had laid dormant and the College had not paid attention to it. She said the Association could bring the subject up in a labour/management meeting or at collective bargaining. According to Dr. Holden, Mr. Armstrong made a comment to the effect that the provision was “kind of like a relic”.

Finally, the provision was raised by Mr. Stride when he met with Drs. Holden and Petter at the end of the selection process. His unchallenged evidence was that Dr. Holden repeated her view about it being a dormant clause which had not been used in years, while Dr. Petter said the clause was “very vague”. Mr. Stride told them he expected the Association would grieve, as it in fact did with a policy grievance dated June 2, 2006. Dr. Petter’s reply of June 19, 2006 set out the College’s position in these terms:

In our view the language of Article 15.16.3 (a) of the Collective Agreement does not apply and was never intended to apply in the manner now asserted by the Association.

Further, the lengthy (over 14 year) practice of the college, of which the Association was aware and has never objected to, does not support the application of Article 15.16.3 (a) that the Association is now attempting to assert.

In any event, in our view the appointment of Dr. John Belshaw was made because he was the candidate that met the criteria of the job description of the position.

The College now argues the Association is estopped from relying on Article 15.16.3 because it had an obligation to speak and object in a timely way, yet never questioned how the provision was being applied and never filed a grievance. Further, while there was discussion about the Article during the selection process, there was no formal request by the Association to have it applied consistently with its interpretation before the process was completed.

The “modern doctrine of estoppel” was reviewed in *B.C. Rail Ltd.*, IRC No. C152/92 (affirmed by BCLRB No. B128/93), where the Labour Relations Board

abandoned the traditional compartmentalization of equitable remedies, along with the strict tests for their application, in favour of a broad principle designed to avoid unfairness or injustice. The purpose of the modern doctrine of estoppel is to avoid inequitable detriment. An estoppel may arise where: (a) intentionally or not, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation or conduct is a question of fact, and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed from the perspective of the party raising the estoppel. The Board in *B.C. Rail* affirmed the classic statement that “you are not allowed to let someone go out on a limb so you can saw him off”: see *City of Toronto*, (1967), 18 L.A.C. 273 (Arthurs), at page 280.

In order for the College to successfully rely on estoppel, it must be shown the Association knew how Article 15.16.3 was being applied (or, more correctly, not being applied) by the College: *Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* (1978), 18 L.A.C. (2d) 307 (P.C. Weiler). There is no evidence here of actual knowledge. And, while I accept the College’s point that knowledge may be imputed where a practice is sufficiently pervasive, the evidence does not rise to that level in the present case. Put simply, the circumstances were not such that the Association should have known the College was failing to apply Article 15.16.3 in a manner detrimental to internal applicants qualified for excluded positions. In the absence of actual or imputed knowledge, there was no obligation on the Association to speak out and alert the College to its position and, consequently, no representation upon which to found an estoppel.

Alternatively, if the first branch needed to invoke the doctrine is satisfied, the evidence does not establish reliance by the College on any representation by the Association. After Article 15.16.3 was negotiated, the College continued to select applicants as it had in the past and “forgot” about the provision. This is not a situation

where an employer has turned its mind to a particular provision and relied on the union's apparent failure to assert its strict contractual rights. The College simply carried on business without regard to Article 15.16.3 and how it might apply. Dr. Holden's email of April 2, 2006 to the President and Dr. Petter noted the clause "has never been raised by anyone before", but there was no suggestion the College had relied on any representation or other conduct by the Association.

Moreover, it is arguable that any estoppel was terminated and/or the College cannot prove detriment because Article 15.16.3 was raised by Ms. Hodgson and Mr. Armstrong during the selection process. The College was admittedly not in a position to re-negotiate the provision. However, as stated by Dr. Holden, "the organization was alive with 15.16.3" at the time. Given this context, it was not necessary for the Association to make a formal request for the provision to be applied. The College had sufficient notice and a clear opportunity to consider how it might apply to the posting, as well as to assess Mr. Stride's application accordingly, before it offered the position to Dr. Belshaw.

For all of these reasons, the College's plea of estoppel must fail. There is no need to address the Association's additional argument that Article 1.7.2 precludes an estoppel based on a past practice which conflicts with the Collective Agreement.

IV. THE INTERPRETATION OF ARTICLE 15.16.3

I have already recorded my determination that the bargaining history does not assist in determining what the parties mutually intended when they included Article 15.16.3 in their Collective Agreement. Nor is the extrinsic evidence of past practice (which the College characterizes as a "complete abandonment" of the clause) sufficient to overcome the ordinary meaning of the words found in the provision:

15.16.3 MOVEMENT OF FACULTY BETWEEN FACULTY AND ADMINISTRATIVE POSITIONS

- (a) In the event that members of the Union apply for positions within Administration, the Union members shall have priority over external applicants, provided they meet the criteria of the job description of the position, including qualifications and experience.

This language is equivalent to sufficient ability clauses which more commonly apply to postings for bargaining unit positions. Assistance can also be drawn from other provisions of this Collective Agreement which refer to “priority”. For instance, under Article 6.4.1(a), internal candidates for a vacant position “shall have priority, in order of seniority, over other applicants”. Likewise, under Article 15.16.2(a), applicants from the College administration “shall have priority over external applicants”. In all of these circumstances, one finds the same limitation: “... provided they meet the criteria of the job description of the position, including qualifications and experience” (in the case of Article 15.16.2(a) the requirement is “teaching experience”).

The Association refers to various authorities such as *Re Capital Regional Authority and CUPE, Local 1978* (1989), 8 L.A.C. (4th) 307 (Munroe), which mandate a “two-step process” for assessing internal candidates. The collective agreement there spoke to internal applicants being given “first consideration”. Such language inherently suggests a sequential consideration of internal versus external applicants, particularly given the companion clause which allowed the employer upon the union’s concurrence to advertise for external candidates simultaneously with a posting for internal candidates.

I agree with the Association’s position that, before assessing the relative strengths of internal applicants against external applicants (as was done in the present selection process), the College must turn its mind to the question of whether the internal applicants “meet the criteria of the job description ..., including qualifications and experience”. This question may well be addressed after both categories of applicants have been interviewed. However, where internal applicants satisfy the provisio in Article 15.16.3, the words “shall have priority” must reasonably be taken to mean they will be recommended to the President for the position. Where internal applicants do not satisfy the provisio, selection committees may proceed to consider them along with external

applicants, and to look for the “most suitable” or “stronger” candidate. Or, selection committees may choose to not make a recommendation, as has apparently occurred where no applicants, internal or external, have been considered qualified for a posting.

This interpretation is subject to two related points which I do not understand to be contentious. First, the College has the right to establish “the criteria of the job description”. In that regard, I note the position of Dean is excluded from the Association’s bargaining unit and make no comment on whether the usual arbitral limitations on this management right might apply. Second, as confirmed by Mr. Broad’s evidence about the origins of Article 15.16.3, any recommendation by a selection committee is subject to the President’s power to make appointments.

V. APPLICATION OF ARTICLE 15.16.3 TO THE PRESENT POSTING

The College acknowledges Article 15.16.3 was not considered during the selection process for the new Dean of Academic Programs. However, it argues Mr. Stride was not qualified and, accordingly, was not entitled to the position under the Collective Agreement. The Association maintains Mr. Stride had the necessary qualifications and says the process was tainted by bias. It submits the College’s breach of the Collective Agreement should be remedied by setting aside Dr. Belshaw’s appointment and awarding the position to Mr. Stride, along with compensation for wage-related benefits.

The question of bias can be answered quite succinctly. I have cumulatively considered all of the Association’s allegations under this heading, although some of its concerns have been omitted from my award. The allegations are directed mainly against Dr. Petter (for instance, his invitation to Mr. Stride to apply for the position and their prior association).

I find Dr. Petter acted in good faith throughout, based on his view of the College’s needs at the time and the role of the Dean, Academic Programs. There is no doubt he

was seeking the strongest applicant, and developed a preference for Dr. Belshaw because of the latter's broader experience and proven track record. But I am equally satisfied Dr. Petter's mind was open to other candidates until the interview process had been completed and the selection committee moved to its deliberation phase. It was Dr. Petter who suggested the second internal candidate be added to the list of interviewees. Mr. Stride was the last candidate to be interviewed, and Dr. Petter's notes on the Interview Guide reveal numerous positive comments, including: "excellent presentation", "good answer - thoughtful and sincere (Question 3); "good response on critiques of planning" (Question 5), "excellent answer (brave)" (Question 13), and "good answer - well informed from union point-of-view" (Question 20). At the same time, Dr. Petter's notes recorded concerns over Mr. Stride's answers such as: "good example - realistic but rather limited" (Question 10). I find these were legitimate observations having regard to Mr. Stride's actual responses and the indisputable fact he had less experience than Dr. Belshaw in many areas canvassed by the interview questions.

I therefore reject the Association's argument that the selection process was biased. Nonetheless, some of the same concerns point to serious flaws in the process. I begin with the uncontested fact of the selection committee giving no effect to Article 15.16.3. As the College's plea of estoppel has failed, there is no remaining defence to this omission. Mr. Stride was entitled to have his application for the position considered in accordance with the Collective Agreement.

The selection committee's failure to have regard to Article 15.16.3 undoubtedly contributed to what I view as a second serious flaw in the process. The provision speaks to "the criteria of the *job description* for the position" (emphasis added). Dr. Petter and others developed the job posting having regard to the generic 2003 job description for Deans. However, the posting arguably established slightly different and more stringent criteria. Even if that was not the case, the "qualifications and qualities" and "Vision" documents which Dr. Petter later developed, and were used as references for the committee's deliberations, strayed even further from the job description. I acknowledge Dr. Petter's objective of finding a particular Dean to meet specific needs of the College;

however, he did not take the step of formulating a new job description. Article 15.16.3 is tied to that document (in this case, the generic 2003 version), and constrains what might otherwise be an unfettered management right to establish additional qualifications for excluded positions.

Another concern raised by the Association relates to the College's limited dissemination of the Caliper report. I appreciate the rationale expressed by Dr. Holden for how she handles these personality profile assessments as a matter of general practice. The problem here is that the reports were expressly commissioned to assist the selection committee in making a recommendation, and some committee members had information which was not disclosed to other members. Dr. Holden fairly allowed in cross-examination that Caliper's conclusions regarding the two candidates might have been helpful to the committee, and she was unable to say whether it would have made a difference. I find the partial withholding of information from some committee members undermined the fairness of process.

What of the College's position that Mr. Stride was not qualified for the Dean's position in any event? Part of the difficulty in addressing this argument stems from the fact the selection process was run as a competition; that is, the interview questions and the committee's deliberations were directed to recommending the best candidate (in line with the College's usual practice), and not to probing their basic qualifications.

In final argument, the College's counsel identified several areas where she suggested Mr. Stride lacked the necessary qualifications having regard to the entire job description. Some of the alleged shortcomings are not borne out by the evidence at arbitration. For example, the job description requires "a working knowledge of governance models and related management approaches". Dr. Petter commented repeatedly during his testimony about Mr. Stride's lack of actual experience in this area and others as a basis for preferring Dr. Belshaw. That standard does not accord with the job description, and I find Mr. Stride's testimony displayed a "working knowledge" of governance models and related management approaches. Likewise, the job description

lists “considerable knowledge of budgetary processes” and “a working knowledge of administration of collective agreements”, as opposed to the actual experience or proven ability sought by Dr. Petter.

I agree with the Association’s submission there were effectively three reasons in Dr. Petter’s evidence as to why he believed Mr. Stride did not meet the criteria of the job description for the Dean’s position. These reasons were the lack of: (i) a doctoral degree; (ii) a record of scholarly activity and research; and (iii) experience in an exempt administrative position.

Taking these points in order, the job description requires a minimum of a graduate degree. Dr. Petter properly recognized in his listing of preferred qualifications that a “Masters is acceptable, but some doctoral work and some experience in research would be ideal”. Mr. Stride has a Masters degree in a related discipline, and thus meets the minimum qualification. Second, there is no reference in the qualifications on the job description to scholarly activity and research; nor was it listed as a required qualification on the job posting. The criterion subsequently arose through Dr. Petter’s amendments to the interview questions, and cannot be used to extinguish Mr. Stride’s candidacy.

This leaves the question of Mr. Stride’s administrative experience. The College points to the criterion in the job description for “5-7 years of leadership and management experience in a community college setting”, and argues this necessarily means experience in an *exempt* position. That is inconsistent with the statement Dr. Petter made in his “qualifications and qualities” document about what he was looking for in the area of senior level instructional and administrative experience:

- ✓ *Ideally this would be someone who has experience of working in an exempt administrative position, as a manager, associate dean, or dean. However, someone with an exceptional record as a chair would also merit serious consideration.*

Thus, while Dr. Petter regarded experience in an exempt administrative position as “ideal”, he allowed a chair with an exceptional record “would merit serious consideration”. According to the Association’s unchallenged calculation, Mr. Stride had 6 years’ cumulative experience as a Department Chair at the time of the posting. The College counters by arguing he did not have an exceptional record while working in that role.

I am prepared to assume for the balance of this award that Mr. Stride did not have the level of administrative experience which the College now says he needed to possess. But it must be reiterated that Dr. Belshaw fell short in the same category if the criterion is experience in an exempt position. His secondments as Interim and/or Acting Dean at his former institution lasted in total about 18 months. In any event, proceeding on the basis of the foregoing assumption, the question becomes whether the College should be allowed to avoid the consequences of its failure to follow Article 15.16.3 of the Collective Agreement because it now argues Mr. Stride did not satisfy one of the criteria of the job description? In the circumstances, I have determined the answer must be “no”.

The College is effectively seeking to exercise its management right to determine the qualifications of applicants and reject someone it says is unqualified. Article 3.1 of the Collective Agreement obliges the College to exercise its management rights “... in a fair and reasonable manner”. I find it would be unfair and unreasonable to now uphold the College’s position that Mr. Stride lacks one of the necessary qualifications for two reasons. First, Article 15.16.3 was brought to the College’s attention during the selection process and it chose not to assess Mr. Stride’s application against the criteria of the job description at the time. The College -- including Dr. Petter who chaired the selection committee -- made this decision despite having received advice in Dr. Holden’s April 2 email about “the most important words in Article 15.16.3”; namely, that internal applicants must meet the criteria of the job description. The second reason is that the College was prepared to waive the same criterion for Dr. Belshaw. The selection committee admittedly found him to be superior overall; however, the inquiry under Article 15.16.3 must be directed to threshold ability and not identification of the best

candidate. In that regard, it is important to recall Dr. Petter's agreement in cross-examination with the notation indicating he stated all shortlisted candidates met the minimum qualifications. The committee found Mr. Stride had sufficient qualifications to remain under consideration until the final step of the selection process.

The College argues the appropriate remedy in the event of the foregoing determination is to send the matter back with directions on how to proceed. The authorities advanced in support of this position include *Re Falconbridge Nickel Mines Ltd. and United Steelworkers of America* (1972), 30 D.L.R. (3d) 412 (McGillivray); *Re British Columbia Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258* (1983), 10 L.A.C. (3d) 56 (Germaine); *Re Corporation of City of Ottawa and Canadian Union of Public Employees, Local 503* (1988), 1 L.A.C. (4th) 60 (Thorne); and *Re Sudbury General Hospital of Immaculate Heart of Mary and Canadian Union of Public Employees, Local 1023* (1990), 16 L.A.C. (4th) 172 (Craven). The College does not argue I lack arbitral jurisdiction to award the position to Mr. Stride. However, it submits I should not place him in the position given the context of the posting; the nature of the position (i.e. a senior, excluded position in the largest division at the institution); and the deference which arbitrators routinely accord to employers in the selection of employees where subjective factors are involved: see *Brown & Beatty, Labour Arbitration in Canada* (Fourth Edition), at para. 6:4100.

I have no quarrel with the general statements of law found in the College's authorities and numerous other awards. But, as the Association contends, there is no principled basis for referring the matter back in this case. The consequence of my conclusions thus far is that Mr. Stride cannot be denied the position because he may have lacked one of the criteria in the job description. The record does not allow me to determine whether any other internal candidate met the criteria. But even if one or more did, the only grievance was brought forward on behalf of Mr. Stride, and he was the only internal candidate still under consideration when eliminated from the selection process: see *Re Sudbury Regional Hospital and O.P.S.E.U., Local 659* (2002), 113 L.A.C. (4th) 380 (Burkett); and *Re Mount Sinai Hospital and O.N.A.* (1990), 13 L.A.C. (4th) 230

(Haeffling). The last observation assumes even greater significance when one recalls internal candidates have priority “in order of seniority” under Article 16.4.1(a), but seniority apparently does not apply under 15.16.3(a). The selection committee unequivocally put Mr. Stride ahead of the other internal applicants.

In terms of deference, this is not a case of “second-guessing” a management decision purportedly made in accordance with the applicable term of a collective agreement. Nor was there any discussion amongst members of the selection committee to the effect that Mr. Stride was not sufficiently qualified for the Dean’s position. Indeed, the committee considered itself fortunate to have “two strong applications from differently qualified applicants”. It is relevant to recall at this juncture the instances of job postings where no internal candidates were interviewed because they were not qualified, combined with Dr. Holden’s testimony that the College does not give “courtesy interviews” -- that is, applicants are not interviewed if they do not have the required qualifications.

Dr. Holden stated members of the selection committee were “conflicted on which way to go” after the interviews. However, based on the record of the interviews and the committee’s meetings, I have no doubt Mr. Stride would have been recommended but for the presence of what a majority viewed as Dr. Belshaw’s “stronger” application. But the critical point is this: the selection committee implicitly found Mr. Stride had sufficient qualifications for the position. There would be no utility to sending the matter back for a new committee to re-visit the decision which was effectively made in the first instance.


VI. CONCLUSION AND REMEDY

I have determined the selection of Dr. Belshaw must be set aside, and Mr. Stride must be appointed instead to the position of Dean, Academic Programs. The foregoing order takes effect thirty (30) days from the date of this award so as to permit an orderly transition. Mr. Stride’s appointment should be made subject to the usual terms and policies which apply to excluded positions at the College.

The final issue concerns the Association's request on behalf of Mr. Stride for wage-related compensation. Dr. Belshaw's appointment was subject to a one-year probationary period, and I assume the same term will apply to Mr. Stride. Further, Mr. Stride has a right under Article 15.16.3(b) to return to his former faculty position during the same period. These contingencies mean Mr. Stride may not remain in the Dean's position. In that event, he will not have suffered a loss beyond having been initially denied the opportunity of appointment to the position (a breach of the Collective Agreement remedied above), and awarding retroactive compensation at this time would be a "windfall". Therefore, monetary compensation is made contingent upon Mr. Stride successfully completing probation.

I reserve jurisdiction to address any issues arising from implementation of this award, as well as from the grievance generally, which cannot be resolved by the parties.

DATED at Vancouver, British Columbia on June 25, 2007.



JOHN B. HALL

ERROR: stackunderflow
OFFENDING COMMAND: ~

STACK: