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GSB#2007-2529, 2007-3698, 2008-1845, 2008-3119, 2008-3120
UNION#2007-0205-0009, 2007-0999-0015, 2008-0446-0006, 2007-0102-0007, 2007-0585-0003

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Brimicombe et al) **Union**

- and -

The Crown in Right of Ontario
(Ministry of Labour) **Employer**

BEFORE	Nimal Dissanayake	**Vice-Chair**
FOR THE UNION	John Brewin Ryder Wright Blair & Holmes LLP Barristers and Solicitors	
FOR THE EMPLOYER	Omar Shahab Ministry of Government Services Counsel	
HEARING	January 7, 8, 2009, March 13, 2009, May 22, 2009, June 3, 12, 23, 2009, July 21, 23, 24, 2009, September 9, 2009, January 18, 2010, February 1, 9, 22, 2010, March 22, 2010.	

Decision

[1] The Board is seized with the following grievances challenging the results of several job competitions held in the summer of 2007 for positions of Worker Adviser (Hereinafter "WA") at the Office of the Worker Adviser (Hereinafter OWA"), classified as Workers Compensation Adviser 2:

2007-2529 Kathleen Brimicombe, grievor
2008-1845 Jennifer Musca, grievor
2008-3119 Belinda Carbert, grievor
2008-3120 Gabriella Letterio, grievor
2007-3698 Union grievance

[2] All incumbents had received third party notices. Some attended the early part of the hearing intermittently as observers. The exception was, Ms. Linda Horne who attended regularly and was represented by Mr. Al Bieksa. However, when it became apparent during the union's final submissions that its remedial request, if granted, would not impact on Ms. Horne, Mr. Bieksa advised the Board that his client was withdrawing from the proceeding.

[3] The issue in these grievances is whether the four grievors were denied the position of WA in contravention of article 6.3 of the collective agreement. That article reads:

> In filling a vacancy, the Employer shall give primary consideration to qualifications and ability to perform the required duties. Where qualifications and ability are relatively equal, seniority shall be the deciding factor.

[4] The job posting, which was "open", covered vacancies in ten different OWA offices located throughout the province. The four grievors, all internal applicants, grieve positions filled at the following locations. Ms. Brimicombe - London, Ms. Letterio - Downsview, Ms. Musca - Ottawa, Ms. Carbert - Windsor. In each of the disputed locations the successful applicant was an "external" from outside the Ontario Public Service.

[5] The union contends that the job competition process that led to the appointments was so fatally flawed that its results do not reflect the true qualifications and ability of the applicants. Most significantly, the union submits that the employer relied exclusively on the scores from an interview process, and that much more reliable information about the applicants' qualifications and ability was not factored into the decision. The union sought an order from the Board

appointing Ms. Brimicombe and Ms. Letterio to the London and Downsview WA positions respectively, on the basis that their qualifications and ability were at least relatively equal to those of the external candidates appointed. Only two applicants, including Ms. Musca, participated in the Ottawa job competition. The employer concluded that neither applicant was qualified for the position. The union claims that Ms. Musca did possess at least the minimum qualifications required, and seeks an order that Ms. Musca be appointed to the Ottawa position. The union concedes that the Board did not receive sufficient information about the relative qualifications and ability of Ms. Carbert and the applicant appointed to the Windsor position. Therefore, it seeks an order that the job competition for the Windsor position be re-run.

[6] The standards expected of the employer in conducting a job competition have been long established through the Board's jurisprudence. These are summarized at pp. 25-26 in the often-cited decision in Re MacLellan and DeGrandis, as follows:

1. Candidates must be evaluated on all the relevant qualifications for the job as set out in the Position Specification.
2. The various methods used to assess the candidates should address their relevant qualifications insofar as is possible. For example, interview questions and evaluation forms should cover all the qualifications.
3. Irrelevant factors should not be considered.
4. All the members of a selection committee should review the personnel files of all the applicants.
5. The applicants' supervisors should be asked for their evaluations of the applicants.
6. Information should be accumulated in a systematic way concerning all the applicants.

[7] There is no substantial dispute as to the process followed in the instant case. The four Regional Managers, Ms. Linda Mador (North-West Region), Ms. Carmen Lucente (Central Region), Ms. Mary Tzaferis (Toronto & Eastern Ontario Region) and Ms. Susan Finch (South-West Region) created the selection criteria and weighted them. Once the posting closed, each Regional Manager assessed the resumes of applicants for vacancies within her region against the selection criteria, and screened in those applicants who would receive interviews.

[8] The selection panel consisted of the four regional managers, although on some days only three were able to attend. The interview process consisted of three parts, an oral question and answer session, written test and oral presentation. Upon arrival, each candidate was put in a

room with a computer and given one hour to complete a written test, and prepare an oral presentation. Next, the candidate appeared before the selection panel, handed in the written test, and then orally answered a series of questions. Next the candidate made the oral presentation. Each of the three parts, i.e. the questions/answers, written test and oral presentation, was scored by the panel, and a final mark out of 220 was assigned to each candidate. The panel had predetermined that to be deemed qualified, a candidate must attain a threshold of 125 marks out of 220. The panel identified the highest scoring applicant in each location as the "winner". Reference checks were done only for those candidates identified as winners. Unless the reference check raised a significant concern, the highest scorers were offered the positions. While resumes were used for screening purposes, they played no part beyond that. Also, none of the members of the selection panel reviewed the personnel files or performance evaluations, which were readily available for the internal candidates. Reference checks were done only for the purpose of confirming the "winners" selected on the basis of the interview scores.

[9] Counsel for the employer acknowledged that the employer had not complied with the standards as set out by the Grievance Settlement Board. Nevertheless, he urged the Board not to set aside the appointments. He submitted that the gap between the scores obtained by each of the grievors and the appointees was so significant that even if the employer had run a perfect job competition, still the grievors would not have been found to be relatively equal to the respective appointees. Employer counsel further pointed out that the selection panel included each grievor's most recent manager. That manager was familiar with the grievor's past performance and discussed it with the other panel members during the course of the interview process. In that manner, submitted counsel, the grievors' qualifications and ability as demonstrated by past performance were given sufficient consideration as part of the selection process.

[10] The grievors had held the position of Intake Counsellor (hereinafter "IC") (classified as "Workers Compensation Adviser 1") with the OWA for varying periods of time. The evidence indicates that there was overlap in the duties performed by WAs and ICs. However, one significant difference between the two positions was that IC duties did not include oral advocacy at hearings. The evidence further establishes that the grievors Brimicombe and Letterio had worked as WA on an acting basis for varying periods. This evidence will be reviewed in greater detail later in this decision.

[11] The union challenged the value of the interview process conducted by the employer on several grounds. While it had no quarrel with the selection criteria themselves, the union disagreed with their weighting. It questioned the relevance of some of the questions and alleged that other questions were confusing. It contended that the process did not test the candidates in relation to key aspects of the WA position. It alleged that the panel had engaged in consensus scoring. Overall, the union argued that the interview process was not capable of drawing out the true qualifications and ability of the candidates to be a WA. The union's primary position, however, was that the appointments to the four positions in question ought not be allowed to stand for the sole reason that they were based exclusively on the interview scores.

[12] The members of the selection panel testified about the process followed. Ms. Mador testified under cross-examination that the directions received from the Director of OWA was that the panel should hire the "best candidate for the job". She agreed that resumes, performance evaluations or personnel files were not reviewed as part of the process. As far as she knew, the process followed in this instant was consistent with how competitions were always run in the past. She was very clear and explicit that any discussion that took place between panel members about the grievors' performance had no impact whatsoever on the interview scores, and further that the decision was based solely on the interview scores.

[13] Ms. Lucente was also cross-examined on the process followed. Then union counsel asked, "So to summarize, the decisions on who to hire for Downsview and elsewhere, were made exclusively based on the scoring in the interviews?" Ms. Lucente agreed.

[14] Ms. Tsaferis testified under cross-examination that no personnel files, resumes or performance evaluations were reviewed as a part of the selection process. She was not sure whether she conducted reference checks only for the top scoring candidate, or also for those close to the top. However, she agreed that the panel's decision that Ms. Musca was not qualified was based solely on her interview score.

[15] Ms. Finch testified in chief that resumes were not considered at any point beyond the initial screening for interviews. She stated that personnel files and performance evaluations were not considered in the final decision-making, and added "But we did talk about performance".

She testified that reference checks were done only for candidates who were identified as successful. Under cross-examination union counsel asked, "The other three managers all testified that the scoring was based exclusively on the answers given at the interview. Do you agree?" Ms. Finch answered "Yes".

[16] Ms. Finch agreed under cross-examination that any comments by managers about the performance of internal candidates occurred after the scoring had been done, and that those comments did not affect the scores or the ultimate decision. Counsel put to Ms. Finch, "In fact you indicated to the others that the advice you received from Human Resources was not to consider performance?" Ms. Finch agreed. She confirmed that she in fact received that advice from Human Resources. She testified that after the offers had been made and accepted, when Mr. Mike Grimaldi, union official, raised his concerns that the panel had relied exclusively on the interview scores, she realized that the advice she had received from Human Resources was "incorrect".

[17] Considering the evidence before me, I have no hesitation concluding that the employer's decisions on the relative qualifications and ability of the candidates were based solely on the interview scores and nothing else. That was indeed the testimony of the members of the selection panel. There was testimony by some panel members about discussions they had about some of the grievors. That evidence will be reviewed later. However, it is clear that those discussions were of a very casual and anecdotal nature. Moreover, any information disclosed by the discussions was not factored into the ultimate decisions. Those decisions were based solely on the interview scores and nothing else.

[18] In Re Alderson, 2006-1007, [2008] 174 L.A.C. (4^{th}) 97 (Dissanayake), concluding that the job competition process was fundamentally flawed and that its results could not stand, at paragraph 35 the Board wrote:

> The evidence is overwhelming that in the present case, the decision was made, for all practical purposes, solely on the basis of the interview/testing scores. I find that there was no attempt to assess past work experience and performance in any manner, and that the interview and test questions did not permit such an assessment. Even if it did, it is not sufficient to consider the candidates' experience and work performance through the answers provided during a brief interview/testing process,

> when much more extensive and reliable information is available by way of reference checks and a review of performance evaluations and personnel files.

[19] In order to meet the standard envisaged in article 6.3, it is incumbent on the employer to gather relevant information about the qualifications and ability of the candidates as they relate to the duties of the position in question, that would allow a thorough comparison. As the Board in Re Quinn (1979) 9/78 (Pritchard) stated at p. 10:

> The employer must design and utilize a selection process in job competitions that is consistent with the purposes of the selection process. Thus, under this collective agreement, the process must be designed to elicit in a systematic manner sufficiently comprehensive information about each applicant relevant to the qualifications and ability required to perform the job in order that a fair and reasonable assessment of the relative strengths of the candidates can be undertaken and the final selection made.

[20] The Board in Re Liblik/Scipnek, 2525/91 (Dissanayake) at pp. 19-20 wrote as follows:

> As the Board has stated on many previous decisions, the employer is entitled to conduct interviews and/or tests to assess the candidates' relative qualifications and abilities to perform the duties in a posted position. Where the employer has no evidence before it, which is more reliable than the performance at the interviews, it many have no choice but to rely solely on the interview scores. However, where some candidates have actual employment experience, particularly in the posted job itself, the evaluation of their performance on the job must usually be preferred to the interview results. At the very least, that must be given serious consideration in the overall assessment of the employee's qualifications and ability to perform the duties of the posted position.

[21] In Re Esmail, 1186/87 (Dissanayake) at pp. 12-13, the Board made the following factual findings:

> Despite Employer counsel's attempts to convince us otherwise, we are satisfied that the panel relied solely on the interview results in filling the SAC positions. Both Ms. Juda and Ms. Gibbs testified that they gave marks based solely on the answers given to the questions at the interviews and did not take into account information they were aware of but not repeated as part of the candidates' answers. On the basis of the marking Ms. Jelley scored an average of 88/110 and the grievor 75/110. The panel concluded that the difference was significant enough not to consider anything in the resumes, employee files or performance appraisals. While two of the three panel members had read the résumés, we are satisfied that their contents were not assessed in determining the relative qualifications and ability to do the duties of a SAC. The same is true of employee files and performance evaluations. These had not been recently reviewed by any of the panel members. While Ms. Juda and Ms. Gibbs were familiar with the employees' work, there is no evidence that that knowledge was analyzed in any way as they related to the suitability for a SAC position. As Ms.

> Juda put it "the scores of the two top employees were so much higher, there was no need to consider anything else".

At pp. 19-20 the Board concluded:

> We have concluded that the selection panel relied solely on the interview marks in selecting the winners. This by itself is reason to strike down the competition. See Re Poole, 2508/87 (Samuels) and Re Clipperton, 2554/87 (Watters). Also, a job interview under article 4.3 must not be approached as a means of judging a performance. The purpose is not to determine who can better handle an interview. It is a process of information gathering for the purpose of ascertaining the true abilities and qualifications of the candidates.

[22] The Board has consistently disapproved the practice of undue reliance on interview scores. Thus in Re Esposito, 2168/92 (Kaplan) it stated at p. 26, "As the Board has noted in a legion of cases, where a selection panel relies inordinately on interviews it does so at its peril". In the present case, the employer relied on interview scores, not inordinately, but exclusively. I cannot help but repeat the following observation by the Board in Re Bent, 1733/86 (Fisher) that "This again emphasizes the slavish devotion that the Ministry seems to have with respect to interview scores, and its failure to understand that an interview is only part of the selection process…." It is simply mind-boggling that the selection panel in this case received specific advice to adopt the very process that had been repeatedly disapproved in a long line of Board decisions.

[23] The next issue then is, what flows from the employer's exclusive reliance on interview scores. Having concluded that the job competition was fundamentally flawed and not in compliance with article 6.3, it is totally inappropriate to limit the remedy to a declaration that the collective agreement had been contravened, as employer counsel urged me to do. There are four grievors before the Board, who have alleged that their rights were infringed as a result of the employer's breach. If that is so, they are entitled to redress.

[24] The standards to be applied in determining the remedy where a breach of article 6.3 is contravened is very succinctly summarized by Vice-Chair Abramsky in Re Naczynski, 2003-3124 at p. 22 as follows:

> Considering all of these cases, and the other cases cited to me, it seems that there are two standards – one for ordering the grievor into the position and one for ordering a re-run. If the Board is to order the grievor placed into the position, the Union must

> prove, on the balance of probabilities, that the flaws *would* have affected the outcome. In other words, the grievor must show, on the balance of probabilities, that he or she would demonstrate relative equality if a proper selection procedure had been done. In a re-run situation, the Union must establish, on the balance of probabilities, that the flaws *could* have affected the outcome. If neither onus is met, the grievance must be dismissed.

[25] All four grievors were subjected to the same flawed process. Apart from the alleged flaws with regard to the weighting and relevance of questions, the consensus scoring etc., which I have not dealt with, I am satisfied that the exclusive reliance on interview scores alone could at least have affected the outcome of the competition. The Board must proceed to determine whether the evidence establishes on a balance of probabilities that the three grievors who seek orders for appointment would have been entitled to appointments, if the process had been conducted in compliance with article 6.3. With that purpose, I turn to the evidence relating to the grievors who seek appointment.

[26] The employer in the present case relied exclusively on the scores in the interview process. The only comparison done was of the scores. It treated the interview score as a complete and accurate reflection of a candidate's qualifications and ability for the WA position. It failed to factor into its decision, very relevant and reliable information which was readily accessible. While the union raised other concerns relating to the questions, the written test and the oral presentation, and the manner in which they were weighted and scored, there is no need to determine the merits of those claims. As the Board stated in Re Esmail (supra) at p. 19, the fact that "the selection panel relied solely on the interview marks in selecting the winners" is "by itself reason to strike down the competition". That result is unavoidable in the present case also.

[27] As noted, the union seeks an order appointing grievors Brimicombe, Letterio and Musca to the positions they competed for in London, Downsview and Ottawa respectively, together with full compensation for losses resulting from the employer's breach. For the Windsor position for which Ms. Carbert applied, it seeks an order that the competition be re-run.

[28] The employer has taken the position that in the event the Board finds flaws in the job competition process which violated the collective agreement, the only remedy ought to be a

declaration. Counsel argued that in the particular circumstances, the appointments made by the employer ought not be disturbed. In other words, counsel submitted that appointments or re-runs ought not be ordered for any of the positions. It was submitted that it is not sufficient for the union to show that the competition process was flawed. It must also show that but for the flaws, the grievors would have been found to be relatively equal to the candidates appointed. I agree with that proposition. Therefore, it is necessary to review the evidence with regard to the qualifications and ability of the competing individuals, to determine the issue of relative equality.

[29] Grievor Kathleen Brimicombe

Ms. Brimicombe's grievance relates to the WA position in London which was awarded to Ms. Robin Bosworth. Ms. Bosworth scored 148.5 marks out of 200. Ms. Brimicombe received 119 marks, and thus failed even to achieve the threshold of 125 marks set by the employer.

[30] Ms. Brimicombe joined the OPS in March 1987, when she was hired by the OWA as a support staff. In April 1990 she was assigned to a IC position on an acting basis and within a year she became a permanent IC through a competition. The IC position was responsible for advising and representing injured workers at the operating level of the claims process under the Workplace Safety and Insurance Act. The IC would interview the worker and make a preliminary assessment of the claim. If the IC determines that additional information, such as medical information, was required to support the claim, he/she would take steps to obtain that. Once the information is gathered the IC has to decide whether to continue supporting the worker's claim. If the determination is that the claim had sufficient merit, the claim is put before a Claims Adjudicator. The IC would make a presentation to the adjudicator orally by telephone, or by way of written submissions. If the claim is allowed the IC would arrange for the implementation of the adjudicator's decision. If the claim is denied, the IC would prepare a case summary, and the file is forwarded to a WA, to consider further appeal.

[31] Ms. Brimicombe held the IC position up to her participation in the job competition in July 2007. However, she had several acting assignments as WA in that period. For a period prior to 2001, Ms. Brimicombe did WA duties and IC duties on a 50/50 basis. Then starting in 2001 she received acting WA secondments on a full-time basis. According to the employer's

records her employment history at the OWA, excluding her pre-2001 part-time work as WA, is as follows:

- Worker Adviser (St. Catharines) – secondment from 2001/06/25 to 2003/02/21
- Returned to home position – Intake Counsellor (Hamilton) effective 2003/02/24
- Worker Adviser (Hamilton) – secondment from 2003/03/03 to 2003/03/28
- Returned to home position - Intake Counsellor (Hamilton) effective 2003/03/31
- Worker Adviser (Hamilton) – secondment from 2004/09/01 to 2004/12/31
- Returned to home position - Intake Counsellor (Hamilton) effective 2005/01/03
- Worker Adviser (Hamilton) – secondment from 2005/01/24 to 2005/06/24
- Worker Adviser (St. Catharines) – secondment from 2005/07/04 to 2006/02/24
- Worker Adviser (Hamilton) – secondment from 2006/02/27 to 2007/05/31
- Worker Adviser (London) – secondment from 2007/06/01 to 2007/08/31

[32] Ms. Brimicombe received notice in May 2007 that her IC position would be declared surplus. At the time, she was on a WA secondment scheduled to end in August 2007. At the end of the secondment, she opted to bump down to a position of Program Assistant.

[33] The records establish that during the approximately 84 month period preceding the July 2007 job competition, Ms. Brimicombe worked as a WA on secondment for approximately 55 months. She testified that during her secondments as WA, she performed the full range of duties within the WA job description. Also, she handled files of various levels of complexity, no different than any other WA. Similarly the volume of her caseload was no less than those of permanent WAs. She testified that during her initial secondment as WA in 2001 she had a caseload of over 100, which was in excess of 65-75 files normally carried by WAs.

[34] Ms. Brimicombe testified that her manager assigned her to train WAs and support staff on the CMS on many occasions. While on secondment at the Hamilton Office, she trained all staff, including WAs, on CMS. Ms. Brimicombe described herself as the “go to” person for CMS. When the CMS was updated, she was one of the persons assigned to do the user testing. She testified that in 2005-2006, at the request of her manager she created a manual for training on CMS. That manual was used to train new employees throughout the OWA organization. Ms.

Brimicombe was of the view that by July 2007 she was more skilled on CMS than virtually anyone within the OWA organization.

[35] Several reviews of Ms. Brimicombe's performance as WA were filed. In the performance plan review for the fiscal year 2005-06, Ms. Finch wrote the comment, "Kathy met all objectives". In a second quarter review for the period April 1, 2006 to September 30, 2006, Ms. Finch wrote under "General comment": "Kathy, congratulations on doing so well during your first year of worker Adviser! You are right on target to meet your objectives". Also filed in evidence was the performance plan review for Ms. Brimicombe signed by Ms. Finch following a review meeting on June 21, 2007, just a few weeks prior to the job competition. In the box "Concluding comments on the level of performance including suggested next assignments if appropriate", Ms. Finch wrote as follows: "Kathy had a very successful year as a Worker Adviser in 06-07. She met or exceeded all objectives in the fiscal year. Congratulations Kathy!" Ms. Brimicombe testified that Ms. Finch made no negative comments whatsoever about her performance during the meeting. While a copy of the performance plan review for the fiscal year 2007-08 was not entered in evidence, Ms. Brimicombe testified that in that Ms. Finch had commented that she had "another excellent year".

[36] Ms. Brimicombe testified that apart from these formal performance reviews, she had received numerous positive comments about her performance as WA from her manager, Ms. Finch. The only negative comment she recalled was about two files which had been in the system in excess of 36 months. When Ms. Brimicombe explained to Ms. Finch that she had inherited those files from another WA very recently, and that she was not responsible for the delay, nothing more was said about it.

[37] Ms. Brimicombe also stated that she had received very positive feedback about her work as WA from co-workers and clients. Some commendations were addressed directly to the OWA director. She referred in particular to a commendation she had received from a Vice-Chair of the Workplace Safety and Insurance Tribunal (WSIAT). Many experienced WAs who had sought her advice had also commented that her advice was very helpful. Ms. Brimicombe testified that she started her first WA secondment at St. Catharines on June 25, 2001. Ms. Finch immediately assigned her to a hearing before the WSIAT scheduled for July 2, 2001. She viewed that as an

expression of confidence in her on the part of her manager. Ms. Brimicombe stated that her records for the most recent 3 to 4 years preceding the competition indicate that her hearing success rate was 85.7 percent.

[38] Ms. Brimicombe applied for the WA job posting soon after she received the surplus notice in May 2007. She testified that as a result she was "a basket case", in the period leading up to the July job interviews. Other than reviewing some material, she did not do much preparation for the interview. She testified that Ms. Finch had told her that she had been identified for rollover into a WA position. Since she had also performed very well as WA for long periods, and was in a WA position at the time, she did not feel there was a need for much preparation.

[39] Ms. Brimicombe testified that in her view, the written test did not accurately reflect a "WA's real world". In real life a WA would have the claim file and medical evidence to review, in deciding how to draft a letter to a doctor. More importantly, the WA is able to question the claimant. It was Ms. Brimicombe's view that the hypothetical claim in the written test had very little information, and therefore, the file was not ready to go forward on appeal to a Review Officer. She stated that the assignment was to write to "a doctor", while the desired answer expected by the panel envisaged letters to multiple doctors.

[40] About the oral presentation, Ms. Brimicombe stated that when she wanted to raise some preliminary issues, the panel told her that she was not entitled to do so. She testified that in real life, the hearing could not proceed until preliminary issues are dealt with. When she pointed that out to the panel, Ms. Lucente instructed her not to argue with the panel. Ms. Brimicombe denied that she read the oral presentation from a script as the panel had alleged. In summary, Ms. Brimicombe stated that in her view a good portion of the interview process did not allow the panel to assess her true abilities. Her past performance as WA, her performance appraisals, her success at hearings, happy clients and happy manager would have accurately showcased her ability.

[41] In cross-examination, Ms. Brimicombe testified that in addition to the oral advocacy she did before the WSIAT as acting WA, she had done a tremendous amount of oral advocacy, albeit

in a less formal setting, before Claims Adjudicators. Employer counsel suggested to Ms. Brimicombe that, as IC or acting WA, she was not among the more knowledgeable employees on "cross-questioning". Ms. Brimicombe disagreed, and explained that if her manager, Ms. Finch, was of that view she would not have assigned her to do a complex case before WSIAT within days of her very first acting assignment as WA.

[42] Ms. Brimicombe agreed that while her case load was higher than average during her 1½ year WA acting assignment at St. Catharines, that was not the case during her later assignments. However, she insisted that her case load, while not above average, was at all times no different from case loads carried by other WAs. Ms. Brimicombe reiterated that she had provided training on CMS to staff in the Hamilton office and had conducted two training sessions in Toronto. If there was a need to train anyone on CMS, management turned to her. In addition, on an on-going basis employees from outside the Hamilton office called her with questions on CMS. She testified that Ms. Finch had personally told her that she was "the best on CMS". Ms. Brimicombe agreed that although Ms. Finch had told her that she had been identified as a potential rollover to WA, she was never given a guarantee of a rollover, and was therefore aware that she may not get appointed if she did not perform well at the interview.

[43] Ms. Mador compared the oral presentations made by Ms. Brimicombe, and the successful applicant for London, Ms. Robin Bosworth. Ms. Mador was very surprised how well Ms. Bosworth performed considering she had no advocacy experience. She stated that at the end of each oral presentation the panel members had a discussion and agreed upon a score. She said that Ms. Bosworth "really excelled" and received 46 marks out of 54. According to Ms. Mador, Ms. Brimicombe had researched for the oral presentation very well, but "fell short" in her actual presentation. She "seemed very nervous, and was not able to communicate in a manner that flowed logically and convincingly". Therefore, she received only 33 out of 54.

[44] During cross-examination, Ms. Finch conceded that Ms. Bosworth's resume does not disclose any experience in making oral presentations at all. When asked whether it disclosed any exposure to workers compensation issues, Ms. Finch replied that Ms. Bosworth was employed as Early Resolution Officer with the Office of the Ontario Ombudsman, and that the WSIB would have been one of the agencies coming within the Ombudsman's jurisdiction. However, she

conceded that the WSIB would be just one out of thousands of agencies within the jurisdiction of the Ombudsman, and that Ms. Bosworth's resume has no indication that she did any work at all involving the WSIB.

[45] Ms. Finch conducted two reference checks for Ms. Bosworth after she had been identified as the top scorer. Ms. Finch testified that she posed the questions set out in the form to the individuals, and asked them to rate Ms. Bosworth within the range 1 to 5 on each question. The form consisted of eight "OWA specific questions" and eleven "General Reference Questions". The very first OWA specific question was, "How would you rate the applicant's level of expertise in the Worker's Compensation/Workplace Safety and Insurance area?" The two reference providers rated Ms. Bosworth on this question at 4½ out of 5, and 5 out of 5 respectively. Under cross-examination, Ms. Finch agreed that she asked no follow up or clarifying questions, to ascertain how Ms. Bosworth obtained that expertise. She agreed that the reference form does not include any question about oral presentation or advocacy skills.

Grievor Gabriella Letterio

[46] Her grievance relates to the Downsview position, which was awarded to Ms. Christie Harper. Ms. Harper scored 145 out of 200 in the interview, while Ms. Letterio received 114 out of 200. Ms. Letterio had expected the Downsview position to be included in the posting. However, it was not posted. When she inquired, Ms. Lucente informed that it had not been posted because someone had applied for a lateral transfer into that position. Ms. Lucente assured her that she would not approve the lateral transfer, and that the position would soon be posted. Therefore, Ms. Letterio decided to wait for that posting and did not apply for any of the posted locations. However, during the July 14-15 week-end, Ms. Lucente called Ms. Letterio at home and asked her to come for an interview on Tuesday July 17, 2007 for the Downsview position. When Ms. Letterio pointed out that it had not been posted, Ms. Lucente replied that the managers had decided to do all interviews at the same time to avoid cheating. Ms. Letterio informed that she had to go to the US to visit her sister who was recovering from open-heart surgery, and that she would not have any time to prepare for an interview. Ms. Letterio testified that Ms. Lucente assured her, stating that she had no reason to worry, that she would not find the interview difficult because she had already done the job. Ms. Letterio testified that she did no preparation

at all, since she did go to the US during the week-end, and on Monday she had a submission to do.

[47] Ms. Letterio stated that she attended the interview on July 17th as requested by Ms. Lucente. On the one hand she was very nervous because she had not done any preparation. On the other hand, she had a sense of security because management had informed her that she and Ms. Brimicombe had been identified for rollover into WA positions, and because of Ms. Lucente's assurances. She was placed in an empty office assigned to a WA. Within fifteen minutes the WA turned up and said that she needed to use her office. A search went on for a place where Ms. Letterio could continue. Ultimately, she was provided a desk placed at the back of the library. Ms. Letterio testified that it was very busy in the library. Her anxiety heightened. She felt she was being sidelined or sabotaged. She thought about leaving, but decided to stay and do her best. Ms. Letterio testified, however, that as a result of the interruption she missed a part of the instructions for preparing the oral presentation, to the effect that the client was unable to attend. She, therefore, prepared her presentation on the mistaken assumption that she would be able to question the client. Her oral presentation consequently suffered.

[48] Ms. Letterio testified that she had demonstrated in her work that she was excellent in written communication. Some template letters used in the OWA were taken from letters she had written in carrying out her work. She admitted, however, that the letter she prepared for the test was "horrible". She attributed that to her state of mind at the time. She testified that her instincts told her that she should leave and take the position that she had not had time to prepare. She continued only because, as a result of Ms. Lucent's assurances, she believed that the interview was a "mere technicality".

[49] Ms. Letterio testified that during the interview her morale was very low. She felt that she had been "conned" into doing the interview without preparation. Yet she was concerned there would be repercussions if she walked out. Due to her state of mind she misunderstood some questions, blanked out on another, failed to mention experience she had, and picked inappropriate examples when she had much more relevant examples from her past work. She stated that her performance in the one hour interview was not an accurate indication of how she had actually done the job.

[50] The evidence indicates that Ms. Letterio first joined the OWA in 1986 in the position of Program Assistant. From 1988, she held the position of IC until her position became surplus in October 2007. Ms. Letterio testified that in her performance evaluation for the fiscal year 2006-2007, her manager wrote on it, "As usual you exceeded the expectations of the job". In the previous performance evaluation also, it was noted that she exceeded expectations. She testified that her manager often complemented her for going beyond job expectations and for getting involved in committee and outreach work. Then OWA director, Mr. Alex Farquhar always complemented her for her dedication, passion and commitment to the job. Moreover, whenever she requested a reference from OWA management, she got excellent references.

[51] The evidence shows that Ms. Letterio did three different acting assignments in the position of WA. The first was for 6 months at the Woodbridge office. Ms. Letterio testified that while no formal performance evaluation was done, her manager, Ms. Lucente, gave her feedback that she was doing an excellent job as WA and that the decisions she obtained were positive. There were no negative comments about her work at all.

[52] Ms. Letterio's next WA acting assignment in 1999 at the Mississauga office was to be long term, with a possibility of becoming permanent. However, after doing it for just under a year, Ms. Letterio decided to return to her home position as IC in order to be close to a family member who was ill. Ms. Letterio testified that when she started that acting WA assignment there was a huge backlog of merit review files. She was able to clear the backlog before she left. Her manager, Mr. Joseph Provato, commented several times to her that she was doing an excellent job, and mentioned that he had received similar feedback from clients about her work. Ms. Letterio testified that Mr. Provato attempted to persuade her to continue in the acting assignment.

[53] Ms. Letterio's final acting WA assignment was from April to October 2007 at the Downsview office. Therefore, at the time she did the interview in July 2007 for the Downsview position, Ms. Letterio was working as WA at Downsview on an acting basis. Ms. Letterio testified that she took over the workload of WA George Lavoratio, who was on sick leave. Mr. Lavoratio's caseload of approximately 145 files was one of the largest and included very complex cases. Filed in evidence was a letter Ms. Letterio had received from Mr. Lavoratio, in

which he highly commends the work Ms. Letterio did on his files, and also mentioning that a hearing officer at the WSIB and clients had also commended her work.

[54] Ms. Letterio testified that in each of the WA acting assignments, she performed the full range of WA duties. Starting in April 2007, in addition to doing Mr. Lavoratio's WA workload, she also had her own IC workload. When Ms. Lucente received decisions in cases done by Ms. Letterio, she complemented her on the good work done. Ms. Letterio was of the view that the Downsview acting assignment was one of her best performances. Union counsel reviewed with Ms. Letterio the interview questions and preferred answers. Ms. Letterio testified that she knew all of the prepared answers, and testified that without that knowledge she could not have performed as well as she did during her acting assignments. She commented that she would have "aced the interview", if she had been given adequate time to prepare. She stated that, along with Ms. Brimicombe, she was on the committee struck for implementation of the CMS.

[55] In chief, Ms. Letterio had testified about her experience at the OWA in making oral presentations at the various levels, including before the WSIAT. When questioned during cross-examination, she reiterated that she made at least a dozen in-person presentations to the WSIAT. It was put to Ms. Letterio that she had declined an offer by Ms. Lucente the opportunity to do a mediation. She agreed, and explained that she declined because the offer came just days after she had received her surplus notice, and added that earlier she had voluntarily done a mediation for a WA, Mr. Sal Morano.

[56] Ms. Letterio agreed that Ms. Lucente had not guaranteed that she would be rolled over into a WA position. When employer counsel asked what Ms. Lucente said to her to give the impression that the interview would be a mere technicality, Ms. Letterio replied that when she repeatedly told Ms. Lucente that she would not have any time to prepare for the interview, Ms. Lucente told her not to worry about it, and advised her to the effect "just do it and get it over with".

[57] In re-direct, Ms. Letterio was asked to summarize her experience in making oral presentations up to July 2007. She replied that she had extensive experience in making oral presentations at all levels of the WSIB hearing system, including WSIAT. She stated that in

addition, she had made oral presentations before the Rent Review Board, had done Canada Pensions appeals, and also appeared in Provincial Court on Highway Traffic Act issues. She believed that she had done an excellent job, both within and outside the workers compensation system, and pointed out that if OWA management did not have confidence in her abilities, she would not have been allowed to work as WA until October 2007, despite not being successful at the July interview.

[58] Ms. Lucente testified that she had managed Ms. Letterio, both in her IC position, and while on acting WA assignments. When asked how Ms. Letterio's performance was as IC, Ms. Lucente replied that she respected the manner in which she worked. She stated that Ms. Letterio's productivity numbers were not very high, but added that it was not Ms. Letterio's fault, but a result of ICs not having enough work to do. Ms. Lucente was of the view that Ms. Letterio fulfilled about half of the targets in her performance plans, but not the other half, and particularly noted that she took longer on "bring forwards". She said that Ms. Letterio was very good at helping clients.

[59] Ms. Lucente testified that she managed Ms. Letterio during her 6 month acting assignment as WA in Downsview, which ended in October 2007. She stated that it was decided that during that period Ms. Letterio would perform all WA duties, except presentation at hearings. Since she had no hearings to do, she continued to perform IC duties also. Ms. Lucente testified that after Ms. Letterio had completed her oral presentation, she told the other panel members that Ms. Letterio had "read her submission with little eye contact" and that her poor presentation reflected her level of knowledge.

[60] In cross-examination, Ms. Lucente agreed that it was not uncommon for ICs with no advocacy experience to be promoted as WA, and that in those cases the employee is provided support in developing advocacy skills. She agreed that following the instant process a number of applicants were offered positions, even though they had no advocacy experience.

[61] Ms. Lucente agreed that Ms. Harper was awarded the Downsview position based exclusively on the interview scores, and that the reference checks done by Ms. Tsaferis were used only for confirmation of the decision. Ms. Harper's two reference checks were provided by

supervisors in her employment in positions of researcher at the Labour Studies Program, McMaster University, and as Consultant at the Injured Workers' Advocacy Centre, Burlington, Ontario. Ms. Tsaferis scored them at 95.5 and 81 percent respectively.

[62] Ms. Harper's resume was filed in evidence. It indicates that she completed a masters degree at McMaster University in 2005. Her thesis topic was, "Workplace Safety: The Criminal Law, its Role and Limitations in the Workplace." Her employment history discloses that from June to November 2005, she was employed as Disability Consultant with HRH Consulting Services, Toronto. Her duties included representing clients before the WSIB. From November 2005 to the time of the competition in July 2007, Ms. Harper held two jobs, one as WSIB Consultant with the Injured Workers Advocacy Centre, Burlington, and the other as WSIB Consultant with a law firm in Hamilton. The resume lists the following among her duties under the former position:

- Manage a 125 client load in all aspects of Workplace Safety and Insurance Board and Canada pension Disability claims through Operations, ARO, and WSIAT.
- Negotiate, verbally and in writing, for all benefits available through the WSIB and Canada Pension Disability with Claims Adjudicators and Appeals Resolutions Officers.
- Represent and defend clients in all hearing levels at the ARO, WSIAT and Canada Pension Disability (Review Tribunal and Pension Appeals Board).
- Represent clients through the Return to Work and Mediation processes, assess modified work offers, and present counter-offers.

[63] In cross-examination, Ms. Lucente agreed that the only discussion of Ms. Letterio's work performance by panel members occurred after all of the scoring had been competed, and that this discussion was very limited. One panel member expressed surprise about Ms. Letterio doing so poorly on the WCB question and Ms. Lucente commented to the other panel members that Ms. Letterio disliked oral presentations and that, therefore she was not surprised Ms. Letterio did so poorly on the oral presentation.

[64] Ms. Lucente was asked for the basis upon which she formed the opinion that Ms. Letterio did not like doing oral hearings. Ms. Lucente replied that in her search of the records, she found that Ms. Letterio had last done an oral hearing in 1995 or 1996. Ms. Lucente agreed that the OWA generally encouraged resolution of disputes without litigation. Ms. Lucente agreed under

cross-examination that she was not aware of any claim that did not go to hearing because of Ms. Letterio's fault or dislike of hearings. However, she referred to the mediation opportunity Ms. Letterio had declined. When union counsel suggested that Ms. Letterio declined that mediation only because the offer was made days after she had received surplus notice and she was angry, Ms. Lucente replied that she did not think that was the reason. She testified that Ms. Letterio at the time probably offered reasons for declining the mediation, but she could not recall what those were. Ms. Lucente also testified that Ms. Letterio did not make overtures to her seeking opportunities to do oral hearings and referred to an "old incident", where when given the opportunity to do an oral hearing, Ms. Letterio opted to go as co-counsel.

[65] Ms. Lucente agreed that the reason she was very surprised that Ms. Letterio did so poorly on the knowledge questions was because she knew that Ms. Letterio had the knowledge. Counsel asked "Her low score for knowledge did not reflect her actual knowledge which you knew about?" Ms. Lucente replied "correct". When further questioned, Ms. Lucente agreed that Ms. Letterio definitely had the knowledge, but she was not sure whether or not the presentation she made at the interview was an accurate reflection of her oral presentation skills.

[66] Ms. Lucente could not specifically recall, but did not dispute Ms. Letterio's testimony that when asked to attend the interview she told her that she would not have time to prepare, and that Ms. Lucente told her not to worry about that. She testified that she would likely have said that because she knew that Ms. Letterio "knew her stuff". Ms. Lucente agreed that Ms. Letterio may have informed the panel that she had been moved to the library after she had started her written test and preparation of the oral presentation, that it was busy in the library, and that as a result she misread the instructions. Ms. Lucente recalled that Ms. Letterio told the panel that she was not aware that she was not allowed to read the presentation.

Grievor Jennifer Musca

[67] Ms. Musca's grievance relates to the WA position at the Ottawa office. She was one of two applicants interviewed for that position. Her interview score was the higher, but she scored only 77 marks, well short of the threshold of 125 set by the employer. As a result she was deemed not qualified, and the position was not filled pursuant to the competition. The evidence is that Ms. Musca's score of 77 did not include any marks for the written test. The panel did not

score Ms. Musca's written test because they concluded that even if she scored full marks on the written test, she would not reach the 125 mark threshold.

[68] Ms. Musca commenced working for the OWA in 1990 as a program Assistant. In 1999 she won a IC position and was in that position at the time of the July 2007 job competition. Ms. Musca testified that she had not received any acting assignments as WA. However, while employed as IC, with the approval of her manager, she performed some WA functions on her own initiative. She regularly did merit reviews, and accompanied WAs to WSIAT several times. As IC, she had made only one oral presentation. That was before an Appeals Resolution Officer. She testified that she would have done more, but had no opportunity since she was on maternity leave from January 2006 to May 2007. Shortly after her return, she received her surplus notice, and she opted to bump down to a Program Assistant position at the OWA.

[69] Three performance reviews completed for Ms. Musca were filed in evidence. In a mid-year review for the period April 1, 2004 to September 30, 2004, Ms. Tsaferis wrote the following under "Overall assessment and comments": "You have been successful in achieving your performance objectives. Your overall performance has exceeded expectations". In the full year review for the period April 1, 2004 to March 31, 2005, there are no comments made by the manager. In the full year review for the period April 1, 2005 to March 31, 2006, Ms. Tsaferis has noted that the overall assessment was not completed because Ms. Musca went off on maternity leave from January 2006.

[70] Ms. Musca testified that throughout her tenure as IC, she received very positive feedback from her manager about her work. The manager was very happy about her voluntarily taking on WA functions, and about her attending tribunal hearings with WAs. She also received feedback from WAs that they were very satisfied with her work on merit reviews, her preparation of case plans, and her written submissions to the appeals branch. Ms. Musca testified that she always had the goal of becoming a WA. She wanted to upgrade her skills towards that end, but had limited opportunity because of her maternity leave. However, she completed all of the on-going OWA courses, and all courses offered through the Ontario Federation of Labour, including a course on presenting at hearings.

[71] According to Ms. Musca, she was extremely nervous going into the interview in July 2007. She testified that the surplus notice came as a shock to her because she had been repeatedly assured by former Director, Mr. Alex Farquhar, that all IC positions were safe. When she received the surplus notice she felt "betrayed and discarded". Union counsel reviewed with Ms. Musca all of the interview questions and the preferred answers. Generally, Ms. Musca testified that she knew and regularly worked with the information required to answer the questions. When asked why she did not give that information in answering the interview questions, she replied, "I thought they'd know that I knew all of that information from my nine years at the OWA".

[72] Ms. Musca described a one week course offered by the OFL which she had completed prior to the job competition. It included training on how to interview witnesses, how to gather evidence, how to question witnesses and how to make presentations and argument. As part of the course she participated in two mock hearings, one in the role of a worker representative before the WSIAT, and the other as an employer representative before an Appeals Resolution Officer. Ms. Musca testified that she received feedback from the trainers that she did very well, and she was offered a position of trainer to teach OFL courses. Ms. Musca testified that among other OFL courses she completed was a week long course on medical terminology.

[73] Ms. Musca testified that when Ms. Tsaferis called her at home to inform that based on the results of the interview she had been deemed not qualified for the WA position, Ms. Tsaferis told her that it was unfortunate that she had been away from work on maternity leave in the period leading up to the interview, and commented that it "did not help". Ms. Musca testified that when the WAs in the Ottawa office heard that the managers had determined that she was not qualified to be a WA, they expressed disbelief. She was aware that they communicated that to Ms. Tsaferis also. Moreover, in the period following, with the knowledge and approval of Ms. Tsaferis, WAs delegated to her four hearings before the WSIAT. She prepared all four. One was cancelled, but she did the other three hearings.

[74] In cross-examination, Ms. Musca testified that she had attended 10 to 15 WSIAT hearings as observer. She stated that she did not ask for an opportunity to do the hearings herself because at the time she did not feel she was 100 percent ready to do a tribunal case. Ms. Musca

testified that she did not think that given the work she had done as IC for nine years, she needed to do much preparation for the interview. Nevertheless, she read through the Industrial Accident Victims Group of Ontario Manual, which she described as covering workers compensation issues from "A to Z". In addition she did some on-line exercises on how to prepare for OPS interviews.

[75] The union called Mr. Al Bieksa, who has extensive experience in advocacy relating to employment issues, including workers compensation. He joined the Ontario Federation of Labour as an instructor in 1990, and in 1993 became its Training Program Coordinator. In that position, his duties included the development and updating of training curriculum and material, and the delivery of training to instructors. Through that whole period Mr. Bieksa has continued to present cases before the WSIB and WSIAT.

[76] Mr. Bieksa testified that in 2001 Ms. Musca did the OFL appeals training course. Mr. Bieksa oversaw the training delivered by instructors, and assisted them. While doing so, he kept an eye out for trainees for recruitment as instructors. At a mock hearing of the WSIAT, Mr. Bieksa sat as the WSIAT chair, and Ms. Musca was the worker representative. He stated that he observed that Ms. Musca prepared her presentation very well and also helped others. About her presentation Mr. Bieksa said, "She did a superior job framing the issues, and explaining the relevant legislative provisions. She articulated a very good legal argument and demonstrated superior questioning of the injured worker witness". He testified that he rarely offered jobs immediately after the completion of training courses, but he was so impressed with Ms. Musca, he did so. She declined, explaining that she was very happy at the OWA, and wanted to progress to be a WA. Mr. Bieksa testified that he made the offer again on two later occasions, but she declined citing the same reason. Mr. Bieksa recalled at least five OFL courses Ms. Musca completed, and commented that she was "top of the class" with regard to how the law operated, that "she had more knowledge about labour market re-entry than anyone I know", and that she "had a very good understanding of complex medical issues".

[77] Mr. Bieksa testified that he was a co-instructor at a Level 2 OFL training course held in 2003 at Hawkesbury. The course was mostly delivered in French. The other co-instructor was bilingual, but he was not. The bilingual co-instructor suddenly could not attend. With hardly

any notice, Ms. Bieksa asked Ms. Musca to deliver the course with him. With no preparation, Ms. Musca delivered a couple of modules to the trainees, and did it very well. When asked for his opinion on Ms. Musca's ability to become a WA at OWA, Mr. Bieksa replied that while he could not comment on her ability to manage a high case load, she had all of the individual skills required to be an effective WA.

[78] Employer counsel suggested to Mr. Bieksa in cross-examination that it was not prudent to offer an OFL instructor position based solely on his observation of Ms. Musca's performance at two mock hearings, when she had no actual experience in making oral presentations. Mr. Bieksa replied that he was very impressed with her abilities, and was confident that if she lacked any skill, she would pick that up during the 10 day training all new trainees receive.

[79] Ms. Mador testified that there was a brief discussion between the panel members after Ms. Musca's interview had been scored. Ms. Tsaferis commented that Ms. Musca was very hardworking, and that it was unfortunate that Ms. Musca was disadvantaged because she did not get the same opportunity as other ICs did to develop her skills through acting WA assignments. Ms. Tsaferis expressed the opinion to the others that Ms. Musca had the potential to be a good WA, but "was not there yet".

[80] Ms. Tsaferis testified in chief that she had managed Ms. Musca for a short time before 1996, and again from 2002 as a bilingual IC at the Ottawa office. When asked to comment on Ms. Musca's work performance, Ms. Tsaferis replied that nothing stood out. She testified that after Ms. Musca's interview had been scored, she commented to the other panel members that Ms. Musca was an excellent employee, but she had no knowledge about Ms. Musca's ability to be a WA because she had never acted in that capacity. She told them that Ms. Musca did not show any interest in performing WA duties until after her return from maternity leave in May 2007.

[81] Ms. Tsaferis agreed on cross-examination that the panel's decision that Ms. Musca was not qualified was based solely on the interview score. She was the only one who commented on Ms. Musca's performance, and that was after the decision was made that Ms. Musca was not qualified. She testified that Ms. Musca was an excellent employee, that she had interpersonal

skills, was articulate and organized. She agreed that Ms. Musca had performed the Program Assistant and IC duties she had listed in the resume. She agreed that Ms. Musca was excellent on the CMS, but could not comment on whether she was also excellent on IFIS.

[82] Ms. Tsaferis agreed that the written submissions prepared by Ms. Musca were competently done, but added that WAs at the Ottawa office had commented on a few occasions that she "needed to pay more attention". Union counsel advised that all three WAs in Ottawa had informed the union that they thought very highly of Ms. Musca, and were of the opinion that she was qualified to be a WA, and asked whether Ms. Tsaferis was surprised by that. She replied, "no. They all told me that, that she had remarkable potential". When counsel asked whether she agreed with that assessment, Ms. Tsaferis said "yes". Ms. Tsaferis was questioned on the performance reviews she had completed for Ms. Musca. She confirmed that the conclusions she made at the time about Ms. Musca's performance were accurate. She testified that by 2005, Ms. Musca had begun to show interest in progressing to a WA position. She agreed that to the extent that Ms. Musca consulted with and obtained suggestions from experienced WAs with regard to her work, it was a positive habit, showing her desire to learn and improve.

[83] Counsel put to Ms. Tsaferis that after Ms. Musca's interview had been scored, she had made a comment to the effect "Jennifer could develop into an excellent WA". Ms. Tsaferis agreed, but added that presently she could not say whether Ms. Musca would be "excellent", because she had been away from work for a significant time.

[84] Ms. Tsaferis agreed that following the job competition in July 2007, Ms. Musca continued as IC until January 2008, and that in that period she made several presentations at the Appeals Resolutions officer level, three hearings before the WSIAT, and one mediation. She agreed that the WA who accompanied Ms. Musca to the WSIAT hearings, Mr. Andre Descoeurs, subsequently wrote to her that Ms. Musca did an excellent job, and that Mr. Descoeurs sent her a similar commendation about Ms. Musca after observing the mediation she did. Ms. Tsaferis stated that she had no reason to doubt Mr. Descoeurs' assessment.

[85] The union called Mr. Denis Leblanc, a WA at the Ottawa office, and Ms. Brimicombe in re-direct. Mr. Leblanc testified that since Ms. Musca became an IC at the Ottawa office in 1999, he had both informal and formal responsibilities with regard to her work. Informally he had an arrangement with Ms. Musca that she could come to him for guidance and advice, and that he would provide constructive criticism about her work. On a formal basis, since there was no manager on site, management relied on him to provide feedback on the performance of ICs.

[86] Mr. Leblanc testified that Ms. Musca carried out a number of WA functions, although employed as a IC. From 2002 to 2007 she did the bulk of merit reviews for the WAs, and made recommendations on how to proceed with files. According to Ms. Leblanc, "a huge percentage of the time she was bang on". He testified that at the time there was an attempt to reduce the number of oral hearings. He relied on Ms. Musca to identify files that could be dealt with through written submissions and to prepare the written submissions. He testified that about 20 percent of the time, a telephone conference would take place between the Appeals Resolution Officer and Ms. Musca, wherein the ARO would question Ms. Musca on her written submissions. He described these as "mini oral hearings", In the early days he observed Ms. Musca do that, and she handled that work very well. Mr. Leblanc testified that in 2004 Ms. Musca handled for him a claim by a widow, whose husband had died as a result of exposure to asbestos, which had been denied. She researched and gathered evidence for appeal. Her research disclosed a cluster of similar claims. She came up with a precedent where a similar claim had been allowed, and she won on appeal.

[87] Mr. Leblanc testified that normally only WAs did full representation cases. Starting in 2003, however, at her request Ms. Musca was allowed to carry ten full representation files in addition to her IC duties and her merit review duties. He testified that she continued to ask for more work, and her full representation case load was gradually increased. By the time she took maternity leave in January 2007, she had a case load of approximately 50 full representation cases. Mr. Leblanc testified that the work Ms. Musca did on these cases was no different than what a WA would have done, except that at the WSIAT stage she handed over to a WA. If a file had to be closed, Ms. Musca did the closing interview and signed off on the letter. He would always review the letter before she signed off, but had to suggest changes only 10 to 15 percent

of the time. Mr. Leblanc testified that Ms. Musca also did outreach clinics which was normally a function performed by WAs.

[88] In cross-examination Mr. Leblanc testified that while oral presentation was one of the most important components of the WA job, WAs were encouraged to settle before the WSIAT stage. He testified that since Ms. Musca was doing excellent work on some of his other WA work, by 2007 he was able to spend over 70 percent of his time on WSIAT matters. In contrast, after she left, he spent no more than 25 percent of his time on that. He stated that he did not encourage Ms. Musca to do hearings before the WSIAT on her own for two reasons. First, by doing other WA duties for him, she enabled him to concentrate on WSIAT appeals. Second, he saw no urgency for Ms. Musca to get hearing experience because he did not foresee a vacancy arising for WA in Ottawa.

[89] Mr. Leblanc testified that Ms. Musca did all the work relating to full representation cases except signing off on closure letters. He stated that he would have been content to let her do that also, but policy required that a WA sign off closure letters. Mr. Leblanc agreed with employer counsel that on occasion he disagreed with Ms. Musca's recommendations on whether or not to close a file. In all of those occasions, he felt that the file should be closed, but Ms. Musca persuaded him by presenting evidence and arguments, that there was sufficient merit to proceed.

[90] When asked whether he ever had concerns about Ms. Musca's work, Mr. Leblanc replied that in the early years occasionally he had to suggest changes to Ms. Musca's written submissions, mostly on issues of style. He explained that Ms. Musca's submissions were in English, but her first language was French. He testified that she accepted his criticism and learned from it, so that by 2004-2005 he had to suggest corrections only the odd time. Mr. Leblanc disagreed with employer counsel's suggestion that the WA files Ms. Musca dealt with were those not involving complex issues. He pointed out as an example that the "asbestos case" she did was very complex. In re-direct, Mr. Leblanc testified that Ms. Musca did merit reviews with full range of complexity as any WA would do.

[91] Testifying in re-direct, Ms. Brimicombe was asked to comment on Ms. Finch's opinion that she shied away from oral hearings, and her testimony that at least on ten occasions, she had

to direct Ms. Brimicombe to proceed with files, which Ms. Brimicombe wanted to close. Ms. Brimicombe testified that she recalled only one such occasion. It involved a file which had already been scheduled for hearing before the WSIAT when she inherited it from another WA. Upon review, she discovered that no work had been done on the file. There was no medical evidence and the client was high strung. She felt that the file was not hearing ready, and she had no time to get it ready before the hearing. Since she had just started her first assignment as acting WA, she concluded that it was prudent to consult her manager. She explained her concerns to Ms. Finch that the file was not hearing ready. Following a discussion, Ms. Finch expressed her opinion that Ms. Brimicombe should proceed to hearing despite her concerns. Ms. Brimicombe also agreed with that, since it was not appropriate anyway to withdraw at the last minute. Ms. Brimicombe stated that as an inexperienced WA, it was prudent to seek her manager's guidance in the circumstances. She did not go to the manager because she disliked or was scared of oral hearings. She explained that when she was offered her very first WA acting assignment at St. Catharines, she was explicitly advised that she would be taking over a caseload of 100 to 130 files, many with hearings already scheduled. Ms. Brimicombe reasoned that if she had any concern about doing oral hearings, she would not have accepted that offer.

[92] Ms. Brimicombe, however, explained that she strongly believed that it is preferable to settle claims at the lower levels rather than litigate. Workers compensation was a form of income replacement. Litigation can drag out for 5-7 years. In the meantime, the workers are left with no income, and could end up losing their houses, vehicles and even their marriages and children. She stated that it was not correct to characterize her desire to settle claims early, as "shying away from hearings". Ms. Brimicombe testified that in the approximately 3½ years she worked as acting WA, Ms. Finch had never expressed any concern that she tended to avoid hearings. She testified that she had done at least 13 to 15 oral hearings before the WSIAT, and some of the resulting decisions are published. She said that a review of the results she obtained would show that she was good at oral presentations.

[93] Conclusion

The Policy grievance

The grievance is allowed. The Board declares that the employer contravened article 6.3 in the manner it conducted the job competition in relation to the grievors.

[94] Grievance of Kathleen Brimicombe

There is uncontradicted evidence that Ms. Brimicombe had worked as a WA for significant periods. The evidence also establishes that in that time, she performed the full range of WA duties, both in terms of complexity and volume. She received very positive reviews of her performance as WA, and commendations from her manager and senior WAs. The only "negative" the Board heard of was the opinion of her manager that Ms. Brimicombe "did not like" or "shied away" from oral hearings. This is an impression the manager had formed, which is not supportable by any evidence. Such a concern had never been brought to Ms. Brimicombe's attention, and is not mentioned in any of the performance reviews, which assess her performance as excellent.

[95] Ms. Bosworth certainly has an impressive resume. However, there was no evidence before the selection panel, and there is none before the Board, that Ms. Bosworth had some of the key qualifications for the WA position. Namely, advocacy/oral representation, and an "in-depth knowledge of the Workplace Safety and Insurance Act, regulations and policies". Her resume and application disclose none of that. Having identified Ms. Bosworth as the successful applicant, Ms. Finch obtained references from two supervisors at the Ombudsman's Office. Eight predetermined questions specific to the OWA were posed to them. The questions did not include an inquiry into advocacy/oral presentation skills. The question "How would you rate the applicant's level of expertise in the workers compensation/workplace safety and insurance area?" was posed. The supervisors rated Ms. Bosworth at 4½ out of 5 and 5 out of 5 for that question. Despite the obvious absence of any indication in Ms. Bosworth's resume that her position at the Office of the Ombudsman required her to have any knowledge of the workers compensation related legislation, regulations and policies, the panel did not seek clarification as to how and when Ms. Bosworth may have acquired that level of expertise in those areas. Nor did the employer call Ms. Bosworth to testify to the effect that she indeed had that expertise.

[96] On the basis of the extensive evidence presented, the Board is convinced that if the employer had systematically evaluated all of the relevant information as it was obliged to do under article 6.3, including Ms. Brimicombe's experience and performance as WA, she would have been found to be at least relatively equal in qualifications and ability to Ms. Bosworth. Given her greater seniority, therefore, she was entitled to be appointed. The grievance is allowed. The employer is directed to rescind the appointment of Ms. Bosworth, and to appoint Ms. Brimicombe retroactively to the date of Ms. Bosworth's appointment. Ms. Brimicombe is also entitled to be made whole for any and all losses she suffered as a result of the employer's breach.

[97] Grievance of Gabriella Letterio

Ms. Letterio's interview score is rendered useless as a measure of her qualifications and ability because of the circumstances under which she was required to attend the interview with no preparation and the disruption during the process. The evidence before the Board establishes that Ms. Letterio was certainly qualified for the WA, and had performed many of the key WA functions very well. However, the evidence indicates that, Ms. Harper, also had some significant experience in oral advocacy, including advocacy in relation to workers compensation issues. In all of the circumstances, the Board cannot conclude on a balance of probabilities that Ms. Letterio would have been found to be relatively equal in qualifications and ability to Ms. Harper, but for the flaws in the process. In the circumstances, while Ms. Letterio's grievance is allowed, the remedial order is that the competition be re-run. If Ms. Letterio is successful in the re-run, she shall be appointed retroactively to the date of the initial appointment. She will then be also entitled to be made whole for any and all losses she suffered as a result of the employer's breach.

[98] Grievance of Ms. Jennifer Musca

Ms. Musca's case is different in that she only needs to establish that she had the minimum qualifications and ability for the WA position in order to be entitled to an appointment. Ms. Musca had not worked in the WA position. As Ms. Tsaferis acknowledged, she was unfortunate in that, partly as a result of her maternity leave, she did not have the developmental opportunities as other ICs did. As a result, her experience in actual oral advocacy pre-dating the competition was limited to one presentation before an Appeals Resolution officer. Despite that lack of experience, there is substantial evidence that she had very good skills in oral presentation

and legal argument. It is evident that the employer did not consider experience in presentation within the Workplace Safety and Insurance hearing system as a necessary pre-condition to be deemed qualified for a WA position. The managers readily admitted that many ICs with potential, but no actual experience have been appointed as WA. Moreover, the employer was prepared to appoint Ms. Bosworth, despite the absence of evidence that she had any experience in presentations of any type. There is significant evidence that Ms. Musca had performed many of the other WA functions very competently In all of the circumstances, the Board is satisfied on a balance of probabilities, that Ms. Musca would have met the minimum qualifications required for the WA position had the employer complied with the collective agreement. Her grievance is allowed. Employer counsel advised, the Board that while the Ottawa vacancy was not filled through this job competition, it was subsequently filled through a lateral transfer. Counsel submitted that if the Board concludes that Ms. Musca was qualified at the time, the Board should order that the competition be re-run between Ms. Musca and the incumbent. I do not agree. The incumbent did not participate in the job competition. Had the employer complied with the collective agreement in July 2007, Ms. Musca would have been appointed at the time, and the incumbent would not have had an opportunity to request a lateral transfer since there would not have been any vacancy available. The employer is directed to appoint Ms. Musca to the position retroactively to the date she would have been appointed had she been deemed qualified through the instant competition process. Ms. Musca is also entitled to be made whole for any and all losses she suffered as a result of the employer's breach.

[99] Grievance of Belinda Carbert

The union did not seek an order that Ms. Carbert be appointed, and conceded that the Board did not have sufficient evidence before it to be able to determine whether or not Ms. Carbert was relatively equal in qualifications and ability to the successful applicant in Windsor, Mr. George Metulynski. Therefore, while Ms. Carbert's grievance is also allowed, the remedy is limited to an order that the competition be re-run. If Ms. Carbert is successful in the re-run, she shall be appointed retroactively to the date of the initial appointment. She will then be also entitled to be made whole for any and all losses she suffered as a result of the employer's breach.

[100] Union counsel submitted that if the Board makes an order that a competition be re-run, it should direct the parties to work out the terms under which it will be done. He further submitted

that if the Board decides to set the terms, it should include a condition that the selection panel should not include any of the managers who served on the original panel. Employer counsel urged the Board to set terms similar to those ordered in Re Alderson (supra), if any competitions are ordered to be re-run.

[101] The only reason union counsel offered for the Board not setting terms for the re-running of the competitions was the passage of time since the original competition. It was submitted that the parties would be best able to take into consideration all of the consequences of the passage of almost 3 years, and agree to mutually acceptable terms. Passage of time of this nature between the date of a grieved competition and the obtaining of a Board decision is not uncommon. That is not a reason for the Board to not provide finality to the litigation. Besides, no matter what terms are directed by the Board, there is nothing that prevents the parties from varying those terms or agreeing to different terms. Therefore, the Board directs that the competitions to be re-run in relation to the grievances of Ms. Letterio and Ms. Carbert be subject to the following conditions:

(a) The competition for the Downsview position shall be restricted to Ms. Letterio and the successful applicant, Ms. Harper. The Board is satisfied that Ms. Letterio met the qualifications and ability for the position. Therefore, in the event that Ms. Harper elects not to participate or declines the position, Ms. Letterio shall be awarded the position. In the event that Ms. Letterio is appointed, she shall be entitled to be made whole for any and all losses she suffered as a result of the employer's breach.

(b) The Board does not have before it evidence that would allow a determination as to Ms. Carbert's qualifications and ability for the WA position. Therefore, the competition for the Windsor position shall be re-run between Ms. Carbert and Mr. Metulynski only. If Mr. Metulynski elects not to participate or declines the position, Ms. Carbert shall be awarded the position, provided the employer determines that Ms. Carbert met the qualifications and ability required for the position following a proper assessment of that. In the event Ms. Carbert is appointed, she shall be entitled to be made whole for any and all losses she suffered as a result of the employer's breach.

(c) In assessing qualifications and ability, the selection panel shall not take into account the experience, knowledge and ability the successful applicants may have acquired since their appointment following the initial competition in July 2007, or their performance in the position since their appointment.

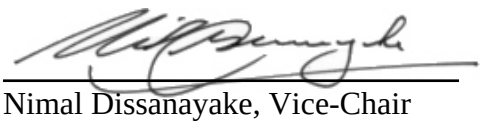
(d) The competitions ordered herein shall be commenced no later then 30 calendar days from the date of issuance of this decision, subject to extension only by mutual agreement between the parties.

(e) The selection panel shall have regard to the criteria for a proper selection process set out by this Board in Re MacLellan and DeGrandis, set out supra at paragraph 6.

[102] The Board does not consider it warranted or appropriate in this case, to prohibit any of the managers who served on the original selection panel, from serving on the panel in the re-run of competitions herein directed. There was no allegation of bad faith on the part of any of the four managers, and none was disclosed by the evidence. The Board found nothing in the evidence that causes it to doubt the good faith and integrity of any of the managers concerned. Each of them testified candidly and honestly, even when it would have been obvious that the testimony would not be helpful to the employer's case. It was clear that these managers in good faith believed that the process they were following was proper, particularly relying on advice received from Human Resources.

[103] I retain jurisdiction to deal with any disputes that may be encountered in the implementation of the directions made herein, and with any remedial issues that remain following the conclusion of the competitions ordered.

Dated at Toronto this 15th day of June 2010.



Nimal Dissanayake, Vice-Chair