

**IN THE MATTER OF AN ARBITRATION**

**between**

**The Haldimand-Norfolk Police Services Board**

**and**

**The Haldimand-Norfolk Police Officers Association**

Grievance of  
Ms Kelley McDonnell

**Before:**

R. L. Jackson  
Sole Arbitrator

**Appearances:**

For the Board:

Graydon Sheppard, Counsel  
David Smith, Civilian Administrator

For the Association:

Paul Osier, Counsel  
Dennis Leigh, Vice President  
Kelley McDonnell, Grievor

A hearing was held in this matter in Simcoe on 28 September 1994.



This is the grievance of Ms Kelley McDonnell, who is a Clerk-Typist, Level III, with the Haldimand-Norfolk Regional Police Force. Ms McDonnell applied for a Clerk-Typist 1 position, entered the competition, but was unsuccessful. Being the most senior of six candidates for the job and considerably senior to the successful candidate, she grieves under Article 3.06 of the collective agreement currently in place between the civilian personnel and the Police Services Board. Ms McDonnell seeks as a remedy that I order that she be awarded the position in question. It was established that the successful candidate had been notified of the grievance, of the time and place of the arbitration hearing, and of her right to appear. However, she did not attend the hearing.

Article 3:06 is set out below.

3:06 Job postings will apply to all permanent openings for personnel. A notice of each vacancy will be posted in each divisional headquarters and detachment office for a period of not less than five (5) calendar days. Job postings shall indicate the job title, job rate, and a brief description of the job duties. Job postings shall not, at any time, apply in cases of temporary vacancies due to sickness or leave of absence. For the purpose of administering the job postings provisions of this Agreement, the following factors shall be considered:

- (a) seniority



(b) knowledge, efficiency, and ability to perform the work.

It is understood and agreed that only where the factors in sub-paragraph 3:06 (b) are substantially equal, seniority as herein defined shall govern.

The facts of this case are as follows. Ms McDonnell has been with the Haldimand-Norfolk Regional Police Force since April of 1980, having begun as a part-time dispatcher and having assumed full-time duties as a Clerk-Typist 1 in August of that year. Ms McDonnell progressed steadily through the Clerk-Typist ranks over the next thirteen years. It is clear from the evidence that the Force was very pleased with Ms McDonnell's work; her performance appraisals were uniformly positive, there were no disciplinary incidents on the record and, indeed, she was asked to train a number of other clerk-typists, including the successful candidate.

On May 13, 1993, the Clerk-Typist 1 position in question was posted, pursuant to the provisions of the collective agreement. The posting is reproduced below.

**Haldimand-Norfolk Regional Police**

**Memorandum**

**MEMO TO:** All Personnel  
**MEMO FROM:** Mr. David Smith, Administrator  
**DATE:** 12 May 1993  
**REFERENCE:** Job Posting -  
Clerk Typist, Group 1

**INTERNAL**  
**APPLICATIONS WILL BE ACCEPTED BY THE UNDERSIGNED FOR A**  
**FULL-TIME CIVILIAN POSITION:**

**POSITION** CLERK TYPIST, GROUP 1



<b>LOCATION</b>	DIVISION #2 (HAGERSVILLE)
<b>SALARY AGREEMENT</b>	AS PER PRESENT COLLECTIVE
<b>EDUCATION/ DIPLOMA EXPERIENCE TYPING</b>	SECONDARY SCHOOL GRADUATION (GRADE 12) OR EQUIVALENT; SPEED/ACCURACY 50 W.P.M.
<b>DUTIES (DATA</b>	OPERATE OMPAC COMPUTER SYSTEM ENTRY)
	ANSWER TELEPHONE, RECEPTIONIST, FILING
	ASSIST WITH OPERATION OF OFFICE EQUIP- MENT AND ANY OTHER RELATED TASKS AS ASSIGNED BY A SUPERVISOR

**CLOSING DATE FOR ACCEPTING APPLICATIONS IS 21 MAY 1993**

POSTED ALL DIVISIONS IN ACCORDANCE WITH ARTICLE 3:06 OF  
PRESENT FULL-TIME CIVILIAN COLLECTIVE AGREEMENT

DAVID SMITH,  
ADMINISTRATOR

At the time of the posting, Ms McDonnell was off work on maternity leave. Hearing of the posting, she submitted her application for the position on May 21, 1993. The position was of a lower classification but was straight day work, which is why it appealed to Ms McDonnell. Ms McDonnell returned to work from maternity leave on June 14, 1993.

There were six candidates for the position — two full-time employees and four part-time. The selection procedure for the position included a typing test, a test of English spelling and usage, and an interview with Mr. David Smith and Inspector Brian Bird (respectively, the civilian Administrator in charge of civilian staff and a senior officer of the



force). The decision on the successful candidate was then made at a meeting of the Chief of Police, four senior uniformed officers, and Mr. Smith. Ms McDonnell was required to complete the English test the day after she returned to work and the typing test on the fourth day after her return.

The English test was a new element in the selection procedures used by the Force, and this was only the second time it had been used. The test had been incorporated into the selection procedures as a result of Article 3.06 being added to the collective agreement and also, apparently, for employment-equity purposes. That is, the Police Service wanted to ensure that its promotion decisions were grounded in actual, specific qualifications, and that that fact could be demonstrated.

According to both Mr. Smith and Inspector Bird, the decision on the successful candidate was based solely on the results of the typing and English tests; no other considerations — for example, performance appraisals — entered into the decision and the interview was not a factor. The interview apparently only served the purpose of soliciting reaction to the tests and ensuring that the candidates all understood the nature of the job for which they were applying.

The results of the grievor's and the successful candidate's typing and English test scores are set out in the tables below. As can be seen, Ms McDonnell scored highest on typing, with a net typing speed (that is, the number of words typed in five minutes, less the number of mistakes) of 58.2 versus a net typing speed for the successful candidate of 52.8. On the other hand, the successful candidate scored highest on the English test, with an overall grade of 85.5%, compared to 70.2% for Ms McDonnell.



It was acknowledged by Mr. Smith in uncontradicted evidence that Ms McDonnell misread the instructions on one part of the English test, with the result, apparently, that she lost some 25 marks. I must point out, however, that I found the evidence on this matter somewhat confusing and the most I am prepared to find on the facts is that Ms McDonnell misread the instructions on one part of the English-usage test.

Candidate	Typing Speed (Net)	Rank	% Error Rate	Rank	Detail Appreciation (Out of 135)	Spelling (Out of 50)	Sequential (Out of 25)	English (Out of 30)	Total (235)	Percentage (100)	Rank
Grievor	58.2	1	2.5	4	93	31	24	17	165	70.2	5
No. 2*	52.8	2	2.0	3	122	39	22	17	201	85.5	3
No. 3	50.6	5	3.3	6	129	42	24	17	212	90.2	1
No. 4	51.4	3	1.1	1	126	43	22	0	191	81.2	4
No. 5	51	4	2.7	5	130	47	25	5	207	88	2
No. 6	50.6	5	1.8	2	117	36	24	14	191	81.2	4

\* the successful candidate

The tests were administered by Ms Pat Hosack, Manager of Finance for the police force. Ms Hosack testified that, if a candidate appeared to be particularly nervous during the typing test, she might be allowed a "one-minute leeway". This meant that, although the candidate would have five minutes to complete the test, the number of words typed would be divided by four rather than five. This one-minute leeway was granted to the successful candidate, so that her score was computed as follows:

$$\frac{294 \text{ (words typed in 5 minutes)}}{4} = 73.5 - 6 \text{ (mistakes)} = 67.5 \text{ wpm}$$



If the one-minute leeway had not been granted, the calculation would have been

$$\frac{294 \text{ (words typed in 5 minutes)}}{5} = 58.8 - 6 \text{ (mistakes)} = 52.8 \text{ wpm}$$

The evidence made clear that it was the *adjusted* net typing speed — that is, the 67.5 words per minute rate resulting from the one-minute leeway — that was reported to the senior officers and which was used in the meeting where the decision on the successful candidate was made.

The evidence also revealed that two different typing tests — that is, bodies of text to be typed in five minutes — had actually been used. The reason for this, apparently, was to allow for candidates who might have recently taken the regular test, although it was not established in evidence that either the grievor or the successful candidate had actually taken a test recently. The grievor had last taken a test in an unsuccessful application for a job in 1989. Thus, the grievor and the successful candidate typed two different texts for their typing tests. Counsel for the Association, Mr. Osier, argued that Ms McDonnell's was the more difficult of the two.

David Smith, Administrator in charge of the civilians, gave evidence for the Force. Among other things, he testified that he felt that the two tests — that is, typing and English — had equal weight in the decision process. When asked by Mr. Osier, in cross examination, whether or not he would say that the grievor and the successful candidate were both substantially equal in terms of their ability to do the work of the Clerk-Typist position, he answered "yes". He also admitted, in cross examination, that he had probably told the grievor that, if the department had been doing things in "old way", she would definitely have gotten the job. Prior to the instituting of formal testing, in other words, the senior officers



would have considered whether they thought the applicants could do the job, along with the seniority of the applicants. On the basis of that process, Ms McDonnell would have been chosen.

Inspector Bryan Bird also testified with respect to the interviews with the candidates and the meeting of senior officers at which the candidates were discussed and the decision was made. Present at the meeting were the Chief of Police, the Deputy Chief, Inspector Berger, Inspector Bird, S/Sgt. Little and Mr. Smith.

Inspector Bird confirmed that the only criteria taken into account in the decision on the successful candidate were the results of the tests; neither the results of the interviews nor the candidates' experience or performance appraisals were considered. He also confirmed that the Chief and other senior officers present based their decision on the test results which showed the successful candidate's net typing speed as being 67.5 words per minutes — in other words, her actual speed adjusted by Ms Hosack's "one-minute leeway."

### Award

This issue turns on that part of Article 3.06 which guides the Haldimand-Norfolk Police Service in the promoting of its civilian employees. The operative part of Article 3.06 is this:

...For the purpose of administering the job postings provisions of this Agreement, the following factors shall be considered:

- (a) seniority
- (b) knowledge, efficiency, and the ability to perform the work.



It is understood and agreed that only where the factors in sub-paragraph 3:06 (b) are substantially equal, seniority as herein defined shall govern.

Article 3:06 is what is known as a competitive or relative-ability seniority clause; that is, seniority acts, in effect, as a tie-breaker where two or more candidates are roughly equal in terms of the other criteria stipulated in the provision. In this case, those other criteria are knowledge, efficiency and the ability to perform the work.

Article 3:06 uses the term, "substantially equal". That is, when two or more candidates are "substantially equal" in terms of the other criteria, then seniority governs. The question arises, then, "how equal is 'substantially equal'?" Arbitral jurisprudence guides us in answering this question, as the following excerpt from arbitrator Wetherill's *Great Atlantic and Pacific Co.* award indicates.

In *Re Lady Galt Towels Ltd. and Textile workers Union* (1969), 20 L.A.C. 382 (Christie), the board adopted the view that the test of "relative equality" is really one of determining whether or not one employee is more qualified than another by a "substantial and demonstrable margin." We would agree with this, subject always to the qualification that the determination is to be made having regard to the particular job in question. [*Re Great Atlantic and Pacific Co. of Canada Ltd. and Canadian Food and Allied Workers' Union, Locals 175 and 633* (1979), 21 L.A.C. (2d) 444.]

Thus, the issue in this case is the following: Does the evidence establish that Ms McDonnell was substantially equal to the successful candidate in terms of knowledge, efficiency and ability to perform the job? Putting the question in the obverse, does the evidence establish that the successful candidate was superior to Ms McDonnell in terms of those factors, by a substantial and demonstrable margin? The answer is that it does not.



Dealing, first, with the two criteria on which the decision was actually made — the results of the typing and the English-usage tests — it may be said that the decision made at the senior officers' meeting was correct in the sense that there was a substantial and demonstrable margin between Ms McDonnell and the successful candidate on the face of the figures presented. That is, there was a substantial margin, in favour of the successful candidate, demonstrated by the numbers on which the senior officers relied.

However, one of those numbers, the net typing speed, was not correct. The net typing speed recorded for the successful candidate, 67.5 words per minute, was the result of her having been accorded the "one-minute leeway", without which it would have been 52.8 words per minute. There is little to be said about the one-minute leeway, other than that it completely invalidates the typing test as a competitive measure. Apparent nervousness cannot be a basis of according certain candidates a major advantage which, on the basis of a calculation, increases their score by almost 25%. To have any validity, tests must be written, and scored, on a consistent basis.

Thus, while those present at the senior officers' meeting saw typing scores of 58.2 wpm and 67.5 wpm and English-usage scores of 70.2% and 85.5% for the grievor and the successful candidate respectively, they actually should have seen scores as set out below.

	Net Typing Speed	English
Grievor	58.2	70.2
Successful candidate	52.8	85.5

In my view, these scores do not clearly demonstrate a substantial margin of superiority for the successful candidate. While she is higher on English, the grievor is higher on net typing



speed; and while it true that the successful candidate's margin on the English test score is more substantial than the grievor's margin on the net typing speed, that is not sufficient to establish a substantial margin of superiority. The evidence disclosed that the two tests were given roughly equal weight in the decision process, and there was no suggestion that English is more important than typing speed and accuracy for purposes of the position.

Thus, while it can be said that the above scores, taken alone and out of context, perhaps demonstrate *some* superiority for the successful candidate, they do not demonstrate a *substantial margin of superiority*. Adding in the fact that Ms McDonnell was required to take the typing test on her second day back at work and the English test on her fourth day, and taking into account the error in reading the instructions which may have cost her some marks on the English test, the margin of superiority becomes even less significant.

Beyond the question of the test scores, however, it must be remembered that Article 3:06 stipulates three criteria — knowledge, efficiency, and ability to perform the work. Typing speed and English skills may be relevant to, and part of, efficiency and ability to perform the work, but they are only two of a number of elements constituting those criteria; and they have nothing to do with knowledge (except, obviously, knowledge of English).

The selection panel should have, but clearly did not, consider all evidence available to it with respect to all three of the criteria, as applied to all applicants for the position. There is no doubt that, in this case, there was significant additional available evidence relating to all three of the stipulated criteria — the interviews, performance appraisals, the officers' knowledge of the candidates, and other factors such as discipline and educational records. But that evidence was not reviewed; the uncontradicted testimony of both Mr. Smith and



Inspector Bird was that nothing beyond the test scores was considered in making the decision. In short, when making the promotion decision, the Force did not comply with Article 3:06.

In some sense, this might suggest that I remit the matter back to the parties to conduct a new competition; indeed, that is what counsel for the Police Services Board suggested. But that is neither necessary nor appropriate in this situation. There is clear, substantial and uncontradicted evidence that, at the very least, Ms McDonnell was substantially equal to the successful candidate on the three criteria. There is, first, the fact that she has performed the job in question, Clerk-Typist, for thirteen years, during which time she was promoted steadily and never disciplined. She received good performance appraisals, and was highly thought of by her supervisors — indeed, highly enough to be asked to train other clerk-typists, including the successful candidate. The successful candidate, on the other hand, worked as a clerk-typist, on a part-time basis, for approximately three years. Aside from the test results, there was no evidence presented with respect to this person's qualifications.

Given the foregoing facts, it is very difficult to conclude that Ms McDonnell was not — at least — approximately comparable to the successful candidate in terms of the three criteria of knowledge, efficiency and ability to perform the work. However, what makes it completely impossible to conclude otherwise is Mr. Smith's answer to Mr. Osier's question as to whether he thought that Ms McDonnell and the successful candidate were substantially equal in terms of their ability to do the work: "Yes." Mr. Smith was the direct supervisor of both people, and knew them and the jobs well. He would have no reason to tell anything other than the truth, nor was there any indication that he did so.



Finally, it will be remembered that I have found that, even on the basis of the tests scores measuring the criteria that *were* looked at, the successful candidate cannot be said to have been substantially superior to Ms McDonnell. Indeed, when one allows for the mistake in reading the instructions for the English-usage test and the timing of the tests, the difference is even less significant.

For all of the foregoing reasons, then, I find that Kelley McDonnell was substantially equal to the successful candidate in terms of the criteria stipulated in Article 3:06 (b) and, accordingly, that the Police Service violated that article in not awarding Ms McDonnell the posted position. I therefore direct that Ms McDonnell be forthwith appointed to the position.

I remain seized in the event that the parties have any difficulty implementing my award.

Dated at Kingston, this 6th day of December, 1994

R. L. Jackson