

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHEQUAMEGON UNITED TEACHERS, Complainant

vs.

BAYFIELD SCHOOL DISTRICT, Respondent

Case 29
No. 62623
MP-3961

Decision No. 30715-A

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier - West, P.O. Box 988, Hayward, Wisconsin 54843, appearing on behalf of the Complainant.

Attorney Christopher R. Bloom, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On August 18, 2003, the above Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the above Respondent had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by selecting a non-bargaining unit person for a vacant High School Secretary position for which an allegedly qualified bargaining unit member had applied. The Respondent filed an answer denying that it had committed the prohibited practice alleged by Complainant.

The Commission appointed a member of its staff, Marshall L. Gratz, as Examiner to conduct hearing and make and issue Findings of Fact, Conclusions of Law and Order in the matter. Pursuant to notice, a hearing was held before the Examiner on November 7, 2003, at the Respondent's District office in Bayfield, Wisconsin. A stenographic transcript was made of the hearing. The parties filed post-hearing briefs which were exchanged by the Examiner on January 7, 2004, marking the close of the hearing.

Dec. No. 30715-A

Based on the evidence and arguments of the parties, the Examiner issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Chequamegon United Teachers (Complainant or Association), is a labor organization with a mailing address of P.O. Box 988, Hayward, Wisconsin 54843.

2. The Respondent, School District of Bayfield (Respondent or District), is a municipal employer with offices located at 300 North Fourth Street, Bayfield, Wisconsin. At all material times, the operation of the Bayfield Recreation Center and of the Bayfield High School have been among the Respondent's functions. At various times material to this case, Carrie Miller, Robert Kent, Sheila Kelly and Mark Jansen have been agents of the Respondent: Miller as Recreation Center Manager until approximately June of 2003, Kent as Principal of Bayfield High School, Kelly as District Administrative Assistant, and Jansen as District Administrator.

3. At all material times, Complainant has been the exclusive representative of a bargaining unit consisting of all regular full-time and regular part-time non-professional employees of the Respondent, excluding supervisory, managerial, confidential and professional employees. Regular employees who work in the Bayfield Recreation Center (Lifeguards, Head Lifeguards, and Recreation Center Receptionists) have been part of that bargaining unit since April 15, 1997.

4. At all material times, Complainant and Respondent have been parties to a collective bargaining agreement (Agreement) with a nominal duration of July 1, 2001, through June 30, 2003. Despite its nominal expiration, the parties have treated the Agreement as remaining in effect at all material times, at least for purposes of this dispute. The Agreement contains no grievance procedure and no final and binding method for resolving disputes arising concerning its meaning and application. Agreement Art. VI.E. provides that each employee shall be evaluated at least once every year and that a copy of the evaluation shall be placed in the employee's personnel file. Agreement XI.A. provides that all newly-hired employees (after July 1, 1987) who work less than 20 hours/week will not receive health and dental benefits. The Agreement Art. XV salary schedule for 2002-03 provides hourly rates for "Recreation Center Receptionist" of start \$7.67, one-year \$7.98 and two-year \$8.28 and for "Secretarial" of start \$11.30, one-year \$11.62 and two-year \$11.93. The Agreement also contains the following language concerning job vacancies:

ARTICLE X - JOB VACANCIES

A. The District will notify all bargaining unit members of vacancies through the District's mail system during the school year and through the U.S. mail

during the summer. Employees requesting consideration for transfer or promotion when a vacancy occurs, shall make an application, in writing to the District Administrator.

B. Employees who are current employees of the District, who apply for a bargaining unit vacant position, shall be transferred to said position if they are qualified for the position. When two or more current employees who are qualified for said position, apply for the vacant position; the employee with the greatest in-district seniority shall be transferred to the vacant position.

. . .

5. At all material times, and since approximately September of 2001, T__ W__ (Grievant), has been employed by the Respondent on a part-time (19.5 hours/week) 12-month per year basis as a Recreation Center Receptionist. As such, Grievant has, at all material times, been a member of the bargaining unit represented by Complaint and covered by the Agreement.

6. At all material times, the position description for the Recreation Center Receptionist position held by Grievant has read as follows:

School District of Bayfield
Job Description

Title: Recreation Center Receptionist

Qualifications:

- *High School Diploma supplemented by advance courses in Secretarial/office procedures or relevant work experience.
- *Working knowledge of computers and computer software.
- *Ability to maintain accurate and complete records.
- *Ability to follow written and oral instructions and to carry through procedures as specified.
- *Ability to draft correspondence.
- *Ability to establish and maintain effective and positive working relationships with the public.
- *Ability to maintain confidentiality of information.
- *Ability to be self-motivated and flexible.
- *Ability to meet deadlines.

Reports to: Activity Director

Performance Responsibilities:

1. Secure facility when opening and closing
2. Record daily customer sign-in
3. Answer telephone lines
4. Monitor lifeguard needs in case of pool emergencies/respond to lifeguard emergencies
5. Monitor activity in the Recreation Center building for safety and proper use. Respond to emergencies appropriately
6. Prepare memberships and manage membership and facility use database
7. Maintain positive communication with members, patrons, staff, and school groups
8. Prepare night deposits
9. Use word processing and computer graphic programs to create accurate and visibly appealing brochures, signs and correspondence
10. Provide secretarial support for Community Education programming which includes maintaining correspondence with instructors. Creating new Community Education brochures for subsequent sessions and disbursing brochures to the public
11. Perform clerical duties including filing and record keeping as assigned by the Activity Director
12. Perform miscellaneous cleaning duties of the facility
13. Maintain confidentiality in all matters
14. Complete and maintain American Red Cross certification in Community CPR and Community First Aid
15. Perform all other duties as assigned by the Activity Director

Evaluation: Performance of this job will be evaluated annually by the Activity Director in accordance with Board of Education Policy.

[undated; no reference to Board approval]

7. The only formal evaluation of Grievant's work performance as a Recreation Center Receptionist was issued by her then-supervisor, Miller, in February of 2003. Miller's evaluation of the Grievant's work rated her 32 out of a possible 40, which placed her in the "very good" category, the second highest of four possible overall ratings. On the eight categories of performance, Miller rated Grievant a 4 (very good) out of possible 5 on six categories, a 5 (outstanding) on one category (attendance and punctuality) and a 3 (satisfactory) on one category. Grievant was rated a 3 on "[r]elationships with others/customer service" which was described on the form as "[a]bility to establish effective working relationships with fellow employees, and be responsive to personal needs of patrons, family members and guests." On that point, Miller commented, "T__ does a good job at customer service. However, she can work on not taking things so personally (i.e., customer complaint.)" Miller's evaluation of Grievant also contained the following general comments unrelated to any of the eight graded areas:

[Comment of employee's major strengths, contributions made during this appraisal period, and development achieved since last performance review.]
T__'s work ethic is well developed. She is punctual and willing to take extra shifts. T__ wants to work and does a good job here.

[Identify areas in which employee should seek to improve performance. . . .]
The only area I see as needing a little improvement is in customer relations/diplomacy. T__ takes things too personally and needs to "step back" before reacting to challenging situations.

8. The reference in Grievant's evaluation to a "customer complaint" was to an incident that occurred on January 4, 2003, for which Grievant was issued a written reprimand. The incident arose during a child's birthday party that was being celebrated at the Recreation Center at a time when Grievant was on duty. Grievant's son was among the birthday party guests. The birthday boy's mother discovered that a toy belonging to her son was missing, complained about it to Grievant and asked Grievant repeatedly whether Grievant's son had stolen it. The series of interactions resulted not only in efforts by Grievant to find the toy, but also in a shouting match between the Grievant and the woman during the course of which the Grievant used profanity and threatened to call the police to have the complaining customer removed from the Center premises. The woman ultimately left without the police being called, and Grievant promptly called her supervisor and reported the incident. As a result of that incident, Grievant was issued a written reprimand as follows:

January 17, 2003

T__ W__

. . .

Bayfield, WI 54814

Dear Mrs. W__:

I am writing regarding the January 4, 2003, incident regarding Mrs. [X__] at the Bayfield Recreation Center. After investigating this incident and discussing it with Mr. Mark Jansen, School Superintendent, I have decided that the only corrective action I will take is this letter of reprimand.

As a receptionist, your primary duty is customer service. This entails being friendly and welcoming to the people who come to use the facility. I believe your attitude was belligerent from the start with Mrs. [X__]. I realize personal differences caused the situation to escalate. I also understand you were at work

and could not physically remove yourself from the situation. However, using phrases like, "[i]f you are going to be a bitch," is inappropriate when you are working for the School District. Any use of profanities when dealing with customers is unacceptable.

In the future, I expect you to handle such situations in a calmer, more professional manner. If this does not succeed in diffusing the situation, please call me at home so that I may come down and intervene or ask the lifeguard to take a break so you can leave the building for fifteen minutes.

If you have any concerns, comments, or questions regarding this letter of reprimand, please come see me.

Sincerely,

Carrie K. Miller
School District of Bayfield
Recreation Center Manager

Cc: Personnel File, Mr. Mark Jansen

At the complaint hearing, the Grievant initially asserted that the only consequence for her arising out of the January 4, 2003, customer incident was that she was spoken to about it by her supervisor. She specifically denied having received a written reprimand. However, when she was presented with the reprimand document later in her testimony, she admitted having received the letter, stating, "I remember it now." She further testified that, until a few days before the complaint hearing, she had believed that she had been issued a written reprimand but that she concluded otherwise when she found no copy of it in her personnel file and when Jansen did not contact her after telling her he would look for the document in his file when she asked him about it.

9. In or about June of 2003, a full-time 9-month per year vacancy arose in the Respondent's High School Secretary position. The job description for that position, as revised by the Respondent on July 14, 2003, reads as follows:

**SCHOOL DISTRICT OF BAYFIELD
JOB DESCRIPTION**

TITLE: HIGH SCHOOL SECRETARY

QUALIFICATIONS:

High school diploma supplemented by advanced secretarial/office certification

1. Working knowledge of computers and computer software with the ability to operate and manage computer systems and other technology

2. Ability to maintain accurate and complete records
3. Ability to follow written and oral instructions with carry through procedures as specified
4. Ability to draft correspondence
5. Ability to establish and maintain effective and positive working relationships with the staff, the public and the Principal
6. Ability to maintain confidentiality of information
7. Ability to be self-motivated, flexible and reliable
8. Ability to meet deadlines

CONTRACT:

Nine (9) Month Employee under the Chequamegon United Teachers Master Agreement

REPORTS TO: Principal

PERFORMANCE RESPONSIBILITIES:

1. Cordially greet and assist students, staff and the public serving as the building receptionist
2. Manage the high school student records including attendance and grade reporting
3. Prepare and distribute report cards
4. Perform clerical duties including filing and records searching
5. Accurately and confidentially draft and/or prepare correspondence
6. Process truancy and disciplinary notices
7. Assist the Principal with budgeting and purchasing to ensure supplies are on hand
8. Maintain student physical and immunization records, tracking compliance and notifying the Principal of deficiencies
9. Prepare immunization reports
10. Compile dates and maintain the school calendar
- [there are no items numbered 11 or 12]
13. Prepare and distribute office bulletins
14. Secure substitutes for absence teachers and support staff
15. Perform other duties as assigned by the Principal or Superintendent

EVALUATION:

Performance of this job will be evaluated at least annually by the Principal in accordance with Board of Education policy.

School Board Approval: May 17, 1999

Revised : July 14, 2003.

The revisions of that job description from the form in which it was approved on May 17, 1999, consisted primarily of changes to reflect the fact that there is no longer an Assistant Principal position to which the High School Secretary position had previously reported. The other changes were from a 188-day contract to a 9-month contract, and the addition of "[c]ompile dates and" regarding the school calendar in item 14.

10. On or about June 27, 2003, the Respondent posted internally and advertised externally for a vacancy in the full-time position of High School Secretary. The internal posting read, in pertinent part, as follows:

**SCHOOL DISTRICT OF BAYFIELD
NOTICE OF INTERNAL VACANCY**

June 27, 2003

POSITION: High School Secretary

(School year plus additional days beyond
and before school year as directed by
Administration)

SCHOOL: Bayfield School District

QUALIFICATIONS: Working knowledge of computers and computer software with the ability to operate and manage computer systems. Ability to maintain accurate and complete records. Ability to follow written and oral instructions and to carry through procedures as specified. Ability to draft correspondence. Ability to establish and maintain effective and positive working relationships with the staff and the public. Ability to maintain confidentiality of information, be self-motivated, flexible, reliable and ability to meet deadlines. The successful candidate will be a positive individual whose interactions are helpful and cordial. The successful candidate will also need to handle multiple tasks simultaneously and have good recall of details.

APPLICATIONS ACCEPTED THROUGH: Please submit letter of application by 3:00 p.m. July 18, 2003.

Apply to: Mark A. Jansen, District Administrator
School District of Bayfield
P.O. Box 5001
Bayfield, Wisconsin 54814

**THE SCHOOL DISTRICT OF BAYFIELD IS AN EQUAL OPPORTUNITY
EMPLOYER**

The external advertisement was materially the same as the internal posting, except that it called upon applicants to submit a "resume" as well as a "letter of application" to the District Administrator by the specified closing time and date. The internal posting and external advertisement were prepared by Kelly, after discussion with Kent, and they were issued by the District Administrator's office.

11. As of the closing time and date for applications, the District Administrator's office had received approximately nine application letters and resumes from outside applicants and one application letter from an internal applicant, the Grievant. At that time, Kelly gave the application materials received to Kent.

12. After receiving the submitted application materials from Kelly, Kent contacted references supplied by outside applicants, and, where necessary, Kent (and in some cases Kelly at Kent's request) contacted outside applicants who did not supply references in their application materials and asked them to provide references for the Respondent to contact.

13. Kent did not contact any references concerning the Grievant. Kent did review the Grievant's initial application for District employment that was in her District personnel file because Grievant's three-sentence letter of application for the High School Secretary position stated generally that she had "relevant experience in this [High School Secretary position] area" and that "[m]y application is on file at the school." The application in Grievant's file that Kent reviewed was her August 27, 2001, application for Recreation Center Receptionist. In that application, the only work experiences listed were "housekeeping" and "bartender/cook" dating back to November of 2000; the only education listed was high school through grade 12, with no graduation date noted; and two Wisconsin area references were supplied. Kent testified that he did not contact any references concerning Grievant because reference checks were only used to determine which applicants to interview and that because he intended to interview Grievant based on her status as an internal applicant alone, checking her references was unnecessary. Kent also did not contact Grievant's current or former supervisor at the Recreation Center or anyone else concerning Grievant's work experience at the Recreation Center, and he did not review Miller's February, 2003 evaluation or any other of the contents of Grievant's personnel file besides her August, 2001 application for employment. Grievant testified that the "application . . . on file at the school" to which she referred in her June 30, 2003, letter of application was to a later and more complete application that she submitted when she applied for another Recreation Center Receptionist position. Grievant testified that the later-submitted application included listings of prior employment experience in Arizona as a telemarketing company secretary and as a grocery store department manager. Grievant acknowledged, however, that when she reviewed her personnel file a few days before the complaint hearing, it did not contain a copy of the later-submitted application document, and no copy of that document was made a part of the complaint hearing record.

14. After receiving the submitted application materials from Kelly, Kent also developed tests to be administered to each of the interviewed applicants, and he determined the minimum passing scores on those tests that would be required for any applicant to be eligible for selection. The tests consisted of a letter test, four list tests, and a timed typing test. The letter test involved asking the applicants to convert a handwritten letter to a printed one using Microsoft Word software on a personal computer. The list tests involved asking the applicants to use Microsoft Excel software on a personal computer to convert a handwritten list of names and grades into printed lists in the following orders: "as is," alphabetical by first name, alphabetical by last name, and alphabetical by last name within each grade. The timed typing test was developed at Kent's request by Kelly. It involved asking the applicant to accurately reproduce as much of the printed test text as possible within five minutes, using Microsoft Word on a personal computer. Kent determined that to be considered minimally qualified for the position, an applicant would have to score at least 90% on the letter and list tests combined (possible 100 points on each of the five tests totaling 500 possible points, with minimum passing score of 450), and type at least a net 55 words per minute on the timed typing test (total number of words typed divided by five, minus one word per minute per error). Kent asked Kelly and the Respondent's Business Education teacher whether those standards were reasonable, and both concurred that they were. The only record Kent made of the minimum qualifying score standards was on an undated handwritten page.

15. Five of the outside applicants and the Grievant were invited to interview for the position on August 5, 2003, one at a time, on a staggered schedule. The rest of the outside applicants were eliminated from consideration by Kent without being interviewed. The applicants invited to interview were not notified in advance that tests would be administered, and they were at no time informed what a minimum passing score on the tests would be. Each applicant was first interviewed and then tested. The interviews were conducted by Kent and Kelly, together, with each of them alternating asking each of the 30 prepared questions, and each of them independently rating the answers as they were given, as either 0 (inappropriate/wrong), 1 (minimum response), 2 (average/good response), or 3 (excellent response), with space on the interview rating form for the interviewer's notes about each response. Kent established no minimum passing score for the interview. Instead, he testified that if two applicants achieved the minimum passing score on the tests, and then one applicant scored higher on the interview than the other applicant, the applicant chosen would be "[t]he one that scored higher on the interview questions." (Tr. 69) The letter and lists tests were administered by Kent, with Kent presenting the test tasks to the applicant orally, without use of a standard script, and with Kent observing the applicant's test performance from a few paces away. The timed typing test was administered by Kelly.

16. Five of the applicants invited to interview (including the Grievant) appeared as scheduled, with one of the outside applicants deciding to withdraw from consideration without notifying the Respondent until contacted by Kent on the day the interviews were conducted. After interviewing and testing each of the five applicants, Kent and Kelly scored the letter and list tests and Kelly scored the timed typing tests, and they totaled their respective interview

scores for each applicant. As a result, Grievant scored a combined 357 on the letter and list tests and a gross 43 and net 42 words per minute on the timed typing test, both below the minimum passing scores. The Grievant also received a combined interview rating of 37 out of a possible 89 from each interviewer. Outside applicant L__ W__ scored a combined 498 on the letter/list tests, a net 63 words per minute on the timed typing test, both of which were above the minimum passing scores, and interview ratings of 78 and 80 from Kent and Kelly, respectively. None of the other applicants achieved passing scores on both of the tests. The other applicants' letter/list test scores were 409, 386 and 444, and their net timed typing test rates were 63, 64 and 37. The other applicants' interview ratings by Kent/Kelly were 45/61, 42/47 and 78/50. Kent then asked Kelly whom she would recommend for the job, and Kelly recommended L__ W__. Kelly testified that her recommendation was "based on the interview, based on her application, based on everything." (Tr. 81) Kent testified that he did not deem Grievant qualified for the position and that he recommended to Jansen the next day that L__ W__ be selected. After Jansen discussed the recommendation with Kent, Jansen agreed that L__ W__ should be offered the position. Kent called L__ W__ that same day and offered her the position. L__ W__ accepted and began work on or about August 26, 2003. According to Grievant, Kent did not communicate the results of the selection process to Grievant in any way, and Grievant learned of L__ W__'s selection from a co-worker who attended the Respondent's Board of Education meeting at which the hiring decision was announced. Kent testified that he thought he sent each unsuccessful applicant a letter to that effect, that he retained no copies in any form, and that if Grievant did not receive such a letter it was due to an oversight on his part.

17. The instant complaint was filed by the Complainant on August 18, 2003, alleging that the Respondent's non-selection of the Grievant violated the Agreement and therefore violated Sec. 111.70(3)(a)5, Stats. Because the parties have treated the Agreement as in effect at all material times, at least for purposes of this dispute, and because the Agreement contains no final and binding procedure for resolving disputes arising under the Agreement, the Examiner finds it appropriate to exercise the Commission's MERA jurisdiction to adjudicate the merits of the Complainant's claim that the Respondent violated the Agreement.

18. The selection standard applicable in this case is that contained in Agreement Art. X.B., quoted in Finding of Fact 4, above. Properly interpreted, that standard required the Respondent to select the Grievant for the vacancy at issue unless the Grievant was not minimally qualified for the job. Because the Complainant has shown that the Grievant was a "current employee" and that L__ W__ was not, under Art. X.B. when properly interpreted, the burden of persuasion shifts to the Respondent to establish that the Grievant was not minimally qualified for the position.

19. Properly interpreted, Art. X.B., in the context of the Agreement as a whole, authorizes the Respondent to establish and change the minimum qualifications for positions, to establish methods of determining whether applicants meet the Respondent's minimum qualifications, and to determine whether applicants meet the Respondent's minimum qualifications, unless the Complainant shows that the Respondent's exercise of those rights has been unreasonable, arbitrary, capricious or discriminatory.

20. The Respondent's failures to give prior notice to applicants that the selection process would involve performance testing generally or testing of the specific types utilized by the Respondent in this case, was not unreasonable, arbitrary, capricious or discriminatory in the circumstances of this case.

21. The Complainant has shown that the Respondent's exercise of the rights described in Finding of Fact 19, above, was unreasonable, arbitrary and capricious in the following respects:

a. Kent established new tests and minimum passing test scores after he had received the applications and had thereby learned the identity of the applicant pool and that the pool included an internal applicant, the Grievant.

b. The Respondent based its decision that the Grievant was not minimally qualified for the position solely on the fact that Grievant failed to achieve passing scores on the performance tests, without considering any other factors such as the nature and quality of Grievant's work experience for the Respondent and other employers.

c. In scoring the "as is" list test, the Respondent deducted points for Grievant's and other applicants' failures to divide the list into columns, and it deducted points from the Grievant for failing to list the names uniformly rather than in the varying last name-first name, first name-last name form in which they appeared on the handwritten test document. Deducting points for those "errors" was unreasonable, arbitrary and capricious in the context of instructions that the applicant was to list the names and grade data "as is" and in any way the applicant chose to list it, and in the absence of further instructions that the applicant was to perform the four list tests in the fastest or most efficient manner possible.

d. In scoring the list tests, the Respondent deducted one point for each of the 17 rows of data on each of the lists that Grievant and other applicants failed to divide into columns, but when L__ W__ failed to properly format the data in four rows of the chart called for in the letter test, the Respondent only deducted one point, rather than four.

22. The Complainant has shown that the Respondent's exercise of the rights described in Finding of Fact 19, above, was discriminatory against the Grievant in the following respects:

a. The Respondent's external advertisement asked applicants to submit a resume in addition to a letter of application, whereas the Respondent's internal posting did not.

b. The Respondent contacted outside applicants' references and contacted some outside applicants to ask them to supply references, but did not contact Grievant's references, did not ask Grievant to supply an updated list of references, did not contact Grievant's current or former supervisor at the Recreation Center, did not review Grievant's

annual evaluation or any other aspect of Grievant's personnel file besides the Grievant's initial application for employment as a Recreation Center Receptionist, and did not take any other steps — aside from the interview — to inform itself regarding the nature and quality of Grievant's work experience as a Recreation Center Receptionist.

23. In light of Findings of Fact 21 and 22, above, the Examiner finds it appropriate to give no deference to the Respondent's determinations that achieving at least 90% and 55 net words per minute on the tests would be necessary for an applicant to be minimally qualified for the High School Secretary position, and no deference to the Respondent's determination as to whether Grievant met the minimum qualifications for the position. Instead, the Examiner finds it appropriate to determine, independent of the Respondent's judgments in those respects, whether the Grievant is minimally qualified for the position.

24. Upon consideration of the entirety of the evidence of record in this case, the Examiner concludes that the Grievant is not minimally qualified for the High School Secretary position in the following respects:

a. Despite the experience she has had in drafting correspondence in her work for the Respondent and for other employers, the Grievant's formatting errors on both the letter test document and on her own letter of application to the Respondent regarding the High School Secretary position, and her omission of one of the words from the handwritten text in the untimed letter test, and her failure to include any specific information regarding her secretarial experience in her letter of application, reflect a lack of the "ability to draft correspondence" and to be "reliable" in doing so, minimally necessary to perform the duties of the High School Secretary position as described in the job description for that position both before and after the July, 2003 revisions, and as described elsewhere in the record of this case.

b. Despite the current experience she has had in using Excel software in her work for the Respondent and her familiarity with the Excel Sort function, the Grievant's failure to make use of that software program function to avoid the errors she made in alphabetically ordering the alphabetical-by-last-name and alphabetical-by-last-name-within-grade test lists reflects a lack of the "ability to maintain accurate . . . records" and to be "reliable" in doing so, minimally necessary to perform the duties of the High School Secretary position as described in the job description for that position both before and after the July, 2003 revisions, and as described elsewhere in the record of this case.

c. Despite the current experience she has had in typing documents of various kinds in her work for the Respondent, the Grievant's gross and net typing speeds on the timed typing test, and the interest Grievant expressed during the interview in taking a "keyboarding" course at the local Technical College as an area she would concentrate on if she had the opportunity to improve herself, reflect a lack of the "ability to meet deadlines" minimally necessary to perform the variety of typing work involved in the duties of the High School secretary position as described in the job description for that position both before and after the July, 2003 revisions, and as described elsewhere in the record of this case.

d. Despite the Grievant's having been rated as "satisfactory" on the evaluation category of "Relationships with others/Customer Service" and despite Grievant's having been described in that evaluation as having doing "a good job at customer service," the customer complaint incident on January 4, 2003, and the written reprimand issued to Grievant regarding that incident reflect a lack of the "ability to establish and maintain effective and positive working relationships with . . . the public" and a lack of being the "[p]ositive individual whose interactions are helpful and cordial" minimally necessary to perform the duties of the High School secretary position as described in the job description for that position both before and after the July, 2003 revisions, and as described elsewhere in the record of this case.

e. Despite the Grievant's testimony that she has good recall of details in various work-related ways, the fact that the Grievant did not remember during her complaint hearing testimony that she had received a written reprimand for the January, 2003, incident, reflects that she lacks the "good recall of details" minimally necessary to perform the duties of the High School secretary position as described in the job description for that position both before and after the July, 2003 revisions, and as described elsewhere in the record of this case.

f. Neither the Grievant's performance of duties as a Recreation Center Receptionist since September of 2001 without being advised of deficiencies in areas other than customer relations, nor the Grievant's performance of duties as a telemarketing company secretary and grocery store department manager in Arizona at times and for durations nowhere revealed in the record, are sufficient to overcome the findings reached in Findings of Fact 24a-e, above.

25. The Respondent did not violate Agreement Art. X.B. when it hired L_ W__ to fill the High School Secretary position rather than selecting T__ W__ to fill it.

CONCLUSION OF LAW

The Respondent did not violate the terms of a collective bargaining agreement and did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., when it failed to select T__ W__ for the position of full-time High School Secretary in August of 2003.

ORDER

The instant complaint is dismissed in all respects.

Dated at Shorewood, Wisconsin, this 1st day of April, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

BAYFIELD SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER**

BACKGROUND

In its complaint, the Complainant alleges that the Respondent violated Art. X.B. of the Complainant's collective bargaining agreement with the Respondent by its selection of an outside applicant rather than the Grievant for a vacancy in the High School Secretary position. The Respondent asserts that the selection did not violate the Agreement because the Grievant was not qualified for the position. The dispute is ripe for resolution pursuant to the Commission's prohibited practice adjudication jurisdiction because the parties have treated the Agreement as in effect at all material times, at least for purposes of this dispute, and because the Agreement contains no final and binding procedure for resolving disputes about its meaning and application.

At the complaint hearing, the Complainant offered testimony by Kent and the Grievant, and Respondent offered testimony by Kent, Kelly and Jansen.

POSITIONS OF THE PARTIES

The Complainant

The Complainant cites various grievance awards in support of the following contentions. Article X.B. of the Agreement does not allow the Respondent to select the most highly qualified applicant where, as here, there is a current who is qualified but is not necessarily the applicant who is most highly qualified. The burden is on the Respondent to show that the bypassed current employee does not meet the minimum qualifications for the position. In assessing qualifications: the Respondent is bound to the minimum qualifications established in the posting for the position, and it cannot add different qualifications during the selection process and then disqualify the senior internal applicant for not measuring up to those different qualifications; the Respondent cannot base its determination solely on the results of tests, but it must also take into account an existing employee's overall work history; and the Respondent must affirmatively ask the employee to update the employee's file concerning the employee's qualifications for the position, rather than leaving it to the employee to update the information on file with the Respondent. If an interview process is used to determine minimum qualifications, a pass/fail score must be established and the interview must be conducted in a fair and even-handed way that is designed to elicit information reasonably related to whether the applicant is minimally qualified for the position. If a test is used as part of the determination of applicants' minimum qualifications, it must reasonably relate to all of

the posted qualifications for the position; it cannot be biased, capricious or arbitrary in its contents or administration; and both the existence of the test and the minimum passing score must be posted in advance.

In this case, Kent inappropriately changed the minimum qualifications during the selection process. After posting the 16 qualifications needed for the position and after receiving the applications, Kent decided to change the minimum qualifications to solely passing performance tests (which were not among, or related to, the 16 original listed qualifications). Then if two or more applications qualified with the tests, the successful applicant would be the one who received the highest interview score. That last minute change in the minimum qualifications indicates that after receiving the applications, Kent realized that the internal applicant (the Grievant) had the minimum 16 posted qualifications and that there was another applicant who was even more qualified. That led him to change the minimum qualifications so the applicant he wanted to hire would be the only applicant who met his new standards. Neither the existence of the tests nor the grades needed to pass the tests nor the criteria for grading the tests were included on the posting. For those reasons, the tests should not be considered in determining whether the Grievant was minimally qualified.

If the tests are considered, the Grievant should be credited with a passing score because of the Respondent's failures to have either uniform written test instructions or a written script for the oral test instructions, and because of the Respondent's failure to fairly administer and score the tests. For example, on the first of the four list tests, the Respondent charged the Grievant with 17 errors because all full names did not have the last name and the first name in separate columns and with 7 more errors because seven full names did not have the last name first and the first name last. However, the task was simply to key the list of names "as is." That is exactly what the Grievant did, typing the names in the same order and with the same commas as provided by the handwritten list given to her. Instead of having 24 points deducted, she should have had none deducted.

Because Kent testified that there was no minimum score established for the interviews, the interview scores could not play any part in determining if the Grievant was minimally qualified for the position. Furthermore, most of the interview questions asked were unrelated to the posted qualifications for the position, and the Respondent's lack of follow up questions and its scoring were arbitrary and capricious.

In any event, the record affirmatively establishes that the Grievant meets the posted qualifications for the position. The record evidence shows that since about September of 2001, she has successfully performed the duties of her current position for which the job description specifies qualifications nearly identical to those of the posted position. On her February, 2003, evaluation, the Grievant achieved an overall rating of "very good," and no category rating below "satisfactory." The Respondent failed to take that evaluation or the job description for the Grievant's current position into account in determining whether the Grievant was qualified for a position for which the posted qualifications are nearly identical. The Respondent also failed

to ask the Grievant's supervisor for input regarding the Grievant's qualifications, despite the fact that it checked with external applicants' references. The record also establishes that the Grievant previously held a full-time secretarial position for a telemarketing firm in Arizona and a department manager position at a grocery store in Arizona, both of which gave her additional experience performing duties that involve the qualifications posted for the High School Secretary position. The Respondent had the responsibility to find out what skills and knowledge the Grievant learned or knew not only by reason of her present District position but also by reason of the positions in which she has been employed by employers other than the Respondent.

The Respondent has not shown that the Grievant fails to meet any of the posted qualifications for the position. While Grievant has not used one of the ten computer programs used by the High School Secretary position, she testified that with her computer experience she was confident she could learn to perform the basics of that program within a period of 15 to 20 minutes, and the Respondent offered no proof to the contrary. While Grievant was reprimanded on one occasion for an incident in which a parent insisted that Grievant's son had stolen a toy, the record shows that Grievant promptly informed her supervisor of the incident when it occurred, and there is no other evidence of any problems of any kind with Grievant's work performance as Recreation Center Receptionist.

For those reasons, the Examiner should conclude that the Respondent's selection of other than the Grievant for the High School Secretary position violated the Agreement and should order that the Grievant be granted that position and made whole with interest for losses she experienced as a result of the violation.

The Respondent

The Respondent cites various grievance awards in support of the following contentions. Article X.B. requires the Respondent to grant a vacancy to an internal applicant only if the internal applicant is qualified for the position. The Respondent has the right to establish minimum qualifications for this and any other bargaining unit position. The Respondent has the right to require applicants to prove that they are minimally qualified for the position by passing tests that are reasonably related to the duties and responsibilities of the position involved and that are reasonably administered. The Respondent's right to rely on test results is not affected either by the absence from the posted qualifications of the existence, nature and passing score for the tests involved or by the fact that the tests do not relate to some of the posted qualifications for the position. The Respondent has the right to determine whether an applicant meets the minimum qualifications and to have its judgment in that regard honored unless the determination is shown to have been arbitrary or capricious.

In this case, the Respondent posted the High School Secretary position in early summer of 2003, and it concurrently advertised externally for the vacancy. The Respondent received about 10 applications, only one of which was from an internal applicant (the Grievant). Prior

to scheduling the applicants for interviews and skills testing, Kent consulted the Respondent's Business Education teacher and the District's Administrative Assistant (Kelly) for input regarding reasonable minimum performance standards for a secretarial position. Consistent with their recommendations, Kent established a minimum performance standard of 90% accuracy for the letter/list tests and 55 words per minute for the timed typing test.

Based on a review of extensive resumes, references and other application materials received from the external applicants, the Respondent selected five of them for follow-up interviews and skills testing. The Respondent also decided to interview the Grievant in recognition of her status as a member of the bargaining unit, even though her application materials would not otherwise have qualified her for an interview.

In August of 2003, Kent and Kelly interviewed the Grievant as well as the four external applicants who remained interested enough in the position to appear for their scheduled interview. After each interview, the applicant was given several skills tests using some of the same software that is routinely used by the High School Secretary. The "letter" test involved providing a draft letter and instructions for typing/revising the letter using Microsoft Word. The "list" test which involved giving the applicant a list of student names and grade levels and instructing the applicant to generate four separate reports using Microsoft Excel. Finally, the applicant was given a timed typing test to measure speed and accuracy using Microsoft Word. Kent administered and graded the letter and list tests, and Administrative Assistant Kelly administered and graded the timed typing test.

The Grievant scored 356 out of 500 (or 71.4%) on the letter/list tests and 42 words per minute on the timed typing test. Both of those scores were below the minimum qualifications established by the Respondent. The external applicant ultimately selected for the position (L__W__) scored 498 (99.6%) and 63 words per minute on the tests, exceeding the Respondent's minimum standards on both tests.

Because the language of the Agreement does not provide otherwise, the Agreement implicitly reserves the right to the Respondent to establish minimum job qualifications for the High School Secretary position, and to use reasonable and appropriate written, oral performance and aptitude tests in determining whether applicants are qualified for positions. The tests used in this case were specifically related to many of the posted qualifications for the job. While the posting does not specify a minimum typing rate or a typing test requirement, the Agreement does not require such specifications, a person cannot operate computers and computer software to meet necessary deadlines without possessing proficient typing skills, and the list tests relate directly to the kinds of skills needed to maintain various databases for which the High School Secretary is responsible. A 55 words per minute typing standard is reasonable both because it is lower than those approved by arbitrators in other cases involving secretarial positions, and because it is lower than the speeds at which other secretaries employed by Kent in the past have typed. The Respondent was not required to produce a perfect testing instrument or one that tests each and every qualification for the job involved; Kent took the

time to develop tests that would measure applicants' proficiency in various job-related skills; and no test could readily determine such qualifications as an applicant's sensitivity to confidential information or ability to regularly report for work on time. The same tests were administered to each of the applicants in the same way, and each was evaluated fairly.

Even if the Respondent's standards are considered fairly rigorous, the Grievant's scores would not have met even the most minimal standards. On the letter test, Grievant had 13 errors for a score of 87 out of 100. On the four list tests, she scored 76, 64, 66 and 64 out of 100 on each. In performing the list test, Grievant manually alphabetized the list rather than making use of the Excel sort function, taking much longer to do so and making errors in the process. Grievant should have recognized, without being specifically told to do so in the test instructions, that because the test was being taken in Excel, she should use available Excel functions to perform the tasks accurately and efficiently. On the typing speed test, Grievant typed a total speed of 43 words per minute with an inaccuracy deduction of one word per minute for a total score of 42 words per minute, well below the Respondent's minimum of 55. Grievant's overall 357 points was 71.4%, well below the Respondent's established minimum of 90%.

Besides the test results, Kent reviewed the Grievant's personnel file at the same time that he was reviewing the application materials of all of the other applicants. For whatever reason, Grievant's February, 2003 evaluation was not in the file he reviewed. Also, Kent was unaware of the existence of documents that Grievant claims to have provided concerning her updated references. However, since Grievant acknowledges that those documents were not in her personnel file and that she did not submit them with her application or even bring a copy with her to the complaint hearing, the Respondent cannot be faulted in the circumstances for Grievant's failure to supply it with updated application materials. Even if the Respondent had reviewed a set of completely updated application materials for the Grievant and even if the Respondent had received the most favorable recommendation possible from her supervisor, those factors would merely have gotten Grievant to the interview and tests that she was allowed access to anyway, and those factors would not have improved Grievant's scores on the qualifications test or qualified her for the job. Some of Grievant's interview answers were problematic, as well, such as the inconsistency between her assertion that she was excellent with computers and her statement that she had recently registered for a technical college keyboarding class to improve her skills in that regard. Moreover, although Grievant testified that she met the posted qualification of ability to establish and maintain effective and positive working relationships with the public, the record reveals that Grievant had recently been issued a written reprimand for an on-duty incident with a parent-customer which escalated into shouting and name-calling by Grievant in front of children and other Recreation Center patrons. The record also shows that the job of High School Secretary is responsible for a higher degree of the duties and responsibilities listed on the job descriptions of the two positions. The Grievant's assertion that she could quickly learn an aspect of the High School Secretary job with which she is not currently familiar is not a persuasive basis on which to conclude that she is currently qualified to perform that aspect of the job.

The Respondent's determination that Grievant is not qualified for the position was not arbitrary or capricious. The Respondent's selection process was systematic, fair and even-handed. It included a review of cover letters, a review of resumes, contacting references, an extensive interview and three individual objective skills tests.

For all of the foregoing reasons, there is no proper basis for second-guessing the Respondent's judgment that the Grievant was not qualified for the position. On that basis, the complaint should be dismissed.

DISCUSSION

Under the "sufficient ability" type language contained in Agreement Art X.B., arbitral authority clearly establishes the right of the Respondent to set and change the minimum qualifications for positions and to determine whether applicants meet the established minimum qualifications, subject only to the implied obligations that those rights not be exercised in an unreasonable, arbitrary, capricious or discriminatory manner. SEE GENERALLY, Elkouri and Elkouri, How Arbitration Works, 5th Edition, pp. 839-842 (1997). The Respondent bears the burden of proving that a bypassed senior employee is not minimally qualified for the job, and the fact that a junior employee or outside applicant is more qualified than the senior employee is irrelevant. ID. at 844. In general, management is entitled to use any method to determine ability so long as the method used is fair and nondiscriminatory. If management chooses to use tests in determining ability, it is generally recognized by arbitrators that the tests must be (1) specifically related to the requirements of the job, (2) fair and reasonable, (3) administered in good faith and without discrimination, and (4) properly evaluated. ID. at 847-852. "While arbitrators . . . generally permit the discreet use of testing, they strongly disfavor utilizing tests as the sole means of determining ability to perform work, much preferring that test results be considered as only one factor in making the determination. . . . It is apparent that this ability can be demonstrated through past experience, training, and education as well as achieving a passing performance on a test." ID. at 851, quoting from PEABODY COAL CO., 87 LA 758, 762 (VOLZ, 1985). 1/

1/ The Examiner has also considered the opinions of the arbitrators who issued the numerous grievance awards cited by the parties. In respects not specifically noted in this Memorandum, the Examiner has been guided by various of those awards where they were persuasive, even though none of them has the effect of precedent in this case.

Accordingly, the central issue in this case is whether the Grievant is minimally qualified for the High School Secretary position. After reviewing the record in detail, the Examiner has concluded that she is not and has dismissed the complaint in all respects. In

Findings of Fact 20-24, the Examiner has reviewed the Respondent's exercise of rights as regards the establishment of minimum qualifications and the determination of whether the Grievant met those minimum qualifications. The Examiner has found that exercise of rights was, in some respects proper, but in various other respects, unreasonable, arbitrary, capricious, or discriminatory. For those reasons, the Examiner has given no deference to the Respondent's determinations that achieving at least 90% and 55 net words per minute on the tests must be achieved for an applicant to be minimally qualified for the High School Secretary position and no deference to the Respondent's determination as to whether Grievant met the minimum qualifications for the position. Instead, as stated in Finding of Fact 24, the Examiner has reviewed the complaint hearing record, independent of the Respondent's judgments, and has found that the Respondent has met its burden of persuasion to the effect that the Grievant was not minimally qualified for the High School Secretary position at issue.

Set forth below are the Examiner's statements of rationale regarding Findings of Fact 20-25 and the Conclusion of Law and Order based thereon.

Effect of lack of advance notice of testing

In Finding of Fact 20, the Examiner has ruled, contrary to the Complainant's assertions, that Respondent's failures to give prior notice to applicants that the selection process would involve performance testing generally or testing of the specific types utilized by the Respondent in this case, was not unreasonable, arbitrary, capricious or discriminatory in the circumstances of this case.

Complainant has cited grievance awards to the effect that test results cannot be used to disqualify a senior applicant unless notice of an intent to test is given in the posting of the position. Respondent has cited grievance awards upholding determinations that employees lack minimum qualifications based on their failing to achieve passing scores on performance tests of which no notice was given in the job posting involved.

The Examiner agrees with Kent's assertion at the hearing (Tr. 19) that, under the Agreement, it is reasonable and proper for the Respondent to expect and require applicants for a secretarial position to come to an interview prepared to demonstrate basic office skills that are reasonably related to the secretarial position involved, whether advance notice of testing is given or not. Aside from questions (discussed elsewhere in this Memorandum) about the timing of Kent's development of the tests, the timing of Kent's establishment of the passing score standards, and the fairness of the scoring of the letter and list tests, the Examiner finds that the letter, lists and timed typing tests were reasonably related to several of the core duties of the position as stated in the job descriptions in effect both before and after the July, 2003 revisions. The lack of prior notice to the applicants that the tests would be administered as a part of the interview process did not, in and of itself, render the tests administered in this case unreasonable, arbitrary, capricious or discriminatory, and neither did the fact that the tests did not relate to some of qualifications set forth in the posting for the position.

Effect of timing of test creation and passing score establishment

In Finding of Fact 21a, the Examiner has ruled that the Respondent acted in an unreasonable, arbitrary and capricious manner when Kent established new tests and minimum passing test scores after he received the applications and thereby learned the identity of the applicant pool and that the pool included an internal applicant, the Grievant.

Although the Respondent asserted otherwise in its opening statement (Tr. 11) and suggested otherwise in its questioning of Kent (Tr. 35), the record squarely establishes that the tests and minimum passing score standards were developed by the Respondent after the applications for the High School Secretary position had been received. Kent unequivocally testified both that the minimum passing scores were determined at the same time that he was developing the tests (Tr. 17, 35) and that the minimum passing scores were determined after and not before Kent had received the applications for the position. (Tr. 35)

The facts that Kent determined the nature of the tests and the minimum passing scores after learning the identity of the applicant pool, especially when coupled with no advance notice to the applicants that tests would be given, raises serious questions about whether the tests and passing scores were established to fairly determine which applicants were minimally qualified or to permit the Respondent to bypass a known internal applicant in order to select one or another known outside applicant who was more than minimally qualified for the position.

Effect of test scores as exclusive determinant of minimum qualifications

In Finding of Fact 21b, the Examiner has ruled that the Respondent acted in an unreasonable, arbitrary and capricious manner when it based its decision that the Grievant was not minimally qualified for the position solely on the fact that Grievant failed to achieve passing scores on the performance tests, without considering any other factors such as the nature and quality of Grievant's work experience for the Respondent and other employers.

The Respondent has cited grievance awards in which arbitrators upheld bypassing of employees based solely on their failure to achieve passing scores on performance tests. However, as noted above, there is also respected arbitral authority that strongly disfavors utilizing tests as the sole means of determining ability to perform work, without consideration of additional factors such as past experience, training, and education. Furthermore, none of the awards cited by the Respondent has been shown to have involved tests and minimum scores that were developed after the applicant pool was known to the employer.

Effect of list test point reductions regarding formatting

In Findings of Fact 21c and 21d, the Examiner has ruled that the Respondent acted in an unreasonable, arbitrary and capricious manner when scoring the "as is" list and the other list tests.

Regarding the "as is" list, Respondent deducted points for Grievant's and other applicants' failures to divide the list into columns, and it deducted points from the Grievant for failing to list the names uniformly rather than in the varying last name-first name, first name-last name form in which they appeared on the handwritten test document.

It is surely true that test scoring, where even-handed, does not need to be perfect in order to be deemed reasonable, nonarbitrary and noncapricious. However, the Examiner finds that the Respondent's scoring of the "as is" test exceeded the broad limits of deference due the Respondent in the circumstances. As noted in the Finding of Fact 21c, deducting points for those "errors" was unreasonable, arbitrary and capricious in the circumstances of this case because the instructions that were given to the applicant were to list the names and grade data "as is" and in any way the applicant chose to list it. Deducting points for failures to list the data in any particular way seems clearly indefensible. Especially so where the instructions were given to the applicants orally by Kent without a uniformly used instructions script, and where the written test document itself identified the task as the creation of the list "as is." The Examiner finds unpersuasive Kent's and the Respondent's assertion that the minimally qualified secretarial applicant should have known that it was important to columnize and uniformly list the data in creating the "as is" list from the facts that it was the first of four related tasks and that the task was being tested by use of Microsoft Excel. Those factors might have been persuasive if the instructions to the applicants had asked them to create the four list in the fastest or most efficient manner possible. However, in the absence of such additional instructions, and especially in the presence of the "as is" written direction, the grading of the "as is" test was unreasonable, arbitrary and capricious.

As noted in Finding of Fact 21d, the Examiner also finds it unreasonable, arbitrary and capricious for Respondent to deduct one point for each of the 17 rows of data on each of the lists that Grievant and other applicants failed to divide into columns, when Respondent deducted only one point for L__ W__'s failure to properly center the data in four rows of the letter test chart. There would appear to be no reasonable basis for a scoring the two multi-row formatting errors so differently.

Effect of differences between internal posting and external advertisement

In Finding of Fact 22a, the Examiner has ruled that the Respondent was discriminatory against the Grievant in that its external advertisement asked applicants to submit a resume in addition to a letter of application, whereas the Respondent's internal posting did not. Kelly testified that she based her recommendation of L__ W__, in part, on L__ W__'s application. Kent obviously considered the Grievant's letter of application and the earlier-in-time application Grievant had on file with the Respondent to which reference was made in Grievant's letter of application. The express inclusion of a request for a resume in addition to a letter of application from outside applicants gave them an unfair advantage over inside applicants.

Effect of checking only outside applicants' references

In Finding of Fact 22b, the Examiner has ruled that the Respondent was discriminatory against the Grievant in that it contacted outside applicants' references and contacted some outside applicants to ask them to supply references, but did not contact Grievant's references, did not ask Grievant to supply an updated list of references, did not contact Grievant's current or former supervisor at the Recreation Center, did not review Grievant's annual evaluation or any other aspect of Grievant's personnel file besides the Grievant's initial application for employment as a Recreation Center Receptionist, and did not take any other steps — aside from the interview — to inform itself regarding the nature and quality of Grievant's work experience as a Recreation Center Receptionist.

Contrary to the Respondent's contentions, Kent testified that he consulted Grievant's personnel file only to review the earlier job application to which Grievant's June 30, 2003, letter of application referred and that he did not review any other parts of that file. (Tr. 25) The record satisfies the Examiner that Grievant's February, 2003 evaluation has been in her file at all material times and that Kent simply did not look for it when he accessed her file to look at her earlier job application.

Kent explained that he considered it unnecessary to check Grievant's references because reference checks were being used only to determine whether to interview the applicants, and he had already decided to interview the Grievant based solely on the fact that she was an internal applicant. However, by treating the Grievant differently in that respect from the outside applicants, Kent failed to offer the Grievant the same opportunity to provide her former Arizona employers as references as it offered to the outside applicants, and contributed to Respondent not being in a position to give the same sort of consideration to Grievant's past employment experience as it gave to that of the outside applicants whose references were contacted.

Overall effect of flaws in Respondent's selection process

In light of the flaws in the selection process outlined above, the Examiner has found it appropriate to give no deference to the Respondent's determinations that achieving at least 90% and 55 net words per minute on the tests must be achieved for an applicant to be minimally qualified for the High School Secretary position and to give no deference to the Respondent's determination as to whether Grievant met the minimum qualifications for the position.

However, that determination does not automatically require the conclusion that the Respondent has failed to show that the Grievant was not minimally qualified for the position. Rather, the Examiner finds it appropriate to determine, independent of the Respondent's judgments in those respects, whether the Grievant is minimally qualified for the position.

Furthermore, the Examiner does not find it necessary or appropriate to wholly disregard the Grievant's performance on the tests administered by the Respondent in this case. As noted above, the Examiner is satisfied that the tests administered were reasonably related to several of the core duties of the position as it is described in the job descriptions in effect both before and after the July, 2003 revisions. It is not unreasonable in the circumstances of this case to take Grievant's performance on those tests into account — as one of many factors — but only in ways that are not tainted by flaws in the Respondent's scoring or by the Respondent's minimum passing score standards to which the Examiner finds no deference due.

Independent assessment of evidence concerning Grievant's qualifications

As noted in Finding of Fact 24, the Examiner has concluded, upon consideration of all of the record evidence in this case that has a reasonable, nonarbitrary, noncapricious and nondiscriminatory bearing on the question, that the Grievant was not minimally qualified for the position for the reasons noted in Findings of Fact 24a-f.

Regarding Finding of Fact 24a, both the Grievant's performance on the untimed letter test and the Grievant's June 30, 2003, letter of application that she submitted regarding the High School Secretary position appear inconsistent with the ability to draft correspondence in a reliable fashion minimally required for that position.

On the letter test, Grievant did not date the letter, spell out Kent's name in full, or leave vertical space for a signature between the closing and the sender's name. Grievant also did not separate with blank lines the salutation from the text or the text paragraphs from one another or the chart from the text, and she did not vertically center the letter contents on the page. She also omitted a word that appeared in the handwritten text and which was necessary for the sentence in which it appears to read properly.

On her letter of application, the Grievant mixed a memorandum format with a letter format, and again left no spacing between the salutation and the text of the letter. Furthermore, the letter itself consisted of just three sentences, the first identifying the position about which she was writing, the second stating that she is applying for and would like to be considered for the position, and the third stating "[y]ou will find my application on file at the school." It seems reasonable to the Examiner that a minimally qualified High School Secretary would realize that a letter of application is an important opportunity for an applicant to highlight the applicant's qualifications for and interest in the position. It also seems reasonable to expect that a minimally qualified High School Secretary would either obtain and enclose a copy of the "application on file" to which Grievant's letter refers, or at a minimum make certain that the later-in-time version of the application to which Grievant testified that she was referring was, in fact, on file at the school. Grievant's reference to a singular "application" failed to recall the detail that she had filed more than one such application with the Respondent, and failed to alert the Respondent that it was to the later-in-time application that she was referring.

Regarding Finding of Fact 24b, Grievant testified that she thought the list test was strictly a test of her ability to manually produce the four lists, independent of the sorting functions available in the Excel program to which Kent switched for purposes of the list tests. (Tr. 113) However, the Grievant's failures to accurately alphabetize two of the four test lists indicate deficiencies in two respects relating to her ability to reliably maintain accurate records. First, a minimally qualified High School Secretary should be able to manually check and accurately correct a list, especially when under no specified time limit for completing the assigned task; yet Grievant made ordering errors on two of the four lists. Second, a minimally qualified High School Secretary — especially one who testified that she is familiar with the sort function of the Excel program — should have taken advantage of that function if for no other reason than to make sure the lists she produced manually had in fact been put entirely into the proper order.

Regarding Finding of Fact 24c, it seems reasonable to expect that a minimally qualified High School Secretary will type faster than the gross 43 and net 42 words per minute at which Grievant performed on the timed test. Both Grievant's testimony that she would probably have practiced to improve her speed had she known a typing test would be part of the interview process (Tr. 103), and her interview response identifying a technical college keyboarding course as an area on which she would concentrate if she had an opportunity to improve herself (item #5 on Exs. 11-l and 11-m), suggest that her current position does not require her to exercise typing skills at speeds which the Examiner is satisfied are minimally necessary to keep up with the varied duties and deadlines associated with the High School Secretary position.

Regarding Finding of Fact 24d, the posted qualifications as well as the job description list of duties of the High School Secretary emphasize the importance of the "ability to establish and maintain effective and positive working relationships with . . . the public" and of being the "[p]ositive individual whose interactions are helpful and cordial." While the Grievant has apparently experienced only one problem in that regard while employed by the Respondent, and while she was evaluated as "satisfactory" by Miller as regards "relationships with others/customer service" in the sole evaluation of her work for the Respondent; she has worked for the Respondent on only a half-time basis and only since about September of 2001, and during that relatively short time she had the January 4 incident which was a serious enough problem to generate an (apparently ungrieved) written reprimand. All things considered, that incident appears inconsistent with the level of helpful and cordial relations with the public that the High School Secretary position minimally requires.

Regarding Finding of Fact 24e, the Grievant initially testified on direct examination that she considered herself to have good recall of details in various work-related respects. (Tr. 102-3). She also acknowledged that the January 4, 2003, incident had occurred but asserted that, "[n]othing really came of the situation. I did get spoken to by my supervisor and I did regret it." (Tr. 97) On cross-examination, Grievant reiterated that she had been talked to about the incident by her supervisor but that no other action had been taken by the Respondent, and she specifically denied that she had received a written reprimand about the incident.

(Tr. 110). However, when presented with a copy of the January, 2003 written reprimand document, Grievant admitted that she had received that letter, adding, "I remember it now." (Tr. 111). On redirect, the Grievant testified that, until a few days before the complaint hearing, she had believed that she had been issued a written reprimand but that she concluded otherwise when she found no copy of it in her personnel file and when Jansen did not contact her after telling her he would look for the document in his file when she asked him about it. (Tr. 127-8) All things considered, it seems reasonable to expect that a minimally qualified High School Secretary would remember as important an event as receiving a written reprimand regarding a work-related incident that occurred less than a year earlier, regardless of the status of the Respondent's files on the subject; especially so when it was the only such written reprimand that the Grievant has ever received from the Respondent.

Finally, regarding Finding of Fact 24f, the record shows that Grievant's work performance as a part-time Recreation Center Receptionist since September of 2001 has been very good overall, with customer relations being the only area in which any deficiency has been called to her attention. While the qualifications listed in the High School Secretary posting closely parallel those in the Recreation Center Receptionist job description, the record persuasively establishes that the former is a significantly different and more demanding position. The testimony of Kelly and Kent to that effect is supported both by a comparison of the duties of the two positions listed in the respective job descriptions and by the substantial difference in the rates of pay for the two jobs, even when consideration is given to Grievant's overall testimony about the nature of her current job. Notably, the Agreement provides 2002-03 hourly rates of \$7.67-\$8.28 for the Recreation Center Receptionist compared with \$11.30-\$11.93 for the High School Secretary. The Examiner therefore concludes that Grievant's overall very good performance as a Recreation Center Receptionist does not conclusively establish that she is minimally qualified to perform the more demanding duties of the High School Secretary position.

The Grievant testified that she also had relevant work experiences in Arizona as both a full-time telemarketing company secretary and as a grocery store department manager in Arizona. While both of those jobs involved some of the same sort of work as the High School Secretary position, the record does not reveal when or for how long the Grievant performed those duties, or why the Grievant failed to list them on her initial application for employment as a Recreation Center Receptionist in August of 2001.

In the Examiner's opinion, the record evidence regarding Grievant's past work experiences, while supportive of Grievant's qualifications in many respects, are not sufficient to overcome the findings set forth in Findings of Fact 24a-e, discussed above.

Conclusion

For all of the foregoing reasons, the Examiner has found that the Respondent did not violate Agreement Art. X.B. when it hired L__ W__ to fill the High School Secretary position rather than selecting T__ W__ to fill it. On that basis, the Examiner has concluded that Respondent did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5., Stats. The Examiner has therefore ordered dismissal of the complaint in all respects.

Dated at Shorewood, Wisconsin, this 1st day of April, 2004.

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner