BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GREEN COUNTY PLEASANT VIEW HOME EMPLOYEES LOCAL 1162, WCCME, AFSCME, AFL-CIO	Case 101 No. 42921 MA-5849
and	
GREEN COUNTY (PLEASANT VIEW HOME)	

Appearances:
Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin, 53719, appearing on behalf of the Union.
DeWitt, Porter, Hugget, Schumacher & Morgan, S.C., Attorneys at Law, Two Ea

ARBITRATION AWARD

Green County Pleasant View Home Employees, Local 1162, WCCME, AFSCME, AFL-CIO, hereinafter the Union, and Green County (Pleasant View Home), hereinafter the Employer or County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing in the matter was held on December 8, 1989, in Monroe, Wisconsin. The record was closed on January 29, 1990, upon receipt of post-hearing briefs.

ISSUE:

The Union frames the issue as follows:

Did the Employer violate the collective bargaining agreement by failing to allow either of the Grievants a fair trial for the Maintenance II position?

If so, what is the proper remedy?

The Employer frames the issue as follows:

Did the Employer violate the collective bargaining agreement by failing to allow either of the Grievants a fair hearing for the Maintenance II position?

If so, what is the proper remedy?

The Arbitrator adopts the Union's statement of the issue.

RELEVANT CONTRACT LANGUAGE

ARTICLE II
Management Rights

2.01 The Union recognizes the rights and responsibilities belonging solely to the County, prominent among, but by no means wholly inclusive are the right to hire, promote, discharge or discipline for cause. The right to decide the work to be done, and the location of the work. The Union also recognizes that the County retains all rights, powers or authority that it had prior to this Agreement except as modified by this Agreement. Reasonableness of managements' decisions are subject to grievance procedure. However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members.

ARTICLE IX
Job Posting

9.01 All vacancies for existing or newly created full-time jobs or full-time shifts shall be posted for at least seven (7) working days. For other vacancies in existing or newly created job openings or shifts, the following procedure shall be followed:

1. The vacancy shall be posted for at least seven (7) working days, and employees will be

permitted to bid on such vacancy.

2. If, as a result of filling the primary vacancy, another vacancy is created (because a present employee had bid into the initial vacancy), normal job posting procedures will be followed [i.e., the secondary vacancy will be posted for seven (7) days, and employees will be permitted to bid on such vacancy].

3. Any remaining job vacancies created by the primary and secondary posting may be filled in a manner determined by the Employer. Current employees who are interested in the remaining jobs should make their interests known to the respective supervisors for consideration for the position. If the Employer elects to post such vacancies, normal posting procedures will be followed.

The Employer shall select from among signatories an employee to fill the new or vacated job. Equal consideration shall be given to seniority and qualifications in making such promotions. If an individual assumes a new position under this section, he/she shall be ineligible to sign for another job posting for a period of three (3) months from the time he/she assumes said new position. However, this restriction does not apply to an employee who may have an opportunity to post into a new position which results in increased hours, increased wages or better hours (e.g. nights to pm's, pm's to days) than their present position.

9.02 An employee awarded a job shall be given a fair trial for a period not to exceed thirty (30) days, but if it shall, at the end of thirty (30) days, be decided by the Employer that such employee is not qualified or adapted to the new position, he shall be returned to his old position without loss of seniority. If, at the end of the thirty (30)-day trial period, the employee desires, he shall be returned to his old job without loss of seniority.

9.03 If, after sixty (60) days, the County has not filled the position vacated by such job bidding, the vacated position will be open for bidding and the County shall not fill this vacancy at its discretion.

ARTICLE XXVI
Anti-Discrimination

26.01 Neither the Employer nor the Union shall discriminate in any manner whatsoever against any employee because of race, creed, color, national origin, or sex. The Employer and the Union agree to comply in all respects with the provisions of the Age Discrimination in Employment Act of 1967.

BACKGROUND

In the summer of 1989, the Employer posted a vacancy in the Grounds Maintenance position. The vacancy was due to the retirement of Elton Segman. Kathy Hunkins and Renelle Figi, hereinafter the Grievants, signed a posting for the Grounds Maintenance position. The Grounds Maintenance position description is as follows:

Grounds Maintenance Man

Characteristic Work of the Class

Nature: Under direction to provide for the maintenance of the grounds at Pleasant View, and to be responsible for the receiving of food and other supplies and to place these supplies in proper storage areas. From requisitions submitted supplies will be issued to various departments by the grounds maintenance man.

Other Duties

May be requested to perform some maintenance duties.
Keeps records and makes reports.
Keeps storage areas in a clean and acceptable condition.
Makes park benches and tables available for resident use.

Trims trees and shrubbery.

Desirable Training and Experience

High school education desirable.
Previous experience in grounds maintenance.

The Employer subsequently canceled the Grounds Maintenance posting. The Employer then posted a Maintenance II position. The Maintenance II position description is as follows:

MAINTENANCE MAN II

CHARACTERISTIC WORK OF THE CLASS

Nature: Under the direction of maintenance supervisors to assist in the repair and maintenance activities of Pleasant View Nursing Home and Complex and to perform related work as required.

EXAMPLES OF WORK:

1. Assist with the overall maintenance of buildings and grounds.
2. Assists with maintenance and repairs to boilers, pumping equipment, water system, water softening system, oxygen equipment, etc.
3. Assists with wall repair, painting, carpentry, etc.
4. Participates in snow removal operation and maintenance of lawns and grounds.
5. When called, may receive supplies to be placed in proper storage rooms.
6. May be called on to provide janitorial services at times.
7. May be assigned other duties by Supervisor as needs arise in order to maintain plant and equipment.

QUALIFICATIONS:

1. A willingness to learn necessary skills and procedures to perform work required.
2. Ability to cooperate with maintenance supervisors.
3. Experience or the ability to repair equipment and machinery and maintain buildings.

DESIRABLE TRAINING AND EXPERIENCE

1. Graduation from high school or equivalent.
2. Previous experience in facility maintenance work or building trades.

The Grievants were the only bargaining unit employes to sign this posting.

On August 24, 1989, the Grievants were told that they were to report to the Maintenance Supervisors to take a test which had been established for the Maintenance II posting. The test involved performing certain physical tasks which included the operation of a tractor used by the Employer for grounds maintenance and for snow plowing, lifting an 80-pound bag of softener salt, removing and inserting a fluorescent light bulb of the type used in the nursing home, hammering a nail into a board, wiring an electrical plug, and transporting supplies using a handcart. On August 31, 1989, each of the Grievants received the following letter from Don Stoor, Administrator of the Pleasant View Nursing Home:

> After reviewing your past work experience and training and the results of your interview with Maintenance Supervisors we have determined that you do not have the qualifications necessary for the Maintenance II position.
>
> Thank you for your interest in the position.

The County tested three other candidates, who were non-bargaining-unit employees, in the same manner as they had tested the Grievants. After all the tests were completed, the Maintenance Supervisors recommended that the Employer hire Rick Smith, which recommendation was accepted and acted upon by the Administrator. On or about September 5, 1989, a grievance was filed alleging that the Employer violated Article XXVI, Article IX, and past practice, when it did not give either of the Grievants a fair trial period and allow on-the-job training. The Grievants further alleged that, in the past, males were not tested prior to receiving the position and on-the-job training.

POSITIONS OF THE PARTIES

Union

Section 9.01 of the collective bargaining agreement provides, in relevant part, that "The Employer shall select from among signatories an employee to fill the new or vacated job." (Emphasis added.) This section also establishes the criteria to be utilized in order to differentiate between employes. (Emphasis added.) Additionally, Section 9.02 provides that only current collective bargaining unit employes are eligible for consideration for a vacant position. Section 9.01 requires the Employer to choose from the signers of the job posting. Section 9.02 requires that the Employer give the selected employe a fair trial period of 30 days. It is only at the end of that trial period that the Employer is permitted to exercise its discretion that the employe is "not qualified or adapted to the new position." As the record establishes, the Employer failed to meet the requirements of Section 9.01 and Section 9.02. Not only did the Employer fail to give either of the employes a trial period, they went outside the current work force to hire an employe to fill that position.

The Employer's actions constitute a blatant case of sex discrimination in violation of Article XXVI of the collective bargaining agreement. The Employer originally posted the vacancy as a Grounds Maintenance position, a job which had been held by a male for the last 14 years. Upon learning that the only male who had signed the posting had withdrawn from consideration, the Employer canceled the posting for Grounds Maintenance and posted a vacancy in a Maintenance II position. The Grounds Maintenance position and the Maintenance II position are at the same pay range and, in fact, there is little difference between the two positions. The Grounds Maintenance position is responsible for supplies and maintenance of grounds, while the Maintenance II position focuses on repair and maintenance activities.

The individual filling the position in dispute will continue to be the person primarily responsible for the maintenance of grounds. It is obvious, therefore, that the Employer had ulterior motives for canceling the original posting. The cancellation of the original posting was an attempt to discourage the Grievants from signing the new posting. When this failed, the Employer concocted a dubiously valid test for the position.

While it is generally acknowledged that an Employer has the right to use tests to gauge abilities, there are criteria which must be met in order to determine if the test is valid. These tests are (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.

There is no basis to establish that the test administered in any way related to the qualifications for the Maintenance Man II position. In no way did the test measure the Grievants' ". . . willingness to learn necessary skills and procedures to perform the work required." Nor did the test evaluate the Grievants' "ability to cooperate with the Maintenance Supervisors." In fact, the test did not actually measure the Grievants' "experience or the ability to repair equipment and machinery and maintain buildings." The Employer admits that the tests were concocted because the Grievants were the only signatories to the job posting.

While it is difficult to believe that, in these times, an Employer would be so brazen as to violate the collective bargaining agreement in this manner, it should be noted that this Employer has done so in the past. In 1986, Arbitrator David E. Shaw found that the Employer had engaged in discriminatory conduct with regard to the assignment of work. While this case involved a different bargaining unit, there was similar contract language. The Employer was found to have violated the contract by hiring an applicant from the outside without giving the employe who signed the posting a "fair trial."

It is important to note that, had the Employer filled the Grounds Maintenance position, they could have assigned the employe additional duties consistent with the job description. The Grounds Maintenance job description specifically states that the employe will be requested to perform some maintenance duties. Moreover, since the positions are in the same pay range, it would not be violative of the agreement to assign the Grounds Maintenance person maintenance duties.

The Employer states that the reason for the denial of the Maintenance II position was due to the Grievants' lack of experience in the building trades. However, the job description for the position only states that such experience is "desirable." It is not listed among the "qualifications" for the position. Accordingly, the Employer's reliance on such experience as being necessary is misplaced.

The Employer's case citations, upholding the Employer's right to select the most qualified candidate, is not controlling because the language of the instant agreement clearly states that "the Employer shall select from among the signatories an employee to fill the new or vacated job." The management rights provision, relied upon by the Employer, expressly recognizes that these management rights may be modified by other provisions of the collective bargaining agreement. In the present case, the management rights provided for in Section 2.01 of the agreement are expressly modified by the language contained in Sections 9.01 and 9.02.

Section 9.01 provides for a comparison of employes by seniority and qualifications. By its terms, therefore, it relates to employes only because outside applicants don't have seniority nor are they eligible to sign the postings referred to in Section 9.01. The Grievants' employment applications were filled out in anticipation of being hired for unrelated positions. Additionally, there was no testimony which indicated that the information on the applications was considered by the Employer in determining qualifications for the disputed position. Accordingly, such applications are irrelevant to the instant dispute.

Both Grievants are currently performing jobs that involve heavy lifting. Both Grievants have had training regarding lifting. The Employer overstates the hazards of working with oxygen. As to the changing of the light bulbs, the Employers' witnesses testified that there was a "trick" to removing the back bulb from a fixture. It is not surprising that the Grievants weren't familiar with the "trick."

The Employer's failure to select one of the two Grievants and providing the selected employe with a fair trial period is in violation of the collective bargaining agreement. As remedy for this violation, the Union is asking that the Employer be ordered to select one of the Grievants for the position, giving equal consideration to seniority and qualifications. The Grievant selected must be afforded a fair trial period as provided in Section 9.02. If, as provided in Section 9.02, the selected employes proves that she is qualified and adapted to the position, then she should be awarded that position on a permanent basis, and be made whole for the difference between those wages and benefits she earned and those wages and benefits she would have earned, but for the Employer's selection of another applicant to fill the position. If the first Grievant selected fails to succeed in obtaining the position on a permanent basis, then the second Grievant should be afforded the same opportunity. Inasmuch as this is an interlocutory type of remedy, the Union asks that the Arbitrator retain jurisdiction to resolve any disputes which may arise under this remedy until discharged by the joint request of the parties.

Employer

Arbitrators have generally recognized that the Employer has the right to determine whether or not an applicant is qualified for a job vacancy. In making this determination, the Employer has the right to award a position to a qualified, non-bargaining-unit member if the bargaining unit employe who bid for the job is deemed by the Employer to be not qualified. In determining whether the bargaining unit applicant is qualified, testing is deemed to be a legitimate device even for jobs where there is no past history of such testing. Management has the right to determine the work elements of the job and a test which is closely related to job duties is a fair test.

Article II of the agreement, Management Rights, reserves to the Employer the right to hire. The Employer does not contest the Union's argument that the Article II right of the Employer to hire has been limited by the adoption of a job posting provision. The Employer, however, denies that in agreeing to this job posting provision, that the Employer has assented to select any employe who may sign a posting and give to him or her a reasonable trial period in the job before seeking others to be hired.

In adopting the language of Section 9.01, the parties to the agreement clearly had qualifications as well as seniority in mind. Therefore, it would be an absurd construction of the agreement to require completely unqualified persons to work at a job solely on the basis that they signed a posting. It is significant that the Union does not attempt to show in its brief that the Grievants were, somehow, qualified to do the job. While there is some testimony to demonstrate that each had limited experience in some portions of the job, both Grievants acknowledge that they were not initially qualified for the job and it is their position that they ought to be permitted to become qualified in a 30-day period by learning from others.

Before an employe is entitled to the Section 9.02 30-day trial period, that employe must first be "awarded a job" pursuant to Section 9.01. Section 9.01 expressly permits the Employer to consider both "seniority and qualifications." In the present case, the Employer made a determination, based on its interview and testing of the Grievants, as well as the evaluation of their background training and experience, that neither of the Grievants were qualified. Since the Grievants were not qualified, they were not contractually entitled to be awarded the job or given the trial period set forth in Section 9.02.

It is not the position of the Employer that the Grievants failed to meet the qualifications set forth in Items 1 and 2 on the job description. Rather, it is the position that neither Grievant possessed "experience or the ability to repair equipment and machinery and maintain buildings" set forth in Item 3.

The Grievants' application forms, which were prepared by each of the Grievants, make it clear that neither had any working experience or training which would, on its face, indicate that the applicants possess the qualifications to do the job. The Employer did not make its determination that the Grievants were not qualified solely on the basis of their job applications. Rather, the Employer took the reasonable approach of conducting interviews and testing. The Maintenance II position involves the employment of many different types of skills, some of which require strength. The test was not designed to cover each and every aspect of the job. Rather, it was designed to give the supervisors some idea if the applicants possessed the rudimentary skills needed for the job. The record does not demonstrate that the tests involved tasks which were unrelated to the job.

By questioning the Grievants during the testing procedure, the supervisors interviewed the Grievants and determined that the Grievants' farm background provided them with some familiarity with the operation of machinery, but they did not have any real experience. Neither of the applicants complains about the scores they received. Rather, they indicate that, with time, they would be able to adequately perform these tests or, in the alternative, they would be able to assist others who could do this work. Each of the Grievants acknowledged that they were unable to do the job at the time they signed the posting and expected to receive on-the-job training. As the supervisors testified at hearing, such training would take a very long time.

The test was reasonable as it was designed to provide the supervisors with information of the most basic nature about each applicant's ability to perform the requisite work. Considering the Grievants' failure to satisfactorily perform such simple tasks as wiring a common wall plug or changing a light bulb, it is not unreasonable for the Employer to have concluded that neither of the applicants was qualified to perform the job.

The agreement does not require the Employer to provide either of the Grievants with an opportunity to learn the job during a 30-day trial period. Nor is it reasonable for the Employer to be expected to provide such a trial period. As the testimony of the supervisors demonstrates, they were concerned about the safety of the Grievants. The Employer also has the right, as well as

the obligation, to consider the safety of others. The work in dispute does not involve clerical or desk work, but rather, involves working with steam boilers, going up on ladders, welding, working with electricity, working with oxygen, driving a very large tractor, lifting 80-pound bags of salt and, on a regular basis, transporting heavy supplies down a flight of steps. Any of these tasks, performed by an inexperienced person, could result in serious injury, or worse. In addition, employes in the position are required, from time to time, to work with other maintenance employes. These employes have the right to expect that their coworkers are well trained and competent to do their job. This is not a "trainee" position. The job description calls for an experienced worker.

While the Grievants have alleged that there is a past practice of hiring without testing, they presented no evidence to support this allegation. The two supervisors who testified at hearing stated that they had never hired anyone to fill a Maintenance II position. What some other supervisor or administrator may have done or not done is unknown as none testified. We do not know what the previous collective bargaining agreements may have said with respect to this issue and we do not know what other supervisory employes may have relied on in the past in making the determination that an applicant was qualified. Assuming arguendo, that the record supported the Grievants' claim of past practice, there is nothing in the agreement which prohibits the Employer from testing, nor is there anything in the agreement that would require the Employer to follow such a "past practice."

The Union's argument that the motivation of the Employer was to keep the Grievants out of the job vacancy solely because of their gender is beyond the scope of the stipulated issue and is not substantiated by the record evidence. Neither the testimony nor the demeanor of the supervisors and the administrator establish that they were hostile to the Grievants or prejudiced against women in any way. Rather, the record demonstrates that each had good reasons to conclude that the grievants were not qualified. Gender bias was not involved in any way. It is the Union's burden of proof to establish the allegation of sex discrimination. The Union must do more than simply state that the actions were based on, or motivated by, prejudice.

The Union's argument that the Employer established the tests because the Grievants had filed for the posting and that the Employer canceled the first posting upon discovering that the Grievants were the only signatories, is not supported by the record evidence. Arbitrator Shaw's 1986 Arbitration Award, relied upon by the Union, has nothing to do with the instant matter, but rather, is an obvious attempt on the Union's part to prejudice the Arbitrator against the Employer.

The Employer did not violate any provisions of the agreement in making its determination that the Grievants were not qualified to perform the work. The tests devised by the Employer to determine qualifications were reasonable and were not barred by any provision set forth in the agreement. The Employer's decision not to award the Maintenance II position to either Grievant was reasonable and consistent with the Employer's contractual rights. Accordingly, the grievance must be denied and dismissed.

DISCUSSION

Section 9.02 sets forth the procedure by which bargaining unit employes may bid on bargaining unit vacancies, such as the Maintenance Man II position in dispute. Employes "bid" on such vacancies by signing the job posting. As the Union argues, Section 9.01 contains the following sentence: "The Employer shall select from among signatories an employee to fill the new or vacated job." Standing alone, this language supports the Union's argument that the Employer was obligated to award the Maintenance Man II position to one of the two signatories to the posting, i.e., one of the two Grievants. This sentence, however, does not stand alone. Immediately following this sentence is the following sentence: "Equal consideration shall be given to seniority and qualifications in making such promotions." Given this explicit recognition that "qualifications" is a relevant factor in awarding promotions, the most reasonable interpretation of Section 9.01 is that the Employer's obligation to "select from among signatories" is an obligation to select among qualified signatories.

As the Union argues, Section 9.02 does provide for a "fair trial" period. However, to be eligible for this "fair trial" an employe must be "awarded a job." Construing the language of Section 9.02 within the context of Article IX, one may reasonably conclude that to be awarded a job pursuant to Sec. 9.02, an employe must be qualified for the job.

In summary, while the language of Sections 9.01 and 9.02 is not without ambiguity, the most reasonable interpretation of this language is that the Employer is not contractually required to award the Maintenance Man II position to either Grievant, or to provide either with a "fair trial," unless the Grievants are qualified for the position. While the Union argues that such a conclusion is contrary to an established past practice, the undersigned does not find the Union's argument to be persuasive.

At hearing, Union witness Steve Chenous, a Maintenance Man II who was

Union President in 1987 and 1988, offered testimony concerning previous promotions involving bargaining unit employes. According to Chenous, the Employer has a past practice of using the trial period to determine whether or not an employe is qualified for a position. While the undersigned does not doubt the sincerity of Chenous' testimony, the undersigned is not persuaded that Chenous has sufficient knowledge of prior bidding situations to reliably comment upon the existence, or non-existence, of such a practice. To give effect to a past practice, i.e., to imply a contract provision which is not reflected in the written word of the contract, the record must demonstrate that this practice was (1) unequivocal, (2) clearly enunciated and acted upon and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Such evidence is not present in the instant case.

For the reasons discussed supra, the Employer was not contractually obligated to provide either of the Grievants with a Section 9.02 trial period unless the Grievants were qualified for the Maintenance Man II position. Thus, the undersigned turns to the question of whether or not the Employer had a reasonable basis to conclude that the Grievants were not qualified for the disputed position.

The position description for the Maintenance Man II position contains the following qualifications:

> 1. A willingness to learn necessary skills and procedures to perform work required.
> 2. Ability to cooperate with maintenance supervisors.
> 3. Experience or the ability to repair equipment and machinery and maintain buildings.

As the Employer recognizes, Article II provides that the "reasonableness of management's decisions" is subject to review by the undersigned.

To determine the "reasonableness" of the qualifications established by "management," one must compare these qualifications to the duties and responsibilities of the position. Upon consideration of the record evidence, the undersigned is persuaded that the duties and responsibilities of the Maintenance Man II position are accurately described in the position description as follows:

> 1. Assist with the overall maintenance of buildings and grounds.
> 2. Assists with maintenance and repairs to boilers, pumping equipment, water system, water softening system, oxygen equipment, etc.
> 3. Assists with wall repair, painting, carpentry, etc.
> 4. Participates in snow removal operation and maintenance of lawns and grounds.
> 5. When called, may receive supplies to be placed in proper storage rooms.
> 6. May be called on to provide janitorial services at times.
> 7. May be assigned other duties by Supervisor as needs arise in order to maintain plant and equipment.

Upon review of these duties and responsibilities, the undersigned is satisfied that the qualifications set forth in the position description are reasonably related to the duties and responsibilities of the Maintenance Man II position.

The letter notifying the Grievants that they had not been selected for the Maintenance Man II position contained the following:

> After reviewing your past work experience and training and the results of your interview with the Maintenance Supervisors we have determined that you do not have the qualifications necessary for the Maintenance II position.

The Employer does not argue that the Grievants lack the following two qualifications:

> 1. A willingness to learn necessary skills and procedures to perform work required.
> 2. Ability to cooperate with maintenance supervisors.

Rather, the Employer's argument is that the Grievants do not have "Experience or the ability to repair equipment and machinery and maintain buildings."

Administrator Stoor's response to the grievance, which is dated September 15, 1989, indicates that the Employer gave consideration to the fact that "Neither of the applicants had any previous experience/training in the building trades or industrial arts." As the Union argues, "Previous experience in facility maintenance work or building trades" is not a "Qualification" for the Maintenance Man II posting, but rather falls under the heading of "Desirable Training and Experience." As a general rule, the Employer may not

rely upon "Desirable Training and Experience" in determining qualifications for a position. However, in the instant case, "Previous experience in facility maintenance work or building trades or industrial arts" is a factor which is relevant to a determination of whether or not the Grievants meet the "Qualification" of "Experience or the ability to repair equipment and machinery and maintain buildings." Accordingly, it was not unreasonable for the Employer to consider the lack of "previous experience/training in the building trades or industrial arts" when determining the Grievants' qualifications for the Maintenance Man II position in dispute.

As the Employer argues, the Grievants employment applications, which were filed with the Employer when the Grievants initially sought employment with the County, do not reflect that either of the Grievants have "Experience or the ability to repair equipment and machinery and maintain buildings." 3/ Nor is it evident that the Grievants' work experience and training with the Employer reflect that the Grievants have the "Experience or the ability to repair equipment and machinery and maintain buildings." 4/

As the Grievants indicated at hearing, their employment applications did not list all of the Grievants' prior work experience and training. For example, each of the Grievants had grown up on a farm and had experience operating and maintaining farm equipment. As the Union argues, it was not unreasonable for the Grievants to have limited their initial employment applications to work experience and training which was relevant to the position they were seeking at the time of initial employment, i.e., a Kitchen Helper and a Nursing Assistant. However, by doing so, it became the Grievants' responsibility to update the Employer's records by providing the Employer with information on prior work experience and training which was relevant to the Maintenance Man II position. Since it is not evident that the Grievants provided the Employer with information on past work experience and training not reflected on the initial employment application, the Union may not rely upon such information to argue that the Grievants were qualified for the Maintenance Man II position. 5/ Given the record presented herein, it was not unreasonable for the Employer to have concluded that the Grievants' past work experience and training did not qualify the Grievants for the position of Maintenance Man II.

In determining the Grievants' qualifications for Maintenance Man II, the Employer also relied upon the "interview with the Maintenance Supervisor." This "interview" involved a test, in which the Grievants were asked to perform the following tasks: (1) wiring a three-prong plug to an electrical cord, (2) removing and replacing two fluorescent light bulbs, (3) lifting an 80-pound bag of softener salt, (4) driving a garden tractor, (5) hammering a nail, and (6) transporting cases of supplies on a two-wheeled dolly.

Where, as here, the contract language does not restrict the Employer's right to use tests to determine qualifications, an employer is entitled to give such tests, provided that the tests are: (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. 6/ As the Union argues, not all of the test tasks measure "Experience or the ability to repair equipment and machinery and maintain buildings." However, the posted position, unlike the other Maintenance Man II positions in existence when the position description was last revised, i.e., 2/88, also has primary responsibility to perform the work previously performed by the Grounds Maintenance Man, e.g., transporting supplies on the two-wheeled dolly, using tractors to mow lawn and plow snow, and other grounds maintenance duties. Since all of the test tasks are tasks which would be performed by the employe in the Maintenance Man II position in dispute, they are specifically related to the requirements of the job. Inasmuch as the test tasks involve the more rudimentary duties of the Maintenance Man II position, it was fair and reasonable to select these tasks for the test.

1/ Hunkins' application lists her previous work experience as waitress, mail order telephone operator, and bookkeeper. Figi's application lists two office manager positions and a sales clerk cashier position. While it is not clear that the Employer reviewed these applications when it determined that the Grievants' past work experience and training qualified the Grievants for the Maintenance Man II position, the information contained in these applications was in the Employer's possession and may be considered when determining whether or not the Employer had a reasonable basis to conclude that the Grievants were not qualified for the Maintenance Man II position.

2/ Hunkins has worked as a Cook's Helper and Figi has worked as a Nursing Assistant.

3/ It is evident that Stewart was aware of the fact that Figi had come from a farm family. It is not evident, however, that Stewart, or any other Employer representative was aware that Figi's farm duties had provided Figi with experience in maintaining farm equipment.

4/ Elkouri and Elkouri, How Arbitration Works, BNA (4th Ed), p. 620.

While the Union argues that the tests were not administered in good faith and without discrimination, the undersigned does not find the Union's argument to be persuasive. Chenous' testimony demonstrates that when Chenous applied for the Maintenance I position, in the Fall of 1981, the Employer tested the senior applicant, who was a female bargaining unit employe. Following the testing, the female applicant was offered the position, but declined to accept the position. Chenous was then offered the position. Chenous, who accepted the position, was not asked to take a test. Assuming arguendo, that it was discriminatory for the Employer to have tested the female applicant and not the male applicant, the present case does not involve such discrimination because all of the applicants, both male and female, received the same test.

As Chenous testified at hearing, the Employer currently employs one female Maintenance I worker. Another female employe, Kelly Huber, had posted into a Maintenance I position, but returned to her former position. 7/ Since the record is silent as to whether these two female employes were required to take any test prior to receiving a position in the Maintenance Department, the record does not demonstrate that there is a pattern of discriminatory conduct involving the testing of female applicants for Maintenance Department positions.

To be sure, as Chenous testified at hearing, he was not required to take a test when he posted for and received his current position of Maintenance Man II. However, prior to accepting the Maintenance II position, Chenous had two and one-half years' experience as a Maintenance I worker. 8/ As Chenous testified at hearing, there was overlap between the Maintenance I position and the Maintenance Man II position, e.g., changing the fluorescent light bulbs and minor repair work. It is reasonable to conclude that Chenous, unlike the Grievants, had performed work for the Employer which provided the Employer with an opportunity to determine whether or not Chenous had the ability to perform the more rudimentary tasks of the Maintenance Man II, of the kind tested by the supervisor. Thus, the Employer's failure to test Chenous does not warrant the conclusion that the Employer's decision to test the Grievants was discriminatory.

The test was administered and evaluated by the two Maintenance Supervisors, Phil Stewart and Don Rufer. It is not evident that either supervisor had any prior conflict with the Grievants, or had engaged in any discriminatory conduct toward any employe. At hearing, Chenous described two conversations with Stewart which occurred after the Grievants were denied the Maintenance Man II position. During the first conversation, Chenous approached Stewart and asked why the Grievants "didn't get a chance." Stewart responded that "they were not going to waste time training them." A day or so later, Chenous told Stewart that "there are women who can do the job." Stewart responded, "Yes, but do you think these two could?" According to Chenous, he was so angered by Stewart's response that he walked away and quit asking him questions.

Crediting Chenous' testimony concerning his discussions with Stewart, the undersigned concludes that Stewart indicated to Chenous that there were women who were qualified to perform the Maintenance Man II work, but that the two Grievants were not qualified to perform such work. Stewart's statements to Chenous do not evidence a gender bias, but rather support the Employer's argument that the Grievants' rejection was due to the fact that the Employer considered the Grievants to be unqualified.

After each applicant completed the test, the supervisors jointly prepared a written evaluation of the test. The evaluation form contained the following categories: "Put Plug on Electrical Cord," "Drive Tractor," "Lift 80# Bag of Salt," "Change Fluorescent Light Bulb," and "Take Supplies Down Steps Using a Cart." While each Grievant was also asked to hammer a nail, this test category is not reflected on the written evaluation.

In the written evaluation of the Grievants' test performance, Hunkins was rated "Poor" in each category except changing the light bulb, which category was rated "Below Average." At hearing, the supervisors indicated that Hunkins had problems putting the electrical wires in the right place; that Hunkins had difficulty in backing the tractor and maneuvering the tractor out of the storage shed; that Hunkins used improper technique in lifting the bag of salt in that she did not bend at the knees and lift with her legs; that Hunkins was able to remove the outer fluorescent bulb, but was not able to remove the inner bulb; that Hunkins endangered her safety by attempting to descend the steps by walking in front of the dolly; that although employes normally transport six cases at a time, Hunkins had difficulty maneuvering the dolly with one case on it; and that Hunkins was able to hammer the nail without

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5/ The record does not establish whether the return was at the request of the employe or the Employer.

6/ At the time of Chenous' acceptance of the Maintenance Man II position, Chenous was in Housekeeping, not Maintenance.

difficulty.

At hearing, Hunkins agreed that she did not do well at wiring the plug and that she was able to remove one of the light bulbs, but not the other; Hunkins further agreed that she was able to hammer the nail. Hunkins did not deny the supervisors' assertion that she had attempted to descend the steps in front of the dolly or that she did not bend her knees and use her legs when lifting the bag of salt. Hunkins indicated that when she initially placed the case on the dolly, it flipped off and that when she replaced the case, she was able to complete the task, albeit somewhat slowly. Hunkins did not agree with the supervisors' assessment that she had problems maneuvering the tractor.

According to Figi's written evaluation, she was "Average" in the lifting of the bag of salt; "Below Average" in "Drive Tractor"; and "Poor" in each of the other categories. At hearing, the supervisors indicated that Figi, with difficulty, was able to put the wires in their proper place, but she failed to tighten the housing screws and the plug came apart; that Figi was riding the tractor's brake and jerking the tractor; that Figi used proper technique to lift the bag of salt; that Figi had difficulty removing and replacing the fluorescent bulbs; that Figi, like Hunkins, attempted to descend the stairs by walking in front of the dolly; and that Figi did not hold the nail properly when she hammered it.

At hearing, Figi agreed that, after she had rewired the plug, she pulled too hard on the housing and the wiring came out. Figi agreed that she had difficulty releasing the brakes but stated that the supervisors also had the same difficulty. Figi did not believe that she had any other problems with driving the tractor. Figi agreed that she did not have any difficulty in lifting the bag of salt. Figi agreed that she had difficulty in removing and replacing the light bulb and, like Hunkins, was not able to remove the second bulb. Figi, who indicated that the supervisors had told her to take what she could handle, placed three cases on the dolly. Figi agreed that she wanted to walk in front of the dolly as she descended the stairs and that she had problems because the load was heavy. According to Figi, she was able to drive the nail in straight.

While there is some difference of opinion, the Grievants' testimony concerning their test performance is generally consistent with that of the supervisors. This consistency, as well as the lack of evidence that the supervisors were hostile towards the Grievants, supports the conclusion that each Grievants' test performance was properly evaluated.

For the reasons discussed supra, the undersigned is satisfied that the test administered to the Grievants was (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. Contrary to the argument of the Union, it was reasonable for the Employer to use the test results in determining whether the Grievants were qualified for the position in dispute. As the Employer argues, the Grievants' test results support their conclusion that the Grievants were not qualified for the Maintenance Man II position in dispute.

As the Union argues, the Employer did initially post a Grounds Maintenance Man position. At the time that this posting was removed and the Maintenance Man II position was posted, the Grievants were the only signatories to the Grounds Maintenance position. While this conduct of the Employer, in and of itself, supports the inference that the Employer was seeking to discriminate against the Grievants by changing the position in such a manner that the Grievants could not qualify for the position, the record, taken as a whole, indicates otherwise.

At hearing, Administrator Stoor stated that he had not intended to fill the Grounds Maintenance position when he posted the position, but believed that he had a contractual obligation to do so. Rufer stated that the Employer's decision to fill a Maintenance Man II position, rather than a Grounds Maintenance position, was due to the fact that there was insufficient work to justify a full-time grounds person and that the Employer wanted to assign Maintenance Man II work as needed. As Chenous' testimony demonstrates, Rufer's explanation for the change in posting is consistent with explanations previously provided to the Union.

As the Union witnesses stated at hearing, it is not evident that there has been a material change in the amount of grounds work. It is evident, however, that the previous grounds keeper did not have enough work to occupy a full-time grounds keeper. Thus, the fact that there may not have been a decrease in the amount of grounds work does not provide a reasonable basis to conclude that the Employer's claimed rationale for posting a Maintenance Man II is pretextual. As the testimony of Chenous demonstrates, the successful applicant has been performing all of the grounds work previously performed by Elton Segman, as well as duties traditionally performed by the Maintenance Man II.

As the Union argues, the position description of the Grounds Maintenance Man, which is at the same pay range as the Maintenance Man II position,

expressly states that the incumbent may be requested to perform some maintenance duties. However, the Union witnesses and Employer witnesses are in agreement that the previous occupant of the position, who held the position for fourteen years, had successfully resisted performing any maintenance duties other than those associated with grounds maintenance. Given this history, it is not incredible that the Employer would have determined that the imposition of Maintenance Man II duties required the position to be posted as a Maintenance Man II.

At hearing, Chenous acknowledged that Stoor has been fair in his dealings with Chenous and has not exhibited any sexual bias. Upon consideration of this testimony, Stoor's demeanor at hearing, and the record as a whole, the undersigned credits Stoor's testimony that he had not intended to fill the Grounds Maintenance posting, but posted the position because he believed that he was contractually obligated to do so. Upon consideration of Rufer's demeanor at hearing, as well as the record as a whole, the undersigned credits Rufer's testimony that the decision to fill a Maintenance Man II position, rather than a Grounds Maintenance position, was due to the fact that there was insufficient work to employ a full-time grounds person and that the Employer intended to assign Maintenance Man II duties to the position. Despite the Union's argument to the contrary, it is not evident that the Employer's decision to fill a Maintenance Man II position, rather than a Grounds Maintenance position was motivated, in any part, by a desire to discriminate against the Grievants on the basis of their sex.

In conclusion, the record fails to establish that the Employer's failure to provide the Grievants with a fair trial period for the Maintenance Man II position was unreasonable in violation of Article II, or discriminatory in violation of Article XXVI. Nor does the record establish that this failure was contrary to the provisions of Article IX.

Based upon the above, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the collective bargaining agreement by failing to allow either of the Grievants a fair trial for the Maintenance II position.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 9th day of May, 1990.

By_____
Coleen A. Burns, Arbitrator