BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	Case 204 No. 44568 MA-6343
CITY OF GREEN BAY CITY HALL, TRANSIT AND PARKING UTILITY EMPLOYEES UNION LOCAL 1672-A, and AFSCME, AFL-CIO	
and	
CITY OF GREEN BAY	

Appearances:
Mr. James W. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.
Mr. Mark A. Warpinski, Assistant City Attorney, City of Green Bay, on behalf of the City.

ARBITRATION AWARD

The City of Green Bay City Hall, Transit and Parking Utility Employees Union, hereafter the Union, and the City of Green Bay, hereafter the City or Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the City concurred, that the Wisconsin Employment Relations Commission designate an arbitrator to hear and decide a grievance as to the meaning and application of the terms of the agreement relating to the filling of vacancies. Hearing was held in Green Bay, Wisconsin, on January 25, 1991, with a stenographic transcript being provided to the parties by February 25, 1991. Briefs were received from the Union on March 25, 1991, and from the City on April 11, 1991. The City and Union submitted reply briefs on April 30 and May 2, respectively.

ISSUE:

Did the Employer violate Article 8 (B) of the collective bargaining agreement when it did not appoint Christine Rudolph to the position of Assistant Parts Clerk? If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 8 NEW JOBS-VACANCIES

(A) A vacancy shall be defined as a job opening not previously existing in the Table of Organization or a job opening created by the termination, promotion or transfer of existing personnel when the job continues to exist in the Table of Organization.

(B) All vacancies shall be posted on the bulletin boards of the City Hall, Transit Office and Parking Utility Office and such notice shall be posted at least three (3) working days before the vacancy is filled. Employees on each seniority list (City Hall, Parking Utility, and Transit), shall receive priority consideration for posted jobs covered by their respective lists prior to employes on the other lists or non-bargaining unit members. Employes wanting such posted jobs shall sign the posted notice. The most senior qualified applicant for promotion, lateral transfer or voluntary demotion shall be selected. Said employe shall demonstrate the ability to perform the job posted within the thirty (30) day familiarization period and on such satisfactory demonstration shall be permanently assigned the job. (emphasis added)

(C) Should such employe not qualify or should s/he desire to return to the former job, s/he shall be reassigned to the former job without loss of seniority. In such event, the employe next in line of seniority shall be given the opportunity to qualify until the vacancy is filled. A copy of such notice of vacancy shall be given to the Union. The Personnel Office shall notify the successful and unsuccessful candidates for a job, with notice to the Union, within ten (10) working days after a posting comes down.

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ARTICLE 11 WORK SCHEDULE - OVERTIME PAY - CALL-IN PAY

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(8) The position of Parts Laborer in the D.P.W. West Side Garage will work overtime in the Parts Area only when it has been determined that the Parts Clerk, Assistant Parts Clerk and employes from the main office of the D.P.W. West Side Garage are unavailable to work the overtime hours.

ARTICLE 25 MANAGEMENT RIGHTS

(A) The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City, including the power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote and discipline for just cause, and to determine reasonable schedules of work and to establish methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, to delete positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kind and amounts of services to be performed as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine methods, means and personnel by which the City operations are to be conducted. The City may also contract out for goods or services as long as the contracting does not eliminate hours from existing employees.

(B) This clause is not intended to deny the employees appeal through the grievance procedure.

BACKGROUND

Christine Rudolph, the grievant, is a typist II at the main office of the City's Department of Public Works (DPW) main garage. This grievance concerns the City's decision not to appoint her to the position of DPW Assistant Parts Clerk.

Rudolph began her employment with the City in 1977, and, at the time of the posting, had worked at the West Side Garage for more than one year. From November 1989-May 1990, Rudolph followed an irregular training routine, in which she would spend a few hours each week in the Parts Room, observing procedure and performing some duties. She did not receive the higher wage rate of Assistant Parts Clerk, which she did not grieve because she had been told by her supervisor that she was being trained for the APC position. From May - July, 1990, consistent with the contractual provisions for the assignment of overtime, Rudolph was formally assigned to fill in as APC for about 30 hours, during which time she did receive the higher wage rate for performing such APC tasks as checking equipment in and out and doing inventory work. Prior to the Parts Room work, Rudolph never had any experience with parts or their distribution. Nor did she have a working knowledge of automobile/heavy equipment parts.

From the morning of June 27 to the afternoon of July 2, 1990, the City posted a Notice of Vacancy For Current Employes for the position of Assistant Parts Clerk, DPW. The notice stated that a review of personnel files would be made "to determine minimum experience requirements." The notice also stated that:

> The selection process involves a review of related education, experience, and seniority and may include an oral interview, tests and/or other measures of knowledge and skills deemed necessary for successful job performance in this position.

The job description itself, last updated on January 8, 1986, but still valid, provided as follows:

I.TITLE

Assistant Parts Clerk

II.DEFINITION

Parts Department work for the Department of Public Works.

III.DUTIES, RESPONSIBILITIES AND WORK PERFORMED

Fill job orders and distribute tools to all divisions.

Receive shipments, stock shelves and balance books for gas and diesel fuel used.

Assist with annual inventory.

Take over for Parts Clerk in his absence.

Performs related work as assigned.

IV.KNOWLEDGE, SKILLS AND ABILITIES

Working knowledge of automotive and heavy equipment component parts.

Knowledge of inventory and supply procedures and basic office practices.

Ability to maintain a working relationship with fellow employes and deal with vendors in an orderly manner.

Ability to follow written or oral orders.

V.PHYSICAL REQUIREMENTS

Must be in good physical condition and be able to pass a standard City physical examination.

Must have no physical defects which would impair work performed or endanger fellow employes.

VI.EXPERIENCE AND TRAINING
Graduation from high school.

Some experience in parts room procedures or related field.

There were nine applicants examined for the position. 1/ After a review of applications and resumes, the City personnel department determined that four applicants (three males, one female) lacked the necessary minimum experience, and these applicants were not considered any further. The five remaining applicants (the grievant, three females and one male) were then invited to take a series of written examinations.
At the time of the posting for the APC position, Rudolph was the senior unit employe to apply. When informed that she would have to take one or more tests to demonstrate her qualification for the position, she did not file a grievance.

The written examinations involved a checking test, a forms completion test and a parts identification test. Because the grievant had recently passed the checking test, she was required only to take the forms and parts tests. The grievant passed the forms test, but failed the parts identification test. On that test, with a passing score being 70%, the grievant scored a 26%. The City thus deemed her to be qualified on three of the four indicia of knowledge, skills and abilities (knowledge of inventory and supply procedures and basic office practices, ability to maintain a working relationship and ability to follow orders), but not on the working knowledge of automotive and heavy equipment component parts.

As the grievant was the most senior applicant, the City completed its review of her application before it considered the other applicants. All five passed the tests for checking and forms completion, but only one passed the test on parts identification. It was that applicant whom the City hired.

On July 16, 1990, the union grieved, stating that the grievant "was tested for a position that she was already trained for and appropriately paid for hours worked doing that job." The requested remedy was that the grievant "be given 30 day familiarization period to demonstrate ability to perform this job." The City denied the grievance, and the matter was advanced to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> This is a unique grievance, clearly distinguishable from all other arbitrations about job posting. The contractual

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1/ There were other applicants whose applications were not fully processed at the time a hiring decision was made.

provisions for job posting must be read in conjunction with the provisions on overtime, which, by specifically stating that overtime in the parts room is to be done by office employes, thereby builds into their jobs automatic training for parts room positions. The grievant did the work of the Assistant Parts Clerk, and was never told she was not qualified to do the work in the parts room; therefore, she is the "most senior qualified applicant." The Employer errs when it relies on the test which it says the grievant did not pass, because there simply should not have been a test at all; as the grievant had already worked in the job she was therefore the most senior qualified applicant, and should have been awarded the position and the 30 day familiarization period as called for in the agreement.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

The 30 hours of work the grievant did as a fill-in Assistant Parts Clerk enabled her to continue in the selection process. But it did not, as the Union contends, automatically render her qualified for the full-time position.

In general, arbitral authority supports using tests to measure qualifications. The Union acknowledges that these particular tests, especially including the parts identification test, were valid and properly administered. That the grievant failed this test painfully underscores that her prior work experience did not make her qualified for this position.

Had the grievant felt it unnecessary to have her qualifications measured, would she have submitted to the test? Why was no grievance filed with respect to the test itself? But having taken the test, the grievant cannot now contend that the results did not favor her. Obviously, had the grievant's 30 hours of work made her qualified, then she should not have had a problem passing the parts identification test. Failing the test, however, meant she was not qualified.

In reply, the union posits further as follows:

The City's argument that the grievant should have had no problem passing the test based on her 30 hours experience compels the City to show that the experience thus gained was with the parts to be identified on the test, and that the grievant was aware that knowledge of these parts was necessary to get a position in the stock room. Yet there is no evidence that this was done, or that the parts on the test are used by the department or even exist; further, some may be used only seldom, if ever. That is why there is a 30-day familiarization period.

The City improperly relied solely and exclusively on the test, failing to take into account the grievant's education, experience and seniority. The City had a right to test, but not the right to use the test as its sole determining factor as to qualifications. As to why she took the test if she thought she was qualified, "do now, grieve later," is a well-established principle that needs no elaboration.

As the grievant's education, experience and seniority made her the most senior qualified applicant, the test should not have been given; alternatively, the employer should not have relied on the test exclusively, but should have taken into account these other factors. Either way, the grievant should have been given the position and the 30-day familiarization period.

In reply, the City posits further as follows:

Contrary to the union's assertion, the contractual language regarding Parts Room work was for the specific purpose of determining applicable work schedules, overtime and call-in pay; it was not to provide automatic training for the Parts Room job. Were there to be such automatic presumption, the contract would provide special consideration for the Parts Room Clerk, similar to that accorded the City Hall, Parking Utility and

Transit seniority lists.

The Union also errs in contending that a test should not have been given. The grievant never objected to signing the posting which she knew could provide for a test; she never attempted to stop the test; she submitted to the test, and should be bound by its result.

DISCUSSION:

It is generally held that, in the absence of specific contractual provisions which prohibit examinations, management has the right to give reasonable and appropriate written and/or oral tests as to performance and aptitude to determine the ability of applicants for hire and/or promotion. Packaging Corp. of America, 70-1 ARB (Stouffer). Of course, to be valid, such tests must be professionally developed, closely related to the job to be performed, and administered and scored both fairly and consistently. Vulcan Materials Co., 70-1 ARB (Block).

Here, the Union is not contending that the test itself was improperly drafted or scored; rather, the Union asserts that what was improper was that the test was given to the grievant at all. That is, the Union's position is that the grievant was entitled to the vacancy simply by virtue of her seniority and qualifications, (i.e., education and experience), which qualifications she did not need to demonstrate via the employer's test.

In part, the City responds by noting that the grievant never objected to taking the test until after she had failed it, suggesting that this was an implied waiver of objection, making the grievant be bound by the test results.

I reject that portion of the City's case. As the Union correctly notes, "do now, grieve later" is a well-established tenet of labor relations. The mere fact that the grievant took the test does not preclude her and the Union from grieving the particulars of the vacancy-filing process.

Essentially, the Union's case is that the collective bargaining agreement granted to the grievant an automatic training opportunity as Assistant Parts Clerk, the position for which she later sought appointment; as the City never told her during her overtime/training period that she was not qualified to perform the tasks of the Assistant Parts Clerk, by definition she was qualified. Therefore, the Union contends, the grievant was, by definition, the most senior qualified applicant, and thus, by virtue of the contract, entitled to the position and the 30-day familiarization period.

The problem with the Union's case is that it seeks to turn automatic overtime into mandatory (and successful) training. Certainly, the overtime provided for in lines 358-363 do provide the opportunity for successful training to become an Assistant Parts Clerk; however, in and of itself, this opportunity does not automatically mean that one who has had this opportunity is, by definition, qualified.

As to the administration and scoring of the test itself, the City procedures were acceptable. The posting clearly stated both the duties performed and the abilities required, including a "working knowledge of automotive and heavy equipment component parts." The posting also put applicants on notice that the selection process might include "tests and/or other measures of knowledge and skills deemed necessary for successful job performance...." The test which the grievant did not pass required the identification of drawings of automotive and heavy equipment component parts -- the very items of which a successful applicant would have to have a working knowledge. Finally, given the procedures the City used in issuing/scoring the tests and evaluating/ranking the applicants, I am convinced the City was mindful of its contractual obligation to award the vacancy to the most senior qualified applicant.

The aspect that has given me most pause is that relating to the "thirty day familiarization period." According to the Union, this provision serves a dual purpose, in that it gives the applicant sufficient time to demonstrate ability, while it also limits the employer's risk in the event the applicant proves unsatisfactory.

But provisions such as this can serve disparate, sometimes conflicting, purposes (notwithstanding the constant goal of reducing employer risk, as noted above). One purpose is to allow a successful applicant a sufficient time to become qualified to perform the duties of the job. For example, to learn how to identify a gasket, differential, carburetor, and so on, or how to complete a basic inventory form. I consider a trial period with this purpose to be a training period. The other purpose is to allow an already-qualified applicant to become familiar with the specific methods and procedures of the new job. For example, an expert, trained parts clerk would still have to learn the lay-out of the parts room, the way in which requests for parts were prioritized, the chain of communications for making requests, the way surplus or spoiled parts were handled, the procedures for purchase (bids, requests for purchase, sole source) and other aspects of the relationship with vendors, and so on.

This is what I consider a familiarization period to be.

It may be that the experience of this employer and this union is such that I have discussed a distinction that does not really exist. For that reason, the two preceding paragraphs should be understood as dicta which underlie my reasoning in this grievance, but which, in the absence of further evidence and argument, do not necessarily extend to other controversies. However, for the purposes of this grievance, the Union has not persuaded me that the 30 days is for training rather than familiarization; but, based on her score on the parts identification test, I conclude that it is not familiarization, but training, that the grievant requires.

A case could be made that it would have been a nice gesture for the City to have offered the grievant the vacancy, especially since its exposure was limited to no more than thirty days. My role, however, is not to impose abstract equity or to compel the parties to display nice gestures, but rather to determine whether specific conduct is within the bounds of the collective bargaining agreement. Here, I am not persuaded that what the City did in passing over the grievant was contrary to the terms of that agreement.

Local 1672-A and the City have previously gone to arbitration on the issue of an Article 8 appointment. 2/ (McLaughlin, 1985) Although that award is not necessarily dispositive of this grievance, it did involve identical language and similar issues/arguments, and thus, it is worth noting that my award is not inconsistent with that reached by Arbitrator McLaughlin.

Accordingly, on the basis of the record evidence and the arguments of the parties, it is my

AWARD

That this grievance is denied.

Dated at Madison, Wisconsin this 14th day of June, 1991.

By _____
Stuart Levitan, Arbitrator

2/ At the time, Local 1672-A apparently consisted of City Hall employes exclusively; it has since grown to include transit and parking utility employes, while retaining the same local number. The language at issue in the 1985 award is identical to that under review here.