

BEFORE THE ARBITRATOR

-----  
 :  
 In the Matter of the Arbitration :  
 of a Dispute Between :  
 :  
 CLARK COUNTY COURTHOUSE EMPLOYEES :  
 LOCAL 546-B, AFSCME, AFL-CIO : Case 59  
 : No. 44850  
 and : MA-6436  
 :  
 CLARK COUNTY :  
 :  
 -----

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.  
Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear and resolve the grievance of Ann Kunkel. A hearing was held on March 11, 1991, in Neillsville, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. The parties completed their briefing schedule on May 22, 1991.

ISSUE:

The Arbitrator will address the following issue:

Did the County violate Section 5.3 of the collective bargaining agreement when it awarded the job of Secretary III to Brenda Strobush rather than Ann Kunkel? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE V - PROMOTIONS AND JOB POSTING

. . .

5.3 In the event a permanent job vacancy occurs, which the County desires to fill, notice of such vacancy shall be posted on all job sites listed in Article 3.10 for a period of five (5) working days, not counting the first day. During this time employees may bid for such job. The County, within seven (7) working days after the vacancy occurs, shall notify the Union of its intent to fill or not fill the job. Should the County change its decision, it shall notify the Union within seven (7) working days after such change. In addition, employees on a leave of absence shall be mailed, by certified mail, to the last known address, a copy of such job posting. Should any such employee desire to post for the job, they shall do so by certified mail, to be postmarked within seven (7) days of the date of the mailing of the original posting.

The job posting shall contain the prerequisites for the position, consistent with the job description, schedule, rate of pay, and expected date the position is to be filled. Employees interested in the position shall sign their name on spaces provided; where this Agreement calls for the filling of vacancies through job posting, those vacancies shall be filled as follows and the following factors shall be considered provided, however, the County shall consider bargaining unit employees first:

1. Qualifications: The term "qualifications" shall mean possession by the employee of the ability (present capacity by virtue of physical and mental capability, aptitude, training, and experience) required for the satisfactory performance of the work for which the employee is being considered.
2. Seniority: Where among the employees

concerned qualifications as defined above are substantially equal in the judgment of the County, seniority shall govern, provided, however, the County agrees not to abuse its discretion.

BACKGROUND:

The grievance is over a position of Secretary III in the office of the Clerk of Circuit Court. The position was posted in May of 1990 1/ and three people posted for the job -- Grievant Ann Kunkel, Brenda Strobush, and Terri Holt. Strobush was awarded the position on August 3rd.

Kunkel's original date of hire with the County is January 2, 1979, when she started working as a program aide for Adult Development Services (ADS after this). The position is called a rehabilitation supervisor, and the parties also refer to it as an aide or adult development aide in the labor contract. Kunkel posted for a Clerk Typist III position in the Clerk of Court's office in 1989 and started that position August 7, 1989. Kunkel stayed in the same bargaining unit and kept her original date of hire for seniority purposes.

Strobush started in the Clerk of Court's office as an Account Clerk I, beginning first as a limited term employee on April 24, 1989, and becoming a regular part-time employee in February of 1990. Holt did not work in the Clerk of Court's office, had less seniority than Kunkel, and is not a factor in this grievance. The dispute centers on whether Strobush or Kunkel should have been awarded the Secretary III job.

Strobush did not testify in the hearing in this matter. Her resume, notes among other things that she has an associate degree of science with a major as animal health technician, that her prior work experience was for two veterinary clinics, with her duties there listed as answering phones, communicating with clients by phones and in the office, keeping inventory, bookkeeping and computer work, paying monthly bills, ordering supplies, making up medicines and doing blood work and culture work.

Kunkel's resume shows that she is a high school graduate, with several continuing education courses completed, that she previously worked as a secretary in a couple of department stores, before starting with the County in the ADS job.

The Clerk of Circuit Courts -- Steven Hemersbach -- is the supervisor of both Strobush and Kunkel. He posted the position of Secretary III, along with a job description that is a standard job description for all Secretary III positions in the courthouse, and an updated description of duties. The standard job description is the following:

SECRETARY III

GENERAL STATEMENT OF DUTIES: Performs highly independent program support, administrative and clerical tasks.

DISTINGUISHING FEATURES OF THE CLASS: This is a broad class consisting of employees who perform technical assistance, administrative and clerical services within an assigned program area to assist the department director with coordinating the overall program and office activities. The Secretary III must be thoroughly familiar with the regulations, policies and procedure under which their department functions. Although clerical duties are included, many self-directed, program-related tasks and considerable independent decision-making are also involved. The specific assignments of the Secretary III vary, but they are of the same level of difficulty and require similar skills. Positions assigned to this class differ from the Secretary II class primarily in the scope and complexity of the responsibilities.

EXAMPLES OF WORK: (Illustrative only)  
Transcribes and types letters, memos, reports, legal documents, forms from shorthand, dictation and rough draft;  
Coordinates, schedules and directs the daily operation of the office;  
Provides technical assistance, information and administrative support services to clients, department

---

1/ All dates are for 1990 unless otherwise stated.

director and staff, and the general public;  
Interviews clients, schedules appointments, gathers pertinent data and makes decisions based on such information;  
Develops forms, procedures and record keeping methods for the program or department;  
Initiates procedures or projects, compiles research and data, and keeps accurate, clear records and reports;  
Prepares documents, letters, vouchers, reports and budgets;  
Schedules director's activities and/or hearings, court calendar, meetings and appearances;  
Handles assigned program functions independently, such as: locating and scheduling witnesses, promoting department activities and public relations, coordinating court activities, interviewing and investigating defendants, and reviewing permit applications for compliance;  
Performs administrative and clerical functions;  
Does related work as required.

QUALIFICATIONS:

--Knowledge of office practices and procedures, terminology and equipment;  
--Knowledge of the rules, regulations, policies and procedures of the assigned department;  
--Knowledge of business math, bookkeeping practices and English;  
--Typing, shorthand, dictation and transcribing skills;  
--Ability to compile, analyze, record and assemble data and information in a meaningful and effective manner;

The updated description of duties includes the follow information:

Position continues to be responsible for routine processing of small claims actions as set forth in the initial description of duties. Responsibilities have been expanded as follows: Position now answers all routine and specific inquires. Assists the public and attorneys in the initiation and processing of small claims cases. Keeps the department head and immediate supervisor informed of case status. Provides assistance and information to the department head on legislative changes as they affect small claims activity. Makes recommendations to the department head on procedural efficiency in the management of small claims activity. See attached statistics which reflect a significant increase in case load.

Positions continues to record and enter court adjudicated judgments as previously done. Position responsibilities have been increased as follows: Position now enters and records judgments received from other counties and prepares and forwards to other counties transcripts of our judgment docket. Prepares execution documents which direct the sheriff of the county to attempt to satisfy judgments. Position takes responsibility for accuracy in maintenance of the judgment docket. (Statutes provide for a significant penalty if in the maintenance of the judgment docket some one is damaged) Employee in this position is subject to periodic review. See attached statistics which reflect an increase in judgment activity.

Position continues to process all civil and criminal matters filed with the office as previously assigned. Expanded responsibilities include: Processing of court fees that accompany civil case activity. Position now prepares a monthly report for the office bookkeeper utilized in the final monthly reporting of all fee activity.

Position continues to be primarily responsible for the statistical reporting of case filings, dispositions and related court activity to the State Court Information Service. Report continues to be done on a weekly basis. Position has expanded and been assigned the responsibilities of digesting updates to the instructional reporting manual and disseminating the information updates to employees. The weekly report is a cooperative effort among employees, however the position is now responsible for assembling and

forwarding of the report to Madison. Employee in this position is expected to represent the department head at training seminars pertinent to statistical case reportings.

Initial position description required that the employee have the skill to operate a typewriter and a calculator. Position has now been expanded to require that the employee have the capability of learning computer and computer printer skills . . . (deleted material) . . . Employee in this position will be expected to continue expanding skills as more of the computerization of the system is implemented. Employee is expected to participate in the computer process not only in the absence of the primary operator, but as frequently as necessary to update or refine skills.

Two years ago the position was transferred to the front office portion of the work area. This move enabled the employee to more fully utilize acquired skills in assisting the general public. The move also added the responsibility of answering general telephone inquiries in the absence of the 1st Deputy.

The position has also been expanded to include responsibilities beyond the scope of the initial position description. They are listed as follows:

Approximately two years ago the position was assigned the responsibility of assisting the Judges in preparing for daily court activity. Employee is now responsible for assembling case files schedule for court activity, inspecting the files to determine filing deficiencies and for alerting the Judge in the event deficiencies exist. Position is also responsible for preparing a minute sheet whereon court activity is recorded on each case.

One year ago the position was assigned the responsibility of initiating the preparing the necessary forms and procedure of securing a new Judge to a particular case when appropriate. The position requires that the employee have a thorough working knowledge of case files and their contents. The application form summarizes the case and assists the District Court Administrator in assigning a new Judge. Application is submitted to the department head and the Judge for approval prior to being forward to the District Court Administrator. Upon the new Judge being assigned to the case, the position requires that the employee comply with any requests made by the new Judge for portions or all of the case file. Employee further advises the attorneys and litigants of the assigning of a new Judge to the case.

With the frequency of outside Judges being assigned to Clark County cases it has become necessary to assign the responsibility of clerking for the Judges in Court on an as needed basis to this position. The activity occurs on at least a monthly basis.

Position has now been Deputized for purposes of signing legal documents and Clerking in Court.

Jury work and responsibility for maintenance of the Law Library have been reassigned to another position.

Hemersbach consulted with the County Personnel Coordinator, Thomas Renne, about filling the position. They discussed the labor contract requirements, and Renne gave Hemersbach some sample interview questions and formats. Renne stated that it is a common practice for department heads to use interview questions. Hemersbach drew up a list of questions, based on the job description, the updated duties, questions he used in the past, and priorities in his office. Hemersbach had the job applications, resumes and knowledge of the performance of applicants available to him when he drew up the questions.

The interview questions, asked of each applicant, were the following:

- (1) What is your present job title and would you describe for me your present duties and responsibilities?

(2) This position requires frequent verbal and written communication with a variety of parties. Some are within the system, however a significant number are everyday citizens seeking information on specific procedure. Please describe any employment experience where one of your responsibilities was to explain a procedure in order for a person to utilize the system.

(3) Occasionally this position will deal directly with a person who is upset or angry over having been sued in small claims court. What employment related experiences have you had in confronting similar situations and what approach do you take when confronting a situation in which emotions are elevated?

(4) Eventually this position will deal with the computerization of the court calendar. What training or experience have you had that would assist you in assimilating this eventual job responsibility?

(5) How do you get along with your co-workers in your present position?

(6) Absolute accuracy and attention to detail are a most important aspect in some of the duties and responsibilities of this position. For example, the entering of adjudicated judgments into the Judgment Docket. The statutes provide that if some one is damaged due to our negligence in the preparation of the docket we could be liable in treble the damages. What experience have you had in working under that kind of or a similar admonition?

(7) This is a question of competing priorities. Here is the situation, the Department Head has given you a number of deadlines to meet by the 3:00 p.m. mail pick-up. You are extremely busy attempting to meet the deadlines. The Judge sends a message from Court requesting information that only you can provide. How would you respond to this situation?

(8) I note from your application and employment history that you have experience working for the court system. What is the maximum amount that one can sue for in small claims.

(9) Why should I hire you for this position? What can you offer that someone else cannot?

(10) This position requires a certain amount of independent judgment and decision making within established guidelines. What employment experience have you had in this type of job-setting?

(11) Why did you leave your prior positions?

(12) How would your present and previous employers rate your job performance. Above average, average, below average. Would you permit me to make such inquiry?

(13) How many days of work did you miss on your last job?

(14) If offered the position, how soon would you be available to begin working in the position?

(15) Do you have any questions you would like to ask about the position?

Hemersbach interviewed the applicants on July 27th. Kunkel found out about the interview on the morning of that day from Strobush that there was going to be a test, or interview. During the interview later in the afternoon, Hemersbach asked each applicant the same questions shown above, and rated their answers to the questions (except for questions #14 and 15) between one and five, with five being the highest score. Strobush scored 64 points, and Kunkel scored 57 points. The differences appeared on questions #'s 1, 2, 4, 6, 8, 9, 12, with Kunkel scoring a point less than Strobush on those questions.

Hemersbach testified that the reason he gave Strobush 4 points on the first question, while giving Kunkel 3 points, is that Strobush was articulate,

with a good grasp of her present position, and made a fluid presentation of her daily activities through the monthly reports. Hemersbach noted that the Secretary III interacts with the general public, attorneys, abstractors, professionals, and it is important to be articulate. Strobush's position in the accounting department allows for interaction with the public on a frequent basis, while Kunkel's position has limited contact with the public. Hemersbach stated that Kunkel's answers to the first question were hesitant, that a number of seconds would pass before she answered the question, and that her articulating was different. Hemersbach said that Kunkel did not misstate her present duties, but he detected that she was anxious to go into the duties of the work of the Secretary III area. Hemersbach considered the first question to be an objective question for the job. Kunkel testified that when Hemersbach asked about her present duties, she hesitated because she had overlapping duties while filling in as the Secretary III, and her job as Clerk Typist had melted together with the Secretary III job. Kunkel recalls during the interview that Hemersbach mentioned that she was going into the Secretary III duties, and he wanted to go back into past jobs, like her job at ADS instead of what she was currently doing.

On question #2, Hemersbach gave Strobush a rating of 5 and Kunkel a rating of 4. He explained that the small claims procedure has to be explained, and in Strobush's position, she has a lot of interaction with the public, such as explaining court-ordered child support payments to employers. Hemersbach noted that Strobush worked in a veterinary clinic, and once worked for a perfectionist in a restaurant. He described Kunkel's experience with clients at ADS as people she worked with on a daily basis, not new people each time, and he assumed the clients were people who were developmentally disabled.

On question #4, Strobush scored 1 point higher than Kunkel, because, according to Hemersbach, she works with a computer, and the bulk of child support work is computerized. Hemersbach was aware that Kunkel took computer courses on her own and had made an effort to become more skilled, but he did not consider her experience on a computer to be current. Hemersbach forgot to ask question #4 of Kunkel during the interview, but asked her later. He was aware that Strobush worked on the calendar on the computer, and that Kunkel had a home computer where she did some work on her hobby in genealogy.

On question #6, Strobush again scored 1 point higher than Kunkel, because Hemersbach considered that her discipline in the accounting area demanded accuracy, that every task required accuracy, as the books needed to be balanced. Strobush spent about 90 percent of her time on accounting type of activities. Hemersbach was aware that Kunkel was doing some of the docketing of judgments, the work of the Secretary III.

On question #8, Hemersbach rated Strobush one point higher. While both Strobush and Kunkel gave the correct amount of small claims court limits (\$2,000), Hemersbach noted that Strobush indicated that the \$2,000 included damages and interest, and court costs could go beyond that, indicating that she had done some research in preparing for the interview. He did not ask for any elaboration in the interview.

On question #9, Hemersbach rated Strobush one point higher because she gave a more concise response, indicating she comprehended well, was good under pressure, and meets her deadlines. Hemersbach stated that he had observed those qualities in Strobush before in her work. According to Hemersbach, Kunkel's responses were good but more general.

On question #12, Strobush rated her own job performance as average, and Hemersbach gave her 5 points, while Kunkel rated her own job performance as above average and Hemersbach gave her 4 points. He testified that he concurred with Kunkel's assessment, but felt that Strobush was above average. He added that at the time of the posting and the interviews for the Secretary III position, he had asked Kunkel for the number of potential jurors for an upcoming trial. Kunkel replied that there were 42 jurors. He checked it out, found out that there were not that many, and corrected it. He testified that he could not give her a 5 rating on this question. It is his responsibility to have jurors available, and Kunkel assists him and provides him with the numbers. If they did not have enough, he would have to summon more. He deemed it important that Kunkel gave him an incorrect number of jurors. Hemersbach stated that both Kunkel and Strobush were above average in performance, and this incident was significant in the scoring. Hemersbach was not aware of any significant mistakes made by Strobush.

Kunkel testified that this was the only mistake she made on the jury list. She noted that usually there are 60 to 65 names on the jury list, and as people serve 10 times, their names are deleted, so the list changes constantly. During the incident when she made the error, she was doing extra duties, and handed Hemersbach the list without checking it. She testified that she changes the list daily, knows the people, and would have caught the error, as she has been performing well at this task.

Hemersbach stated that the purpose of the interview questions was to see

if there was anything in addition to what he had available that he should considered, and to give employees the opportunity to provide him with anything additional. The interview process was given about 30 - 35 percent weight to the whole process.

Hemersbach testified that the interviews did not change his mind, that he still saw significant differences between the two employees. He had observed both employees' performance on the job, and used that observation to assess aptitude and mental capability. He considered that Kunkel's former job with the County at ADS was not a clerical position, and the qualifications and training for the ADS work were not relevant for his office. Kunkel did not show more office experience than what he gleaned from her resume, and her secretarial experience was some 10 years ago. He noted that Strobush had an associate degree and considered her Account Clerk I experience. He concluded that Strobush came in with background and expertise in accounting, assimilated the job quickly, did well with any new task, and was a very capable employee. He concluded that Kunkel had not used clerical skills for some period of time, and that while her performance was acceptable, she did not grasp matters as well as Strobush. He stated that many procedures had to be repeated to her. All in all, he concluded that Strobush was the person for the job, that the relevant qualifications were not equal or substantially equal.

Hemersbach also testified that he had seen Strobush in his office for 16 months, and because the office is small, employees are adsorbing all the duties and functions and becoming familiar with the language of the court system. However, he did not believe that Kunkel would be the best person for the job, because of her limited expertise in accounting. He can hear telephone conversations from employees and is aware of how they handle themselves on the phone. While on its face, the Clerk Typist III position held by Kunkel would be more in line with the Secretary III position than the Account Clerk I position held by Strobush, Hemersbach stated that the Account Clerk position took off with extra responsibilities and he did not have time to get it reclassified. Strobush took care of accounts except for the trust and investment areas, and a significant part of her work was with child support. He testified that the Clerk Typist position is not more responsible than the Account Clerk position, because of the potential for error.

As to the criteria in Section 5.3 of the bargaining agreement -- mainly aptitude, training and experience -- Hemersbach testified that Strobush has a significant amount of aptitude, and that Kunkel does not measure up to Strobush on this element. There was no test given to judge aptitude, and Hemersbach noted that Strobush had the tools to do her job as Account Clerk when she was hired, and that she was able to sit down and do the job. He considered Strobush's training and background and experience to be more significant than Kunkel's, and significant enough so that they were not substantially equal. Hemersbach noted that Strobush had been in a clerical capacity for five years and was familiar with office procedures, although he did not contact her former employers. As far as the associate degree that Strobush holds, Hemersbach considered that her training in animal health and biology were academically competitive areas. He was not aware that Kunkel had any bookkeeping training or experience, and until the day of the hearing in this matter, Hemersbach did not know that Kunkel performed bookkeeping on the farm for 17 years.

The Assistant First Deputy Clerk of Court, Dorothy Staffon, is familiar with the work of both Strobush and Kunkel. Staffon assigned some of the Secretary III work to them during the vacancy of that position, and most of it was assigned to Kunkel. Staffon found no mistakes in the docketing work performed by Kunkel. Staffon noted that Kunkel did a good job keeping the jury list clear, and that Kunkel seldom got to answer the phone on her job. Staffon had no knowledge of either employee's prior training or experience outside of the Clerk of Court's office. Staffon never met with Hemersbach before he made a selection -- the only meeting the two had was when he told her he had chosen Strobush and that Strobush was more qualified. She knew both had applied for the Secretary III position and did not want to favor one over the other. Kunkel was more familiar with the docketing work that the Secretary III performs, as Strobush did not perform any docketing work. Hemersbach told Staffon that he observed Strobush on the phone and at the counter handling the public, and that she was more qualified based on his observations. Hemersbach also told Staffon that Strobush was familiar with the computer, that she seemed to comprehend and learn easily, that if she was told something once, she did not need it repeated. Staffon felt that as a Union member with both of these employees, she did not want to be on the spot, and Hemersbach was not asking her for her opinion.

Stephen Walter, an Account Clerk III, supervised Strobush, in addition to Hemersbach. Hemersbach did not discuss his selection in advance, except to ask whether Strobush asked as lot of questions on the job. Walter worked with Strobush on a daily basis and did not supervise Kunkel.

Kunkel's former supervisor at ADS, Brent Shoup, was not contacted by Hemersbach when Kunkel sought the Secretary III position. While she was at ADS, Shoup gave Kunkel very positive evaluations. Shoup noted that her

position at ADS did not involve a lot of clerical or secretarial duties, although there was some record keeping. Shoup testified that Kunkel's attention to detail was definitely one of her strengths, that her communication skills were good. Kunkel did not deal with the public on a daily basis at ADS but was working independently.

When Hemersbach selected Strobush for the Secretary III position, he notified all the applicants. Kunkel put a note on his desk asking to see him, and he invited her into his office where they went over the interview questions and how he had graded the answers. Hemersbach testified that Kunkel was surprised that the selection was not based on seniority and reminded him that she had more seniority, and he reviewed the contract language of Section 5.3 with her. Kunkel's recollection of this meeting is that Hemersbach had the contract open to Section 5.3 and was reading from it word by word, and then said that he went to Renne to see about devising a test to see about qualifications. She thought he meant that before the test, or interview questions, both she and Strobush were substantially equal. Hemersbach did not recall telling Kunkel that he devised the interview questions to see which one was qualified.

Kunkel testified that when she started working for the County at ADS in 1979, she started out as a program aide and was a trainer with handicapped people of all levels. In 1980, mentally ill people were merged with developmentally disabled people, and she worked with Sharon Rogers to schedule activities to cover goals mandated by the State. She was careful about bookkeeping and records on clients. Between 1979 and 1982, she worked with Rogers to plan daily activities, kept case notes, was involved with families and with paperwork. Then a work program was introduced, and the program now functions like a small factory.

Kunkel noted that the main flow of the Clerk of Courts' office is keeping records, as the public needs access to those records, whether dealing with family and paternity matters or civil or criminal suits. Shortly after Kunkel was hired in that office in 1989, the Chief Deputy, Joanne Lynch, retired in March of 1990. Staffon had been the Secretary III before taking Lynch's position as Chief Deputy, and there was a four-month period when Kunkel and Staffon did all the work. Staffon delegated work to her, such as garnishments, which were time consuming. Kunkel kept minute sheets, part of the Secretary III's duties, and pulling and updating files could take up to a half a day. She put together exhibit sheets, listed the action, the case numbers, coded them, and kept other reports for the files. She was doing the garnishment and docketing work, except for a few things. She understood that the docketing work was most important, and that if it were done incorrectly, they could be sued. On one occasion when Staffon was not there and Kunkel had an execution to be done, she asked Hemersbach how to do it and he showed her how. She had notes on other things. She testified that Strobush asked Walter about how to do things, because they worked together. She was never told that she had any problems with her job performance.

Kunkel testified that she had four years as a private secretary, and has typed every day of her life for the last 10 years. In looking at the qualifications on the job description for the Secretary III position, Kunkel stated that she has all the qualifications. She knows all the equipment in the office, and is learning rules and regulations more and more each day. As for the knowledge of business math, bookkeeping practices and English, Kunkel noted that she keeps the farm books, took bookkeeping in high school, and was always good in English, even getting awards. She knows typing, shorthand, dictation and transcription, and finally, compiles and assembles data and information on a daily basis. She believes that Hemersbach sees little of her work, that Staffon knows what she is doing all day, but that neither Staffon nor Walter were asked about her work when she applied for the Secretary III position.

Kunkel has fulfilled some of the functions listed as examples of work on the Secretary III job description. She has also observed the previous person in that position and she believes she has the physical and mental capability and aptitude. She was an "A" student in high school and won a scholarship to college but could not take it due to other concerns. So she became a secretary in a department store in Cincinnati, and doubled her salary on the next secretarial job. She also worked at the IRS for six months as a seasonal job. She has done all the bookkeeping on the farm since 1974, and the farm includes 120 acres and 36 cows. Kunkel did not mention this farm bookkeeping experience on her resume, because she does not get paid for doing the farm books. She took two computer classes before coming to work at the courthouse, and is currently completing a third class. Each course consists of six to 10 weeks of training at night. She has taken other courses, such as assertiveness training, business, genealogy, and classes dealing with abusive people.

Kunkel believes that she did not get the Secretary III position because of a previous matter involving Strobush, when Strobush went from LTE status to part-time and was given a raise which someone else protested. She also believes that if Hemersbach knew more about what she was doing in his office, she would have had a chance at the job.



THE PARTIES' POSITIONS:

The Union:

The Union asserts first the burden of proof lies with the County in this case involving a modified seniority clause in order to justify its decision to pass over an employee with more seniority.

The Union next argues that the County abused its discretion in a series of intentional or unintentional procedural defects in the selection process to evaluate the qualifications of the job applicants. The Union believes that the Grievant was demonstratively more qualified and should have been awarded the Secretary III job regardless of seniority and other bidders, and if the Arbitrator finds that qualifications were "substantially" equal, then seniority should have governed.

The Union notes that Kunkel had satisfactorily performed the majority of the examples of work listed in the Secretary III job description as well as the actual work of the job which had been vacant. Kunkel had more general clerical experience before coming to the Clerk of Courts office, and her training involved courses which were specific to the nature of duties of the Secretary III job. The training of Strobush dealt with courses in animal science, which is unrelated to the Secretary III's duties. In job posting disputes, technical training should relate to the specific requirements of the position.

If it is found that the qualifications of the two bidders were substantially equal, seniority should have governed the selection for the position, the Union states. Both applicants were clerical employees already working in the Clerk of Courts office. The position of Secretary III does not require an advanced degree and could likely be filled by any number of clerical employees. There was no evidence that either Strobush or Kunkel were ever disciplined or had any job performance problems. The scores given on the graded interview were not that dissimilar and the interview was accorded no more than 30 percent weight of the decision-making process. Kunkel's hands-on job experience should have outweighed the minor differences in the graded interview. There is no evidence that the interview properly evaluated the aptitudes of the two bidders.

The Union asserts that doubt should be resolved in favor of the more senior employee. Arbitrators have used the "head and shoulders" principle -- that unless the junior employee is proved to be "head and shoulders" above the senior employee in ability, the junior employee is not entitled to a promotion under a "relative ability" clause. Arbitrators have ruled that similar standards, including "substantially and demonstratively superior" also fall under the "head and shoulders" rule.

The Union calls the hiring process critically flawed, that the process used by the County to evaluate qualifications was so flawed that it effectively rendered the decision arbitrary, capricious, discriminatory and unreasonable. The County ignored the relevant experience of the candidates, and neither the Deputy Clerk of Courts nor the Deputy in Child Support, who were most familiar with the two bidders' work, were questioned by Hemersbach, who made the decision. While the County emphasized Strobush's accounting experience, the only accounting involved in the primary tasks of the Secretary III position is listing fees charged in new court cases. The job description makes no specific reference to accounting duties. The County should have known that Kunkel was performing many of the Secretary III tasks, and yet it failed to take this into account or ask Staffon for her view on Kunkel's performance in the job. The Union finds it troubling that during the interview, Hemersbach interrupted Kunkel when she attempted to discuss the Secretary III work she had been doing for months.

The Union believes that the graded interview is evidence that the County abused its discretion, as the interview was subjective in content and grading. The grade on question #1 was not evenhanded. Question #6 refers to accuracy and attention to detail. Kunkel testified that she had done at least 15 judgment dockets, Staffon testified that Kunkel did the work accurately, and yet Strobush received more points. Question #8 was answered correctly by both, yet Strobush received an additional point for additional information, while Holt, the other unsuccessful bidder, received only one point less than Kunkel for an incorrect answer. On question #12, the Union asks if points were awarded to Strobush for modesty? The Union states that this interview amounted to the opinion of Hemersbach in the clothing of an objective test. While the opinion of a supervisor is entitled to some consideration, it will not be deemed conclusive without factual support. The interview amounted to 30 percent, and the other 70 percent was based on other considerations. Yet the County did not call Strobush as a witness. So what were those other considerations.

Kunkel should have been given a trial period as outlined in Article V, the Union asserts, on the basis of having experience, and if doubt existed, a trial period would cause no serious inconvenience. The Union asks that the grievance be sustained and the Grievant made whole for all losses incurred.

The County:

The County asserts that it is a well-established principle of arbitration that a determination regarding an employee's ability to fill a position is a management decision and that the determination can only be challenged on the basis that it was arbitrary, capricious, discriminatory, clearly wrong, or made in bad faith. Numerous arbitration decisions establish that the County's determination as to the relative qualifications of the Grievant for the Secretary III position must be upheld unless it can be shown that the determination was arbitrary, capricious, discriminatory or made in bad faith.

The County notes that it has retained the right to determine employee selection procedures and employee qualifications. Section 5.3 of the collective bargaining agreement provides that seniority shall only become a factor if the qualifications of the employees are substantially equal, and the only limitation on the County's authority is in Section 5.3, subsection 2, which provides that the County shall not abuse its discretion. If the County determines that the qualifications of an employee are not substantially equal to the qualifications of other employees posting for the position, seniority does not become a factor in the promotional process.

The County states that the burden is on the Union to prove that the County abused its discretion and that the decision was arbitrary, capricious, discriminatory, clearly wrong or made in bad faith, and this is the only standard by which this grievance can be upheld. The Union presented no evidence that the County abused its discretion or that the County's determination was arbitrary, capricious, discriminatory, clearly wrong or made in bad faith. The Arbitrator may not substitute her judgment for that of management, the County asserts, noting that by the terms of the grievance procedure, the Arbitrator has no authority to amend, modify, nullify, ignore or add to the provisions of the collective bargaining agreement. The County followed a reasonable and consistent hiring procedure which did not violate the parties' agreement.

The County contends that it used a fair and methodical process in selecting the successful candidate for the Secretary III position. The job posting included the generic job description as well as a detailed job description specific to the position in the Clerk of Court's office, and the posting encouraged applicants to contact Hemersbach if they needed further clarification of the duties of the position. Hemersbach reviewed the labor contract, discussed the procedure with Renne, and understood that seniority did not become a factor unless the applicants' qualifications were substantially equal. Hemersbach developed a standardized list of questions for interviews. The interviews were not a test, and the purpose of the interviews was to give each applicant the opportunity to provide additional relevant information which might not have been contained in personnel files. The interview process has been used for about three dozen positions in the last three years.

In addition to the information gleaned from the interviews, Hemersbach reviewed information in applications and resumes submitted by Kunkel and Strobush when he hired them in 1989 for positions in his department. He consulted with Kunkel's supervisor at ADS, Shoup, when she posted for the Clerk Typist III position. He considered the work performance of the employees within his department since 1989. A review of all the relevant information led him to conclude that the qualifications of Kunkel and Strobush were not substantially equal. His conclusion was reasonable and not an abuse of discretion.

The County argues that it reasonably determined that Kunkel's qualifications were not substantially equal to those of Strobush. Hemersbach had determined prior to the interviews that their qualifications were not substantially equal, based on job applications and resumes, information gathered when he hired them, and his observation of their job performance. After considering the results of the interviews, Hemersbach's conclusion remained unchanged, that Kunkel's qualifications were not substantially equal to those of Strobush.

In evaluating the physical and mental capability and aptitude of candidates, Hemersbach had ample opportunity to observe and assess those capabilities. Hemersbach concluded that Strobush was very capable and had assimilated her job immediately, while Kunkel had problems grasping certain tasks and he occasionally had to repeat procedures for her. Hemersbach noted the mistake that Kunkel made relating to the jury roster, and he was not aware

of a significant mistake made by Strobush. Walter told Hemersbach that Strobush was a quick study, and a requirement of the Secretary III position is that the employee perform highly independent and self-directed tasks.

As to training, Strobush has a two-year associate degree with courses in accounting and English, and has significant skills in using computers, including their applications with bookkeeping, word processing, and accounting spreadsheet software. Kunkel does not have a post-graduate degree. She was recently enrolled in a computer course, at Hemersbach's direction, to improve her computer skills. Computer skills and statistical reporting skills are integral components of the Secretary III position, and Hemersbach concluded that Strobush had substantially more training in these key areas than did Kunkel.

Turning to experience, Kunkel's most recent clerical experience was nearly 30 years ago, while Strobush had six years of clerical experience from 1983 to 1989. Further, there is no evidence that Kunkel's prior clerical experience involved the use of computer technology. Kunkel's position at ADS was not a clerical job. Comparing their current positions, Hemersbach noted that 90 percent of the Account Clerk I's duties were accounting tasks for which absolute accuracy is required, while one-half or more of the Clerk Typist III's duties are filing and that position is not as demanding. Although Kunkel testified at the arbitration hearing that she has done bookkeeping on the family farm for 17 years, she did not mention this to Hemersbach and he did not learn of it until the hearing. Thus, this information is not relevant to the review of whether Hemersbach's decision was arbitrary, capricious, clearly wrong, discriminatory or made in bad faith. The Secretary III position requires substantial contact with the public, and Strobush's position required a lot of interaction with the public while Kunkel's position involved limited contact with the public.

The County points out that both Staffon and Walter, co-workers of Kunkel and Strobush, told Hemersbach that they agreed with his decision to promote Strobush, and the County believes that in light of that testimony, it is impossible to find that the Union met its burden. The County has not discredited the work performance of Kunkel in her Clerk Typist III position. However, when a vacancy occurs, the County is obligated to follow contractual job posting procedures. While Kunkel may wish that her greater seniority would be the deciding factor, the threshold question is whether her qualifications are substantially equal to those of the successful candidate. Hemersbach determined through an extensive, fair and objective process, that they were not, and in light of no evidence demonstrating that his decision was arbitrary, capricious, discriminatory, clearly wrong, or made in bad faith, his decision must stand. The County asks that the grievance be dismissed.

#### The Union's Reply:

In looking at one of the cases cited by the County, the Union states that the question is begged as to whether a fair appraisal and consideration of the evidence and other pertinent factors occurred in this case. The Union asks where the fair appraisal was in terms of the objectivity of the graded interview, the lack of supervisor consultation prior to the selection of the successful bidder, and the lack of consideration given to Kunkel for having performed the duties of the Secretary III position.

While the County calls the list of interview questions standardized, the Union suggests that accepted standardized tests for clerical jobs include typing, dictation, grammar, spelling, and other tests to determine relative qualifications. The County's assertion that the interview process has been used in the past does not make it proper here, the Union asserts. The Union also takes issue with the County's claim that there was consideration of the applicants' work performance in the department, as neither Staffon nor Walter was consulted prior to the selection, and Hemersbach did not allow consideration of Kunkel's performance of the Secretary III's duties.

The Union questions whether the single error committed by Kunkel constitutes a substantial difference in qualifications. While the County claims that Strobush's accounting skills made her more qualified for the position, the job description does not include examples of work or qualifications that relate to accounting or bookkeeping knowledge. Similarly, the job description makes little mention of computer skills except to record child support monies, and Staffon testified that the Secretary III position included no more than 10 minutes per week of such work on the computer.

The Union contends that the burden of proving that Strobush's position as a veterinary assistant included a substantial component of clerical duties, and that her application indicates that her duties were primarily related to receptionist type duties in veterinary clinics. While the County minimizes the importance of Kunkel's work at ADS, her position there was a people oriented position working with clients, the public, families, and various professionals.

The Union objects to the County's notion that Staffon gave testimony damaging to the Union, as Staffon testified that Hemersbach never consulted with her until after he made the decision to promote Strobush. The Union further does not believe it must prove that the County discriminated against Kunkel, since discrimination is difficult to prove. The Union suggests that if the County were trying to prove that Strobush had superior qualifications, the County should have called her as a witness.

The Union concludes that the County based its decision on the subjective opinion of one person, Hemersbach, and that the graded interview did nothing more than demonstrate the subjectivity of the framer and the grader.

The County's Reply:

The County takes issue with some of the Union's characterization of facts, such as how many Secretary III duties Kunkel had performed, the time Strobush spent as an LTE and Strobush's experience outside County employment, the amount of Kunkel's clerical experience, Kunkel's experience with the IRS and ADS, Strobush's associate degree training, and Kunkel's job performance problems. The County call the Union's shading of the facts as a thinly disguised effort to cover up the fact that Strobush has more relevant work experience than Kunkel.

The County finds it surprising that the Union attempted to downplay the level of skill and responsibility of the Secretary III position, since the Union has negotiated a wage rate comparable to wage rates for the positions of Legal Secretary and Assistant Systems Operator II. The job description shows that the position is responsible and demanding, and any attempt to water it down to enhance the Grievant's qualifications must be rejected.

Reacting to the Union's assertion that the interview process was flawed, the County notes that Hemersbach had a rational basis for his scoring. He had problems with Kunkel's performance whereas he has not had any significant problems with Strobush. Kunkel did not provide any new or additional information during her interview which could reasonably have been expected to require him to change his conclusion.

The question is not whether another evaluator would have rated the two bidders differently, but whether the County abused its discretion. Hemersbach followed a thorough and objective process in evaluating the employees' qualifications. He reviewed resumes and job applications, he considered information from former employers, he considered their job performance in his department, he gave them the chance to provide additional information in the interview process. If the selection process were flawed, the Union does not say what changes should have been made in the process. The Union's argument is that Kunkel did not get the job. Reasonable people can disagree, but that does not show that there has been an abuse of discretion. Staffon and Walter told Hemersbach that he made the right decision. The purpose of the arbitration hearing is to review the decision made by Hemersbach and to determine whether he abused his discretion, and whether his decision was arbitrary, capricious, discriminatory, clearly wrong or made in bad faith. The Union falls short of meeting its burden of proof.

Finally, the County objects to the Union's argument that Kunkel should have been given a trial period, as the contract allows for the trial period to take effect after the promotion of an employee.

DISCUSSION:

Section 5.3 of the labor contract contains a modified seniority clause, one in which the ability of an individual to perform a job is recognized. The County correctly notes that seniority does not come into play unless the employees' qualifications are substantially equal. The term "substantially equal" is akin to the term "relatively equal" used in some contracts. For an interpretation, here is Arbitrator Luskin in Interlake Steel Corp., 46 LA 23 at 26 (1965):

The term "relatively equal" when applied to the factor of "ability to perform the work" has been interpreted, defined, and applied on numerous occasions by many arbitrators. In many instances the term "relatively equal" has been defined to mean that the Company must establish the fact that one employee has substantially or significantly greater ability to perform the work than does a senior employee before the junior employee can be promoted to the vacancy. In some instances arbitrators have pointed out that the term "relatively equal" does not mean "equal," and that where minor variations exist with respect to

comparative ability, a minor distinction between two competing employees would not be sufficient to warrant the Company in disregarding the basic concept of seniority as set forth in Article XVI, Section 1 by promoting a less senior employee to a vacancy. Although the term "relatively equal" has been given many definitions, including the application of the concept of a requirement that the junior employee must be "head and shoulders" above the senior employee before he can be awarded the job, all of the various definitions boil down to the fact that there must be a definite, distinct, substantial, and significant difference between two competing employees with respect to "ability to perform the work" in favor of the junior employee before the Company can award a vacant job to a junior employee where the senior employee does have the basic ability to perform the work.

What's missing in this case is the definite, distinct, substantial, and significant difference between the two competing employees. Although Hemersbach sees that difference, the evidence fails to support such a conclusion. In Ford Motor Co., 2 LA 374 (1945) Arbitrator Shulman stated:

A supervisor's testimony that he honestly believes one employee to be superior to another with respect to the promotion is certainly a factor to be considered. It is not, however, either conclusive or sufficient. The supervisor must be prepared to state the basis for his belief and to support it, not by repeated asserts but by specific and understandable evidence.

The contract defines qualifications as ". . . the ability (present capacity by virtue of physical and mental capability, aptitude, training, and experience) required for the satisfactory performance of the work for which the employee in being considered." Hemersbach determined that Strobush had greater mental capability and aptitude than Kunkel, as she was a quick study who quickly learned her job and asked few questions. However, given the fact the Kunkel had been performing some of the duties of the Secretary III position for several months, there is no evidence that Kunkel lacked the mental capability and aptitude to satisfactorily perform the work for which she was being considered.

As to training and experience, Kunkel's background as well as her present experience would indicate that she was substantially equal in qualifications for the satisfactory performance of the work for which she was being considered. Her training was all secretarial experience, while Strobush's background was of an academic nature. It may be that Strobush was being underemployed in clerical or secretarial positions, but the position being considered was that of a secretary. It called for no post-graduate work, but called for secretarial skills, all of which Kunkel has. If Strobush could be considered in any determination to be significantly more qualified than Kunkel, it could not be for this particular position.

The County further argues that the position of Secretary III has a lot of interaction with the general public, and Strobush had a lot of interaction with the public in Hemersbach's office. Yet Hemersbach also testified that 90 percent of Strobush's work was spent on accounting type activities. The County wants to stress on one hand that Strobush's experience in accounting made her significantly more qualified than Kunkel, despite its lack of relevance to the position being sought, while on the other hand, it wants to stress that Strobush's interaction with the public made her significantly more qualified than Kunkel. The County ignored Kunkel's ability to interact with the general public and discounted her work at ADS as not dealing with new clients each time but with repeat clients. The County does not explain how it would be more difficult to deal with the general public as opposed to dealing with people who are mentally ill or developmentally disabled. Kunkel is a very articulate person who has no difficulty communicating. Both job bidders are competent in English, written and oral, and there is no evidence that Strobush has skills that are significantly higher in dealing with the public.

The County argues strenuously that it is a well-established principle of arbitration that a determination regarding an employee's ability to fill a position is a management decision and that the determination can only be challenged on the basis that it was arbitrary, capricious, discriminatory, clearly wrong, or made in bad faith. While the County places much emphasis on the language of Section 5.3(2) that calls for a determination in the judgment of the County, the County fails to take a closer look at the language of Section 5.3(1). That language refers to qualifications ". . . required for the satisfactory performance of the work for which the employee is being considered."

It is the County who in the first instance determines the qualifications for a position. In this case, the job description for the generic position of a Secretary III in the courthouse gives the following qualifications (from Joint Ex. #5):

QUALIFICATIONS:

- Knowledge of office practices and procedures, terminology and equipment;
- Knowledge of the rules, regulations, policies and procedures of the assigned department;
- Knowledge of business math, bookkeeping practices and English;
- Typing, shorthand, dictation and transcribing skills;
- Ability to compile, analyze, record and assemble data and information in a meaningful and effective manner;

Kunkel has all of the above qualifications. There is no evidence on the record that Strobush has skills relating to these qualifications that are distinctly difference and greater than those of Kunkel. In fact, there is a lack of evidence to show that Strobush has secretarial skills such as shorthand, dictation, etc.

Regarding the examples of work in the job description that may be required by the Secretary III, Kunkel has already done much of this work. Although she tried to point out to Hemersbach in her interview that she was doing Secretary III duties, he wanted her to stay on track about her past jobs, such as the job at ADS, instead of going into the Secretary III duties she already was performing. At the time of the interview, she was the only one doing the first example of work on the Secretary III job duties, one of the largest parts of the position.

It is arbitrary and capricious for a supervisor to ignore all the evidence that favors one job bidder, while elevating the qualities of the other job bidder especially where those qualities do not relate to the job being sought. The Arbitrator finds that not only did the County abuse its discretion in this case -- it failed to relate qualifications to the job being sought by Strobush and Kunkel, as it was required to do by Section 5.3(1) of the collective bargaining agreement. There is no evidence on the record that Strobush has the qualifications to perform the type of work being sought any better than Kunkel. At a minimum, the County should have related the qualifications to the job being sought, as the contract states under Section 5.3(1), and once it did so in a fair and objective manner, it would have been difficult to find any conclusion other than that Kunkel and Strobush were substantially equal, in which case, seniority would govern as per Section 5.3(2).

The updated job duties posted with the qualifications and examples of work also show that Kunkel is at least substantially equal in qualifications. The updated duties first call for routine processing of small claims, answering routine and specific inquiries, assisting the public and attorneys in processing small claims, reporting case status to supervisors, recording and entering court adjudicated judgments as well as judgments from other counties, preparing execution documents, maintaining an accurate judgment docket, processing court fees for civil cases, preparing a monthly report for the office bookkeeper, reporting the statistics to the State Court Information Service on a weekly basis including digesting updates to a manual and giving updated information to employees. Much of this is work that Kunkel has already done, such as the docketing work. She has prepared execution documents with assistance from Hemersbach. Some of this work is routine by its very description, such as the routine processing of small claims. There is no evidence on the record to show that Strobush has qualifications that are distinctly superior or significantly higher than Kunkel's qualifications for this work.

As far as the computer skills required, the updated job description states the following:

Position has now been expanded to require that the employee have the capability of learning computer and computer printer skills . . . Employee in this position will be expected to continue expanding skills as more of the computerization of the system is implemented. Employee is expected to participate in the computer process not only in the absence of the primary operator, but as frequently as necessary to update or refine skills.

Kunkel has more computer skills than the job calls for. The job calls for the capability of learning computer and computer printing skills, with an expectation to continue to expand skills. While Kunkel does not work on a computer in the office as Strobush does, she has a home computer, has taken

several computer courses, and works on a hobby on her home computer. She obviously has the skills required by this job for computer work.

The updated duties also call for answering phones in the absence of the First Deputy. Hemersbach considered Strobush more capable of dealing with the general public due to the manner in which she handled questions regarding child support payments. Staffon noted that Kunkel seldom got a chance to answer phones because of her work location. The phone work involved here does not appear to be a large portion of work, given the description that it occurs in the absence of the 1st Deputy. This factor would hardly be sufficient to overcome Kunkel's other basic qualifications for this position.

There is nothing in the record showing that Strobush is substantially more qualified than Kunkel to handle any of the updated job duties. In fact, the record would tend to show that Kunkel has more qualifications than Strobush in some ways, as she handled the judgment docket without a problem.

The real problem is that these two employees are both quite capable, but they are somewhat different. Hemersbach sees Strobush in a brighter light because she is quick, articulate, and has good accounting skills. However, accounting skills are simply not needed on this job. There is nothing in the updated job description, the generic job description, or anything the County has described that shows that accounting is either a necessary or important component of the Secretary III position.

Hemersbach failed to give due consideration to Kunkel's qualifications. Kunkel is a conscientious employee who is a self-starter. She has taken improvement courses on her own. She has developed forms, records and lists to keep track of things she does. When she is told how to do a task, she keeps notes to refer to when necessary. She is well aware of the need for accuracy in the office. She asks questions to avoid making mistakes. She respects her supervisor, Hemersbach, and is proud to work in his office. She is neat in her appearance and dresses appropriately for the office. She feels she has done a good job in the office, whether doing her clerk typist work and maintaining the jury lists, or work on the judgment dockets and some of the work of the Secretary III. No one disagrees.

The three things Hemersbach basically relied on to select Strobush were accounting skills, computer skills, and interaction with the public. But neither the accounting skills nor the computer skills are important qualifications for the position of Secretary III, as determined in the first place by the County. If the County wanted to establish those qualifications for the position, it certainly could have done so, but it had to do so when posting the position -- not first finding a person with those qualifications and then determining that it wanted those qualifications. When a supervisor chooses one job applicant who has certain skills which are not related to the position being sought, and disregards the job applicant with skills related to the position, the selection process is arbitrary and capricious.

The fact that Staffon and Walter agreed with Hemersbach's choice after he had already made his decision has no weight. Walter was Strobush's immediate supervisor but not the supervisor of Kunkel. Staffon was attempting to stay neutral in the selection process. Hemersbach never asked either of them before he made his decision for their input. Staffon testified that Kunkel and Strobush performed equally well on the Secretary III work she assigned them. Hemersbach relied heavily on his own observations and impressions. Such observations and impressions do not rise to the level of evidence showing a definite, distinct, substantial, and significant difference between the two competing employees to satisfactorily perform the job being sought -- the kind of evidence necessary to overcome to evidence that there was an abuse of discretion in the selection process. While Hemersbach believed that he and Staffon were equally familiar with the job applicants' work, he was under the impression -- as reflected both in his testimony and in his notes during Strobush's interview -- that Strobush had done some docketing work. Staffon knew that Strobush had not done any docketing work.

Another demonstration of the manner in which the County abused its discretion is the interview which Hemersbach graded. For example, on the first question, in which the applicants were asked to describe their present job titles and present duties and responsibilities, Hemersbach gave Strobush one point more than Kunkel, because, in his words, Strobush was articulate, had a good grasp of the position, while Kunkel's answers were hesitant, and a number of seconds would pass before she answered. Kunkel testified that she hesitated because she had been doing some of the duties of the Secretary III position, and yet when she mentioned those duties, Hemersbach mentioned that she was going into the Secretary III duties and he wanted to go back into past jobs, such as her job at ADS. The question itself is objective enough -- but the evaluator (Hemersbach) was not rating the answers with enough objectivity. The question asked for a description of present duties. When Kunkel attempted to give the present duties which did indeed include some parts of the Secretary III position, Hemersbach was not giving proper consideration to the fact that Kunkel was answering the question. Additionally, Hemersbach stressed

the fact that Strobush answered this question in a more articulate manner. The Arbitrator has no reason to doubt that Strobush is articulate. However, Kunkel is very articulate, as the Arbitrator had a chance to see first hand. A fair and objective evaluation to the answers to this question would be to give each candidate full credit as long as the could accurately describe their present duties and responsibilities.

On the second question, the candidates were asked to describe an employment experience where one of their responsibilities was to explain a procedure in order for a person to utilize the system (court system). Hemersbach gave Strobush an extra point because she has to explain court orders such as child support payments to employer, as well as giving consideration to her prior work at a veterinary clinic and the fact that she worked for a perfectionist in a restaurant. However, he failed to give Kunkel any consideration for work she did at ADS. Hemersbach testified that he tried to score this question on present experience, yet he looked at Strobush's past experience. This is another example of where Hemersbach was acting arbitrarily and failing to give Kunkel due consideration.

The fourth question dealt with training or experience in computer work. Hemersbach gave Strobush one more point than Kunkel because the bulk of her work in child support is computerized. Hemersbach was aware that Kunkel had taken computer courses and had a computer at home, but considered her experience not to be current. First of all, if this interview was in fact designed to glean additional information which Hemersbach did not have available to him, how could he consider that Kunkel's computer experience was not current when he did not really know what work she was doing on a computer? Secondly, the job description itself and Staffon's testimony indicate that working on the computer does not take a significant amount of time in the Secretary III position. Third, Hemersbach forgot to ask Kunkel this question during the interview and asked her later about it. Hemersbach did not attempt to find out how "computer literate" Kunkel was and did not attempt to relate such computer skills to the requirements for the Secretary III position. The updated duties do not require any significant experience in computer work, and Kunkel has the skills required for the job.

The sixth question asked about accuracy and attention to detail, and again, Hemersbach gave Strobush one point more than Kunkel. He gave consideration to Strobush's accounting activities for this score, while not giving consideration to the fact that there are little accounting activities involved in the Secretary III position. Hemersbach gave no consideration to Kunkel for her current work on docketing of judgments, even though he was aware that she was doing some of that work and not aware of any mistakes on the docket. Shoup found Kunkel's attention to detail to be one of her strengths, yet Hemersbach did not question Shoup about Kunkel's work regarding accuracy and attention to detail, and gave no consideration to Kunkel's past performance evaluations.

The eighth question is an example of a perfectly designed objective question -- with a subjective evaluation. The question asked for the maximum amount that one can sue for in small claims court, and both Strobush and Kunkel gave the correct amount of \$2,000. That should have been enough to give both candidates a perfect score. Instead, Hemersbach gave Strobush an additional point for elaboration, when Strobush added that court costs could go beyond \$2,000. Hemersbach felt Strobush was more prepared for the interview and had done some research. Oddly enough, it was Strobush who first informed Kunkel that there was going to be an interview. So Strobush had some advance notice somehow.

While Hemersbach gave Strobush an additional point for elaboration on question #8, he gave her an extra point on question #9 for being concise. Strobush could do no wrong. Hemersbach's evaluation of these two questions shows the arbitrariness and capriciousness of the selection process.

Question #12 is again troubling. This is the type of question which should not have been ranked or graded to begin with, due to the nature of the question which asks applicants how present and previous employers would rate their job performances. When Strobush responded that she was average, Hemersbach felt she was above average and gave her five points. When Kunkel responded that she was above average, Hemersbach agreed that she was above average and gave her four points. This makes no sense.

The real difference on that question revolved around the one mistake Kunkel made when Hemersbach asked for the number of potential jurors for an upcoming trial, and Kunkel gave him an incorrect number which he checked out and corrected. Despite the fact that Hemersbach continued to assert that Kunkel was an above average employee, the significant factor in his mind was that single mistake.

One mistake. Really.

At this point in time, the time of the interview, Kunkel had worked for



the County for about 10 and one-half years, with nearly one year in Hemersbach's office. And Hemersbach cites one mistake as being important. In this Arbitrator's experience, the only employees not making any mistakes are those not doing any work. Given the chance, Kunkel would have corrected the mistake herself. This again points up the arbitrary and capricious process used in the selection process.

When Hemersbach concluded the interviews, he had not changed his mind. In the Arbitrator's opinion, this was a supervisor who already had his mind made up, given the arbitrary evaluations given to Strobush and Kunkel on the interview questions. Even if Hemersbach had given the same scores to each of them, he still would have selected Strobush, based on his prior determination that Strobush was significantly more qualified than Kunkel. Hemersbach accorded between 30 to 35 percent of the selection to this interview, which is a significant amount in itself, and significant in demonstrating the abuse of discretion in this case.

If the purpose of the interview process was to give each candidate the opportunity to provide additional relevant information, as the County asserts, then Hemersbach was acting arbitrarily in cutting off Kunkel when she tried to give that relevant information, particularly when she tried to point out the duties she was currently doing in performing part of the Secretary III's function. He arbitrarily gave a point to Strobush on the most objective question of the interview -- the question of the limits in small claims court -- and acted arbitrarily in down grading Kunkel for one mistake while at the same time rating her as an above average employee.

Additionally, the County seemed surprised to learn during the arbitration hearing that Kunkel had performed bookkeeping on the family farm for the past 17 years, and now claims that Kunkel should have come forward with such information, probably during the interview designed to give additional relevant information. However, the updated job description duties makes no reference to bookkeeping or accounting requirements, and the generic Secretary III job description makes only one reference to it among many other factors. If the County deemed such experience to be important, it was incumbent upon the County to so notify job applicants, not vice versa. It was an abuse of discretion for Hemersbach to rely on Strobush's accounting experience to consider her more qualified for the job, while not advising job applicants that this was an important criteria for the position. Perhaps the real reason no one deemed it important to advise the job bidders that accounting experience was necessary for the position of Secretary III was the fact that it was not an important function in that position.

Based on the above and the record as a whole, the Arbitrator concludes that the selection process was not fair or objective. The Arbitrator finds that the County abused its discretion in this case, particularly where Hemersbach failed to give due consideration to Kunkel's qualifications and failed to relate qualifications to the work for which the employees were being considered, as required by Section 5.3 of the collective bargaining agreement. Furthermore, the evidence fails to show that there is a definite, distinct, substantial, or significant difference in the qualifications of Kunkel and Strobush for the position of Secretary III, and therefore, Kunkel should have been awarded the job under Section 5.3 of the bargaining agreement. Accordingly, the grievance will be upheld.

#### AWARD

The grievance is sustained.

The County violated Section 5.3 of the collective bargaining agreement when it awarded the job of Secretary III to Brenda Strobush rather than Ann Kunkel.

The County is ordered to immediately give Ann Kunkel the position of Secretary III and to reimburse her for any differences in wages and benefits from the date it awarded the position to Brenda Strobush to the present to make her whole for the loss of the position of Secretary III.

Dated at Madison, Wisconsin this 21st day of June, 1991.

By \_\_\_\_\_  
Karen J. Mawhinney, Arbitrator