

BEFORE THE ARBITRATOR

-----  
 :  
 In the Matter of the Arbitration :  
 of a Dispute Between :  
 :  
 MANITOWOC COUNTY :  
 (HEALTH CARE CENTER) :  
 :  
 : Case 240  
 : No. 45571  
 and : MA-6647  
 :  
 MANITOWOC COUNTY :  
 INSTITUTIONAL EMPLOYEES :  
 UNION, LOCAL 1288, AFSCME, AFL-CIO :  
 :  
 -----

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1710 Meadowbrook Drive, Manitowoc, Wisconsin 54220, on behalf of the Local Union.

Mr. Alan M. Levy, O'Neil, Cannon, Hollman, S.C., 111 E. Wisconsin Avenue, Milwaukee, Wisconsin 53202, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1990-91 collective bargaining agreement between Manitowoc County (hereafter the County) and the Manitowoc County Institutional Employees Union, Local 1288, AFSCME, AFL-CIO (hereafter the Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the County's refusal to pay employes for the time they spent traveling to and from an examination for the job of nursing secretary as well as the time they spent taking the exam. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was held on June 18, 1991 at Manitowoc, Wisconsin. A stenographic transcript of the proceedings was made and received by June 24, 1991. The parties filed their written briefs herein by August 7, 1991 which were thereafter exchanged by the undersigned. The parties waived their right to file reply briefs at the hearing herein.

ISSUES:

The parties stipulated to the issues to be determined in this case, as follows:

- 1) Did Manitowoc County violate the Union contract by not paying employes for travel and testing time for the nursing secretary position?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively

in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it, from time to time, deems necessary for the effective operation of the Institution. The union agrees, at all times, as far as it has within its powers, to preserve and maintain the best care and all humanitarian considerations of the patients of said Institution and otherwise further the public interest of Manitowoc County. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The employer agrees that all amenities and practices in effect for a minimum of twelve (12) months or more, but not specifically referred to in this Agreement, shall continue for the duration of this Agreement. The parties recognize the County's right to implement an Employee Assistance Program. Practices and policies established pursuant to the Employee Assistance Program shall not be considered a past practice, regardless of how long they exist. The County reserves the right to modify or discontinue any portion of the program. The decision of the County to modify or discontinue any portion or all of the program shall not be subject to the grievance procedure.

#### ARTICLE 21 - JOB POSTING

Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in the institution as well as the bulletin board in the office of the County Clerk and the Human Resources Department for five (5) working days. A copy of each job posting shall be submitted to the Local Union Vice President. The posting shall include a statement defining which weekend off and which holidays off the position has. Any employee desiring to fill any such posted vacancy or new position shall make application in writing at the institution's personnel office. After the conclusion of the posting period, the applications shall be reviewed at the institution's personnel office in the presence of a representative of the Union and a representative of the County Personnel Committee, or its designee, at a time to be mutually agreed upon.

Whenever any vacancy occurs it shall be given to the employee with the greatest seniority within the classification within a specific department within seven (7) work days after the vacancy date as provided in Article 2 - Seniority, B, provided the applicant is

qualified for such position.

. . .

ARTICLE 22 - HOURS AND PAY DATE

- A. Eight (8) hours shall constitute a normal work day.
- B. Five (5) days, Sunday through Saturday, forty (40) hours of work, shall constitute a week's work.
- C. Employees shall receive every other weekend off.

. . .

- G. All training meetings, fire drills, etc., shall be conducted during regular working hours.

. . .

ARTICLE 24 - OVERTIME, CALL-IN, STEP-UP PAY

For all work performed in excess of eight (8) hours per day or forty (40) hour per week, the employee shall receive time and one-half (1 1/2).

For the purpose of computing overtime, paid leave, except sick leave, shall be counted the same as hours worked.

Employees called in to work outside of their normal scheduled shifts shall receive a minimum of three (3) hours pay or time and one-half (1 1/2) whichever is greater.

. . .

ARTICLE 27 - ENTIRE MEMORANDUM OF AGREEMENT

- A. The Agreement constitutes the entire agreement between Manitowoc County and Manitowoc County Institutional Employees, Local 1288, AFSCME, AFL-CIO. None of the terms and conditions of this Agreement shall be changed unilaterally. Changes may be made by mutual agreement of the parties in writing.

STIPULATED FACTS:

The parties entered into the following stipulations for fact:

- 1) Mary Fuller, Patricia Strege, Nancy Becker, Corrine Eichmann, Kathy Baumann and Laurie Magyar are all employes within the Union at the Health Care Center and were eligible to use the Union posting procedure.
- 2) The above-listed six individuals posted for the

nursing secretary and took the required examination at Lakeshore Technical College to see if they possessed the minimum qualifications for the position.

- 3) These six employes were paid for mileage; that is, reimbursement for the cost of travel. They were not paid for the time that they spent traveling to and from the test or for the time they took in the administration of the test.
- 4) Whether the test for the position in question was necessary, appropriate or permissible is not before the arbitrator in this case.
- 5) After the job posting herein was put up, the employes who posted were told for the first time on or about August 21, 1991, that there would be a test that they would have to take to demonstrate qualification.

FACTS SURROUNDING THE DISPUTE:

The facts here essentially are not in dispute. The six grievants all work as aides at the County Health Care Center (HCC). They are eligible to post for openings at the HCC pursuant to the terms of the effective labor agreement. On or about August 9, 1991 each of them noticed a posting for a nursing secretary job opening at the HCC. None of the six grievants was then working in a clerical capacity; all of them were then employed as aides. All six of the grievants signed the posting, indicating their interest in being considered for the job. Three other HCC employes (not involved here) also signed the posting. The posting made no reference to the possibility of a test being required for the applicants to qualify for the opening, but it did describe the clerical duties/responsibilities of the position as follows:

1. Preparing and maintaining nursing schedules - including developing work hours, vacation and holiday hours and requests, over-time use and maintaining attendance records.
2. Assist with filing for medical records.
3. Process payroll schedule reports to verify hours.
4. Calculate medicare nursing hours for billing.
5. Back-up typing for social services and nursing.
6. Other related duties.

The posting also indicated the rate of pay, hours and days of work, holidays, meal period and probationary period required by the opening.

Also on August 21, the County posted a notice at the HCC regarding "Testing for Position of Nursing Secretary" which stated as follows:

Tuesday, Aug. 28, 1990  
2 PM @ LTC Cleveland

Time needed: Approximately 3 hrs.

You will be reimbursed for mileage, not your time.

You will receive a letter from B. Huber with the

details. If you are scheduled to work, please inform your supervisor.

Approximately one week prior to the testing date (on or about August 21st), all those who had signed the posting received identical letters from Human Resources Director Beth Huber, which indicated that a test would be required to qualify for the nursing secretary position. The letter described the circumstances of the test and the substance of the test in relevant part, as follows:

Testing for this position will be held on Tuesday, August 28, 1990, beginning at 2:00 P.M. at Lakeshore Technical College, 1290 North Avenue, Cleveland, Wisconsin. The testing will take approximately three hours and will consist of:

- (1) Manitowoc County Clerical Test which consists of grammar, punctuation, filing, proofreading, spelling, word definitions, and other basic clerical skills; (Passing score is 70%);
- (2) The Otis Lennon Mental Ability Test (Passing score is 70%); and
- (3) A typing test (A speed of 50 WPM is required for passing).

Those individuals that attain all of the above referenced passing scores will go through an interview process to assess their qualifications as they relate to the other minimum criterion as specified in the job description.

Manitowoc County will reimburse mileage from Lakeshore Technical College and back for those individuals taking the required examinations.

If you have any questions concerning any of the above matters, please feel free to contact me during regular Courthouse hours.

. . .

These letters made no reference or promise to pay applicants for any expenses they might incur in taking the test at LTC other than mileage. Also, no reference was made in the letter to allowing applicants to take the test at any other time. However, none of the six grievants asked anyone in County management if they could arrange to take the test at a different time.

All six grievants took the test at LTC which occurred on August 28, 1990 beginning at 2 P.M. and took approximately 3.5 hours to complete. The other HCC employes who had signed the posting decided not to pursue the job opening and did not take the test. No adverse consequences were suffered by those who chose not to pursue the job and take the test. Of the six grievants, Magyar, Becker and Strege were scheduled to work at the HCC on the day of the test. Magyar testified that she decided to leave work at 12:45 to go home and shower and change clothes. She then drove the 20 minutes from her home to the LTC to take the test. Magyar's regular work day that day was from 5:45 A.M. to 1:45 p.m. Magyar took two hours leave without pay on the day of the test. Magyar

admitted that she decided on her own to go home before the test to shower and change her clothes, and that this was not required by the County.

Although Strege did not testify, documents submitted here indicated that her regular work hours at the time of the test were from 6:30 A.M. to 2:30 P.M.

On August 28, 1990, Stege took 1.5 hours leave without pay to take the exam for the nursing secretary position. Becker also did not testify here. Record documents showed that Becker worked at the HCC from 8:00 A.M. to 12 Noon on August 28th and took four hours of vacation time for the rest of that day. Becker's normal work day on that day was from 8 A.M. to 4 P.M.

Baumann stated at the hearing here that she took a full eight hours off on the day of the test by either taking vacation or switching workdays with another employe. Baumann's regular work hours at the time of the test were from 1 P.M. to 9 P.M. The County's records showed that in fact Baumann took eight hours of vacation that day.

The remaining HCC aide employes who took the test on August 28th were Fuller and Eichman. Neither of these employes testified here. The record documents showed that neither of these employes was scheduled to work on August 28th; that they completed their normal work schedules for that pay period with no loss of pay or accrued time off, due to their having decided to take the test. 1/

County Human Resources Director Huber stated that because the HCC is a 24-hour-a-day operation, it was virtually impossible to schedule the test for the nursing secretary opening at a time that would not have conflicted with one or more of the six grievants' work schedules. Although the County did not discuss the testing arrangements with the Union prior to setting the test up, the County did discuss the possibility of giving the test at the HCC with LTC officials. LTC officials indicated that this could not be done because the HCC did not have the proper equipment for the typing portion of the test. Also, LTC officials told County officials that it would be better to give the whole test at one time in one place, at the LTC. Therefore, the County scheduled the test at LTC for a date as soon as possible upon which LTC officials could be present to administer the test.

Huber noted that in the past, the County has used the LTC facilities for the administration of these same types of clerical tests to examine applicants for other County clerical openings in the past; that the notices of the requirement of testing and the date, time and place thereof have, in the past, been received by applicants about one week before the test date, as occurred here. Huber also stated that in arranging the test date and time, the County tried to avoid any conflicts with the applicants' work schedules as much as possible.

HCC Administrator Frances Anderson testified that she made the decision to require a test for the applicants for the nursing secretary job because none of those who signed the posting had had any clerical experience in their current aide positions. Furthermore, Anderson stated without contradiction that the HCC had never paid employes for training, education, testing time, etc., unless it was to assist the employe in the performance of his/her current job.

---

1/ As requested by the Union and agreed to by the County here, I ascribe no weight to the fact that some of the grievants did not testify at the instant hearing.

The undisputed evidence also showed that the County has never paid its employees for the time needed to apply for jobs outside the County or to apply for County jobs in different departments. In this regard, Anderson stated that none of the six grievants was required to take the test once they signed the posting nor were they required to take the test in order to keep their County jobs. Anderson also stated that in her opinion the test involved could not be used by the grievants to enhance or improve their performance in their current jobs. Finally, Anderson stated that the last time the nursing secretary position had been filled (prior to the instant situation), a test had been required for qualification.

After taking the examination here, none of the grievants was selected to fill the nursing secretary position.

POSITIONS OF THE PARTIES:

Union

The Union contended that the County violated Articles 22G, and 21 as well as the rule of reasonableness in applying contract language, when it refused to pay travel and testing time to the six employees who posted for the nursing secretary position and took the examination to qualify therefor. The nursing secretary job posting, posted on August 9, 1991, did not indicate that a test would be required to determine qualifications for the position. Not until August 21st, did the County notify the employees who had posted for the job, of the date, time, duration, place and contents of the exam which was to be conducted only one week later, at 2:00 p.m. on August 28, 1991. The Union conceded that "the Employer could have the opportunity to test employees for the position." However, the Union asserted that the County was unreasonable in not listing the testing requirement on the posting.

The Union contended that a reasonable reading of Article 21 would require the County to state the requirements of the position on the posting so that employees could decide whether to sign the posting with clear knowledge of what would be required of them. In this regard, the Union pointed out that it could "contribute to abuse" if the County were allowed to announce a testing requirement after the posting has expired and the County had had a chance to see who had posted internally. The County could then decide to test for qualifications and to use this procedure to assure that employees it did not like would be unable to qualify for the posted position or to avoid testing if no internal applicants signed the posting.

The Employer was responsible to clearly indicate all position specifications in a timely fashion, the Union urged. It did not do this here and this worked a hardship on employees who took the exam for the job, the Union contended. Because the Employer did not clearly state the "position requirements" here, in the Union's view, the Union urged that the County should make whole the employees who took the exam (at such a short notice) for their travel and test time.

County:

The County argued that the Union failed to prove any violation of the labor agreement or of past practice here. The County asserted that nothing in Article 21, Job Posting requires the County to pay for applicants' travel and testing time. The County contended that the clerical skills test given here did not involve any kind of in-service training for the six grievants' then-current aide positions. Hence, Article 22 (G) was not involved and was not violated by the County here. Both Article 3 and Article 27 allowed it to do as it did in this case, the County asserted.

The County also contended that no valid past practice existed to provide pay for employes' travel and test time. The County noted that the employes decided to take the test voluntarily; that they took it for their own improvement/benefit; that the test was not required to retain their then-current jobs; and that the test would not assist them in or train them for the aide jobs they held at the time of the test. The County contended, therefore, that this situation should be treated in the same fashion as a situation where a County employe seeks employment with a different employer: the County employe would have to use non-work time, accrued paid leave or an approved unpaid leave to apply for such employment. The County noted that it has never paid its employes for time spent in searching for other work (except where the employe has used accrued vacation for this purpose). Indeed, the County pointed out, the practice at the Health Care Center has been to pay employes only for training and testing which relate to the employe's current position.

Thus, the County asserted because no specific provision of the agreement requires the payments sought here and because no past practice was proven to support the Union's claims, the County was within its management rights to refuse to pay the grievants for travel and testing time. The County pointed out that its decision to test these six aide employes for their clerical skills was reasonable and appropriate given the requirements of the job and the grievants' non-clerical positions at the time of the posting. The County also noted that although the Union complained that the grievants were not given enough advance notice that a test would be required for the position, the contract contains no specific notice requirements.

The County further noted that neither the notice regarding the posting nor the letter each of the grievants received indicated that they could expect to receive travel and testing time pay. On the contrary, the only payment promised by the County was the cost of mileage. Mileage costs were paid to each of the grievants.

The County urged that the evidence also showed that it had acted reasonably in setting up the time, date and place for the test. In this regard, the County pointed out that the Health Care Center must operate 24 hours a day. In addition, the County had to coordinate the exam with employes of the Lakeshore Technical College (LTC) who would administer the exam. LTC officials informed the County (despite the County's request to have the test at the HCC) that the test could not be given at the HCC because all applicants had to take the test at the same time and at the LTC facility because the HCC did not have the necessary equipment for the typing portion of the exam. Conducting the test at the LTC necessarily meant that the test would be scheduled at a time when one or more of the applicants would normally be working. The County therefore asserted because the exam unavoidably conflicted with one or more applicants' work schedules and because taking the test was entirely voluntary, and for the benefit of each applicant, the County cannot be required to pay for the grievants' travel and testing time. Finally, the County cited an allegedly

similar case for consideration here: In re St. Louis County Water Co., 83 LA 1162 (1984).

Based on its arguments, the County urged that the grievance be denied and dismissed in its entirety.

#### DISCUSSION:

Initially, I note that the labor agreement in this case is silent regarding any requirement to pay employes, who sign the relevant job posting,



for travel and testing time when the employees take County examinations given to determine qualifications for the job opening posted pursuant to Article 21. In this regard, I note that the language of Article 22 - Hours and Pay Date does not require the County to pay employees for travel and testing time for jobs for which they post.

Section G of Article 22 specifies pay for situations where the County determines that employees need training or where the County determines that fire drills should be conducted. There is no reference to pay for testing and travel time to qualify for a job vacancy in Section G. The two items specifically listed in Section G -- training and fire drills -- logically relate to job training for employees in their current jobs and fire drills at the HCC. These activities are normally conducted during "regular working hours," and according to Article 22G, these activities should be conducted during regular working hours, and employees can therefore expect to be paid for these items.

The "etc." which appears after the reference to "fire drills" is the opening to which the Union points to support its argument that the County should pay for the travel and testing time herein. I disagree with the Union on this point. The "etc." used here arguably refers back to training and fire drills. Therefore, only items that are similar to training and fire drills should be encompassed by the reference to "etc." Notably, the one common characteristic that fire drills and training have is that they are being required by the County. Logically, the County could conduct training at a site different from the HCC if the County chose to or needed to do so, but the County would not conduct fire drills at any place other than the HCC as that would defeat the purpose of the drills. Thus, training and fire drills do not have location at the HCC in common.

As noted by the County, the County did not require the employees who posted for the nursing secretary position to take the test in order to retain their jobs. In addition, the County made it clear in its communications with the employees who posted, that the County only intended to pay employees for their mileage to and from the test. The County submitted uncontradicted evidence that the grievants' skills, experience and performance in their aide positions would not be enhanced or improved by taking the predominantly clerical skills exam. The County also submitted uncontradicted evidence that the County's practice was to pay only for training and testing time relating to employee's currently held jobs. Thus, the Union's argument that travel and testing time to qualify for a posted position should be paid by the County is not supported by the specific contract language, the logical interpretation thereof, or by the record

evidence. In these circumstances, I find the reference to "etc." in Article 22G does not apply to the disputed travel and testing time pay.

In addition, it is significant that no provision of the effective agreement requires the County to indicate, on the job posting itself, that a test will be required to demonstrate qualifications. Article 21 specifically indicates that "any vacancy" ". . . shall be given to the employee with the greatest seniority within the classification within a specific department . . ." "provided the applicant is qualified for such position." (emphasis supplied). This language indicates by implication that the County has the sole authority to determine qualifications by whatever reasonable, non-discriminatory means it deems appropriate. Article 3 further supports this interpretation of Article 21 because Article 3 reserves to the County the "right to hire, promote, transfer . . ." employees. Nothing in Articles 22 or 24 detracts from the County's Article 3 rights to require the County to pay

travel and testing time, as the Union has asserted here. Indeed, even the past practice language of Article 3 does not require the County to pay travel and testing time. The record is clear. As discussed above, the undisputed practice proven in this case supports the County's refusal to pay travel and testing time for tests not related to the employee's current job. Because the test given here clearly and undisputedly did not relate to the grievants' aide positions the County was not required by past practice to pay for the travel and testing time involved here. Therefore, I find that no violation of the contract has occurred here.

The Union has argued that the County was unfair to employees who posted for the nursing secretary opening on several grounds and that in fairness it should have indicated on its job posting that a test would be required to qualify for the nursing secretary opening. As noted above, the contract does not require that such an indication be included on the posting. In addition, I find that the posting herein followed Article 21 requirements and that it was reasonably definite in its terms. The County also tried to accommodate the employees who had posted for the opening in arranging for the test but that due to the 24 hour-a-day nature of the HCC operation, not all of the employees' schedules could be accommodated. The facts here also demonstrated that the County acted reasonably in requiring a clerical skills test where all of the applicants held non-clerical aide positions. In these circumstances, I can find no unfairness in the posting process and procedures used here (including the timing of the notification to employees that a test would be required) which would rise to the level of a contract violation.

Based upon the relevant evidence and argument here, I issue the following

AWARD

Manitowoc County did not violate the Union contract by not paying employees' travel and testing time for the nursing secretary position.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 28th day of October, 1991.

By \_\_\_\_\_  
Sharon Gallagher Dobish, Arbitrator