BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 284, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO	
	Case 196
	No. 45604
and	MA-6665
CITY OF EAU CLAIRE	

Appearances:
Mr. Steve Day, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.
Mr. Jeff Hansen, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Employer and Union above are parties to a 1990-92 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the promotion grievance of Betty Judkins.

The undersigned was appointed and held a hearing on July 24, 1991 in Eau Claire, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on September 24, 1991.

STIPULATED ISSUES

1. Did the City violate the collective bargaining agreement or past practice when it disqualified the grievant from the Skilled Worker-Horticulturist position?

2. If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS

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Article 3 - UNION SECURITY AND MANAGEMENT RIGHTS

> Section 2. The rights, power, and/or authority claimed by the City are not to be exercised in a manner that will cease to grant privileges and benefits, limited to mandatory subjects of bargaining, that the employees enjoyed prior to the adoption of this agreement and that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent, or purpose of this agreement.
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> Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the agency, set standards of services to be offered to the public, and exercise control and discretion over

its organization and operations.

It shall be the right of the City to direct its employees, take disciplinary action, relieve its employees from duty because of lack of work, or for other legitimate reasons, and determine the methods, and personnel by which the agency's operations are to be conducted. But this should not preclude employees from raising grievances about the impact that decisions on these matters have on wages, hours, and working conditions.

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Article 8 - JOB POSTING

Section 1. All new or vacated positions shall be posted on each bulletin board in all applicable departments for five (5) working days on a form (furnished by the City) stating the job that is to be filled, the date the job is to be filled, qualifications, and the rate of pay. Interested employees shall sign their names to this notice. Seniority shall be the determining factor in the selection of the applicant for a trial period which may last as long as four months during which the applicant shall attempt to qualify for the position. A permanent full-time employee in the work division in which a job posting applies shall have the rights over all permanent full-time employees in other work divisions as defined in Article 1, Section 2.

Section 2. The successful applicant shall be allowed up to four (4) months to qualify for the position, and shall retain his/her status as a permanent employee. If the applicant fails to qualify for the position, the applicant shall be returned to the position formerly held, within or at the completion of the four (4) month probationary period, or the applicant may do so of his/her own volition. Upon working in the new position, after the four (4) month probationary period, the employee shall be considered as having qualified, and

> both the employee and the City shall lose all rights to return the employee to his/her former position.
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FACTS

The facts are largely undisputed. Grievant Betty Judkins had worked for 13 years for the City's Parks and Recreation Department when on January 24, 1991, she answered a posting for the new position of Skilled Worker-Horticulturist. The job posting identified the following qualifications for the position:

> . . . Some of the duties of this position are as follows: Designs, selects, and installs floral areas. Designs, selects, and installs landscape beds. Maintains said areas with records of the design and composition of plant beds. Utilizes integrated pest management procedures, determines need for use of appropriate pesticides, growth regulators, fertilizers and anti-transpirants. Maintains appropriate certification and has the primary responsibility for the mixing, calibrating and properly applying of pesticides and fertilizers. Mains complete and accurate records of pesticide and fertilizer applications. Prunes, trims, and maintains wood ornamentals through accepted horticultural practices. May perform skilled worker functions as follows: repairs to buildings, including electrical, plumbing, and concrete work, inspections of facilities, maintenance of equipment, and repairing as necessary, painting, athletic field layout and maintenance, and the development and interpretation of plans and sketches.

As the senior applicant, the grievant was awarded the position. She performed no actual work in the position, however, because on her first day she was instructed to take a written multiple-choice test. In the afternoon of that day, the grievant was informed that she had failed the test, had therefore failed the trial period in the horticulturist position, and was being returned to her prior position. The only other employe applicant also tested for the horticulturist position and failed the test. Subsequently, the City hired Steve Roscoe, a new employe with a bachelor's degree in forestry and a minor in horticulture, to fill the position in dispute. Roscoe did pass the written test.

Judkins testified, without rebuttal, that she had a good record as a semi-skilled employe, and had recently been promoted to probationary skilled worker 1/ at the time of the posting in question. Judkins testified that during her employment she had come to specialize in horticulture, and had been responsible for laying out as well as planting and maintaining flower beds in City parks. Judkins testified that for a number of years she worked with horticulture for most of her working time, and designed, selected and installed flower and landscape beds. Judkins stated that she maintained them with written records, used integrated pest management procedures, and sometimes determined which pesticides and fertilizers should be used. She had a

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1/ A classification used for multiple jobs with different functions.

commercial driver's license with amendments for airbrakes, tanker truck, combination vehicles and hazardous materials, and at the time of the posting was studying for a state pesticide certification. Judkins testified that she subsequently was certified in pesticides as of March 12, 1991, but that for general pesticide application City employes did not have to be certified. Judkins also testified that she continued to spray pesticides and herbicides after the test was given. The grievant had completed 11th grade when in school, and did not have the pesticide certification at the time she took the exam for the horticulturist position.

Philip Johnson, Superintendent of Park Maintenance, confirmed the grievant's testimony that she had a good record in the practical horticultural work she had done for the City. Johnson testified that the purpose of creating the horticulturist test was to insure that the City had a properly qualified individual, particularly because public concern over pesticide use was increasing and so was the regulatory control of such employes. Johnson testified that pesticide application and knowledge; woody and ornamental plant material; turf management; and irrigation practices were the areas which would primarily allow someone to perform successfully in the horticulturist position. Johnson testified that pesticide questions were critical, and he got them from a University of Wisconsin study guide. The other materials he got from textbooks and manuals used in teaching about the respective subject matter. Johnson testified that he tried the test twice, once on the grounds manager for the University of Wisconsin-Stout, and the other time on the UW-Extension specialist for Eau Claire County. Johnson stated that after taking the test, each of these two colleagues told him that it accurately represented what was needed, and was a fair test. Johnson testified that the passing grade was established in advance at 70%, and that the test was not designed to exclude Judkins or any other Local 284 employe, but that Judkins scored 58% and simply failed the test.

Johnson testified that he encouraged Judkins to study for the pesticide exam and gave her a week's notice of the horticulturist exam, giving her time on the job to study for the pesticide certification. Johnson conceded that he had no prior experience or education in the formulation of tests, but testified the City has used tests before, and did so in the case of the recent establishment of a skilled arborist position.

Judkins testified that she has never been good at taking tests, but feels she was qualified for the position based on her practical work and the requirements specified in the job posting. Judkins further gave detailed testimony to the effect that some 18 of the 100 questions on the test were either misleading [because the answers expected did not correspond to actual experience with plants in the Eau Claire area]; or irrelevant [because they called for knowledge not actually part of the horticulturist's duties as specified in the job posting]; or required a pat answer to an issue that was actually a matter of judgment; or actually called for a wrong answer, based on her own knowledge. Johnson testified that two questions were incorrectly specified in the test, but did not directly address the remaining allegations of inaccuracy raised by the grievant.

Everett Foss, Director of Human Resources, testified that the City has used tests in this Department not only in the arborist position, but also in the sign shop, painter, engineering aide and carpentry positions. Foss testified that no grievances have been successfully filed on these tests except for the arborist position. Foss also testified that employes have not always been given the full four months' trial period, or close to it, before being sent back for not qualifying, and gave three examples of employes returned to their prior positions from a few days to a few months after successfully bidding.

While conceding that Judkins had been "very dependable" as an employe and that her knowledge base in horticulture had progressed over the years, Johnson testified that the skilled horticulturist position was created to expand the City's knowledge base, and that the purpose of creating a skilled position in that area was that the supervisors could not keep current on horticultural issues and wanted to let staff take over the primary decision-making. Johnson testified that as a semi-skilled employe, Judkins had not been given this degree of autonomy except in some areas. Judkins testified that in horticultural issues she had been given considerable autonomy, and also noted in her testimony that she had recently been promoted to skilled worker, and was undergoing the probationary period in that position at the time of the posting in question. Judkins also testified that she was given at most a weekend's notice of the impending test, and that she was told it was to determine which areas she needed training in. She testified that she was never told prior to the test that she could be disqualified from the position if she did not pass. Johnson admitted that he did not tell Judkins that the cut-off score was 70%, and did not deny her allegation that she was never told she would be disqualified if she did not pass.

THE UNION'S POSITION

The Union does not argue that the City cannot test to determine qualifications of employes bidding for positions. The Union also notes in its brief that it does not argue that every employe awarded a position must serve the entire trial period. The Union does argue, however, that in this particular case the grievant was improperly disqualified, for several reasons. The Union argues first that the disqualification was shown by testimony to be based solely on the grievant's failure to pass a multiple-choice test. This, the Union argues, violates long-standing arbitral precedents to the effect that where testing is used, it cannot be the sole basis on which a senior employe is disqualified. The Union argues also that the grievant was disqualified on the first day of a four-month trial period, which undercuts the intent of the trial period and prevented the grievant from demonstrating her true skills on the job. In addition, the Union argues that the grievant was given no advance warning that the test was either significant or imminent, and that the test was ill-prepared and contained irrelevant questions. Finally, the Union contends that past practice is to the effect that employes have received training in their new positions during the trial period, which was not offered to the grievant; and that in the past employes, with only a few exceptions, have been allowed to complete a majority of the trial period in an attempt to qualify for the position. The Union argues that these practices fall within the meaning of Article 3, Section 2 of the Labor Agreement and are a "privilege or benefit" which should be maintained. The Union requests that the Arbitrator order that the grievant be reinstated to the Skilled Worker-Horticulturist position and made whole for any lost wages and benefits.

THE EMPLOYER'S POSITION

The City contends that the Management Rights clause [Article 3, Section 3] provides that the City has the power to control personnel and the positions they hold. Within those rights, the City argues, it must abide by Article 8, Sections 1 and 2, which provide that the most-senior bargaining unit employe signing for a job posting is the successful applicant. The City notes that it awarded the grievant the job in question, and argues that by testing her and determining that she was unqualified within the period of "up to" four months specified in Section 2 of that Article, it complied with the contract's requirements. The City contends that Johnson acted appropriately in devising a test to determine whether the successful applicant would be qualified to perform the duties of a newly-created position, and argues that Johnson was

well qualified, based on his own 20 credit hours in the field of horticulture and his prior job experience, to draft such an examination. The City contends further that Johnson took reasonable precautions by testing the test on two individuals who work in the horticultural field, and that both confirmed the test was fair. The City argues that testing was not newly introduced by the City for this particular position, and that the record shows that this method has been used in the past for several jobs covered in this bargaining unit. The City argues that the components of the test were derived from official publications and manuals, and this should be weighed more heavily in any assessment of whether the test was an accurate measure than the grievant's biased allegations that the test contained flawed questions.

The City further argues that the grievant did not possess the state certification for use of pesticides, even though that was a requirement listed on the job posting, and that there was no testimony to indicate that she had satisfied management that she possessed the knowledge, background or leadership abilities which would qualify her for this position. The City points to Johnson's testimony that he wanted an applicant who could "hit the ground running" and work independently. While conceding the Judkins was "unquestionably a good employee on the jobs she had performed in the past" the City argues that this did not establish that she was qualified for this particular position. The City notes that there is no evidence of any prejudice against the grievant or the Union, and argues that the evidence as a whole does not demonstrate that management was arbitrary, or capricious or discriminatory. The City argues, therefore, that the requirements customary under Management's Rights clauses for exercise of such rights were met in all instances by the City. Finally, the City contends that the evidence adduced at the hearing failed to show that past practice was violated by the Employer's actions. Foss' testimony demonstrated that the test had been administered for several positions previously, and his testimony also demonstrated that employes had been sent back prior to the expiration of the four-month qualification period.

The City requests that the grievance be denied.

DISCUSSION

In reviewing the record in this matter, I am struck particularly by two facts. First, there is nothing whatsoever in her prior job performance to indicate that there is any reason to believe that the grievant cannot perform as a skilled worker in the horticulturist position. While the City attempts to distinguish the independence of that position from the grievant's prior employment, the grievant, at the time of applying for the position, had already been promoted to the skilled worker classification, and was apparently serving the contractually-required trial period without incident. Furthermore, all of the evidence from management and Union witnesses alike was to the effect the grievant had not only performed well over 13 years' employment in this Department, but had been granted a significant degree of the kind of latitude which Johnson, in his testimony, described as characteristic of the new position. There is thus nothing in the record to demonstrate any ground for any hesitation of management's part based on the grievant's actual work performance. The second controlling fact is related, in that management made virtually the entire decision to disqualify her dependent on a written multiple-choice test. Arbitrators have routinely found that while management can require bidders to take tests, tests are only an aid in judging ability, not the sole measure thereof. In fact, experience on the job is generally considered the most reliable measure of an employe's likely success in a related job, while tests which have been well regarded generally are those which show a strong correlation to the content of the job in question. It requires little reflection to conclude that it would be difficult for the most

well-drafted multiple-choice test to mirror accurately the many functions of a horticulturist, a classic "hands-on" job. 2/

The City's argument that the grievant did not have the pesticide certification required in the job posting bears close consideration. I note, however, that the grievant was then in the process of studying for that certification, and subsequently received the certification, well within the four-month trial period which she might have served. I note, also, that there is no evidence that that certification was required by law at the time of the posting, and that the City continued to use the grievant to apply pesticides after she failed the written test and before she obtained the pesticide certification. I therefore conclude that, at the minimum, the grievant was entitled a fair period of time to obtain that certification.

This also applies to the City's argument generally. Even if the four-month trial period specified in this contract, as the City argues, is not a training period, it is at least a familiarization period. Inasmuch as the horticulturist position was different in kind from all other positions in the Department, there is no justification for the City concluding that an employe who could not pass the written examination on the first day of employment in the new position should be disqualified from the remainder of the trial period. This is particularly true when her actual job-related experience was both closely related to the content of the new position and well performed. To find otherwise would be to allow the City effectively to rewrite the contract to allow it to substitute for the trial period, at its sole option, a written test to be administered on a schedule of its choosing.

I note also that the grievant testified without contradiction that she had already performed, successfully, virtually all of the job functions identified in the job posting. While the City also prepared a somewhat longer job description, the Union's argument that the requirement in Article 8, Section 1 that "qualifications" be included in the job posting has a degree of merit inasmuch as employes ought to know what it is that is required of them. Furthermore, there is nothing listed in the full job description for the position which is the occasion of any testimony by management demonstrating that the grievant could not perform that function, except for the pesticide certification already discussed.

In sum, I conclude that the City has improperly relied on a written multiple-choice test, to the exclusion of most other information, in determining that the grievant was unqualified; that while there is no evidence

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2/ While the cases are too numerous to warrant individual citation, many can be found cited between footnotes 144 and 174, pages 618 - 623 of Elkouri, F & EA, How Arbitration Works, 4th Ed., BNA Books 1952, 1989. Particularly relevant, however is Arbitrator Harry J. Dworkin's decision in Glass Containers Manufacturers Institute, 47 LA 217, 223, in which several important criteria for validating the use of tests were identified: The use of a specialist to design and evaluate the tests, a demonstration that the test was related to the skills and qualifications required in the job, and the use of a trained administrator and test examiner to give the test. Arbitrator Dworkin, in addition, commented favorably upon an extra precaution taken by the company in that instance: the ability of employes to take a test twice. It is worth noting that while it is doubtful whether the multiple-choice test given here was closely related to the skills and qualifications required in the job of a horticulturist, it is clear that none of the other criteria was met.

that the test was administered in bad faith, the test was not so job-related as to inspire confidence that it could fully measure the diverse requirements of a horticulturist; that the testimony indicated that the grievant had enough of the requisite job experience and successful prior work performance that, except in certain areas of substantive knowledge, she could perform the job in question; and that the City, by ignoring that experience and work performance, violated both the letter and the intent of the trial period clause. 3/

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the City violated the collective bargaining agreement by disqualifying the grievant from the Skilled Worker-Horticulturist position.

2. That as remedy, the City shall, forthwith upon receipt of a copy of this Award, reinstate the grievant to the Skilled Worker-Horticulturist position; shall afford her a fair trial period of up to four months to qualify for said position, as specified in Article 8, Section 2 of the Agreement; shall make the grievant whole for any losses in wages or benefits incurred as a result of the City's action; and shall correct its records accordingly.

Dated at Madison, Wisconsin this 18th day of November, 1991.

By _____
Christopher Honeyman, Arbitrator

3/ With this conclusion, I find it unnecessary to address three of the Union's contentions: that the test itself contained inaccurate and misleading questions, that the grievant was given insufficient notice of the test, and that the maintenance of standards clause was violated by the City's actions. I therefore make no conclusions as to those arguments.