

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 WOOD COUNTY (NORWOOD HEALTH CENTER) :
 :
 and : Case 110
 : No. 47491
 : MA-7286
 NORWOOD HEALTH CENTER :
 EMPLOYEES LOCAL 1751, AFSCME, AFL-CIO :
 :

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME,
 AFL-CIO, 306 Greenbriar Avenue, Stevens Point, Wisconsin 54481, on
Mr. Douglass F. Maurer, Personnel Director, 400 Market Street, P.O.

behalf
Box 80

ARBITRATION AWARD

According to the terms of the 1992-94 collective bargaining agreement between Wood County (hereafter County) and Norwood Health Center Employees Local 1751, AFSCME, AFL-CIO (hereafter Union), the parties requested the Wisconsin Employment Relations Commission to appoint a staff member to act as impartial arbitrator of a dispute between them involving the County's failure to award a Developmental Disability Technician position to Grievant Pat Reigel. The undersigned was designated arbitrator. Hearing was held on September 16, 1992 at Marshfield, Wisconsin. No stenographic transcript of the proceedings was made. The parties filed their briefs, reply briefs and other post-hearing communications by December 3, 1992. The briefs were exchanged by the undersigned, as agreed by the parties.

ISSUES:

The parties were unable to stipulate to the issues for determination here, but they agreed to allow the undersigned to frame the issues. The Union suggested the following issues in this case:

- 1) Did the Employer violate the collective bargaining agreement when it failed to award the position of Developmental Disability Technician which was posted on February 25, 1992, to the Grievant?
- 2) If so, what is the appropriate remedy?

The County suggested the following issues:

- 3) Were the qualifications of the candidates for the Developmental Disability Technician relatively equal?
- 4) If so, should the most senior candidate have been selected?

Based upon the relevant evidence and argument, I find that the Union's more traditional phrasing of the issues in this case is appropriate. Therefore, issues 1) and 2), as quoted above, shall be decided herein.

RELEVANT CONTRACT PROVISIONS:

ARTICLE 5 - VACANCIES AND JOB POSTING

5.01 Job Posting: When the Employer deems it necessary to fill a vacancy or create a new position or transfers and promotions become necessary, the Employer shall post a notice for three (3) full days, excluding Saturdays and Sundays, on the Health Center bulletin board. The Employer will send a notice to all part-time employees and to those on vacation who so request in advance. The posting shall contain the date the position is to be filled, title of the position, requirements, rate of pay, and space for all interested employees to sign said posting. Employees desiring these jobs shall sign such posted notice and shall thereby be deemed to have made application for such jobs. Any employee may make application for any job so posted and his/her application shall be considered.

In the event the Employer decides not to fill a vacancy, the Union shall be notified in writing. The Employer shall provide the Union with a duplicate copy of job postings at the conclusion of the posting period.

5.02 Qualifications: Qualifications for a job shall be determined on the basis of ability, efficiency, experience, and physical fitness of the employee in accordance with standards established by the Employer. These standards shall be fair to all applicants and be applied uniformly in all departments. Where qualifications between and among applicants are relatively equal, seniority shall be the determining factor. In regard to any disputes which arise from this section, the burden of proof regarding candidate qualifications rests with the Employer.

Qualifications (i.e. ability, efficiency, experience, and physical fitness) shall be commensurate with job descriptions and work to be performed.

. . . .

FACTS:

Grievant Patrick Reigel has been employed by Norwood Health Center, a County operated residential care facility located in Marshfield, Wisconsin, since September, 1983, in various positions. Reigel worked in admissions, as a casual employe working all units and, since October, 1991, Reigel has been

employed as a DD Tech on the P.M. shift. Before working at Norwood, Reigel worked for six years at the Marshfield Living Center Nursing Home as a certified nurses aide.

In October of 1991, Reigel was the successful employe among several who had posted for a DD Tech position on the second shift. The job description for this DD Tech position reads in relevant part, as follows:

. . .

II. POSITION DESCRIPTION:

Provides direct care and training services to residents of the HSS-134 Unit in accordance with the Individualized Program Plan (IPP) for each resident and under the supervision of the Developmental Disabilities Services Supervisor, performs assigned support services to program including cleaning, housekeeping, laundering, clothing repair, transportation, etc.

III. TYPICAL DUTIES:

- A. Assists and instructs residents in hygiene, grooming, and activities of daily living (ADL's). Depending on shift, leads groups on ETC.
- B. Participates as a member of treatment team in assessing resident needs, developing treatment goals and approaches for IPP, and developing behavioral programs.
- C. Observes and records resident behaviors.
- D. Provides individual and group training and recreational activities in accordance with IPP's and unit programming schedule.
- E. Provides immediate first aid measures as required.
- F. Performs health-related tasks for/with residents including measuring/recording temperature, pulse, respiration, and blood pressure, providing enemas and hot/cold compresses, assisting with range of motion exercises, etc.
- G. Transports and supervises residents for appointments and out-of-center activities.
- H. Assists with dining room supervision as assigned.
- I. Provides written records of activities, treatments, and care provided to residents, resident progress towards IPP goals, accidents, unusual incidents and other observations as per facility policy/procedure.
- J. Recognizes potentially problematic resident

behaviors and intervenes in manner consistent with IPP, behavior program, and sound clinical practice.

- K. Works as part of team to effectively intervene with acting out, assaultive or self-abusive residents/patients.
- L. Participates in staff inservice education activities.
- M. Performs housekeeping procedures: making beds, putting away clothing, emptying and cleaning waste baskets, cleaning floors, bathrooms and work areas.

IV. PERFORMANCE REQUIREMENTS:

- A. Knowledge: Should have basic understanding of developmental disabilities, behavior theory and behavior management techniques, therapeutic intervention techniques; and ADL teaching approaches. These knowledge bases will be subject to formal assessment at job entry and periodically thereafter.
- B. Communication Skills: Must demonstrate functional literacy skills sufficient to manage recording/reporting duties of the position. Must intervene and deal in non-retaliatory, therapeutic manner with agitated, confused, or otherwise disturbed residents. Must have ability to work effectively as part of treatment team.
- C. Accuracy: Must carry out IPP's and behavioral programs with high degree of consistency. Must demonstrate accuracy in observation skills, in charting and other reports, and in data collection.
- D. Education: High school graduate or GED required. College preferred. Must participate in a continuing education program. Must be certified as a nursing assistant.
- E. Physical Demands: Moderate to heavy. Some walking, lifting, agility and physical labor required. Must be able to rise from kneeling position carrying up to 60 pounds. Must have, or attain, and maintain demonstrable competence at approved physical control techniques for dealing with assaultive residents.
- F. Minimum Age: 18
- V. NON-PERFORMANCE CONDITIONS:
 - A. Position Relationships: Has continuous contact with patients/residents and frequently with all

Health Center personnel.

- B. Policy Responsibilities: All staff members should be familiar with and follow established Health Center policies. Each employee must have a thorough knowledge of Health Center policy and is individually responsible for carrying out policies.
- C. Certification Requirements: Valid drivers license required. Must be certified as a nursing assistant.
- D. Promotion Possibilities: FROM: D. D. Technician
TO: D.D. Services Supervisor (dependent upon education/experience)

. . .

At the time Reigel received this position, there were two other employes who had posted for the position who had less seniority than Reigel. The County analyzed the candidates as follows and found that since there was more than a 5% difference between Reigel and Fostmeier's scores, Reigel was more qualified and seniority should not be the determining factor. 1/

. . .

CANDIDATE EVALUATION:

	<u>Reigel</u>	<u>Fostmeier</u>	<u>Osborne</u>
Experience	4.00	2.00	2.00
Past 2 Evaluations	3.05	3.05	2.00 (no
Interview	<u>2.70</u>	<u>2.80</u>	<u>3.40</u>
Total	<u>9.75</u>	<u>7.85</u>	<u>7.40</u>

. . .

The County's assessment of the candidates for this position followed certain practices that had been in place for several years and had been applied without Union objection. For example, the County credited these candidates on a scale used consistently over a period of several years for their "experience". By the County's definition, experience has not been considered to be identical to seniority with NHC but in the above-described situation, it appeared that the County gave credit to Reigel, Fostmeier and Osborne only for their work experience at NHC. In addition, as consistently done in the past,

1/ Had Reigel and Fostmeier been relatively equal in qualifications and had seniority been the determining factor, Reigel would have been selected for the position due to his greater seniority, in any event.

these three candidates' two most recent performance evaluations at Norwood (if any such existed) were rated and considered during the candidate evaluation process. Finally, it is undisputed that the County has also consistently used a team of two interviewers to ask job candidates certain interview questions and to grade and rate their responses, giving up to 5 points (total) for the responses given. 2/ These practices and procedures were used in determining that Reigel was the best qualified applicant for the DD Tech position on P.M. shift in October, 1991.

One of the evaluations considered in awarding Reigel the DD Tech P.M. shift position had been given to him on June 10, 1991 by P.M. Supervisor Schultz. This evaluation rated Reigel as "satisfactory" in twelve of twenty-two categories, "requires improvement" in four categories, "above average" in five categories, with one category rated "no basis for evaluation." In none of the categories was Reigel rated "outstanding". The four categories in which Reigel rated "requires improvement" were: 1) "uses good judgment in decision making", 2) "maintains high standards of accuracy thoroughness and reliability," 3) "skill in conveying facts, ideas, and results -- oral and written," 4) "stability and ability to cope under pressure." Supervisor Schultz also wrote the following comments under "Recommendation for Improvements" on this June 10, 1991 evaluation:

At times Pat's decision making process is questionable in dealing with residents and their ability to follow unit rules or daily APL's. His judgment is improving over the past 6-9 months though. When documenting incidents or aggressive behaviors . . . Pat tends to be vague in writing the facts, part of this problem is due to limited staff and not charting these things very often. With charting more often I feel Pat's charting will improve as he becomes more knowledgeable and comfortable in charting. When the unit is stressful or when there are major changes taking place, Pat doesn't always handle these situations well resulting in using poor judgment or taking time off of work. Hopefully by having Pat talk about potential problems he's having on the unit with his supervisor will help.

It is undisputed that prior to Reigel's June 10, 1991 evaluation, he had received a warning for his lack of judgment. Nonetheless, Reigel was awarded the DD Tech P.M. shift position.

Thereafter, Reigel's supervisor Schultz left employment at Norwood. At some point, the County decided to change its performance evaluation schedule to one in which evaluations were performed annually on or about the anniversary date of employment for each employe without regard to any leaves of absence

2/ NHC Administrator Bestul testified that writing tests/samples had also been used in the past in evaluating candidates for job openings like the DD Tech positions on day and second shift but that this had not been a consistent practice in Bestul's approximately ten or eleven years as Administrator of NHC. In addition, Reigel could not recall whether the written test for this 1991 open position was the same as that given for the DD Tech day shift position opening in 1992, although Reigel acknowledged that the same or a similar format may have been used for both tests. Apparently, no spelling test was given for the DD Tech, P.M. shift position in 1991 but one was given for the DD Tech day shift position in 1992.

which may have occurred during the year. Therefore all employes, including Reigel, were again evaluated in 1991 for the preceding year as of their starting date. This resulted in Reigel (as well as all similarly situated employes) being evaluated more frequently than annually during 1991-92 based upon their starting dates of employment. For Reigel, it meant that he was evaluated in October, 1991, just four months after his previous (June 10th) evaluation.

On October 10, 1991, Reigel was evaluated by his new supervisor on nights, D. Kirkstrom. As of October, 1991, Kirkstrom had been Reigel's supervisor for approximately three months. In that evaluation, Kirkstrom used the same evaluation form as was used in June, 1991. Kirkstrom rated Reigel "satisfactory" in eleven categories, "requires improvement" in six categories, "above average" in four categories and he was rated "no basis for evaluation" in one category. Kirkstrom also rated Reigel "requires improvement" in all of the categories (listed above) in which he had received this rating in June, 1991. Kirkstrom also gave Reigel this rating in the following additional categories: 5) "versatility in application of knowledge" 6) "clarity, brevity, and quality of reports and presentation" in his October, 1991 evaluation. Kirkstrom placed the following comments on the form in the section entitled "Recommendations for Improvement:"

Since your last evaluation, the following areas have not improved and require your immediate attention; Decision making process is still questionable in regard to the resident's IPP programs, documenting them in a timely manner and shift charting when deemed appropriate in various situations. Documentation of RX's and or signatures were often left unsigned, (even though they are completed). Usage of sick time has been questionable; see September 26, 1991 memo. Charting has not improved in regard to specific documentation that is needed, progress notes are often vague and hard to follow a sequence of events. Pat needs to accept constructive advice or criticism from his supervisor in regard to communication.

In February, 1992, Reigel and nine other employes signed a posting for the disputed position, DD Tech on day shift on the "Stepping Stones Unit." Only Reigel and the successful applicant, Margene Bartsch, completed the application, testing and interview process. The job description for this opening was identical to that of the DD Tech PM shift (quoted above) which Reigel had been awarded in 1991, except that no reference was made to working on the "Stepping Stones Unit" on the 1991 posting.

The County rated Bartsch and Reigel's experience, gave them a written test (worth from 1 to 5 points) and a spelling test (of 10 spelling words) and interviewed them using the same interview questions as for other DD Tech positions and scored the interview results using the same scoring method (up to 5 points) that the County had used in the past. The County originally judged their qualifications as follows:

I.	Experience	<u>Bartsch</u>	<u>Reigel</u>
	A. Norwood Health Center	87 mo. = 4.0	101 mo. = 4.0
	B. Other groups/classes	24 mo. = <u>3.0</u>	-0- = <u>1.0</u>
	AVERAGE	3.5	2.5
II.	Past Performance		
	A. Average of two previous evaluations	4.9	3.0

III. Interview/Test

2	A. Interview responses	4.6	3.6
	B. Writing/Spelling Test	<u>4.3</u>	<u>2.3</u>
	AVERAGE	4.5	3.0
	TOTAL OF I, II, III	12.9	8.5

The County then awarded the position to Bartsch, on the grounds that she was most qualified for the job based on her scores.

The Union then filed the instant grievance on behalf of Reigel. During the processing of that grievance, the County offered to disregard the writing and spelling tests of both Bartsch and Reigel and to give credit to Reigel (+1.0 points) for his prior work experience as a certified nurses assistant at Marshfield Living Center Nursing Home. The County also decided not to give Ms. Bartsch any additional experience points for her prior employment as a teacher aide at Lincoln School (although, it had originally done so under "B. Other groups/classes," quoted above). Therefore, the County subtracted 3.0 from Bartsch's score despite its belief that her teaching experience was relevant to the performance of the work in the disputed DD Tech position. Finally, the County gave Reigel his absolute score for the interview, 3.55, although it had originally rounded Reigel's score up to 3.6 in its initial evaluation. The revised County scoring for Bartsch and Reigel was as follows:

	<u>Bartsch</u>	<u>Reigel</u>
Experience	4.00	5.00
Past Evaluations	4.90	3.00
Interview	<u>4.60</u>	<u>3.55</u>
Total	13.50	11.55

The record demonstrated without contradiction that the DD Tech day shift position requires the ability to regularly write lesson/instruction plans and to regularly chart residents' progress; that the DD Tech on the Stepping Stones Unit would spend the majority of his/her time teaching residents in a structured classroom setting from approximately 9 A.M. to 2:45 P.M. daily; that this DD Tech would also spend more time during the day shift interacting with residents, taking them on field trips, giving them various types of active treatment and dealing with stressful situations that occur during the daytime hours. 3/

Other evidence offered herein regarding Bartsch and Reigel's qualifications for the disputed position was as follows. Ms. Bartsch had had prior work experience as a teacher's aide at Lincoln School. The County was aware of this fact when it selected Bartsch to fill the disputed position, and it had originally given her credit for this experience under the "other groups/classes" section of the County's original evaluation. 4/ Ms. Bartsch had received a letter of recommendation for her work at or around the same time that Reigel received discipline for a lack of judgment. Reigel stated that his

3/ On the P.M. shift (3 P.M. to 11 P.M.), a DD Tech does not teach classes and has less structured interaction with residents because the residents are practicing their daily living skills and are getting ready to go to bed for the night.

4/ As noted above, the County subtracted 3.0 experience points originally given to Bartsch for her teacher aide experience, during the processing of the grievance herein.

NHC performance evaluations, given prior to the two done in 1991, had been "positive". The Union also submitted a writing sample from Reigel, created on the day of the hearing to show that Reigel is capable of the writing and charting necessary in the DD Tech day shift position. 5/

Finally, the County provided evidence that during negotiations for the effective labor agreement, the Union proposed to delete language in Section 5.02 relating to relative equality of qualifications and to replace it with language which would require the County to promote the most senior employe applicant who possesses minimal qualifications for the position. The Union ultimately dropped this proposal and the language of the agreement remained as quoted in the "Relevant Contract Provisions" section of this Award.

POSITIONS OF THE PARTIES:

Union:

The Union argued that Grievant Pat Reigel should have been selected for the position of Developmental Disabilities Technician (DD Tech) on the day shift in the "Stepping Stones Unit." The Union urged that the County's review and analysis of Reigel's experience and ability to perform the job were flawed in several ways. First, the Union observed, the County disregarded both the written text and spelling test which the County had originally used to determine the successful candidate for this position because the Union had objected to these measures of ability during the processing of this grievance. This fact, the Union contended, demonstrated that the County recognized "the arbitrary nature of the tests given."

In addition, the Union pointed out that during its review, the County had failed to recognize or give credit for Reigel's six years' experience as a certified nursing assistant at another nursing home. (The Union believed (contrary to the County) that such experience is more relevant to the DD Tech job than was Ms. Bartsch's two years' prior work experience as a teacher aide). This resulted in Reigel's score being unfairly impacted in a negative way, according to the Union. The Union asserted that the use of the two most recent performance evaluations for Reigel which had been given four months apart (June and October, 1991), was unfair to Reigel because these were the only evaluations he had received since 1983 which were merely "satisfactory", while all other evaluations of him had been in the "above average" to "outstanding" range. The use of Reigel's 1991 evaluations again showed the arbitrary actions of the County in reviewing and analyzing employe qualifications for the DD Tech job, in the Union's view.

The Union also took issue with the County's general use of a 5% differential between candidate scores to support its decision that the two candidates here were not "relatively equal" because more than a 5% difference between their adjusted scores existed. The Union asserted that Section 5.02 requires that the County prove the "candidate qualifications" of Reigel and

5/ I reserved ruling on the admissibility of this document, having taken an offer of proof regarding the document following the County's objection to the document and any testimony thereon. I find the document and the testimony thereon to be inadmissible hearsay, not relevant to this case. This document was not considered by the County in its deliberations regarding which candidate to select in this case. The document is also a self-serving document created specifically for trial. As such, I have not considered this document (nor any testimony thereon) in reaching my decision herein.

Bartsch and to demonstrate that Bartsch was actually more qualified for the DD Tech position than Reigel. This, the Union contended, the County failed to do.

The Union noted that the County did not submit Bartsch's resume or work history and she was not called as a witness by the County. The Union cited Elkhart Community Schools, 78 LA 64 (Rifkin, 1981) for the proposition that an employer must affirmatively prove why the ability factor is given greater weight than seniority in cases like the instant one. Furthermore, the Union observed, the job description for the posted vacancy is identical to the job description of the DD Tech position held by Reigel since 1991.

Finally, the Union urged that if the County had truly been so concerned about the "active treatment" abilities of the candidates, it should have asked Reigel about his abilities in this area during the interview for the position.

The Union asserted that the County did not do this. In sum, the Union urged that the County's selection process was fatally flawed and that Reigel should be awarded the DD Tech position.

COUNTY:

The County argued that its testing, evaluation and selection process were fair and equitable, that any measures used to weigh qualifications were applied consistently and equally to both candidates and that the measures which the Union claimed were unfair to the Grievant were eliminated by the County. The County observed that the County's use of a 5% differential to determine relative equality had been used by the County in the past without Union objection. Such a measure, the County contended, is otherwise statistically recognized as a margin for error, used in national polls and surveys where scientific accuracy cannot be assured. Thus, such a 5% differential was appropriately used in this case. The County observed that the evaluation and selection process used in this situation has been used in the past to fill various positions and the Union has not objected thereto.

The County noted that the Union's arguments regarding the fairness of the written and spelling tests given to the two candidates in this situation are moot because the County threw out these tests as a measure of the two candidates here. In addition, the County emphasized that the work on the day shift in the DD Tech position is quite different from the 3 p.m. to 11 p.m. shift DD Tech position which Reigel holds. The County noted that Reigel had demonstrated a need for improvement in his decision-making process and in accurately charting resident activities. The County urged that the day shift DD Tech position requires good judgment and accuracy in charting.

Based on the interviews and past evaluations, Reigel proved to be the less qualified of the two candidates so that the County did not actually have to consider seniority in its decision-making process. Therefore, the County sought that the grievance be denied and dismissed in its entirety because the candidates were not relatively equal.

Reply Briefs

Union

The Union contended that although the County asserted it eliminated consideration of the written test it had not actually done so, as evidenced by the County's arguments that the work on the day shift DD Tech position is different from that of a night shift DD Tech. The Union again noted that the job descriptions for both positions are identical. The County's emphasis on Reigel's charting skills showed that the County continues to rely on the written/spelling tests to eliminate the Grievant from consideration. Finally, the Union took issue with the County's arguments that it had applied its system

of evaluating the candidates fairly and consistently and pointed to the arguments it had made on these points in its original brief.

County

The County took issue with several arguments/assertions made by the Union in its initial brief. The County reiterated that the written/spelling tests, having been eliminated, constituted a non-issue here; and that the County recalculated the two candidates' experience based on Union objections to the County's calculation of the Grievant's experience. Despite this, there was a 16.88% difference between Reigel and Ms. Bartsch's overall scores. This, the County urged was far more than 5%, showing that the Grievant was not relatively equal to Bartsch in qualifications. Indeed, the County reiterated that the 5% differential it had used in this and several past situations, without Union objection, was a reasonable measure of relative equality.

The County also defended its use of the Grievant's last two performance evaluations in the selection process for the position in question. The County noted that using the two most recent evaluations had been its consistent practice in the past and that the Union had failed to prove that had other performance evaluations of the Grievant been used, that the Grievant's overall score would have changed.

The County asserted, contrary to the Union, that the Grievant had been asked questions in his interview relating to active treatment and that his answers had been "wholly inadequate". The County asserted that it applied its evaluation standards and methods, in its discretion, and found that Reigel was not relatively equal to Bartsch. Therefore, the County asserted it had met its burden of proof in this case.

The County also noted that the Union had attempted to eliminate the "relatively equal" language from the contract during negotiations for the effective agreement but that the Union had ultimately withdrawn this proposal. The County urged that the Union should not now be granted, through arbitration, a concession it had failed to win in negotiations.

On December 3, 1992, the undersigned received a letter from the Union taking exception to the County's characterization of the Grievant's work performance as "average" in prior years. The Union pointed out the Grievant's uncontested testimony on this point was to the contrary. Upon receipt of this letter, the record herein was closed.

DISCUSSION:

As a general matter, the opinion of supervisors and/or interviewers regarding an employe's relative qualifications and ability is considered important and will be accorded significant weight by arbitrators if these opinions are substantiated by objective, tangible evidence (such as performance evaluations of more than one supervisor and the results of job interviews). In addition, a collective bargaining agreement may contain provisions which require the employer to give greater weight to current employes' seniority than to the employer's opinion of the employes' abilities. 6/

6/ Notably, in the case cited by the Union, Elkhart Community Schools, supra, the contract contained a provision requiring seniority and ability to be considered as two of the factors in awarding jobs. The Elkhart case did not contain "relative equality" contract language as does the instant case. Therefore, the ruling in Elkhart is inapposite and is not applicable to this case.

In this case, the labor agreement contains a relative equality provision which means that only if the candidates' qualifications are deemed by the Employer to be relatively equal, will seniority become the determining factor in awarding jobs at NHC. Article 5.02 of the effective labor agreement also specifically provides that "in accordance with standards established by the Employer," qualifications "shall be determined on the basis of ability, efficiency, experience and physical fitness" which "shall be commensurate with job descriptions and work to be performed." Standards must be "fair to all applicants and be applied uniformly in all departments." Article 5.02 further provides that "the burden of proof regarding candidate qualifications rests with the Employer."

The record in this case demonstrates that the County has established standards for judging qualifications in the form of certain long-established practices and procedures for measuring candidate qualifications. In this regard, I note that the County has used the same scoring method, the same 5% differential for judging relative equality, the same interviewing methods and measure of NHC experience, all without Union objections, for the past several years. The evidence showed, therefore, that these measures have become past practices of the parties to fill in the blanks of the language of Article 5.02.

The central dispute in this case revolves around several aspects of the candidate evaluation method used to select Ms. Bartsch for the disputed opening. First, it is clear that the County did not have a consistent practice of giving spelling tests or of requiring writing samples in candidate evaluations. 7/ However, after the Union objected to the County's use of the spelling test and writing samples in this situation, the County decided to disregard those tests, in an attempt to satisfy the Union and/or settle this case. With the writing/ spelling test scores included, Bartsch had a score of 12.9 and Reigel had a score of 8.5. Without these test scores included, Bartsch' score would be 8.6 while Reigel's score would be 6.2. Thus, Bartsch' score would have been 2.4 points higher than Reigel's score, a 27.9% difference, without consideration of the spelling test and writing samples.

In addition, after the Union objected to the County's having given Ms. Bartsch experience credits for her prior teachers aide experience and the County's not having given Reigel any experience credits for his prior nurses assistant experience, the County subtracted the 3.0 points it had given Bartsch for her teacher aide experience, but it gave Reigel 1.0 point for his past nurses assistant experience. With these changes, Bartsch received 4.0 experience points and Reigel received 5.0 experience points. This changed Bartsch' overall score (excluding the spelling test and writing samples) to 13.5 and Reigel's overall score to 11.6, a difference of 1.9 points or approximately 14%. 8/

I disagree with the Union's argument that the County's efforts to compromise on this case by disregarding the writing sample and spelling test and rescoring the candidates experience necessarily means that these measures

7/ My comments on this point should not be construed as a judgment that such tests and samples would not be relevant to the DD Tech position in dispute. Such a judgment is for the County to make, within the context of past practice and contractual requirements.

8/ Ultimately, the County decided to give Reigel his absolute score, not a rounded score as it had done originally. I do not find this change significant one way or the other.

must have been inherently arbitrary, capricious and discriminatory. In regard to the writing/spelling tests, there was evidence provided that the position in dispute requires the incumbent to write lesson plans, teach in a classroom setting for a substantial part of the work day and to chart resident activities in depth. The evidence also undisputedly showed that Reigel's DD Tech position on the 3 p.m. to 11 p.m. shift did not include these responsibilities. In addition, I note that the DD Tech job description refers to instructing, training, charting, making written records and teaching and that Section III. A. of the job description specifically refers to leading "groups on ETC", depending upon the shift. The posting for the disputed position also referred to "Stepping Stones Unit." Thus, in these circumstances, the evidence showed that the ability to teach and to write were "commensurate" with the work to be performed and with the job description of the DD Tech position in dispute, as required by Article 5.02.

Thus, the County, having voluntarily eliminated the spelling/writing test from consideration, relied upon its measurement of Bartsch and Reigel's experience and their interviews for the position to reach its decision to give Bartsch the position. I note that the County changed its evaluation of Bartsch and Reigel's experience (in Reigel's favor) changing Reigel's experience rating to 5.0 from (an average) 2.5 and charging Bartsch' experience to 4.0 from (an average) 3.5. 9/ In addition, the County's method of measuring NHC experience has not changed for the past several years and this same measure/method was applied in the instant case. Given the County's application of its practice in this area, its change in Reigel's experience rating (in his favor), and the lack of evidence that the County's experience ratings of Bartsch and Reigel were otherwise arbitrary, capricious or discriminatory, I find that the County's judgment in this area should not be set aside.

Regarding the 5% differential for judging relative equality, I note that the County has used this measure in the past to judge relative equality and that the Union has failed to object thereto. In these circumstances, and given the necessarily subjective nature of any evaluation of qualifications, the application of a 5% differential appears to be a reasonable means of weighing qualifications.

The County rated Bartsch 4.6 points for her interview responses and it rated Reigel 3.6 for his interview responses. Such ratings are, of course, subjective, being based in part upon the interviewers' impressions of the interviewee. However, the Union proffered no evidence to demonstrate that these ratings were, in fact, based upon any arbitrary, capricious or discriminatory factors. Indeed, the evidence showed that the County used the same interviewing format and questioning procedure here that it had used in the past.

Finally, the use of the two most recent performance evaluations and the ratings thereon for Reigel and Bartsch were shown to be based upon past practice, and not upon any arbitrary, capricious or discriminatory factors. In this regard, the record showed that the County had traditionally used the two most recent performance evaluations for candidates. The fact that the County changed its schedule for performing performance evaluations before the disputed position opened up does not require a conclusion that the use of Reigel's two most recent performance evaluations was somehow arbitrary, capricious or discriminatory. Rather, the record showed that the County applied its new

9/ Even if the County had ultimately given Bartsch 3.5 and Reigel 5.0 for experience, Reigel's overall score would have been 1.45 points lower than Bartsch's, a difference of 1.45 points or approximately 11%.

employe evaluation schedule to all of its employes based upon their hiring date. In regard to Reigel's performance evaluations themselves, I note that these were prepared by two different supervisors, based upon objective criteria and the supervisors' personal observations; that Reigel had received discipline (which he apparently did not grieve) at approximately the same time that Bartsch received a written commendation for her work; and that the County's method of rating these performance evaluations has been in place for some time and has not been disputed by the Union. Therefore, I see no reason to disturb the County's rating of 4.9 for Bartsch and its rating of 3.0 for Reigel in the past evaluations category.

Thus, the evidence demonstrated that the County's candidate evaluations of Bartsch and Reigel were based upon the requirements of the job, were supported by objective facts regarding the candidates and were performed pursuant to past practice, without any arbitrary, capricious or discriminatory considerations or factors entering into the process. In these circumstances, I shall not alter the County's decision and I issue the following

AWARD

The Employer did not violate the collective bargaining agreement when it failed to award the position of Developmental Disability Technician (posted on February 25, 1992) to the Grievant.

The grievance therefore is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 11th day of February, 1993.

By _____
Sharon A. Gallagher, Arbitrator