BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
THE MADISON METROPOLITAN SEWERAGE DISTRICT	:	Case 43 No. 48762 MA-7697
and	:	
DANE COUNTY, WISCONSIN MUNICIPAL EMPLOYEES UNION, LOCAL 60, AFSCME, AFL-CIO	:	

Appearances:

Mr. Michael Westcott, Attorney at Law, Axley, Brynelson, Attorneys at Law, 2 East Mifflin Street, P.O. Box 1767, Madison, Wisconsin 53701-1767, appeared on behalf of the Employer.

Mr. Darold O. Lowe, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719-1169, appeared on behalf of the Union.

ARBITRATION AWARD

On February 10, 1993, Wisconsin Council 40, AFSCME, AFL-CIO, and the Madison Metropolitan Sewerage District filed a joint request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between those parties. The Commission, on March 9, 1993, designated Mr. Houlihan as Arbitrator to hear and resolve the parties' dispute. A hearing was conducted on April 28, 1993, in the offices of the Employer, in Madison, Wisconsin. At the close of the evidentiary hearing, the parties made closing oral arguments, and waived the filing of briefs.

This arbitration involves a promotional posting into an Assistant Electrician position.

BACKGROUND AND FACTS

On July 14, 1992, the Madison Metropolitan Sewerage District posted the following job vacancy notice for an Assistant Electrician:

> IN ACCORDANCE WITH PARAGRAPH 7.04 OF THE MADISON METROPOLITAN SEWERAGE DISTRICT/LOCAL 60 CONTRACT, AN OPENING FOR AN ASSISTANT ELECTRICIAN, RANGE 11, IS HEREBY POSTED. THE JOB DESCRIPTION AND QUALIFICATIONS ARE

ATTACHED. SELECTION WILL BE BASED ON A WRITTEN TEST TO BE GIVEN JULY 28, 1992, AT 1:00 p.m., IN THE OPERATIONS BUILDING. MINIMUM ACCEPTABLE SCORE ON THE WRITTEN TEST WILL BE 70%.

APPLICATION SHOULD BE MADE IN WRITING TO DAVE LUNDEY ON OR BEFORE JULY 24, 1992.

MADISON METROPOLITAN SEWERAGE DISTRICT
James L. Nemke /s/
James L. Nemke
Chief Engineer and Director

A number of employes, including the grievant, Carl Wright, signed for and took the exam.

Wright, and another employe, Jeff Woerpel approached Lundey prior to the test date, advised Lundey that each of them had plans to be on vacation and requested that they be allowed to take the exam early. Lundey agreed that that was appropriate, and both Woerpel and Wright took the exam on July 23.

On July 28, beginning at 1:00 in the afternoon, three men sat for the exam. They were given one hour and fifteen minutes to complete the test. At 2:15, tests were collected, whether finished or not. Shortly before 2 p.m. on July 28, Dave Smith approached Mr. Lundey with a request that he, Smith, be allowed to take the exam. Smith acknowledged that he had failed to sign the posting, but reminded Lundey that he had been on vacation a considerable amount of time during the posting period, and requested that he be allowed to take the exam. Lundey allowed Smith to take the exam and advised Smith that while he was allowing him to sit and write the exam he was not committing the Sewerage District to accepting the exam given the lateness of Smith's application.

The two high scorers on the exam were Wright and Smith. Mr. Wright, whose seniority date is June 8, 1981, scored a 92.3. Mr. Smith, whose seniority date is October 4, 1976, scored a 91.75. Scores of other applicants were significantly lower than either of these.

Based upon the test scores and relative seniority, Dave Smith was selected for the Assistant Electrician position. In the judgment of Mike Simon, Director of Maintenance and Electrical Engineering and Lundey's supervisor, the test scores were only one-half point apart and in his mind, were substantially equal. That being the case, Smith was the more senior employe and was awarded the job. Simon called Smith on Friday, July 31 and asked Smith if he would be interested in assuming the position. Smith indicated an interest and on the following Monday, August 3, 1992,

Smith was awarded the position and a notice to that effect was posted. On that same date, August 3, 1992, Wright filed a grievance. It was Wright's contention that Smith was allowed to take the Assistant Electrician test on July 28 notwithstanding the fact that he had not signed up by July 24th. In his grievance, Wright contends that Smith was off work from July 20 through 24. Wright further asserts that Smith took two hours off on July 14 and five hours off on the 16th; that he (Smith) worked full days on July 15 and 17. The essence of Wright's grievance is that Smith was permitted to take the exam after the expiration date for filing had passed. It is the further contention of the Union that Smith took the exam following the cutoff time in the posted notice.

ISSUE

The parties stipulated to the following:

> Did the Employer violate the labor agreement when it did not promote Carl Wright to the position of Assistant Electrician? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

> 7.04 Job Posting. Whenever there is a permanent job opening, it shall be posted on each bulletin board for the benefit of all employees in the unit and application blanks will be made available. Such notices shall be posted seven (7) days before an open job shall be permanently filled. The employer agrees to post minimum qualifications, performance and experience requirements, date of examination, if any, and whether oral or written or both.
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> 7.05 Filling Position
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> (a) Application of Seniority - It is the policy of the employer to promote employees with the most seniority where qualifications, past performance, skill and ability are substantially equal, and where it is reasonably practical to do so. In promotions to jobs in pay ranges 11, 12, 13 and 14, the employer will be the prime judge of skill and ability.
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> (b) Temporary Assignment - The employer may fill a vacant position or job opening in order to meet the needs of the employer on a temporary basis pending consummation of the procedures relating to a permanent filling of such position. This provision shall not be used to avoid or delay the permanent filling of any position.
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> (c) Examination - Vacant positions shall, whenever practicable, be filled by the promotion of employees. The employer agrees to hold examinations within the time prescribed by the posting, and fill positions expeditiously, in compliance with the letter and spirit of this agreement and otherwise in accordance with established practice. Upon

filling a position, the employer shall notify the Union of the name of the successful applicant and shall also post it on all bulletin boards. The employers shall notify all senior unsuccessful applicants in writing as to the reasons that they were not selected. If written performance evaluations of employees are made in conjunction with a job posting, the employee involved in posting for the job can receive a copy of the evaluation if he/she submits a request in writing for such information.

The Employer will keep on file for a minimum of three (3) years copies of all examinations given to fill vacant positions. These examinations can be viewed by appropriate Union personnel prior to or during grievance proceedings in the event a candidate for a position questions the validity of an examination he has taken for that position. However, no one will be allowed to view these examinations between the time that a job is posted and the time it is filled. Under no circumstances will the examination be removed from District offices or be copied without written District permission.

(d) Trial Period in New Position - All employees filling a new position by virtue of promotion, lateral transfer or demotion shall serve a trial period of 90 days and during such trial period shall have all the rights provided by this agreement subject to Section 7.01. The Employer may request an additional 30 days; and, if mutually agreed upon, such trial period shall be for a total of 120 days. A trial period shall not be granted in the case where an employee requests a demotion and a lower classification job has not been posted. In addition, a trial period shall not be granted in the case of a disciplinary demotion.

POSITIONS OF THE PARTIES

In the view of the Union, the Employer's posting required a written test commencing at 1:00 p.m. on July 28 and further obligated workers to apply in writing. Written applications were received from everyone but Smith. The Union acknowledges that two workers were given the opportunity to take the test early due to vacation. Smith was working during the period in question and

should have known of the posting. He should not be excused from his own failure to sign for the exam. Smith was not only late in applying and failed to apply in writing, he also took the test after the exam period had closed. Based upon the test scores in the view of the Union, Wright should be awarded the job with full back pay.

It is the view of the Employer that my role is to determine whether or not specific terms of the collective bargaining agreement were violated. My power is limited to the interpretation and application of the words of the contract. The Employer believes that the Union's real argument in this dispute is that the posting, not the contract, was violated. In the view of the Employer, it has done nothing here to frustrate the promotional process. Only three of the six applicants actually tested within the promotional time frame. Smith took the test closer to the designated promotional time frame than did Wright. The Employer notes that other postings have indicated that applicants must submit applications in writing on or before a date. This posting said application "should be made". Given the history of this employer in demonstrating significant flexibility, it would be unfair, argues the Employer, to deny Smith an opportunity to take the exam. Had it done so, the Employer speculates the parties would be in this proceeding with a grievant named Smith. The spirit of the agreement, argues the Employer, is to reward seniority if all else is equal. The Employer honored that agreement. Here, an employe was given the benefit of the doubt. The promotion came from within and was seniority based. That is the essence of the agreement between the parties.

DISCUSSION

I think the Employer is right in this matter. It is clear, at least to me, that the intent of this contract is to promote by seniority where that is possible. Specifically, it is the policy reflected in this agreement to promote bargaining unit employes with the most seniority where "qualifications, past performance, skill and ability are substantially equal, and where it is reasonably practical to do so." This case finds the most senior employe receiving a promotion. The real question is whether there exist technical barriers to that occurring. I think not.

I do not believe that any specific provision of the contract has been violated. The job posting provisions of this contract begin with Article 7.04. That paragraph obligates the Employer to post all permanent job openings. The job opening was posted. The paragraph goes on to establish a time frame and there is no challenge to the amount of time or the timing of this posting. The paragraph concludes by obligating the Employer "to post minimum qualifications, performance and experience requirements..." It appears to me that the posting satisfies that obligation and there has been no challenge in this regard, either.

Article 7.05 goes on to discuss the filling of posted positions. Paragraph (a) declares it to be the policy of the Employer to promote employes with the most seniority. The clause goes on to qualify seniority by "past performance and skill and ability." Where performance and skill and ability are substantially equal, and it is practical do so, senior employes are to be promoted. In this proceeding, the Employer gave an exam. Nothing in this proceeding challenges the validity of the exam administered. For purposes of this proceeding, I have concluded that the exam is a legitimate tool to measure skill and ability and that the exam was valid. The test scores of the two men were very close. The Employer testified that he had for years treated test scores within five points of one another as substantially equal. I believe that the test scores being as close as they were to one another, and the practice of the Employer in question that the two are deemed to be substantially equal. 7.05(A) goes on to make the Employer the "prime judge of skill and ability". There is nothing in this record that suggests that the Employer abused its discretion in this regard.

Paragraph 7.05(C) goes on to direct the parties that "vacant positions shall. . .whenever practicable, be filled by the promotion of employees". In this instance, an employe was promoted. The paragraph goes on to require that the Employer "hold examinations within the time prescribed by the posting". In this instance, the Employer conducted the exam within the posted examination period. The timing of the exam is subject to question in this proceeding. The Employer allowed Smith to take the exam at a time other than that posted. However, the Employer allowed two other employes, including Carl Wright, the grievant, to take the exam early and outside the posted examination time. Nothing in this article specifically limits the Employer's right to make such allowances. Paragraph "C" goes on to direct the Employer to fill positions expeditiously and in compliance with the letter and spirit of the agreement and in accordance with established practice. It seems to me that the spirit of the agreement argues strongly for the promotion of the senior employe. I find that the Employer has done that here without offending the letter of the agreement in any fashion.

It appears from the testimony of all parties that the Employer has historically permitted a good deal of latitude with respect to taking exams. While few specific instances were brought forward, all witnesses testified that they had never heard of an employe who had been denied the opportunity to take an exam even where that was outside the normal posted exam time. While the record is inadequate to establish the existence of a firm practice, it appears likely that there exists a practice of allowing deviations from the scheduled exam period.

This case is framed in a somewhat odd posture. It is somewhat curious to find a Union claiming that the senior employe should be disqualified for technical, and procedural reasons from competing for a posted job. It is atypical in that commonly procedural defenses exist for the administrative benefit of the Employer. They commonly reduce or define the time frame in which the Employer's judgments can be challenged. The Union is raising these traditional Employer defenses, and is doing so without clean hands. Wright, the grievant, is really the moving party here. Yet, Wright was the recipient of a strongly paralleling accommodation in that he was allowed to take the test early. It is difficult for me to see the equity in Mr. Wright's argument that Smith ought to be technically barred from taking the exam late.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 16th day of July, 1993.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator