

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 ROCK COUNTY EMPLOYEES, LOCAL 1258 : Case 270
 AFSCME, AFL-CIO : No. 48686
 : MA-7679
 and :
 :
 ROCK COUNTY (HEALTH CARE CENTER) :
 :

Appearances:

Mr. Thomas A. Schroeder, Rock County Corporation Counsel, appearing on behalf of the County.
Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

ARBITRATION AWARD

On January 28, 1993, Rock County Employees, Local 1258, AFSCME, AFL-CIO, hereinafter Union, and Rock County, hereinafter County or Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as the impartial arbitrator involving a dispute concerning the County's refusal to promote Ken Louis to Mechanical Maintenance Worker III. Hearing in the matter was held on May 3, 1993, at Janesville, Wisconsin. The parties were afforded the opportunity to adduce testimony and submit documentary evidence. No stenographic transcript of the proceeding was taken, and the parties concluded filing post-hearing briefs by June 25, 1993.

STIPULATIONS:

At hearing the parties stipulated to the following statement of the issue:

Did the County violate the terms of the collective bargaining agreement when it did not offer Ken Louis the position of Mechanical Maintenance Worker III on October 7, 1991?

If so, what is the appropriate remedy?

Additionally, the parties stipulated:

Had Ken Louis met the minimum qualifications and been hired for the position of Mechanical Maintenance Worker III, the County understands that it would have

been necessary to investigate reasonable accommodations so that he could perform essential functions of that position.

Also the County stipulated that it presently makes accommodations so that Ken Louis can perform as a Mechanical Maintenance Worker II.

BACKGROUND:

Ken Louis has been employed by the Rock County Health Care Center as a Mechanical Maintenance Worker II for two years. Prior to that time he was self-employed in landscaping, and prior to his landscaping position he worked as a maintenance worker at the Cedar Crest Health Care Center Complex for nine years. While working at the Cedar Crest Health Care Center Complex his duties included inside building maintenance, lighting, plumbing, floors and lawn. Before his employment by Cedar Crest he had no other relevant maintenance work experience. At Cedar Crest there was only one level of maintenance worker and maintenance workers performed all tasks.

He was interviewed for the Mechanical Maintenance Worker III position in October of 1991, and was told on October 7, after the interview, that he did not meet the minimum qualifications for the position. He does agree that while he is familiar with the Maintenance Worker III duties and responsibilities, there are some duties that he will not be able to perform, for example, small wiring and boiler tests which require color coordination and being able to identify contrasting colors. These are functions which he cannot perform because of his impaired eyesight. After being told he would not be promoted, he grieved the County's determination that he did not meet the minimum qualifications, and that grievance is the subject of this arbitration proceeding.

In his present position as a Mechanical Maintenance Worker II, the County makes accommodation for his visual handicap. He is not permitted to engage in snowplowing because he cannot drive, and he is restricted in the type of painting that he can do. Also, he does a minimal amount of electrical work, for example, light switches where the panels are marked sufficiently well so that he can shut off the electricity. If he receives work which he can't perform, he returns the work slip stating what is needed, and that he cannot perform that work. The work is then assigned to another employe.

The Department Head, Varga, who interviewed candidates for the Mechanical Maintenance Worker III position, 1/ testified that an oral interview exam was given to each candidate and the interviewers were evaluating the basic knowledge and experience of the applicants. There were no performance-based questions and physical ability or disability was not a consideration. A rating was given for each answer to the questions with a minimum score of zero and a maximum possible

1/ Personnel Analyst Lemkuhl-Pederson also participated in the interview process along with Varga.

score of three points for each question. Employees who scored at least 70 percent of the total available points (21) in all seven areas were deemed to have met the minimum qualifications. In this case, a 70 percent score would have equalled 14.7, whereas the grievant got a score of 10.

Varga acknowledged that there is specialization among the Mechanical Maintenance Worker III's in order to best utilize the time of those employes, but the County requires that they be able to perform all of the work of a Mechanical Maintenance Worker III even though it may be more efficient to specialize.

The pertinent contract language with respect to this grievance is Article V - Seniority, Promotions, Section 5.03 A.:

. . . In filling job vacancies or new positions, employees within the bargaining unit shall be given preference. Employees with the greatest seniority, provided that said employee is minimally qualified for the position to be filled, shall be granted the position. The determination of such qualifications shall rest with the Department Head and shall be subject to the grievance procedure set forth in this Agree-ment. . . .

ARTICLE XVI - NO STRIKE, NO LOCKOUT

. . .

16.04 The Employer and Union agree that there shall be no discrimination against any employees or prospective employees because of race, creed, color, age, sex, national origin or handicapping condition. It is and shall be the policy of the Employer and the Union to treat all employees equally.

. . .

The County argues it has the authority to decide job qualifications for hiring and filling of vacancies. In the instant case, the interview questions were an "excellent tool" for measuring an applicant's knowledge and a 70 percent cut-off score was a reasonable standard for determining minimum qualifications. The questions were knowledge based and did not measure physical ability or disability. The Union seems to be arguing that the rating of the responses to the oral interview questions were subjective. The County acknowledges that to a certain extent responses to any oral interview questions are not precisely quantifiable. In this case the Department Head was very specific about the expected responses. Also, there was an answer key that had been prepared prior

to the interviews. In response to the Union's contention that the interview was really not a measure of Mr. Louis' knowledge or experience, but rather a measure of his ability to orally convey his experience and knowledge, the County states that Louis did not testify that any of his responses to the questions were improperly recorded or that he actually knew more than his responses at the time of the interview indicated.

Also, the County disputes the Union's contention that Louis is currently performing Mechanical Maintenance Worker III work, and therefore, obviously meets the minimum qualifications of the position. The Department Head clearly refuted that notion in his testimony, whereas Louis' testimony regarding the extent of plumbing, electrical, duct work, etc. was very vague. While the County acknowledges that there is similarity between the Mechanical Maintenance Worker II and III positions, there are significant differences in the requirements of the positions. The County cites the pertinent language of the Mechanical Maintenance Worker II classification description:

Performs manual labor and semi-skilled work in the maintenance and upkeep of Health Care Center buildings, facilities, grounds, equipment, vehicles and related duties.

and also quotes from the Mechanical Maintenance Worker III position description:

Performs skilled work in several different crafts, particularly electrical, plumbing, heating, ventilation and related duties.

Varga's testimony established that work performed by Louis is minor manual labor fitting within the Mechanical Maintenance Worker II job description, and that he performed very little electrical work. This testimony was not rebutted.

Last, the County strongly disagrees with the Union's argument that Louis was not offered the position of Mechanical Maintenance Worker III because of his visual impairment. The Department Head testimony was that the interview was designed to measure an applicant's knowledge and did not get in to the issue of Louis' visual impairment. Also, the County has already made accommodations so that Louis can function as a Mechanical Maintenance Worker II and that as the stipulation notes, the County would have investigated the need for reasonable accommodation if he had been deemed to be minimally qualified and selected for the position. Thus, there is no basis for concluding that the grievant was discriminated against by the County because of his physical condition.

The Union argues that the County relied on the results of the oral interview process to determine that the grievant was not qualified for the position. However, the Employer did not produce the results of both interviewers, rather only produced the scores of the Department Head. It can be concluded from the Employer's failure to produce the interview score from the other interviewer that those scores would have worked against the interests of the Employer in this case. Furthermore, under cross examination the Department Head acknowledged that many of the questions in the oral interview could have had more than one correct answer. However, the Employer would only accept one correct answer and not the other.

While the Union acknowledges that the Employer has the right to use testing to determine qualifications, the test must be administered in a fair and unbiased manner. In this case, clearly the results of the testing do not meet those requirements in that the questions were ambiguous. The Union concludes therefore that the record establishes that the grievant was minimally qualified to fill the vacancy of Mechanical Maintenance Worker III and should have received the promotion. Thus, the Union requests that the grievance be sustained and that the grievant be made whole for all lost wages and benefits which resulted from the Employer's failure to select the grievant to fill the vacancy.

DISCUSSION:

The Union in this case does not dispute that the County must determine which, if any employees bidding on vacancies are minimally qualified so that seniority considerations can then be applied. Further, the Union does not dispute the County's use of an oral interview exam to determine if an applicant is minimally qualified. Rather, in this case the Union argues that the oral interview exam process used by the County was flawed.

While the undersigned agrees with the Union's conclusion that an oral interview exam has a significant subjective component, it has not been established in this case that the interviewers' scoring of Louis' answers to the questions were fatally flawed. Clearly, Union representative Larsen's cross examination of Department Head Varga showed that in at least one instance an answer different than the preferred answer could also be deemed to be a correct answer. Also, Larsen's questions established that he was knowledgeable in the area of boiler operation on which the County was testing applicants. However, it was never established that the grievant was as knowledgeable as Larsen or that the County had so erroneously scored his responses such that he should have been given a passing score. Absent such evidence, it cannot reasonably be concluded that Louis knew more than his score indicated.

The oral exam had a maximum score of 21. The minimum passing score was 70 percent or a score of 14.7. The Department Head gave Louis a score of 9+ which was rounded to 10. The Union contends that the other examiners' rating of the grievant's answers were not put in evidence, and infers therefrom that had they been they would have lent support to its claims that the exam was unfair. The other examiner, however, only gave the grievant's answers a score of 11, also not a passing score. With the scores of the two raters being as close as they were, the Arbitrator does not find the Union's claim persuasive. Furthermore, the contract at Article 5.03 provides that the Department Head determines who is and is not qualified.

. . . The determination of such qualifications shall rest with the Department Head and shall be subject to the grievance procedure set forth in this agreement. . . .

Consequently, even if the other interviewer gave Louis a higher score, it is the Department Head's score which controls.

Thus, the Arbitrator is persuaded that the oral exam process followed in this case was fair and unbiased, and appropriately determined the grievant to not be minimally qualified for the position of Mechanical Maintenance Worker III.

Finally, the record also does not establish that the grievant was discriminated against on the basis of his visual impairment. The interview questions dealt exclusively with experience and knowledge in the areas of the duties and responsibilities of a Mechanical Maintenance Worker III. 2/ The Arbitrator is satisfied after reviewing the questions that they were indeed solely knowledge based and visual acuity was not being tested. Further, there is no record evidence upon which to conclude that the County's knowledge and prior accommodation of his visual handicap in his current position of Mechanical Maintenance Worker II in any way adversely influenced the scores he was given on the oral exam.

Therefore, based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The County did not violate the terms of the collective bargaining agreement when it did not offer Ken Louis the position of Mechanical Maintenance Worker III on October 7, 1991. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 12th day of January, 1994.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

2/ Employer Exhibit #1.