

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 DISTRICT 1199W/UNITED PROFESSIONALS : Case 110
 FOR QUALITY HEALTH CARE/SAUK COUNTY : No. 49747
 CHAPTER : MA-8050
 :
 and :
 :
 SAUK COUNTY :
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Appearances:

Ms. Helen Marks Dicks, Attorney/Consultant, District 1199W/United Professionals for Quality Health Care, appearing on behalf of the Union.
Mr. Eugene R. Dumas, Sauk County Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

District 1199W/United Professionals for Quality Health Care/Sauk County Chapter, hereinafter referred to as the Union, and Sauk County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Baraboo, Wisconsin, on November 15, 1993. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on January 4, 1994.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. In September, 1992, a Human Services Worker III (HSW III) position in the children's unit of the County's Human Services Department became vacant. The supervisors of this position discussed the possible reorganization of child protection and while this was being done, the HSW III position was temporarily filled by Julie Morris, an HSW II.

Management decided against reorganizing child protection and the position was posted on or about November 23, 1992. 1/ There were five applicants for the position: Zinda Ertz, Cristie Harbour, Kevin Hoff, Donald Scheckel and Julie Morris. 2/ After the initial evaluation of the candidates, two of them, Morris and Harbour, were not only considered the most qualified but they were considered essentially equally qualified. At this point, the County decided to give the applicants a test to decide who would be offered the job. Four of the applicants took the test. The test was provided by an outside company, ACTION

1/ Ex. 6.
 2/ Id.

for Child Protection, and the test was designed by that Company to license their trainers in a system called Children at Risk Field (CARF). The County uses the CARF system. The test results indicated that Morris and Harbour were essentially equally qualified. 3/ The County selected Morris for the position based on her greater seniority.

ISSUES:

1. Whether the use of testing in the selection process for Human Services Worker III violated Section 12.01 of the contract?
2. Did the particular procedure used in the selection process for the Human Services Worker III position constitute a violation of Section 12.01 of the contract?
3. If the answer to 1 or 2 above is yes, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE II
MANAGEMENT RIGHTS

- 2.01 The County possesses the sole right to operate the County and all management rights repose in it, subject only to the express terms of this Agreement. These rights include, but are not limited to, the following:
 - A. To direct all operations of the County;
 - B. To establish reasonable work rules and schedules of work;
 - C. To hire, promote, transfer, schedule and assign employees in positions within the County;
 - D. To suspend, demote, discharge and take disciplinary action against employees for cause;

- E. To relieve employees from their duties because of lack of work or any other legitimate reasons;
- F. To maintain efficiency of County operations;
- G. To take whatever action is necessary to comply with state or federal law;
- H. To introduce new or improved methods or facilities;
- I. To change existing methods or facilities;
- J. To determine the kinds and amounts of services to be performed as pertains to County operations, and the number and kind of classifications to perform such services;
- K. To determine the methods, means and personnel by which County operations are to be conducted; and
- L. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

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ARTICLE XII
JOB TRANSFER AND POSTING

12.01 Permanent Transfers and Promotions Within the Bargaining Unit:

Permanent transfers and promotions to another position within the bargaining unit shall be determined on the basis of training, qualifications, experience, and performance as reflected in the personal records of the Employer, with seniority governing where other factors are relatively equal. Any Employee who is selected for transfer shall have three (3) working days in which to decline the offer. In the event the more senior Employee is not selected to fill the vacancy, the Employer shall notify the Employee and the Union in writing. Denial may be for just cause. The Employee selected will receive a trial period of six (6) months. If during the trial period the Employee is unable to fill the position satisfactorily, or if the Employee determines to return to his/her former position, the Employee shall be returned to his/her former position without impairment of his/her seniority rights. An Employee promoted to a higher position will be placed at the next higher pay rate above his/her current pay rate.

UNION'S POSITION:

The Union contends that the contract does not allow testing in the promotion process. It submits that the following four factors are to be considered for promotions within the bargaining unit: 1) training; 2) qualifications; 3) experience; and 4) performance. It admits that the first round of evaluations appears to have been based on those four factors and up to this point the County seemed to follow the contract.

The Union maintains that the language of the contract is clear that when these factors are relatively equal, seniority governs. It claims that at this point the County violated the contract because it added a test to differentiate between Harbour and Morris and this is not allowed in the contract as seniority is the final factor.

The Union asserts that bargaining history supports its position. It submits there were no proposals or discussions at the bargaining table with respect to the issue of testing. The Union points out that testing has never been used for transfer or promotions and thus the past practice is consistent with the Union's position.

The Union takes the position that even if testing is allowed, the test was not valid because it was not related to the job in question. According to the Union, the test was used to license ACTION's trainees and consultants and had no connection with Chapter 48, Stats., the law that governs child protection in Wisconsin. The Union alleged that the test shows familiarity with forms and that while it was prepared to argue that Morris' continuing use of forms during her temporary assignment in the position gave her an unfair advantage, the test results did not reflect any advantage to her raising the question, "What did this test measure?" The Union submits that the test had no relationship to the position.

It further notes that the test did not achieve the goals of the County and seniority was deemed the determining factor as it should have been earlier in the process. The Union argues that testing violated the contract and it asks for a ruling to this effect.

COUNTY'S POSITION:

The County contends that the claim that the temporary filling of the position was improper is a red herring because the grievance involved the testing for the position and the argument with respect to the temporary filling of the position was a last minute effort to broaden the grievance. The County alleges that the evidence fails to support any claim that the County acted improperly, and contrary to the Union's assertion, the evidence supports the County's actions in this matter.

The County contends that nothing in the collective bargaining agreement or past practice precludes it from the use of testing in the filling of the HSW III position. The County claims that it does not seek to fill positions solely on the basis of testing nor with the aid of any test which cannot be directly related to qualifications, skills and abilities necessary to do the job. It argues that nothing in the contract precludes the use of any tests. The County claims that the use of a test is a more objective method to determine the relative qualifications of applicants. It asks: what harm can anyone fear if there is an objective instrument such as testing to confirm relevant differences reflected in the employees' personnel records, especially where impartial and binding review is available? The County insists that general principles of arbitral law are consistent with its position. The

County submits that the children whose safety is at stake, and the families who have a profound interest in avoiding unnecessary disruption by police action, deserve that all reasonable efforts will be taken to ensure that someone identified as a professional specialist and charged with the primary role in deciding whether immediate intervention is appropriate is in fact qualified. It thinks that the test used in the case was appropriate and was not the exclusive factor relied on, and it requests that the grievance be denied.

UNION'S REPLY:

The Union contends that the introduction of the evidence about the temporary filling of the position is not a red herring. It submits that the temporary filling of the position dispute is not before the arbitrator and was resolved by the posting of the position. It asserts that it introduced this evidence simply to show the test was not valid.

The Union asserts that the collective bargaining agreement and past practice preclude the use of testing to fill the position. The Union refers to the County's arguments and the criterion set forth therein for a test to be used to determine ability, which criteria are: 1) the test must specifically relate to the requirements of the job; 2) the test must be fair and reasonable; 3) the test must be administered in good faith and without discrimination; and 4) it must be properly evaluated. The Union contends that the test did not meet these requirements in that it tested only knowledge of a paperwork system, it was neither fair nor reasonable to test for knowledge and systems not required for the position, and it was not administered fairly because it should have been a factor for all or limited to the two employees, and this would avoid the contract requirement to use seniority. The Union insists that the final criteria is not met because the test was not properly evaluated and the low score of Morris evidences that the test did not measure what it was supposed to measure. The Union submits that the County violated the contract by its testing, and if the hiring process is reversed, the position should be re-posted and filled in accordance with the contract.

COUNTY'S REPLY:

The County believes the real issue in this matter should be whether the collective bargaining agreement prohibits the County's use of tests under any circumstances. The County refers to Article II, Management Rights, which provides that it has the sole right to operate the County subject only to the express terms of the agreement. It argues that the agreement says nothing about

testing and there is no past practice limiting testing. The County alleges that the supervisors deemed that a test was a more objective method to determine the relative qualifications of applicants. The County admits that the test may not now seem necessary or logically suited for choosing between Morris and Harbour, and it was not sure what the test would reflect as to any ability of the applicants to utilize the CARF system, however, there was no evidence of improper motive on the part of the County.

The County emphasizes that it felt that it was important to determine if there were substantial differences in the ability to work with CARF not evident in the record.

The County notes that Section 12.01 provides a just cause standard and if there was no discretion by the County, there would be no reason for the standard. The County maintains that an objective instrument such as testing is a desirable way to confirm the relevant differences reflected in applicants' records. The County concludes that consistent with Article II, it possesses discretion to evaluate the qualifications of applicants in any manner that seems reasonable, subject only to the express terms of this agreement, and if someone is not selected, there is review through arbitration by a third party. The County seeks denial of the grievance.

DISCUSSION:

A substantial portion of the County's brief was devoted to the issue of Morris' temporary assignment to the HSW III position before it was posted. The Union has asserted that this issue is not before the arbitrator, and it presented evidence on this issue only to demonstrate that the test administered in this case was not valid. Inasmuch as the instant grievance relates to testing only and as the Union has the burden of proof in this matter and has not asserted a violation of the contract per se by the temporary assignment, the undersigned makes no finding with respect to Morris' temporary assignment but will consider such only with respect to the validity of the test.

With respect to testing in general, arbitration authorities have held that, in the absence of a contractual prohibition, an employer has the right to administer tests to establish or verify the qualifications of job bidders to perform the requirements on the job bid. 4/ This is not an unrestricted right and the test must be related to the requirements of the job, it must be fair and it must be impartially and fairly administered and scored. 5/ Employees are subject to disqualification if they refuse to take the test. 6/ Bidders cannot

4/ Elkouri & Elkouri, How Arbitration Works, (4th Ed. 1985) at pp. 618-623; R.D. Werner Co., 45 LA 21 (Kates, 1965).

5/ James River Corp., 93 LA 874 (Allen, 1989); Archer Daniels Midland Co., 92 LA 96 (Eisele, 1989).

6/ Equitable Gas Co., 46 LA 81 (Wagner, 1965); Elkouri & Elkouri, p. 622.

determine which tests they will or will not take but must comply with the requirement. If the test is not reasonable or is not fairly administered or if unwarranted conclusions are drawn from the results, the remedy is through the grievance procedure. 7/ Additionally, an employer may institute a test for a job although none has ever been required in the past. 8/

Application of the above general principles to the instant case yields the following conclusions. Section 12.01 of the parties' agreement provides that permanent transfers and promotions to another position within the bargaining unit shall be determined on the basis of training, qualifications, experience, and performance as reflected in the personal (sic) records of the County, with seniority governing where other factors are relatively equal. 9/ The determination of qualifications is vested in the County and the County, in light of the above principles, may use a test to determine qualifications. The agreement contains no prohibition on testing, and the Managements Rights clause reserves to the County all rights not limited by the express terms of the contract. Furthermore, in determining qualifications, a valid test would be a more objective method to determine qualifications than the subjective determination of the supervisor. Therefore, in accordance with the above principles, the County may use a valid test to determine the qualifications of applicants for a transfer or promotion.

Although the County could administer a test to determine the qualifications of applicants in this case, the Union has raised two issues, as follows: 1) the test was not used to determine qualifications but was used as a tie-breaker rather than seniority, and 2) the test was not valid. The undersigned finds that the Union is correct in its assertion that the test was used as a tie-breaker. Supervisor Judy Olmanson testified that a review of the contractual factors for the applicants resulted in Julie Morris and Cristie Harbour being deemed equally qualified. It was her opinion that there was a "coin flip" difference between the two. At this point, Carol Bassett, the County's then Personnel Director, suggested a test. The test was ultimately given with the result that Morris and Harbour were equally qualified and Morris was awarded the job on the basis of seniority. Timing is sometimes everything. Here, the test was given after the relative qualifications had been determined and the test was used to determine which employe should get the job. Section 12.01 provides that where the other factors are relatively equal, seniority shall govern. The use of the test here was, in effect, an effort to ignore the seniority factor. Thus, the undersigned concludes that the method for which the test was employed in this case was not for an initial determination of qualifications but used as a substitute for the application of seniority and the County violated Section 12.01 by the use of the test in this case. This is not to say the County cannot use a valid test to determine qualifications to determine the relative rank of employes, but once it is

7/ Vulcan Materials Co., 54 LA 460 (Block, 1970).

8/ Hesco Industries, Inc., 81 LA 649 (Chapman, 1983).

9/ Ex. 1.

determined that employes are relatively equal in the four factors, then seniority must be applied. Because the use of the test in this particular case was as a tie-breaker, the agreement was violated and it is unnecessary to determine the validity of this particular test.

With respect to remedy, the undersigned believes that a cease and desist order is the appropriate remedy. Although the use of the test in this case violated the contract, the test result did not play a factor in the ultimate selection because the County applied seniority as it should have done in the first place. It would serve no purpose to re-post the position and evaluate the applicants over and award the position by seniority as that is essentially what was done. Here, the violation was the use of the test as a tie-breaker and directing the County to cease this conduct in the future is deemed the proper remedy.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The use of appropriate testing in the selection process for permanent vacancies and transfer to HSW III does not violate Section 12.01 of the parties' contract. However, the County violated Section 12.01 of the parties' collective bargaining agreement in this particular case by the use of the test for selection between two equally qualified applicants for the HSW III position, and the County is hereby ordered to cease and desist using a test essentially as a tie-breaker rather than seniority as provided in Section 12.01 of the parties' agreement.

Dated at Madison, Wisconsin, this 2nd day of February, 1994.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator