BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration<br>of a Dispute Between<br><br>CITY OF WAUKESHA<br><br>and<br><br>AFSCME LOCAL 97 | Case 118<br>No. 50672<br>MA-8342 |

Appearances:

Ms. Christine Bishofberger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W237 S4626 Big Bend Road, Waukesha, Wisconsin 53186-7904, appeared on behalf of the Union.

Mr. Gary Ruesch, Attorney at Law, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appeared on behalf of the City.

## ARBITRATION AWARD

On March 7, 1994 the Wisconsin Employment Relations Commission received a request from Wisconsin Council 40, AFSCME, AFL-CIO, Local 97 to appoint an arbitrator to hear and decide a grievance pending between the Union and the City of Waukesha. Following jurisdictional concurrence from the City, the Commission, on April 26, 1994 appointed William C. Houlihan, a member of its staff, to hear and decide the dispute. An evidentiary hearing was conducted on July 14 and August 12, 1994 in Waukesha, Wisconsin. Transcripts were prepared and distributed by August 24, 1994. Post-hearing briefs and reply briefs were submitted and exchanged by November 3, 1994.

This arbitration addresses the City's refusal to promote employee Paul Neuman to the position of Arborist.

## BACKGROUND AND FACTS

The City and the Union are signatories to a collective bargaining agreement which contains a provision regulating the posting and bidding rights of bargaining unit members into vacated positions. Relevant portions of that agreement are set forth below. On or about June 17th, 1993 the following posting, for an Arborist position, was made:

ARBORIST

PARK AND RECREATION DEPARTMENT
(93-19)

Women and Minorities Strongly Urged to Apply

To perform maintenance on trees and shrubbery in parks, parkways, and boulevards; to plant and transplant trees and shrubs; to prune trees and shrubs; to remove trees; to assist in tree surgery work such as bracing, bolting, and guying branches; to inspect trees and shrubs for insect and disease pests; to treat these conditions; to operate equipment in connection with the work; to be available and subject to regularly scheduled overtime and also subject to call during emergencies; to make daily written reports of work performed; and to do other related work as assigned. Good knowledge of tree pruning methods and techniques; some knowledge of tree surgery techniques; good understanding of the hazards of tree work and the precautions necessary for safe work; skill in the use of saws, ropes, ladders, hand tools, and power tools and power equipment commonly used in trimming and treatment operations; ability to climb trees and work effectively at considerable heights; good strength, agility and overall physical condition. Required: Completion of high school or equivalent, one year of professional tree experience or closely related work requiring agility and physical activity, ability to secure and maintain the Wisconsin Pesticide Certification Category 3, Ornamentals and Turf, a current and valid CDL, excellent health and capable of severe physical exertion, ability to pass physical examination at City expense. A written exam assessing knowledge will be administered.

Competitive salary with excellent fringe benefits. Apply to the Personnel Department, Waukesha City Hall, Room 206, by 4:00 P.M., June 23, 1993.

An Equal Opportunity/Affirmative Action Employer.

This position open only to current members of Local 97 - Streets & Parks at this time.

Under the terms of the collective bargaining agreement this posted position was initially open only to members of Local 97. The posting drew two bargaining unit applicants, Gary Tompkins, and Mr. Neuman, the grievant. Tompkins was the more senior applicant, was offered the position, and turned it down. Mr. Neuman's application was rejected. The City offered two

reasons for rejecting Neuman: 1) He failed to achieve a passing score of 70 on a test (Basic Knowledge Assessment) administered by the employer, and 2) lack of one years' experience. There is a dispute of fact as to how much experience Mr. Neuman communicated to David Liska, the City Forrester, in their interview. Neuman testified that he advised Liska that he had worked for a period of time with a tree service. Liska denies that Neuman ever made mention of such experience. The test was administered on September 28. The interview in question was conducted on October 1. Following his rejection Mr. Neuman filed a grievance on or about October 15.

Having exhausted the internal candidate pool, the City filled the position from outside. The successful applicant, a Mr. Gorman, passed the test. At the time of his hire, Mr. Gorman lacked a commercial driver's license, and lacked experience operating the kind of equipment used within the department.

Prior to 1982 the City hired Arborists without benefit of a screening test. In approximately 1982 David Liska determined it was necessary to create such a screening test in order to insure that applicants for the Arborist position had adequate substantive backgrounds. Liska reached out to other cities, notably Madison, Green Bay, Sheboygan, Milwaukee, West Allis, and Wauwatosa for exams those cities administered in selecting Arborists. He obtained those exams and essentially assembled an exam for the City of Waukesha based on these other tests. The test, which has been revised two or three times, was not made a part of the record. Mr. Liska testified that the exam tests for job duties. The test has never been formally validated. A test score of 70 out of 100 has been set as a minimum successful score. Mr. Neuman got a test score of 60. There is no test for agility, knot tying, tree climbing, operation of a backhoe or any other equipment, or for the ability to work in high places. The record is unclear with respect to whether or not the cities noted above test for these physical attributes.

Prior to 1982 it appears that the City did not administer formal exams for any bargaining unit position. Since 1982 the Arborist test has been administered to all applicants for Arborist positions. The City has not used a test in filling other vacancies. According to Thomas Wisniewski, Personnel Director, the Arborist position is regarded as unique in that it requires a minimum knowledge base for an employe to successfully move into the job.

In June of 1986 the employer tested for an Arborist vacancy. It rejected the application of a Mr. McCartan, on the grounds that he did not pass the written test. At the time McCartan was the union steward for the department. In 1988 the City again posted an arborist position, and again required applicants to take an assessment test. The position was awarded to an employe Rauterberg, who had previously taken and passed the test. Later, in August of 1988 an employe named Tomlinson applied to transfer into an Arborist position. Tomlinson took and passed the test, was offered the position, but declined to accept. The employer subsequently hired from outside the unit. In 1990 yet another Arborist position came vacant. That position was filled by an employe, Kujawa, who had previously taken and passed the Arborist exam.

It was Mr. Liska's testimony that on a number of occasions a bargaining unit employe named Lenhart, took the Arborist exam. Lenhart failed to pass the exam and was denied the opportunity to fill the Arborist vacancies. Lenhart was also denied other transfers due to a lack of qualifications.

The language applicable to this dispute has remained constant for the last several years. On at least two occasions the City has attempted to alter the promotional criteria. In a proposal dated November 1, 1990 for a successor agreement the City proposed that "seniority should not apply as primary for the selection of job openings or promotions." That proposal was withdrawn. In December of 1993 the City made the following proposal:

. . .

ARTICLE 8 - SENIORITY

8.01 DELETE and REPLACE with: "Definition.: Seniority shall, for the purpose of this Agreement, be defined as an employee's length of continuous full-time service since their last date of hire, less any adjustments due to layoff, approved unpaid leaves of absence, or other unpaid breaks in service.

8.02 NEW: "Application: In all applications of seniority under this Agreement (except vacation), the ability and qualifications (including physical ability) to perform the required work will be primary. Among employees of equal skill and ability, seniority as defined in Section 1 above shall govern."

. . .

The Union's response was to reject the proposal in favor of the *status quo*. In March of 1994 the City submitted the following among its proposals:

. . .

3. Article 8, Section 1-2

Seniority. The Labor Agreement, in its present form, does not define seniority. Further the City desires to include in the new agreement language which reflects promotion of employees who are able and qualified for the top positions within the departments. (The City's position for Arborist, is

that this language modification merely reflects an ongoing past practice.) The City will continue in its efforts to have this language addressed in the new labor agreement.

. . .

Ultimately, the City withdrew its proposals relative to seniority and posting. With respect to its proposal on Article 8.03 the withdrawal came in the following written form:

. . .

"Article 8.03 Seniority Rights - the City will withdraw except for the position of arborist. The City will going (sic) to rely on (10) years of testing"

. . .

ISSUE

The parties stipulated to the following issue: Did the City violate either Sections 8.01 or 9.03 of the parties' collective bargaining agreement by failing to promote Paul Neuman to the Arborist position? If so, what is the appropriate relief?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 8 - SENIORITY

8.01 The Employer agrees to recognize seniority and it shall apply in promotions, demotions, transfers, layoffs, recall from layoffs, filling vacant positions, vacation preference and shift preference (providing there is a vacancy).

. . .

8.04 If it becomes necessary to reduce the number of employees of the Boards, such layoff shall be accomplished by first laying off the seasonal and probationary employees, then employees with the least seniority will be laid off, irrespective of department, providing the more senior employee is capable and qualified to perform the available work.

8.05 In all matters, involving promotions, layoffs and recall

from layoffs, length of continued service within the department covered by this Agreement shall be given primary consideration. Skill and ability will be taken into consideration only where the senior employee is not capable or qualified to perform the available work or qualify as set forth elsewhere in this Agreement.

. . .

## ARTICLE 9 - PROMOTION, TRANSFERS & RECLASSIFICATIONS

9.01 When vacancies arise in any position under the jurisdiction of the Boards, an opportunity shall be given to all employees of the Boards to apply for that position.

9.02 The position shall be posted for five (5) workdays in overlapping weeks, setting forth the job requirements, qualifications required, shift and work location and rate of pay.

9.03 The applicant with the most seniority that can qualify within a sixty (60) day probationary period shall be selected for the vacancy.

9.04 If the employee does not qualify within the sixty (60) day probationary period, or if the employee so chooses during this period, he or she shall be returned to his or her previous position and selection shall be made from among remaining applicants according to the criteria set forth in this Agreement. Any employee who chooses to return to his or her original position shall not bid on another job in the same classification as that originally applied for during the next twelve (12) months.

9.05 The City agrees to, within five (5) working days of the selection of the employee, to post the name of the successful applicant.

9.06 If there is a question concerning application of seniority and/or qualifications, the matter may be submitted to the grievance procedure.

9.07 An employee who is promoted or transferred through a job posting shall:

A. Receive the minimum rate of pay of the new classification if it is higher, or

B. Retain his or her present rate of pay if the classification rate of pay is the same.

C. After sixty (60) days, the employee shall receive the top salary of the classification. This shall not apply to newly hired employees on their probation.

D. Receive the maximum of the new rate range if the new classification is paid a lower rate than the employee's present position, unless the reclassification is at the convenience of the City, in which case the employee shall continue to receive his or her higher rate of pay.

9.08 Training and Performance. The Board agrees to assume full responsibility for training employees under the guidance of qualified personnel in the work to which they are assigned. An employee whose work is unsatisfactory shall be given written notice, with a copy to the Union, of his or her unsatisfactory work and shall be given a reasonable time in which to improve his or her work. If no improvement is shown after the third notification, the supervisor shall report the employee to the superintendent who may then take whatever action as may be deemed necessary. No permanent employee shall be discharged except for just cause.

. . .

POSITIONS OF THE PARTIES

The Union contends that the pertinent contractual language is clear and unambiguous, requiring the application of strict seniority. The language of the agreement does not permit the City to ignore seniority and promote the "most qualified" or "best qualified" employe. The City is not free to bypass the more senior applicant. Those who negotiated the agreement intended to provide time in which an employe would be able to prove his or her ability to learn the job. The parties went so far as to bargain retrocession language should the employe fail to prove himself or chose to return to a former job. Minimally, there exists a 60-day window in which to qualify for a position. The Union produced 16 years of job application forms where seniority had consistently been used as the determining criteria for promotion or denial of promotion. The existing language affords a senior employe an opportunity to learn the job within the disqualification period; an opportunity provided an outside applicant, in this instance, but denied to a 15-year employe. The City's action here is characterized as unreasonable, biased, and reeking of favoritism.

The Union contends that the selection process based upon the knowledge assessment (test)

is flawed. The Union attacks the test as inaccurate, unreliable, and incapable of measuring ability and aptitude. Instead, the Union contends that the purpose of the exam is to exclude applicants who lack a 4-year college degree. The Union notes that six of the eight Arborists hired by Mr. Liska possess college degrees in forestry. The Union attacks the validity of the test. It contends that merely accumulating questions from various sources provides no validity to this test and creates a "hodge podge" method of evaluation. The City produced no evidence that the test was either reliable or valid as an indicator of either aptitude or ability.

The Union contends that the posting which merely states "a written exam assessing knowledge will be administered", provides no notice that an applicant must pass an exam in order to succeed. The Union notes that while the City contends that the test has been in practice for ten years, the whole truth is that the test has been administered to only three other bargaining unit members prior to this dispute. In two instances, test takers ultimately changed their minds about becoming Arborists for the City.

The Union contends that the City has not treated Neuman equitably. Because Neuman failed to meet the qualifications identified in the posting, i.e., the successful completion of the test, he was not provided an opportunity to prove his ability. Simultaneously, the City acknowledged that their choice, hired from the outside, also did not meet the qualifications identified on the posting, but chose to train him. Put in proper perspective, argues the Union, Mr. Neuman's 60% test score without the benefit of a four year college degree certainly suggests potential and begs the question of how well he could have tested with education or training.

The Union notes that the City attempted and failed in negotiations to remove seniority as the primary consideration in promotions. On at least two occasions the City introduced proposals in negotiations to dilute the significance of seniority in the promotion process from primary to something equal to ability and qualifications. Both efforts failed. The City's claim, as it withdrew its proposal, that a practice relative to Arborists existed can hardly be characterized a mutual understanding.

The City contends that the grievant both failed the exam and lacked the requisite one year professional tree service experience. Pointing to the testimony of Liska the City contends that Neuman never indicated to Liska that he had worked for a professional tree service. The City contends that the practice of promoting bargaining unit members who have demonstrated basic qualifications, regardless of seniority has not been limited to the Arborist position. In its brief it points to three incidents involving an employee named Lenhart, where Lenhart was denied promotions based upon qualifications and experience. The City points to the exams administered to Rauterberg, Tomlinson, and Kujawa and notes that each of the men took the assessment exam with no grievances forthcoming.

The City points to the language of the collective bargaining agreement and contends that the language permits it to consider a candidate's qualifications in filling a job vacancy. Article 9,

Section 3 provides that the applicant with the most seniority that can qualify within a sixty day probationary period shall be selected for the vacancy. It is clear from the language of Article 9 that the City is not required, when filling a vacancy, to offer the position to the most senior applicant, regardless of competency for the given position. The City reads the various provisions of the contract together to require a minimum threshold that each applicant must meet to be selected.

The City cites arbitral authority which has sustained the right of an employer to administer a valid test. The City goes on to argue that the contract language does not contemplate that the most senior applicant for a vacant position has an automatic right to a sixty day probationary period, and within that period, can learn the necessary minimal skills for the position. That reading would render the requirement of posting "qualifications" for the position meaningless.

The City contends that an established practice of assessing Arborist candidates' knowledge for the position has been in existence for over ten years. The City contends that there is no challenge by the Union to the validity of the test in and of itself; i.e., that the test is unrelated to the duties of an Arborist. The City notes that since 1982 the knowledge assessment has been taken by all bargaining unit members seeking transfer to an Arborist position, without exception. There have been at least three occasions where bargaining unit members have taken the assessment, failed to score the minimum 70%, and were denied transfers. No grievances were filed. The Union's failure to grieve these practices in the past precludes the Union and the grievant from now asserting that the City is violating the terms of the collective bargaining agreement. The Union has been aware that the City requires all applicants to complete the knowledge assessment. The assessment has been given to all applicants, and has occurred over a period of time sufficient for the Union to become aware of the City's practice.

The City contends that the grievant was clearly unqualified for the vacant Arborist position. The grievant filed to score at least 70% on the knowledge assessment and was also unable to demonstrate one year of professional tree experience. A passing score of 70 on the knowledge assessment is intended to indicate a candidate's suitability for the position at the most minimally acceptable level. The process of training even a minimally qualified individual for all of the duties is a time consuming process. It lasts longer than the 60-day probationary period, and because of the seasonal nature of the work of Arborists, it often takes a full year for a new Arborist to have experience in the variety of duties assigned. Because of the grievant's relatively low level of knowledge in critical areas it would not have been possible to train him within 60 days, considering the scope and magnitude of the assigned duties, to a minimally qualified Arborist.

The City contends that to the extent that the Union challenges the validity of the exam the Union bears a burden to demonstrate that the exam is either inaccurate, unreliable, or invalid.

The City denies that it is attempting to fill the position with only the most qualified or best

qualified candidate. Instead, the City contends it is attempting to fill the Arborist position with the most senior, minimally qualified candidate available, consistent with the contract language and practice. Its use of the knowledge assessment is but one of the factors to which the City looks to determine a candidate's minimal qualifications; the job positing in question listed at least ten requirements for eligibility.

DISCUSSION

Article 9.03 is the contractual provision most directly on point. Read literally, it says that an employe can qualify within a 60-day probationary period. It does not require that an employe be qualified as a precondition to filling a vacancy and commencing a probationary period. To the extent that the City contends that an employe must be qualified to enter into the probationary period, that contention is inconsistent with the specific provisions of the agreement. The opportunity to qualify on the job is reinforced by Section 9.04, which repeats the premise that an employe has 60 days in which to qualify for a position, and failing that has a right of return.

I read 9.03 and 9.04 to provide that a senior applicant who has the potential to qualify within a 60-day period is entitled to be selected. My reading of Sections 8.01 and 8.05 are that they are more general statements relative to seniority which serve to corroborate my construction and interpretation of Article 9.

Articles 9.03 and 9.04 also use the term "qualify." Just as the senior employe has bidding rights on day one, the employer has the contractual assurance the selected employe will be minimally qualified on day sixty. This observation leads to a number of conclusions:

1. This is not a relative qualifications provision. The most senior employe applicant who can be trained to satisfy the minimum standards set for the job is entitled to the position.

2. A certain level of on-the-job training is both fairly anticipated and expressly provided for in Article 9.08.

3. There is no obligation to select and train an individual so lacking in basic skills that the individual cannot qualify within the 60 days. For example, it appears that this job requires a certain mechanical aptitude in the use of tools coupled with a certain level of physical fitness including strength, agility and the ability to climb. A candidate with no mechanical aptitude or a candidate whose physical health was fragile would have a difficult time being trained.

In applying these various provisions, it appears that this employer generally assigns posted positions to senior applicants, who are not required to take written tests to confirm their ability. Two basic exceptions to the foregoing are evident. The first concerns a series (3) of promotional

opportunities denied to Mr. Lenhart, on the basis of his qualifications. The second exception is relative to the Arborist positions. With respect to the Arborist positions a test has been administered since 1982. The test is open, notorious, with no effort made to conceal its existence. All applicants were forced to take the test with the exception of an employe who was previously an Arborist seeking reinstatement. Test results were used as an exclusionary device by the employer. Employes excluded as a sole consequence of test results were so advised in writing.

It was Mr. Wisniewski's testimony that the Arborist position is unique, in that it requires a substantial knowledge base. This is consistent with Mr. Liska's testimony. I regard this substantial knowledge base as the underlying basis for utilization of a test. The record supports the conclusion that this is a complex job. I do not know the circumstances surrounding Mr. Lenhart. It may be that the Union would agree that he was not trainable for the various jobs he sought.

The test was created or assembled in 1982. Neither its content nor its application was negotiated with the Union. Since that time it has been administered for all Arborist vacancies. The Union correctly points out that there were only three job vacancies in that twelve-year period. However, that did constitute the universe. The test was not grieved prior to the grievance leading to this arbitration. The utilization of the test was not grieved until Mr. Neuman was denied a job. Applications for the Arborist position were taken in June, the test was administered in September, Mr. Neuman was interviewed and rejected on October 1, his grievance was thereafter filed on October 15.

There is no indication this test has ever been validated. Mr. Liska assembled the test from component parts of tests administered in other jurisdictions. There are a number of areas not tested. It is not clear which, if any, of these areas are tested in the other jurisdictions. In order to pass a score of 70% must be achieved. Seventy percent appears to be an arbitrary number. The testimony establishes that a good deal of the Arborist work is seasonal in nature. Regardless of when an employe is hired, a 60-day probationary period will exclude the great majority of the calendar year and work specific to various seasons. The appropriate relationship between this test, the training period, and the seasonal fluctuation of work is unclear.

I believe this employer has established the use of this test for purposes of determining minimum knowledge for an Arborist position. The use of an exam to establish a substantive base is supported by the record testimony which characterizes the Arborist position as uniquely complex. As such, this is an exception to the normal vacancy filling process. This practice has gone on for 12 years, has been conducted openly, is universally applied and is unambiguous. Employes who failed to qualify were told that they failed to score the required 70 points necessary. The fact that certain employes, advised that they had failed the exam, subsequently decided they were no longer interested in the job is of no consequence. The point is that all employes who applied to fill Arborist positions were required to be tested, and were required to pass the test as a predicate to getting the job. Those who failed to pass the test were not given the job. During the course of negotiations the employer put the Union on written notice that it believed it had a right to

test for the Arborist position. I believe the Union acquiesced in the administration of a test. It is not now free to attack the test per se.

The Union attacks the validity of this test on a number of fronts. The test administered in this proceeding is as valid as were its predecessors. Given the history of Union acquiescence I think it would be unfair to overturn the employer's decision, put Gorman on the street, hold the position open until such time as the City could have its test validated, and thereafter repeat the process. This is both impractical and unfair to all.

Given the long history of the use of this test, the City is entitled to meaningful notice that the validity of the test is questioned. The City now has that notice. The Union has clearly and unequivocally put the City on notice that it believes the test is not valid. It is the burden of the City to see to it that any test administered is a valid instrument. The notion that some contrary burden falls on the Union ignores the fact that the Union has no role in the development or administration of the test and may well not be privy to the test.

The test is an instrument which has historically operated to deny an employe a promotional opportunity to which he might otherwise contractually be entitled. The City argued that it is but one of several criteria considered. While that may be true, it has been utilized as a device to exclude applicants who fail to achieve a minimum score. That is not true of other criteria found in the posting. If it is to have that affect it must minimally be job related, test what it purports to test, exclude only those properly excluded, and not otherwise artificially deny access to the 60-day probationary period.

I don't find the bargaining history particularly meaningful. The City attempted and failed to get changes in the process. The result was a retreat to the *status quo*. This was a result agreed to by the parties. My view of the *status quo* is set forth above.

## AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 21st day of July, 1995.

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