

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MARATHON COUNTY PARK DEPARTMENT
EMPLOYEES UNION, AFSCME, LOCAL 1287

and

MARATHON COUNTY

Case 238
No. 53336
MA-9315

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Jeffrey T. Jones, appearing on behalf of the County.

ARBITRATION AWARD

Marathon County Park Department Employees Union, AFSCME, Local 1287, hereinafter referred to as the Union, and Marathon 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 Wausau, Wisconsin, on February 28, 1996. The hearing was transcribed and the parties filed post-hearing briefs and reply briefs, the last of which was received on July 5, 1996.

BACKGROUND:

The basic facts underlying this case are not in dispute. On May 16, 1995, the County posted a Trades Technician I position. The posting listed the normal duties and qualifications as follows:

NORMAL DUTIES:

Work involves skilled journeyman level construction trades work in the construction and maintenance of park facilities. Repairs

building shelters, playground, equipment, fencing, roofs, plumbing, etc.. (sic) Builds partitions in buildings, hangs doors, forms, pours and finishes concrete. Operates tools, equipment, and vehicles related to these tasks.

QUALIFICATIONS:

Successful completion of an approved apprenticeship or two years working experience in at least one of the building construction trades. Possession of a valid Wisconsin Commercial Driver's License (CDL).

Three individuals signed the posting including the grievant and Mr. Rick Boris. The grievant has greater seniority than Boris. The County conducted a structured interview format where each applicant was interviewed by three supervisors, William Duncanson, Daniel Fiorenza and Ed Ninnemann. One of the applicants withdrew and the grievant and Boris were interviewed and each was asked the same nine questions. It was predetermined that the minimum acceptable score was 78 points. 1/ The grievant was given 63, 54 and 55 points by the interviewers, respectively, for an average score of 57.3. 2/ Boris was given 73, 63 and 66, respectively, for an average of 67.3. 3/ Inasmuch as neither met the minimum acceptable score, each was sent a letter on May 25, 1995, indicating they would not be offered the job. Mr. Boris asked the Park Operations Superintendent why he had not been selected for the position and he was told that the panel felt he did not possess all the necessary qualifications, particularly experience in the maintenance field. Boris reminded the Superintendent that he had four years at Marathon Park. The Parks Director then contacted Boris' prior supervisor and inquired about his work there. This information helped Boris but the supervisors still didn't think that it was enough to be minimally acceptable. The County and the Union met and discussed Boris' filling the job with a six-month probationary period rather than the thirty (30) working days probation provided in the agreement. The parties entered into the following:

Memorandum of Agreement

It is hereby agreed by and between Marathon County, the Park Department Employee Union - AFSCME Local 1287, and Richard Boris that:

1/ Ex. 14.

2/ Exs. 15, 18 and 20.

3/ Exs. 16, 19 and 21.

1. Richard Boris shall immediately be assigned the position of Trades Technician I on a trial basis.
2. Richard Boris will serve a 6-month probationary period in this new assignment during which he is expected to demonstrate the knowledge, skills, abilities and attitudes to successfully perform the job.

Dated this 21st day of June in Wausau, Wisconsin.

ON BEHALF OF
MARATHON COUNTY

ON BEHALF OF
AFSCME 1287

William L. Duncanson /s/
Bill Duncanson
Park Director

Bruce Henkelman /s/
Bruce Henkleman
Union Representative

Dan Fiorenza /s
Dan Fiorenza
Park Operations Superintendent

Richard Boris /s/
Richard Boris

When the grievant learned that Boris was assigned the position, he filed a grievance alleging a violation of Article 10, Section B. The grievance was denied and appealed to the instant arbitration.

ISSUES:

The parties were unable to agree on a statement of the issues. The Union stated the issue as follows:

Did the County violate the collective bargaining agreement when it refused to award the position of Trade Tech I to the grievant?

If so, what is the appropriate remedy?

The County states the issues as follows:

1. Whether the County violated the terms of the collective bargaining agreement by failing to award the Trade Tech I position to the grievant?
2. Whether the grievance is subject to arbitration?

If not, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Is the grievance arbitrable?
2. If so, did the County violate the collective bargaining agreement when it failed to award the position of Trade Tech I to the grievant?
3. If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

Article 5 - Management Rights

The County possesses the sole right to operate County government and all management rights repose in it but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

- A. To direct all operations of County Government;
- B. To hire, promote, transfer, assign, and retain employees in positions with the County;

. . .

Article 10 - Job Posting

A. General: The County shall attempt in each posting to fill a job first with a present Park Department employee before it hires new personnel for the job.

B. Job Posting: Whenever a vacancy is to be filled or a new job is created, this position shall be posted for a period of three (3) working days on the bulletin board in the department designated for job posting purposes. Such posting shall be made as soon as reasonable but in no event shall the posting be made later than thirty (30) days from the date the vacancy occurs or the date the new position is created or the date the new position is to be filled. This time limit may be extended by mutual consent of the parties where circumstances warrant. Each employee interested in applying for the job shall endorse his/her name upon such notice in the space provided. The full-time employee with the greatest seniority with the department who can qualify shall be given the job.

C. Regular Part-Time: If no full-time employee bidding can qualify for the work it shall be given to the regular part-time employee with the greatest part-time seniority who has bid for the job and can qualify.

D. Employment From Outside The Department: If there is no application for a posted position from within the workforce, the County shall have the right to fill the position with a new employee within four (4) months of the expiration date of the posting. In the event the position has not been filled within four (4) months of the expiration date of the posting, it must be reposted before it may be filled.

E. Temporary Assignments: The County shall have the right to temporarily fill the job that is posted. However, such temporary filling of the job shall continue only for a reasonable time until the end of the posting or the settlement of a grievance if one should arise.

F. Notification: The Union Steward shall be furnished a copy of the posting and shall be notified in writing of the name of the applicant who received the position. Whenever a vacancy occurs that is not to be filled, the County where practical, will notify the steward of Local 1287.

G. Time Limits: Any vacancies to be filled or new position shall be filled within thirty (30) days after the expiration of the posting.

H. Qualification: The initial determination as to an employee's qualifications shall be made by the County. However, if there is a difference of opinion as to the qualifications of an employee, the Union committee and/or Union representative in conjunction with the employee may take the matter up for adjustment under the grievance procedure.

I. Lateral Movements: Employees may post for vacant positions within the same job classification or lower pursuant to this section. After receiving such position, an employee shall be limited from posting for a new lateral or lower position after the initial move, except for reasons of ill health, for a period of two (2) years.

Article 11 - Promotions

A. Probationary Period Following Promotion: An employee changing positions through job posting shall serve a probationary period of thirty (30) working days in a new position, unless the probationary period for that position is extended by mutual consent between the Union and the Employer prior to posting. If the probationary period for a position is extended by mutual agreement, the mutually agreed upon probationary period shall be included in the posting notice. In the event the employee does not successfully complete the probationary period or chooses to return to the employee's former position or due to reasons of sickness or health during or at the completion of the probationary period, the employee shall be returned to his/her former position at his/her former rate of pay. When the County determines an employee is not qualified to fill the position before the end of the probationary period, the employee may grieve the reasonableness of the decision.

...

Article 14 - Grievance Procedure

A. Definition of Grievance: A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute of any employee or group of employees concerning this contract. The grievance procedure shall not be used to change existing wage schedules,

hours of work, working conditions, fringe benefits and position classifications.

B. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent. Time limits shall be exclusive of Saturdays, Sundays and holidays.

...

D. Steps in Procedure:

Step 1: All grievances must be presented promptly and no later than fifteen (15) work days from the date the employee knew or should have been aware of the cause of such grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later, except in cases affecting the employee's health or safety.

The Employee alone or with one (1) union representative will explain the employee's grievance orally to the employee's immediate supervisor (or his/her designee). The employee alone or with one (1) union representative shall identify whether any matter being discussed with the supervisor is an actual or potential grievance. The employee's immediate supervisor shall within seven (7) working days orally inform the employee of his/her decision on the grievance presented to him/her.

Step 2: If the grievance is not settled in the first step, the employee and the grievance committee will appeal the decision in writing to the department head within ten (10) working days.

...

F. Arbitration:

. . .

5. Decision of Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to or delete from the express terms of this agreement.

. . .

UNION'S POSITION:

Arbitrability

The Union points out that the County raised the arbitrability issue for the first time at the hearing. It notes that the grievance was submitted the same day as the date of the Memorandum of Agreement and any reasonable person who believed that he had an agreement on an item would have questioned the Union's challenging the issue the very same day. It submits that the purpose of the Memorandum was simply an extension of the probationary period and was not intended and did not impart permanent selection and was not an agreement that the junior bidder may be selected nor was it a waiver of the Union's right to grieve it. It claims that Henkelman understood the Memorandum to merely be an agreement on an extended trial period to establish whether Boris could handle the work and he did not have the authority to enter into an agreement which would impact another employe's contractual rights.

The Union notes that all throughout the processing of the grievance there was no mention of an agreement to select the less senior bidder; rather, the County asserted this was a trial period and not a training period, a position with which the Union agrees. It argues that the word "assignment" rather than "selection" or "award" is significant and there is a difference between assignment and awarding a position. It asserts that the parties agreed to a trial period, to determine whether Boris could handle the job. The Union asserts that the County is raising the issue in "bad faith" to avoid reaching the merits. The Union maintains that the County knows that the grievant is qualified and is the most senior and the County's attempt to "cook up" a bogus procedural issue must be rejected.

Merits

The Union argues that the County has the burden of proving that it correctly determined that the grievant did not have the ability to perform the Trade Tech I duties. It submits that the burden is on the County to show that the bypassed senior employe is not competent. It maintains that the County failed in its burden of proof. As to the merits, the Union believes that the case is simple in that the job posting identifies the qualifications for the Trade Tech I and the grievant is fully qualified for this position. It notes that the grievant is an accomplished welder and welding is a building trade in which the grievant has more than two years of experience. It asserts that the

grievant also has a wide range of experiences in a number of construction trades other than welding. It observes that as the grievant was the most senior applicant, he must be awarded the job under the contract which requires the most senior qualified applicant be awarded the position. It argues that the County cannot ignore seniority and promote a more qualified or better qualified junior employe. The Union insists that the structured interview process was a sham, highly subjective with an arbitrary weighting system and biased against the grievant. It asserts that the best reason to reject the structured interview is that the County itself rejected its results because it was ultimately determined, despite the failure of both, one was deemed qualified enough for a trail and later promoted to the position.

The Union, anticipating that the County will rely on two prior arbitration decisions, distinguishes them because the contract language had "relative ability" clauses rather than a "sufficient ability" clause as here. It asserts that the structured interview may have been concocted to make favoritism appear to be science. The result in this case could have been avoided if, according to the Union, the County gave the grievant a trial period. It claims the bottom line is that both applicants were qualified and the contract requires the more senior be promoted and promotion of the junior employe violated the contract. As for a remedy, the Union seeks the grievant's appointment to a Trade Tech I position and the least senior employe in that class be permitted to bump a less senior employe in another classification.

COUNTY'S POSITION:

Arbitrability

The County contends that the Memorandum of Agreement bars the arbitration of the instant grievance. It submits that under the Memorandum of Agreement, Boris was to be permanently assigned the Trade Tech I position if he passed the six-month probationary period. It claims that it would be contrary to common sense and to basic collective bargaining principles to conclude that the parties could reach such an agreement and that the grievant could challenge Boris' award of the position through the grievance procedure. It asserts that the grievance should be summarily dismissed. It argues that the Union's support of the grievance violates the Memorandum and is in bad faith. It takes the position that if it grants the grievance, it violates the Memorandum of Agreement and if it honors the Memorandum, the Union asserts that it is violating Article 10 (B). It concludes that under these conditions the Union should not be permitted to proceed.

The County asserts a second procedural defense that the grievance is not timely. It submits that the grievance procedure timeline provisions must be complied with and arbitrators have consistently ruled that an untimely grievance is not arbitrable. It claims that the right to contest arbitrability can be raised at any time because it relates to the jurisdiction of the arbitrator. The County refers to the grievance procedure which provides that grievances must be presented within

fifteen (15) work days. It points out that the grievant was notified by letter dated May 25, 1995, that he had been rejected for the position and no grievance was filed until June 21, 1995, well beyond the 15 day period. The County takes the position that the grievant's delay based on his belief that Boris was also denied the job is not justified. It alleges that if the grievant believed that he was qualified for the job then he had 15 days to file a grievance whether or not Boris was later awarded the job. It maintains that the grievance should be summarily dismissed.

Merits

The County contends that its determination that the grievant was not qualified for the Trade Tech I position was correct. The County asserts that it possesses the inherent authority to determine an employe's qualifications for a position and to use the methods it deems appropriate for doing so. It insists that its determination is only subject to challenge as being unreasonable under the facts, arbitrary, capricious or discriminatory. It claims that the County has the right to use any method to determine qualifications including an oral examination so long as it is fair and nondiscriminatory.

The County refers to Article 10 (H) as expressly conferring on the County the authority to determine an employe's qualifications for a position. The County points out that the contract is silent on the method and the Union bears the burden of proving that the County's use of the structured interview process was unfair, unreasonable or discriminatory.

The County alleges that the evidence established that the grievant was not qualified for the position. It submits that the three interviewers concluded that the most important qualifications for the job were skills in carpentry, masonry and plumbing. The interview questions were developed based on these areas weighted the most and the grievant's score by all interviewers, according to the County, was well below the minimum acceptable score. It observes that the grievant's best ability was welding, but this was not a required skill for this particular Trade Tech position; rather, it was carpentry, masonry and plumbing and the grievant admitted that he never laid any building foundations, never made or poured footings and never operated and maintained pool filtration systems. Thus, the County states that its determination that the grievant was not qualified for this position is reasonable and nondiscriminatory and should be upheld. It argues that its decision must be given deference and the Union has failed in its burden of proof that the County's decision was unreasonable, arbitrary, capricious or discriminatory. It asks that the grievance be dismissed in its entirety.

UNION'S REPLY:

The Union observes that the County's claim that by the Memorandum of Agreement, the parties intended to exclude the instant grievance from arbitration and that Boris would be assigned the position on a permanent basis is not supported by even a scintilla of evidence. The Union asserts that, contrary to this assertion, the Union indicated its intent to proceed to arbitration and the County never objected in any way whatsoever until the hearing in this matter. It concludes that the evidence demonstrates that the parties never intended to exclude the current grievance from arbitration. The Union reiterates that the parties simply agreed to an extended trial period and not a permanent award of the position to Boris. It states that it seems that this "trial period" could be extended to both employes. It insists that the agreement clearly did not constitute an understanding that the junior bidder would be permanently selected. It asserts that the agreement

was not a waiver of its right to grieve. The Union insists there was no meeting of the minds on this issue because the County never asserted it before the arbitration hearing.

As to the timeliness defense raised by the County, the Union claims that the grievant filed it the day Boris was assigned the job because he suspected that the County was using the Memorandum to permanently fill the position with a less senior bidder. It claims that when the County decided Boris was qualified after having previously determined he was not qualified, the grievant then knew such action was contrary to Article 10 (B) and the Union agreed. The Union insists that as the grievant believed he was as qualified as Boris, he correctly assessed that the County had violated Article 10 (B) and timely grieved. The Union insists that the procedural arguments are bogus and must be rejected.

As to the merits, the Union states that it does not dispute the County's right to determine applicants' qualifications and to do so by a structured interview. It insists that the selection of Boris was not reasonable under the facts. It points out that under the structured interview, both employees failed, yet Boris was awarded the position, obviously based on something other than the interview which was neither reasonable nor contractually consistent. The Union refers to Article 10 (B) whereby the parties agreed that seniority would be the governing factor among those qualified, the grievant was qualified and was not awarded the job, so the contract was clearly violated.

COUNTY'S REPLY:

The County contends that the Union's arguments on arbitrability are contrary to the record. It admits that the issue of timeliness was not raised prior to the hearing but that can be raised at any time and the County did assert that the grievance was improper in light of the Memorandum of Agreement at both Steps 2 and 3 of the grievance procedure. The County takes the position that the Union's claim as to the parties' understanding of the Memorandum of Agreement is not supported. It claims the Union has made half truths and is "splitting hairs" with regard to terminology. The County insists that the Memorandum of Agreement provided Boris the opportunity to demonstrate that he possessed the necessary qualifications and if he passed, he would be awarded the job. The County denies it has raised the procedural defenses in order to avoid the merits; rather, it believes the Union's actions are inappropriate and taken in bad faith. It alleges that the Union's unusual remedy request supports this belief.

The County argues that the Union has misstated the evidence in this case. The County points out that the grievant worked as a Parks Maintaner II and primarily performed minor maintenance duties or assisted the public and, contrary to the Union's assertions, did not perform, to any meaningful extent, construction duties such as carpentry, plumbing and masonry. The County takes exception to the Union's statement that a supervisor informally entered into a conversation with Boris after the job posting process implying a supervisor approached Boris about

his ability to perform the Trade Tech I position but the evidence contradicts this statement as Boris approached his supervisor. It observes that the Union asserts the grievant was never afforded the opportunity for reconsideration but the evidence establishes that he never requested such an opportunity.

The County argues that the Union's claim as to who bears the burden of proof is supported by the minority view and the majority view holds that the Union bears the burden of proving that the selection was unreasonable under the facts, arbitrary, capricious or discriminatory. The County submits that the express language of the contract provides it with the authority to determine qualifications and it is not required to prove that no contract violation occurred when it exercised that authority.

The County believes that there is no basis for the Union's criticism of the structured interview process. It argues that the use of oral interview tests have been upheld by numerous arbitrators including two arbitration decisions involving the County. The County maintains that the structured interview process was designed to be as objective as possible. It further claims that the evidence failed to show any bias or ill will toward the grievant as argued by the Union. The County responds to the Union's claim that the grievant was entitled to a trial period, that such claim is without merit because the County had no contractual obligation to give him a trial period because he never qualified for the position. According to the County, giving the most senior applicant a trial period would render the language of Article 10 (B) and (H) mere surplusage because it would never be given effect. The County argues that the Union has incompletely stated the relevant legal authority in support of its position by quoting from Elkouri but overlooking the requirements Elkouri attaches to the quote.

For the above reasons, the County requests that the grievance be dismissed in its entirety.

DISCUSSION:

After all briefs were received in this matter, the County objected to a portion of the Union's Reply Brief wherein the Union pointed out that its witness Henkelman testified in a later but related proceeding that under the terms of the Memorandum of Agreement, Boris was "assigned" the position rather than "awarded" the position as he had testified on cross examination at page 65 of the transcript in this proceeding. The Union responded to the County's objection asserting a good faith attempt to correct an error in the record. The Rules of Professional Conduct, SCR 20:3.3(a)4 provides that "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." Henkelman's testimony with respect to whether "awarded" should be "assigned" is not material evidence. Exhibit 5 speaks for itself. The Union's seeking to correct the record is appropriate on the basis of a duty of candor, however because it is not material evidence and has no probative value, the correction to the record is irrelevant to the decision in this matter.

Arbitrability

The County has raised two issues related to arbitrability. The first is that the grievance is not timely in that the grievant was notified on May 25, 1995, that he was not getting the Trade Tech I position and didn't file a grievance until June 21, 1995. 4/ The contract requires a grievance be filed within fifteen (15) work days from the date the employe knew or should have been aware of the cause of such grievance. In May, 1995, the grievant knew he didn't get the position and also knew Boris had not been awarded it. When he found out Boris was given the position, he promptly grieved. The undersigned finds that the grievance is timely. The grievant didn't know why Boris was given the position. The County may have thrown out the results of the interview, it may have simply wanted Boris because he was more qualified than the grievant or simply ignored the contract language. Whatever the reason, when the grievant first learned that Boris got the job, his grievance was promptly filed within the time limits and is therefore timely.

The second challenge to arbitrability is the Memorandum of Agreement which the County contends prevents the grievant from grieving the matter. Nothing in the Memorandum of Agreement states or implies that the grievant cannot file a grievance over it. Additionally, the Grievance Procedure set forth in Article 14 is rather broad in definition and allows an employe to bring the grievance at the first step of the procedure alone or with a Union representative and it provides at Steps 3 and 4 that the grievant and/or the grievant's representative may appeal the grievance to the next step. Thus, the employe without the Union can continue the appeal of his grievance if he is dissatisfied.

The County has argued that the Union acted in bad faith by entering into the Memorandum of Agreement and then pursuing the grievant's grievance. The Union is under a duty to fairly represent all of its employes and as discussed above did not agree that the grievant could not file a grievance and the grievant could pursue his grievance through the steps of the grievance procedure. Sometimes a Union has to take opposing grievances of two different employes to arbitration as part of its duty to represent them fairly and this is not bad faith because the decision of an arbitrator in one case may resolve or preclude the other. Here, the Union may not have been as persuasive with the grievant as the County feels it should have been to convince the grievant not to pursue his grievance but this does not constitute bad faith. Thus, the undersigned concludes that the Memorandum of Agreement does not preclude the grievance from a hearing on the merits and the procedural objections are dismissed.

Merits

4/ Exs. 6 and 2.

Article 10, Section B provides, in part, as follows:

The full-time employee with the greatest seniority with the department who can qualify shall be given the job.

Section H provides, in part, as follows:

The initial determination as to an employee's qualifications shall be made by the County.

Where specific language is lacking as to how qualifications are to be determined, great deference is given to the employer's determination that an employee is qualified and that determination will stand absent a showing that the decision was arbitrary, capricious, discriminatory or unreasonable on the facts.^{5/} The burden of proof is on the Union to demonstrate that the County's determination regarding the grievant's qualifications was unreasonable on the facts, arbitrary, capricious or discriminatory.^{6/} Neither of the applicants were found to meet the qualifications and neither timely grieved the County's determination that he was not qualified. The grievant testified, in part, as follows:

. . . I had understood after the interview was over that I didn't get the job. I got a letter on that. At that time I -- later on I asked Rick if he had gotten a letter. Rick says I got a letter, too, and I didn't get it. The letters were exactly the same, so we both didn't get the job. I dropped the matter. I figured they were hiring from the outside, and if you don't know the qualifications of the person from the outside, as I learned in this previous job it is hard to file a grievance. You know, you can't file a grievance on

5/ Barbers Point Federal Credit Union, 84 LA 956 (Brown, 1984); Leach Manufacturing Co., Inc., 82 LA 235 (Harrison, 1984); E-Systems, Inc., 84 LA 194 (Steel, 1985); Southern California Gas Company, 91 LA 100 (Collins, 1988); Equitable Bag Company, Inc., 83 LA 317 (Modjeska, 1984); Whirlpool Corp., 56 LA 40 (Johannes, 1971).

6/ GTE Products Corp., 91 LA 44 (Dworkin, 1988); Barbers Point Federal Credit Union, 84 LA 956 (Brown, 1984); E-Systems, Inc., 84 LA 194 (Steele, 1985).

someone you know nothing about. . . . 7/

It is clear that the grievant had every intention of dropping the matter and never timely filed a grievance over his being determined not qualified and he cannot collaterally attack that decision in the instant case. It is also true that where there are no qualified applicants, the County can hire from the outside. All of the Union's arguments related to the qualifications of the grievant and the structured interview process simply are not applicable to this case. This is not a situation where the junior employe, Boris, was found qualified and the grievant was found not qualified; rather, neither were found qualified, so Article 10 (B) does not apply.

The parties, recognizing that the only option under the contract was to hire from outside, reached a separate agreement apart from the contract to enable Boris to get a chance to be awarded the job outside the terms of the contract. The Union has argued that the Memorandum of Agreement was merely an extension of the probationary period. The Union is essentially claiming that the County awarded the job to Boris and then the Union agreed to extend the probation. The evidence simply does not support the argument. First, Article 11 (A) allows the parties to mutually extend a probationary period but it must be done prior to the posting. The Memorandum was done after posting. Secondly, the County did not seek out Boris to award him a job they had determined he was not qualified for. It strains logic to conclude that they rejected him so they could award him the position. Actually, Boris approached the County and asked for a trial and then got the Union involved. The Union and the County then entered into the Memorandum of Agreement whereby Boris got a trial but instead of thirty (30) work days it was six (6) months. This was not a mere extension of probation but was an agreement to award Boris the job if he passed a six months trial period because without such an agreement, the County would have to hire from the outside and the Union wanted someone within the bargaining unit to get the job. Union Vice President Bruce Henkelman testified as follows:

By Mr. Jones:

Q. Your counsel can bring out something if he wants to. When you agreed -- I think you made a statement when you agreed to this you did this because you thought no one within the Union was going to get the job, is that right?

7/ Tr. 18-19.

- A. Well, when this all started, you know, there was the deal both of them got the letter that neither was qualified. Then one day Rick came to me, and he says, well, they want you to sign a paper for an extended probationary period. You know, I didn't -- you know, first I didn't get what was going on, you know, and then I went in and it was explained to me that we will give Rick the job, you know, if we can extend the probationary period, so I thought, well, that sounds fine with me, you know, so I signed this, you know, so that Rick would get the job, and then John filed a grievance. 8/

It is clear that the parties entered into an agreement which was separate from the labor agreement (a side bar) such that the County would not go outside but give Boris a trial period to show he was qualified for the job. 9/ There was no violation of the collective bargaining agreement because the Memorandum was not to allow selection of a qualified junior over a qualified senior as neither was qualified. The collective bargaining agreement is completely separate from the Memorandum of Agreement. The parties were free to enter into a separate agreement to give Boris a trial period. It is that agreement which controls here and not the collective bargaining agreement. There was no showing that there was any collusion on the part of the County and Union to deprive the grievant of any contractual right. He was given all his contractual rights so the grievance which alleges a contract violation is without merit as there was no contractual violation. Nothing prevented the County and Union from entering into the Memorandum of Agreement. The parties had no obligation to the grievant to extend any part of the Memorandum to him. In short, the Memorandum has not violated the contract nor has it been violated by the parties. The instant grievance does not challenge the Memorandum of Agreement and thus must be dismissed.

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

AWARD

8/ Tr. 65.

9/ Under Article 10, Section A, the County must attempt in each posting to fill a job with a present employe before going outside. See also Tr. 96.

1. The grievance is arbitrable.
2. The County did not violate the collective bargaining agreement when it failed to award the Trade Tech I position to the grievant, and the grievance is therefore denied in all respects.

Dated at Madison, Wisconsin, this 17th day of October, 1996.

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