

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

KEWAUNEE COUNTY (COURTHOUSE)

and

KEWAUNEE COUNTY COURTHOUSE  
EMPLOYEES LOCAL 2959, AFSCME, AFL-CIO

Case 43  
No. 54366  
MA-9652

Appearances:

Ms. Elma Anderson, Corporation Counsel, Kewaunee County, 613 Dodge Street,  
Kewaunee, Wisconsin 54216, appearing on behalf of the County.

Mr. Jerry Uglund, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,  
P.O. Box 370, Manitowoc, Wisconsin 54220-0370, appearing on behalf of the  
Union.

ARBITRATION AWARD

According to the terms of the 1996-1998 collective bargaining agreement between Kewaunee County (hereafter County) and Kewaunee County Courthouse Employees Local 2959, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding whether the County violated the collective bargaining agreement when it failed to award the vacant Administrative Assistant/Social Services Clerk II position to Carol Wisnicky. A hearing was held at Kewaunee, Wisconsin on October 2, 1996 and a stenographic transcript of the proceedings was made. The transcript was received by the undersigned on October 17, 1996 and the parties filed their initial briefs by December 17, 1996. The parties waived the right to file reply briefs.

Issues:

The parties were unable to stipulate to the issue to be determined in this case. The parties agreed that the undersigned could frame the issue based upon the relevant evidence and argument herein. The Union suggested the following issue:

Did the County violate the collective bargaining agreement when it failed to award the vacant Administrative Assistant/Social Services Clerk II position to the most senior qualified applicant?

If so, what is the appropriate remedy?

The County suggested the following issue for determination herein:

Did the County's method of establishing qualifications for the position in dispute violate the collective bargaining agreement?

If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, I conclude that the Union's issue more reasonably states the dispute between the parties and it shall be determined herein.

Relevant Contract Provisions:

. . .

ARTICLE 4: WAGES

. . .

E. TRIAL PERIOD

An employee who is promoted or transferred shall serve a 90 calendar day trial period. The trial period may be extended by mutual consent for up to an additional 30 calendar days. During the first 30 days of the trial period, the employee may return to his or her former position with seniority rights. The employee shall give notice of the desire to return in writing to the County's Administrative Coordinator and the President of the Union. The employer may return the employee to his or her former position during the trial period for just cause. The employer will furnish the employee and the Union with written notice and the reasons for the return. Service beyond the trial period (or extension thereof) shall be deemed evidence of satisfactory completion of the trial period.

. . .

ARTICLE 14: SENIORITY

A. SENIORITY DEFINED

Seniority shall mean the continuous length of service with the county from an employee's last date of hire in this bargaining unit. Also, in the case of any part-time county employee, seniority shall be determined according to the proportion of hours worked by such part-time county

employee to the hours worked by a full-time county employee.

. . .

D. POSTING

1. The Board shall post any new or vacant position within the scope of the bargaining unit for a period of eight (8) calendar days. Any interested employee may apply for the position in writing to the Chairman and members of the Personnel Committee.

2. At the end of the eight (8) day posting period the applicants shall be interviewed and their qualifications reviewed by the Personnel Committee and then the position will be filled by the Personnel Committee with the most senior qualified employee. Any transfers to a vacancy in the Department of Social Services must comply with the State Social Service Merit System rules for hiring.

. . .

ARTICLE 18: VESTED RIGHT OF MANAGEMENT

A. GENERALLY

Except as otherwise provided in this agreement, the right to employ, to promote, to transfer, discipline and discharge employees, for good and sufficient causes, and the management of the property and equipment of Kewaunee County is reserved by and shall be vested exclusively in the Kewaunee County Board of Supervisors through its duly elected Personnel Committee and through the duly appointed or elected department head. . . .

BACKGROUND:

In December, 1995 the position of Clerk-Typist II/Administrative Assistant in the Social Services Department of the County was vacated by its then-incumbent, Lois Schultz. Ms. Schultz's position was a bargaining unit position. The position inventory/description covering the combination position which Ms. Schultz had filled read in relevant part as follows:

. . .

Social Services  
Title of Position Administrative Assistant

1. Purpose of Position.

Performs specialized clerical functions of considerable difficulty and responsibility calling for thorough familiarity with agency regulations & procedures; confidential secretary to Director, maintain fiscal records.

. . .

2. Fundamental Duties and Responsibilities

. . .

Percent	Duty or Responsibility
20%	1. Entering all data into CRN such as monthly reports, changes sheets, reviews, person add or delete, or special action sheets and application forms.
10%	2. Greeting and directing clients or others who come into the office; explain application form.
20%	3. Operate agency phone counsel (sic) and direct to appropriate person.
10%	4. Various typing for ES workers such as Medical examination forms for incap reports; disability determination to Madison, etc. Various typing for General Relief program.
30%	5. Maintain accurate and up to date filing for all agency case records, open and closed. Maintain accurate case records for General Relief.
5%	6. Open and sort all incoming mail; log in any checks received. Sort and mail all out going mail such as AFDC checks, reviews, and all other agency related mail.
4%	7. Compile list on a quarterly basis of targeted case reviews for ES workers.

- 1% 8. Must assume responsibilities of coworker in the event of sickness, vacations, etc.

Title of Position Social Services Clerk II  
(IM)

- 1. Purpose of Position. . . .

Greet & direct clients and visitors to appropriate people; operate agency phone counsel (sic) and direct calls; enter all ES functions into CRN; various typing for ES workers; open & sort incoming mail; maintain open & closed agency case files.

. . .

- 2. Fundamental Job Duties and Responsibilities

. . .

Percent	Duty or Responsibility
40%	1. Is responsible for the agency's fiscal procedures; including the preparation of payrolls and related financial & statistical (sic) reports.
20%	2. Serves as confidential secretary to the Director.
10%	3. Responsible for record work involved in purchase and issuance of supplies and equipment, maintains accurate inventory record.
10%	4. Assists with preparing budgets of estimated expenditures. Assists with annual report.
10%	5. Issue receipts for Agency for all money received.
10%	6. Submit vouchers for payment of crisis grants or any and all agency related expenditures.

On or about December 19, 1995 the County posted the following notice regarding the

vacancy created by Ms. Schultz leaving the Administrative Assistant/Clerk-Typist II at the Department of Social Services.

. . .

One full-time replacement vacancy exists in the Department of Social Services. This is a split position whereby the person occupying this position serves as the Agency's Administrative Assistant half-time (Grade 5) and as a Clerk II (Grade 3) half-time.

Persons wishing to transfer to this position must meet the following qualifications:

Must be familiar with the State's Community Aids reimbursement reporting system; be able to assume responsibility for the Agency's fiscal and office procedures; including the preparation of payrolls and related fiscal and statistical reports; serve as office manager responsible for training and supervision of other office staff; serve as confidential secretary to the Director; be knowledgeable on how to aid in preparing budgets of estimated expenditures and monitoring same on a daily basis. Greet and direct clients and visitors to appropriate staff; operate Agency phone counsel (sic) and direct calls; enter appropriate Economic Support data in the state CRN; type all correspondence for Economic Support; maintain accurate and up to date filing for all Agency case records (open and closed); and any other duties as assigned.

Anyone wishing to transfer to this position, please submit your written application to Harold J. Reckelberg for the Personnel Committee by 4:30 PM on December 28, 1995. The Personnel Committee will interview the qualified applicants to fill the position.

. . .

At all times relevant hereto, the County had a County merit system rule in place for the Social Services Department, containing a section regarding recruitment and examinations, which read in relevant part as follows:

. . .

(2) Recruitment

- (a) Each agency shall use recruiting publicity through appropriate media to provide open opportunity for interested persons to apply.
  - (b) Each agency shall specify that it is an equal opportunity employer.
- (3) Examination
- (a) Examination processes will maximize reliability, objectivity, and validity through a realistic and multi-part assessment of applicant attributes necessary for successful job performance in the position for which he is applying.
  - (b) All applicants qualified for examination shall be given the opportunity to be examined.

. . .

Three applications for the vacant position were received in a timely fashion. Ms. Carol Wisnicky, the most senior applicant, was then a Clerk-Typist II at the Sheriff's Department and had been employed by the County since January 15, 1979. The second most senior applicant was Luann LeCloux who was then a Public Health Aide at the Public Health Department of the County and had been employed by the County since January, 1986. The third applicant for the position was Rita Paul who had been employed by the County since February, 1989 as a Clerk-Typist in the County's Social Services Department.

When the Director of the Social Services Department, Giles Hanson, saw who had applied for the vacancy and how many applicants there were, he decided to give the three applicants a test to determine which one of them was the most qualified for the position. Either Ms. Schultz or Mr. Hanson told each of the three applicants that a test would be given and the date thereof. Thereafter, Mr. Hanson stated that he took into consideration the above-quoted position inventories when he drafted the examination which was given to the three applicants. That test read as follows:

The Administrative Assistant is responsible for a variety of the Agency's fiscal procedures. One of the most important procedures is the submission of the DMS-600 report.

- (1) Please identify how frequently and at what intervals the Administrative Assistant must

submit the Department of Social Service's DMS-600 reports for state reimbursements.

- (1a) Do you feel you are qualified at this time to assume the responsibility to complete and submit the DMS-600 report.

YES \_\_\_\_\_ NO \_\_\_\_\_

If YES, please explain the procedure for doing this.

- (2) Are you acquainted or familiar with some of the typical profiles involved in the DMS-600 report.

YES \_\_\_\_\_ NO \_\_\_\_\_

- (2a) If YES, please list several DSS profiles.

Part of the Clerk II's responsibility is to enter a number of Economic Support reports into the "CARES" computer system.

- (3) Are you familiar with any of the reports that must be entered into the "CARES" computer system for Economic Support purposes.

YES \_\_\_\_\_ NO \_\_\_\_\_

- (3a) If YES, please identify one.

- (4) Do you feel qualified to enter this report into the "CARES" system at this time.

YES \_\_\_\_\_ NO \_\_\_\_\_

- (4a) If YES, please explain the procedure.

- (5) List several accounts that appear on the Department of Social Services monthly "Purchase of Services" vouchers.



(5a) Please explain the procedure for preparing the Department of Social Services "Purchase of Services" voucher.

Mr. Hanson stated that he collaborated with Lois Schultz in preparing this examination. However, Ms. Schultz stated herein that although she made suggestions regarding the content of the examination, she did not know whether her suggestions were actually followed; that she did not criticize the exam for Mr. Schultz, typing it as it was given to her.

Despite the terms of the posting and the language of Article 14D(1), none of the applicants was interviewed for the position. None of them was told the passing score for the examination or what topics would be covered on the test prior to the administration thereof. It should be noted that Ms. Wisnicky received 0 points on the test, Ms. LeCloux received 10 points on the test and Ms. Paul received 100 points on the test. 1/

After Hanson graded the exams, both Wisnicky and LeCloux received telephone calls from Mr. Hanson in which Hanson indicated that they had not passed the test and that Rita Paul was being given the position. Neither Wisnicky nor LeCloux were told the score they received on the examination at this or any time. On January 15, 1996 County Board Chairman Reckelberg sent both LeCloux and Wisnicky the following (identical) letter:

This is in response to your request for transfer into the vacant position in the Department of Social Services.

Mr. Hanson has shared your test results and his discussion with you on January 12, 1996.

As Mr. Hanson informed you at that time, Mrs. Rita Paul received the highest grade and will be hired in the vacant position.

...

Neither LeCloux nor Wisnicky had had any experience working at the Social Services Department prior to applying for the vacant Administrative Assistant/Clerk-Typist II position, although both LeCloux and Wisnicky had had experience filling out County departmental vouchers and working with various computer programs for the County prior to their applications. Before the examination, neither LeCloux nor Wisnicky made any attempts to obtain a job description for the vacant position, to observe Schultz at work or to get any written information regarding her job.

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1/ I note that questions 1, (1a), 2, 3, (3a), 4, (4a), 5 and 5a were to receive a maximum of 10 points each, for a total of 90 points on the test.

After Rita Paul took the position vacated by Schultz, Wisnicky was hired as a Clerk-Typist II in the Social Services Department into the position vacated by Paul. LeCloux then took Wisnicky's former Clerk-Typist II position in the Sheriff's Department.

Giles Hanson testified that he alone decided who should receive the position in dispute and that he based his decision solely upon each applicant's test scores. Hanson stated that he personally scored the tests and that none of the applicant's names were masked so that he knew which applicant had completed each test. Hanson stated that the test had not been designed to establish a list for hiring in the future. Rather, Hanson stated that he wanted the test to determine which of the three applicants was "most qualified" for the vacant position.

Both Lois Schultz and Giles Hanson stated that work on the DMS-600, work with the "CARS" and "CARES" programs as well as work with the purchase services vouchers of the Department of Social Services were essential duties to the vacant position. Schultz stated that she would not have been able to answer the test questions relating to the DMS-600 before she occupied the Clerk Typist II/Administrative Assistant position and that it took her between six months and one year to learn how to successfully complete the DMS-600 forms. Only employees in the Department of Social Services, Child Support and Community Projects complete the DMS-600 forms. There are approximately four or five Department of Social Services employees who are involved in using the "CARS" and "CARES" programs which convey information to Madison regarding Social Services functions. There are only two employees in the Department of Social Services who complete purchase services vouchers for the Department of Social Services; approximately six to fifteen such forms are prepared each month.

In regard to the validity of the test drafted by Mr. Hanson and given to the three applicants herein, Union Representative Dave Campshure stated that the test drafted and given by Hanson was not based on a proper job analysis nor was it content valid. Campshure stated that the test was too specific; that the test did not actually test the knowledge, skills and abilities necessary to perform the Administrative Assistant/Clerk-Typist II position in the Department of Social Services. In addition, Campshure stated that some of the questions were inappropriate such as those not related to performing the actual tasks involved in the job and applying the knowledge, skills and abilities of the candidate to those tasks. Finally, the fact that the identities of the three applicants were not masked and that Hanson himself not only wrote the test but also scored the test was called into question by Campshure as being an approach which professionals in the testing field would eschew.

Positions of the Parties:

Union:

The Union has argued that the relevant contract language is clear. In addition, the Union noted that the County is required to adhere to the State of Wisconsin merit system standards,

which require "valid and objective" exams to be given for positions including the one in issue here. The Union argued that the test given to the three applicants was not valid; that it did not test the general skills required to do the job; that it was not based on a thorough job analysis with relative weighing of skills to determine the criticality of each; and that it was improperly administered. On the latter point, the Union noted that there was no cut off score designated, that the person who graded the exams (Hanson) knew the identities of each of the applicants whose exams he scored, and that Hanson was the one who made the decision regarding who should receive the job. Furthermore, the Union noted that Hanson admitted that he decided to give a test after he was notified who had applied for the job and that he made no attempt to determine the qualifications of the three applicants based on their knowledge, skills and abilities. Finally, no interviews were conducted despite the language contained in the contract and that of the posting for the vacant position. Therefore, the Union argued, the results of the test should be disregarded and Hanson's selection of Paul for the position must be overturned.

The Union urged that the testimony of testing expert Dave Campshure should be credited in this case. The Union noted that Campshure made clear that if a proper job analysis is not done, a test which is based upon a faulty analysis will not measure whether the applicants are actually qualified to perform the job being tested. Campshure also stated that from the test given in the instant case, he had no idea how important the work referred to would be to the successful completion of the job and that Mr. Hanson's heavy involvement in the testing and selection process posed a potential bias problem given the fact that the identities of the applicants were not masked. The fact that Mr. Hanson may have shown a bias in grading the examinations could also, in Campshure's view, have affected the validity of the examination given.

The Union noted that Hanson admitted that he was looking for the "most qualified" applicant. Therefore, the Union urged that as the contract states that the most senior qualified employe should receive the job, Hanson admitted violating the contract by his selection of Mrs. Paul for the position. In addition, the Union noted that there was no evidence that Hanson had followed the contract or the posting, because the Personnel Committee never became involved in the selection process. As Hanson had no authority to fill the job on his own, the Union urged that his decision to appoint Paul should be set aside.

The Union asserted that most arbitrators require that tests must be specifically related to the requirements of the job, fair and reasonable, administered in good faith and without discrimination, and properly evaluated. As none of these preconditions were met in this case, the Union urged that it should prevail herein. Finally, the Union noted that Article 4 provides for a trial period for employes transferred into new positions and that the County could have utilized this provision to determine whether Wisnicky was in fact likely to be able to perform in the vacant position satisfactorily. The Union therefore sought an Award declaring the test to be invalid, placing the senior applicant (Wisnicky) in the position effective to the date when the job was originally filled and making Wisnicky whole from that date forward.

County:

The County urged that it had retained the right to promote and transfer employees subject only to contract limitations and the limitations of past practice. As no applicable past practice was proven herein, the County urged that only the contract could limit its authority to transfer employees from job to job as it did in this case. The County noted that Article 4, Section E provides only a trial period not a training period on the job, so that the County was not required to try out Ms. Wisnicky in the vacant position. The County observed that the contract does not address the issue of testing or how qualifications should be set and evaluated or by whom. The County urged that it had retained all of its management rights in these areas and that the arbitrator is without jurisdiction to rule on this case.

The County noted that the contract does not require the employer to use a valid test so that whether or not the test is invalid is not material or relevant to this case. The County also observed that the Union had not demonstrated that the test discriminated against a protected class of employees. Indeed, in the County's view, there were other employees who could have

performed well on the test and the fact that those who applied did not perform well does not necessarily mean that the test was unfair. Rather, the fact that LeCloux and Wisnicky did not come close to passing the test, in the County's view, showed that these employees did not have the present ability to perform the job and that therefore they were not qualified as Hanson found. Therefore, the County urged that the grievance should be denied and dismissed in its entirety.

Discussion:

The overwhelming evidence in this case demonstrated that the test given for the Administrative Assistant/Clerk-Typist II vacancy was invalid. In this regard, I note that Giles Hanson admitted that he only decided to give an examination after he saw who had applied for the vacancy. In addition, Hanson personally drafted the examination based upon incomplete inventory/position descriptions for the vacancy. Hanson also stated herein that he believed that the person with the highest score on the examination would be the "most qualified" applicant and that he selected that person for the position. I agree with Union witness David Campshure that the examination questions were far too specific regarding the tasks to be performed in the position, and that this resulted in Wisnicky and LeCloux, who might otherwise have qualified for the position on other grounds, failing to receive high enough grades on the test to be considered qualified for the position. In addition, the fact that Hanson also graded the examinations himself, without masking the identities of the applicants, tends to show that some bias may have entered into the results of the examination. Finally, the fact that Mr. Hanson alone decided that Paul

should receive the position and that Hanson chose not to follow Article 14, Section D(2) of the collective bargaining agreement or the terms of the posting he drafted for the position, by not involving the Personnel Committee in interviews and in the selection of the successful candidate, also shows that the process of selection in this case was fatally flawed. In these circumstances, the results of the examination and Hanson's selection process must be disregarded.

The County has argued that the undersigned lacks jurisdiction to rule upon this case given the breadth of the Employer's discretion in the area of testing, evaluation and setting qualifications. I disagree. Initially, I note that Article 14, Section D(2), requires that applicants for positions must be interviewed, that their qualifications must be reviewed by the Personnel Committee and that the Personnel Committee must then select the "most senior qualified employe". In addition, subsection 2 of Article 14(D) incorporates by reference the rules of the State Social Service merit system. Those rules, in relevant part, require that examinations "will maximize reliability, objectivity, and validity through a realistic and multi-part assessment of applicant attributes necessary for successful job performance in the position. . ." (emphasis added). Given these specific limitations contained in the collective bargaining agreement, I find

the County's argument that its discretion is unfettered in this area to be wholly unpersuasive. 2/

Because the County failed to follow Article 14, Section D(2) and because the examination given was neither fair nor reasonable and it appears to have been administered and evaluated unfairly, the results of the examination and selection process must be disregarded. Therefore, the County shall be ordered to re-post the vacancy of Administrative Assistant/Clerk-Typist II in the Social Services Department and follow the posting and selection provisions of Article 14, Section D (as well as the trial period provision contained in Article 4, Section E) after the Personnel Committee has reviewed the applicants' qualifications, interviewed the applicants and decided to fill the position with the "most senior qualified employe" who has made proper application for the vacancy. Based on the above analysis as well as the relevant evidence and argument herein, I therefore issue the following

### AWARD

The County violated the collective bargaining agreement when it failed to award the vacant Administrative Assistant/Social Services Clerk II position to the most senior qualified applicant. The County shall therefore re-post and fill the position in accordance with Article 14, Section D, subsections 1 and 2 and Article 4, Section E. 3/

Dated at Oshkosh, Wisconsin this \_\_\_\_ day of February, 1997.

By \_\_\_\_\_  
Sharon A. Gallagher, Arbitrator

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2/ Under Article 18, it is clear that the County's management rights are limited by the provisions of the labor contract. Thus, the specific language of Article 14, Section D(2) stands as a limitation on the County's right to transfer employes. Furthermore, I do not believe one can fairly conclude that the test Hanson gave to the three applicants actually tested the "attributes" necessary for successful performance in the position of Administrative Assistant/Clerk Typist II.

3/ The Union sought the placement of Ms. Wisnicky into the Administrative Assistant/Clerk-Typist II position in the Social Services Department as part of this Award. I find that action would be inappropriate. Furthermore, I do not find it appropriate to award any backpay in this case and I have not done so. In addition, by issuance of this Award, I do not mean to imply that the County cannot give an examination for the vacancy. However, the County must follow the contract if it chooses to give an examination as part of its effort to determine who is the most senior qualified employe for the position.