

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

MARINETTE COUNTY COURTHOUSE  
EMPLOYEES UNION, LOCAL 1752, AFL-CIO

and

MARINETTE COUNTY

Case 159  
No. 54361  
MA-9650

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, on behalf of the Union.

Mr. Chester C. Stauffacher, Marinette County Corporation Counsel, and Mr. Charles E. Carlson, Carlson Associates, Inc., on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Marinette, Wisconsin, on December 19, 1996. The hearing was transcribed and the parties thereafter filed briefs and reply briefs which were received by April 17, 1997. Based upon the record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the County violate Articles 5 and/or 6 of the contract when it awarded the posted Human Services Intake position to Mimi Guesck and, if so, what is the appropriate remedy? 1/

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1/ The Union stated at the hearing that it would hold in abeyance its related grievance related to the posting of a Day Care position. As a result, the facts relating to that grievance are not discussed herein.

## BACKGROUND

The County in April, 1996, 2/ abolished the Front End Verification Specialist and Clerk/Typist positions and created a new Financial Support Clerk - Day Care ("Day Care") position, a new Human Services Aide-Intake ("Intake") position, and a new Job Services receptionist position. As a result of these newly-created positions, no bargaining unit employees were laid off.

The County initially posted the new Intake position on April 18 and subsequently awarded that position to Sandra W. Waugus on the basis of departmental seniority without administering any test. 3/ The Union objected to the posting on the ground that it had not been properly reviewed by the contractually provided Job Study Committee. In response, the County rescinded that posting and submitted it to the Job Study Committee so that it could be placed in the appropriate pay range.

After the matter had been submitted to the Job Study Committee and placed in one higher grade, the County on April 29 reposted the Intake position at one higher pay grade, as well as the Day Care position. The Intake posting stated, inter alia:

### TYPICAL DUTIES

Interview people via the telephone, or in person, to identify the type of service being requesting.

Provide an assessment of the existing problem/situation and refer the case to the appropriate social work manager/supervisor for assignment.

Provide fee charging for alternate care program and group home, which includes interviewing clients and completing financial forms to determine cost of care per family.

Process monthly billing to be sent to client for reimbursement for service costs of child in alternate care.

The above statements are intended to describe the general nature

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2/ Unless otherwise stated, all dates herein refer to 1996.

3/ The only other applicant for that position at that time was outside the department and hence ineligible.

and level of work being performed by employee assigned to this position. They are not to be construed as an exhaustive list of all job duties performed by personnel so classified.

### **EMPLOYMENT QUALIFICATION**

**EDUCATION:** High school diploma or equivalent.

**EXPERIENCE:** A minimum of two years experience working in a Human Service Agency (or other similar service experience) and/or relating closely with people of various needs. Must demonstrate knowledge of general office routines, word processing, 10-key calculator by touch, and a practical working knowledge of grammar, spelling, punctuation and arithmetic. Two year associate degree in human services related field may be substituted for work experience.

The qualifications listed above are guidelines. Other combinations of education and experience which could provide the necessary knowledge, skills, and abilities to perform the job should be considered.

Said posting did not mention, one way or the other, whether a test would be administered as part of the County's selection process.

Four employees bid for the Intake position: grievant Linda Hanley with a seniority date of February 18, 1980; Waugus with a seniority date of October 17, 1988; Diane Stryzewski with a seniority date of November 13, 1991; and Mimi Guesck with a seniority date of March 21, 1994.

The County on May 6 interviewed and tested these applicants. The test was administered by Intake Worker Ellen M. Dzurick, a member of the bargaining unit, and Human Services Supervisor Jill Davis, who is not a member of the bargaining unit.

Dzurick testified that the single most important quality needed for this job is dealing with the public and "a lot of difficult people"; that there was no answer key to the test questions asked; and that Guesck was the better candidate because:

Her answers were much more -- she seemed to have a better grasp of what was needed on the intake questions to determine what follow-up would be needed by the social workers, by the supervisor, and she did extremely well on the financial, and she was able to answer all of those questions correctly.

Supervisor Davis testified that Guesck was the best applicant because "her answers were very concise, very complete. They showed a lot of insight. They just contained the things that I was looking for as a manager." Davis also considered "her background of where she had worked previously, her relationship with some of the clients that I had seen her working with within our agency. . ." She also said that she did not consider anything in either Guesck or Hanley's personnel files.

On cross-examination, Davis said that factors other than test scores were considered in selecting the best applicant such as, "The way the applicant presented herself during the interview. . .working with other clients"; that she had no first-hand knowledge of Hanley's work; and that she did not know why the job posting did not refer to a test.

Dzurick and Davis independently scored the test and gave the following points to Hanley and Guesck for each of the five test questions:

**Mimi Guesck's Scores**

**Linda Hanley's Scores**

Test Item	Davis	Dzurick	Davis	Dzurick
#1	15	15	18	15
#2	17	16	7	7
#3	17	17	15	16
#4	20	20	17	17
#5	18	18	19	19
Total	87	86	76	74

**Average**

**86.5**

**75.0**

Hanley's final score was thus 75, compared to Guesck's 86.5. Since Guesck had the higher point total, the County awarded her the position on May 7. The Union grieved on May 9, hence leading to the instant proceeding.

Grievant Hanley, a Billing Clerk, testified that but for questions asked during the test process, she was never interviewed for the Intake job.

County Administrator Stephen Fredericks testified that the County in the past has regularly administered tests as part of its posting process involving this bargaining unit and that he identified a number of postings (County Exhibit 1), where tests had been given. He also said that testing has

accompanied all postings for the last two years except when (as was the case with the first Intake posting) there is only one qualified candidate.

On cross-examination, he testified that he did not know whether any of that prior testing involved oral tests and he acknowledged that there was no testing for the initial Day Care posting even though there were multiple candidates for that position.

Business Manager Steve Corbeille testified that he offered the initial Intake posting to Waugus, but that he had to rescind it once the position had been graded one pay range higher.

Union President Mary B. Scoon testified that the testing was unfair "Because the sole basis of deciding on the issue was based on a test score" without looking "at the other qualifications that are involved in filling the job."

### POSITIONS OF THE PARTIES

The Union claims that the County violated Articles 5 and 6 of the contract because the Intake test was not specifically related to the requirements of the position; because the test was not fair or reasonable; because the test and selection process were not conducted in good faith; and because the test was not fairly evaluated. The Union cites How Arbitration Works, Elkouri and Elkouri, p. 848, (BNA, 5th Ed., 1997), in support of its position that the Company has violated its testing obligations. The Union therefore requests that Hanley be awarded the Intake position and that she be made whole.

The County, in turn, mainly contends that the contract "clearly defines the process for selecting employes for vacant positions"; that it followed the contractual vacancy procedure "to the letter"; that its process here follows a "long history" of using similar tests; and that its testing process was proper. The County also asserts that there is no merit to the Union's request for a trial period; that prior arbitration cases between the parties support its position; and that it has not acted in "an unreasonable, arbitrary and capricious manner."

### DISCUSSION

This case boils down to whether the test administered for the Intake position was fair and whether Hanley's qualifications are relatively equal to Guesck's. Thus, Article 6.02 of the contract states:

#### **6.02 Application of Seniority.**

A) Promotions, layoffs and recalls after layoffs will be determined upon the basis of the County's appraisal of the individual Employee's skill and ability, but where these are relatively equal, the Employee with the greatest bargaining unit

seniority will be given preference over those with less bargaining unit seniority.

The County has wide latitude under this proviso in determining promotions because it refers to qualifications that are based "upon the basis of the County's appraisal. . ." Hence, it gives more discretion to the County than is found in other contracts which do not have this quoted language.

However, that discretion is not absolute. If it were, this proviso would expressly state that questions arising under Article 6.02 are not subject to the grievance-arbitration procedure. Since it does not, the contract therefore presupposes that some kind of review is proper over the County's decisions. In agreement with the County, I therefore conclude that the proper test is whether the County's actions were arbitrary and/or capricious.

As to that, the record shows that Davis and Dzurick were only one point apart in the total number of points they awarded to Guesck who received 87 and 86 points from each of them respectively, and that they were only two points apart in the total number of points they awarded to Hanley who got 76 and 74 points from them. Given the closeness of these scores and the nearly identical number of points that Davis and Dzurick gave for the answers to the test questions, and given the further fact that Davis and Dzurick independently graded the tests, it must be concluded that the test was fairly graded.

Moreover, Guesck and Hanley received about the same number of points for all of their answers except for question 2 which asked:

You're on intake and you take a call from a babysitter of a three year old girl. The babysitter states she found blood on the child's underpants and suspects sexual abuse.

Please list the questions you would ask the referral source before forwarding intake to supervisor.

Guesck's answer to this question stated:

Would there be any other reason that may explain the blood in the child's pants?

Is there any other incidents that might have happened that the sitter may have found questionable?

What time did the sitter begin watching the child that day?

What activities did the child do between the time the child arrived until the time she found the blood?

What other adults or children were around between the time the child arrived & the blood was found?

Had the child gone to the bathroom in between these times?

Name, addresses and telephone numbers.

Hanley's answer stated:

What is your name? Where do you live?

What are her parent's names?

Where do they live? In Marinette County?

Where are they employed?

Have you noticed any other abuse?

What is the child's name?

Are you a certified child care provider?

I find, in agreement with Davis and Dzurick, that Guesck's answer was far more detailed and analytic than Hanley's answer which only provided routine information which anyone can collect. Guesck's answer, by contrast, showed a far deeper level of understanding of the kind of information that Intake Workers need before deciding what should be done in such a situation. Since obtaining such information represents one of the Intake Worker's core functions, both Davis and Dzurick were entitled to give Hanley a much lower grade for her answer.

The Union nevertheless argues that this question should be disregarded because Intake Workers are given a standard questionnaire that is used in interviewing clients. Said questionnaire, however, does not cover the myriad of different factual settings presented to Intake Workers. Hence, the County properly tested how well employees could analyze a given situation, in this case a possible child abuse problem.

The record shows, however, that Hanley and Dzurick's personnel files were not considered during the selection process. That was a fundamental error and hence an arbitrary action because an employer is not free to ignore an employee's overall work history when

considering whether he/she is qualified for a promotion. To the contrary, such an examination of an employee's history is an essential part of any selection process because it is well recognized that an "employer may not base its determination of ability solely upon the results of a test but must consider other factors and other evidence." How Arbitration Works, p. 851.

The need to do so here is all the greater because Davis testified that she partly based her selection on the fact that she had first-hand knowledge of Guesck's work. She did not, however, have any first-hand knowledge of Hanley's work. How then, absent their personnel files, could Davis fairly compare Guesck and Hanley's past work histories? I conclude that she could not.

In addition, Davis testified that her selection was in part based upon "The way the applicant presented herself during the interview. . ." Absent any jarring shortcomings in the way that someone presents themselves, which is not present here, an employer cannot base a promotional decision upon such a highly subjective factor.

The test also was flawed because it did not cover the posted job requirements relating to general office routines, word processing skills, and use of a 10-key calculator. Since these were the posted requirements for the job, it was arbitrary for the County to totally sidestep any testing for these requirements.

The County also acted in an arbitrary manner when its Intake posting did not state that a test would be administered. To be sure, the record shows that the County in the past has routinely tested applicants. As a result, there is no merit to the Union's claim that the County discriminated against Hanley by administering its test. Nevertheless, employees must be told ahead of time in a posting that a test can be administered because that obviates a claim that an employer has chosen to test at the last minute only in order to disqualify certain candidates. If there is only one qualified applicant - as there was here when the County initially posted the Intake position on April 18 and when Waugus was initially given that position - there is no need for such a test. But, if there is going to be more than one qualified applicant - and the County must assume that there will be - a posting must state that a test will be given. If it does not, no testing can be given.

In response to the Union's claims, the County argues that the Union cannot rely on How Arbitration Works by Elkouri and Elkouri because, in the County's words: it "does not have the opportunity to cross-examine the Elkouris or impeach the credibility of the Elkouris." Cross-examination and impeachment, however, have absolutely nothing to do with whether the arbitral authority cited in How Arbitration Works should be adopted here. Thus, that standard text - sometimes called "the Bible" by labor practitioners - is regularly quoted by parties in support of their respective positions and arbitrators regularly quote it in their decisions. That is why it might be worthwhile for the County to become more familiar with some of the principles set forth in How Arbitration Works in order to avoid the kind of problems found here.

The County also contends that "Sections 6.01 and 6.02 do not address the concept of



seniority. . ." and that Sections 5.02 and 5.03 "are the only ones" in the contract that "deal with the filling of new jobs." I disagree. Absent clear contrary language which is not present here, seniority governs the filling of jobs which involve promotions in the face of the kind of seniority proviso found in Article 5. Hence, it is immaterial that Article 5 does not refer to seniority when it addresses the filling of jobs since such filling is subject to Section 6.02's additional mandate that seniority must be considered for all promotions - i.e., higher-paying jobs. 4/ Indeed, it already has been decided in a prior arbitration proceeding between the parties that Article 6 requires seniority to be considered when skill and ability are otherwise equal. See Marinette County and Local 1752, AFSCME, AFL-CIO, Case 137, No. 50179, MA-8173 (Crowley, 1994).

Given all of the above, it is now necessary to determine what, if anything, should be done about the aforementioned arbitrary errors which are outside the scope of the broad discretion given to the County in Article 6.02.

In order to protect the integrity of the testing process and how employees are selected for promotions, it is necessary for the County to repost the Intake Worker position, as that is the only meaningful remedy to the County's errors. Said posting shall relate whether a test will be given and the County thereafter shall award that position to the best-qualified applicant based upon his/her testing results which measure all of the job's posted requirements and his/her work history as measured by the information contained in his/her personnel file. If the personnel files and an employee's overall work record are not considered, and if the posting does not state whether a test will be given, the County's selection will again be overturned. In addition, the County cannot consider such subjective factors as the "way the applicant presented herself during the interview. . ." Instead, it must base its decision on objective considerations which are solely related to whether an applicant is qualified for the Intake Worker's position.

Normally, an employer who has violated a contract in the fashion found here must offer the posted job to the most senior qualified applicant. Here, however, that remedy is inappropriate because of the broad discretion given to the County in Article 6.02. That is why only a reposting is being ordered.

In order to resolve any questions that might arise over application of my Award, I shall retain my jurisdiction until such time as the reposting has occurred, an applicant is selected, and any subsequent questions have been totally resolved.

In light of the above, it is my

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4/ That is why Article 6.02 supersedes the County's right in Article 2.(B) to "determine the competence and qualifications of employees. . ."

AWARD

1. That the County violated Article 6.02 of the contract when it awarded the posted Human Services Intake position to Mimi Guesck.

2. That the County shall immediately repost the Human Services Intake position and fill that position pursuant to the terms stated above.

3. That I shall retain my jurisdiction to resolve any questions arising over application of this Award.

Dated at Madison, Wisconsin, this 21st day of August, 1997.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator