

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration  
of a Dispute Between

**NORTHEAST WISCONSIN VOCATIONAL,  
TECHNICAL & ADULT EDUCATION DISTRICT**

and

**BAYLAND TEACHERS UNITED**

Case 93  
No. 54573  
MA-9725

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Appearances:

**Mr. Robert W. Burns**, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of the District.

**Mr. Miguel E. Salas**, Executive Director, Bayland Teachers United, 1136 North Military Avenue, Green Bay, Wisconsin 54303-4414, appearing on behalf of the Union.

**ARBITRATION AWARD**

According to the terms of the 1994-97 collective bargaining agreement between Northeast Wisconsin Vocational, Technical & Adult Education District (Employer, College or District) and Bayland Teachers United (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 District had violated the contract when it refused to grant Grievant Barbara Schaden an interview during the selection process for the position of Registration Aide/Operational Assistant III, and selected Gail Zwicky for that position. The undersigned was designated Arbitrator by the Commission and a hearing was held at Green Bay, Wisconsin on March 11, 1997. A transcript of the proceedings was made and received by April 9, 1997. The parties filed their initial briefs by June 30, 1997, which were exchanged by the undersigned. Thereafter, the parties filed their reply briefs by July 14, 1997, whereupon the record was closed.

Issues:

The parties were unable to stipulate to the issues to be determined in this case. However, they agreed to allow the undersigned to frame the issues based upon the relevant evidence and argument in the case and after considering their suggested issues.

The Union suggested the following issues for determination:

- 1) Whether Article IV of the collective bargaining agreement "Vacancies and Transfers" was violated when the College transferred Gail Zwicky to the position of Registration Aide/Operational Assistant III on July 5, 1996.
- 2) Whether there was disparate treatment when Zwicky was able to take the typing test twice on two different dates after the position was posted, while the Grievant was not given the same opportunity.
- 3) If the answer to either 1), 2) or both is in the affirmative, what would the appropriate remedy be?

The District suggested the following issues for determination:

- 1) Was the grievance timely filed?
- 2) Does the collective bargaining agreement prohibit the District from considering applications from bargaining unit members for District vacancies for which that bargaining unit member does not have a contractual preference?
- 3) Did the District violate the collective bargaining agreement in its administration of the typing test and its determination of qualifications for the position in issue?

Based upon the relevant evidence and argument in this case as well as the suggested issues of the parties, I find that the following issues shall be determined herein:

- 1) I the grievance properly before the Arbitrator?
- 2) If so, did the District violate either the collective bargaining agreement or past practice by the manner in which it administered the typing test to the Grievant and Zwicky, by its refusal to interview the Grievant and/or by considering and selecting Gail Zwicky to fill the position of Registration Aide/Operational Assistant III on July 5, 1996?
- 3) If so, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE II**

#### **MANAGEMENT RIGHTS RESERVED**

The Board, unless otherwise herein provided, hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and

vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including but without limiting the generality of the foregoing the right:

. . .

B. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions, to relieve from duty because of lack of work, to discipline, demote, or dismiss for proper cause, and to transfer such employee.

The above outlines the management responsibilities and rights of existing Wisconsin laws, and nothing in the above shall reduce the rights of employee recourse to the grievance procedure as provided within this agreement.

ARTICLE IV

VACANCIES/TRANSFERS

1. In the filling of vacancies which may occur in any of the positions covered by the Agreement, the Employer will post such vacancies for a period of five (5) working days for employees to sign as to their intent to bid for such vacancy, and shall advance or transfer employees covered by this Agreement who are qualified to perform the duties of the position. If two or more employees have equal qualifications, the employee having greater seniority shall be given preference. Any employee may apply for such an internal move provided that twelve (12) months has elapsed since employment or the last internal move by that employee, or mutual agreement to the contrary by both management and the unit. This restriction shall not apply to employees who have been reassigned to their current position.

. . .

3. The Employer shall, as in past practice, continue the testing procedures. Applicants tested for a specific position will be given the same battery of tests.

. . .

9. The twelve (12) month count for the bidding limitation stated in paragraphs 1, 4, and 7 above shall commence on the date the bidding employee accepts the new position.

. . .

ARTICLE XII

GRIEVANCE PROCEDURE

1. A grievance is herewith defined as any dispute or difference between the Employer and the Union or employees so represented with respect to the

interpretation or application of any provision of this Agreement.

. . .

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E. Failure at any step of this procedure by the employer to communicate the decision on a grievance within the specified time limit shall permit the Union to submit an appeal at the next step of this procedure.

F. The time limits specified in this procedure may be extended in any specific instance by mutual agreement in writing.

. . .

### PROCEDURE

STEP 1. Any employee in the bargaining unit, or the union in its own behalf, claiming to have a grievance shall meet with the appropriate supervisor, either directly or accompanied with a union representative, with the object of resolving the matter informally within fifteen (15) working days of discovery.

STEP 2. In the event that the matter is not resolved informally, the grievance stated in writing may be submitted to the President or his/her designee within five (5) working days.

A. Within five (5) working days after receiving the grievance, the President shall communicate his/her decision in writing, together with the supporting reasons.

B. The President shall furnish one copy to the employee who submitted the grievance and one copy to the Union representative.

STEP 3. If the grievance has not been resolved satisfactorily within five (5) working days after receiving the decision of the President, the grievance may be submitted to arbitration in accordance with the procedure in Article XIII, ARBITRATION.

### BACKGROUND

The initial issue in this case is whether the grievance was timely filed. The facts surrounding this issue are as follows. On June 7, 1996, Grievant Barb Schaden formally applied for the position of Registration Aide/Operational Assistant III (hereafter RA III). Schaden had made her application in response to a posting for the vacancy made by the Employer on May 31, 1996. The posting and the position description for the vacancy stated that ". . .(g)eneral typing ability approximately 68 w.p.m. . . ." was a necessary qualification to receive the position.

Schaden had been hired originally by the Employer in 1987 into a non-unit position. In 1989, she was hired as a half-time Operational Assistant III in the Book Store (a bargaining unit

position). In July, 1989 Schaden received a full-time Operational Assistant III position in the Book Store where she remained until she applied for the vacancy in dispute here. After applying for the RA III position, Schaden arranged to take the required typing test under the supervision of Joan Laubenstein, an Operational Assistant in the Business and Marketing Office who

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regularly supervises such testing for the Employer. On June 20, 1996, Schaden took the typing test which amounted to taking two identical typing tests with a break between tests. In accord with the undisputed past practice, the highest of the two grades on the identical tests was then submitted to the Employer in the hiring process for the RA III vacancy.

In her best of two test scores, on June 20th, Schaden received a score of 67 gross words per minute or 63 net words per minute. 1/ On or about June 24, 1996, Schaden spoke to Human Resources Department Employment Specialist Sandy Ryczkowski. Ryczkowski told Schaden that she would not be given an interview for the vacancy as she had not received at least 68 words per minute or more on her typing test.

During the week of June 26, Schaden contacted Union President Sandy Kraft and spoke with Kraft regarding her concerns surrounding both the testing conditions and procedures as well as the use of the word "approximately" in the posting and job description for the RA III vacancy. Schaden also indicated to Kraft that she felt she should have been interviewed based upon the fact that she had received "approximately" 68 (gross) words per minute on her typing test. Kraft went on vacation the following week and returned on July 8, 1996. 2/

Schaden again spoke with Kraft on July 8th regarding the concerns she had raised previously as well as the fact that another internal applicant, Gail Zwicky, (who had been a unit employe for less than twelve months) had received the RA III position. On July 8th, Schaden and Kraft met with Ryczkowski. Ryczkowski indicated that Zwicky had been hired as an outside applicant and had not transferred into the RA III position pursuant to Article IV of the labor agreement. Kraft mentioned the testing problems that Schaden had experienced -- the noise in the test room, the fact that Ms. Laubenstein was moving around during the testing and the fact that the computer which Schaden used did not have a template to indicate any functions of the computer. Kraft also raised the use of the word "approximately" in conjunction with the requirement of "68 words per minute" for qualification for the position. Kraft attempted to settle the grievance with Ms. Ryczkowski at this time, but was unable to do so.

Kraft called a Union Executive Committee meeting for July 10, 1996, and indicated to the Committee that it should deal with Schaden's issues and speak to her regarding the next step. This meeting occurred, but the Executive Committee did not file a grievance on Schaden's behalf at this time. On or about July 19, 1996, Kraft received a call from former Union President Sharon Van den Heuvel wherein Van den Heuvel indicated that she had discovered that Gail Zwicky had been allowed to test on more than one day prior to her receipt of the RA III position.

Also on July 19th, Kraft spoke with Personnel Administrator Evans and tried to settle Schaden's complaints. As settlement had not occurred prior to July 27, 1996, Kraft instructed

Union's Executive Committee to file a grievance on Schaden's behalf. 3/ A formal written grievance was filed on Schaden's behalf on August 5, 1996. That grievance listed the fact that the time clocks in the testing room were not working properly; that loud noises occurred and doors slammed in the room during Schaden's typing test; that Laubenstein (the test proctor) was

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constantly moving around near Schaden while Schaden was testing; that the personal computer Schaden used for the tests did not have a template to indicate its functions; and that Zwicky, who had been hired into the position, had not worked for the District in her prior position for at least twelve months as required by Article IV. The grievance also listed the fact that Zwicky had been allowed to take her typing tests on more than one occasion in order to qualify for the position.

The Employer submitted its answer to the grievance on August 13, 1996. This was more than five working days after the Employer's receipt of the written grievance and the answer was therefore untimely. In its August 13, 1996 answer, the Employer stated, that the grievance had been untimely filed and that the "incidents in question occurred on June 21, 1996." The Union, without objecting to the untimely issuance of the answer, appealed the initial decision of the Employer in writing directly to College President Prindiville on August 30, 1996. On September 4, 1996, Dr. Prindiville responded to the Union's appeal in relevant part as follows:

...

It's my understanding that Step 2 of the formal grievance procedure was covered when the Union and Ms. Schaden formally filed the grievance. Human Resources has historically acted as my designee in such responses.

...

Given all the material presented, I find that it is appropriate that your request be denied and that the response of Human Resources pursuant to Step 2 of the grievance procedure be sustained....

On September 30, 1996, Personnel Administrator Evans, at the request of Union President Kraft, gave the Union a hand-written note stating that the College would have "no problem with extending timeliness on filing for arbitration . . . to 10/15/96." This extension was gained in response to Union President Kraft's request. Neither Kraft nor any other Union officer had previously requested an extension of time or a waiver of the timeliness for filing or processing this grievance.

Union President Kraft stated that it was because new facts kept coming to light in this case that the Union did not earlier file a written Step 1 grievance on Schaden's behalf. Kraft also stated that it was her understanding that the Union could attempt to settle a grievance over an indefinite period of time, so long as the parties were having discussions which might lead to a settlement.

Personnel Administrator Evans 4/ stated herein that it is his general practice that if an extension of time is to be given by the District, he tries to put that in writing. Evans stated that he had no recollection of extending the time limit either verbally or in writing prior to his agreement

to do so on September 30, 1996. Evans stated that it has been his belief that the second step of the grievance procedure starts no later than fifteen days after the employe discovers that they have been aggrieved by an action of the Employer and that therefore, written grievances must be submitted no later than twenty days after discovery. 5/

Substantive Facts: 6/

Prior to July 1, 1990, the Union and the Employer had become concerned about the administration of typing tests for qualification. At this time, the Employer was in transition between its use of memory typewriters and computers to perform typing functions. The parties were also concerned about the impact of testing anxiety upon the results of typing tests; that the Employer's job descriptions were not consistent in regard to references to typing qualifications; and that the Employer was reorganizing its structure and reclassifying employes which resulted in support staff employes being red circled or their jobs being eliminated, causing disruptive bumping in the support staff unit. As a result, Union and Employer representatives agreed to meet to attempt to resolve problems surrounding the typing tests and qualifications. The following memo, which issued June 22, 1990, represents the Union and Employer agreement regarding the proper administration and evaluation of typing tests:

. . .

1. The method of measuring the typing speed for all internal and external applicants should be measured on the basic PC word processor software available in the typing lab. However, during a period of transition, existing unit employees may chose to use either a typewriter or the word processor until July 1, 1991. Should an existing employee wish to use the typewriter, they must make that choice prior to the actual test being given.

2. The performance measure used to evaluate internal and external bidders/applicants shall be changed to:

- Level I: 48 net words per minute (no variance)
- Level II: 58 net words per minute (no variance)
- Level III: 68 net words per minute (no variance)
- Level IV: 68 net words per minute (no variance)

3. The method of calculating the typing speed shall remain the same as the existing procedure

Gross words per minute minus the quantity of {(total errors minus five) multiplied by two}

4. The effective date for the change be July 1, 1990.

During their negotiations regarding the setting in which typing tests should be given, the parties agreed that typing tests should be given in a real office setting which would include both noise and disruption. It is undisputed that the Employer has administered all typing tests according to the terms of this memo since July 1, 1990. The Employer submitted undisputed evidence to show that since at least the 1991-92 school year, unit employees who failed to receive the net words per minute required under the June 22, 1990 memo, were not considered further and were not interviewed for the vacancies for which they had applied. The unrefuted evidence submitted by the District can be summarized as follows:

...

<u>Employee</u>	<u>Position</u>	<u>Test Results</u>	<u>Requirement</u>
Schaden	P701-8/20/92	63 wpm	68 nwpm
	Oper. III, Apprentice	51 nwpm	
Schultz P701 - 8/20/92	Oper. III, Apprentice	74 wpm	68 nwpm
			46 nwpm
Barnick P761 - 5/31/94	Oper. I, Health Receptionist	44 wpm	48 nwpm
			44 nwpm
Clarke	P761 - 5/31/94 Oper. I, Health Receptionist	no results	48 nwpm
			available
Trybek P830 - 9/21/95	Oper. II, T & I Receptionist	58 wpm	58 nwpm
			55 nwpm
Schaden	P860 - 5/30/96	67 wpm	68 nwpm
	Oper. III, Registration Aide	63 nwpm	
Marcelle	P866 - 7/9/96	56 wpm	58 nwpm
	Phone-In/Mail-In Registration	50 nwpm	

It was also undisputed that any employee who applied for a vacancy who had not worked in his/her position for the requisite time period (either 18 months or 12 months) under Article IV, has not been allowed to bid and transfer into a vacancy pursuant to Article IV, but rather has been treated as an outside applicant for the opening. The Employer submitted evidence to show that since at least 1983, employees in such circumstances have been treated as outside applicants, as follows:

...

<u>Employee</u>	<u>Hire Date or Last Internal Move</u>	<u>Position Applied For</u>	<u>Result</u>
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Powers	9/13/95 Information Receptionist	P866	7/16/96 Phone-In/ pass typing Mail-In Registration	Did not requirements
Zwicky	8/14/95 Phone In-Mail In Registration	P860	6/6/96 Oper. III Registration Aide	Accepted P860
Hines	2/21/94 Career Data Specialist 1/2-time		2/6/95 P789 Career Data Specialist - full time	Accepted P789

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Feaker	9/15/86 Career Center		1/1/87 P432 School/ Community Relations	Accepted P432
Feaker	5/27/83 Operational III Veterans/Registration		9/15/83 P299 Operational III Registration	Position offered to another applicant

As stated above, Schaden took her typing tests under the supervision of Joan Laubenstein. Laubenstein stated that since 1991, she has administrated typing tests in the same fashion for the District and that these tests are either scheduled by the employe or by the Personnel Department. Laubenstein stated that she uses two time clocks to time each test so that no errors in timing can be made; and that when someone comes in to test, Laubenstein gives them a few minutes to practice on the computer before she explains the testing procedures and how the test will be scored. Laubenstein stated that on the day Schaden took her typing test, the test site was no more noisy or disruptive than usual and that she (Laubenstein) did not move around the room more than usual during Schaden's test; that Schaden made no complaints to Laubenstein on June 20th regarding Laubenstein's movement around the room or the noise or other conditions pertaining in the room that day. Laubenstein stated that Schaden also asked no questions regarding the use of the computer or the absence of a template on that machine.

Ms. Laubenstein also stated that she has administered the typing tests to all employes and applicants including Schaden and Zwicky since she became test proctor in 1991. Laubenstein stated that employes could take as many typing tests as they wished if interviews for a job they have bid/applied for had not begun. 7/ Union President Kraft also stated that the contract does not limit the number of times employes can take the typing tests during the year.

Gail Zwicky was hired by the Employer in August, 1994 as a Registration Aide II. On or about June 26, 1996 Zwicky applied for the position that is in dispute in this case. Zwicky stated that before she applied for the position, she knew that she would have to be considered for it as an outside applicant because she had not been in her present unit position for 12 months, and that she would only be considered after all internal applicants had been tested. Zwicky stated that she took

the typing test for the RA III position only once, on June 27th; that she exceeded the 68 net words per minute requirement; and that she then took the four other tests required for the position. 8/ On June 27, 1996, Zwicky received a score of 69 net words per minute on the typing test. Test Proctor Laubenstein recalled that Zwicky took the typing test on another day sometime prior to June 27, 1997 and that the first test Zwicky took could have been taken as early as May, 1996. Gail Zwicky received the RA III position on July 5, 1996.

Employment Specialist Sandy Ryczkowski in the District's Human Resources Department, stated that in selecting Zwicky for the vacancy, she considered Zwicky as an outside applicant, as she was not eligible for an Article IV bidding transfer. 9/ Union President Kraft stated that she was aware that employees had been treated as outside applicants if they had no right to the preference available under Article IV. Kraft also stated that there was nothing in the contract to prohibit employees like Zwicky from applying as outside applicants. Both Schaden and Kraft admitted that they were unaware that any employee had ever been given an

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interview who had failed to meet the minimum requirement on the typing test for a vacancy. However, Schaden stated that if Gail Zwicky had in fact been an outside applicant and treated in that fashion, she would only have been allowed to take the typing test on one day, not on two days. 10/

The RA III position in dispute reports to the Registration Manager. The qualifications, general duties and responsibilities of this position read in relevant part as follows:

. . .

**GENERAL QUALIFICATIONS:**

1. High school graduate and a minimum of three year's occupational experience or an equivalent combination of education and experience.
2. General typing ability (approximately 68 w.p.m.)
3. Ability to relate well with others and handle problem and/or pressure situations tactfully.
4. Be able to organize well and work independently.
5. Working knowledge of data processing procedures and CRT equipment. Ability to operate word processor and calculator.
6. Ability to speak to groups and communicate ideas as necessary.
7. Knowledge of District organizational operations/policies and procedures desirable. Ability to work with more complex information and material, analyze

and make necessary decisions. Process complicated forms and data.

8. Ability to develop and write departmental procedures.

9. Be able to coordinate activities and prioritize workload responsibilities.

10. Be able to assume some independent responsibility for a significant district wide function(s).

11. Ability to delegate duties to others.

### **GENERAL DUTIES AND RESPONSIBILITIES:**

1. Organize registration process; supplies, equipment and general information for student registration as well as provide assistance to students and staff during the process; provides direction, assigns work, assists staff by in-servicing, training and instructing.

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2. Responsible for maintaining registration records and files; develop and maintain process for storage of records, inventory and other related activities.

3. Responsible for verification and terminal maintenance of the Master Course Index and Annual Course File; duties include updating changes (aide codes, fees, credits, etc.) and adding/deleting course information.

4. Develop and update procedures for various registration functions; provide direct support to staff and students regarding these procedures; research and organize these procedures.

5. Compile data and organize reports and/or comparisons of registration totals, program revisions, form IV statistics, etc.

6. Answer questions, investigate complaints, discuss problems, explore solutions and provide follow-up on student-related issues.

7. Develop and maintain registration data processing program addition or revision requests; meet and discuss requests with area staff on an on-going basis.

8. Responsible for student promissory note procedures; prepare reports, process notes and follow-up with collection procedures with the District office.

9. Provide information to staff, students and general public regarding state and federal legislation involving registration functions (i.e. veteran's, FTE, statistics, etc.)

10. Develop and implement Inservice (sic) activities dealing with the various registration functions; work with outside agencies to provide assistance (reservists, DVR, Tribal Offices, etc.)

11. Assist with the development and organization of special projects such as microfilming of records, record's (sic) audits, etc.

12. Other related duties as assigned.

. . . 11/

### POSITIONS OF THE PARTIES

#### Union

The Union argued that the grievance was timely filed. It observed that Zwicky had been transferred into the RA III position on July 5, 1996. Because the Grievant's union representative was out of her office until July 8th, this should be the date upon which the grievance was "discovered" for tolling purposes. The Union noted that the contract states that informal Page 12  
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settlement efforts should occur before grievances are filed. The Union argued, therefore, that it was unclear that Zwicky had not been in her prior position for twelve months before being given the RA III position. The Union also contended that Ryczkowski failed to deny the grievance on July 8th.

The Union cited several cases for the proposition that timelines do not begin to run until settlement efforts have been abandoned by the parties. The Union also pointed out that the Employer failed to object to the timing of the filing of the grievance and that its answer to the initial grievance was late. Furthermore, the Union asserted that the Employer's statement in its answer was incorrect -- that the grievance was untimely because facts were known to the Union on the date of Schaden's typing test (June 21, 1996). Finally, the Union claimed that the District did not contest the timeliness of the grievance until the day of the hearing and that the College had engaged in disparate treatment.

The Union urged that the Employer had violated that collective bargaining agreement, which does not allow employees who have worked less than twelve months to "apply" for any openings that arise. The Union contended that the Employer's submission of bargaining history and past practice evidence is not relevant to this case, as the contract language in Article IV is clear and unambiguous. Even if the undersigned finds the contract language unclear, the Union asserted, the evidence of past practice does not clearly apply to Zwicky's case. The Union also asserted that there was no evidence to show that the Union was aware of these prior transfers and had failed to object to them.

The Union asserted that the Employer had treated Zwicky disparately when it allowed her to take the typing test twice. The Union noted that two witnesses (Laubenstein and

Van den Heuvel) testified that in fact Zwicky had taken the typing test twice prior to being selected for the RA III job. In any event, the Union urged that the Arbitrator should resolve any question regarding credibility in favor of the Grievant. Here, the parties' clear contractual intent is to favor more senior employees who bid for positions assuming they are qualified.

### Employer

The Employer argued that because the grievance had not been timely filed it was not arbitrable. In this regard, the Employer noted that WERC Arbitrator Shaw had previously construed the contract language in question consistently with the Employer's view. The Employer noted that the Union knew that Zwicky had not been in her position for twelve months as of July 8, 1996, yet the Union failed to file a grievance until August 5, 1996.

Should the undersigned reach the merits in this case, the Employer argued that it had not violated the contract when it selected Zwicky for the RA III position. On this point, the Employer noted that it had followed the parties' mutually agreed upon testing procedures and that it had used 68 net words per minutes to determine qualifications, which yardstick had been in use since July, 1990. In addition, the Employer noted that the use of the word "approximate" before the words 68 words per minute, was not controlling as both the Grievant and the Union knew that no one had ever been given a position at the college unless they met at least the 68 net words per minute standard.

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The Employer argued that Schaden's claim that she had been disparately treated by the District was unwarranted. The Employer asserted that Schaden had not met the minimal requirements for the RA III position and that there was insufficient proof to show that Zwicky had taken the typing test two times after interviews for the position began. In this regard, the Employer noted that any employees could take typing tests throughout the year and have those test results count toward qualification, so long as they did not attempt to take more than one test after interviews for a particular position opening began. The Employer further noted that this approach was well known to both the Grievant and Union representatives and had been agreed upon long ago by the parties.

The Employer asserted that its testing procedures did not discriminate among applicants. The District noted that the Grievant's allegations were unfounded that testing conditions on the day of her tests were poor. Furthermore, the Employer noted that all employees and candidates who tested had been exposed to the same types of conditions that the Grievant was exposed to and that Ms. Laubenstein stopped walking around the room when the Grievant asked her to on June 20th, despite the fact that Laubenstein found this unusual. The District noted that despite Laubenstein's accommodation of the Grievant's request, Schaden did worse on her second typing test than she had on the first.

The Employer urged that as the collective bargaining agreement contains inherent management rights, these support the Employer's right to determine qualifications of all applicants. In this regard, the Employer argued that management has the right to determine qualifications and that Arbitrators will generally hold that only arbitrary, capricious,

discriminatory, clearly wrong or bad faith determinations of such qualifications will be set aside. In the District's view, management had used an objective series of tests to assist it in determining qualifications in this case. The Employer argued that it had the implicit right to use such a series of tests and that there is a strong arbitral preference for such objective tests as support for a judgment of qualifications. The District argued that the Union had failed to prove that it had acted arbitrarily or in a capricious manner. The Employer argued that where, as here, the Grievant received scores of 61 net words per minute and 67 net words per minute, Grievant was clearly not qualified under the Employer's procedures and standards.

The Employer contended that the contract does not prohibit it from taking applications from among its employees within the bargaining unit if they treat them as if they were outside applicants where they lack bidding rights under Article IV. The District noted that this approach is supported not only by past practice but also by bargaining history where, as here, there were no internal qualified bidders, the District could select Zwicky as an outside applicant who had met the Employer's minimal qualifications of 68 net words per minute. Therefore, based upon its arguments, the District sought denial and dismissal of the grievance in its entirety.

### **REPLY BRIEFS**

#### **Union**

The Union argued that the Employer's contention that the grievance is untimely is irrelevant, as the grievance was filed twenty days after the Union's discovery of the injury to Ms. Schaden. The Union contended that the Shaw Award is distinguishable from this case as the former case concerned a mutually agreed-upon extension of time for filing the grievance Page 14  
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which the Union clearly missed. The Union urged that both bargaining history and the unambiguous contract language support the Union's view that only an employee who has been in his/her position for twelve months can "apply" for a new position. The Union observed that if the undersigned agreed with the Employer's interpretation of Article IV, this would abrogate the limitations contained in that article. The Union asserted that there must have been mutual agreement in the past to allow employees who failed to meet the employment requirements of Article IV to nonetheless receive new positions.

The Union also contended that the Employer's testing procedures were not fairly administered in this case. First, the Union asserted that the documentary evidence supported the Union's contention that employees have only been allowed to take the typing test once if they are applying for a specific opening and that here, Zwicky was allowed to take the typing test twice after she applied/bid for the RA III position. Thus, the Union contended that the testimony received from Ms. Laubenstein was inaccurate.

The Union further argued that the Employer failed to investigate Van den Heuvel's statements and it failed to successfully attack her credibility as a witness herein. In addition, the Union noted that Laubenstein corroborated Van den Heuvel's statements when she (Laubenstein) stated that Zwicky had taken two typing tests after she bid for the RA III position. As a remedy, the Union requested that the RA III position be reposted for internal applications and that if Grievant Schaden applied and was the most senior qualified internal applicant that she should then

receive the position.

Employer:

The Employer argued that the Union has failed to rebut its timeliness arguments. In this regard, the Employer noted that Union President Kraft could have easily gotten clarification regarding whether Zwicky was part-time or full-time and that it was Kraft's responsibility to do so. The Employer also pointed out that the Union's assertions that the Employer never raised the timeliness issue until the hearing herein was incorrect, as the Employer's August 13th answer raises the timeliness issue.

The Employer urged that the language of Article IV does not prohibit it from considering applicants for positions who have no bidding rights under the contract. In the Employer's view, it would be illogical to conclude that if there are no qualified internal applicants, the Employer must select an external applicant and refuse to consider internal applicants who are qualified but who possess no contractual bidding rights. The Employer urged that the procedure used to hire applicants herein supports the Employer's position in this case as there were no qualified internal applicants and there is nothing in the contract to prohibit the Employer from treating internal applicants as external under the contract.

In addition, the Employer asserted that the Union's evidence of bargaining history missed the real focus of Article IV. The Employer contended in this regard that Article IV addresses only bidding rights by seniority and that neither the contract nor the bargaining history or past practice limits the Employer's right to consider current employees who have no bidding rights as outside applicants.

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The Employer argued that Schaden could have taken as many typing tests as she chose prior to the start of interviews for the RA III position, and that no evidence was presented that Schaden asked and was denied a second opportunity to test for the RA III position after her initial typing test. The Employer also noted that Schaden had 13 days to qualify for the position, from June 7th when she signed the bid sheet to June 20th, when she took her scheduled typing test. Thus, the Employer urged that Schaden could have taken as many tests as she chose between these two dates.

The Employer argued that Zwicky testified that she only took the typing test on one occasion and that this evidence was not contradicted by specific evidence to the contrary in this record. In regard to the Union's requested remedy, the Employer urged that there is no basis in the record for the Union's request that Schaden be given the RA III position, as Schaden proved to be unqualified for that position and even assuming that Zwicky should not have been given the RA III position, this does not mean that Schaden should be given the position outright. For all of these reasons, Respondent sought the denial and dismissal of the grievance in its entirety.

**DISCUSSION**

## **Procedural Arguments:**

The District has argued that the grievance was not timely filed. In my view, the grievance was timely filed based upon the following analysis. It is clear that on June 24, 1996 the Grievant discovered that Gail Zwicky had been given the RA III position when she spoke to Sandy Ryczkowski, who told her that she would not be given an interview for the vacancy as she had not received at least 68 net words per minute on her typing test. Article XII provides that any employe in the bargaining unit or the Union on its own behalf "shall meet with the appropriate supervisor . . . with the object of resolving [a grievance] informally within fifteen (15) working days of discovery". This clause provides that a meeting between the parties must occur within fifteen days of the discovery of an injury or grievance. I note that on July 8, 1996 (within fifteen working days of Schaden's discovery of her injury) Union President Kraft, Schaden and Ryczkowski met and at this time Ryczkowski indicated that Gail Zwicky had been hired as an outside applicant and had not been transferred into the RA III position pursuant to Article IV of the labor agreement. Kraft stated that she was unable to settle the grievance with Ryczkowski at this time. It is not determinative that on July 8, 1996 Ryczkowski failed to tell Kraft and Schaden that Zwicky had not served twelve months in her previous position at the time she was awarded the RA III position. In my view, on July 8th, Kraft and Schaden had sufficient facts to file the instant grievance.

Article XII further provides that in the event that a dispute is not resolved informally at an initial meeting within fifteen days of discovery of an injury, ". . . the grievance stated in writing may be submitted to the president or his/her designee within five (5) working days." In this regard, I note that on July 10, 1996 Union President Kraft called a Union Executive Committee meeting and indicated to the Committee that it should deal with Schaden's issues and speak to her regarding the next step of her grievance. However, despite Kraft's instructions to the Committee, the Union Executive Committee failed to file a grievance on Schaden's behalf

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at this time. A literal application of Article XII, Step 2 demonstrates that a written grievance should have been filed on or about July 23, 1996. However, on July 19, 1996, Kraft spoke with Personnel Administrator Evans and specifically attempted to settle Schaden's grievance. When Kraft was unable to settle Schaden's grievance at this time, she instructed the Union's Executive Committee to file a grievance on Schaden's behalf. However, Schaden's grievance was not filed until August 5, 1996, eight days after the date upon which it should have been filed.

Despite the apparent tardiness of the grievance, as the Employer's answer was received more than five days after the Employer's receipt of the grievance herein, under Article XII, Section 1, E, the Union had the right to appeal this case to the next step of the grievance procedure without penalty. 12/ I note that when the Union submitted its next appeal to the President the District failed to assert that the Union thereby failed to follow proper procedures. Therefore, based upon all of the circumstances herein, I find that the grievance is properly before me for determination of the substantive issues. 13/



## Substantive Issues:

The Union has asserted that Zwicky was unfairly granted the advantage of being able to take the dual typing tests twice while Schaden was not allowed this advantage. 14/ In this regard, I note that the contract is silent regarding testing procedures, implicitly leaving this to the Employer's discretion. Furthermore, the contract is silent regarding the content of job postings and it fails to grant the Union or an aggrieved employee the right to grieve the content of job postings. Given the silence of the agreement, evidence of past practice and bargaining history regarding proper testing procedures as well as the minimum words per minute necessary to qualify for certain positions at the College becomes relevant.

The undisputed evidence showed that the parties agreed, effective July 1, 1990, that the minimum net words per minute required on various typing tests would not allow for any variation from the number of net words per minute required in the job posting. It is also undisputed that since July 1, 1990, the Employer has administered all typing tests according to the terms of the parties' agreement dated June 22, 1990. Furthermore, the Employer submitted unrefuted evidence that since at least 1991, seven employees in the bargaining unit who failed to receive the minimum net words per minute on typing tests for particular positions were denied those positions. I note in this regard that the Grievant, Barbara Schaden, was twice denied positions (once in 1992 and a second time in May, 1996) because she failed to receive the minimum net words per minute for the positions for which she had applied. 15/ In addition, I note that Article IV, Section 3 states that the Employer "shall, as in past practice, continue the testing procedures." Thus, to treat Schaden differently (to allow her to use a score of 67 gross words per minute or 63 net words per minute to qualify for the RA III position in dispute here) would be inconsistent with the undisputed past practice surrounding the District's testing procedures. The fact that the job posting for the disputed position used the word "approximately" in conjunction with 68 words per minute does not require a different conclusion in light of the undisputed evidence regarding the June 22, 1990 memo which memorialized the parties' agreements regarding the proper administration and evaluation of typing tests. 16/

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The Union also argued that the fact that Zwicky was allowed to take the typing test twice requires a conclusion that the District failed to treat Schaden fairly in denying her the RA III position. As a preliminary matter, in my view, the evidence failed to show that Zwicky actually took the typing test on two days after she had signed the posting for the disputed position. In this regard, I note that Zwicky denied having taken the typing test twice; and that Laubenstein had no recollection regarding the specific date upon which Zwicky may have taken a typing test prior to the one she took on June 27, 1996. Furthermore, I find Van den Heuvel's testimony unhelpful as she could state no exact dates for her conversations with Zwicky, providing inconclusive evidence to show that Zwicky improperly took the test on two different days in late June, 1996 after the interviews for the RA III position had begun.

The evidence is clear in this case that employes can take typing tests as many times as they like throughout the school year and that they can place the results of these tests on file with the Employer. 17/ Thus, even assuming arguendo, that Zwicky had taken the typing test on two separate occasions, once prior to June 27 and once on June 27, 1996, this fails to show that this was improper. Indeed, Schaden could also have taken the typing test on two occasions had she chosen to do so before interviews began for the position opening.

The Union has contended that Article IV Vacancies/Transfers was applied in this case. I disagree. The evidence is clear that Zwicky was treated as an outside applicant for the disputed position and that as such, she was given no preference under Article IV. 18/ In reaching this conclusion, I note that Article IV, Section 1 indicates that unit employes shall be advanced or transferred if they are "qualified to perform the duties of the position . . . and twelve (12) months has elapsed since employment or the last internal move . . ." by the employe. The District submitted undisputed evidence that since 1983 four employes on five occasions have been treated as outside applicants because they have not been able to qualify for Article IV treatment. 19/ Furthermore, Union President Kraft admitted that she was aware that employes had been treated as outside applicants in the past if they had no right to an Article IV preference. In the circumstances of this case, therefore, the Union failed to prove that Zwicky had in fact been advanced or transferred pursuant to an Article IV preference in her favor.

There is no doubt that Schaden lacked the specific qualifications for the RA III position as determined by the Employer. In this regard, I note that she failed to receive the minimal requirement of 68 net words per minute on her typing test for the RA III position. As Schaden failed to meet this minimal qualification, the District had no responsibility or obligation to consider her further in the selection process for a successful RA III applicant. Thus, the District's consideration of Zwicky after it had determined Schaden to be unqualified was permitted under the collective bargaining agreement.

In all the circumstances of this case, no violation of the collective bargaining agreement has occurred and the grievance shall be dismissed in its entirety per the following

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### AWARD

The grievance is properly before the Arbitrator. The District did not violate either the collective bargaining agreement or past practice by the manner in which it administered the typing test to the Grievant and Zwicky, or by its refusal to interview the Grievant or by considering and selecting Gail Zwicky to fill the position of Registration Aide/Operational Assistant III on July 5, 1996. Therefore the grievance is hereby denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 14th day of October, 1997.

Sharon A. Gallagher /s/  
Sharon A. Gallagher, Arbitrator

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#### ENDNOTES

1/ It is undisputed that Schaden had taken a pair of typing tests in 1991 or 1992 and that the results thereof had been placed on file for her. However, as the results of typing tests are, by past practice, only good for one year from the date of the tests, Schaden had to take the Employer's typing tests again in June, 1996 in order to be considered for the RA III position opening.

2/ Schaden did not contact any other Union representative between June 26 and July 8, 1996.

3/ Kraft went on vacation on July 27, 1996.

4/ Evans was hired by the College in 1972 as a faculty member. He was President of the Union for several years as well as Vice President of the Union and editor of the faculty newsletter. Evans also served several years as Chief Negotiator for the Union and Grievance Chair. Since 1979, Evans has been in Personnel Administration for the Employer (a non-bargaining unit position), and since 1982, Evans has been Chief Negotiator for the Employer on contracts covering unit employees. Evans stated that the contract reached three years ago had been reached through consensus, so that there was no spokesman at the table for the College per se.

5/ The Employer also submitted a grievance arbitration award issued by WERC Arbitrator Shaw on May 2, 1994 involving the same unit and the issue whether a grievance had been timely filed under the exact language that appears now in Article XII - Grievance Procedure. NORTHEAST WISCONSIN VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT, CASE 79, NO. 49775, MA-8057 (SHAW, 5/94).

6/ Although the instant grievance was not timely filed and the Employer objected thereto early on, the Employer waived its right to object on the grounds of timeliness by filing a late answer to the grievance under Article XII, Section 1E. Later, the Employer also granted the Union an extension of time to file for arbitration. Therefore, as detailed infra, I have determined the merits hereof.

7/ Schaden stated that she knew that she could take the typing test as often as she wanted during any particular year, that she could place the results of any of those tests on file with the Employer and that the score would be effective for a period of one year after she had taken the test.

8/ Zwicky was questioned regarding conversations she had with both Schaden and former Union President Sharon Van den Heuvel. Schaden stated that Zwicky had two conversations with her regarding the RA III vacancy. In one of these conversations, Schaden stated that Zwicky admitted that she could not type 68 words per minute or greater, that she had attempted to do so but had failed and she would be withdrawing her name from consideration for the opening. Van den Heuvel stated that Zwicky told her on a day in late June, 1996, that she (Zwicky) had taken the typing test for the RA III position and that she had failed. The next day, Van den Heuvel stated, Zwicky told her that she had taken the test a second time and that she had passed with 20 more words per minute on the test than she had the day before. Zwicky

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stated that she had no conversations with Schaden during June except to say hello and that she merely told Van den Heuvel that she thought typing tests were horrible and that she did not want to take a typing test. Zwicky specifically stated that she took her typing test for the vacancy on June 27, 1997.

9/ Ryczkowski's predecessor in her position, Mary Steffin, stated that it was her consistent practice while she was in the Employment Specialist Position (from the mid-1980's until 1993), to treat employees who had not worked in their positions long enough to be considered internal bidders as outside applicants.

10/ Schaden's typing test scores taken after June 20, 1996 are not relevant to this case. However, had Schaden taken one or more typing tests prior to June 20th, these tests would have been relevant, according to the past practice proven herein.

11/ The Union also presented evidence regarding the bargaining history surrounding Article IV, Section 1 preference to be given to the senior of two or more employes with equal qualifications who apply for an internal transfer. This evidence will not be recounted here, as I have found that Zwicky was not treated as an internal bidder under Article IV and because Zwicky possessed better qualifications (69 net words per minute) than were required for the position received at the time she applied for the RA III position.

12/ The fact that the Union failed to raise the untimeliness of the District's answer does not require a different conclusion as Article XII, Section 1, Section E states that failure "at any step" of the Employer to submit a timely response will allow the Union to submit a proper appeal to the next step of the grievance procedure.

13/ The Union's assertion that the Employer did not contest timeliness in its first answer (August 13, 1996) is incorrect. I note that the Union was correct in its assertion that Schaden did not "discover" the injury on the day that she took the exam, as she might have nonetheless received the position. Schaden knew that she had not received the position for a certainty on June 24, 1996 when she spoke to Ryczkowski. In addition, I note that Personnel Administrator Evans extended the time limit for the Union to appeal to the WERC in writing in this case despite the fact that the Union had (according to the District) previously untimely filed the grievance in this case. Finally, I find the Shaw Award inapposite, as it concerned a written agreement by the District to extend the deadline for filing a grievance.

14/ In the original grievance, the Grievant also asserted that the circumstances of the typing test she took (noise in the room, the clocks used for the timing, the lack of a template for her computer) were unfair or inappropriate. The Union failed to argue that any of these items resulted in Schaden's being disparately treated by the Employer either at the hearing or in its briefs. Therefore, these items, which were originally listed in the grievance, have not been addressed herein.

15/ I note that no grievance has previously been filed regarding the meaning or application of the minimum net words per minute required on the District's typing tests.

16/ As the contract fails to grant employes or the Union the right to grieve the content of job postings and as nothing in the contract guarantees that such job postings (drafted by the Employer pursuant to its management rights) shall be error free, I find that the use of the word "approximately" does not violate any provision of the collective bargaining agreement. Nor does the use of the word "approximately" in the job posting for the disputed position bind the Employer

to accept less than the minimum qualifications for the position.

17/ Schaden admitted that she was aware of these facts and that she knew that the results placed on file with the District would be effective for a period of one year from the date of the test.

18/ I note that in her testimony, Ms. Schaden urged that Zwicky was not treated as an outside applicant because she had been allowed to take the typing test twice which would not have been available to an applicant off the street. As a bargaining unit employee, Zwicky had the right, just as Schaden, to take qualifying typing tests throughout the year and to register the results of those tests if she chose. Thus, I do not find Schaden's argument persuasive in this case.

19/ I note, however, that the Union made the undisputed assertion that it was unaware that these five instances of unit employees being treated as outside applicants had occurred.

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