BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DODGE COUNTY TECHNICAL AND SUPPORT EMPLOYEES LOCAL 1323-G, AFSCME, AFL-CIO

and

DODGE COUNTY

Case 198
No. 55286
MA-9967

Appearances:

Mr. Sam Froiland, Staff Representative, AFSCME Council 40, on behalf of the Union.

Davis & Kuelthau, S.C., by **Mr. Roger E. Walsh**, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Juneau, Wisconsin, on September 9, 1997. The hearing was transcribed and the parties thereafter filed briefs and reply briefs that were received by December 1, 1997.

Based upon the entire 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 Article XV of the contract when it awarded the posted Administrative Assistant position to Carol Lemke and, if so, what is the appropriate remedy?

BACKGROUND

The County on March 5, 1997, 1/ posted an Administrative Assistant position in the Corporation Counsel's office (Joint Exhibit 4), which stated:

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Full-time -- 40 hours per week

Salary: $9.90 - 10.762 - 11.053 - 11.322 - 11.574 - 11.819 (1996 rates)

Overall Purpose/Summary: Under the general direction of Assistant Corporation Counsels, provides administrative assistance/secretarial services to Corporation Counsel's office.

Job specifications include but are not limited to: high school diploma or GED equivalent, including or supplemented by typing or personal computer/word processing courses and four (4) years experience preferably in a legal setting, or equivalent combination of education and experience which provides considerable knowledge of legal terminology and court practices/procedures, working knowledge of garnishment, guardianships, reciprocal actions, real estate transactions, and IN-REM proceedings, ability to accurately enter information into computer/word processor at rate equivalent to 70 wpm. Ability to take notes in abbreviated form and transcribe them at rate equivalent to 100 wpm, maintain accurate/complete records and prepare clear/detailed reports, and other skills and abilities normally associated with administrative position of this type.

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Said posting thus did not mention whether a test would be administered for said position.

Bargaining unit employes Clara Marx, Nancy Deck, and Kari Pursley bid for said position. In addition, Carol Lemke - then a temporary employe who was filling in for the vacated Administrative Assistant position - bid for it.

After they had bid, the County told Marx, Deck, and Pursley that they had to take a shorthand test because the ability to take shorthand was one of the essential features of the Administrative Assistant's position. Marx, a Typist II, refused to take the test. Deck, a Legal Secretary in Child Support, and Pursley took the test and failed it, hence leading to their disqualification. Lemke previously worked as a legal secretary for another employer, but nevertheless was required to take the steno test, which she passed on March 31. The County awarded Lemke the Administrative Assistant's position because she was the only qualified applicant at that point. The Union on April 7 grieved the County's action, hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union argues that the County violated the contractual seniority provision set forth in Article XV of the contract because the County improperly insisted that applicants take a shorthand test even though the posting did not refer to a test; because the test did not meet all of the criteria needed to constitute a valid test; because the County gave too much weight to the shorthand requirement since that represents only a "minimal" part of the overall job; and because more senior applicants were qualified to perform all other listed duties. It further claims that "Lemke was favored by current Corporation Counsel employes"; that the "decision to test was made after the posting period was completed"; and that prior Corporation Counsel Legal Secretaries "were not tested for shorthand prior to hire." As a remedy, the Union asks that the most senior, qualified applicant be given the position.

The County, in turn, contends that it has the unilateral right to establish minimum job qualifications pursuant to Article III of the contract; that there is nothing in the contract which requires the County to announce in a job posting whether job applicants must take a test; that it therefore can insist on a testing requirement; that the ability to take shorthand notes has always been part of the Administrative Assistant's job; and that, as a result, it properly passed over all applicants who either refused to take the test (Marx) or who took it and failed (Deck and Pursley).

DISCUSSION

The resolution of this case partly turns on Article III of the contract, entitled "Management Rights", which states:

. . .

> Except as hereinafter provided, the Employer will have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of work and all matters pertaining to the management and operation of the County, including the hiring, promoting, transferring, demoting, suspending or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this Section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

"Except as hereinafter provided," the County under this proviso thus reserves the right to determine matters involving the "promoting" of employes, along with the right to pass upon the "capabilities of the Employees. . ." The County therefore can test employes in order to determine which, if any, employes should be promoted since that is one way to determine the "capabilities" of its employes and since it is well-established that: "management is entitled to use any method to determine ability so long as the method used is fair and nondiscriminatory." How Arbitration Works, Elkouri and Elkouri, p. 845, (5th Ed., BNA, 1997). Such methods include testing. Id. at 847.

That being so, it must be determined whether any other parts of the contract limit the County's right to administer tests as part of its promotional procedures.

The Union cites Article XV, entitled "Seniority Rights", in support of its claim that such testing is not permitted, at least to the extent relied upon by the County here. Article XV states:

ARTICLE XV
SENIORITY RIGHTS

15.1 It shall be the policy of the Employer to recognize seniority.

15.2 Seniority shall be defined for purposes of the Agreement as the net credited service of the employee. Net credited service shall mean continuous employment in the County, beginning with the date on which the Employee began to work after last being hired. However, it is understood that job posting preference shall be given first to department seniority and then to County seniority. The department seniority shall be defined as net credited service within the department. Department and County seniority shall not include unpaid leaves of absence.

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15.6 Seniority shall apply in promotions, transfers, layoffs, recall from layoff and vacation selection as hereinafter provided.

15.7 **Job Posting.** Whenever a vacancy occurs which Management desires to fill or it is known that a new job will be created, the following procedure shall apply:

15.71 The job vacancy shall be posted on union bulletin boards for a period of five (5) workdays and Employees may apply for such postings during this period.

15.72 Selection of applicants to fill job vacancies shall be determined by the Employee's skill, ability and seniority. Where all factors are relatively equal, the Employee with the greatest seniority shall be entitled to preference.

15.73 When objections are made by the Employer regarding the qualifications of an Employee to fill a position, such objections shall be presented to the Union Committee for consideration. If there is any difference of opinion regarding the qualifications of an Employee, the Union may take the matter up for adjustment under the grievance procedure contained in Article XVI of this Agreement.

15.74 The County Personnel Director may make temporary assignments to the position until any dispute with respect to those positions is resolved.

This language restricts the County's unfettered discretion to promote employes because it mandates that seniority must be considered when employes bid for a posted position and because it provides: "Where all factors are relatively equal, the Employee with the greatest seniority shall be entitled to preference."

However, there is nothing in this part of the contract - or any other part of the contract for that matter - which expressly prohibits the County from administering tests for promotional opportunities. As a result, the County can test employes pursuant to the management rights which are reserved to it in Article III, supra.

The Union nevertheless claims that a shorthand test was improper here because this marked the first time that a steno test was administered and because shorthand only represents a "minimal" amount of the work that an Administrative Assistant must perform.

The record shows otherwise. Corporation Counsel John F. Corey testified that when he was an Assistant Corporation Counsel, he regularly asked the then-Administrative Assistant to take shorthand over the telephone and that he asked her to do so about 150-200 times a year. Corey also said that the Administrative Assistant must regularly fill in for the Corporation Counsel's Secretary when she is absent and that she at that time must be able to take dictation. Corey added that Assistant Corporation Counsels at present also regularly utilize the shorthand skills of the Administrative Assistant.

For her part, Lemke testified about the many times where she has been required to take dictation and County Exhibit 2 reflects some of those instances. In addition, Assistant Corporation Counsel Joseph Ruf, III, testified that he regularly dictates most of his work because taking dictation in longhand would not work.

Given this testimony, I find that stenographic skills are hardly "minimal" and that, as a result, the County could legitimately reject applicants who failed to meet the posted requirement that they take 100 words per minute.

The Union also argues that the County never before administered a steno test and that it did so here only in order to secure Lemke's hire. The record shows that former Legal Secretary Harkins worked as a Legal Secretary for about 10 years before her hire and that she was completely proficient in taking steno notes. As a result, the County legitimately concluded that there was no need to test her for this skill. In addition, Bobholz took and passed such a test when she was initially hired in the late 1950's. Marx never took a steno test when she worked in the Juvenile Office as a Legal Secretary about 10 years ago. That job, though, is different from the one here because taking steno is such an essential part of the Administrative Assistant's position. Given all this, I conclude that the County did not err when it insisted that applicants for this position had to take a steno test.

The Union also complains that the County did not measure all of the listed job requirements and qualifications and that it excluded applicants only because they failed to satisfy one of the job's requirements - i.e. the ability to take steno. It is up to an employer, however, to determine whether it will administer a test for each and every component of a job, just as it is up to an employer to determine whether an applicant's failure to perform an essential skill outweighs an applicant's ability to perform all other skills. Moreover, even assuming arguendo, that the County failed to properly test for all aspects of the Administrative Assistant's position, Lemke was the only applicant who is proficient in taking steno. That being so, the County was free to award her that position since she had previously worked as a legal secretary for another attorney, thereby showing that she had some mastery of a legal secretary's job.

Contrary to the Union's claim, the County therefore did not violate the principle enunciated in How Arbitration Works, supra, p. 851, to the effect that: "the employer may not base its determination of ability solely upon the results of a test but must consider other factors and evidence." [footnote citation omitted] For this quoted principle goes to a separate issue; i.e. whether an employer can refuse to promote an employe without looking at an employe's other on-the-job qualifications and experience. That is a separate question of whether an employe can be denied a promotion where said employe: (1), has not demonstrated any on-the-job experience in taking steno; and (2), fails to pass a steno test. In other words, if an employe in the past has not demonstrated any experience or ability to do a particular job function, an employer is certainly free to test for that function where, as here, it is an integral part of an Administrative Assistant's overall job duties.

The Union also asserts that the County erred in administering a steno test because the Administrative Assistant posting did not refer to any testing requirement. In this connection, Personnel Analyst Marlene Zarling testified that County postings hardly ever refer to any testing requirements; that the Union in the past has never complained over that fact; and that applicants for all technical support jobs that require typing must take a typing test.

Zarling's testimony establishes that the County here followed the same testing notice (albeit for different jobs) that it has followed in the past and that the Union before now never complained about it. Absent any such prior objection, and absent any contract language requiring the County to post any testing requirement, the County did not violate the contract when it followed that same procedure here.

The Union argues otherwise by citing my ruling in MARINETTE COUNTY COURTHOUSE UNION, LOCAL 1752, AFL-CIO V. MARINETTE COUNTY, Case 159, No. 54301, MA-9650 (Greco, 9/97), wherein I ruled that the employer there was required to include a testing requirement in its posting for a Human Services Intake position. There, though, there was no well-established past practice showing that the employer in the past had a history of not including a testing requirement in its job postings. Here, by contrast, the Employer on about thirty or so occasions has posted jobs without stating that a test would be administered. This question of past practice is dispositive because it shows how the parties have effectively administered contractual job posting procedures. That is why - absent clear language in the contract - notice of testing may be required in one job setting, but not in another.

However, the County came very close to violating the contract when it failed to tell all applicants ahead of time that they would be taking a steno test. Thus, Deck testified without contradiction that she was told about the test only when she showed up to take a typing test. The County's failure to tell her about the steno test before then therefore prevented her from practicing for the steno test ahead of time, which was something she certainly was entitled to do.

If the County's failure were prejudicial to Deck's right to be fairly considered for the Administrative Assistant's position, the grievance would be sustained on this basis alone. Luckily for the County, though, Deck was honest enough to admit that she cannot pass a test requiring a speed of 100 words a minute and that: "I don't use it [i.e. steno skills] enough that I'm proficient at it." Given this admission, the County's actions cannot be overturned because of its failure to give Deck sufficient time to prepare for its unannounced steno test. Nonetheless, the County is being put on notice via this decision that it will be skating on very thin ice if it ever again fails to give employes sufficient preparation time before giving them a proficiency test.

Marx - who said she never needed any steno skills when she formerly worked as a Legal Secretary in the Corporation Counsel's office - also has a legitimate basis for complaining that she initially was told by Corporation Counsel Corey and Zarling that she would be interviewed for the job even though she had refused to take the steno test because she knew that she would not pass it. Having promised that interview, the County certainly should have kept its word by at least giving her the courtesy of an interview. Courtesy, after all, is something that should be accorded to each and every employe even though it is not mandated in the contract. Its failure to do so here, however, did not violate the contract because an employer generally is not required to interview job applicants who refuse to take an appropriate test, as any such refusal automatically disqualifies them from further consideration.

The Union also asserts that the entire posting here was flawed because Shirley Bobholz, now the Corporation Counsel's Secretary, is a client of Lemke's hairdresser husband, Michael Lemke. 2/ The record, though, does not bear out this claim since Bobholz credibly testified that she did not try to influence Lemke's hiring and since there is not one iota of evidence in this record showing otherwise. 3/

Having determined all of the above, one final word is necessary: while the County was not required to list a testing requirement on its posting, it would have been far better for it to have done so since that would have obviated the Union's claims that the testing was added only to aid Lemke and to disqualify the other applicants. While the Union's claim is without merit for the reasons stated above, it is entirely possible that similar suspicion may arise in the future if this situation is ever repeated. That is why it is in the County's own self-interest to list <u>all</u> testing requirements in any future postings. But, since I do not have the power to require the County to provide such information, it is up to the County to decide for itself whether it should follow such a course.

In light of the above, it is my

AWARD

That the County did not violate Article XV of the contract when it awarded the posted Administrative Assistant position to Carol Lemke; the grievance is therefore denied.

Dated at Madison, Wisconsin, this 23rd day of February, 1998.

<u>Amedeo Greco /s/</u>
Amedeo Greco, Arbitrator

ENDNOTES

1/ Unless otherwise stated, all dates hereinafter refer to 1997.

2/ Bobholz also testified that she had to take dictation on a "daily basis" when she formerly served as the Administrative Assistant.

3/ This also is why there is no merit to the Union's claim that the testing requirement was instituted after the posting period was completed, as Zarling credibly testified that the decision to test was made before the posting.

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