BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARINETTE COUNTY COURTHOUSE EMPLOYEES, LOCAL 1752, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

MARINETTE COUNTY, WISCONSIN

Case 169
No. 56120
MA-10182

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311-6051, appearing on behalf of Marinette County Courthouse Employees, Local 1752, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Frank M. Ganzlmar, Human Resource Director, Marinette County, 1926 Hall Avenue, Marinette, Wisconsin 54143-1728, appearing on behalf of Marinette County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Connie Gisenas, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on April 22, 1998, in Marinette, Wisconsin. The hearing was not transcribed. The parties filed briefs and a reply brief or a waiver of a reply brief by September 11, 1998.

ISSUES

The parties were not able to stipulate the issues for decision. I have determined the record poses the following issues:

> Did the County violate the parties' collective bargaining agreement when it denied the Grievant the opportunity to take the qualifying examination after she signed the June 9, 1997 posting for a Civilian Corrections Officer, and when it subsequently deemed her not qualified for that position?
>
> If so what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2

REPRESENTATION AND MANAGEMENT RIGHTS

. . .

2.03 Management Rights. The Employer possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

. . .

B) . . . and to determine the competence and qualifications of Employees . . .

G) Such authority shall not be exercised in a manner which violates the provisions of this Agreement.

. . .

ARTICLE 4

GRIEVANCES PROCEDURE

4.01 Grievance Procedure. Should differences arise between the Employer and Employees or the Union, this procedure shall be followed:

. . .

ARTICLE 5

NEW JOBS, VACANCIES

. . .

5.02 Filling a New Job or Vacancy. A new job or vacancy within the County shall be filled as follows:

A) Posted on the County bulletin board five (5) working days before the job operation begins.

. . .

C) Employees desiring posted jobs will sign the posted notice or make a written application to the department head concerned.

5.03 Awarding Bid on New Job or Vacancy. At the end of the bidding period, the vacancy or new job will be awarded on the basis of the following provisions:

. . .

B) Bargaining unit Employees from the department in which the vacancy exists shall have first opportunity to fill the position if qualified.

C) If no bargaining unit Employee from the department applies or qualifies, it shall be open to any bargaining unit Employee from any department if s/he is qualified.

D) If no bargaining unit Employee bids on the posted job and is qualified, the County shall have right to recruit personnel from outside the workforce.

E) The bargaining unit Employee shall demonstrate h/er ability to perform the job posted within thirty (30) days for Group B and sixty (60) days for Group A employees, and if deemed qualified by the Employer, shall be permanently assigned to the job. . . .

ARTICLE 6

SENIORITY

. . .

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. . . .

BACKGROUND

The grievance form, filed on June 24, 1997, states the relevant background thus:

> (The Grievant) posted for a Civilian Correction Officer position in the Sheriff's Department. On 6/17/97, Chief Deputy Waugus informed (the Grievant) verbally that she was not allowed to test for the position. She was the only bargaining unit member who posted for the position. She was not given the trial period to demonstrate her ability to do the job.

At the time she signed the posting, the Grievant was a Secretary in the Records Department of the Sheriff's Department. She had served in that position for roughly nine years. She has also served the County as a Dispatcher and, for roughly one month, served as a Matron.

The grievance form cites the second Civilian Corrections Officer (CCO) posting signed by the Grievant, and a review of the background of the grievance starts with the first posting.

The Initial Posting and the Screening Process

The County posted a permanent, part-time CCO position on April 17, 1997. The position was 92% of a full-time equivalent (FTE) position, and noted the successful applicant "(m)ust complete a written and oral examination." The Grievant and Lynn Grosso signed the posting. After the completion of the posting period, Chief Deputy Michael Waugus informed the Grievant and Grosso that they would have to take a qualification test in Brookfield.

Police Consultants, Inc. (PCI) administered the test in Brookfield. The County entered into an agreement with PCI late in 1996 or early in 1997 to create an eligibility list for the County to use in hiring into the CCO position. Another firm had screened applicants for the County for some time before this. By the end of 1996, however, the eligibility list was roughly one and one-half years old, and the County concluded it was considering applicants from the bottom of the list. The County was also not entirely satisfied with the scoring or the timeliness of the scoring of tests from the prior vendor. Beyond this, the County's experience with a grievance regarding the filling of a Dispatcher position convinced the Sheriff that the County needed an objective means to screen job applicants. The County wanted to generate a hiring list in anticipation of CCO openings. It feared that acting without an eligibility list would generate undue delay in filling the CCO openings.

PCI administered what the County viewed as a pre-offer qualification exam. An applicant who passed the exam would then be given an oral interview and a background check before being offered a CCO position.

The PCI Test

The test administered by PCI for the unit and non-unit applicants who wished to fill the April 17 posting is drawn in significant part from the Comrey Personality Scales. Roughly speaking, the Scales posit a normative personality. Test questions are then constructed to test the components of the normative personality. PCI adapts these scales to the law enforcement, and particularly the corrections, environment. The test administered for the County was designed to give scores for the following personality traits: detail orientation; dependability; listening ability; maturity; reading ability; caution; self confidence; self control; and independence. The test also yielded a "+" or "-" score for the following "Work Performance Traits:" physically active; paramilitary oriented; streetwise and stress resistant. Negative results in the work performance traits area were, in theory, an indication of a concern "which should be investigated prior to making a final employment decision."

Because the test is designed to determine personality components, it is potentially subject to manipulation by a test taker. The Comrey Personality Scales Handbook describes the problem thus:

> Unlike ability tests, which cannot be faked easily, personality tests are subject to many kinds of distortions by the respondents. They may be motivated to present themselves in a favorable light, or in an unfavorable light. They may wish to appear helathier than they really are, or unhealthier. They may have a perception, rightly or wrongly, about what responses are acceptable and what responses are not acceptable, and answer accordingly. The CPS personality test results are interpreted most readily when the subjects are willing and able to

> answer the items truthfully and do so. To the extent that subjects change their responses to something other than what they really think is correct for them, the CPS profile will be distorted. Proper interpretation of CPS profiles requires a determination of the nature and extent of response distortion that has taken place, if it has, and the proper utilization of that information in interpreting the record.

To guard against such distortion, the PCI administered test contained internal validation checks designed to screen out applicants who attempt to "fake good" results. Roughly speaking, those validation checks screen for patterns of answers that are anomalous to the bulk of a test taker's responses. Where those anomalies are sufficiently predominant, the test yields a "cannot be generated" score. Such a score is treated as a failing score.

On April 30, 1997, the Grievant and Grosso drove to Brookfield to take the PCI administered test. They were the only unit applicants tested that day. Upon their arrival, they were shown into a conference room. A proctor, Dr. Nick Claditis, read them two short stories, then asked them a few questions. This constituted the first of four components to the test. The two applicants were then separated to complete the remaining components. Grosso remained in the conference room and the Grievant was escorted into a smaller room. Each was given a test booklet. Neither were given any oral instructions. Claditis occasionally came into the room occupied by the Grievant. After two or three return visits, Claditis informed the Grievant that Grosso had completed her test. The Grievant responded that she understood that she had three hours to complete the test. The Grievant testified that Claditis continued to return to her room and repeat that Grosso was done. She testified he did not speak in an upset tone, but that she perceived that he wanted to be elsewhere.

Claditis testified that he could recall nothing out of the ordinary occurring on April 30. He could not recall any specifics of the test administration, but stated that his routine was to distribute the test packets, point out to the applicants that they should read the instructions on the packet and follow them. The front page of the test booklet given to the Grievant and Grosso states the following:

COMREY PERSONALITY SCALES

> PLEASE <u>DO NOT ATTEMPT TO FALSIFY INFORMATION WHEN TAKING THIS TEST</u>
>
> THIS EXAMINATION IS A VERY SENSITIVE TEST WHICH CONTAINS SEVEN LIE SCALES. THESE SCALES WILL INDICATE WHETHER OR NOT YOU ARE ATTEMPTING TO FALSIFY INFORMATION OR PRESENT A "PICTURE OF YOURSELF" WHICH IS DIFFERENT FROM

> THE WAY YOU ACTUALLY ARE. WHEN THE COMPUTER DETERMINES ATTEMPTED DECEPTION, A PRINTOUT WILL BE FURNISHED TO THE COMMISSION WHICH MAY RESULT IN YOUR NOT BEING CONSIDERED FOR EMPLOYMENT.
>
> DIRECTIONS: For each numbered statement in the booklet, please follow these steps . . . If you should find it impossible to select an answer that is even approximately correct for you, leave the answer space blank for the statement. . . .

Claditis could not recall specifically seeing this cover sheet on the test packet on April 30, although he noted the test booklets, to his knowledge, all include it. Claditis noted that he typically does not give oral instructions to small groups of test takers, and that the test does not include express time limits. The Grievant could not recall seeing, on April 30, the instructions cited above, and stated that she felt the admonition printed in caps above was significant. Grosso recalled that she asked Claditis to repeat something he had told them and that Claditis responded that he could not repeat anything. She affirmed the Grievant's testimony that Claditis did not, in any fashion, warn them about "faking" or "lying" on their responses. She noted that she completed the test quickly, because it did not require any thinking or calculating. Grosso also noted that on their way back home, the Grievant complained that Claditis had rushed her. Grosso could not recall seeing the cover sheet admonition cited above, but could recall some of the material stated on it.

Events Following the PCI Test

Sometime after the test, Waugus individually informed the Grievant and Grosso that they had not passed the test. Grosso had no desire to repeat the experience, and left the matter there. The Grievant pressed Waugus for detail, and was informed she had received no score from PCI, and that this amounted to a failing score. She pressed Waugus further, and was informed that not being truthful or trying to "beat the test" could yield such a result.

On June 9, 19 and 30, 1997, the County posted CCO positions. The Grievant was the only unit applicant to sign the June 9 posting, which was for a 50% FTE position. The position ultimately became full time. Sometime after she signed the posting, the County informed her that it was going to hire off of the eligibility list generated through PCI testing in April and May. Her failure on the April 30 test excluded her from that list and from further consideration for the June 9 and subsequent postings.

Mary Scoon, the Union President, filed the grievance on June 24, 1997. Prior to the filing of the grievance, the Union had sought information from PCI regarding the nature of the

test and its procedures. The filing of the June 24 grievance coalesced with the Union's request for information. In a letter to PCI dated June 27, Frank Ganzlmar, then the County's Human Resource Director, summarized the status of the parties' dispute thus:

> I am writing this letter concerning a recent grievance . . . As we discussed previously, this employee feels that she should be given an opportunity to retest for the Correction Officer position. The union also indicated at the above meeting that the employee has a right to know what her particular test score was; pass, fail, or otherwise.
>
> As we discussed I recently sent you the appropriate Civil Service language as referenced by the Union for your review. . . . Therefore the County must comply with Section 103.13 of the Wisconsin Statutes which relates to "open records".
>
> Mr. David Campshure, AFSCME Local Representative, has requested a written response to his letter of May 15, 1997 when he requested certain information as it related to your testing validation, validity, and reliability. Mr. Campshure also asked to be provided with the specific reason why Connie Gisenas scored a "cannot calculate" . . . score on the exam.
>
> I am asking that you provide a response in writing to Mr. Campshure addressing as many of the items in his letter as possible, and also what your company's position is on Section 103.001 and 103.13 of the Wisconsin Statutes. If you cannot provide a response to those items please indicate that in your response. It is important to the grievance process that your responses are returned promptly so that the Union and the County may take appropriate action. . . .

David E. Christensen, PCI's Technical Director, responded in a letter to Campshure dated July 9, which states:

> Please consider this correspondence to be . . . as much of a response to your May 15, 1997 request for information as can be permitted by law and corporate policy.
>
> We enclose herewith the actual printout from the correctional officer's test indicating the "cannot calculate" findings for a typical candidate. We also include a sample report to illustrate the typical results format. . . .

> The empirical validation strategy employed is concurrent criterion verified with predictive cross validities. . . .
>
> The criterion measures employed are multiple and include purified global supervisory performance evaluations by Q-sort and by forced frequency paired comparison. Negative measures include disciplinary actions, and rehire assessments of incumbents. The measures are enhanced by factor analysis. Attenuation for possible range restriction in the sample populations still reveal corrected validities in the .6's and test retest reliabilities in the .7's.
>
> Scoring is by multiple linear regression equation with multiple empirical pass point strategies. (outlier quadrant minimization and inferential probability of failure reduction.) Scoring is the result of a precise mathematical combination of job critical mental abilities with job related attitudes and aptitudes all of which are independently related linearly to the criterion measures.
>
> This approach to screening has never failed to survive expert testimony or judicial scrutiny under color of any legal standing.
>
> In this, technically, adverse environment we cannot fully satisfy the level of discovery you attempt absent a formal cause of action in a court of competent jurisdiction in which venue in camera inspection is usually performed. . . .
>
> You are hereby informed that the "cannot calculate" condition itself is independently validated against negative criterion measures beyond the required .05 level of statistical significance. . . .
>
> We do not intend to subject our Wisconsin client list to the perils of casual disclosure in adverse environments without a compelling necessity. Such an action would demonstrate a disregard for the level of professionalism that has been a hallmark of this firm for decades. . . .

The "cannot calculate" printout referred to in Christensen's letter states:

> SCORE CANNOT BE CALCULATED
>
> THE COMPUTER ANALYSIS OF THIS CANDIDATE'S TEST PROFILE CLEARLY INDICATES THAT RESPONSES WERE GENERALLY UNRELIABLE OR INCONSISTENT. THEREFORE, A MEANINGFUL AND ACCURATE WRITTEN SCORE CANNOT BE GENERATED.

> This test is a state-of-the-art screening instrument that has been highly validated and designed in strict conformity to all applicable state and federal laws. It is job related and predictive of success on the job. It involves the use of technologies that are not easy to understand for the average job candidate.
>
> Candidates who do not pass the examination should not be advised of their specific test scores; only those who pass should be advised. We especially recommend against reporting 'cannot be generated' results to candidates already sensitized by their elimination from the testing process. Communication of failing results can cause needless litigation.
>
> Test papers can be rejected as unscorable for many reasons. These range from simple failure to follow directions for completing the answer sheet, to trying to 'beat the test'. The most common cause is exaggeration of responses to a point of serious inaccuracy. Candidates are warned both verbally and in writing that inconsistent test papers can result in failure of the examination. In some circumstances, the candidate may be unable to accept the fact that a portion of their exam was completed improperly.
>
> A score of 'cannot be generated' is most often regarded as a failure to complete the examination. Depending upon your circumstances, it may be possible to retest candidates who failed to receive a score. However, the legal rights of the balance of the applicants must be carefully examined.
>
> Research does confirm that candidtates who do not generate a test score possess intellects or aptitudes that are less compatible with the job than those who recieve valid test results. . . .

Waugus formally denied the grievance on August 6, 1997. The Union responded in a memo, dated August 15, from Scoon to the then incumbent County Administrator. That memo states:

> The Union wishes to proceed to the next step in the grievance procedure . . . by appealing to the Personnel Committee.
>
> The Union interprets the June 19, 1997 meeting between David Campshure, Frank Ganzlmar, Michael Waugus and myself as satisfying Step 2 of the grievance procedure. If the County interprets that meeting as Step 1 of the grievance process, please consider this an appeal to Step 2.

> The Union feels compelled to proceed on to the next step of the grievance procedure because the information received from . . . (PCI) did not answer the Union's main question. Namely, the Union still has not been informed of either (the Grievant's) score on the test, or a reason why her test score could not be calculated. . . .

Ganzlmar responded to Scoon in a memo dated August 22, which states:

> . . . It is my understanding that this grievance is currently at Step 2 . . . due to the first level response issued by Chief Deputy Michael Waugus on August 8, 1997. I would like to follow the grievance process in this matter because I would like to afford . . . (PCI) the opportunity to make one (1) last response to the union's requests . . .

Campshure responded in a letter to Ganzlmar, dated September 9, 1997, which states:

> . . . (T)he Union is willing to waive Step 2, but not Step 3, of the grievance procedure . . . To reiterate, the Union is seeking the opportunity for (the Grievant) to retake the exam administered by PCI because she has received neither a score on the exam nor a reason why her test score could not be calculated. . . .

Further discussion could not resolve the grievance, which was processed to Step 3.

In a letter to Christensen dated December 3, 1997, Ganzlmar stated:

> . . . The following will confirm and clarify exactly what the Personnel Committee requested from PCI in order to resolve the above captioned grievance:
>
> 1. In order for the Personnel Committee to determine that a clerical error or some error was made that could not be attributed to the grievant, the Committee respectfully requests that the original test submitted by (the Grievant) be regraded . . .

> 2. Once the test is regraded the Committee requests exactly which of the thirteen (13) criteria that fall under the heading of "Cannot be Generated" be identified . . . If for some reason once the test is regraded and a different outcome is generated due to the test not being correctly graded or some other reason, then that outcome must be relayed to the committee as well.
>
> 3. The explanation concerning the criteria on how the employee failed, (if the result remains the same after regrading), must be explained in terms that can be understood by a layman and not an individual who is an expert in the field of testing or testing validation.
>
> Finally, your written response . . . must be provided prior to December 8, 1997 as the Personnel Committee is meeting the following day. . . It is my opinion that if the above information, as previously discussed, is submitted, the grievance will be resolved to the mutual agreement of both parties. . . .

Christensen responded in a letter dated December 5, which states:

> . . . We have pulled the actual test sheets of the candidate in question and visually observed and verified the result generated by the computers. In addition, we rescanned and computer scored the candidate's actual test papers to confirm the result originally issued by this office.
>
> The test that caused the result . . . is the Comrey Personality Scales. The author of this is one of the most respected theorists and applied psychometricians in the field. . . . This test in both the abstract, and as applied in this instance is above reproach. We have counted over 500 studies conducted by professional psychologists attesting to the validity, reliability and utility of this instrument. Our own independent research confirms this level of regard.
>
> The test, as used by this firm, has been criterion, validated and cross validated in conformity with the Uniform Guidelines on Employee Selection Procedures issued by the federal government, and meets the Division 14 standards of the American Psychological Association. Accordingly, it has never failed to withstand judicial scrutiny.
>
> Although we have independently validated the "cannot calculate" result as a respective predictor of failure on the job, we have enclosed herewith, some excerpts from the manual itself, as well as the test book for your review.

> In short, this candidate received this result due to rather serious attempts to "fake good." Not only was the reliability scale itself triggered, but a second error detector based upon statistically improbable response inflations on 3 separate scales was triggered; specifically, service orientation, organizational levels and drive levels.
>
> The enclosed materials indicate that the candidate was warned both verbally and in writing to avoid this pattern of responses. . . .

Included in the "enclosed materials" was part of the Comrey Personality Scales Manual, authored by Andrew L. Comrey. Chapter seven of that manual states the following:

> My own practice is to advise examinees in selection situations that the CPS is designed to detect faking so they cannot expect to distort their true responses without being detected. I further warn them that if response distortion is detected, this will have a negative effect on their chances for selection. Experience has shown that applicants will fake less under such instructions than without them. . . .

The Personnel Committee met on December 10 to consider the grievance. Robert Dulak, the Committee Chairman, reported the results of its deliberation in a memo to Campshure dated December 12. That memo states:

> . . . Upon much deliberation and discussion the Personnel Committee renders the following decision:
>
> > 1. That the life of the current list concerning the PCI test which was held in April of 1997 be limited to two (2) years. This means that unless the current list is exhausted, it would remain in effect until April 1999 when, at that time, it will become necessary to retest. The retest will be conducted utilizing a different testing company mutually agreeable to the county and union.
> >
> > 2. The grievance . . . is denied.

The Union responded by advancing the grievance to arbitration.

The PCI tests administered in April and May of 1997 were given to thirty candidates. Of those thirty, twenty-three received a passing score, seven received a failing score and two received "Cannot Be Generated" scores. Those candidates who received a score generated results from 57.81 to 83.69. PCI designated 70 as a passing score.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the facts, the Union contends that "(t)here was no contractual provision or County policy against retesting, therefore the Grievant should have been allowed to take the qualifying examination after signing the second job posting." There is no provision in the labor agreement and no County policy justifying denying the Grievant the right to qualify for the Correctional Officer position, according to the Union. That the Personnel Committee passed a motion limiting the life of the hiring list to two years affirms this. Since "a qualifying exam is a condition of employment . . . (which) is a mandatory subject of bargaining," the Union concludes that the County cannot unilaterally implement restrictions on a unit applicant's ability to test for a position. Beyond this, the Union argues that the County "cannot arbitrarily decide after-the-fact that the results of a specific test are good for two years."

The bar on applicants asserted by the County rests on no agreement provision nor on any binding practice. Since PCI's documentation permits retesting, only the County's unilateral action bars the Grievant's attempt to qualify for the Correctional Officer position. That bar has no contractual basis.

The Union then contends that even if the County can bar applicants from taking the test more than once, "mitigating circumstances surrounding the administration and reporting of the Grievant's exam certainly warrant a retest." More specifically, the Union asserts that the test proctor failed to read the Grievant and Grosso any test instructions. That PCI administers its test differently to large than to small groups flies in the face of standard testing procedures. Beyond this, the proctor hurried the Grievant in spite of the fact that she had been told she would have three hours to complete the exam. Finally, PCI and the County failed to satisfactorily account "as to why the Grievant's results were reported as 'cannot calculate' until December 5, 1997." A 'cannot calculate' result can be based on clerical error, and this underscores how egregious the County's denial of a retest is.

The Union concludes that the grievance must be sustained. As the remedy for the County's conduct, the Union seeks an order that the "County . . . allow the Grievant to take the qualifying

exam and, if she achieves a passing score, offer her a full-time CCO position and make her whole." The Union further seeks that the make-whole remedy "include paying the Grievant any difference in wages, overtime pay, and benefits between the CCO position she would have held (from July 1, 1997, through the date of her future appointment as CCO) and the position she actually held during that same time period."

The County's Initial Brief

The County states the issues for decision thus:

> Did the County violate Articles 5 and 6 of the collective bargaining agreement when it awarded the position of corrections officer to a candidate who successfully passed the required written examination and met the required qualifications?
>
> If the County did violate said agreement, what is the appropriate remedy?

After a review of the facts, the County contends arbitral precedent sets four criteria to define a valid pre-hire test:

> 1. The test must be specifically related to the requirements of the job. 2. The test must be fair and reasonable. 3. The test must be administered in good faith and without discrimination. 4. The test must be properly evaluated.

The County contends that it has met each of these criteria.

PCI has specialized in testing applicants for law enforcement positions, and the County contends that testimony from PCI representatives establishes that the test given to the Grievant was job related. That the Union grieved only one failing test score must be considered to underscore this conclusion.

The County then contends that "the fact that twenty-three (23) candidates passed the examination versus seven (7) who failed . . . indicate(s) the test is reasonable." The test proctor's testimony further establishes that "the test was administered in a fair and reasonable process and that appropriate steps were taken to ensure proper conditions for the test." Union attempts to intimate that the Grievant was harassed or rushed during the test are, the County asserts, without any basis. Beyond this, the test booklet expressly warned her not to attempt to falsify her answers.

The County has an established history of using "prequalifying examinations" and has properly evaluated such examinations in the past. Its right to use such tests has been affirmed in arbitration, and there is no basis to conclude the County failed to properly evaluate the Grievant's test score.

That the Grievant was not permitted to retest flows directly from the integrity of the hiring list generated by the PCI test. No other applicant who failed that test will be permitted to retake the test, and granting the Grievant that right undercuts the integrity of the testing procedure. Such procedures must be valid for both unit and non-unit applicants. If there is to be a retest, the County argues that it must be done at the Union's expense.

Viewing the record as a whole, the County concludes that the grievance must "be dismissed in its entirety."

The Union's Reply Brief

That the Union grieved only one of the failing applicant's scores is irrelevant, since only the Grievant signed the second posting. Since the Union does not challenge the County's ability to administer pre-qualification tests, prior arbitration awards are irrelevant. Nor is the Union challenging the validity of the test administered to the Grievant. Rather, the grievance "deals only with the issue of the county denying the Grievant the opportunity to take the PCI test a second time in response to a second job posting."

Evidentiary concerns regarding the proctor's conduct are belated and unpersuasive. That the proctor failed to read test instructions and failed to warn the applicants about faking results can be held only against the proctor. That neither the County nor PCI "has been able to explain in plain language . . . exactly how she 'falsified' the exam" underscores how tenuous that assertion is. That the County now chooses to view the results of the first test as the establishment of a hiring list cannot obscure that it reached this conclusion unilaterally, well after the test was administered.

The Union contends that "(t)he plain truth of the matter is that there is no provision of the Agreement which allows the County to effectively ban employees from signing and attempting to demonstrate their qualifications for posted positions." Just as applicants for clerical positions can retake typing tests, the Grievant here should be permitted to retake the pre-qualifying exam. Beyond this, any County contention that unit and non-unit applicants must be treated alike is "totally absurd." Restrictions placed on unit applicants must be created "at the bargaining table, not by means of a retroactive policy which unilaterally alters conditions of employment."

The Union concludes by repeating the remedial request stated in its initial brief.

The County's Reply Brief

The County waived the filing of a reply brief.

DISCUSSION

I have adopted the Union's statement of the issues as that appropriate to the record. This statement broadly refers to a violation of the agreement, but the focal point of the parties' dispute is the relationship of Articles 2 and 5. More specifically, the parties dispute whether the County's right to determine qualifications under Section 2.03 B) and Section 5.03 B) authorized the County to deny the Grievant a new test for the June 9 posting. Beyond this, the dispute extends to a County offer of the CCO position posted on June 9 to any individual pulled from an eligibility list drawn from unit or non-unit applicants who successfully passed the PCI test. The force of the Union's argument rests on Section 2.03 G), which turns on the application of Section 5.03 B).

The grievance poses many levels of contractual and factual difficulties. At least two levels of contractual difficulty are apparent. The uncertain relationship of Articles 2 and 5 is the interpretive issue. This issue is complicated, however, by an additional level of difficulty. The labor agreement containing Articles 2 and 5 rests on the agreement between the Union and the County. The qualification determination, however, turns in significant part on a contractual relationship between the County and PCI. The Union is not a party to that agreement.

This contractual difficulty spawns factual complexity. The interpretive issue in June of 1997 turned on an unsubstantiated assertion by PCI that the Grievant had failed the April 30 test. This assertion was then tied to the County's general assertion of the indefinite validity of the eligibility list generated from the April and May testing. As the grievance procedure progressed, however, PCI offered greater detail to its assertion and the County distanced itself from its general assertion that the eligibility list was valid indefinitely. Other factual problems can be noted, but this indicates the interpretive difficulties posed by the grievance.

The factual nature of the Union's statement of the issue on its merits focuses the interpretive issue on the County's refusal to permit the Grievant to retake the PCI test to qualify for the June 9 posting. The Union's forceful arguments highlight potentially fatal deficiencies in the PCI test procedure. They fall short, however, of supporting the remedy the Union seeks here. An examination of this conclusion requires confronting the contractual and factual difficulties noted above.

As preface to this, it is important to note what is not in dispute. The Union does not dispute the County's general right to test the qualifications of job applicants. Nor does the Union challenge the specific validity of the Comrey Personality Scales test as a means to test

the qualifications of applicants for the CCO position. That the Union did not grieve Grosso's and the Grievant's April 30 test scores thus has no bearing on what, if any, right the Grievant had to seek a retest for the June 9 posting.

Thus focused, the issue for determination is whether the County could rest its determination of the Grievant's lack of qualifications on the April 30 test. This denial has a specific and a general component. Specifically, the County denied the Grievant the right to test for the June 9 posting. More generally, the County, after the Personnel Committee's December 10 deliberations, denied her the right to retest until April of 1999.

The Union essentially advances two broad contentions to support its conclusion that the labor agreement demands the Grievant retake the PCI test. Initially, it contends that Section 5.03 demands that qualifications be determined for each posting. It supports this by noting that typing tests can be retaken with each posting. Beyond this, the Union argues that the PCI test, as administered, was so flawed that a retest is warranted.

The Union's first contention must be acknowledged as forceful, but lacks sufficient support in the evidence to be considered persuasive. That the County permits an applicant who fails a typing test to retake the test with each new posting stands unrebutted. It must be noted, however, that typing is a manual skill that can be improved with time and practice. There is no apparent reason not to retest typists. The tests posed here are subtler, and designed not to screen a manual ability, but a personality type suited for corrections work. The County hoped to use the test to avoid employe turn-over in the CCO position. This is a legitimate goal. More to the point, if personality testing is valid, and on this record its validity is not challenged, it is not immediately apparent what a retest would accomplish.

More significantly, Waugus testified, without contradiction, that the County has used eligibility lists in the past. One of the primary reasons for approaching PCI was, according to Waugus, that the eligibility list determined by a prior vendor was becoming dated. To accept the Union's first contention flies in the face of this testimony. Section 5.03 does not clearly specify whether qualifications must be determined in each case or whether they can be determined over time. The Union's use of the typing skills test coupled with its assertion that the labor agreement does not specify hiring list usage ignores that the agreement does not specifically mandate individual testing for each posting and that the County has, in the past, used eligibility lists.

In sum, the record will not support an absolute determination that Section 5.03 mandates a test for each posting for the same position. Section 5.03 can support repeating a qualifying test for each posting. It can also, however, support the use of eligibility lists. What evidence there is of practice indicates the County has used both methods for different positions. Thus, the Union's broad contention that Section 5.03, standing alone, mandates a separate test for each posting cannot be accepted.

The Union's second contention has considerable persuasive force. The Union questions whether the Grievant ever received a valid explanation for her asserted failure to pass the test and whether the test was administered objectively. Either argument is potentially forceful enough to establish that the County did not, as required by Section 5.03, resort to non-departmental or non-unit employes until unit applicants were found unqualified.

If the issue regarding the explanation of the Grievant's test results rested on the quality of information made available to the Union by PCI in the summer and fall of 1997, a violation of Section 5.03 is apparent and egregious. Article 5 determinations of qualifications are subject to scrutiny under Article 4. This was affirmed in MARINETTE COUNTY, MA-9650 (GRECO, 8/97). Until Christensen's letter of December 5, 1997, PCI had supplied the Union with no information worthy of characterizing as a rationale for its determination that the Grievant had failed the test. The absence of a meaningful rationale where arbitral oversight must be exercised is tantamount to no rationale. In the absence of a rationale establishing a qualification determination, the County had no proven right under Section 5.03 to move to non-departmental or non-unit applicants.

That PCI offered the Union no meaningful response to the issues posed by the grievance is apparent on the face of Christensen's letter of July 9 and its enclosures. The unspecified "score cannot be calculated" sheet advises employers not to advise failing candidates of their scores. Beyond this, the sheet urges that "cannot be generated" scores not be communicated to avoid "needless litigation." These bald assertions are irreconcilable with the demands of Articles 4 and 5. Christensen's cover letter is no more helpful. The technical precision of the statements of that letter and the broad assertion that PCI testing methodology "has never failed to survive expert testimony or judicial scrutiny" cannot obscure that no factual information whatsoever is communicated regarding the Grievant's test results.

If the July 9 letter constituted the County's response to the grievance, a contract violation would have to be found. As noted above, however, PCI and the Union do not share a contractual relationship, and Articles 4 and 5 are obligations enforceable only against the County and the Union. The County did not accept PCI's non-answer as its response to the grievance, and the examination of the grievance must reflect this. Ganzlmar's letter of June 27 joined the County with the Union in seeking further detail from PCI. Further discussion and further Union action ultimately provoked Ganzlmar's letter of December 3, which in turn provoked the only arguably meaningful PCI response to the issues of the grievance. When the Personnel Committee acted on that response on December 10, the County's position and PCI's merged. Thus, determination of a County violation of Section 5.03 must focus on that response.

As noted above, the County's response was a specific affirmation of the April 30 test results and a general denial of the right to retest until April of 1999. In the December 5 letter PCI denied the possibility of clerical or computer based error in the "cannot generate score"

result. There is no persuasive evidence to overturn that denial. Thus, the issue turns to the reliability of the score. Because the validity of the CPS test is not challenged, the "faking good" determination cannot be questioned here. Rather, the issue is whether PCI failed to administer an otherwise valid test to a degree warranting a retest for the June 9 posting.

The Union has demonstrated a significant flaw in the administration of the test. Comrey's explanation of his own testing procedures notes the significance of "explicitly warning examinees in advance that faking . . . can be detected." Christensen's letter of December 5 underscores this by asserting that the Grievant was "warned both verbally, and in writing to avoid this pattern of responses." In spite of this, neither Grosso nor the Grievant received a verbal admonition. Claditis acknowledged this, at most asserting he did not verbally instruct small groups. That this assertion has no support in Comrey's explanation of method or Christensen's defense of PCI testing procedures cannot be ignored. The related assertion that Claditis rushed the Grievant has only tenuous support in the evidence. At most, the record indicates the Grievant felt rushed by Claditis. There is no persuasive evidence Claditis actually rushed her, or that his periodic visits to the room were any different than the behavior of the proctor who administered the test to other applicants.

The Union's challenge of the Personnel Committee's assertion that it could deny a retest on the June 9 posting because no testing would be permitted until April of 1999 is more difficult to assess on the evidence. As touched upon above, this challenge cannot be accepted as an absolute. Sections 2.03 and 5.03 are broad enough to permit testing with each new posting, the creation of eligibility lists, or both on a case-to-case basis. Evidence is not sufficient to establish a binding practice, but what evidence there is of practice indicates the County has used both options. This does not offer sufficient evidentiary support for a conclusion that the Personnel Committee could not rely on an eligibility list generated in April and May of 1997 to determine qualifications for a June, 1997 posting.

However, just as the Union cannot support an absolute right to posting-by-posting testing, the County's assertion of indefinite validity for an eligibility list cannot be accepted as an absolute. That the Personnel Committee acted in December to limit the effective period of the test cannot obscure the tortured evolution to that point. In June of 1997, the eligibility list was asserted as an absolute. Waugus' testimony on the earlier eligibility list indicated that list was dated after perhaps only one year. Beyond this, the general assertion of the validity of the eligibility list ignores specific problems in the administration of the April, 1997 test.

Against this background, determination of the issue must be factual in nature, and tied tightly to the evidence posed here. The evidence supports a conclusion that the County can rely on the general validity of the CPS test as a means to determine qualifications under Section 5.03. The evidence will not bar County generation of an eligibility list for filling CCO vacancies. The evidence will not, however, support an indefinite duration for such a list, nor will the evidence permit a definitive conclusion on how long the list can be considered

valid. Ambiguity on this point must be left to the parties to address in bargaining or on a more fully developed record. The evidence establishes that the April 30, 1997, PCI test was flawed by the absence of an explicit verbal caution regarding what the test sought to measure and how it could not be "beaten" by offering less than personally candid responses.

This flaw is sufficient to establish a technical violation of Section 5.03, but is not sufficient to warrant the remedy the Union seeks. To award the remedy sought by the Union, the flaw should have demonstrably harmed the Grievant's ability to pass the CPS test. The evidence will not support this conclusion. Neither Cladítis nor Christensen could specifically address the test administration of April 30. Cladítis could not recall the details beyond his recollection that nothing unusual happened. Christensen was not present for the test. Each, however, testified credibly about the standard test procedures of PCI. Standard procedure involved distributing a test booklet with explicit warnings about faking responses. There is no reason to believe Grosso or the Grievant received something other than the standard test booklet with the standard warning. Grosso's testimony affirms this. She could remember instructions that are stated on the cover page containing the warning. Thus, the record will not support a conclusion that the Grievant was misled regarding what the CPS test sought and its controls against candidate attempts to "beat the test."

That Cladítis declined to give the oral instructions Comrey recommends and Christensen claimed had been given cannot be denied. However, that omission cannot be characterized as a flaw so fundamental that an immediate retest is warranted. To reach this conclusion would effectively void the validity of the CPS test, and, as noted above, the parties do not dispute the general validity of the test. The test seeks to measure, among other points, an applicant's ability to follow directions and the compatibility of an applicant's personality with the demands of corrections work. That a test has not been ideally administered cannot, standing alone, become a basis for voiding the test. Doing so would void virtually any qualifying examination. In this case, the evidence cautions against such a result. The Grievant could not recall, but intimated she had not seen the instruction sheet containing the cautionary note regarding beating the test. She further indicated she felt rushed by Cladítis. There is, however, no evidence indicating she was rushed at the point she received the test booklet. As noted above, the evidence supports the conclusion that she received a booklet containing the caution she cannot recall seeing. To deny the County's ability to rely on the April 30 test results against this background would permit any unsatisfied candidate the ability to void a test the candidate had failed.

This is why the County violation of Section 5.03 must be labeled technical on this record. The violation focuses less on the Grievant's dissatisfaction with the April 30 test than with PCI's grudging willingness to openly report her results and the County's initial attempt to assert the test had indefinite validity. As noted above, PCI's initial response to valid County and Union attempts to determine the Grievant's score standing alone would establish a violation of Articles 2 and 5. That the County struggled with the Union to remedy this precludes holding PCI's belated and conclusory response against the County. That the County

could rely on the April 30 results cannot, however, obscure that the County sought to give those results an effect not given earlier eligibility lists. The record affords no support for so sweeping a result. The procedural defects in the administration of the April 30 test further caution against such a result.

Thus, the Award entered below permits the Grievant to retake the CPS test, if the Union so requests. This has the effect of permitting her to qualify for CCO openings occurring after the date of this Award. It removes the County from financial liability beyond, potentially, the cost of the test. Strictly speaking, the flaws turn on PCI administration of the test. The determination of qualifications under Articles 2 and 5 is the County's obligation, and it must be considered responsible for PCI's action on its behalf. The evidence will not, however, justify faulting the County for failing to retest the Grievant for the June 9 posting. This reflects that the procedural flaws isolated by the Union, on this record, cannot be considered so fundamental to subject the County to liability for relying on the April 30 test results. To reach this conclusion would, without clear support in the contract, bar the use of eligibility lists, which have been used in the past by the County. It would also permit an unsatisfied applicant veto power over an undesired test result. On other facts, such a result would be appropriate. On this record, however, the flaws in the testing procedure are more technical than fundamental in nature.

AWARD

The County did not violate the parties' collective bargaining agreement when it denied the Grievant the opportunity to take the qualifying examination after she signed the June 9, 1997 posting for a Civilian Corrections Officer, but did violate the parties' collective bargaining agreement when it subsequently deemed her not qualified for that position indefinitely.

As the remedy appropriate to the County's technical violation of Section 5.03, the County shall, upon request by the Union, permit the Grievant to retake the qualifying examination to determine her inclusion on the current eligibility list for the CCO position. Nothing stated in the Award shall entitle the Grievant to claim any CCO position filled prior to her successful completion of the qualifying examination necessary to be included on the eligibility list.

Dated at Madison, Wisconsin, this 25th day of November, 1998.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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