

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 2150**

and

**CITY OF KAUKAUNA UTILITY COMMISSION**

Case 95  
No. 56685  
MA-10378

---

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney Naomi E. Solden**, 1555 Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Local 2150.

Godfrey & Kahn, S.C., by **Attorney Edward J. Williams**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the Employer.

**ARBITRATION AWARD**

The International Brotherhood of Electrical Workers Local 2150, hereafter the Union, with the concurrence of the City of Kaukauna Utility Commission, hereafter the Utility or Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff as arbitrator to hear and decide the instant grievance. The undersigned was so designated and hearing was held in Kaukauna, Wisconsin, on May 4, 1999. The hearing was transcribed and the record was closed on June 18, 1999, upon receipt of post-hearing written briefs.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

**ISSUE**

The parties stipulated to the following statement of the issue:

Did the Utility violate the collective bargaining agreement when it failed to award the Maintenance Mechanic position to Kevin Obiala?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

ARTICLE I

. . .

Sec. 5. The rights, in accordance with the provisions of this Agreement to employ, promote, demote, discipline, and discharge employees and the management of the property are reserved by and shall be vested exclusively in the Utility management. It is agreed, however, that promotions shall be based on seniority, ability, and qualifications. Ability and qualifications being sufficient, seniority shall prevail. Membership in the Union shall in no way prejudice an employee's qualifications for promotion to fill any position. The Utility shall have the right to determine how many men it will employ or retain, together with the right to exercise full control and discipline in the interest of good service to the public and the proper conduct of its business.

Sec. 6. When a vacancy occurs within the classifications covered by this Agreement, such vacancy shall be posted by bulletin for written bids at places accessible to all employees for a period of at least ten (10) days. Such notices shall also be sent to the Secretary of the Union. Employees of the Utility shall in this way be acquainted with and be given an opportunity to apply for the position; and, of the employees applying for the position the one who has the longest service in the occupational group\* shall be given preference for the position, providing his ability and qualifications are sufficient. Utility employees will be given an opportunity to fill vacancies or new positions and the order in which any job shall be filled in this unit will be as follows:

1. First consideration shall be given to the most senior employee in the occupational group and continue through the group until an applicant with sufficient ability and qualifications is selected. In the case where no qualified applicant is selected, the following procedure shall be followed:

2. Applicants from the unit in order of their seniority.
3. New employees hired from outside of the unit.

Employees will be given a fair and reasonable opportunity to demonstrate their qualifications and ability to fill such vacancies or positions before new or outside help is hired. For the convenience of the Utility Commission, temporary assignments may be made until bids are received and permanent assignments are made. An employee shall not be required to exercise his seniority in connection with any such promotion or vacancy and shall not sacrifice any future rights to bid on promotions or vacancies through failure to do so.

\*Occupational group as used in this agreement means a group of occupations which as a whole represent the total number of occupations necessary to perform a complete given work function. For the purposes of this contract, the occupational groups are as follows: line department, operating department, plant maintenance department, mechanical overhaul department, meter department, water department, substation, office, garage, stores & records, utility laborer.

...

### **BACKGROUND**

On January 5, 1998, the Utility's General Manager, Peter Prast, sent Union President Mark Damro a memo regarding "Job Descriptions-Maintenance Mechanic & Electro-Mechanical Technician" which stated as follows:

Please find the attached job descriptions for the two positions which we previously discussed. The Commission authorized the hiring of these positions in anticipation of the upcoming retirements of Jim Van Toll and Tom Helf. Please review these and direct any comments or questions to me. I would like to be ready to post these two positions in the near future.

The attached Maintenance Mechanic job description stated as follows:

JOB TITLE: MAINTENANCE MECHANIC

TYPE: REPRESENTED

DEPARTMENT: MAINTENANCE – GARAGE

GENERAL RESPONSIBILITIES

Skilled mechanical work in the maintenance and repair of equipment, including trucks, automobiles, construction and maintenance equipment, and other types of engines and generators.

Perform other related and incidental duties as assigned and as provided for in general statement for position descriptions. The employee will perform under the direction of the Assigned Supervisors.

The work involves responsibility for the performance of skilled repair work on automobiles, trucks, tractors, and other automotive equipment, as well as skilled repairs on gas turbine, diesel and hydro generation equipment. Also, miscellaneous equipment such as power mowers, chain saws, air-compressors, etc. Duties include welding, fabrication of parts, or other duties relating to the upkeep of equipment.

Employees of this class work under general supervision, using independent judgment as to the method of repair after receiving oral or written instructions.

EXAMPLES OF WORK

Repairs and maintains automobiles, pickup trucks, dump trucks, line trucks, digger derricks, tractors, loader/backhoes, gas turbine, diesel, and hydro generators, and related equipment.

Performs adjustments on carburetors, motors, transmissions, and other automotive and related equipment; maintains and repairs hydraulic digger derricks and mobile aerial towers.

Performs body work and painting; repairs, replaces, and rebuilds worn or broken parts.

Uses acetylene and arc welder and cutting torch in the cutting, welding, and straightening of metal for utility vehicles and construction equipment, and other machinery and apparatus.

Performs routine lubrication and other services to vehicles, equipment and machinery as required.

Makes rounds of generating facilities, prepares and maintains necessary records and reports.

Ability to assist Water Department personnel in the repair of pumps, motors, filters, watermain and service breaks.

Performs related work as required.

### JOB SPECIFICATIONS

**Required Education:** Technical degree in automotive mechanics or equivalent experience. Be a qualified welder, capable of becoming certified mechanic in State of Wisconsin.

**Required Experience:** Five years of automotive garage experience. Experience with hydraulic repair and welding.

**Special Knowledge:** Comprehensive knowledge of procedures involved in repairing, rebuilding, and overhauling engines, transmission, clutches, differentials, hydraulic systems and other assemblies.

**Special Skills:** Operate line and other trucks, loader/backhoes, trenchers, and other material handling equipment. Must maintain a current State of Wisconsin Class BCD commercial drivers license.

Considerable knowledge and ability to use and apply standard practices, methods, tools, and equipment of the automotive mechanic's trade.

Knowledge of the principles of internal combustion and diesel engines.

Knowledge of the occupational hazards and safety precautions of the automotive mechanic's trade.

Knowledge and ability to use and apply standard practices, methods, tools, and materials of metal fabricating and welding.

Ability to learn the maintenance and repair of gas turbine and diesel engine generators, hydro turbines and apply that learning to actual maintenance and repair work.

Ability to work independently and to understand and carry out oral and written instructions.

Ability to establish and maintain effective working relationships with supervisors and other employees.

Skill in the use of tools and in the operation of equipment employed in the adjustment, repair, and maintenance of automotive and related equipment, and in welding.

Skill in locating and adjusting defects in automotive and generating equipment.

**Physical Requirements:** Essential functions of the job include: Occasional lifting of 50 to 100 lbs., performing long periods of heavy manual work, and frequent lift and/or carrying of up to 50 lbs. Use of fingers and both the hands or compensate with the use of acceptable prostheses. Able to frequently reach above shoulders, crawl, kneel, and repeatedly bend. Use of both legs. Good coordination and sense of smell. Clear vision in both eyes, with depth perception, field of vision, ability to distinguish basic colors, and ability to distinguish shades of color (glasses acceptable). Able to hear conversational voice up to 15 feet away in at least one ear (aid permitted).

Must pass post offer medical examination as required.

**Job Conditions:** Job duties performed under general supervision.

Normal work week consists of five eight hour work days, Monday through Friday, as provided in this schedule: ((4) four regular eight hour work days, Monday, Wednesday, Thursday, and Friday from 7:30 a.m. to 3:30 p.m. and (1) one 8 hour work day Tuesday from 12:00 noon to 8:00 p.m.

May travel occasionally for training and updating skills.

Job duties normally performed in indoor shop/plant environment. Must work outdoors occasionally under all types of weather conditions, including excessive cold conditions. Exposure to excessive noise, fumes, smoke, gasses, solvents, and grease. Work is done around machinery with moving parts and around moving objects and vehicles. May work on ladders and scaffolding or in cramped confined quarters. May be required to wear respirator at times. May be exposed to hot engines, exhaust systems, welding and cutting, grinding, chemicals, paints, and epoxies.

Must wear hard hat, goggles, ear protection, gloves, face shields, and safety shoes at all times.

Ability to work overtime as required.

WAGE RATE

As per Collective Bargaining Agreement.

. . .

On January 30, 1998, Prast sent the following letter to the Union's Secretary, Jerry Kieffer:

This letter is to post for the Maintenance Mechanic position. The job duties, responsibilities and qualifications of the position are in accordance with the attached job description.

Written applications will be accepted until 7:30 a.m. on February 9, 1998.

The attached job description was identical to the Maintenance Mechanic position description that had been sent to Union President Damro on January 5, 1998.

Kevin Obiala, hereafter Grievant, has held the position of Utility Man in the Utility's Water Department since April 30, 1990. On January 30, 1998, the Grievant notified Prast that he was applying for the posted position of Maintenance Mechanic. At the time of posting, the Maintenance Mechanic wage rate was \$21.52 per hour and the Grievant received \$19.23 per hour.

Utility Water Department employes Scott Skalmusky and Randy Vercauteren also applied for the Maintenance Mechanic position. The Grievant was the most senior of the three applicants.

On February 10, 1998, Prast sent the following memo to the Grievant, Skalmusky, and Vercauteren:

Thank you for your interest in the Maintenance Mechanic position. The next step in the filling of this position is to evaluate your training and work experiences as they directly relate to the job description. As you are aware,

there are specific qualifications and/or experiences necessary for this position. Please submit a comprehensive list of training and work experiences that you have had which directly relate to the job description. Please submit this information by February 16, 1998.

Thereafter, the Grievant provided Prast with a letter dated February 12, 1998, which stated as follows:

This Letter is for you to know what Qualifications I have for the Mechanics Job. I will start by saying I really have not had any Mechanical Schooling. Everything I know is from hands on experience. I have been doing Mechanical work for roughly 22 years. I started by doing General Maintenance and Tune-ups on motorcycles. Then my Dad bought a Farm, at which I did Mechanical and General Maintenance on Farm Tractors and Farm equipment and that is about the time i (sic) started doing work on cars which included Tune-ups, Engine work, Exhaust work, Shocks, Brakes, over the years I have learned a lot from working on Automobiles. I have done Engine Overhauls, Transmission Rebuilds which included Automatics and Standards, Differentials rebuilds, Universal joint replacements. Over the years, I have done some Body and Paint work. When I worked at Haupt Well Co. I maintained the 2-ton International truck I was using and also Maintained the Hydraulic Pump hoist that was mounted on that truck. Since I have been at the Utility you know what I have done on the Diesel Generators and the Gas Turbine. I have done a lot of different Welding jobs all over the Utility. I know I would have to get some Training on the Bucket Trucks, I am willing to learn. I know I have the Knowledge and the ability to do a good job in the Mechanics position. I am looking forward to talking to you on this job.

Thank-you,  
Kevin

On February 24, 1998, Damro sent the following to Prast:

I talked to you on Friday, February 20, 1998, about the procedure your are trying to use in selecting employees for job vacancies.



In the past, the most senior employee that posted for the job was given it; starting with the occupational group seniority and then company seniority. Management and the Union then sat down and went through that persons (sic) qualifications.

Management has, in the past, unsuccessfully tried to pick out employees with less seniority but which they thought had more qualifications. The senior employee has always been given a fair and reasonable opportunity to demonstrate their qualifications and ability to fill such vacancies.

This letter is to give notice that the Union has no interest in a new precedent being set in this matter. After we talked on February 20, I got the feeling you didn't come away with a clear understanding of what the Union's position on this matter was.

On February 24 and 25, 1998, Prast and supervisor John Rabideau interviewed all three applicants for the position of Maintenance Mechanic. During the interviews, Prast made written notes on a form that he created for the purpose of comparing the applicants' qualifications and abilities to those listed on the job description.

Following the interview, Prast concluded that (1) the Grievant did not have five years of automotive garage experience or (2) a technical degree in automotive mechanics or equivalent experience. Prast decided that a written test should be devised for the purpose of providing the three applicants with an opportunity to demonstrate qualifications.

In early March of 1998, Prast telephoned the Fox Valley Technical College Transportation Division Dean Ken Kempfer to discuss testing for the Maintenance Mechanic position. During this discussion, Kempfer offered to develop a test similar to the Automotive Service Excellence (ACE) test, a national certification exam, to determine the applicants' automotive qualifications.

In a letter dated March 10, 1998, Union Business Representative Ronald Nyhouse, Sr., advised Prast that the Union opposed the testing of employees who bid on job vacancies. Nyhouse also advised Prast that Article I, Sec. 6, clearly states how a vacancy or a new position is to be filled; that the Maintenance Mechanic posting should be filled according to the labor agreement; and that the Union expected the Utility to provide the senior employee with a fair and reasonable opportunity to demonstrate their qualifications and ability as stated in the labor agreement, as in the past.

Prast responded to Nyhouse by letter dated March 12, 1998. In that letter, Prast advised Nyhouse that the Utility intended to adhere to the labor agreement; that the labor agreement requires the Utility to select an applicant with the most seniority so long as that

applicant's ability and qualifications are sufficient to perform the work; and that, as confirmed in a prior arbitration award, seniority does not prevail unless ability and qualifications are sufficient. More specifically, Prast stated:

Hence, before we get to the issue of seniority it is necessary for us to give the employees a fair and reasonable opportunity to demonstrate their qualifications and ability to fill such vacancies or positions by the appropriate review of their ability and qualifications. That's precisely what is being done.

For us to ascertain the validity of the statements made in Mr. Damro's memorandum, please (either Mr. Damro, you, or both) provide us, within the next two weeks, the specific names of people, positions, times and dates when the Utility awarded positions purely on seniority with no consideration for ability and qualifications. . . .

Neither Nyhouse, nor any other Union representative, provided Prast with the requested information.

On March 26, 1998, Kempfer provided Prast with a copy of the Automotive Technician Certification Booklet (Test Preparation Manual). Thereafter, Prast contracted with the Fox Valley Technical College to administer a test for the position of Maintenance Mechanic. On April 16, 1998, Prast sent the following letter to the three applicants:

To determine the sufficiency of your ability and qualifications for the position of Maintenance Mechanic, we have scheduled you for testing to be administered by Fox Valley Technical College (FVTC). The exam is similar to the ASE Certification tests.

The exam will cover three sections of the ASE Certification: Engine Repair, Brakes and Electrical/Electronic Systems. The tests will be evaluated by the FVTC staff. The test will be given on May 13, 1998 at 12:30 PM. You are to report to FVTC Appleton Campus, building F, Room F110. Please contact me by May 4, 1998 to verify your attendance.

If you do not confirm with me your interest in taking the exam by May 4, 1998, I will assume that you are no longer interested in the position and do not want to be considered as a candidate.

Nyhouse was copied on Prast's letter of April 16, 1998. In a letter dated April 29, 1998, Nyhouse advised Prast that the Union would agree to the following:

1. John Kempfr (sic) (Dean of Transportation at Fox Valley) will administer the test and be a neutral party in this testing.
2. John Kempfr, (sic) or a person he delegates from Fox Valley, will not know the seniority of the three applicants.
3. After the tests are given and graded, the results will be put in three separate sealed envelopes with the applicant's name on the outside.
4. No one from the Kaukauna Utilities or Local 2150 will be told or shown the results of the tests.
5. After the tests are graded, and the results sealed in separate envelopes, John Kempfr (sic) will call Ron Nyhouse from Local 2150, IBEW and inform him that the results of the tests are ready to be picked up.
6. Ron Nyhouse will call Pete Prast and make an appointment to open the envelopes.
7. On that given day, Ron Nyhouse will pick up the results of the tests in the separate envelopes, along with a copy of the test and take it to Pete Prast's office.
8. In the presence of Ron Nyhouse, Mark Damro, and Pete Prast, the envelope of the employee with the highest seniority will be opened first. If that employee has a score of 70 or above, the other two envelopes will not be opened. If the score from the first envelope is lower than 70, the envelope from the second highest employee will be opened, and so on.
9. If none of the three employees get a grade of 70 or over, we feel that all other applicants should take the same test and the results be reviewed in the same manner as described above.

In a letter dated May 5, 1998, Prast responded to Nyhouse as follows:

I received your letter dated April 29, 1998 in which you suggested a methodology for evaluating the test scores of the three applicants. We discussed these items last week in a telephone conversation. As I stated in that telephone conversation, our position is that the test scores will be handled in a similar fashion as was done for the System Operations Tech. Position.

The individual test scores will be sent to the individual applicants as well as the Utility. We will then be evaluating the scores to see if they achieved the minimum score of 70% set by FVTC. We plan to proceed as follows.

- 1). The three applicants will all be tested on May 13 at FVTC.
- 2). The individual test scores will be sent to the individual applicants and the Utility.
- 3). We will be evaluating the test scores and will meet with the applicants to discuss the test results and their abilities and qualifications for the position.

We hope this clearly sets forth the procedure we will be following.

On May 13, 1998, the Grievant and the other two applicants were tested on the following sections: Engine Repair; Brakes; Steering and Suspension. A section on Electrical/Electronic Systems was mistakenly omitted from the initial test, and, consequently, was administered on June 23, 1998.

The tests were administered and graded by Fox Valley Technical College staff. Not one of the three applicants achieved the minimum score of 70%.

A grievance dated May 29, 1998, was filed in which it was alleged that the Employer had violated Article I, Sec. 6, of the labor contract. In the grievance, the Union raised, inter alia, the following:

This grievance pertains to the selection process and the testing of the applicants of the Auto Mechanic job.

When we met to agree to a wage rate and posting for the mechanic job, it was the understanding of both Jerry Kieffer and myself that the senior person would be given a fair and reasonable chance to demonstrate his or her abilities.

Since then, you have come up with a testing process for the applicants and the senior applicant, Kevin Obiala, wasn't given a chance to show he could do the job. Also, when Ron Nyhouse talked to both you and the Dean at FVTI he was led to believe that the tests given would be aptitude tests given to people enrolling in mechanics courses at the school, not tests given to students after they have completed the court.

You assured me all along that the reason for the testing wasn't to block people from getting the job or to set a precedent for blocking people from getting future jobs. As a matter of fact, when I told you what I thought your intentions were you told me I was nuts.

When Jerry and I reviewed the job posting before it was posted, we weren't concerned about some of the qualifications because we had seen similar postings in the past and the senior person had been given a chance to do the job and to complete schooling, if needed, while they were going through pay steps that are set by their qualifications.

The Union also believes the Utility is not being consistent as far as what jobs testing is being administered to. It seems you only want testing when the senior person posting for a job is not who you want at that position.

The Union doesn't feel the test given to the applicants shows whether or not they could function as the Auto Mechanic. We feel it is a shame that you have a person "in house" that can do that job and do it well and he isn't given a chance. You are taking away the chance of anyone here advancing within the company.

Article I, Sec. 6 of the Labor Agreement clearly states: "Employees will be given a fair and reasonable opportunity to demonstrate their qualifications and abilities to fill such vacancies or positions before new or outside help is hired."

The grievance was thereafter denied by the Utility and submitted to arbitration.

### **POSITIONS OF THE PARTIES**

#### **Union**

The parties' collective bargaining agreement states that promotions will be based on "seniority, ability and qualifications." Where ability and qualifications are "sufficient, . . . seniority shall prevail." This seniority provision is a "sufficient ability" clause, under which the senior employe will be given preference if he or she possesses sufficient ability to perform the job.

Under a "sufficient ability" clause, it is necessary to determine only whether the employe with greater seniority can in fact do the job. Thus, the senior qualified employe is entitled to the job even if another applicant has greater skill and/or ability.

The test unilaterally instituted by the Utility did not seek information pertaining to all of the job's responsibilities. The parties' past practice supports the Union's position that the Utility should have awarded the mechanic position to the Grievant.

For example, in approximately 1992 or 1993, Frank Vander Wyst applied for the posted position of Distribution Technician II. Although the Utility believed that Vander Wyst was the most qualified applicant, it awarded the position to Mike Bergner because he was senior. When Bergner took the position, he started at 88% of a full wage because he had to obtain additional training to fully perform the Technician II position.

In 1996, Vander Wyst was awarded the Systems Operation Technician job after the more senior applicant, Paul Hennes, turned it down. Vander Wyst started at 92% of the full wage rate because he had to complete some schooling before fully performing the position. In the past, Vander Wyst, Bergner, Damro, Hennes and Kieffer also started at lower wages in jobs for which they needed additional training.

The Utility routinely pays employees a percentage of scale until full ability is achieved. Specifically, the Utility's past practice has been to start the most senior employee that needs further training or school at a certain percentage, usually at 88% of the full rate.

The Grievant has performed most, but not all, of the mechanic position duties while at the Utility. Additionally, he has considerable experience outside of the Utility that also establishes his qualifications. An applicant's related work experience at another job is relevant in determining his qualifications for an internal position.

The Utility's mechanical specialist, as well as the Utility's retired automotive mechanic, commended the Grievant's mechanical abilities. Additionally, they confirmed the Grievant's ability in the area of "Special Skills," such as use of independent judgment; ability to work independently; and ability to work with others and to understand instructions.

The Maintenance Mechanic job description requires a technical degree or "equivalent experience." The retired automotive mechanic did not have a technical degree.

The Grievant's educational qualifications are sufficient even though he does not have a technical degree. The Grievant recently received an "A" in a class at a Fox Valley Technical College course certifying him in hydraulics, basic pumps, valves and cylinders. The Grievant has maintained a pump installer's license for approximately the last 12 to 13 years and has taken a seminar in pump maintenance.

The Utility appears to be seeking a candidate for the mechanic position who is proficient in and has experience with each and every requirement in its job description. Realistically, the Utility's chances of ever finding such an individual are remote. Indeed, Prast conceded that he did not think that an outside applicant would be able to perform all of the duties without any training or on-the-job learning.

An employer may not base its determination solely upon the results of a test, but must consider other factors. Ability can be demonstrated through past experience, training and education, as well as achieving a passing performance on a test. The test used in determining ability must be specifically related to the requirements of the job.

The Utility's test, to which the Union never consented, was the result of Prast's brief telephone conversations with Kempfer. Prast never provided Kempfer with a copy of the mechanic's job description.

The test was essentially a general automotive test and failed to address a majority of the areas and abilities necessary to successfully perform the Maintenance Mechanic position. There is no evidence that a minimum score of 70% is an accurate harbinger of an employee's poor or excellent performance in the Maintenance Mechanic position.

The Utility's generalized test does not reflect the Grievant's ability to perform the mechanic job duties. Consequently, the Utility cannot rely on the test results to deny the Grievant the mechanic position.

At a minimum, the Utility must provide the Grievant with a fair and reasonable opportunity to demonstrate his qualifications and abilities to fill the Maintenance Mechanic position. The Grievant has established that he has both experience and qualifications to warrant receiving at least a trial period to demonstrate his ability.

Providing the Grievant with a reasonable period of time to demonstrate his abilities would not be unduly burdensome to the Utility. A trial period is not only contractually required, but is the best predictor of ability. Arbitrators have generally held that if there is a reasonable doubt as to the ability of the senior employe, and if the trial would cause no serious inconvenience, it should be granted.

The Grievant is the most senior internal applicant with sufficient ability and qualifications to fill the mechanic position. Thus, the Utility violated the agreement when it denied him the position.

The Arbitrator should order the Utility to award the Maintenance Mechanic position to the Grievant or, in the alternative, to provide him with a trial period in the mechanic position. The Arbitrator should further order the Utility to make the Grievant whole for all losses resulting from the Utility's improperly denying him the mechanic position.

### Utility

The clear and unambiguous language of Article I, Sec. 5 and 6, of the labor agreement authorizes the Utility to consider the "ability and qualifications" of the Grievant with regard to

promotions. This language is the subject of interpretation by Arbitrator Knudson in an Arbitration Award dated January 3, 1990. In that award, the arbitrator dismissed a job posting grievance stating:

The Union accurately argues that the contractual seniority clause contains a sufficient ability standard, and, that such a clause requires the City to select the applicant with the longest service in the occupational group in which the vacancy is located, if that applicant's ability and qualifications are sufficient to perform the job. If the senior employe has sufficient ability and qualifications to do the job, the City cannot select a junior employe who is more qualified.

Under a sufficient arbitrability clause, the Arbitrator must determine only whether the employe with the greatest seniority can do the job. Seniority never became a factor in the instant case because the Grievant did not have the requisite ability and qualifications to perform the job.

Absent a contractual clause that clearly establishes an evaluative procedure for promotion, the evaluation of an employe's qualifications is left to management. Management may adopt any reasonable method to determine employe qualifications. There is nothing in the labor agreement that expressly prohibits the Utility from testing.

The Union must sustain the burden of proving discrimination, capriciousness, arbitrariness or bad faith on the part of the Utility or proving that the Utility's evaluation of the Grievant's ability and qualifications was clearly wrong. The Union has not met this burden.

The Utility interviewed the Grievant and allowed him to provide the Utility with any supplementary materials relative to his ability and qualifications. Additionally, the Utility asked the Dean of the Transportation Department at Fox Valley Technical College to review the job duties of the Maintenance Mechanic position and to develop and administer a test so that the Grievant could demonstrate his ability and qualifications with regard to the position.

The nature of the duties of the Maintenance Mechanic position requires that the individual not only possess specific skills with regard to work to be performed, but also independent judgment as to the diagnosis and actual repair of equipment. Approximately 60 to 70% of the Maintenance Mechanic's work time is devoted to automotive repairs.

The test the Utility utilized was specifically related to the requirements of the Maintenance Mechanic position. The test utilized by the Utility was fair and reasonable. The test utilized by the Utility was administered in good faith and without discrimination. Given that the Grievant's test scores are so far below the required score, the Grievant clearly does not possess the requisite ability and qualifications for the Maintenance Mechanic position.



The provisions of Article I, Secs. 5 and 6, are clear and unambiguous. Therefore, past practice has no place in this case. Moreover, the Union has failed to establish a past practice with regard to the Utility only utilizing seniority and allowing other employees to train in positions. The specific instances relied upon by the Union can be distinguished on the factual circumstances involved. The non-use of a discretionary right, such as testing, does not deprive the Utility of that right.

Based on the interview, supplementary materials submitted by the Grievant and test results, the Utility determined that the Grievant did not possess the requisite ability and qualifications for the Maintenance Mechanic position. The Grievant was given a fair and reasonable opportunity to demonstrate that he possessed the requisite ability and qualifications for the position. The grievance should be denied.

### DISCUSSION

The Grievant is seeking a promotion and the Utility is filling a vacancy. Article I, Sec. 5, of the parties' collective bargaining agreement addresses promotions. Article I, Sec. 6, of the parties' collective bargaining agreement sets forth the procedure for filling vacancies. The parties have not relied upon any other contract language.

Under each of these sections, seniority prevails if ability and qualifications are sufficient. Thus, under clear and unambiguous contract language, the Grievant does not have seniority rights to the position of Maintenance Mechanic unless the Grievant is sufficiently qualified for the position. Sufficiently qualified is minimally qualified.

Absent a contractual restriction, an employer has the management right to determine the minimal qualifications of a position. The Union does not claim, and the record does not establish, that there is such a contractual restriction.

The Utility has determined that a minimally qualified applicant for the position of Maintenance Mechanic possesses, inter alia, the following:

**Required Experience:** Five years of automotive garage experience.  
Experience with hydraulic repair and welding.

At least 60% of the Maintenance Mechanic work involves the maintenance and repair of the Utility's vehicles. The Utility's fleet includes an automobile, at least a dozen pick-up trucks, two dump trucks, three line trucks, two digger derricks, and two tractors (a/k/a loader/backhoes).

The nature and size of the Utility's fleet; the quantity and type of automotive mechanic work required of the Maintenance Mechanic; and the fact that no one in the Utility has the knowledge and experience to oversee the automotive mechanic work performed by the Maintenance Mechanic, supports the conclusion that a minimum qualification of "Five years of automotive garage experience" is reasonable. Moreover, the testimony of Fox Valley Technical College Dean of Transportation Ken Kempfer confirms that an individual would need five to six years of work in an automotive repair facility to be competent to perform the automotive mechanic duties of the Maintenance Mechanic in an unsupervised setting. Given Kempfer's extensive education, training, and work experience in automotive mechanics, Kempfer's testimony is persuasive.

In summary, the Utility has determined that a minimally qualified applicant for the position of Maintenance Mechanic possesses, inter alia, "Five years of automotive garage experience." The record demonstrates that this minimum qualification is reasonably related to the duties and responsibilities of the Maintenance Mechanic position. The Utility's determination that a minimally qualified applicant for the position of Maintenance Mechanic possesses, inter alia, "Five years of automotive garage experience" is a reasonable exercise of the Utility's management rights. 1/

---

*1/ The undersigned notes that Jim Van Toll, who previously performed auto mechanic work at the Utility, worked at an automotive garage for eighteen years prior to assuming his position with the Utility.*

---

As the Union argues, Article I, Sec. 6, of the parties' collective bargaining agreement provides that "Employees will be given a fair and reasonable opportunity to demonstrate their qualifications and ability to fill such vacancies or positions before new or outside help is hired." While "a fair and reasonable opportunity to demonstrate qualifications and ability" may be a trial period, the contract language does not mandate that it be a trial period.

Nor does the evidence of past practice relied upon by the Union establish that "a fair and reasonable opportunity to demonstrate qualifications and ability" must be a trial period. For example, Mike Bergen's "trial period" in the Distribution Technician II position was actually a training period that was recognized in the posted job description (apprentice program), as well as in a side agreement between the parties. The evidence regarding the Systems & Operations Technician position created in 1996 and filled by Frank Vander Wyst indicates that this position also involved a "training period," rather than a trial period, and that this "training period" was also a subject of a side agreement between the parties. The other instances relied upon by the Union, involving Vander Wyst, Bergner, Damro, Hennes, and Kieffer apparently also involved a "training period." (T at 118)

As Arbitrator Knudson stated in a prior award involving the parties:

There is a major difference between a trial period and a training period. The purpose of a training period is to provide an employe with the ability to perform the job, whereas the purpose of a trial period is to give an employe an opportunity to demonstrate possession of the ability to do the job. A trial period is not a training period.

As Arbitrator Knudson also concluded, the parties' contract does not require the Utility to give employe applicants a training period.

The most reasonable construction of the evidence of the parties' past practices is that, when there has been a training period, the training period was a product of a specific agreement between the parties. Such specific agreements do not give rise to a general contract right.

Moreover, the minimum qualification of "Five years of automotive garage experience" cannot be demonstrated by a trial period. Either the applicant has such experience, or the applicant does not have such experience. Thus, a trial period would not provide a reasonable opportunity for the Grievant to demonstrate that he was qualified for the position of Maintenance Mechanic.

Prior to the applicant interview for the position of Maintenance Mechanic, the Utility provided the Grievant with an opportunity to submit materials that demonstrated that the Grievant met the minimal qualifications of "Five years of automotive garage experience." At the applicant interview, the Grievant was queried on his previous work experience. The undersigned is satisfied that the Utility's application and interview process provided the Grievant with a fair and reasonable opportunity to demonstrate that he met the minimum qualification of "Five years of automotive garage experience."

Neither the application materials submitted by the Grievant, nor the Grievant's responses at the applicant interview, demonstrated that the Grievant possessed five years of automotive garage experience. Following the submission of application materials and the Grievant's applicant interview, the Utility had a reasonable basis to conclude that the Grievant did not possess the minimum qualification of "Five years of automotive garage experience."

At hearing, the Grievant acknowledged that he did not possess "Five years of automotive garage experience." The Grievant maintains, however, that his prior work experience is equivalent.

Unlike "Required Education," the "Required Experience" qualification does not provide that "Five years of automotive garage experience" may be replaced by any other "equivalent experience." Nonetheless, the Utility provided the Grievant with the opportunity to demonstrate that his prior work experience was the equivalent of "Five years of automotive garage experience" when the Utility provided the Grievant with an opportunity to take the test that was developed, administered, and graded by the Fox Valley Technical College.

Where, as here, the contract language does not restrict the Employer's right to use tests to determine qualifications, an employer is entitled to give such tests, provided that the tests are: (1) specifically related to requirements of the job, (2) fair and reasonable, (3) administered in good faith and without discrimination, and (4) properly evaluated. Kempfer's testimony is sufficient to demonstrate that the test provided to the Grievant and the other applicants has met these requirements.

To be sure, the test did not measure competencies in all areas of the "Job Specifications." However, that was not the purpose of the test. Kempfer's testimony is sufficient to demonstrate that an individual with "Five years automotive garage experience" should be able to score 70% or higher on the tests. The Grievant's score was substantially below 70%.

Inasmuch as the Grievant does not possess "Five years automotive garage experience," the Grievant's qualifications for the position of Maintenance Mechanic are not sufficient. Having reached this conclusion, it is not necessary to determine whether or not the Grievant possesses other minimum qualifications, such as "Required Education."

### Conclusion

In conclusion, Article I, Secs. 5 and 6, provide the Grievant with a seniority right to the Maintenance Mechanic position if the Grievant has sufficient "ability and qualifications." Inasmuch as the Grievant does not possess "Five years of automotive garage experience," he does not have sufficient "ability and qualifications." Contrary to the argument of the Union, the Grievant does not have a contractual right to the position of Maintenance Mechanic.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

### AWARD

1. The Utility did not violate the collective bargaining agreement when it failed to award the Maintenance Mechanic position to Kevin Obiala.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 22<sup>nd</sup> day of July, 1999.

Coleen A. Burns /s/

---

Coleen A. Burns, Arbitrator