

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**WINNEBAGO COUNTY HIGHWAY DEPARTMENT  
EMPLOYEES UNION, LOCAL 1903, AFSCME, AFL-CIO**

and

**WINNEBAGO COUNTY**

Case 314  
No. 57581  
MA-10682

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Appearances:

**Mr. Richard C. Badger**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, Wisconsin 54913, appearing on behalf of Winnebago County Highway Department Employees Union, Local 1903, AFSCME, AFL-CIO, referred to below as the Union.

**Mr. John A. Bodnar**, Winnebago County Corporation Counsel, Winnebago County Courthouse, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, appearing on behalf of Winnebago County, 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 Michael Spanbauer, 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 August 18, 1999, in Oshkosh, Wisconsin. The hearing was not transcribed. The parties filed briefs and a reply brief or a waiver of a reply brief by November 5, 1999.

**ISSUES**

The parties stipulated the following issues for decision:

Did the County violate the contract when it did not award the Gradall Foreman position to the Grievant?

If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE 1**  
**MANAGEMENT RIGHTS**

1. The management of the Winnebago County Highway (including the Landfill), Solid Waste, Airport and Parks Departments and the direction of the employees in the bargaining unit, including, but not limited to, the right to hire, the right to assign employees to jobs and equipment in accordance with the provisions of this Agreement . . . shall be vested exclusively in the County.

. . .

**ARTICLE 10**  
**JOB POSTING**

. . .

The County shall determine the qualifications of the applicants and in the event that qualifications as determined by the County are relatively equal, the applicant with the greater departmental seniority shall be selected to demonstrate his ability to perform the job during a trial/training period of not more than thirty (30) days actual performance on said job . . . If said employee is deemed qualified by the County, he shall be assigned to fill the vacancy. Should such employee not qualify within the aforementioned thirty (30) day period or should the employee desire to return to his former position at any time within the said thirty (30) day period, he shall be reassigned to his former position without loss of seniority. In this event, the applicant next in line of seniority with the department shall be given preference pursuant to the above procedure until the vacancy is filled. Should no employee within the department apply or qualify for the vacant position, employees in the three remaining departments who have signed the posting shall be eligible for such vacancy in accordance with the above procedures using bargaining unit-wide seniority as the determining factor should qualifications be relatively equal. Should no bargaining unit employee apply or qualify for the vacancy, the County may fill the position from outside the bargaining unit.

**QUALIFICATIONS DISPUTES:** If there is any difference of opinion as to the qualifications of an employee, the Union may take the matter up for adjustment through the grievance procedure.

. . .

## BACKGROUND

As stipulated by the parties, the grievance, on its merits, poses a single issue. Procedurally, however, the single issue arose from two separately filed grievances. The first grievance form states the "Employee's Name" as "Class Action," and puts the "Circumstances of Facts" thus:

Management first sees who signs the posting and decides whether or not to have a test. Then management writes the test instead of having an impartial party write and administer the test.

The grievance form states the "corrective action desired" thus:

Do not give test for any job and let the senior man have the job. Make employee whole.

The second grievance form names the Grievant for the "Employee's Name," and states the "Circumstances of Facts" thus:

The Gradall Foreman retired and his job was posted. The grievant, who has 20 years at the Highway Department and 15 years as a foreman signed the posting. There was a test and an interview for the position. The grievant and five other employees took the test. An interview was given to four of the six employees. The job was given to the less senior employee. When the previous foreman was awarded the job it was given to the senior man with no test or interview. At that time Ray Grigar, Highway Commissioner, and Supervisor Joel Rasmussen stated that from now on the senior man would get the job regardless of qualifications.

The second grievance form states the "corrective action desired" thus: "Give the senior employee the job or at least his 30 days to try the job and make employee whole."

The position at issue is Gradall Foreman. The County posted the position on December 16, 1998 (references to dates are to 1998, unless otherwise noted). The posting describes the position thus:

. . .

### MAJOR DUTIES:

1. Supervises operation of equipment and employees on ditching projects, culvert placement and sloping operations.
2. Sets grades of ditches and slopes.
3. Coordinates project operations for pickup, distribution and disposal of materials to ensure efficient operations with minimal down time.
4. Prepares records and reports that document time, materials and equipment for charge-backs to the towns and state.

5. Performs snow removal during winter months on an as needed basis.
6. Performs other related duties as assigned including general labor such as shoveling, snow fencing, brush clearing, etc.

GENERAL QUALIFICATIONS:

1. Ability to supervise and maintain effective working relationships with fellow employees.
2. Ability to organize complex operations that require equipment, materials and manpower to be coordinated appropriately.
3. Ability to operate surveying equipment used to establish grades.
4. Thorough knowledge of the operation of the gradall and other highway equipment needed for ditching and setting of culverts.
5. Ability to fill our records and reports accurately and appropriately.
6. Thorough knowledge of traffic regulations and work related safety practices.
7. Ability to understand and carry out instructions.
8. High school degree or its equivalency, plus related experience preferred.
9. Possession of a valid Class A or Class B Commercial Driver's License.

PHYSICAL QUALIFICATIONS:

1. Ability to perform strenuous or heavy manual labor.
2. Ability to work in continuous exposure to extremes in temperature and inclement weather.

...

Six employees signed the posting. The Gradall Foreman typically oversees a three-person crew, although the size or complexity of the job may require the use of additional employees.

After the posting period ended, the County directed interested applicants to take a written test. The written test consisted of the following questions:

1. Name the 6 colors used in utility locates and the category for each.
2. What is the recommended distance from the located line that requires hand digging?
3. What is the purpose of apron end walls and what type of culvert end is NOT suitable for an endwall?
4. Name some situations when a "dimple" band would be used instead of a standard ribbed band.
5. When replacing a cross culvert, why is it important to have tapered walls?
6. If you have to install 2 cross culverts side by side on a 60 degree skew, how would you place them? (Illustrate locations on drawing)

7. Describe a bench mark and how it applies to our operation.
8. List some examples of erosion control techniques in ditches.
9. The drawing below is a profile of established driveway culverts not at the proper grades in a relatively flat ditch. You have to ditch this for drainage without changing the culverts. Draw the fall line you will use and identify the grades you will use on the line below.
10. In this scenerio (sic), identify the grades to solve this drainage problem. **WRITE IN THE NEW GRADES.**
11. You need to excavate a wide shoulder to make a lane addition for a right turn lane. It requires 1 foot of gravel and 3 inches of blacktop. Using the grades given, what depth would you cut this to achieve the proper slope? **FILL IN THE BLANKS**
12. Describe, in order, the process for replacing a cross culvert on a state or county road with substantial traffic requiring a detour.

Ray Grigar, while employed by the County as its Highway Commissioner, asked Joel Rasmussen, the Highway Maintenance Superintendent, to prepare the written test. Rasmussen did so in collaboration with Gary Demler (references to Gary Demler will be by his full name, while references to Bill Demler will be by last name only), John Haese and Elizabeth Davey. Gary Demler once served as Seal Coat Foreman for the County before moving into a non-unit supervisory position. Haese was Grigar's successor as Highway Commissioner. Davey was, at the time of the test's creation and administration, the County's Assistant Human Resources Director.

Each applicant who signed the posting took the written test at the same time and at the same location. Each applicant took the test in an individual room, isolated from the other applicants. Applicants were not permitted to ask questions about the test. The County considered the test to generate eighty-six possible points. The highest rated applicant received a score of sixty. The next highest score was forty. Two other applicants received a score of thirty. One other applicant scored twenty-five, and the lowest rated applicant scored nine. Bill Demler received the score of sixty. The Grievant was one of the applicants who scored thirty.

After scoring the test, the County offered each applicant an interview. The applicant who had the lowest score declined the interview. Each applicant who accepted an interview received one. The County interviewed each applicant using a panel composed of Haese, Rasmussen and Davey. The panel asked each applicant the following questions:

1. Why are you interested in the Foreman position?
2. How familiar are you with the operations of this crew? Have you worked on or with this crew in the past. Have you operated a Gradall or similar heavy equipment?
3. What is your experience in supervising others? Have you supervised work crews in the past (seasonals?, outside work activities?, previous employers?).

4. If you were assigned a project and as the work proceeded you realized that something was not working out as you expected or were told it would work, what would you do at that point?
5. Would contacting a patrol superintendent (always) be your first option? What if you were confident in your ability to solve the problem? What situations would you feel comfortable in proceeding along without consulting a supervisor? Give me an example.
6. As a foreman, if someone on your work crew refused to complete a task assigned to him and there was not a safety or legal question involved, what would you do?
7. What do you see yourself doing in five years? Do (sic) have goals you hope to accomplish in your career? School? Computers?
8. What experience have you had keeping detailed records? Describe your ability with figures. Do you balance your own checkbook?
9. What makes you the best candidate for this position?

Each interviewer used this slate of questions from a pre-printed form. The form included the written test score of each applicant.

The County awarded the Gradall Foreman position to Bill Demler, who has less departmental seniority than the Grievant. The balance of the background is best set forth as an overview of witness testimony.

### **The Grievant**

The Grievant worked for the County as a Laborer until being awarded the position of Seal Coat Foreman. He has served in that position for fifteen years. As Seal Coat Foreman, the Grievant oversees the work of roughly twelve employees. He must order materials for the crew and coordinate their work.

The Grievant has worked as a member of the Gradall crew, particularly to cover for absences of members of that crew. He has not, however, operated the Gradall. He has experience setting culverts and working on ditch and drainage projects, including large and complex projects. He has taken a class offered by the County Surveyor in reading a level, and used laser-based levels to assist in grading the parking lot at the old Highway Department Offices.

The County has, for some time, used two employees serving in the position of Gradall Foreman. One of those employees retired, creating the vacancy prompting the December posting. That employee had held the post for roughly four years, after the County awarded him the position after posting it. The Grievant also signed that posting, and felt he should have received the

position at that time. When he did not receive the position, he asked Highway Department management about it, and was informed that the senior employe would receive the position then and in the future. Thus, when he signed the December posting, the Grievant felt that, as the senior applicant, the position would be his.

More specifically, the Grievant stated that his experience as Seal Coat Foreman met the first and second "General Qualifications" of the December posting. His experience on the job and in a landscaping position he fills during off-work hours met the third listed qualification. His work on the Gradall crew meets the fourth stated qualification, and his lack of experience on the Gradall cannot be held against him, since the County controls such assignments. His experience meets the remaining five qualifications, as well as the two listed "physical qualifications."

The requirement of a written test came as a shock to the Grievant. No test was required of the retiring Gradall Foreman at the time he was awarded the position. The administration of the test and the interview process convinced the Grievant that the process may have been skewed in Demler's favor. More specifically, the Grievant stated that he did not think it appropriate to ask applicants Question 1 of the written test, since the colors are stated in printed material carried on County trucks, and since the County did not permit applicants the opportunity to study or to memorize such details of Gradall work. He found the printed scenario underlying Question 10 confusing and was not permitted to ask clarifying questions. Beyond this, he noted that Demler has, for the past two to three years, been granted more opportunity to work with the Gradall.

### Joel Rasmussen

Rasmussen has been Maintenance Superintendent for roughly five years and spent the prior four years of his County service as Gradall Foreman. In his opinion, the most significant of the "general qualifications" stated on the December posting, in the order of their importance, are 4, 3, 1 and 2. Grigar asked him to develop the test for the December posting to avoid past problems. More specifically, Grigar felt that awarding the position based on seniority had resulted in too long a "learning curve" for the foreman and required more oversight of the foreman than Grigar considered productive.

Rasmussen created an initial draft of the test, then submitted it to Gary Demler and Haese for them to critique. The major part of the drafting process consisted of isolating past on-the-job problems, and specifying them to determine if the applicants could recognize and solve them. The test had no predetermined passing grade. Question 1, in Rasmussen's view, was worth testing for because a Foreman should not spend time running back and forth to his truck to determine utility locates. Question 10, in his view, reflected the reality of the job. Many situations are not self-explanatory and demand on the site interpretation. The County Surveyor will sometimes isolate on-the-job problems for the Gradall crew, but other problems must be resolved on site by the crew. The Grievant's answer to Question 10 failed to solve the depicted problem by routing drainage toward the natural flow of a waterway depicted on the illustrated scenario.

Rasmussen noted that the County has not, in the past, tested for the position of Gradall Foreman, but has tested for other positions such as Paving Foreman and Shop Welder.

### **Elizabeth Davey**

Prior to his retirement, Grigar informed Davey to post the Gradall Foreman position. He anticipated the position would generate a large number of applicants, and he wanted to make sure the County could distinguish between them and select the most qualified person possible. In filling the position in the past, Grigar had, in Davey's view, over-reacted to a prior grievance by awarding the Gradall Foreman position based on seniority. Doing so had produced on-the-job problems in her and Grigar's view. Grigar felt that a Foreman should not rely any more than absolutely necessary on a Superintendent's or the Commissioner's assistance in addressing job-site problems.

Davey played no role in drafting the test. She reviewed it, however, prior to its administration to determine if it was job related and objective. Davey felt that Demler was by far the best applicant, particularly in the interview process. She felt his answers demonstrated leadership and problem-solving skills. The Grievant surprised Davey during the interview by responding to Questions 4, 5 and 6 by indicating he would routinely consult a Superintendent. On the interview, she ranked two to three applicants ahead of the Grievant. Haese made the ultimate hiring decision, but Davey testified she felt it was the right choice.

She noted she did not consult personnel records as part of the hiring process. That process was, in her view, predictive rather than evaluative.

### **John Haese**

Haese became Commissioner in January of 1999. He has prior experience as Highway Commissioner of Calumet County and as a unit employe of the Manitowoc County Highway Department. He served Manitowoc County as a grade crew foreman. Manitowoc County, unlike Winnebago County, uses a back hoe, not a Gradall, on its grade crew.

Haese was not yet Commissioner when Rasmussen created the test. Haese noted that he agreed with Grigar's decision to test applicants. He was given the opportunity to critique the test while it was in draft form. He felt the test was job related and fair. Manitowoc County has used tests and, in Haese's opinion, has done so successfully. Haese did not know either Demler or the Grievant prior to the testing process.

Haese reviewed the grading of the written tests and concluded they had been graded fairly. He considered Demler the best interviewee. Demler showed, in Haese's estimation, good working knowledge and a willingness to make on the spot decisions. The Grievant, in his estimation, failed to give detailed answers and showed too great a willingness to turn to



supervision to resolve on-the-job problems. Considering the test, the interview and relevant experience, Haese concluded Demler was the best candidate for the position. Haese noted he had ranked three applicants ahead of the Grievant.

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

## THE PARTIES' POSITIONS

### The Union's Initial Brief

The Union contends that, as processed by the parties, the grievance subsumes three distinguishable issues. The first is whether the Grievant had "a reasonable expectation that the gradall foreman position would be awarded based on seniority and past experience rather than a test." The second is whether "the test and the circumstances under which the test was administered" was fair. The third is whether the Grievant's qualifications were relatively equal to Demler's.

The evidence establishes that the "union had been advised by the County that it intended to fill foreman positions . . . by seniority" prior to the posting of the Gradall Foreman position. From this, the Grievant reasonably assumed he was next in line for the posted position. That the County did not advise applicants that the position would be tested for is "not fair" to the Grievant, who was thus denied "the opportunity to study or otherwise prepare for the test."

Beyond this, "the test itself, the manner in which it was given, and the interview process were unfair and prejudicial to the grievant." The unfairness of the test is exemplified by the question concerning utility locates. The question presumes knowledge that could only be expected of an incumbent on the Gradall crew or through study. The County, however, did not permit applicants to study, and thus skewed the test toward incumbent crew members. That the County refused to permit applicants to ask questions about the test highlights that it was not administered fairly. The non-standardized format of the test underscores this point. That the County included test scores with the interview sheets highlights that testing flaws continued into the interview process. No less troubling is that the questions placed before the applicants permitted too many subjective factors to creep into the evaluators' view of the applicants.

The Union notes that the grievance does not question the County's "right to determine qualifications," but argues that "those qualifications should be directly related to the job." Contending that "(t)he fairest way to define the essential qualifications is to use those listed on the job posting," the Union concludes that the Grievant "is relatively equal to (Demler) overall," and thus that the Grievant's "seniority should have prevailed." More specifically, the Union contends that a review of the relevant portions of the Gradall Foreman job

description establishes that the Grievant and Demler “are equally matched” regarding all but four criteria. Of those four, the Grievant’s “fifteen years of proven experience” as a foreman establish he “is clearly superior” on two of those four. Of the remaining two, Demler’s experience on the Gradall crew establishes Demler’s greater experience. That experience is tempered, however, by the Grievant’s personal experience on the Gradall crew. Against this background, the Grievant’s qualifications must be considered at least “relatively equal” to Demler’s. It follows that “seniority should have ruled the day.”

The Union concludes that the Grievant should be awarded the position of Gradall Foreman, or no less than “the 30 day trial period provided for under the contract to prove that he can handle the responsibilities of the gradall foreman position.”

### **The County’s Initial Brief**

After a review of the evidence, the County contends that arbitral authority establishes that an employer “generally has the right to control promotions, except as limited by the Collective Bargaining Agreement.” Beyond this, such authority establishes that “regarding qualification disputes, the burden of proof clearly falls upon the Union to prove either arbitrariness, discrimination or bad faith before the job selection made by Management is reversed by the Arbitrator.”

More significantly here, the County argues that WINNEBAGO COUNTY, MA-3633, 3707 (BIELARCZYK, 2/86) “is almost identical in factual situation to the present case.” In that case, “despite the fact that (the Grievant) was the least senior of the three applicants” for “the position of Seal Coat Foreman . . . he was awarded that position by the County on the basis that he was intimately familiar with the entire sealcoating operation.” The County used the fact that the Grievant had filled in on a temporary basis as Seal Coat Foreman as a reason to award him the position. The facts posed here state no reason to depart from the rationale that served the Grievant well in the past.

Arbitral precedent will not support imposing training requirements on the County. Article 10 cannot be considered “a minimum qualifications or minimum ability clause.” Past County experience with awarding Foreman positions relying on seniority was adverse, and resulted in more on-the-job training than the County considers productive. Against this background, the Union cannot be considered to have met its burden of proving arbitrary, discriminatory or bad faith conduct by the County in filling the Gradall Foreman position. In fact, the evidence supports the County’s conduct. The Grievant has not operated the Gradall machine, and his test score “was significantly lower than that of the test score of Mr. Demler.”

Nor can the test or its administration be faulted. Test questions “related to basic surveying and mathematical skills.” Beyond this, the interview process afforded applicants the opportunity to demonstrate their skill. That Demler, unlike the Grievant, chose to respond to

problem solving questions by indicating what, other than referring the problem to the Superintendent, he would do to solve the problem cannot be held against Demler. In the absence of evidence to believe any County personnel involved in the hiring decision had prejudice against the Grievant, there is no persuasive basis to overturn the County's decision.

In the event a contract violation is found, the County contends that "the Arbitrator's Award should be limited to ordering that (the Grievant) be provided a trial/training period of not more than thirty (30) days." No "back pay should be awarded in this matter given the fact that the pay for both the Gradall Foreman position and (the Grievant's) present position as Sealcoat Foreman are equal." The County concludes, however, by stressing that there has been no contract violation and "the grievance before the Arbitrator in this matter (should) be denied."

### **The Union's Reply Brief**

The Union "does not dispute that the parties arbitrated a similar case approximately fourteen years ago," but contends that the "difference between that case and the instant one is that (the Grievant) is much more qualified to be a gradall foreman" than was the senior applicant for the open position disputed in the prior award. Here, the Grievant has prior experience "as the gradall foreman and had other experience with grading." Since he "met the basic qualifications to become the gradall foreman," he should have been awarded the position. That the County knew of his interest in this position three years ago, yet altered the means used to fill the position without notice is, at a minimum, questionable. A review of the evidence manifests that only Demler could have met the County's newly established criteria. This sort of "cherry-picking" must be viewed as arbitrary and capricious.

In any event, the labor agreement "provides for a trial period." However the Grievant's and Demler's qualifications are evaluated, the Grievant should have received the trial period to be able "to succeed or fail on his own." The Union concludes by requesting that the Grievant be awarded the Gradall Foreman position or be "given the 30 day trial period provided for under the contract to prove that he can handle the responsibilities of the gradall foreman position."

### **The County's Reply Brief**

The County decided not to file a reply brief.

## **DISCUSSION**

The stipulated issue broadly questions whether the County violated the labor agreement by awarding the Gradall Foreman position to Demler. Resolution of the issue is, however, more narrow in scope. Article 10 governs the grievance, and resolution of the stipulated issue demands its terms be applied to the December posting process. That portion of Article 10 relevant to the grievance is set forth above.

The parties do not dispute that the Grievant is a qualified applicant for the position of Gradall Foremen. Thus, Article 10 must be applied to a competition between qualified employes within the same department as the posted position. The first sentence of the cited portion of Article 10 establishes that the County addresses a competition between qualified departmental applicants by determining their qualifications. Once this individual determination is made, a thirty-day on-the-job “trial/training period” is awarded to the most qualified applicant, unless an applicant “with the greater departmental seniority” has qualifications “relatively equal” to the most qualified applicant. In that case, seniority prevails, and results in the senior applicant receiving the on-the-job trial/training period.

In a competition between qualified intra-departmental applicants, Article 10 establishes a competitive process beyond the determination of minimal qualifications to perform the posted job. Thus, competing applicants may or may not each far exceed the minimum threshold of competence. Where there is competition between qualified applicants, Article 10 demands a comparison of the qualifications of each applicant, not a comparison of any single applicant to the minimum qualifications for the job. Under Article 10, departmental seniority governs only when competing individuals possess “relatively equal qualifications.” The grievance questions, then, not whether the Grievant could be considered qualified to perform as Gradall Foreman, but whether the Grievant has qualifications “relatively equal” to Demler’s.

As the Union notes, this determination demands an examination of the County’s evaluation of the applicants. Regarding this determination, I do not write on a clean slate. In a prior arbitration award between these parties, Arbitrator Bielarczyk noted:

Herein both parties acknowledge the County has the right to determine qualifications of applicants for a posted position and both parties acknowledge that the County can not be arbitrary, unreasonable or discriminatory in its determination of an applicant’s qualifications. MA-3633 AND MA-3707 AT 6.

The governing contract language has not changed since this award, and I can see no persuasive reason to apply a standard other than the agreed-upon standard noted in the prior award.

There is no persuasive evidence that the County acted in a discriminatory fashion. It can be noted that Demler shares at least a last name with one of the creators of the written test. The record is silent on whether they share anything else. Nor can Demler’s past assignments to fill-in on the Gradall be considered evidence of discrimination. The Grievant has, in the past, been assigned to the Gradall crew, thus being placed at an advantage to applicants other than Demler for the December posting. Beyond this, the Grievant’s experience as fill-in for the then incumbent Seal Coat Foreman worked to his advantage in securing the Seal Coat Foreman position when it became vacant. Relying in part on that experience, the County awarded him that position over a more senior departmental applicant, and successfully defended its action before Arbitrator Bielarczyk. It is not immediately apparent how the type of experience that brought the Grievant his current position can be considered evidence of

discrimination in this case. In any event, it is undisputed that Haese selected the Gradall Foreman when he was new to the job. He had no prior knowledge concerning Demler or the Grievant. There is no persuasive evidence to indicate any other supervisor communicated, or would communicate, to Haese a preference for Demler or against the Grievant.

Nor can the County's conduct be characterized as capricious. The evidence establishes that County management shared a good faith belief that past experience awarding the Gradall Foreman position based on seniority had not produced the desired result. Grigar and his management team felt that the County needed Foremen who did not require extensive training and who were capable of acting independently. The County created the written test and the interview process to address past problems. The written test reflects actual problems confronted by its Gradall Foremen. The County acted in good faith to avoid past mistakes. This cannot be characterized as capricious.

The stipulated issue thus focuses on the disputed reasonableness of the County's determination of qualifications. As noted by the Union, this demands a review of the means chosen by the County to make the determination. The Union questions whether the test was a reasonable means and whether it was reasonably administered.

There is no contention that the County lacks the contractual authority to use a test. Neither Article 1 nor Article 10 bars County use of a test or an interview, and each appears sufficiently broad to authorize their use. In any event, it is apparent that the County has tested for other positions without challenge. The Grievant questions whether the County offered him the position after it denied him a prior placement as Gradall Foreman based on seniority. This ignores that he acquired his current position over a more senior departmental applicant. Beyond this, it ignores that Article 10 does not award positions based on seniority alone. Even if statements were made to the Grievant that his turn was coming, an arbitrator's authority flows from Article 10. If any statement made between a manager and a unit employe was enforceable standing alone, the contract would lose all meaning, and there could be no unit-wide standards. If the labor agreement is to be modified, it must be by the County and the Union, not by individual employes or managers.

While the force of the Union's arguments regarding the test and the interview must be acknowledged, the evidence does not establish that they were unreasonable as created or as administered. For example, the Union's arguments cast doubt on the worth of Question 1. The question would appear to favor an incumbent on the Gradall crew, and would appear to be a matter easily memorized by a qualified applicant. Like the balance of the written test, however, the question is objective and job-related. Beyond this, the Union's critique of the potential bias of questions toward applicants with Gradall crew experience is weakened by the fact that the Grievant has such experience, and seeks to advance his experience as a basis for preferring him over other applicants.

As noted above, the County created the written test to address problems encountered by Gradall Foremen. Presumably, the ability of an applicant to recognize and to effectively assess such problems directly addresses problem-solving ability. The County created the test, and this opens the test to the assertion of bias noted in the grievance form. The assertion, however, has no solid evidentiary support. The hiring decision is the County's, and no outside testing service could bring to the process the experience and knowledge of personnel familiar with the work. Beyond this, use of outside testing services does not, standing alone, assure unbiased selection.

Nor does the record establish the County administered the test unfairly. The lack of notice pointed to by the Grievant was common to all applicants. No applicant was permitted to ask questions while the County administered the test. Applicants took the test alone, and the County scored each test individually. The issue under Article 10 is not whether the test was the best means of assessing qualifications. The issue is the reasonableness of the test and its administration. The evidence affords no persuasive basis to find it unreasonable. The process put no applicant at an unfair advantage.

Interviews are inevitably subjective, but are commonly used. The Foreman position works more closely with non-unit managers than do other unit positions. It is neither surprising nor improper that management would want to interview applicants for the position. The questions asked of the applicants were common to each applicant, and permitted the Grievant the opportunity to emphasize his experience as a foreman. The Union persuasively contends that posting the written test scores on the interview question form was ill-advised. Standing alone, however, this cannot undercut the validity of the interviews. The interviews attempted to isolate the problem solving ability the County was seeking. The Grievant's choice to emphasize his willingness to bring supervision into job-site problems cut directly against what the County was seeking. In another context, this response could have assisted the Grievant. For better or for worse, this is part of the risk of competition for jobs. Demler's responses tied more closely to the skills the County specifically sought. This cannot be held against the County.

In sum, the creation and administration of the test cannot be considered unreasonable. This leaves the County's conclusion that Demler's and the Grievant's qualifications were not relatively equal. The Grievant's written test score placed him tied for third among six applicants, with a point total one-half of Demler's. Haese and Davey rated two to three of the five applicants who accepted an interview ahead of the Grievant. The County's conclusion that this failed to establish "relatively equal" qualifications cannot be dismissed as unreasonable.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The discussion stated above should not be read to imply the grievance failed to pose troublesome points.

The Union's argument that the Grievant had a reasonable expectation that the Gradall Foreman position would be awarded based on seniority poses a more troublesome problem of inter-personal communication than of contract interpretation. If, after filling the vacancy prior to the December posting, management personnel told the Grievant that he would be next, then that communication was ill-advised at best. Article 10 establishes an open competition for positions, based on qualifications and seniority. It cannot be interpreted to permit the selection of an applicant prior to a posting. For similar reasons, it cannot be said that the County unfairly changed the means of determining the qualifications for a posted position. The reference point to assess qualifications is Article 10, not an individual fact situation regarding a posting. The Grievant earned the Seal Coat Foreman position because his selection ahead of an employee with greater seniority complied with Article 10. That the County chose the senior applicant in a prior posting of the Gradall Foreman cannot obscure that seniority is only one of the criteria for selection stated in Article 10. A single placement of a Gradall Foreman based on seniority can no more establish a binding practice than can the single departure from seniority that placed the Grievant as Seal Coat Foreman.

The most troublesome issue concerning the selection process is whether it is skewed in favor of applicants whose prior placement, on a temporary basis, gives them an advantage over other applicants. This issue cannot, on this record, be considered determinative without ignoring that both parties acknowledge experience has, and should, play a role in filling Foreman positions. Against this background, the selection process at issue here was not biased for Demler or against any of the remaining applicants. It cannot be characterized as unreasonable, and Demler's selection thus cannot be set aside as a violation of Article 10.

### AWARD

The County did not violate the contract when it did not award the Gradall Foreman position to the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 9th day of December, 1999.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator