

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OSHKOSH CITY EMPLOYEES UNION,
LOCAL 796, AFSCME, AFL-CIO, and affiliated with
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES**

and

CITY OF OSHKOSH, WISCONSIN

Case 318
No. 58953
MA-11126

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, Wisconsin 54912, appearing on behalf of the Oshkosh City Employees Union, AFSCME, AFL-CIO, and affiliated with Wisconsin Council of County and Municipal Employees, referred to below as the Union.

Mr. William G. Bracken, Employment Relations Services Coordinator, with **Mr. Tony J. Rennig** on the brief, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of City of Oshkosh, Wisconsin, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Employer and the Union 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 dispute reflected in grievance filed on behalf of Jay Munig, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was conducted in Oshkosh, Wisconsin on September 27, 2000. A transcript of the hearing was filed with the Commission on October 16, 2000. The parties submitted briefs and reply briefs by January 2, 2001.

ISSUES

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

Did the City violate the Collective Bargaining Agreement when it denied the Grievant a trial period for the Equipment Mechanic job vacancy?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this agreement, the City reserves and retains solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Union.

...

ARTICLE XVII

NEW JOBS – VACANCIES

...

All non-supervisory vacancies shall be posted on the bulletin board of the Public Works and Parks Department and such notice shall be posted five (5) working days before the vacancy is filled. Employees wanting such posted jobs shall sign the posted notice. The employee shall be selected on the basis of seniority, work record and qualifications. In the event an official training program has been conducted for a given position successful completion of the course will be the qualifying factor for promotion. Said employee shall demonstrate his ability to perform the job posted within thirty (30) working days and if deemed qualified by the employer shall be permanently assigned the job.

Should such employee not qualify or should he desire to return to his former job, he shall be reassigned to his former job without loss of seniority.

BACKGROUND

The grievance, filed on July 27, 1999 (references to dates are to 1999, unless otherwise noted), cites Article XVII as the governing contract provision. Gerald Herbst serves the City as the Parts Clerk in its Central Garage. He also serves as Union Steward. In that position, he completed the grievance form on the Grievant's behalf, and attached to it the following summary of relevant facts:

(The Grievant) signed the posting for Central Garage Mechanic on June 8, 1999.

On July 12, 1999 John Nackers asked him to sign an agreement stating he would score at least 80% on the test F.V.T.C. was giving on July 16, 1999 to be accepted for the mechanic position.

On July 14, 1999 (the Grievant) and myself met with John Nackers, Bill Rasmussen. They asked him why he would not sign the agreement. (The Grievant) and I said it did not state in either the contract or the posting that the position would be based solely on the test being given by F.V.T.C.

(The Grievant) and I said we would see what the instructor from F.V.T.C. said and we would take it from there. Bill Rasmussen then told John to tell the instructor at F.V.T.C. that (the Grievant) would need to score at least 80% or better.

On July 19, 1999 (the Grievant) was informed that he did not pass the test by John Nackers. We saw the actual test itself and on Friday July 23, 1999 (the Grievant) received in the mail his results of the test.

We feel with (the Grievant's) Associate Degree and test results from Universal Technical Institute and work history he is not being given a fair chance at the job.

(The Grievant) has not worked as a mechanic for seven years and we feel if given the chance he would be able to pick up where he left off and be a credit to the Central Garage.

We also feel that the test (the Grievant) was given was not fair because he has not taken the course given by F.V.T.C.

(The Grievant) also was not even interviewed by anyone for the job and only one reference was checked.

Even though (the Grievant) has had only about three and one half years working on heavy equipment and has limited knowledge of test equipment for electronic engines and transmissions he is very capable of learning it quickly.

Our mechanics that work in the Central Garage now do not have any knowledge of the test equipment, simply because we do not even have it and would have to learn as they go also. The test equipment we have now is for pickups and related vehicles, and the mechanics have not had any training for that even. They have to read from the manuals and follow the step by step instructions.

The position the Grievant sought is known as the Central Garage Equipment Mechanic, which is referred to below as Equipment Mechanic.

The City's Central Garage is responsible for the maintenance of a varied fleet of vehicles and equipment. City owned trucks range from pickups to garbage trucks. The City also uses motor graders, backhoes, end loaders, bucket trucks and vans. The Central Garage also does small engine maintenance and repair. The City staffs the Central Garage with four Equipment Mechanics and one Welder.

On June 8, the City posted an Equipment Mechanic position. Attached to the posting was a two-page position description, which states the following:

GENERAL STATEMENT OF DUTIES

This is a skilled position, involving the maintenance and repair of light and heavy duty trucks, and off road machinery. Work involves performing skilled tasks in the maintenance and repair of gasoline, diesel and hydraulic powered equipment. Employees in this class will also perform welding and body repairs. Work is performed under general supervision allowing maximum opportunity for independent judgement.

ESSENTIAL DUTIES AND RESPONSIBILITIES

- A. Tests, repairs, reconditions and maintains machinery and equipment, including, but not limited to; trucks, trailers, tractors, endloaders, excavators, dozers, motor graders, etc.
- B. Installs, repairs and reconditions auxiliary equipment used on vehicles and equipment including but not limited to; snow plows, snow blowers, sweepers, flail mowers, etc.
- C. Repairs brakes, engines, electrical, fuel, hydraulic, transmission, ignition, air, exhaust, axle assemblies, clutches, and related systems.
- D. Responsible for diagnosing mechanical problems and determine the most effective means of maintenance, repair or replacement.

- E. Operates a variety of hand, electric and air driven tools, provided by Central Garage.
- F. Responsible for keeping shop areas and equipment in a safe and orderly fashion.

...

REQUIRED EDUCATION AND EXPERIENCE

- Graduate from an accredited Technical College in auto and or diesel mechanics.
- Five (5) years experience working on diesel engines, or heavy equipment.
- Knowledge in the use of test equipment for electronic engines, transmissions, etc.
- Must possess a valid Wisconsin Commercial Drivers license, with air brake endorsement.

...

John Nackers is the Central Garage Foreman, and drafted the position description, with the assistance of the City's Human Resources Department. The predecessor position description for Equipment Mechanic stated the following:

Nature of Work

This is a skilled level of work involving the maintenance and repair of light and heavy duty trucks, and off road machinery.

Work involves performing skilled tasks in the maintenance and repair of gasoline, diesel, and hydraulic powered equipment. Employees in this class also perform welding and body repair tasks on a limited basis. Work is performed under general supervision and is inspected during progress and upon completion.

Examples of Work

Performs mechanical repairs, adjustments, and preventative maintenance tasks on a variety of automotive, light and heavy trucks, and off road equipment. Trouble shoots and repairs mechanical, electrical and hydraulic system malfunctions. Uses tune-up and testing equipment to aid in problem diagnosis. Performs body panel repairs on both sheet metal and fiberglass. Welds and brazes on a limited basis using both electric and gas methods. Performs related duties as required.

. . .

Required Education and Experience

High School graduation

Wisconsin Commercial Drivers License, with air brake certification.

Ownership of necessary wrenches and other hand tools needed for performance of job duties.

Ability to perform heavy physical labor.

Nackers redrafted the position description because he found the original unduly vague, and out of date. He added the five-year requirement to the “required education and experience” section to highlight the demands placed on Equipment Mechanics by the varied nature of the equipment maintained at the Central Garage. That level of experience reflected, in his view, “a pretty good training time . . . where you’re going to have a real broad spectrum of knowledge” (Tr., at 88). The increased experience requirement reflected an upgrade in the requirements of the position.

The City also uses mechanics in its Fire, Transit and Parks Departments. The Fire Department requires “(a)t least two years of technical school with four to five years of journeyman training or equivalent in vehicle and small engine repair” for its mechanic. The Transit Department requires “200 or more hours in formal course work in mechanics or related fields” and “(t)hree years experience in automotive and electrical repair work” of its mechanic. The Parks Department requires “(3) years of demonstrated mechanical work or any combination of training and education that will provide the required knowledge” of its mechanic.

The Grievant and one other unit employee signed the June 8 posting. Sometime shortly after signing the posting, the Grievant detailed his experience and his interest in the position to Nackers. On Nackers’ request, he supplied the Human Resources Department with a resume, which summarized his work experience thus:

City of Oshkosh, Oshkosh, WI

--Employed April 1993 to present

--Sanitation Technician

--Operation of heavy and light equipment

--Asphalt and concrete construction

--General construction

City of Berlin, WI

--Employed December 1990 to December 1991

--Mechanic

--Worked on small engine, automotive, light truck, heavy truck, heavy equipment

Quality Truck Care Center, Oshkosh, WI

- Employed December 1989 to December 1990
- Mechanic
- Worked on heavy truck, heavy equipment

DMS Auto Parts, Oshkosh, WI

- Employed January 1987 to January 1988
- Oil change
- Parts counter

Metzler Sales and Service, Oshkosh, WI

- Employed September 1986 to March 1988
- Light automotive work
- Clean up crew
- Errand-runner

The resume also noted the Grievant had graduated, with an Associate's Degree, from Universal Technical Institute of Glendale Heights, Illinois. After the completion of the posting period, the Human Resources Department reviewed the personnel files of the applicants. Nackers learned that he should consider further review of the Grievant's qualifications, but that the other applicant lacked a Technical College degree. The City does not test for all of its vacant positions, but typically tests applicants for police officer, fire-fighter and mechanic.

Nackers contacted Fox Valley Technical College (FVTC) concerning the creation of a test for Equipment Mechanic. FVTC referred him to Daniel Poeschel, a team leader and instructor of Diesel Mechanics. Poeschel has an Associate's Degree in Diesel Mechanics and Truck Construction, and worked for Schneider National Trucking in Green Bay for nineteen years prior to becoming an instructor at FVTC in 1997. While at Schneider, Poeschel worked twelve years as a diesel mechanic and seven years in the engineering department. His experience in testing is from teaching and through certification courses at FVTC.

Nackers faxed Poeschel the position description for Equipment Mechanic, and discussed what the City was looking for in four to five conversations with Poeschel following his receipt of the fax. Nackers informed Poeschel that the City was interested in testing with some specificity regarding automatic transmissions, electronics and brakes. Poeschel adapted a test he administers to his students for the City's use.

Nackers discussed the need for a test with the Grievant, who informed Nackers he should have no problem with it. Nackers asked the Grievant if he would agree to an 80% passing grade for the test. He gave him the following memo, dated July 12, for his signature:

On July 16, 1999 at 1:00 p.m. there will be a mechanics' skills test given by the Fox Valley Technical College in Appleton. The test will be a combination of written data, and hands on skills.

A score of 80% will be required to be accepted for the position of Central Garage Mechanic. The tests are scored and graded by the Fox Valley Technical Instructor.

After successful completion of the skills test, you will be scheduled for your physical testing. When this is completed, your probationary time will start per the Local 796 Union Contract. Please sign below and return this letter to me if you agree to continue with the skills testing.

The Grievant asked to think about signing the memo, then consulted Herbst. Herbst, Nackers, the Grievant and Street Superintendent William Rasmussen then met. Herbst took the position that the FVTC instructor should score the tests and determine the passing grade, without regard to the Grievant's willingness to sign the memo. The parties agreed that this would be the appropriate procedure.

Nackers and Poeschel had at least some discussion on this point, ultimately agreeing that 70% would be the passing score. This is the passing score for Automotive Service Excellence (ASE) tests. ASE is part of the National Automotive Technicians' Education Foundation. ASE certifies mechanics, and permits its logo to be displayed by those shops that employ ASE certified personnel. Poeschel views ASE tests as essentially industry standard. Nackers is not ASE certified. The City does not require ASE certification for its Equipment Mechanics. The test created by Poeschel is not an ASE test.

Poeschel designed the test to evaluate introductory-level mechanical knowledge. For the first portion of the test, Poeschel built three problems into an engine. He provided the Grievant a laptop computer to generate fault codes, a troubleshooting manual, and necessary tools to locate the problems. The second portion of the hands-on portion of the test concerned slack adjusters for brakes. The test first demanded the identification of four different brands of slack adjusters. The next part demanded the proper set up of each brand of slack adjuster. Poeschel supplied the necessary tools, manuals and templates. The written portion of the test consisted of multiple choice and true/false questions.

Poeschel summarized the results of the test in a letter to Nackers that states:

...

The written portion consisted of 125 multiple choice and true/false questions. The hands on portion contained engine problems worth 30 points and a brake section worth 72 points. The scores are as follows:

Written section:	67 correct = 57%
Engine section:	20 correct = 67%
Brake section:	48 correct = 67%

Total answers correct: 135
Total possible correct: 227
Final cumulative percent Score: 59%

...

On Nacker's request, Poeschel sent a follow-up letter stating the Grievant "does not meet the minimum qualifications" for the Equipment Mechanic position.

Nackers informed the Grievant of the results of the test, prompting the grievance. The City then advertised the position to applicants outside of the bargaining unit. The City received six applications and interviewed three of the applicants. The unanimous choice of the interviewing committee was Shawn Winslow. He had worked as a heavy equipment mechanic for ten of the eleven years preceding his application for City employment. He spent the remaining year as a mechanic for a landscaper. On September 10, Winslow took the same test taken by the Grievant in July. Winslow received a score of 73.5%, and was subsequently awarded the position of Equipment Mechanic.

The balance of the background is best set forth as a brief overview of witness testimony.

Stanley Beduhn

Beduhn has worked as an Equipment Mechanic since December of 1988. He estimated that roughly 10% of his work time is devoted to the repair and maintenance of light-duty vehicles. He has taken vocational school courses since high school, and has participated in ongoing training by the City. He does not possess an Associate's Degree.

Gary Stahowiak

Stahowiak has served as an Equipment Mechanic for roughly seven years. Prior to this, he worked in the City's Sanitation and Street Departments. At the time he became an Equipment Mechanic, he did not not have advanced training in mechanics. Rather, he had acquired sufficient experience through his life and job experience to be hired by the City as an Equipment Mechanic. He estimated he devotes roughly 75% of his work time to heavy equipment work, with the remaining time spent on light truck and automotive work. He has participated in City sponsored training in transmission work and hydraulics. He testified that when the City acquires new equipment, the manufacturer typically affords some training to the Equipment Mechanics.

Mike Phillips

Phillips has served as an Equipment Mechanic for roughly sixteen years, and prior to that served as a Mechanic for the Transit Department. He has had training beyond high school in helicopter maintenance through the U.S. Army, and has participated in City sponsored training. He estimated between 75 and 80% of his work time is devoted to heavy equipment work.

Gerald Herbst

Herbst has worked for the City for roughly thirty-one years. He stated that the City should have checked the Grievant's references and interviewed him. If they had, in his view, the Grievant would have demonstrated the need for a trial period to evaluate his qualifications. He noted he believed the Grievant had sufficient experience to meet the five-year requirement stated in the posting. Herbst noted that the City only used two of the four brands of slack adjusters covered in the test.

The Grievant

The City hired the Grievant into its Sanitation Department in May of 1993. Since July of 1997, he has served in the Street Department as an Equipment Operator II. While in the Street Department, he has worked in the small equipment room. In the small equipment room, he repaired and maintained power equipment used in the Street Department. He noted his degree from Universal Technical Institute involved an automotive and diesel engine program. His work experience with engines started in high school, when he worked at Metzler Sales and Service. He started cleaning cars, and doing errands but demonstrated the initiative and ability to work his way into car and truck repair and maintenance. Most of the trucks were light duty, but he did do work on heavy equipment and snowplows. He estimated that when he worked on vehicles for Metzler, he spent roughly 25% of his time on heavy equipment. At DMS Auto Parts, he worked at the parts counter, and also performed oil changes and lubrication. His work at Quality Truck Care Center typically involved heavy equipment maintenance and repair on a variety of vehicles. For the City of Berlin, he worked on a wide variety of equipment from small engines to backhoes. He estimated that roughly 75% of his time there was spent on heavy equipment work. He added that his current duties sometimes require him to make adjustments on heavy equipment. That work, added to his prior experience, met the City's five-year requirement.

Daniel Poeschel

Poeschel acknowledged he never viewed the Central Garage. He developed the test based on the position description for Equipment Operator and input from Nackers. The test he developed was scheduled for four hours, split evenly between the hands-on and written portions. He noted the Grievant was in a classroom alone to complete the written portion of the test. For the hands-on portion, he and the Grievant used an FVTC lab. FVTC supplied all of the equipment and tools used for the test. He considered the entire test to be geared to knowledge possessed by an entry-level heavy equipment mechanic. He noted that he drew heavily on ASE test preparation booklets to develop the questions, and that he ascribed no greater significance to it than that it reflected the City's view of an adequate passing score.

He stated his assessment of the Grievant's score thus: "He did not score high enough to be put in the shop and to be able to work by himself without further training" (Tr. at 72). The Grievant's score on the slack adjustment portion concerned Poeschel. In his view, whether the Grievant was familiar with each given brand or not, he should have been able to set them up

properly. He was unaware of how often a City Equipment Mechanic must set up a slack adjuster. In Poeschel's view, it takes a minimum of five years to develop a competent mechanic.

John Nackers

Nackers does not possess an Associate's degree, but worked as a mechanic or maintenance manager for twenty five years prior to becoming the Central Garage Foreman. He estimated Equipment Mechanics devote roughly 80% of their work time to heavy equipment. The balance of City departments work with a less varied type of equipment than the Central Garage, which in his view accounted for the varying degrees of experience sought by each department.

He drove the Grievant to the test site, and discussed the Grievant's desire to become an Equipment Mechanic. He testified that he was somewhat surprised by the Grievant's score. Sometime after receiving the score, he rechecked the Grievant's employment history and then determined the Grievant did not meet the five year requirement. In his view, the Grievant was unqualified for a trial period under Article XVII.

Nackers noted that the Parks Department filled a vacant mechanic position using a testing procedure similar to that used to hire Winslow, but geared to small engine work. FVTC administered the test, which also carried a 70% passing score. Three Equipment Mechanics took the test. Two failed to receive a passing score. Each continues to work on small engines in Central Garage. The Equipment Mechanic who received a passing score ultimately took the position, creating the vacancy sought by the Grievant.

Nackers acknowledged that the City does not use each of the slack adjusters used for the test. He stated he believed the City uses three of the four brands.

Yvonne Molinski

Molinski works as a Personnel Assistant in the Human Resources Department. Neither she nor Nackers noted that the Grievant did not meet the five year requirement until after he took the test. When an outside applicant appeared for an interview for the position, she learned he did not meet the five year requirement. She stopped the interview and informed the applicant he would not be considered for the position.

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

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union contends that the grievance centers on the Grievant's qualifications. He is qualified to be an Equipment Mechanic and, if there is any doubt on this point, "he should at least be afforded a trial period to demonstrate his abilities."

More specifically, the Union argues that the Grievant is certified to operate any piece of City-owned heavy equipment, and has extensive small engine experience with City equipment. The successful applicant has no such qualifications. Beyond this, the Grievant has extensive private and public sector experience. That experience is sufficient to meet the City's "five year requirement." Since the City considers "light" duty performed on its "heavy" equipment to be "heavy equipment work", his experience with City equipment must be totaled with his earlier work experience.

The Union then contends that "the City's test must be thrown out because it reaches the epitome of arbitrary, capricious and unreasonable behavior." More specifically, the Union notes that the City failed to notify the Grievant of the test until after the job posting. More significantly, "the test was set up so only a Fox Valley Technical College graduate could pass the test". That the City's Parks Department gave a test its own Central Garage mechanics were unable to pass underscores this conclusion. No less troublesome is that the test given the Grievant shows inordinate concern with brakes and brake parts not used in City equipment.

As the remedy appropriate to the City's contract violation, the Union asks that the grievance be sustained and that the Equipment Mechanic position be awarded to the Grievant. At a minimum, the Union asserts that the Grievant is entitled to a trial period, and appropriate make-whole relief after he successfully completes it.

The City's Initial Brief

The City contends the record poses the following issues:

Did the City violate the Labor Agreement when it elected not to award the Central Garage Equipment Mechanic position to the Grievant?

If so, what is the appropriate remedy?

After a review of the evidence, the City contends that Article XVII clearly and unambiguously grants the Employer the authority to determine the qualifications of job applicants. The evidence confirms that the City weighed the factors stated in Article XVII before concluding the Grievant failed to meet the minimum qualifications of an Equipment Mechanic.

Beyond this, Article I, read in light of relevant precedent, establishes that the City can

determine the minimum qualifications for its positions. Its determination is subject to challenge, but the Union's challenge must establish arbitrary or unreasonable City conduct to warrant overturning the its assessment of the Grievant's qualifications. Relevant precedent also establishes that "(e)xperience is ordinarily considered a tangible, objective factor . . . in determining an individual's qualifications." Since the labor agreement is silent regarding how to assess qualifications, it follows, according to the City, that it has discretion "to give reasonable and appropriate written, oral, performance, aptitude and physical ability tests".

More specifically, the City argues that the five-year requirement is reasonably related to the Equipment Mechanic position. The variety of City equipment establishes the range of skills necessary to the position, which is devoted "somewhere between 75% and 80%" to heavy equipment. The Grievant submitted nothing beyond his resume to meet this requirement. Read most favorably to the Grievant, the resume falls short of establishing "five years' experience working on diesel engines or heavy equipment." To conclude that his experience meets the minimum qualifications of the Equipment Mechanic position "would completely replace the City's discretion with arbitral opinion."

Confronted with the assertion that the Grievant possessed experience that could meet the five-year requirement, the City determined to test the applicants, including the Grievant. Poeschel based his test on the position description and Nackers' assessment of its duties. The test created "was fair and reasonable" and was "administered in good faith . . . without discrimination." The City's evaluation of the results, including its determination of the passing score, was reasonable. The 70% passing score is solidly rooted in ASE certification requirements. The Grievant's low score established that he was "not qualified for the . . . position" and that "even a thirty day training period would not provide the Grievant with the requisite qualifications."

A review of relevant precedent establishes that the City could, and did, fairly test the Grievant's qualifications. Because "the test was a reasonable and proper requirement for ascertaining whether the Grievant possessed the requisite qualifications" and because he failed to obtain a passing score, his elimination from the field of applicants cannot be faulted. Nor does the language of Article XVII permit the conclusion that the Grievant was entitled to a training or a trial period to acquire the minimum qualifications needed for the position. Article XVII presumes the qualifications the Grievant lacked.

The City concludes that "the grievance is without merit and, therefore, must be denied."

The Union's Reply Brief

The Union notes that it does not dispute the City's authority to "establish minimum qualifications" or to "determine a job applicant's qualifications." Rather, the Union challenges "the City's methods for determining qualifications", its test, and its refusal to allow the Grievant a trial period "to demonstrate his ability."

Even if the City can establish qualifications, that right is not unfettered. Article XVII demands City consideration of “seniority, work record and qualifications.” The Union contends that the City failed to recognize the Grievant’s “seven years of experience operating City equipment.” Nor will the record support the City’s assertion that the Grievant acknowledged he lacked five years of experience in heavy equipment maintenance.

Beyond this, the City’s test “was irreparably flawed”. The City gave no advance notice of the test, and failed to use City equipment in the test. The creator of the test “never visited the City’s garage to see what equipment the City actually used.” Although the City points to ASE criteria, and an ASE based passing score, the City’s test was not ASE-approved and the City does not require ASE certification. Even if none of these flaws standing alone destroys the validity of the test, taken together, they establish “gross unfairness.” The Union concludes the “test must be thrown out.”

Nor can the precedent cited by the City obscure what the grievance seeks. The Union seeks not a training period, but a trial period. In fact, relevant precedent establishes this is the best way to determine qualifications. A “fair trial” is not a “training period”. The Union concludes by repeating its demand that the grievance be sustained with appropriate make-whole relief awarded to the Grievant.

The City’s Reply Brief

The City argues initially that the Union has argued, but failed to prove, the existence of a binding past practice. There is no evidence of a binding practice “with regard to the City providing individuals with a trial period to demonstrate that the individual is qualified for a particular position.” For such a practice to exist, governing precedent establishes that it must be “unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.” The City concludes no such evidence exists.

The City then challenges the assertion that the Grievant is minimally qualified for the position. His experience operating heavy equipment cannot be equated to maintaining it. Nor will experience with small engines establish the ability to maintain diesels or heavy equipment. The Grievant’s education can be granted, but education and experience are not synonymous. Nor do the qualifications of any other applicant bear on the determination of the Grievant’s qualifications. What experience the Grievant possesses simply cannot meet the five-year requirement.

Asserting there “was no way for the City to independently confirm whether the Grievant possessed the qualifications”, the City concludes “it was essential to have an independent third party develop and administer a test to aid the City”. An examination of the evidence establishes that “the test was: (1) specifically related to the requirements of the job; (2) fair and reasonable; (3) administered in good faith and without discrimination; and (4) properly evaluated.” That two Parks Department employees failed a test concerning small

engines has no bearing on the grievance. The City's focus on brake work cannot be considered a remarkable point on which to test a heavy equipment mechanic.

The City then contends that it has no obligation under the labor agreement to afford a trial period to any other than a qualified applicant. The trial period cannot be used as a substitute for required experience. The City concludes by repeating its request that the grievance be denied.

DISCUSSION

I have adopted the Union's statement of the issues. Either party's view accurately states the interpretive issue. The Union's is more narrowly stated than the City's, but each highlights that the issue turns on the Grievant's qualifications. The offer of a trial period presumes the demonstration of qualifications. As the documentation to the grievance shows, the Union contends that the Grievant qualified for a trial period.

Article I plays no determinative role over the grievance. The City's authority under Article I is established "(e)xcept to the extent expressly abridged by a specific provision of this agreement". Article XVII specifies the selection procedure following a posting, and thus governs the City's selection of an applicant other than the Grievant. There is no "official training program" conducted for Equipment Mechanic, and thus Article XVII demands that the City select the employee to fill the vacancy "on the basis of seniority, work record and qualifications."

The three criteria of Article XVII govern competition between applicants for a single position. The grievance poses an issue of competition between applicants only if the Grievant is entitled to the trial period. If the Grievant is not qualified for the trial period, there is no competition. Two unit employees signed the posting, with one eliminated because he did not fulfill the degree requirement. The only remaining possible competition would be between the Grievant and Winslow. Prior to advertising for outside applicants, however, the City determined the Grievant was not qualified for the position. Thus, there is no competition between the Grievant and Winslow unless the Grievant qualified for a trial period. In sum, application of the "qualifications" criterion is, standing alone, crucial to this grievance.

While the Union has made forceful arguments, the City's position is persuasive. The force of the City's arguments rests on the five-year requirement. There is no evidence to rebut Poeschel's or Nackers testimony that a competent heavy equipment mechanic needs five years of experience. The Union and the Grievant acknowledge this by asserting not that this requirement is faulty, but that the Grievant meets it. There is, in any event, no apparent contractual basis to doubt the City's authority to set or to enforce this as a requirement for the Equipment Mechanic position.

Thus, the dispute is factual. The evidence will not, however, support the assertion that the Grievant has five years of experience with diesel engines or heavy equipment. The Grievant's experience at Metzler's spans roughly seventeen months. It is evident the Grievant, then in high school, worked into the job, showing the initiative and ability to move from car washing/errand running into mechanical work. This, however, inevitably took time, and something less than seventeen months of that experience was devoted to mechanical work. Beyond this, there is no showing the Grievant worked a forty-hour week. This too, cuts into the seventeen-month period. In any event, the amount of diesel engine or heavy equipment work involved is debatable. Thus, something other than a full seventeen months of experience can be traced to Metzler's. This leaves his one-year employment at Quality Truck Care Center and at the City of Berlin as his heavy equipment experience. This, however, accounts for only two years. Added this to the something less than one and one-half years of experience at Metzler's falls short of five years.

The Union attempts to make up for this lack of experience by pointing to his work for the City in the small engine shop and as an Equipment Operator. The Union buttresses this point by contending that mechanical work that is similar on light and on heavy equipment, such as oil changes, can be counted as relevant experience. Accepting these arguments, however, rewrites the experience requirement. That requirement is for "Five (5) years experience working on diesel engines, or heavy equipment." To accept the Union's position changes this to "Five (5) years experience, full or part-time, working on internal combustion engines." This conclusion cannot be accepted without a persuasive reason to believe the five-year requirement, as written, violates the labor agreement.

There is no such contractual basis. To conclude otherwise weakens the Union's arguments on the Grievant's behalf. The grievance presumes the Grievant was the sole qualified unit applicant, because the other applicant was not a Technical College graduate. If, however, that requirement can be rewritten by an arbitrator to "Graduate from an accredited Technical College or equivalent experience", then the Grievant's claim to be the sole qualified unit applicant for the position weakens. In sum, the City's contractual authority to set minimum requirements is not challenged by the grievance. As a factual matter, the Grievant failed to establish five years of experience working with diesel engines or heavy equipment, and thus cannot be considered qualified for a trial period.

This conclusion addresses the grievance, but fails to address the Union's forcefully stated concerns with the test. The Union argues that the sole reason the Grievant failed to get the trial period was an improper test. From this, the Union concludes that if the test is thrown out, the entitlement to the trial period remains. It is not, however, immediately apparent how the City weakened its contractual argument to establish qualifications for the position by failing to note the difficulty with the Grievant's experience prior to the test.

The force of the Union's arguments on the test must, however, be acknowledged. The strength of the ASE basis of the test is debatable, since the Central Garage employs no ASE certified mechanics. That the test relied on FVTC equipment and a testing methodology based

on coursework given at FVTC grants potential bias against non-FVTC graduates. The test was not rooted in existing City equipment or procedures, and its passing score was set with less than scientific precision.

It is inevitably easier to criticize an existing test than to define an appropriate one. Any review by an arbitrator must turn on a wide range of reasonable alternatives. If interview processes bring unwanted subjectivity, some latitude must be granted to attempt more “objective” assessments of qualifications. Most fundamentally, there is no evidence that the test was created to favor any applicant, unit or otherwise, over any other applicant. At the time of the test’s creation, the City had not considered any non-unit applicant. There is no evidence they knew or could have foreseen an FVTC graduate would take the test. The passing score is, in itself, of little significance outside of evidence it was designed to favor or disfavor any applicant. There is no persuasive evidence the test was administered, scored, or evaluated in anything other than an even-handed fashion.

Most significantly here, the Union’s strongest arguments regarding the test undercut the Grievant’s experience claims. The Grievant asserts any experience with light or heavy equipment, including operating that equipment, creates general mechanical experience which travels across all types of machinery. If this is the case, how can the City be faulted for not using City equipment etc., to test for general mechanical experience? If general mechanical experience travels across machinery types, then the City’s use of FVTC or City equipment or manuals should be irrelevant to the test’s validity.

That the City employed a similar test for a mechanic position in the Parks Department and screened out two Equipment Mechanics does not afford a reliable basis to discredit the test given the Grievant. There is no evidence the tests are comparable. Even assuming they are, City willingness to permit employees to work on small engines in Central Garage in spite of their below passing level score on a small engine test for the Parks Department has no bearing on the grievance. The “just cause” standard, not an abstract test, governs day to day work performance. There is no better measure of daily work performance than its direct observation. No abstract test offers a superior means to evaluate daily work performance. Success at a test and successful completion of work are separate points. A hiring test seeks not to evaluate work product, but to give some insight into an individual’s knowledge. Presumably, that measurement affords some insight into the probability of future success at on-the-job work. It is not a substitute for work.

The Union’s arguments support Herbst’s position statement from the grievance. It is not necessary to characterize those arguments as anything other than well-stated to deny the grievance. Nothing said above should be read to indicate that the Grievant could not be a competent mechanic. The same may be true of the other applicant who signed the posting. This is not, however, the contractual issue. Whether the Union or an arbitrator would make the Grievant a mechanic has no bearing on whether the contractual standards for screening multiple applicants for the same job have been followed. Here, the evidence establishes that the standards have been followed. To be applied reasonably, those standards must apply to

any applicant, including all unit members. The ultimate flaw in the Union's position is that accepting their arguments would slant the process in favor of the Grievant. This may appear, at least to the Union, compelling when viewed against the non-unit applicant. The arguments, however, lose their compelling force when viewed against the other unit applicant. Once bent, the standards must be bent for all.

AWARD

The City did not violate the Collective Bargaining Agreement when it denied the Grievant a trial period for the Equipment Mechanic job vacancy.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of February, 2001.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

