

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LOCAL 326, AFSCME, AFL-CIO
MARATHON COUNTY HIGHWAY UNION**

and

MARATHON COUNTY

Case 276
No. 59413
MA-11285

Appearances:

Mr. Phil Salamone, Staff Representative, AFSCME Council 40, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin, on behalf of the labor organization.

Ruder, Ware & Michler, S.C., by **Attorneys Dean R. Dietrich** and **Bryan Kleinmaier**, 500 Third Street, Wausau, Wisconsin, on behalf of the municipal employer.

ARBITRATION AWARD

Local 326, AFSCME, AFL-CIO, Marathon County Highway Union and Marathon County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the county concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to job posting. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held on February 20, 2001 in Wausau, Wisconsin. It was not transcribed. The parties filed written arguments on April 23 and reply briefs by June 11, 2001.

ISSUE

The union states the issue as follows:

“Did the employer violate the collective bargaining agreement by refusing to award the position of mechanic to the grievant? If so, what is the remedy?”

The county states the issue as follows:

“Did Marathon County violate Article 7 of the collective bargaining agreement when it concluded that the grievant was not qualified to fill the posted position of Equipment Services Mechanic? If so, what is the remedy?”

The arbitrator states the issue as follows:

“Did Marathon County violate the collective bargaining agreement when it declined to award the vacant position of Equipment Services Mechanic to Tom Kijak? If so, what is the remedy?”

RELEVANT CONTRACTUAL LANGUAGE

Article 2 – Management Rights

Public policy and the law dictate clearly the Department’s primary responsibility to the community as being that of managing the affairs efficiently and in the best interests of our clients, our employees, and the community. The employer’s rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.

. . .

3. To hire, promote, transfer, assign, or retain employees in positions within the department.

. . .

Article 3 – Grievance Procedure

2. **Subject Matter**: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated, the signature of the grievant and the date.

3. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

. . .

5. Steps In Procedure:

Step 1: The grievant, along with a representative, shall orally explain their grievance to their immediate supervisor no later than five (5) working days after the employee knew or should have known the cause of such grievance. . .

. . .

Article 7 – Job Posting

1. Posting Period: Notices of vacancies due to retirement, quitting, new positions, or for whatever reason, shall be posted on all bulletin boards for five (5) working days (to overlap two consecutive weeks). The employer shall notify the union in writing in the event it decides not to fill a vacancy and/or abolish a position. The employer shall send a copy of the posting to the Union.

2. Requirements: The job requirements, qualifications, and rate of pay shall be part of the posting and sufficient space for interested parties to sign said posting.

3. Job Award: In filling a vacancy, the employee signing with the greatest seniority in the Department who can qualify shall be given the position. The County shall post on the bulletin boards the name of the employee who is awarded a posted job and also provide a copy to the Union.

There shall be a ten (10) day working trial period for any employee posting into a new position in the Highway Department where the employee may exercise the option of returning to the employee's former position.

4. Trial Period: Employees filling promotional vacancies shall be on a probationary period for thirty (30) days unless such employee has not yet completed an initial six (6) month probationary period as specified in Article 6(1). If such employee has not yet completed an initial six (6) month probationary period as specified in Article 6(1), such employee shall remain on probationary status until that probationary period is successfully completed. The trial period may be extended by mutual agreement between the Union and management where there remains reasonable doubt regarding satisfactory performance.

. . .

BACKGROUND

This grievance concerns the county's decision to reject Tom Kijak's bid for promotion into the position of Equipment Service Mechanic. Although Kijak was the most senior employee to apply, the county highway commissioner determined that he was not qualified for the position, based on the published position description which required either two years of school in diesel maintenance and two years experience as a master heavy-duty truck technician or four years experience in diesel engine maintenance.

The position of Equipment Service Mechanic (ESM) is a level 1 classification in the parties' collective bargaining agreement, one of the four positions at the highest pay level. The position involves skilled, journeyman level mechanical work repairing a variety of automotive and heavy equipment, including equipment with diesel engines. As highway heavy equipment becomes more complex and computerized, the need for employees able to work on diesel engines grows greater. All ESM's with the county are expected to be able to handle all equipment, especially when they are the single mechanic on-call.

Kijak had initially submitted an employment application with the county for the position of highway worker on or about December 1, 1993. On that application he noted that he had graduated from Mosinee High School, had obtained a two-year associate's degree in agricultural mechanics from Northcentral Technical Institute, also known as Northcentral Technical College (NTC). He also noted that he had taken additional courses in advanced stick and wire feed welding and basic and advanced hydraulic systems maintenance and repair from NTC, along with certain safety training seminars. Kijak recounted his employment experience as follows:

Ron Wimmer Construction: Operator-labor, 7-88 to present. “Work with & supervise in general construction of buildings, sewer & water installation & clean up. Set up & pour & finish concrete, work on structural buildings. Demolition with air hammer. Patching asphalt, backfill frost walls & footings & compacting to 98% or better in 8” lifts. Repair curb & gutter & catch basins. Plow snow & haul snow from private lots.”

Kafka Granite: Operator-labor, 4-88 to 7-88. “Work in granite pit & rock quarry crushing operations. General maintenance & repair of equipment. Load trucks & screener with front end loader. Strip & clear with chain saws & bull dozers.”

City of Wausau (Public Works): Operator I, 1-88 to 4-88. “Operate & drive 6 yd dump truck with plow & sander. Work on tar kettle tarring cracks. Blowing out cracks with air compressor. Flag traffic, patch asphalt with cold mix. Shovel snow & sidewalks. Cut brush.”

Ron Wimmer Construction: Operator-labor, 6-81 to 1-88. “Work in general construction, sewer & water installation building bridge construction pouring & finishing concrete welding landscaping, snow plowing & hauling moving equipment.”

In response to the direction to list any job-related equipment he was skilled in operating, Kijak wrote “bulldozer, crane, CruzAir backhoe, tractor backhoe, triaxle & tander dump truck, semi-tractor & low boy, 6 yard dump truck w/plow & sander, snow blower, front end loader, hand compactor landscape equipment.”

Based on this application, the county hired Kijak. As of the time of the ESM posting on or about July 24, 2000, Kijak was still in the county’s employ, as an equipment opertor.

The county has modified the position of Equipment Service Mechanic over the past ten years, and made several appointments under the various iterations.

On March 19, 1991, Highway Commissioner Glenn Speich caused to be posted a Notice of Job Vacancy for the position of Equipment Service Mechanic, with the following qualifications:

QUALIFICATIONS: Completion of standard or vocational high school and one year's journeyman level experience in mechanical repair work, or equivalent training and/or experience. Must have a valid Wisconsin Drivers License, Wisconsin Chauffeur's License and Commercial Drivers License (CDL),

Two employees signed the posting, including Gary Carr. At the time, Carr had no relevant experience at the journeyman's level in mechanical repair work or in equivalent activities. Nevertheless, on the recommendation of the then-shop supervisor Vern Landreth, Speich approved Carr's promotion to the ESM position.

On or about September 2, 1998, Speich caused to be posted a Notice of Job Vacancy for the position of Equipment Service Mechanic, as follows:

General Duties: Skilled journeyman level mechanical work in repairing or assembling a variety of types of automotive equipment and highway equipment. Work to be performed in accordance with established procedures and accepted trade practices.

Qualifications: High school graduation or equivalent preferred, supplemented by two years of school in diesel maintenance and two years of experience as a master heavy-duty truck technician; OR four years of diesel engine maintenance experience. Basic knowledge and experience in engine electronics on modern equipment desirable. Must furnish small tools up to 1 ¼" that would be necessary to perform all light and heavy duty equipment work. Must have a valid Wisconsin Class A CDL without restrictions on air brakes.

The County will award the vacant position to the bidder with the greatest seniority provided that the applicant can qualify for the position. A decision will be reached on this matter by September 16, 1998 and the successful bidder will be assigned to a probationary period on the new job by September 21, 2000.

All employees interested in bidding for the position must sign in the space provided below by 3:30 PM, September 11, 1998.

Four county employees signed the posting, and the county appointed one of them, James Werner. At no time did the union raise any procedural or substantive challenges, objections or grievances to the terms of the posting.

On June 14, 1999, the highway commissioner caused to be posted another Notice of Job Vacancy, identical but for the different dates and the insertion of the phrase "Please Refer to Class 4444 Equipment Service Mechanic" in the listing of qualifications. That Class Code provides as follows:

EQUIPMENT SERVICES MECHANIC – Highway

Definition of Class

This is skilled, journeyman level mechanical work in repairing a variety of types of automotive and heavy equipment.

Work involves performing all types of mechanical repair work on trucks and heavy duty construction equipment as well as specialized gasoline and diesel powered equipment, including complex engine repairs, complete overhauls, transmission, brake, and differential repairs. Work is performed in accordance with established procedures and accepted trade practices, and most assignments performed under general supervision. No supervision is exercised over other employees; however, responsibility may be exercised over persons assisting or learning repair work. Considerable independent judgment is exercised in determining work methods, within accepted departmental and trade guidelines and with careful regard for safe work practices. Work originates upon assignment from the lead mechanic or a supervisor. Work is reviewed by observation and by inspection of work in progress and upon completion.

Examples of Work Performed

Performs minor engine repairs including valve jobs, engine overhauls, transmission and suspension repairs.

Repairs and rebuilds water pumps, rear ends, steering assemblies, electrical systems, and other mechanical components on a variety of heavy equipment including bulldozers, front-end loaders, graders, and large trucks.

Checks and repairs hydraulic equipment and other components. Hard surfacing of plow blades and salt spreaders.

Performs some auto body repairs.

Performs related work as required.

Knowledge, Skills, and Abilities

Thorough knowledge of the methods, materials, tools and equipment used in mechanical work.

Thorough knowledge of the principles of operation as well as maintenance and repair needs of a variety of types of medium and heavy duty equipment.

Considerable knowledge of occupational hazards and of the safety precautions necessary in the performance of mechanical repair operations.

Ability to understand and follow oral instructions as well as the ability to analyze and determine the proper methods for repair of a variety of mechanical problems.

Ability to lead and guide the work of others.

Again, at no time did the union raise any procedural or substantive challenges, objections or grievances to the terms of the posting. Three county employees signed the posting, and the position was awarded to one of them, "Little Jo" Hernandez.

The highway commissioner posted another such Notice on June 24, 1999, identical but for the dates. Again, at no time did the union raise any procedural or substantive challenges, objections or grievances to the terms of the posting. On this occasion, the county hired Jerry Hargrove.

At the time of their appointments, Carr, Werner, Hernandez and Hargrove were all members of the bargaining unit, and all but for Carr were qualified under the terms of the relevant postings.

On or about July 24, 2000, the county again posted for the position of ESM, again identical to the three immediately prior postings but for the dates. Again, at no time did the union raise any procedural or substantive challenges, objections or grievances to the terms of the posting.

Two employees, Rich Thraen and Kijak, signed the posting, with Kijak being the more senior. 1/ Based on his review of Kijak's application, education and work history, Speich

1/ The record is silent on the details surrounding Thraen's application, other than the fact that he did not receive the promotion.

determined that Kijak failed to satisfy either the educational or experience criteria.

Kijak graduated from Northcentral Technical College on May 22, 1974, with a two year degree in Agricultural Mechanics. He received one A (vocational math), 9 B's, 10 C's, and 3 grades of Satisfactory, ranking him 16 out of 21 in that major. It was the highway commissioner's determination that this did not satisfy the educational requirement of "two years of school in diesel maintenance...." Based on his review of Kijak's personnel file (particularly his initial application) and his awareness of Kijak's duties with the department, Speich also determined that Kijak did not have the requisite four years experience in diesel engine maintenance to qualify him for the position of Equipment Services Mechanic. Speich therefore rejected Kijak's bid to post for promotion to that position.

On or about August 14, 2000, the union grieved, claiming "the job was not awarded to the person the union feels qualifies for the position, that person being Tom Kijak." The grievance was held in abeyance while the parties sought a mutually satisfactory settlement, but was reactivated on September 6 when the parties determined they could not reach a voluntary settlement.

By an undated letter, Speich informed the AFSCME shop steward that the grievance "is denied, applicant did not meet qualifications for position of Equipment Service Mechanic." The union advanced the grievance to the next step.

On September 27, 2000, Glenn Kafka of Kafka Granite submitted a letter of recommendation for Kijak, as follows:

This letter of recommendation is for Tom Kijak, whom I have known personally for over 20 years. In the 18-month period of employment dating back in the late 1980's, Tom served both as a full-time and a part-time employee. Tom was hired as a mechanic for heavy equipment including dump trucks, screening plants, crushing plants, conveyors, engines, and other duties such as welding in the mechanic shop. He also doubled as an operator for the heavy equipment mentioned above. Tom is a very reliable, knowledgeable and honest individual

and I feel very confident that he would strongly qualify as a small and heavy equipment mechanic. If you have any questions, please contact me at my office number 715/687-2423.

Also on September 27, 2000, Jeff Burnett of Wimmer Construction submitted a letter to County Personnel Director Brad Karger as follows:

As Divisional Manager for Wimmer Construction, Inc., part of Mr. Kijak's duties involved working in the shop during the winter months. He has shown mechanical ability and aptitude in the work performed.

Examples of work would be trouble shooting and repairing electrical and hydraulic systems. Rebuilding pumps, transmissions diesel and gas engines, changing clutches, brakes, springs on dump trucks and heavy equipment. From 1981-1991 Mr. Kijak had accumulated approximately 2½ years of shop experience.

On October 5, 2000, Karger wrote to AFSCME Staff Representative Phil Salamone as follows:

I have decided to deny Grievance #3 (Tom Kijak) as there has been no violation of the Labor Agreement.

The relevant section of the Labor Agreement is Article 7 – Job Posting
(3) Job Award:

In filling a vacancy, the employee signing with the greatest seniority in the Department who can quality shall be given the position.

(Emphasis added).

The facts of the dispute are:

1. The position of Equipment Services Mechanic was posted on 7/24/00.
2. The posting established these qualifications:

“High school graduation or equivalent preferred, supplemented by two years of school in diesel maintenance and two years of experience as a master heavy-duty truck technician; OR four years of diesel engine maintenance experience

3. Two employees (Tom Kijak and Rich Thraen) signed the job posting requesting consideration for the position.

4. The Highway Commissioner determined that neither candidate met the minimum qualifications for the position.

5. Tom Kijak's grievance was put on hold while creation of an apprentice program was discussed. Unfortunately, that discussion failed to result in any agreement.

During the grievance meeting, the Union said it believed that Tom Kijak had the education and job experience to qualify for the position. Tom Kijak subsequently sent me several documents summarizing his relevant education and work experience. From those documents, I have concluded that:

- Tom Kijak received a degree in Agricultural Mechanics from Northcentral Technical College in 1974.
- Tom Kijak has more than 2 years of diesel mechanic experience with Wimmer Construction and Kafka Granite, but does not have 4 years of experience in diesel mechanics.

Here is how I see this: Tom Kijak is close to meeting the minimum qualifications for the Equipment Service Mechanic position but he does not have either a degree in Diesel Mechanics or the Master Heavy-Duty Truck Technician certification. I suspect that many of the classes for the agricultural mechanics and diesel mechanics programs are the same but the educational programs are not exactly the same. Thus, while I am left with a very favorable impression of Tom Kijak as a person and an employee, I have decided to deny the grievance as the Highway Commissioner has correctly determined that he is not qualified for the position.

Upon receipt of this letter, Salamone informed Karger the Union was advancing the grievance to the Personnel Committee. The Personnel Committee denied the grievance at its meeting of November 6, 2000.

In preparation for the arbitration hearing, the Union retained the services of Allen Gresch, a consultant with significant educational and professional experience in diesel repair and maintenance. Gresch toured the highway shop and interviewed certain union and supervisory personnel on February 14, 2001. He later submitted a report, as follows:

. . .

Due to the large variety of equipment and equipment manufacturers the mechanics tend to specialize to some extent on equipment systems and makes. As with most shops of this size, after troubleshooting, most equipment components are sent out for rebuild or exchange rather than in-shop rebuild. This is more cost effective and usually provides faster turn around time.

As relates to the posted job specification, it is very important to note that less than 20% of mechanic time is devoted to repair of diesel engines exclusively.

The county provides for a 30-day trial period for all new mechanics for them to try the job and the county has the opportunity to evaluate how well they can perform. If the new position does not work out for either party, the employee can return to his prior position with no penalty.

Interviews with other mechanics:

All felt that regardless of posted qualifications, Tom Kijak should be given the opportunity to try for this new mechanic position. All have worked with Tom and/or heard positive comments about his mechanical aptitude and abilities and feel he has adequate experience to be successful on this job.

. . .

Posted job qualifications for Equipment Services Mechanic-Marathon County

“High school graduation or equivalent preferred, supplemented by two years of school in diesel maintenance and two years of experience as a master heavy duty truck technician; or four years of diesel engine maintenance experience.”

While Marathon County has the option of writing the job specification as they wish, it would appear that this spec does not address the very broad qualifications needed to successfully discharge the daily duties likely to be

encountered by any mechanic in the Marathon County Shop. As related by the shop supervisor and mechanics these duties include but are not limited to the troubleshooting and repair of:

- Gas engines – two and four cycle
- Diesel engines – two and four cycle
- Clutches and torque converters
- Manual and automatic/power shift transmissions
- Electrical systems
- Hydraulic systems
- Mechanical drive lines
- Differentials and final drives
- Suspension systems
- Tires and track systems
- Crushing equipment
- Welding experience operator capabilities on all county equipment

is also needed for this position

It should be noted that diesel engines account for only a small portion of the total job skills needed to successfully perform this job. Of far more importance is the fact that a Marathon County Shop Mechanic must have a wide variety of previous job experience servicing heavy duty construction equipment.

Mr. Kijak's previous documented work experience includes four years general maintenance, troubleshooting, and repair of exactly the type of equipment used by the County when he worked for Kafka Granite and Wimmer Construction. He has additional mechanical experience with Lang Exploration and over 26 years experience as an operator of construction, drilling and crushing equipment.

The posted job specification is very tightly written around the diesel mechanic position to the neglect of all the other duties that are needed for the Equipment Services Mechanic position. In fact, some of the existing mechanics probably would not be able to meet the new spec as written.

In my previous seven years experience as Service Manager for Marathon Implement and Gresch Implement I have had the opportunity to interview and hire approximately 25 mechanics to assemble, service, troubleshoot, and repair farm, light and heavy duty industrial equipment. In my experience with Caterpillar and Cummins diesel engines associated with city, county, and state

agencies, private and public trucking companies, construction companies, etc. I was frequently in contact with shop/fleet managers who hire mechanics. There is absolutely no doubt that my past experience would very strongly favor hiring Mr. Kijak who has a broad general shop experience over someone else who may be more highly specialized or had more formal training in just one area of expertise. He has all the qualifications needed to successfully complete the daily job duties as determined in the fact finding visit to the Marathon County Shop.

Findings:

- 1- The job spec for the posted position is written too tightly around the diesel mechanics duties to the neglect of all other job duties likely to be encountered.
- 2- Mr. Kijak is well qualified to fulfill the actual daily job duties in the Marathon County Shop.

Recommendations:

- 1- Hire Mr. Kijak to fill the posted mechanic position. If there is any doubt he can fulfill the job duties, perhaps a longer probationary time period can be negotiated.
- 2- Provide the opportunity for additional in-house and/or off site training for diesel mechanics. Major engine manufacturers offer one day seminars for this training as well as more specialized one week sessions at their headquarters in various Wisconsin cities. This would be very beneficial long term for the county. Training in other areas should also be considered to upgrade mechanic skills with the changes in new equipment acquired by the county. An inventory of mechanic skills should be initiated to discover whether there are shortcomings, and the mechanics offered the opportunity to upgrade their skills.

POSITIONS OF THE PARTIES

The Union

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

The union does not maintain a burden of proving that the contract has been violated. Despite the fact that this is a contract interpretation type dispute, a logically neutral approach would be that there would be no burden to be borne by either side. Or (arguably) that the burden of proof borne by the employer is significantly greater in light of the fact they rejected an applicant with seniority within the bargaining unit in favor of a bidder from outside the unit.

The grievant clearly meets and/or exceeds the minimum qualifications for the position and on that basis should appropriately be awarded the position. The principal reason the grievance should be sustained relates to the simple fact that the grievant is clearly qualified for the posted position, in that he clearly possesses all of the listed qualifications.

It is not surprising that the grievant was initially determined to be unqualified for the position, in that he simply was not fairly considered by the employer's process. Actually, the lack of proper consideration exceeded unfair, and the conduct of the initial interview was a monumental abomination. The highway commissioner's high-handed conduct, not even conducting the most cursory review of the education and/or experience of the grievant, speaks loudly for itself and should be soundly rejected by the arbitrator. In fact, it can reasonably be argued that the commissioner's conduct was so monumentally outrageous, even higher levels of management could apparently not see fit to credit it.

Although the personnel director ultimately concurred with the highway commissioner's determination (which he politically had to), he did indicate the grievant was close to meeting the qualifications; one can only speculate as to the outcome had the personnel director not needed to overturn the brash and autocratic commissioner's initial decision.

The past practice of the parties supports the position advanced by the union, in that the listed qualifications for the position of Equipment Services Mechanic have been relaxed and/or ignored for other interested employees in the past. For example, Gary Carr signed a very similar posting in 1991 and was awarded the position, despite having absolutely no formal mechanical training or experience purportedly required by the posting. The difference in the way the commissioner treated Carr and Kijak represents a telling and literal about-face in attitude from an enlightened and fair minded approach into an approach which is more reminiscent of a 1930-40's type dictatorship. The contrast is rather striking.

The employer should have used the provision in the collective bargaining agreement which provides for a trial period where employees with debatable qualifications can have an opportunity to demonstrate their ability to perform the range of duties and responsibilities of the position. A number of arbitrators have reasoned that in questionable cases such as this, a bidder should be given the opportunity to prove their ability to perform the job. If the grievant fails to perform the expected duties adequately, he can be returned to his former position without any undue harm to the employer's operation.

The arbitrator should give considerable weight to the review and determination of the union's consultant, who was the most recent instructor of the same program from which the grievant received his mechanic training. After a detailed and careful independent review, the consultant reported that the grievant was well qualified to fulfill the actual daily job duties, and that he should be hired. It seems more than just happenstance that the more careless, arbitrary and biased the review of the grievant's background, the less he was deemed qualified; the more professional, detailed and independent the review, the more qualified he became.

Accordingly, the grievance should be sustained, and the grievant awarded the position and made whole.

The County

In support of its position that the grievance should be dismissed, the county asserts and avers as follows:

The county did not violate the collective bargaining agreement when it concluded that the grievant was not qualified for the position of Equipment Service Mechanic, and, therefore, did not award him the position. The county appropriately exercised its authority to make hiring decisions and reasonably determined that the grievant was not qualified. Consequently, the union's claim is without merit.

It is well established that the employer possesses inherent authority to set minimum job qualifications and make employee qualification determinations unless it has bargained that authority away. Numerous arbitrators have recognized that an employer's determination in this regard should be deferred to and should not be disturbed unless the employer has exercised its authority in an arbitrary and capricious manner. The management rights provision of the

collective bargaining agreement explicitly confers upon the county the authority to set minimum job qualifications and to determine an employee's qualifications.

The county did not violate the collective bargaining agreement when it reasonably concluded that the grievant was not qualified to serve as an equipment service mechanic and therefore did not award him the position.

Pursuant to its inherent authority, the county established minimum job qualifications for the subject position. Pursuant to arbitral law, the county is vested with the exclusive authority to determine the grievant's qualifications for the subject position. The county's determination that the grievant was not qualified for the subject position was not arbitrary or capricious, discriminatory or unreasonable.

The county's determination that the grievant lacked the requisite educational background in diesel maintenance was not arbitrary or capricious, discriminatory or unreasonable, in that the grievant had neither two years of school in diesel maintenance or two years experience as a master heavy-duty technician. The agricultural mechanics course the grievant took in 1973-74 at Northcentral Technical College does not satisfy the educational requirement.

The county's determination that the grievant lacked the requisite work experience was not arbitrary or capricious, discriminatory or unreasonable, in that the grievant fell far short of four years of diesel maintenance experience. Indeed, it is the county's position that the grievant does not possess even one year of diesel maintenance experience, much less the required four years.

Because the collective bargaining agreement sets no limits on the county's inherent managerial authority to set minimum job qualifications and to make employee qualification determinations, the union must prove that the county's determination that the grievant did not satisfy the qualifications for the subject position was arbitrary and capricious. The union has failed to meet this burden.

The Union Response

While the union does not dispute that the employer has the right to set minimum qualifications for a position, those rights are not unlimited and must be exercised in a good-faith, fair and non-discriminatory manner. All employees

should be treated uniformly in an even-handed manner which is reasonable under the facts.

The union reasonably asks whether a procedure where an interview of an applicant is begun by the decision-maker announcing the he will not be selected before examining relevant education, experience and references could be considered anything but unreasonable, arbitrary or capricious conduct. The union also questions how an employee with absolutely no qualifications can be considered for a position where an employee with many relevant qualifications is excluded could be considered anything but highly discriminatory.

While the grievant and Gary Carr are both able-bodied Caucasian men, there could be little question but that there was unequal or unfair application of policy to the grievant vis-à-vis Carr. Discrimination is discrimination. While the record does not establish the basis for the discrimination, it is hardly arguable that it occurred considering the fact that the same (or very similar) set of qualifications were applied by the same employer to the same position by the very same agent of the employer. Yet despite the fact that the grievant's qualifications were head and shoulders above those of Carr, Carr was successful while the grievant was not. In fact, it is hardly likely that the union would have even filed a grievance had Carr not been awarded the position because he possessed none of the listed qualifications. Not surprisingly, the employer brief is silent with respect to Carr.

While it may technically be arguable as to whether the grievant precisely met each and every one of the listed qualifications to the letter (the union maintains that he did), even the employer's chief professional personnel administrator acknowledged that he was at least "close" to doing so.

The record is absent any evidence or formal documentation of the commissioner's review. In fact, other than his letter denying the grievance, there is no record as to why the grievant was initially denied the position other than the statement that he did not meet the qualifications. But the record clearly reflects that these materials were not reviewed until after the grievance was filed.

In a desperate attempt to set the bar at a low level, the county maintains that its determination that the grievant was not qualified was not arbitrary, capricious, discriminatory or unreasonable. But what could possibly be more irrational (and also cruel and insensitive) than to indicate to a job applicant at the outset of

the interview, prior to any review, that there was no way he will get the position. And then providing no basis for the decision.

The employer's selecting an employee with virtually no qualifications for a position, yet summarily denying it to another employee who the employer believes to be "close" to qualifying is high-handed, arbitrary and capricious conduct which the arbitrator should not credit. The employer dismally fails to reach even the modest and self-serving notion of setting the standard at a very low rung.

The employer's flawed notion that the grievant admitted he had only two to three months of work experience as a mechanic was disputed by the union witnesses and documents in the record. The employer apparently relied upon the grievant's initial employment application, but as the grievant testified, he did not list his mechanic experience because it did not relate to his application for a highway worker position.

Also, the letters of recommendation were written to the personnel director rather than the highway commissioner because the commissioner conducted a kangaroo interview where he brazenly announced that he had already determined that the grievant was not qualified. It was the personnel director who conducted a more serious interview and asked the grievant to provide documentation such as these letters.

This is not even a close case. It is an important grievance. If it is not sustained, it is highly probably that a longstanding avenue of advancement for Marathon County highway employees will effectively be blocked.

The grievance should be sustained.

The Employer's Reply

The union brief mischaracterizes arguments as facts. It is clearly argument, not fact, for the union to state that the ESM position is awarded on a "liberal basis." To the contrary, applicants must be qualified for the position in order to be awarded it. Of the four other employees who posted into the position, three were all subjected to the same qualifications as the grievant and all satisfied those qualifications; the fourth, who was not subjected to the same qualifications, was not awarded the position by the highway commissioner.

The union also errs in stating as a fact that “only about 20%” of the mechanical work is exclusively distinctive to diesel engines. This conflicts with the testimony of union witness Hernandez, who testified that up to 30% percent, and with the testimony of supervisor Korpa, who stated that more than 30% is on diesel engines.

The union also errs in claiming that the grievant performed a “significant degree” of mechanical service while working in the county asphalt plant, in that the county introduced evidence that the grievant did not perform such work.

The union further errs in claiming that it was un rebutted that Speich began his interview with the grievant by saying, “There is no way in hell I will award you the mechanic job.” Speich’s testimony rebuts this statement.

The union must prove that the county’s determination that the grievant did not satisfy the qualifications for the ESM position was arbitrary, capricious, discriminatory or unreasonable.

Despite the union’s attempts to confuse the issue, seniority is not an issue in this dispute; whether the grievant is qualified for the ESM position is the issue. Further, the union’s position that it does not bear the burden of proof directly conflicts with the well-established arbitral principles cited in the county’s initial brief. The collective bargaining agreement does not contain any language limiting the county’s inherent authority to set minimum job qualifications, so the only way the union can prevail is to establish that the county was acting in an arbitrary, capricious, discriminatory or unreasonable manner in its decision that the grievant did not satisfy those qualifications. The cases the union cites to support its position that it does not have the burden of proof in this dispute either are not applicable or actually support the county’s position that the union has the burden of proof.

The grievant clearly does not satisfy the minimum qualifications for the ESM position, in that he has neither the necessary educational background in diesel engine maintenance nor the two years experience as a master heavy-duty truck technician. The grievant also fails to satisfy the alternate requirement of four years of diesel engine maintenance experience.

The county properly considered the grievant’s qualifications and determined that they did not satisfy the minimum requirements for the position. The highway commissioner did review the grievant’s education and work history, and

consulted with the shop supervisor. Further, the job interview was not confrontational.

Further, past practice does not support the union's position that the listed qualifications for the ESM have been relaxed and/or ignored for other employees. Hernandez, Werner, Hargraves and the grievant were all subject to the same standards, and all but the grievant satisfied those standards. The posted standards were different when Carr sought the position in 1991, and it was the former shop supervisor Landruff, not commissioner Speich, who promoted Carr.

Also without merit is the union's claim that the current qualifications shut the door on bargaining unit members seeking the position. Hernandez, Werner and Hargraves were all in the unit when they posted up into the position.

The case law cited by the union is not applicable as it discusses the reasonableness of job qualifications, which the arbitrator ruled was not an issue in this dispute.

Pursuant to the collective bargaining agreement, unqualified applicants never advance to the trial period. The union's argument here illustrates another attempt to acquire a benefit through grievance arbitration when such benefit must be gained through collective bargaining.

The arbitrator should give absolutely no weight to the testimony of Gresch, whose testimony and experience relate only to the reasonableness of the job qualifications of the ESM position. His testimony is thus totally irrelevant because the issue here is not the reasonableness of those qualifications, but rather whether the grievant met those minimum standards. Gresch is not an expert on this point, and his testimony deserves no weight.

Because the evidence demonstrates that the county reasonably concluded that the grievant did not satisfy the minimum job qualifications, the grievance should be dismissed in its entirety.

DISCUSSION

The union has used exceptionally strong language to describe the reason for and result of the county's decision to reject the grievant's bid for promotion into the Equipment Service Mechanic position. It calls the county's "cruel and insensitive" conduct "a monumental abomination ... so monumentally outrageous," that it cries out for reversal.

The union has also made a strong claim that there may be a workplace-wide impact from my decision, alerting me that denial of the grievance makes it “highly probable” that the promotional path provided in the collective bargaining agreement “will be effectively blocked.”

However, neither facts nor law support either this sense of outrage or this state of alarm.

The union makes three basic arguments why I should sustain the grievance – that Kijak was qualified under the terms of the posted position description; that other, less qualified employees were promoted into the ESM position, and that the terms of the position description were unduly restrictive and imposed onerous burdens on bargaining unit personnel seeking to advance. I will address each argument in turn.

Prior to doing so, however, I must address the union’s argument that it bears no burden of proof or persuasion in this proceeding. The union contends that a “logically neutral approach” would be that there is “no burden to be borne by either side,” or that the burden borne by the employer “is significantly greater” because it rejected an internal candidate for one from outside the bargaining unit.

After a thorough review of the cases the union has cited in support of its analysis in this regard, I have concluded that its construct as to burden of proof and persuasion is contrary to the terms of the parties’ collective bargaining agreement and generally accepted arbitral principles.

The collective bargaining agreement, Article 2, Section 3, explicitly grants to management the rights to “hire, promote, transfer, assign or retain employees in positions within the department.” While those rights “must be exercised consistent with the provisions of this contract,” this grant of authority to management sets the floor for further consideration. Even cases *which the union itself cites* disagree with the union’s theory as to proof and persuasion.

“Management’s decision with respect to the award of a posted job among competing bidders is entitled to the presumption of validity,” an arbitrator wrote in *FECO ENGINEERED SYSTEMS*, 90 LA 1282 (Miller, 1988). “The burden is upon the Union to show that the management judgment was arbitrary.”

Similarly, it has been held that the determination of whether an applicant met the stated qualifications was “a factual matter to be initially determined by the Company. So long as the selection is not arbitrary, capricious, discriminatory or unreasonable, the Company’s decision

must stand.” MOUNTAIN STATES TEL. & TEL. CO, 70 LA 729 (Goodman, 1978). Both of these cases were cited by the union, and reflect what I believe the prevailing attitude among arbitrators to be on this point.

The collective bargaining agreement awards a vacancy to the most senior employee “who can qualify.” Pursuant to the management right cited above, the county has since 1990 promulgated position descriptions for the ESM listing certain qualifications. If the qualifications are reasonable and Speich’s negative evaluation of Kijak accurate 2/, then Kijak was not qualified for the position and the grievance must be denied.

2/ The Union also contends that a discriminatory attitude on Speich’s part so corrupted the process as to so compromise the evaluation as to make it fatally flawed. This question is a subset of the larger issue of whether the underlying evaluation was or was not accurate.

Were the qualifications listed in the July 2000 Notice of Vacancy reasonable?

The union challenges the validity of the existing position description for the ESM, contending that it is unduly restrictive and sets too high a standard for members of the bargaining unit to meet. The union also offers the testimony of its retained consultant, who advised that the job specifications were too tightly written around the diesel mechanic position to the neglect of the position’s other duties.

This argument fails on several grounds. First, the time has long passed for the union to challenge this position description. The first Notice of Job Vacancy for the position of Equipment Service Mechanic with the list of qualifications that confronted Kijak was published on September 2, 1998; another was published on June 14, 1999, and a third ten days later. At no time between September 1998 and June 1999 did the union raise any procedural or substantive challenges, objections or grievances to the terms of the posting. On July 24, 2000, the county again posted for the position of ESM, again with a list of qualifications identical to the three immediately prior postings. Again, the union failed to raise any procedural or substantive challenges, objections or grievances to the terms of the posting.

The collective bargaining agreement requires that grievances be conveyed orally to an immediate supervisor no later than five working days after the employee knew or should have known the cause of the grievance. Although the 1998 and 1999 postings were independent actions which did not trigger the time limitations applicable to the 2000 posting, their occurrence did serve to inform the union and the bargaining unit of the employer’s attitude and intent in defining the terms of the position description. Thus, the union and bargaining unit were well-prepared in July 2000 to challenge the terms of the next posting if they felt it

improper. Had the union challenged the substance of the notice of vacancy within five days of its issuance, the question of the validity of the stated qualifications would properly be before me. But it did not do so.

I have not evaluated what merit or standing a timely challenge to the position description would have had, or how persuasive the consultant's critique of the listed qualifications would have been.

I have evaluated, however, the standing of an untimely challenge. The union had until July 30 to grieve the terms of the posting; it did not do so then, and it cannot do so now.

Accordingly, the union cannot sustain its challenge to the reasonableness of the qualifications as stated in the notice of vacancy.

I find, therefore, that the county was within its Article 2, Section 3 rights in evaluating all candidates for the ESM position against the specific terms of the July 24, 2000 notice of vacancy, especially its requirements for education and/or experience.

Unsuccessful in its challenges to the terms of the notice, the union now has only its challenge to the way the county administered those terms.

Was Speich's negative evaluation of Kijak accurate?

There are two paths an applicant could have follow to establish she or he was qualified under the terms of the notice of vacancy – education plus experience, or experience alone.

The first way a candidate “can qualify” under the notice of vacancy is by having “two years of school in diesel maintenance and two years of experience as a master heavy-duty truck technician.” Did Kijak have two years of school in diesel maintenance?

No. His two year associate degree from Northcentral Technical College (NTC) in 1974 in agricultural mechanics does not constitute “two years of school in diesel maintenance.”

In the Diesel and Heavy Equipment Technician program currently offered at the Northeast Wisconsin Technical College (NWTC) in Sturgeon Bay, 17 of the 21 required courses have the word “diesel” in their title 3/. This program, designed to “train students to

3/ The complete curriculum includes Diesel Engine Fundamentals, Diesel-Elect Fundamentals, Welding-Metal Working Procedure, Math 1-Diesel, Math 2-Diesel, Diesel-Chassis/Suspension/Steering, Diesel Brake Systems, Diesel Preventive Maintenance, Diesel-Electrical Systems, Science-Mechanics, PC Operations-Intro, Diesel Engine Systems, Diesel-Fluid Power Systems, Diesel-Schematic Interpretation, Diesel-Track Drive Systems, Diesel Equipment Service/Maintenance, Diesel-Refrigeration/Air Conditioning, Diesel Engine Troubleshoot, Diesel-Power Trains, Communication-Diesel and Economics-Basic.

service and repair diesel powered equipment” is an example of “two years of school in diesel maintenance.” By contrast, *none* of the 23 courses Kijak took were identified in any way as involving diesel engines -- but his transcript does include credits for such courses as consumer economics, implement shop, and vocational math. Kijak’s program, as is clear from the transcript, was in Agricultural Mechanics. 4/ While some of the course work was undoubtedly

4/ Kijak’s course work included Implement Fundamentals 1 and 2, Implement Shop 1 and 2, Parts Nomenclature and Manual Int, Basic Welding for Ag Mechanics, Applied Comm 1 and 2, Vocational Math 1, Consumer Economics, Man-Society-Work, Internal Combustion Engine, Engines Shop, Basic Hydraulics, Applied Science, Tractor Power Tran, Tractor Shop, Applied Hydraulics, Effective Selling and Employ Orientation.

relevant to the job duties of ESM position (e.g., two courses in hydraulics), Kijak’s course of study at NTC, even as supplemented by the additional course work noted above, did not constitute “two years of school in diesel maintenance.”

That a 1974 associate degree in agricultural mechanics does not satisfy the requirement for two years of school in diesel maintenance was further supported by Speich’s testimony about the considerable technological changes that have come to the agricultural and highway industries over the past 26 years. Speich testified, on his personal knowledge, that the farming industry a generation ago relied heavily on gasoline powered vehicles and implements, technology far different from today’s diesel equipment. I find Speich’s testimony that a course in agricultural mechanics from the early 1970’s would not prepare someone for serving as a technician on diesel equipment in the 21st century to be credible.

Indeed, there have long been separate programs for gasoline and diesel equipment; as James Werner’s application indicates, the vocational system’s Eau Claire campus (identified as the District One Technical Institute) offered a course in Diesel Mechanics at least as far back as 1977, only three years after Kijak took the agricultural mechanics course in Wausau.

Having failed to satisfy the educational requirement, Kijak must demonstrate four years of diesel engine maintenance experience before he “can qualify” for this promotion. Can he establish by his record of employment that he has “four years of diesel engine maintenance experience,” as required by the notice of vacancy?

Kijak has considerable experience at a variety of positions in the highway/construction industry, some of it highly relevant to the position of ESM. Indeed, some of Kijak’s experience is even in the precise area of diesel engine maintenance. In its aggregate, that experience may or may not make him *able* to do the job of being an ESM. But only if it adds up to four years at diesel engine maintenance does it mean he “can qualify” under the terms of the notice of vacancy.

When Kijak sought a highway worker position in 1993, his application listed 12 years of employment experience as an operator/laborer, primarily in general and heavy construction, sewer and water installation, landscaping and roadwork. The duties he listed most frequently were quite distinct from those of "diesel engine maintenance," as required by the notice of vacancy. The only reference to maintenance and repair of equipment at all was as part of a three-month stretch with Kafka Granite in 1988. As one arbitrator has commented in a similar case, "the most reliable statement as to experience is that contemporaneous statement made by the grievant in his application." MUELLER CO., 95 LA 111 (Kirby, 1990).

As commissioner at the time Kijak was hired and consistently since, Speich was aware of Kijak's employment history as indicated on his application. He was right to conclude that Kijak's application does not, on its face, come close to establishing four years experience in diesel engine maintenance.

Kijak testified at hearing that he also had experience as a mechanic during his second tour with Wimmer Construction 1988-1993, but that he "evidently didn't put it in there, for whatever reason." The union also offered a letter it had submitted to county personnel director Brad Karger during the grievance process, whereby an officer of Wimmer Construction represents that Kijak "had accumulated approximately 2½ years of shop experience" during the period 1981-1991.

With all due respect to the signatory of this letter, I find that the inherent difficulties in recreating and analyzing data from assignments 10-20 years old makes this attestation to Kijak's work experience less than persuasive.

For its part, the Kafka firm also supplied a letter in 2000, crediting Kijak with 18 months of full and part time work as a heavy equipment mechanic and operator "back in the late 1980's." Given that this letter is more than a decade after-the-fact, and that its description matches neither the duration nor the duties that Kijak listed on his employment application in 1993, I find this also fails to provide meaningful support for the union's case.

As commissioner throughout Kijak's seven years with the county, Speich was also aware of his duties as an equipment operator, and the extent to which they do or do not qualify as diesel engine maintenance. I find credible Speich's testimony that Kijak has done "some limited mechanic work at the asphalt plant," but that he "didn't have anywhere close to two years experience in diesel engines."

Notwithstanding his failure to meet the educational or experience standards, should Kijak have been awarded the ESM position anyway?

While maintaining that Kijak easily met the criteria set by the list of qualifications, the union makes further arguments that, even if he didn't meet those terms, the county still should have awarded him the position.

First, the union contends that Speich did not properly consider Kijak's qualifications. Describing Speich's interview with Kijak to be "a monumental abomination ... so monumentally outrageous," the union cites a hornbook dictionary to illustrate how a *proper* employment interview should have been conducted.

The union's problem, however, is that the dictionary explanation does not support the union's theory. According to Roberts' Dictionary of Industrial Relations (Third Ed., BNA 1986, pp. 184-185), employment interviews "should serve as a final check" and are "*generally used after ... measures of fitness have been obtained and a final decision has to be made*" (emphasis added). Here, of course, the employment interview took place in the context of the applicant *not* having provided the requisite measures of fitness for promotion.

Regardless of the scope and purpose of the interview, any professional encounter between management and labor should be marked by mutual respect. If Speich conducted his interview with Kijak in the combative and confrontational manner as the union contends, that would have been unfortunate and inappropriate. But even if Speich's conduct did justify the union's harsh words – and I do not necessarily find that it did – such an attitude would not, by itself, serve to give Kijak the education and/or experience necessary for promotion.

The union attributes Speich's purportedly confrontational approach in the interview to an alleged anti-union attitude.

I understand that the union may rightfully feel it is unfair of me to sustain an objection to this line of questioning at hearing and then summarily dismiss the allegation in my award. The county wanted to ask Speich, "you don't like the union, do you?" I sustained the county's objection for two reasons. First, I did not feel that the issue was relevant to the question before me, namely whether the county violated the collective bargaining agreement; as the union is well-aware, there exists an independent forum to pursue the complaint of such a prohibited practice under secs. 111.70(3)(a) 1 and 3, Wis. Stats. Second, I did not feel the union had even made a *prima facie* case that Speich indeed did harbor such an invidious motive.

No such *prima facie* case could be made because of the contrary evidence in the record, namely that the previous four promotions to the position of ESM – all promotions which Speich made – were of existing bargaining unit members. Indeed, as will be discussed below, Speich even promoted a member of the bargaining unit *who was not qualified*.

This is why I also fail to follow the union's argument on the workplace-wide implications of this matter. The union has asserted that promotions under the collective bargaining agreement will "effectively be blocked" if I deny this grievance. When four out of five promotions are of bargaining unit members, it is hard for the union to establish that promotions of bargaining unit members "will effectively be blocked" if this grievance is not sustained.

Asserting a “past practice of the parties,” the union argues that the county has forfeited its right to require strict compliance with the full terms of the posting because it previously promoted to the ESM position an employee who did not meet the terms of the posting, namely Gary Carr. 5/ The union is correct that Carr clearly failed to satisfy the 1991 posting in that

5/ *The union misstates the record in asserting that the listed qualifications for the position “have been relaxed and/or ignored for other interested employees in the past.” (emphasis added). As there is only a single such incident in the record, the reference to “employees” is a misleading exaggeration. Indeed, the union cites only the incident involving Carr, notwithstanding its reference to “employees.”*

he had neither a year’s journeyman-level experience in mechanical repair work or equivalent training and/or experience. The union is incorrect, however, in concluding that this one episode invalidates the county’s ability to rely on the terms of the posting.

It is well-established that a past practice only blossoms when the parties engage in a practice that is 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. See, CELANESE CORP. OF AM., 24 LA 168, 172 (Justin, 1954). A single episode over a decade ago, which has not been followed on three subsequent and recent occasions, does not constitute a past practice.

The union also draws another incorrect conclusion in claiming that Carr’s inadequacies somehow make Kijak qualified. Carr testified that he had neither the education nor the experience when he got the job. That much is true. But the union cannot extrapolate from this that Kijak himself was qualified. Certainly, Kijak was *more* qualified than Carr; but that is far short from establishing that he was *qualified* as measured objectively against the published standard. Yet that is exactly the claim the union makes, asserting that “the testimony of Carr ... established the Grievant to be an overwhelmingly trained and experienced candidate.” The testimony of Carr established that Carr got a job he wasn’t qualified for (as defined by the published posting). The testimony of Carr establishes nothing at all about the objective qualifications of Kijak. The fact that Carr got a job he wasn’t qualified for does not accomplish the same end for Kijak.

In MUELLER CO., 95 LA 111 (Kirby, 1990), the employer had, at various times over a 27-year period, waived the collective bargaining agreement’s requirement for four years actual experience in bidding for certain jobs. As in the instant case, the union there argued that this established a past practice which prevented the employer from applying the experience requirement to the grievant. The arbitrator disagreed, explaining that “(p)ast practice is used to flesh out the meaning of ambiguous language or an agreement or a practice where no language exists. The language in dispute here is unequivocal as to qualification. In the absence of overwhelming evidence of a practice in terms of frequency and numbers, an argument of a waiver of these qualifications is not convincing.” That one or more bidders were allowed without the required experience was “not sufficient evidence of frequency and numbers to establish a past practice,” the arbitrator wrote in denying the grievance.

The union also notes that the collective bargaining agreement requires that an employee filling a promotional vacancy “shall be on a probationary period” for at least thirty days. The union suggests that Kijak should be accorded this “probationary trial period,” and that “if he fails to perform the expected duties adequately, he can be returned to his former position without any undue harm to the employer’s operation.” In support of this theory, the union cites an arbitral hornbook to state that a trial period should be granted “if there is a reasonable doubt as to the ability of the senior employee and if the trial would cause no serious inconvenience....”

There are two problems with this argument. The first is that the trial period in Article 7, Section 4 is not an opportunity for a employee to prove qualifications when management isn’t sure about the promotion; the trial period is an opportunity for management to evaluate the performance of someone who has already qualified and been promoted. These are quite different concepts.

Furthermore, the facts in this case are contrary to a critical aspect of the union’s analysis – that an unsuccessful trial period would be “without any undue harm to the employer’s operation.”

Under the county’s standard scheduling, there are times when an Equipment Service Mechanic has the sole responsibility for ensuring the safety and performance of the highway department’s many vehicles. At some time or another, every ESM serves as the only ESM on-call. Having as the sole ESM on duty someone who is not qualified could endanger fellow employees and members of the public, and risk serious damage to expensive and complex machinery. Such a potential for disruption and danger does not fit the union’s description of being “without any undue harm to the employer’s operation.”

The union also asks me to give “considerable weight” to the review and determination of its outside consultant, whose “detailed and careful independent review” supported hiring Kijak.

There are again two problems with this request. The first is that, notwithstanding the consultant’s obvious experience and presumed integrity, his was not an independent review. It was commissioned and paid for by the union.

The second problem with asking me to rely on its consultant’s opinion that Kijak was “well qualified to fulfill the actual daily job duties” of the position is that it reflects a fundamental misunderstanding of my role. My role is not to identify the “actual daily job duties” of the ESM position and make a determination as to whether or not Kijak was “well qualified” to perform those duties. Quite to the contrary – since I have determined the qualifications identified in the notice of vacancy to be valid, my task is to determine whether the employer acted in an arbitrary, capricious or unreasonable manner in determining that Kijak failed to satisfy the qualifications listed in the published position description.

It did not.

Kijak had neither the education nor the professional experience to meet the terms of the valid notice of vacancy, and thus did not qualify for promotion. The single instance of promoting an unqualified bargaining unit member in 1991 does not establish a past practice that precludes the employer from applying the terms of the notice of vacancy.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 6th day of September, 2001.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

