

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**DODGE COUNTY TECHNICAL AND SUPPORT EMPLOYEES,  
LOCAL 1323-G, AFSCME, AFL-CIO**

and

**COUNTY OF DODGE, WISCONSIN**

Case 212  
No. 59825  
MA-11418

---

Appearances:

**Mr. Jeffrey J. Wickland**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 551, Menomonee Falls, Wisconsin 53052-0551, appearing on behalf of the Union.

**Ms. Nancy L. Pirkey**, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the County.

**ARBITRATION AWARD**

Dodge County Technical and Support Employees, Local 1323-G, AFSCME, AFL-CIO, and the County of Dodge, Wisconsin are parties to a collective bargaining agreement that provides for final and binding grievance arbitration. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a staff member as an impartial arbitrator to resolve this dispute. The Commission appointed Coleen A. Burns. Hearing in the matter was held on August 3 and September 28, 2001 in Juneau, Wisconsin. Catherine Thimm-Braunschweig filed a transcript of the hearing with the Commission on October 10, 2001. The record was closed on December 4, 2001, upon receipt of post-hearing written argument.

**ISSUE**

The Union frames the issue as follows:

Did the County violate the collective bargaining agreement when it failed to award the position of Mechanic II at the Dodge County Justice Facility to Randy Frank?

If so, what is the appropriate remedy?

The County frames the issue as follows:

Did the County violate the collective bargaining agreement when it determined that Randy Frank did not have the necessary skills and abilities for the Mechanic II position?

If so, what is the appropriate remedy?

The Arbitrator adopts the County's statement of the issue.

**RELEVANT CONTRACT LANGUAGE**

**ARTICLE III  
MANAGEMENT RIGHTS**

Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of work and all other matters pertaining to the management and operation of the County, including the hiring, promoting, transferring, demoting, suspending or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this Section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

...

**ARTICLE VII  
PROBATIONARY PERIOD**

...

- 7.4 Employees who are promoted may also be required to serve a ninety (90) day probationary period in the position to which they are promoted. Employees serving a probationary period shall not be subject to discharge without recourse to the grievance procedure. During such probationary period, either the Employer or the Employee may request that the Employee be returned to his former position.

...

**ARTICLE XV  
SENIORITY RIGHTS**

- 15.1 It shall be the policy of the Employer to recognize seniority.

...

- 15.6 Seniority shall apply in promotions, transfers, layoffs, recall from layoff and vacation selection as hereinafter provided.
- 15.7 **Job Posting.** Whenever a vacancy occurs which Management desires to fill or it is known that a new job will be created, the following procedure shall apply:
- 15.71 The job vacancy shall be posted on union bulletin boards for a period of five (5) workdays and Employees may apply for such positions during this period.
- 15.72 Selection of applicants to fill job vacancies shall be determined by the Employee's skill, ability and seniority. Where all factors are relatively equal, the Employee with the greatest seniority shall be entitled to preference.
- 15.73 When objections are made by the Employer regarding the qualifications of an Employee to fill a position, such objections shall be presented to the Union Committee for consideration. If there is any difference of opinion regarding the qualifications of

an Employee, the Union may take the matter up for adjustment under the grievance procedure Michael Johnson as Director of Maintenance for the County's new Justice Facility contained in Article XVI of this Agreement.

- 15.74 The County Personnel Director may make temporary appointments to the position until any dispute with respect to those positions is resolved.

...

### **RELEVANT BACKGROUND**

In early August of 1999, the County hired Michael Johnson as Director of the County's Justice Facility Maintenance Department. Johnson worked with the County Personnel Department in creating positions for the new facility. After reviewing existing position descriptions for the Administration Building, *i.e.*, the Building Maintenance I and II and the Maintenance Technician, Johnson drafted new position descriptions for the Justice Facility. Johnson, who viewed the new Justice Facility as having more sophisticated mechanical systems than the Administration Building, anticipated that the Justice Facility "Mechanics" would be technical and maintenance oriented, with these employees performing no janitorial work beyond cleaning up after themselves.

On May 15, 2000, the County provided the Union with position descriptions for the following Justice Facility positions: Custodian, Mechanic II, Mechanic III, and Typist II. The parties bargained the conditions of employment for the new positions, reaching tentative agreement by late July, 2000.

Prior to reaching this tentative agreement, the County posted for the Mechanic III position on June 8 and the Mechanic II position on June 30, 2000. The County posted the Maintenance Technician position on August 9 and the Lead Mechanic position on August 16, 2000.

Each posting noted, as the parties had discussed in bargaining, that applicants would be required to complete a test. Given the fact that there were more available positions than bargaining unit employees that posted, the Union agreed that the County could test external applicants at the same time that it tested internal applicants.

A decision to use the NOCTI Building Trades Test was reached at a meeting that included County Personnel Director Joe Rains; County Administration Building Maintenance Director Randall Machkovitz; Johnson; County Personnel Analyst Lloyd Gary Mosier, and a representative of Moraine Park Technical College (MPTC). Johnson did not agree with the

decision to use the test as a screening tool because when this test had been used previously for a lead worker position, the test results were not consistent with what Johnson “saw” during the interview process.

The County contracted with MPTC to proctor the NOCTI Building Trades Test on July 6 and September 8, 2000. This test was to be given to each applicant for either a Mechanic II or Mechanic III position.

Mosier received the results of the first test in mid-July and provided these results to Rains and Johnson. The results included raw test scores and a “% Correct” entry. The results also included an overall rating from “Minimal” to “Superior” for the test as a whole, as well as for the specific skills tested. County representatives inquired further regarding the scoring of the tests and discovered that the test results were based on a reference to a national average generated by the test’s creator. When the County was unable to discover what skill level composed the national average, Rains, Mosier and Johnson agreed that the test was inappropriate as a screening tool because they could not determine what the test was indicating. The three decided to not use the test to evaluate applicants. It was also decided to continue administering the test so that the process would be the same for everyone.

The decision to not use the NOCTI test made an interview the County’s sole screening mechanism for the mechanic positions. Johnson, without any consultation with the Personnel Department, developed a series of interview questions. With the exception of the Grievant, applicants who posted for both the Mechanic II and the Mechanic III positions were offered the opportunity to be interviewed separately for each position. Paul Cupery was the only applicant to be interviewed separately for each position.

Johnson conducted the interviews over a period of weeks. Only Johnson and the applicant were present at the interviews. Pursuant to directions from Human Resources, Johnson interviewed internal applicants before external applicants. Johnson did not review an internal applicant’s personnel file prior to interviewing the applicant.

The interview process occurred over a period of weeks and, on average, each interview involved from thirty to forty-five minutes. Johnson divided his prepared questions for the interview into three areas: General, Operational and Technical. Johnson’s prepared questions were as follows:

#### GENERAL

- 1) Tell me about your general work history & maintenance experience
- 2) What interested you in applying for this position
- 3) Experience with food equipment
- 4) What do you like about your present job? Dislike?

OPERATIONAL

- 1) What do you feel is the major function and/or purpose of the Justice Facility Maintenance Department?
- 2) If you were alone in the facility, @4pm and simultaneously a call came in that a Judge's office called & said they were cold, & the kitchen called and said the oven wasn't working, which service call would you do first?

TECHNICAL

- 1) On a large (600 ton) chilled water system, where would I find the Evaporator?
- 2) In very general terms, what is the purpose of a relay
- 3) How would one reverse direction of a 3 (phase) motor
- 4) Experience with building automation systems. Difference between binary & analog?
- 5) If one opened up a 800 amp 3 (phase) panel, there were no markings on the panel, and you did not have a voltmeter, could you determine the voltage within?
- 6) What is the purpose of boiler blow down

Sometime after completing all the interviews, Johnson concluded that only one of the internal applicants had the qualifications for any of the Mechanic II vacancies. That applicant, however, withdrew his name from consideration to take an intra-departmental promotion.

Having determined that no internal applicant was qualified for the Mechanic II position, Johnson went to the Personnel Department and reviewed job applications then on file and selected a number of external applicants to interview. Johnson used the same interview process with the external applicants as with the internal applicants and ultimately filled five Mechanic II vacancies with external applicants.

Johnson reviewed the applications of external candidates prior to interviewing those candidates. Johnson based his decision to hire on the interview alone. Johnson was not aware of and, thus, did not consider the seniority of any internal applicant when he made his hiring decision. Prior to making the hiring decision, Johnson did not consult the internal applicant's supervisor, or anyone else, regarding his evaluation of the internal applicants, and did not generate any written report for the Personnel Department of his evaluation of the applicants.

Jeff Beecher was the first of the external candidates to be hired by the County. Beecher worked in the non-unit position of Temporary Maintenance I from June of 1999 until he became a Mechanic II in October of 2000

The Union filed Grievance 00-02 on behalf of Randy Frank, Randy Nofsinger, Gary Zweig, Fred Bohn and Tony Muhle. The grievance form states the following as the "Circumstances of Facts:"

Management hired a nonunion, temporary employee for the Mechanic II Justice Facility Maintenance position, specifically passing over all internal applicants. The non-union, temporary employee had worked for the county maintenance department during which time he received training & experience not otherwise made available to members of the bargaining unit.

The grievance requests the following remedy:

Award Mechanic II Justice Facility Maintenance position to the most senior qualified employee who signed said job posting.

Randy Frank is the most senior unit applicant claiming the position and is hereafter referred to as the Grievant.

The Grievant, who signed the Mechanic II and Mechanic III posting, took the NOCTI test on September 8. Moraine Park mailed out the scores of that group of applicants to the County on September 11 and to the applicants on September 12. The scores for the Grievant stated an overall "% Correct" of 21.5%, and no rating above "Minimal." Mosier gave the results to Rains, but not to Johnson.

When the Grievant asked Moraine Park to verify his test results, Moraine Park did so and discovered an "error made in the data entry for Randall Frank's assessment." In a letter dated September 16, 2000, Moraine Park advised the County that the Grievant's overall "% Correct" was revised to 70.6%, while his overall rating was revised to "Superior." For the nine specific areas that were tested, the Grievant received one "Average" rating, one "Above Average" rating and seven "Superior" ratings.

The County hired the Grievant on September 19, 1988. The Grievant has held the position of Building Maintenance II in Administration for at least ten years. Prior to assuming his Building Maintenance II position, the Grievant held the position of Building Maintenance I.

The position description for Building Maintenance II in Administration contains the following:

**OVERALL PURPOSE/SUMMARY:**

Under the general direction of Assistant Supervisor of Maintenance, operates, maintains, and repairs the electrical, plumbing, and HVAC systems. Also

installs new equipment, paints, cares for lawn, performs some custodial work, and performs other assigned work.

**PRINCIPAL DUTIES AND RESPONSIBILITIES:**

1. Maintains and repairs HVAC, plumbing, and electrical systems.
2. Performs interior/exterior carpentry and painting work.
3. Replaces worn or broken parts on boilers, air conditioners, plumbing fixtures, and equipment.
4. Operates and maintain water softeners.
5. Operates emergency generators and maintains records.
6. Maintains building surfaces and roofs.
7. Performs general custodial work. Includes, but not limited to sweeping, mopping, and dusting.
8. Performs floor maintenance like stripping, scrubbing, and refinishing.
9. Cleans, polishes, and relocates furniture.
10. Cleans windows and installs storm windows.
11. Operates and maintains electrical, plumbing, heating, and air conditioning systems/equipment.
12. Performs weekend building checks on rotating basis.
13. Performs grounds maintenance. Includes, but not limited to lawn care and snow removal
14. Prepares and maintains records and reports as required.
15. Performs related duties as may be required or assigned.

**JOB SPECIFICATION:**

**KNOWLEDGE, SKILLS, AND ABILITIES**

Considerable knowledge of power equipment and tools.

Considerable knowledge of electrical, plumbing, and HVAC systems.

Considerable knowledge of equipment and methods used to operate buildings and equipment.

Knowledge of safety related to electricity, cleaning chemicals, and general maintenance work.

Ability to follow prints and drawings.

Ability to operate steam and water boilers.

Ability to understand and effectively carry out instructions.

Must meet requirements of Dodge County Driver Qualification Policy.

Regular attendance and punctuality required.

#### EDUCATION AND EXPERIENCE

High school diploma or GED equivalent, three (3) years minimum building operation, maintenance, and custodial work, or equivalent combination of education and experience which provides necessary knowledge, skills, and abilities.

Although seventy to eighty per cent of the Grievant's work for the County is custodial, the Grievant routinely performs maintenance work. Approximately seventy per-cent of this maintenance work is performed alone, with the remainder performed as an assistant to the Maintenance Technician. The Grievant does not install, HVAC, plumbing and electrical systems, but does operate and maintains these systems. This maintenance work includes troubleshooting HVAC systems, including ensuring that air boxes, filters and compressors are functioning properly; repairing thermostats; changing fuses and evaluating why fuses have blown; performing safety checks on boilers; and assisting the Maintenance Technician in changing boiler valves. With respect to his County employment, the Grievant's experience with electrical systems has included changing ballast and evaluating the functioning of circuit breakers, including checking for cross-wiring and the Grievant's experience with plumbing has included cleaning pipes with a water pressure cleaner; installing toilets; unplugging drains with a drain plug; replacing o-rings on faucets; and maintaining and replacing shower fixtures. The Grievant, who has never worked on the County's fire suppression systems, has a general understanding of how the systems in the Administrative buildings suppress fires and periodically tests the fire alarms. The Grievant has a general understanding of the purpose of the automated building systems in the Administrative buildings, but has not had the responsibility to operate these systems. The Grievant has assembled and disassembled furniture, including workstations, chairs and desks.

Prior to his employment with the County, the Grievant performed custodial/maintenance work for the Beaver Dam Unified School District, which work included maintenance on the District's plumbing, air conditioning, heating and boiler systems. While a student at Beaver Dam High School, the Grievant took the Capstone course, which is a three year program designed to introduce qualifying students to the fundamental components of woodworking; building construction, including electrical wiring; auto mechanics; small engines and metals, including welding and tool and die. The Grievant graduated from High School in 1988.

For at least four years, the Grievant and his wife have operated a cleaning and maintenance business in which the Grievant performs maintenance work that can be done without a license, including electrical, heating, air conditioning, and plumbing work. The Grievant also has incorporated a business selling and installing windows. Starting in 1991, the Grievant has rehabilitated older homes. This rehabilitation work has included redesigning; gutting to the wall studs; performing all heating, cooling, plumbing and electrical work that by

code could be performed by a non-licensed worker; and reframing the house. This rehabilitation work has included installing countertops, sinks and drains, dishwashers, garbage disposals and connecting stoves to gas lines. The Grievant has worked on two rehabilitation projects on his own and has worked on one or two rehabilitation projects with his brother. Several years ago, the Grievant also worked in the building department of Fleet Farm for approximately sixteen months, during which time the Grievant assisted customers in selecting building materials.

The County opened its new Justice Facility on January 1, 2001. At the time of hearing, the Justice Facility Maintenance Department had one part-time secretary, four janitorial employees and six Mechanics, five of whom were classified as Mechanic II and one of whom was classified as Lead Mechanic. Additionally, one Mechanic III position was vacant. The Mechanic II position which is the subject of this grievance is one of the positions created to staff the County's Justice Facility.

The position description for Mechanic II in the Justice Facility Maintenance Department contains the following:

**OVERALL PURPOSE/SUMMARY:**

Under the general direction of the Director, responsible for total operation of HVAC equipment and related systems, electrical systems and equipment and plumbing and fire suppression systems. May perform custodial work if required.

**PRINCIPAL DUTIES AND RESPONSIBILITIES:**

1. Operates, maintains, repairs, installs and performs diagnostics and troubleshooting on HVAC equipment and related systems, electrical systems and equipment and plumbing and fire suppression systems.
2. Adjusts and programs building automation system.
3. Performs interior/exterior carpentry work and painting, etc.
4. Replaces worn or broken parts on boilers, air conditioners, plumbing fixtures, and equipment.
5. Maintains building surfaces and roofs.
6. Assembles/disassembles and repairs/relocates furniture systems.
7. Performs general custodial work including but not limited to sweeping, mopping, and dusting.
8. Performs floor maintenance including but not limited to stripping, scrubbing, and refinishing.
9. Prepares and maintains records and reports as required.
10. Performs related duties as may be required or assigned.

**JOB SPECIFICATION:**

**KNOWLEDGE, SKILLS, AND ABILITIES**

Considerable working knowledge of power equipment and tools.

Considerable working knowledge of electrical, plumbing, HVAC systems and fire suppression systems.

Considerable working knowledge of Direct Digital Control (DDC) building automation systems.

Considerable working knowledge of equipment and methods used to operate buildings and equipment.

Knowledge of safety related to electricity, cleaning chemicals, and general maintenance work.

Knowledge of kitchen equipment its maintenance and operation.

Good mechanical aptitude and dexterity.

Ability to read and understand blueprints.

Ability to work with customers with tact, courtesy and professionalism.

Ability to work flexible work schedules.

Ability to understand and effectively carry out instructions.

Must meet requirements of Dodge County Driver Qualification Policy.

Regular attendance and punctuality required.

**EDUCATION AND EXPERIENCE**

High school diploma or GED equivalent, six (6) years experience in building operations and maintenance or equivalent combination of education and experience which provides necessary knowledge, skills, and abilities.

Under Appendix B of the parties' 2000 labor agreement, the Building Maintenance I is Grade 7, with a starting rate of 10.761 and a top rate of 12.831. The Building Maintenance II is Grade 8, with a starting rate of 11.141 and a top rate of 13.225. The Mechanic II is Grade 9, with a starting rate of 11.470 and a top rate of 13.570. The Maintenance Technician is Grade 10, with a starting rate of 11.839 and a top rate of 14.028. The Mechanic III is Grade 11, with a starting rate of 12.218 and a top rate of 14.349. The Mechanic III/Group Leader is Grade 14, with a starting rate of 13.519 and a top rate of 15.707.

**POSITIONS OF THE PARTIES**

**The Union's Initial Brief**

After an extensive review of the evidence, the Union contends that Section 15.72 is a "hybrid" job posting standard "because it requires the County to consider skill, ability and seniority, and, where these factors are relatively equal, it requires the County to award a position to the most senior employee." The grievance pits the Grievant against external applicants, and thus the posting standard here is "sufficient ability" to perform the job. Under

arbitration authority, the County's decision that the Grievant lacked the ability to perform the job must be evaluated to determine if it "was arbitrary, capricious or discriminatory." Although the labor agreement does not define a burden or standard of proof, governing arbitration and judicial precedent establishes that it "is the County's burden to establish that the Grievant did not possess the sufficient ability to perform in the Mechanic II job by clear and convincing evidence."

A review of the record will not support a conclusion that the County proved the Grievant lacked sufficient ability to perform Mechanic II duties. The "duties, qualifications and wages of a Mechanic II are only marginally distinguishable from those associated with a Maintenance II." Whatever difference exists between the positions cannot obscure that the County has failed to establish any factor beyond Johnson's unguided opinion to demonstrate that the Grievant lacked necessary qualifications.

Although not strictly applicable, standards developed under Title VII of the 1964 Civil Rights Act highlight the arbitrary nature of the County's conduct. Johnson did not seek, and the County failed to provide, any "written instructions pertaining to the qualifications necessary." What standards Johnson applied were vague and subjective. Although employees generally were informed of the Mechanic II vacancy, neither the posting nor the interview process included any procedural safeguards to avoid a contract violation. Johnson, effectively, acted on his own. A review of the evidence establishes that this unrestrained subjectivity fails to meet the contractual standard.

A review of the record establishes no County attempt to interject more objective factors into the assessment of the Grievant's qualifications. The County initially tested job applicants, but Johnson rejected the test results as "inconsistent" with his experience in the interview process. The July 6 test, however, placed external applicants over internal applicants. This is inconsistent with Johnson's testimony, and inconsistent with the County's conduct in administering the test to other applicants. In fact, the "objectivity of the test would have improved the quality of the County's hiring process."

An effective evaluation of the Grievant's experience and education could have afforded some objective check on the hiring process. A review of the evidence, however, establishes no significant attempt by the County to determine the Grievant's experience or education. One of the Grievant's supervisors did testify, but that testimony "in this case, is irrelevant." Machkovitz's testimony came well after the fact, and had no bearing on Johnson's conduct.

Section 7.4 of the labor agreement affords a "break-in period." In this case, such a trial period could have afforded a means for the County to objectively evaluate the Grievant's qualifications. The evidence establishes that such a trial period would not have delayed the hiring process, and this further underscores the lack of any objective basis for the County's refusal to award the position to the Grievant.

The evidence does establish that the Grievant is qualified for the Mechanic II position. His experience within the County in a similar position, his educational background and his extensive off-the-job experience amply demonstrate his qualifications. The County's decision rests on "a biased interview," invalid "assessment methods, " and Johnson's "not credible" testimony.

The Union concludes that the Arbitrator should "sustain the grievance, award the position of Mechanic II to the Grievant, and make the Grievant whole for lost wages, overtime benefits and seniority rights." His seniority within the Justice Facility "should precede that of the most senior employee hired from the outside." The Union adds that in "light of the Grievant's impressive qualifications for the position of Mechanic II and the record of the County and bias of the supervisor . . . it would be unfair to require him to serve a trial period during which time the County could return him to his former position. Thus, the Union contends that the Arbitrator should "award the position to the Grievant and . . . grant him the right to be returned to his former position within ninety (90) days."

### **The County's Initial Brief**

The County notes that the Union has abandoned its original position that the Grievant's seniority entitled him to the position to adopt its current position that the Grievant possesses "sufficient abilities" to perform as a Mechanic II. Article II, however, grants the County the contractual right to determine qualifications. Here, the County "used a fair and objective process to measure the qualifications of the candidates."

The interview process established that the Grievant is not qualified to be a Mechanic II. The Union's excessively aggressive attempt to undercut the validity of the test made it "unable to establish a consistent position with regard to the test." The assertion that the County tampered with the test is inconsistent with the assertion that the County discarded or failed to use the test results. Either assertion is unhelpful to resolving the grievance since "the results were never used in the selection process." Because the test scores "were based on national averages," the County determined they "did not provide a realistic picture of the experience and skills of local applicants." This conclusion moots the Union's critique of the test.

The County's rejection of the test made the interview processes "the sole basis for selection of applicants." Johnson developed background and technical questions based on the Mechanic II job description. During the technical questions, "the Grievant demonstrated his lack of knowledge and experience for the position." More specifically, the Grievant indicated his lack of experience with food equipment. Beyond this, he "demonstrated a dislike for working on mechanical systems – the primary function of the Mechanic II position – and expressed a desire to continue in janitorial services." That he missed the answers to the specific technical questions, and "looked to Mr. Johnson to guide him to the right answer"

further undercut his interview. On balance, he “completely botched the interview process,” missing “two-thirds of the questions.”

Nor does his experience as a Maintenance II qualify him to be a Mechanic II. The Union’s assertion that the positions are “virtually identical” is unfounded. The new position “was created in response to the highly sophisticated mechanical systems in the new building.” The County’s assessment of existing positions established the need for new positions.

The Mechanic II position is “over 80% committed to mechanical work” thus clearly distinct from the Maintenance II position, which is “less than 20% committed to mechanical work.” If anything, the Mechanic II position is related to the Maintenance Technician position, “a position for which the Grievant previously applied, but was deemed not qualified to fill.” The Grievant’s failure to grieve that determination undercuts his claim that his experience qualifies him for an even more technically demanding position.

Machkovitz’s testimony establishes that the Mechanic II position requires “advanced mechanical skills . . . not utilized by the Maintenance II position.” A review of the duties of the skills demanded of a Maintenance II worker against those demanded of a Maintenance Technician establishes that a Maintenance II worker is called upon to investigate, but not to repair, significant equipment malfunctions and electrical problems. On balance, Maintenance II employees perform “primarily custodial and janitorial duties” while Maintenance Technicians perform “significant mechanic or repair work.” Ten years of experience as a Maintenance II did not qualify the Grievant for any repair or mechanic work. The Grievant’s testimony underscores this.

The Grievant’s knowledge of HVAC and boiler equipment is superficial. Beyond this, the Grievant lacks significant “experience with regard to electrical systems.” His testimony “is the clearest demonstration of (his) lack of qualifications for the position.” Since the Grievant has the burden to establish his qualifications, and since the Union has failed to show that “the County used a discriminatory, arbitrary, or capricious procedure to hire the most qualified applicant for the Mechanic II position” it follows that the grievance “must fail.”

Under the labor agreement and relevant arbitral precedent, it is inappropriate to compare the Grievant to any other applicant once the County demonstrated he lacked the necessary qualifications for the job. The Union’s assertion that Beecher received training denied the Grievant is unproven. The evidence demonstrates that the County’s selection procedure appropriately focused solely on the qualifications of internal applicants. When the sole qualified unit applicant withdrew from the process, the County appropriately turned to external applicants. There is no basis to compare the Grievant to any of those applicants. His seniority need not have been considered because he failed to establish that he was qualified for the position. The County concludes by requesting “the Arbitrator find that the County did not violate the contract” and that “the grievance be dismissed with prejudice.”

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

The Union contends that the County has inaccurately characterized its own testing procedures and the Union's critique of them. The County may have intended to ask the same questions of every applicant, but the evidence belies the assertion. Nor is it accurate to assert that the Union alleges the County tampered with test scores. The Grievant did no more than question the mistaken scoring of his test results. Beyond this, the Union does not allege the County discarded or ignored the test results. Rather, the Union argues that the "County's failure to consider other available evidence of an employee's current and potential abilities was unreasonable, arbitrary, capricious, discriminatory and in bad faith."

Nor will the evidence support the County's characterization of the Grievant's interview answers. The Grievant never stated he preferred custodial work, and stated a "keen interest in mechanics and maintenance." If the County's view of his responses is accurate, the grievance is inexplicable. At most, the County's view highlights the risk of relying on subjective interview processes, since Johnson's "notes recollection, testimony and conclusions concerning the interview are unreliable, inaccurate and invalid."

The County's comparison of the Mechanic II and Maintenance Tech position is no more reliable. A review of the evidence establishes that the Maintenance Technician position is comparable to the Mechanic III position and that the "Mechanic II supports the Mechanic III in the same way that the Maintenance II supports the Maintenance Technician." That the Grievant did not grieve his denial of a Maintenance Technician position establishes no more than that "his good friend . . . was more qualified for the vacancy." Beyond this, the County understates the amount of maintenance work the Grievant performs as a Maintenance II.

Machkovitz's testimony is irrelevant to the grievance, since Johnson never approached him when determining the Grievant's qualifications. This underscores the County's refusal "to investigate or consider anything other than the results of the interview." Nor should the Union's focus on Beecher be a surprise to the County. The County posted the Mechanic II positions sequentially, and Beecher became the first external applicant to fill the posted positions. The contractual violation is the County's denial of the first vacancy to the Grievant: "Beecher can have the second vacancy, but the first position should have gone to the Grievant."

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

The County contends the Union fails to appropriately categorize the type of "modified seniority clause set forth in Section 15.72" and erroneously asserts the contract demands only that the Grievant be shown to have "sufficient ability" for the Mechanic II position. The contract places the initial determination of qualifications in the County's hands. Here, the

County “used a fair and objective process to measure the qualifications of the candidates” by using the same interviewer to ask the same questions of each candidate. Whether there is a better means to assess candidates is irrelevant to the application of Section 15.72. Rather, the Union must prove the County’s “methods were arbitrary, capricious, or discriminatory.” The Union has failed to do this by asserting that better evaluation tools exist. The Union unpersuasively attempts to obscure that the sole issue “is whether the method used was fair and uniformly applied to all applicants including the Grievant.”

Johnson developed the Mechanic II position, and “was uniquely qualified to evaluate potential applicants for the Mechanic II position.” Whether more objective tests exist cannot obscure that Johnson was qualified to make the evaluation that the County relied on in filling the positions.

The Union’s attempt to attack the test is internally inconsistent. Its initial brief implies that Johnson somehow used the tests in evaluating applicants. Johnson’s testimony rebuts this. The Union inexplicably asserts that reliance on the tests would make the evaluation process more objective. This contradiction cannot obscure that the County’s determination not to use the test results renders the entire debate moot.

The Union’s attempt to undercut Machkovitz’s testimony is “counter-intuitive and self-defeating.” Machkovitz is the Grievant’s direct supervisor. He is clearly in a position to evaluate whether the Grievant’s experience in the position of Maintenance II qualifies him to be a Mechanic II. Machkovitz’s testimony cannot be made inadmissible by post-hearing regrets.

The Union’s assertion that the Grievant acquired significant education to prepare him to be a Mechanic II is “very misleading.” The high school training is not the sort of technical training the County sought in creating the position of Mechanic II. Johnson considered the training in any event, and determined it was entitled to little weight.

Nor can Section 7.4 be considered applicable. The trial period it creates presumes the qualifications of an applicant. The Grievant has failed to demonstrate that he is qualified. The Union thus inappropriately seeks to transform a trial period into a training period. The contract does not entitle the Grievant “to the opportunity to learn the position” and does not obligate the County “to provide a trial period to an unqualified applicant.”

The Union’s attempt to highlight Beecher’s qualifications cannot obscure that the Grievant must be proven qualified to wrest the position from Beecher or any other successful applicant. The County objected to this line of argument at hearing and “hereby renews its objection to the evidence submitted by the Union and cited in its brief regarding the qualifications or interview answers of the external candidates.” The determination of the

Grievant's qualifications is central to resolution of the grievance. Beecher's qualifications cannot address the void in the evidence concerning the Grievant's qualifications.

### DISCUSSION

Article III, Management Rights, provides the County with the general right to determine the qualifications of job applicants. Article III, however, must be construed in a manner that is consistent with other provisions of the labor agreement. One of these provisions is Article XV, Seniority Rights.

Section 15.72 states as follows:

Selection of applicants to fill job vacancies shall be determined by the Employee's skill, ability and seniority. Where all factors are relatively equal, the Employee with the greatest seniority shall be entitled to preference.

By agreeing to the language of Section 15.72, the County has placed a limitation upon its general management right to determine the qualifications of applicants for job vacancies, such as the Mechanic II position in dispute. Specifically, it requires the County to select an applicant upon the basis of the employee's skill and ability and seniority. Given this selection requirement, the County's determination of an applicant's "qualifications" for the Mechanic II posting must be based upon the factors of "skill and ability and seniority." When all the factors "are relatively equal," then seniority is determinative.

At the start of the posting process, the County's representatives intended to use the NOCTI Building Trades Test as a measurement of "qualifications." Had this test been a valid measure of the "skill and ability" needed to perform the work of the Mechanic II, then it would be a reasonable exercise of the County's contractual management rights to consider the results of this NOCTI test when selecting applicants for the Mechanic II position.

As County Personnel Analyst Lloyd Gary Mosier credibly testified, the County's representatives decided to not use the results of the NOCTI building trades test because they could not verify the skill levels being tested. (T. 342-43) Without such verification, the County could not determine whether or not the test was a valid measure of the "skill and ability" to perform the work of the posted Mechanic positions. Accordingly, the decision to not use the test was a reasonable exercise of the County's contractual management rights.

As Mosier also credibly testified, the County's representatives decided to continue with the NOCTI testing in order to ensure that all applicants underwent the same application process. (T. 344-45) This decision furthers the goal of providing an evenhanded evaluation process. Accordingly, this decision was a reasonable exercise of the County's contractual management rights.

The decision to not offer the Mechanic II position to the Grievant was made by Michael Johnson, Director of Maintenance for the County's new Justice Facility. As Johnson stated at hearing, he was not aware of the seniority of any of the employee applicants for the Mechanic II vacancy and did not give any consideration to seniority when he made the determination that the Grievant was not qualified for the vacant position of Mechanic II. (T. 182, 211) The County argues that the Grievant's seniority is irrelevant because the County has the management right to determine qualifications and where, as here, the County "used a fair and objective process to measure the qualifications of the candidates," the arbitrator must defer to the County's determination.

As Johnson testified at hearing, he made his hiring decision solely on the basis of an interview. (T. 186-187) The use of an interview process would be a reasonable exercise of the County's contractual management rights, if the interview process were designed to elicit information that is reasonably related to the determination of the applicant's "skill and ability" to perform the work of the Mechanic II position and the interview process were fair and even handed. Indeed, the County recognized the need for a fair and even handed selection process when it decided to not use the NOCTI test and when it decided to continue to test all applicants so that all applicants would be subjected to the same application process.

The County established the job duties and responsibilities of the Mechanic II position when Johnson developed the Mechanic II position description. Thus, the initial question to be determined is whether or not the interview questions developed by Johnson are reasonably related to the determination of the applicant's "skill and ability" to perform the work of the Mechanic II position.

According to Johnson, the General questions were designed to elicit information regarding the applicant's prior work experience and to determine what made the applicant enthusiastic about work. (T. 190-191; 194-195) The first of the Operational questions was designed to determine if the applicant had a general understanding of the purpose of the Maintenance Department at the new facility. (T. 195-196) With the second of these questions, Johnson sought "to get a thought process" recognizing that "You've got 800 people that you don't want to deprive of food . . . (while the) judge can be cold for an hour" (T. 196)

With the first of the Technical questions, Johnson intended to elicit a response that would show an understanding of the Justice Facility's chilled water air conditioning system. (T. 205-206) With the second question, Johnson intended to elicit a response that would demonstrate if "there was an understanding or thought process with control logic." (T. 197) With the third and fifth questions, Johnson intended to elicit a response that would demonstrate an understanding of three phase electrical systems of the type found in the Justice Facility, as

well as a familiarity with wiring systems and knowledge of relevant safety considerations. (T. 197-199) With the fourth question, Johnson intended to elicit a response that would demonstrate the degree of familiarity with building automation systems and recognition of the fact that the older systems were analog, while the newer systems were binary. (T. 198) The sixth question was designed to explore the depth of understanding of boiler operation. (T. 199)

Neither Johnson's testimony, nor any other record evidence, establishes a relationship between the interview questions and the specific duties and responsibilities of the Mechanic II position. Johnson's testimony demonstrates that, when he developed the interview questions, he did not have in mind any specific answer. (T. 194) Johnson's testimony further demonstrates that no interview question had a fixed value; that Johnson did not establish a pass/fail score; and that no combination of answers dictated any conclusion regarding the applicant's "qualifications." (T. 199-200)

The evidence does not demonstrate that the interview questions developed by Johnson are reasonably related to the determination of the applicant's "skill and ability" to perform the work of the Mechanic II position. The only evident basis for the County's determination of "skill and ability" to perform the work of the Mechanic II was Johnson's subjective approval or disapproval of individual applicants.

Johnson's notes of the Grievant's response to the interview questions are handwritten and impossible to duplicate here, but organized according to the interview questions, read thus:

GENERAL

- 1) Janitorial  
Mech Course's H/S  
Steam Traps = Volume??
- 2) Challenge  
Lot of Years Service  
In Business for Himself -- Janitorial
- 3) No
- 4) Variety  
Not A/C & Boilers  
Learn what I need to know  
Would like to be Janitorial Supervisor

OPERATIONAL

- 1)
- 2)

TECHNICAL

- 1) Cools Freon  
A/H?? Outside??  
Heat Froms??
- 2)
- 3) Change one of the phases  
(2)
- 4) No
- 5) Size of Feed??  
4 Feeds for 480%
- 6) Nitrate – Sludge?  
Personality Does not lend itself to leadership i.e. ego,  
Not sure of answers – took guesses – Looked for guidance from me  
Had pressing need to tell me about brothers suicide?  
Had bad childhood???

Johnson recalls that, in response to the first General question, the Grievant discussed the work he was doing for the County and his janitorial experience; stated that he knew a lot about systems, including steam traps; that, when Johnson asked the Grievant about the purpose of a steam trap, the Grievant “told me that it regulates volume” and that Johnson responded by saying that was not the purpose of a steam trap and then explained the purpose of a steam trap. (T. 202) Johnson also recalled that the Grievant mentioned that he took an automotive mechanical maintenance course in high school and had performed housekeeping and janitorial duties for a school. (T. 254) Johnson recalled that, in response to the second General question, the Grievant said that he thought that it would be a challenge; that he had a lot of years of service with the County; that he was in business for himself; that he and his wife operated a janitorial business, which gave the Grievant a good ability to plan, lay-out jobs, and a business sense. (T. 202-203) Johnson recalled that, in response to General question 3, that the Grievant stated that he did not have experience with food service equipment (T. 203) Johnson stated that he did not expect applicants to have considerable experience with food equipment. (T. 195) Johnson recalled that, in response to General question 4, that the Grievant stated he liked the variety of his current job and working with different buildings and

people, but that he did not like working on air conditioning or boilers. Johnson further recalled that the Grievant stated that he was willing to learn what he needed to know and that he would like to be a janitorial supervisor. (T. 203-204)

The fact that he did not have any notes in response to the two Operational questions and the second Technical question leads Johnson to believe that he did not ask the Grievant these questions. (T. 204; 206) According to Johnson, he did not ask the Operational questions of the Grievant because he did not “feel that it had value at that point” and that Johnson had “sensed that, right or wrong, Randy’s heart was not in the job with the response to Question Number 4.” (T. 204)

According to Johnson, a correct response to the first Technical question “would be something to the effect that it’s in the chilled water side and/or the cool air side or something like that;” that none of the Grievant’s several responses to the first Technical question were what Johnson was seeking; and, at that point, Johnson “got a sense” that the Grievant was looking to Johnson for an indication of which of the answers was the right answer. (T. 205) The fact that Johnson did not have any notes in response to the second Technical question leads Johnson to believe that he did not ask this question of the Grievant. The correct answer to the third Technical question would be to change two of the phases and, although the Grievant’s answer was not technically correct, the “thought process” was there (T. 206); that the Grievant’s response to the fourth Technical question was that he did not have any experience with building automation systems (T. 207); that a correct answer to the fifth Technical question would demonstrate knowledge of the state mandated color-coding which reflects voltage (T. 198-199) and the Grievant’s response was incorrect because the size of the feed has no bearing on voltage, but rather, has a bearing on ampage (T. 207); and that the Grievant’s response to the sixth Technical question, i.e., “nitrate and sludge” was correct. (T. 207-208)

Johnson’s note at the end of the final question, i.e., “Personality Does not lend itself to leadership i.e. ego,” reflected Johnson’s opinion that the Grievant was not a good match for the janitorial supervisory position for which Johnson understood the Grievant to have expressed a desire. (T. 208) The note “Not sure of answers – took guesses – Looked for guidance from me” reflected Johnson’s opinion that, when responding to interview questions, the Grievant looked to Johnson for guidance as to whether the responses were right or wrong. (T. 209) The final notes reflected Johnson’s puzzlement over why the Grievant offered information on the Grievant’s brother and the Grievant’s personal life history. (T. 209-210)

According to Johnson, he did not reach any conclusion until after he had interviewed all the internal candidates. At that point, he “sat down and went over and digested these things.” (T. 210) In making this decision, he relied upon his interview notes and what he could recall from them. (T. 273)

The Grievant recalls that the interview lasted for approximately one hour and began by Johnson indicating that the Grievant should not be tense; that it was not an interview to be uptight about; and that it was more of getting to know who and what you are. (T. 88-89) When the Grievant was asked the first question, he was unsure of where to start and asked if Johnson had reviewed his job application with the County, to which Johnson responded “no.” The Grievant then asked if Johnson had spoken with Dick Walters, the Director of the Administration Building, to which Johnson responded “no”, that he (Johnson) liked to build off his own opinion, rather than other people’s opinions. (T. 90) The Grievant then responded to the first General question by referring Johnson to his work history from high school to the Mechanic II posting. (T. 90-91) This work history did not include any mention of the Grievant’s window business. ( T. 140) According to the Grievant, in explaining his high school Capstone program, the Grievant did not limit his discussion to auto mechanics. (T. 356)

The Grievant responded to the second general question by noting that, since it was a new building, “it would be a challenge which I really like” and that it would involve less custodial work. (T. 93) The Grievant could not recall the third question being asked, or if he gave any answer to that question. (T. 94) In response to the fourth General question, the Grievant explained that he liked the variety and challenge of maintenance work and that he really enjoyed working with the people in the buildings. (T. 94) In response to the question of what he disliked in his job, the Grievant indicated that there was more custodial work than what he had expected. (T. 95) The Grievant did not recall informing Johnson that he disliked working with air conditioning or boiler systems. (T. 128; 359) The Grievant recalls stating that he liked working on boilers and, because he does not mind working on air conditioning and boilers, could not imagine why he would say that he disliked working on such systems. (T. 358-359) The Grievant recalls telling Johnson that he would have an interest in a janitorial lead worker position if such a position were created, but does not believe that his remarks were in response to General question 4. The Grievant believes that these remarks occurred at the end, when the Grievant was just making conversation. (T. 359-360)

The Grievant recalls that Johnson asked the first Operational question and the Grievant responded to the effect, that it was to basically maintain the building, to assist people if needed, and to basically keep track of the equipment being run. (T. 96-97) The Grievant did not offer any testimony with respect to the second Operational question. With respect to the first Technical question, the Grievant recalls informing Johnson that the Evaporator “would be located near the compressor on the outside of the building . . . (and is) the unit that evaporates the heat from the freon into the environment again” and that Johnson had some follow-up questions about troubleshooting on the chiller, to which the Grievant responded correctly. (T. 97-98) The Grievant recalls that he responded to the second Technical question by informing Johnson that a relay “is to actually control a mechanical item such as it would tell

the unit to shut on or off or when it should control the temperature, whatever it's controlling. Really basically tells the mechanical unit what to do or when to turn it on." (T. 98) The Grievant believes that he fully addressed the third Technical question by stating that the operation required the reversal of two wires. (T. 99) With respect to the fourth Technical question, the Grievant acknowledged that management was responsible for operating the building automation system and that he described his knowledge of building automation systems by "going through with what the system did and how it basically, I guess like I said, runs the building, controls the temperature or units to turn on and off." (T. 99-100) The Grievant acknowledges that he had trouble with the fifth Technical question because he had never opened an 800 amp, 3 phase, panel and indicated that he would check the size of the wire to the feed to determine how much current the box could take. (T. 101) The Grievant acknowledges that he did not respond correctly to the second portion of the fifth question (T. 101), but that he correctly answered the final Technical question by explaining that it was to remove any mineral build-up in the bottom of the boiler. (T. 102)

The Grievant denies that he was taking guesses or looking to Johnson for guidance with answering the questions. (T. 361) According to the Grievant, he did not have a pressing need to discuss his brother's suicide, but believed that Johnson should be informed of his brother's suicide because it occurred in the County jail and had led to litigation, as well as to an agreement to exclude the Grievant from the jail work, which exclusion lasted until the lawsuit was settled. (T. 361-362) Although the Grievant had not experienced any problems since his return to working at the jail site, he did not want Johnson to learn of the matter from other sources. (T. 362-363) His remarks regarding his childhood were made for the purpose of distinguishing his own life experiences from those of his brother. (T. 362-363)

Johnson acknowledges that, when interviewing the Grievant, he did not ask three of the twelve interview questions. Johnson's testimony demonstrates that two of these interview questions, *i.e.*, the Operational questions, were not asked because Johnson had already made a judgment regarding the Grievant's qualifications for the position, *i.e.*, that "Randy's heart was not in the job."

Johnson confirms that it was the response to the fourth General question that lead Johnson to conclude that the Grievant's "heart was not in the job." Johnson's testimony establishes that this conclusion resulted from the Grievant's expressed interest in a janitorial supervisory position and the Grievant's stated dislike of working on air conditioners and boilers.

The Grievant's interest in the Mechanic II position was established when he posted for that position. The fact that the Grievant also stated interest in a nonexistent janitorial supervisory position has little, if any, bearing on the Grievant's "skill and ability" to perform the Mechanic II position.

Working on equipment such as air conditioning and boilers are core duties of the Mechanic II position. Thus, it defies belief that an applicant for the Mechanic II position would assert that he had no interest in such work. Given this opinion, as well as the Grievant's testimony on this issue, the undersigned is persuaded that Johnson misunderstood, or misreported, the Grievant's response to the fourth General question. Johnson's conclusion that the Grievant's "heart was not in the job" is of dubious value.

Johnson considered the General questions to be of less value than the Technical questions. Johnson asked the Grievant all of the General questions, but did not ask the Grievant one of the "more valuable" Technical questions. Johnson did not explain why he did not ask the second Technical question of the Grievant. In other testimony, Johnson acknowledged that he "frankly was not consistent in asking everybody all the same questions because in some cases it became apparent to me that some people were not familiar with the questions or went over their head and frankly, in a few cases it was I felt a little embarrassing for them." (T. 187)

The notes following the Grievant's response to the sixth Technical question, i.e., Nitrate-Sludge, represent Johnson's conclusions regarding matters of little, if any, relevance to a determination of the Grievant's "skill and ability" to perform the work of a Mechanic II. These notes are more extensive than Johnson's notes of the Grievant's responses to the majority of the interview questions, including the Grievant's responses to the more "valuable" Technical questions.

In summary, the interview process used by Johnson to evaluate the Grievant's "skill and ability" for the position of Mechanic II was not fair and even handed, but rather, was arbitrary and capricious. Johnson's subjective disapproval of the Grievant is flawed procedurally and substantively. Notwithstanding the County's argument to the contrary, Johnson's conclusion that the Grievant did not have the "skill and ability" for the Mechanic II position is not entitled to be given any deference by the undersigned.

County Administration Building Maintenance Director Randall Machkovitz confirms that the position description of the Building Maintenance II position in Administration, currently held by the Grievant, accurately reflects the duties of this position. (T. 300-301) Machkovitz further confirms that the Grievant has done a "good job" in this position. (T. 332)

A review of the "overall purpose" of the Mechanic II and the Building Maintenance II position descriptions reveals that each works under the "general direction" of a supervisor. While the verbiage is not identical, the "overall purpose" of each position description includes the responsibility to operate and maintain HVAC systems, electrical systems, plumbing systems, as well as the performance of custodial work. The "overall purpose" of the

Mechanic II, unlike the Building Maintenance II position, includes a responsibility for the operation of fire suppression systems and the “overall purpose” of the Building Maintenance II position, unlike that of the Mechanic II position, includes the responsibilities of installing new equipment, painting, and caring for lawns. Thus, a review of the “overall purpose” section of the position descriptions indicates that the Building Maintenance II position has all of the responsibilities of the Mechanic II position, except those relating to fire suppression systems, and, additionally, has other responsibilities.

A comparison of the position descriptions indicate that the Building Maintenance II position has fifteen “Principal Duties and Responsibilities,” while the Mechanic II has ten. Seven of the ten, *i.e.*, Items 3, 4, 5, 7, 8, 9 and 10, are identical to those of the Building Maintenance II position.

One of the remaining three “Principal Duties and Responsibilities” of the Mechanic II position, *i.e.*, Item 1, is quite similar to the duties and responsibilities found in Item 1 and Item 11 of the Building Maintenance II position description. The variation occurs from the fact that the Mechanic II has the added “duty and responsibility” for the “diagnostics and troubleshooting” on HVAC, plumbing, electrical and fire suppression systems.

Machkovitz states that the Building Maintenance II employee’s responsibility to maintain and repair HVACs, plumbing and electrical systems is limited to simple troubleshooting and that more complex troubleshooting and repair work is typically assigned to a Maintenance Technician. (T. 304, 320) However, neither Machkovitz’ testimony, nor any other record evidence, provides a reasonable basis to conclude that the work of the Maintenance Technician, including diagnostic and troubleshooting, is equivalent to that performed by the Mechanic II employee, or that the work of each of these positions requires comparable “skill and ability.” Indeed, the fact that the Maintenance Technician is a pay grade above the Mechanic II militates against such a conclusion. The fact that the Grievant was previously found to be unqualified for a Maintenance Technician position is of no relevance to this proceeding.

Machkovitz and the Grievant agree that the majority of the Grievant’s current employment with the County involves janitorial work. Machkovitz’s testimony, however, establishes that the Grievant also performs maintenance work consistent with the Grievant’s position description. Machkovitz’ testimony does not demonstrate that this maintenance work differs in any material respect from that performed by the Mechanic II. Machkovitz does not claim, and his testimony does not demonstrate, that the Grievant is not qualified to perform the work of the Mechanic II.

The responsibilities and duties of Item 2, “Adjusts and programs building automation system,” and Item 6, “Assembles/disassembles and repairs/relocates furniture systems,” are

not found in the Building Maintenance II position. The Grievant acknowledges that he has limited experience with building automation systems. (T. 100) The Grievant confirms, however, that he has assembled desks and assembled and unassembled workstations. (T. 45)

The “Job Specification” section of the Mechanic II position description lists thirteen items under “Knowledge, Skills, and Abilities.” Of the thirteen items, eight are identical, or virtually identical, to those found in the applicable section of the Building Maintenance II position, *i.e.*, Items 1, 2, 4, 5, 8, 11, 12, and 13. Of the remaining five, the record provides evidence that the Grievant is deficient in one area, *i.e.*, “Considerable working knowledge of Direct Digital Control (DDC) building automation systems.”

The “Education and Experience” section differs in only one respect, *i.e.*, the Building Maintenance II position description provides for a minimum of three years experience in “building operation, maintenance and custodial work”, while the Mechanic II position provides for a minimum of six years experience “in building operations and maintenance.” The Grievant has over ten years of performing building operation, maintenance and custodial work for the County. Additionally, the Grievant has performed such work outside the County, as well as through his self-employment. The “Working Conditions” described in the Mechanic II position are also found in the Building Maintenance II position.

Johnson testified that, as of the arbitration hearing, employees in the Mechanic II position at the Justice Facility have devoted perhaps 90% of their time to the HVAC system, with the remaining time being devoted to electrical, plumbing and fire suppression systems. As the Grievant testified at hearing, he has worked with HVAC, electrical and plumbing systems both inside and outside of County employment. Neither Johnson’s testimony, nor any other record evidence, demonstrates that the Grievant does not have the “skill and ability” to perform the HVAC, electrical, plumbing and fire suppression work of the Mechanic II. In reaching this conclusion, the undersigned notes that having the “skill and ability” to perform work means that you are capable of performing the work; it does not mean that you must have actually performed the work.

In summary, the position description of the Mechanic II closely mirrors that of the Grievant’s Building Maintenance II position. The evidence that the Grievant has successfully held a County position that has duties and responsibilities that closely mirror those of the Mechanic II position provides an objective basis to conclude that the Grievant has the skill and ability to perform the work of the Mechanic II. As does the evidence of the Grievant’s education and other work experience, including his housing rehabilitation work.

### Conclusion

Section 15.72 requires the County to select applicants to fill job vacancies upon the basis of the employee's "skill, ability and seniority." In the instant case, the County relied upon Johnson's conclusion that the Grievant did not have the "skill and ability" to perform the work of the Mechanic II. This conclusion of Johnson's was based upon judgments that Johnson formed during the interview of the Grievant.

The record fails to establish that the interview questions developed by Johnson provided information that was reasonably related to the determination of an applicant's "skill and ability" to perform the work of the Mechanic II. The interview of the Grievant was not conducted in a fair and even-handed manner.

Johnson's judgment that the Grievant did not have the "skill and ability" to perform the work of the Mechanic II was arbitrary and capricious. Accordingly, Johnson's determination that the Grievant did not have the "skill and ability" to perform the work of the Mechanic II is not entitled to be given any deference by arbitrator.

By relying upon Johnson's judgment that the Grievant did not have the "skill and ability" to perform the work of the Mechanic II, the County failed to exercise its Section 15.72 rights in a reasonable manner. Thus, this conduct of the County has violated Section 15.72.

The record provides a reasonable basis to conclude that the most senior applicant, *i.e.*, the Grievant, has the "skill and ability" to perform the work of the Mechanic II position. Thus, the most appropriate remedy for the County's failure to exercise its Section 15.72 rights in a reasonable manner is to award the Grievant the most senior Mechanic II position at the Justice Facility, *i.e.*, the position awarded to Jeff Beecher, and to make the Grievant whole for all loss of wages and benefits resulting from the failure of the County to award the Grievant the position that was awarded to Jeff Beecher.

The fact that the County did not appropriately evaluate the Grievant's "skill, ability and seniority" when selecting applicants for the Mechanic II vacancies at the Justice Facility does not vitiate the County's Section 7.4 rights. Accordingly, the County may require the Grievant to serve a ninety (90) day probationary period in accordance with Section 7.4.

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

**AWARD**

1. The County violated the collective bargaining agreement when it determined that Randy Frank did not have the necessary skills and abilities for the Mechanic II position.

2. In remedy of this violation, the County is to immediately award Randy Frank the Mechanic II position at the Justice Facility that was awarded to Jeff Beecher and to make Randy Frank whole for all wages, benefits and seniority lost as a result of the failure of the County to award Randy Frank the Mechanic II position that was awarded to Jeff Beecher.

3. The County may require Randy Frank to serve a ninety (90) day probationary period in accordance with Section 7.4 of the parties' collective bargaining agreement.

Dated at Madison, Wisconsin this 3rd day of July, 2002.

Coleen A. Burns /s/

---

Coleen A. Burns, Arbitrator