BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MERRILL CITY EMPLOYEES LOCAL 332,
AFSCME, AFL-CIO**

and

CITY OF MERRILL

Case 63
No. 60933
MA-11759

Appearances:

Mr. Phil Salamone, Staff Representative, AFSCME, Council 40, AFL-CIO, 7111 Wall Street, Schofield, WI 54476, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., by **Attorney Jeffrey T. Jones** and **Attorney Bryan Kleinmaier**, 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050.

ARBITRATION AWARD

The Merrill City Employees Local 332, hereinafter referred to as the Union, and the City of Merrill, hereinafter referred to as the City, are parties to a collective bargaining agreement, hereinafter CBA, which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the City's decision to promote a less senior employee instead of the more senior Grievant, Robert A. Dickey, hereinafter referred to as the Grievant. The undersigned was appointed by the Commission as the Arbitrator and held a hearing into the matter in Merrill, Wisconsin, on May 23, 2002, at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed post-hearing briefs by September 4, 2002, marking the close of the record.

BACKGROUND

The City of Merrill operates a Wastewater Treatment Plant which employs four operators including the Head Operator, Tom Rein. On October 17, 2001, a notice was posted

pursuant to the provisions of the CBA announcing the availability of a "Trainee Operator" position at the Wastewater Plant. This position became available as a result of the departure of one of the four operators at the plant. This position required a six-month probationary period and a training period of one year. At the end of the one-year training period, the successful candidate was required to hold licensure as a Wastewater Treatment Operator I, Class IV *or be progressing toward* that licensure. Licensure as an Operator I, Class IV requires one to successfully complete eight examinations administered by the Wisconsin Department of Natural Resources. The requirements of the posting required that the Trainee Operator complete the first two of the eight tests within two years of his/her date of employment and the remaining six tests within six years of the employment date. The Grievant signed this posting but his signature was affixed after the scheduled cut-off period. He was thus not considered and a less senior employee, Kim Kriewald, was awarded the Trainee Operator position. The decision to award the position to Kriewald consequent to the initial posting was based upon seniority alone.

As it turned out, the October 17, 2001 posting was determined to be defective in that the City failed to post the notice in the Parks Department. The CBA required that it be posted in all Departments. The Union grieved this posting defect and the City ultimately re-posted the notice in all City departments. In the interim, Kriewald had been transferred to the Water Treatment Plant and started work as the Trainee Operator on November 26, 2001. When the City agreed to re-post the notice on December 3, 2001, one week following Kriewald's transfer to the Water Treatment Plant, Kriewald was sent back to his prior position.

The Grievant signed the December 3, 2001 (second) posting within the prescribed time period, as did Kriewald and two other less senior employees. This second posting, like the first, contained a requirement that candidates have a "basic knowledge of math" and the "ability to learn wastewater treatment principles." This time, though, the City Engineer/Utility Manager, Pat Geisendorfer, devised an examination for the candidates designed to test their knowledge of "basic math." The test contained 21 questions, a number of which related directly to water treatment issues and principles. A score of 75% was established by Geisendorfer as a passing grade. Of the four candidates only Kriewald passed. His score was virtually perfect: he missed only one part of a four-part question. The Grievant scored 67.9% and the other two candidates scored lower still. On the basis of the results of this test, Kriewald was the only candidate found to be qualified and was awarded the position. This grievance followed.

ISSUE

The parties were able to stipulate to the issue before the Arbitrator as follows:

> Did the City violate the Collective Bargaining Agreement by failing to award the posted Trainee Operator position to the Grievant? If so, what is the proper remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 4 – SENIORITY RIGHTS

A) It shall be the policy of the Employer to recognize seniority in filling vacancies, making promotions, and in laying off or rehiring, provided, however, the application of seniority shall not materially affect the efficient operation of the various departments covered by this Agreement.

. . .

E) Whenever a vacancy occurs, or a new job is created, it shall be posted on the bulletin boards in each department covered by this Agreement for a period of one (1) week. All vacated positions shall be posted within four (4) working days from the date the vacancy occurred. The posting shall contain the prerequisites for the position to be filled and said prerequisites for the position to be filled shall be consistent with the requirements of the job. Each employee interested in applying for the job shall endorse his/her name upon such notice in the space provided. The full time employee with the greatest seniority with the department where the vacancy or new position exists, who can qualify, shall be given the job. If no employee applies or can qualify within the department where the position exists, it shall be given to the full time employee with the greatest seniority who can qualify, from within the other departments covered by this agreement.

. . .

F) The initial determination as to an employee's qualifications shall be made by the Employer. However, if there is any difference of opinion as to qualifications of any employee, the Union Committee and/or Union Representative may take the matter up for adjustment under Article V, Grievance Procedure.

G) An employee being promoted to a higher classification shall serve a probationary period of sixty (60) days (calendar), with the exception to Sewage Treatment Plant, which will be six (6) months. If the employee fails to qualify within the sixty (60) day probationary period, or six (6) months for Sewage Treatment Plant, he/she shall return to his/her former job at the former rate of pay. During the probationary period, the employee, except an employee promoted to the position of Mechanic, shall maintain his/her previous rate of pay. At the completion of the probationary period, he/she shall be increased to the maximum rate in the classification . . . .

ARTICLE 24 – MANAGEMENT RIGHTS

A) The City possesses the sole right to operate City Government and all management rights repose in it, subject only to the provisions of this Contract, which restricts those rights. These rights include, but are not limited to the following:

. . .

3) To hire, promote, transfer, schedule, and assign employees;

. . .

13) To determine the methods and personnel by which City operations are to be conducted;

. . .

THE PARTIES' POSITIONS

The Union

The Union argues that it does not have a burden of proving that the CBA has been violated. It maintains that, although arbitrators "have often placed the burden of proving 'contract interpretation' cases upon the Union," and although this is "basically a 'contract interpretation' dispute," arbitrators, in cases dealing with issues of seniority and ability, have "simply considered all the evidence and arguments of both parties and decided from a consideration thereof whether the employer's determination should be upheld." (Citing NORTH COUNTRY DODGE, 77 LA 391, 392-393 (CRAVER, 1981), among others.) In cases involving issues where less senior bidders were selected, the Union says arbitrators have required the employer to show why some criteria other than seniority was relied upon. (Citing WAPATO SCHOOL DISTRICT, 91 LA 1156, 1159-62 (GAUNT, 1988), among others.) The Union concludes that a "logically neutral approach" should prevail on the issue of burden of proof and that "no burden (should be) borne by either side."

The Union argues that the contract language contained within the Seniority Rights section under Article 4, specifically paragraph (E), clearly sets forth the intent of the framers that preference be given to applicants from within the bargaining unit on the basis of seniority. It refers to this section of Article 4 as creating a "sufficient ability" standard of selection of applicants and asserts that it supports the selection of the applicant with the highest seniority "so long as the employee meets minimum qualifying standards." Furthermore, the fact that Article 4 contains language to the effect that the most senior bidder "who can qualify" for the

position means that the framers intended that applicants merely have the aptitude and ability to learn the functions of the position once selected. This analysis is reinforced in this case, according to the Union, by the fact that the position is entitled "Trainee Operator" and that the use of the word "trainee" suggests that the selectee need not be fully qualified initially but allowed to gain proficiency during an "extended" training period. The Union says that the Grievant should be given a "fair trial" on whether he can do the job citing Arbitrator Warns in DAYTON POWER AND LIGHT CO., 28 LA 624, 626 (1957) in support, and quotes Elkouri and Elkouri at page 856, for the proposition that "arbitrators generally are inclined to view that if there is a reasonable doubt as to the ability of the senior employee and if the trial would cause no serious inconvenience, it should be granted." The Union refers to a "trial period" of 10 days within which a successful bidder may elect to return to his/her former job. It says this provision is found in Article 4, paragraph (G). Also found at this location, according to the Union, is a provision allowing the employer to determine initial qualifications. (The Arbitrator does not find these provisions under Article 4, paragraph (G) or anywhere else in the CBA.)

Regarding the use of a test as a means to "improve on seniority as a criterion for selection," the Union observes that many arbitrators have held "that tests must be properly evaluated in light of the contract provision's relation to seniority and job requirements, and that they must not be used in a manner inconsistent with the contract." The Union charges that Geisendorfer was happy with the initial selection of Kriewald and devised the test as a means to ensure that he would be the successful bidder the second time around. Hence, concludes the Union, the test was nothing more than a vehicle by which the seniority provisions of the CBA could be circumvented. The contract does not provide the employer with the right to administer such a test, although the Union does admit that the Employer has the right to give "reasonable and appropriate performance tests as an aid in determining the ability of competing employees." (citing Elkouri at page 847) It reminds the Arbitrator that most arbitrators look upon the use of proper tests with favor and refers me to Arbitrator Dworkin in the case of MEAD CONTAINERS, 35 LA 349, 352 (1960) in support of its assertion that a proper test, fairly and objectively administered, will tend to allay suspicion of favoritism among competing employees. But the test in this case, and its administration, managed to accomplish just the opposite result. The Union asserts that an appropriate test should measure aptitude as opposed to knowledge because it is generally deemed unreasonable for an applicant to have a high degree of specific knowledge about a position they have never filled. The language of the CBA supports this line of reasoning by referring to bidders "who can qualify" proving that the framers intended that new internal applicants be given the opportunity to learn the job within a realistic amount of time following selection. The fact that this particular position is entitled "Trainee Operator" supports this argument. The Union points to a number of questions which it argues test specific knowledge about the position, to wit:

> **Question 1**: Sewage is considered a potable water source. True or false?
>
> **Question 7**: How many gallons of caustic soda is needed to make 250 gallons a 5% solution? How many total gallons of solution will there be?

Question 8: B.O.D. and suspended solids are identifying characteristics of drinking water? True or false.

Question 11: A 24" pipe flows at 10 ft/second. What is the flow volume?
Q = VA (Q = cubic feet/second) = V(feet/second) x A (pipe area in square feet)
Flow volume = velocity x pipe area
Area = 3.14 x Radius squared (Radius in feet)

Question 12: A sediment basin has a volume of 100,000 gallons. There is a constant flow rate of 500 gallons per minute. What is the detention time?

Question 15: Name 2 types of material that are prohibited from being discharged into the sewer system.

Question 16: Explain the difference between planned and corrective maintenance. Which is preferred and why?

The Union accuses the City of relying solely upon the results of the test to make the selection. It says that arbitrators normally conclude that, while tests may be used to verify ability, an employer "may not base its determination of ability solely upon the results of a test," paraphrasing Arbitrator Volz in PEABODY COAL CO., 87 LA 758, 762 (1985).

Finally, the Union questions the Employer's failure to call the winning applicant, Kriewald, to testify at the hearing and suggests that the Arbitrator should "assign an adverse inference" because "prevailing in this case is in Kriewald's personal self-interest."

The City

The City argues that it has the inherent authority to set minimum job qualifications unless the CBA contains language to the contrary. It has the authority, also, to administer tests as part of its authority to determine whether an applicant is qualified for a position, unless it has bargained that right away. The employer's exercise of these rights should not be disturbed by an arbitrator unless they have been exercised in an arbitrary or capricious manner. Here, the City has not bargained those rights away. Paragraph F, Article 4, Seniority Rights, expressly gives the City the sole right to determine qualifications. Also, Article 24, Management Rights, gives the City the sole right to hire, promote, transfer, schedule and assign employees and the record here, says the City, demonstrates that it was not arbitrary or capricious in making the determination that the Grievant was not qualified for what it refers to as the "Operator I" position.

The City says that, absent limiting contractual provisions, and subject to the requirement that it not act arbitrarily, capriciously or in bad faith, it possesses the inherent right to establish job qualification and quotes Elkouri and Elkouri, How Arbitration Works, 5th Edition, pp.841-842, (1997); Arbitrator Raleigh Jones in TOMAHAWK SCHOOL DISTRICT, DEC. NO. 58213 (JONES, 7/00); Arbitator Amedeo Greco in RUSK COUNTY, DEC. NO. 45807 (GRECO, 4/92); Arbitrator Christopher Honeyman in ANTIGO SCHOOL DISTRICT, DEC. NO. 51544 (HONEYMAN, 5/95) and Arbitrator Ralph Roger Williams in LOCKHEED AIRCRAFT CORP., 25 LA 748, 750-51 (1956) in support of that position. It maintains that in this case the CBA has no such limiting provisions. On the contrary, the Seniority Rights clause in Article 4 expressly provides that the City has the sole right to determine qualifications and the Management Rights clause in Article 24 provides the City with the sole right to hire, promote, transfer, schedule and assign employees.

The City asserts that its establishment of minimum job qualifications (here, that the applicant have a basic knowledge of math) and its determination as to the Grievant's qualifications are subject to the arbitrary and capricious standard and that the burden of proving that the employer's actions were arbitrary or capricious rests with the Union. Article 4 (F) expressly provides the City with the sole right to determine qualifications, as does well-established arbitral principle and in support of this claim cites Arbitrator Greco in RUSK COUNTY, DEC. NO. 45807 (GRECO, 4/92): "Normally, an employer has the inherent managerial right to establish minimum job requirements unless there is express contractual language to the contrary." (quoting the Arbitrator); Arbitrator Christopher Honeyman, ANTIGO SCHOOL DISTRICT, DEC. NO. 51544 (HONEYMAN, 5/95) standing for the proposition that a school board (an employer) possesses the authority to set qualifications for its teachers pursuant to its management rights, subject to the requirement that the school board not act arbitrarily, capriciously or in bad faith; and Arbitrator Ralph Roger Williams in LOCKHEED AIRCRAFT CORP., 25 LA 748, 750-51: "In the absence of specific language stating how the determination of ability, skill, and efficiency will be made and who will make it, the Company must determine it as part of the residuum of management prerogative which is always left after the original whole of such prerogative has been altered by express limitations which are the normal content of collective agreements as we know them today." The City relies on Arbitrator Crowley's definition of "arbitrary and capricious" found in DEERFIELD COMMUNITY SCHOOL DISTRICT, DEC. NO. 52550 (CROWLEY, 10/95): "A decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct" and concludes therefrom that any decision based upon a rational justification is not arbitrary or capricious.

The City maintains that in requiring the applicants to take a test to determine their basic math skills it acted within its inherent managerial and contractual authority. It says that arbitrators look with favor upon the use of proper tests and refers this Arbitrator to Elkouri and Elkouri, 5th Edition, pp. 847-848 (1997) in support. It also cites the case of INDEPENDENT SCHOOL DISTRICT NO. 279, 71 LA 116 (FOGELBERG, 1978) wherein the Arbitrator addressed a grievance relating to a "modified seniority clause" which provided that the successful bidder

would be the "senior most qualified applicant." In this case, the Arbitrator ruled that the employer had the right to select the employee with the higher score on the test rather than the most senior bidder. Arbitrator Fogelberg stated:

> . . . Even in the absence of specific contractual provisions, management has been held entitled to give "reasonable and appropriate" written, oral and performance examinations as an aid in determining the relative ability of competing applicants. Moreover, the employer's ability to institute and utilize such tests has been widely supported (again, assuming no contract language to the contrary) in accordance with the exercise of "sound judgment."

The City says that the test it administered "was reasonably related to the basic math skills required for the Operator I position" and that both parties agreed that it tested "math at a junior high level." Geisendorfer discussed the test with the Head Operator of the Wastewater Treatment Plant, Mr. Rein, who is also a member of the Union, who agreed that the questions were appropriate and even suggested adding a few more difficult ones. The City also points to the testimony of Union witness O'Brien, a former treatment plant operator, who testified that the questions were "certainly associated with the nature of" the work. The City believes that the reasonableness of the test is supported by Rein's testimony that the questions are all mathematical computations related to the job duties of the Operator I position and which are done every day in the plant and that if a candidate "couldn't get 75% correct on that exam that he isn't qualified." (Quoting the City's recollection of Rein's testimony.)

The City next argues that because it gave a test to an applicant for the same position in 1976, and a test to another candidate at some time since then, this "past practice" supports the City's authority to administer a test in this case. Anyway, the Union acquiesced in the City's right to administer the test because none of the members who were required to take the test challenged the City's authority to give it.

The City maintains that its determination that the Grievant was not qualified for the position was not arbitrary or capricious because it informed the applicants that a basic knowledge of math was a requirement for the position; that each applicant took the test under the same conditions; that each applicant was given the same amount of time to complete the test; that each was advised he could use a calculator or scratch paper during the test; that it has not bargained away its inherent authority to determine qualifications; that that inherent right includes the right to use tests to determine qualifications; and that it exercised this right by administering a test that measured "basic math skills." It believes that its decision regarding the qualifications of the Grievant may not be disturbed unless the Union proves that it exercised its authority in an arbitrary or capricious manner. In any event, the Union did not advance any evidence that the City improperly scored the test nor does the applicant deny he received a failing grade (68%) or that the successful applicant received a passing grade (96%). Also, each applicant was held to "the same standard," i.e. a passing score of 75%. This

passing percentage was not arbitrary because the DNR requires the same percentage score to pass its certification tests. This, says the City, demonstrates a rational basis for setting a pass-fail standard at the 75% level.

Finally, the City reiterates that the person selected to the position of "Operator I" "must come to the job with a basic knowledge of math." It maintains that it offered the job to "the only applicant who demonstrated a basic knowledge of math" and that the Union has introduced no evidence establishing this decision to be arbitrary or capricious.

The Union's Reply

The Union criticizes the City for consistently referring to the position in question here as the "Operator I" position rather than its proper designation as "Trainee Operator." The Union reminds the Arbitrator that in order to become an "Operator I" one must serve as a trainee for a period of one year. Further, this is the only training position in the bargaining unit and its "training" component is bolstered by the fact that the contract requires that the position be awarded to the most senior bidder "who can qualify." It says that the contractual language supports the conclusion that the framers intended that the senior bidder be given the "opportunity to better himself" by being allowed to learn the Operator I position as a trainee.

The Union looks at the sequence of events leading to the introduction of the test and concludes that Geisendorfer engaged in a concerted effort to manipulate the events surrounding the second posting in a way that would result in the position being awarded to Kriewald. This effort equates to bad faith.

The Union observes that, although the City maintains that all applicants took the test on equal footing, Kriewald actually had a recent opportunity to serve in the position of Trainee Operator. It is reasonable to assume this experience provided him with an advantage over the other applicants. Although no one can say with certainty what he learned during his tenure at the water plant, his score on the test supports this hypothesis.

Finally, the Union says that the testimony of its expert witness, O'Brien, that the duties of a water plant operator relate more to the mechanical service of equipment than to mathematics casts further doubt upon the assertion that math should have been the focus of applicant qualification.

The City's Reply

The City renews its argument that the Union must prove the City's determination of the Grievant's qualifications, or lack thereof, to have been arbitrary, capricious or unreasonable. It states that "whether the Grievant satisfied the minimum job qualifications for the Operator I

position is the issue." (Emphasis in original) It says that the contract language "who can qualify" is clear and unambiguous and means that "seniority only becomes an issue if two (2) qualified candidates post for a position." In this case, the Grievant's seniority is not an issue because he was found not to be qualified. Hence, the language means that the more senior qualified candidate will be awarded the position. The burden of proof is borne by the Union.

The City repeats its assertion that it has the inherent right to establish minimum job qualifications subject to the arbitrary, capricious or unreasonable standard and cites numerous cases in support. It refers to its initial brief and the cases cited therein in further support and revisits some of them. It says that the cases cited by the Union in its brief actually support the City's argument regarding burden of proof.

The City argues that the probationary period set forth in the contract does not require the City to give a job to an unqualified applicant. It does not provide an opportunity for an applicant to prove his/her ability to perform the duties of the position by giving them a "tryout." It maintains that the applicant must be qualified before starting the probationary period. If an unqualified applicant were to be placed in the Wastewater Treatment Plant and were to make a mistake during the Union sought "training period," there is a potential for disruption and danger. The test administered by the City measuring "basic math skills" reduces or prevents the possibility that an unqualified applicant will fill out a report incorrectly, subjecting the City to fines, or will make a mistake testing water resulting in "dire consequences for the City's water supply."

The City argues that the record does not contain any evidence that Geisendorfer manipulated the process to accommodate Kriewald or that the City conspired against the Grievant.

The Union's attempt to discredit the test has no merit. In response to the Union's assertion that the test was unfair because it tested specific knowledge of the job, the City points to the testimony at hearing which, it says, supports the conclusion that the test measures knowledge of math at the junior high school level. So, the test measured basic math skills, not specific knowledge of the intricacies of the Operator I position. It points to Rein's testimony about the routine daily use of math on the job and the fact that an Operator I must possess basic math skills.

Regarding the Union's assertion that it was not appropriate for the City to use the test results as the sole criteria in selecting the successful bidder, the City disagrees. It was appropriate because the test results proved that the Grievant did not possess basic math skills. Once that was determined all other issues became irrelevant because the Grievant was not qualified for the job.

The City urges the Arbitrator to deny the Grievance because the evidence in the record establishes that the test administered by the City was reasonably related to the duties of the Operator I position.

DISCUSSION

The Union wrongfully argues that it bears no burden of proof in this case. The analysis of the existence of that burden was well stated by Arbitrator Levitan in MARATHON COUNTY, DEC. NO. 59413 (LEVITAN, 9/01), cited by the City, and I adopt that analysis here without repeating it.

The City argued extensively, and referenced a plethora of cases in support of its argument, that it has the inherent authority to set minimum job qualifications and to administer tests as part of its authority to determine applicant qualifications and that these management rights should not be disturbed by an arbitrator unless contract language exists which modify them or unless they have been exercised in an arbitrary, capricious or unreasonable way, or in bad faith. The Union does not take issue with these assertions and I agree that they fairly and accurately state the present condition of the law. Furthermore, I find no language in the CBA which modifies these rights, nor does the Union argue that any such language exists.

The City also argues that by requiring the applicants to take a test to determine their basic math skills it acted within its inherent managerial and contractual authority. While the Union argues that the contract does not give the City the right to administer such a test, it does agree that the City generally has the right to give a "reasonable and appropriate" performance test as an aid in its quest to measure applicant qualifications. The City is correct in its interpretation of the parameters of its contractual and managerial boundaries in this regard. The Union is also correct that the City has the right to give a "reasonable and appropriate" test which must be "properly evaluated in light of the contract provision's relation to seniority and job requirements" and that such a test "must not be used in a manner inconsistent with the contract." Both sides cite Arbitrator Fogelberg in INDEPENDENT SCHOOL DISTRICT NO. 279, 71 LA 116 (FOGELBERG, 1978). The Union cites it in support of its argument that the test should be reasonable and appropriate and not used in a manner inconsistent with the contract; the City cites it in support of its argument that it acted reasonably in selecting the applicant with the highest score on the test. The contract in the INDEPENDENT SCHOOL DISTRICT case, unlike the case here, contained a "modified seniority clause" which provided that the "senior *most qualified* applicant" be awarded the position. In the instant case, the contract's seniority clause would award the position to the most senior bidder "who *can qualify*" for the job. Hence, the question here is not who is the *most qualified* senior bidder but who is the *most senior* bidder who *can qualify* for the job.

The City argues that past practice supports its authority to administer a test in this case. I need not address this contention since the Union admits, and I agree, that the City has, and had, the right to administer a test to aid it in its decision regarding qualifications. Consequently, I do not rule upon the existence, or lack thereof, of a binding past practice relative to the administration of a test for the position of Trainee Operator.

Having determined that the City had the authority to determine minimum job qualifications for the position of Trainee Operator and that it had the authority to administer a test to aid it in making a decision as to which applicant/s were qualified for that position, we turn to an analysis of the test itself to determine whether it was arbitrary, capricious, unreasonable or in bad faith: in short, was it fair.

The test must actually measure what it purports to measure, i.e. a basic knowledge of math. The word basic is defined as "essential; fundamental," Funk & Wagnalls New International Dictionary of The English Language, Vol. One, (1987). It is generally understood that the *fundamentals* of mathematics are four: addition, subtraction, multiplication and division. Therefore, a "basic knowledge of math" would mean a knowledge of the fundamentals of math; a knowledge of addition, subtraction, multiplication and division. A cursory review of the questions reveals that the test did, in fact, contain questions which required the application of math fundamentals. And a review of the results of the Grievant's test show that he answered the majority of those questions correctly, including the following:

Question 2: There are 7.48 gallons of water per cubic foot. How many gallons in 40 cubic feet?
This question required him to demonstrate his ability to multiply.

Question 3: Water weighs 62.4 lb/cubic foot. How much does 7.48 gallons weigh?
This question required him to demonstrate his ability to divide and multiply.

Question 7: How many gallons of caustic soda is needed to make 250 gallons a 5% solution? _____. How many total gallons of solution will there be?
Multiplication again.

Question 9: A meter reads 491 on September 30, 2000, and reads 731 on September 30, 2001. What is the average monthly usage? What is the average quarterly usage?
This question requires the application of subtraction and division.

Question 10: One gallon of water contains 3.785 liters. How many liters are in 20 gallons?
Multiplication.

Question 12: A sediment basin has a volume of 100,000 gallons. There is a constant flow rate of 500 gallons per minute. What is the detention time?
This question requires the application of division.

Question 18: What is the average daily flow of the following? 1100 GPD, 900 GPD, 800 GPD, 1000 GPD, 1200 GPD, 1300 GPD & 1400 GPD
This question required that the Grievant demonstrate his ability to add and divide.

The questions he failed to answer correctly required a knowledge of specific geometric equations, the conversion rate from Fahrenheit to Centigrade, a knowledge of "flow volume" determination and, in one case, he merely misplaced a decimal point.

But the test contained more. Four of the questions, for example, were completely unrelated to mathematics and cannot, therefore, be said to test for a basic knowledge of math. These questions relate specifically to knowledge one would learn as an Operator Trainee and not to mathematics, basic or otherwise. They are:

> **Question 1**: Sewage is considered a potable water source?
> True_____ False_____
>
> **Question 8**: B.O.D. and suspended solids are identifying characteristics of drinking water?
> True_____ False_____
>
> **Question 15**: Name 2 types of materials that are prohibited from being discharged into the sewer system._____
>
> **Question 16**: Explain the difference between planned and corrective maintenance. Which is preferred and why?_____

The inclusion of these questions on the test go beyond the stated purpose of the test, i.e. to measure the applicant's basic knowledge of math, and penetrate the area of measuring the applicant's specific knowledge of the position he/she seeks to fill. I agree with the Union that to expect an applicant to be well versed in specific aspects of a job he/she has never held is unreasonable.

The test purports to measure whether the applicant has a basic knowledge of math. This according to Giesendorfer, who designed the test and set the passing grade at 75%. He used 75% not because of some detailed consideration of the number of questions one would have to answer correctly in order to provide the City with evidence that one was knowledgeable in the basics of math, but because 75% is what the Department of Natural Resources uses on their certification tests. The City says that because the DNR uses 75% then its use of 75% is not arbitrary. I disagree. The DNR tests for specific knowledge in a specific subject area following specific training in that subject area and has determined that a certain score evidencing a minimum threshold of knowledge in the specific subject area is required before it will issue a certification or license. The test given by the City was designed to determine only whether the taker had a basic knowledge of math. The record does not explain why Geisendorfer chose to include 28 questions or portions of questions, but in any event, to "pass" the test one had to score 21 correctly out of 28. Geisendorfer did not explain the rationale behind his decision that 21 correct answers would constitute evidence that one

possessed a basic knowledge of math, where 19 or 20 correct answers would not. The Grievant answered 19 questions correctly amply demonstrating his knowledge of basic math but yet he "failed" under the Geisendorfer guidelines.

As noted above, many questions required the use of algebra and geometry, generally considered to be advanced branches of mathematics. Even so, the Grievant answered the majority of these questions correctly. Further, many of these questions were specific to the Operator I job in that they, as Geisendorfer and Rein confirmed, related to *calculations performed on the job on a daily basis*, and *in some cases many times a day*. Kriewald's experience in the plant afforded him at least some exposure to the formulas and calculations which appeared on the test. Prior to his move to the Water Treatment Plant, he worked in the Water Department. It is hard to say to what extent this experience aided Kriewald in taking the test, but it is safe to say that it gave him an unfair advantage over the other applicants in those areas which were job specific and which involved calculations used daily in the Water Treatment Plant.

For the reasons set forth above, I find that the test, as designed and as evaluated was unfair, arbitrary and capricious. As I stated above, the Grievant did demonstrate his knowledge of basic math and was therefore qualified for the position of Trainee Operator pursuant to the minimum qualifications set forth by the City. I also find that the Union, wittingly or otherwise, has met its burden of proof. Kriewald, having worked in the plant for a week prior to the testing, had an unfair advantage over the rest of the applicants and the inclusion of questions on the test relating specifically to the position of Operator I was unreasonable and unfair.

The contract language in Article 4, Section (E), clearly supports the Union's assertion that the position should have been awarded to the most senior applicant who could qualify. Since I have determined that the Grievant *was* qualified for the posted position of Trainee Operator, there is no occasion for me to consider the specific meaning of the term "can qualify" as it relates to the facts of this case. Nor is there reason for me to comment on the Union's allegations that management favored one applicant over another and in some way attempted to manipulate events to achieve a desired result. Suffice it to say that the record does not fully support such a charge. It is also inconsequential that the City consistently referred to the posted position as the "Operator I" position rather than the "Trainee Operator" position.

Accordingly, I find that the City did violate the CBA by failing to award the posted Trainee Operator position to the Grievant.

In light of the foregoing, it is my

AWARD

The City will offer the position of Trainee Operator to the Grievant, Robert A. Dickey, within 10 days of the date of this award. No back or differential wages are assessed.

Dated at Wausau, Wisconsin, this 3rd day of December, 2002.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/anl
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