

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**MONROE CITY EMPLOYEES UNION LOCAL 3760, AFSCME, AFL-CIO**  
and  
**CITY OF MONROE**

Case 39  
No. 62528  
MA-12322

(Promotion grievance – Administrative Secretary, Water Department)

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**Appearances:**

**Tom Larsen**, Staff Representative, AFSCME Council 40, 1734 Arrowhead Drive, Beloit, WI 53511, appearing on behalf of the Union.

**Howard Goldberg**, Murphy Desmond, S.C., 2 East Mifflin Street, Suite 800, P.O. Box 2038, Madison, WI 53701-2038, appearing on behalf of the City.

**ARBITRATION AWARD**

Monroe City Employees Union Local 3760, AFSCME, AFL-CIO, hereafter Union, and City of Monroe, hereafter City or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide the instant grievance under the parties' 2002-03 Agreement (Agreement). Susan J. M. Bauman was so designated on July 11, 2003. A hearing was held in Monroe, Wisconsin on September 24, 2003. Following the hearing, the parties summed up their positions in post-hearing briefs and reply briefs, the last of which were mutually exchanged on October 27, 2003, marking the close of the record.

**ISSUES**

The parties agreed that the issues for determination were:

1. Did the Employer violate the collective bargaining agreement by failing to grant the Streets Department Administrative Secretary position to the most senior qualified applicant?
2. If so, what shall the remedy be?

**PORTIONS OF THE AGREEMENT**

**Article 2 – Management Rights**

2.01 Statement of Principle: The Employer retains the sole right to plan, direct and control the working force, to schedule and assign work to employees including overtime work, to determine the size of the work force and the means, methods and schedules of operation, to establish reasonable standards, work rules and regulations, and to promote methods to maintain or improve the efficiency of its employees. The Employer also has the sole right to require employees to observe its reasonable rules and regulations, to hire, promote, lay off or relieve employees from duties and to maintain order and to suspend, demote, discipline and discharge employees for just cause; however, the Employer shall not take any action which would be in violation of state or federal laws. The above itemization is not deemed to be any kind of limitation on the general powers that the Employer has to regulate employees and it is agreed and understood that the Employer has retained all rights relating to the planning, direction and control of the employees in this bargaining unit to the extent such rights are not expressly amended or altered pursuant to the terms of this Agreement. . . .

**Article 5 – Grievance Procedure**

5.01 Definition: A grievance is defined to be any dispute between the Employer and an employee in the bargaining unit, or the Employer and the Union, involving the application or interpretation of this Agreement.

5.02 Procedure:

. . .

**Step 3 – Arbitration:**

. . .

B) Selection of an Arbitrator: Either party may thereafter request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. The decision of the arbitrator shall be final and binding on the parties. The arbitrator shall not modify, add to, or delete from this Agreement.

. . .

## **Article 7 – Seniority**

7.01 Definition: It is the policy of the City to recognize seniority. “Seniority” is defined as an employee’s length of continuous service in the bargaining unit from the employee’s most recent date of hire. Seniority shall be prorated for part-time employees, however, for fringe benefit calculation purposes, length of continuous service in the employ of the City from the employee’s most recent date of hire shall be used.

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## **Article 10 – Job Posting**

10.01 Posting: Job vacancies in the bargaining unit, that the Employer intends to fill, due to retirement, quits, new position, transfers, or whatever reason, shall be posted in conspicuous locations for a period of seven (7) working days. The posting shall provide information concerning the qualifications needed for the position, a brief description of the job duties, the salary, starting date of the position, and the closing date for applications.

10.02 Applicants: Any employee interested in the posted position must sign the posting within the time period set forth in the posting.

10.03 Selection: In selecting the successful applicant, the Employer shall be guided by the principle of seniority consistent with qualifications, skill and ability. Where the qualifications, skill and ability of two (2) or more employee applicants are relatively equal, the employee with the greatest seniority shall be selected, subject to applicable statutes. The position shall be filled within a reasonable time after the posting was first posted. The Employer may adopt and require applicants to take appropriate tests or examinations to determine their qualifications. Until the position has been filled, the Employer is entitled to fill the vacancy at its discretion on a temporary basis. If no qualified employee from within the bargaining unit applies for the job, it may be filled through hiring from outside the bargaining unit.

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## **BACKGROUND**

After 25 to 26 years of service to the City of Monroe as Administrative Assistant in the Streets and Sanitation Department, Judith Nelson retired. This afforded the City an opportunity to both review the position and hire someone new. By letter dated January 21, 2003, City

Clerk/Director of General Government James R. Myers wrote to Tom Burkhalter, Union President, and asked the Union to consider the downgrading of the Administrative Assistant position to that of Secretary, with a wage rate of \$12.15 per hour in accordance with Appendix A of the Agreement.

After due consideration, the Union agreed to downgrading the position, but only to Administrative Secretary, with a wage rate of \$12.88 per hour, comparable to the position of Administrative Secretary at the Wastewater Treatment Plant as listed in Appendix A of the Agreement. On February 7, 2003 Steve Streiff, Streets Superintendent, posted the position of Administrative Secretary/Streets & Sanitation Dept. By the posting closing, February 18, 2003, six (6) City of Monroe employees had signed the posting.

Although the City has not routinely utilized testing to determine qualifications for all positions, the Streets & Sanitation Department routinely used testing to fill vacant positions. In light of this knowledge, and the fact that there were six (6) applicants, Myers, in consultation with Streiff, determined that a test should be given.

At Myers' direction, Safety and Human Resources Director Laura McBain contacted Wisconsin City County Services (WCCS), a service that operates within the Wisconsin Department of Employment Relations (now the Office of State Employment Relations within the Wisconsin Department of Administration), to identify a test appropriate for determining which applicants were qualified for the position. Streiff, or Tom Boll, advised each of the applicants that they were to take the test. They were also told that the test would be only a small portion of the hiring process, and would not be a major or deciding factor in filling the position.

In consultation with Michele Sorum-Schmid of WCCS, McBain identified the test to be utilized in the selection process for the Administrative Secretary. This test, originally developed for an Administrative Assistant position in Price County, was designed to test competencies in four different areas: knowledge of spelling, punctuation, capitalization, other basic grammar usage and public relations; ability to edit or "proof accurately"; reading comprehension and the ability to analyze what has been read; and fiscal management, budget knowledge, basic math skills and providing administrative support in the development and management of the budget.

The test consisted of 135 questions and was administered to the six (6) applicants. The tests were scored by WCCS and returned to McBain. The raw scores ranged from 67 to 114, which McBain converted to percentages. McBain decided that only those who had achieved 70% or higher passed the test and would be invited to interview for the position. Three individuals were deemed to have passed the test: Darci Jackson, Kathy Babler and Sandy Waefler.

A four-person committee composed of Streiff, Boll, McBain and the Police Chief, Fred Kelley, interviewed each of the three candidates. Each applicant was asked the same seven (7) questions and each interviewer ranked each answer on a scale from 1 to 5. Jackson received the highest total score (109) and was offered the Administrative Secretary position although she had less seniority than Babler (score 81, 6.5 years) and Waefler (89.5, 5.5 years).

According to three of the applicants, the test was outdated. It included questions involving typewriters, dictation and shorthand. There were no questions involving the use of computers or other modern technology. Questions included one about how to contact the boss if he is out of the office that did not offer a cell phone as one of the options, the means currently utilized for making such contacts. The proofing questions included how to abbreviate Wisconsin, how many spaces after a zip code, whether "employee" or "employe" is the correct spelling. The questions did not distinguish as to type of professional letters were to be edited, making it more difficult to determine if something was in error. In addition, there were a large number of mathematical calculations that had to be processed manually, something that is not done in a modern office where calculators and computers are omnipresent.

The applicants also expressed concerns about the questions used in the interview. Because policies differ from department to department, they could not know the correct answer to some questions as they did not know Streets Department policies.

Additional factual background is noted in the summaries of the parties' positions and in the discussion, below.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The union does not dispute that the Employer has the right to utilize testing to determine the qualifications of the applicants. However, the test utilized must be appropriate for the position and should only serve as a portion of the information used to determine the applicants' qualifications. Inasmuch as all applicants already held the position of Secretary in the City of Monroe, there should have been a presumption that all were qualified.

The test administered by the Employer was for the position of Administrative Assistant, although the position to be filled was that of Administrative Secretary, a position receiving a wage of nearly \$3.00 per hour less than the retired Administrative Assistant. Thus, it was an inappropriate test and the Employer should not rely on the test scores.

Since the selection process was based on the results of an inappropriate test, the results must be thrown out and the process restarted. In the alternative, the most senior applicant should be awarded the position since all applicants are presumed qualified.

### The City

The collective bargaining agreement governs how postings should be handled. It only requires the City to award a position based on seniority if all applicants are equal and qualified. The Agreement expressly states that the employee with the most seniority is to be selected only in those situations where the qualifications, skill and ability are relatively equal. This paragraph requires the City to give preference to applicants from within the bargaining unit. As all applicants were from the bargaining unit, the City was entitled to consider the relative qualifications, skill and ability of all of the candidates.

The City used a state agency to provide a test to be taken by the applicants. The test was obtained from WCCS based upon the position description of the job to be filled. It was intended to measure competencies in four different areas: knowledge of spelling, punctuation, capitalization, other basic grammar usage and public relations; ability to edit or “proof accurately;” reading comprehension and the ability to analyze what has been read; and fiscal management, budget knowledge and basic math skills as well as administrative support in the development and management of the budget.

All of the areas of the test are directly related to measuring the competency of the applicant to perform the job duties of the position to be filled, Administrative Secretary. 1/

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*1/ In its initial brief, the City states that the Union erred in referring to the position in question as that of an Administrative Secretary and that, in fact, it is an Administrative Assistant position. In its reply brief, the Employer acknowledges that the position in question is that of an Administrative Secretary.*

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A panel interviewed those who scored 70% or higher on the test. The members of the interview panel independently graded the applicant responses on questions that were intended to evaluate a candidate’s ability to employ common sense when confronted with various real life situations that would tend to arise in the Streets Department work environment. All interviewers agreed that the position should be offered to an applicant who was not the most senior. The Employer acted reasonably and appropriately, within the meaning of the collective bargaining agreement, when it selected Darci Jackson as the successful applicant. The grievance should be denied.

## DISCUSSION

After more than 25 years, Judith Nelson retired from her position as Administrative Assistant in the Streets and Sanitation Department. In preparing to fill the impending vacancy, the City sought to downgrade the position to that of Street Department Secretary. By letter dated January 21, 2003, James Myers, City Clerk and Director of General Government, advised Tom Burkhalter, Union President, of the City's proposal to create this new position and add it to Appendix A of the collective bargaining agreement at a wage rate of \$12.15 per hour, with a position description that mirrored that of secretaries in other City departments. 2/ (Employer Exhibit 5) The Union did not agree with this proposal, but did agree to downgrade the position to that of Administrative Secretary at a wage rate of \$12.88 per hour to parallel the position in the Wastewater Treatment Plant. Employer Exhibit 3 is the position description of the position to be filled.

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*2/ This letter refers to the old position as that of Street Department "Administration Secretary" rather than "Administrative Assistant" as listed in Appendix A of the collective bargaining agreement, thus beginning the confusion regarding the title of the position to be filled and, thereby, the qualifications necessary to fill the position.*

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The position was posted on February 7 and six (6) current City employees timely signed the posting. Although all were current City employees, in the classification of Secretary, none held the position of Administrative Secretary.

The collective bargaining agreement, at Section 10.03 provides:

In selecting the successful applicant, the Employer shall be guided by the principle of seniority consistent with qualifications, skill and ability. Where the qualifications, skill and ability of two (2) or more employee applicants are relatively equal, the employee with the greatest seniority shall be selected, subject to applicable statutes. . . . The Employer may adopt and require applicants to take appropriate tests or examinations to determine their qualifications. . . .

As there were six (6) applicants and a practice in the Streets Department to utilize testing in filling positions, the Employer determined that a test would be utilized. Human Resource

Director Laura McBain contacted Wisconsin City County Services (WCCS) to obtain an appropriate test. Relying on the position description and the job posting, she worked with Michele Sorum-Schmid and determined that the most appropriate test was the “Administrative Assistant – Price County” exam.

The Union challenges the use and appropriateness of this examination on several grounds. First, it argues that all of the applicants are qualified for the position as they already hold positions as Secretary for the City. While it does not challenge the City’s right to administer a test, it feels that it was unnecessary, all applicants are qualified and the one with the most seniority should be awarded the position. However, the wide range of scores on the test clearly demonstrates that the applicants have different abilities. In addition, the applicants all hold the position of Secretary, not Administrative Secretary. 3/

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*3/ We leave for another day the question of whether the applicants would all be considered qualified if the position they sought was that of Secretary.*

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Next, the Union alleges that the proper position description for McBain to have relied on in discussion with WCCS is that reflected by Employer Exhibit 5. However, the higher pay grade, increased responsibilities, and more training and experience required reflected in Employer Exhibit 3 is persuasive to the undersigned that this is the Administrative Secretary position that was to be filled in February 2003. 4/ Employer Exhibit 5 is the proposed position description of the Secretary in the Streets and Sanitation Department that was attached to Myers’ January 21 letter proposing the creation of a Secretary position, a position that was not created as the Union did not agree.

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*4/ The confusion about Employer Exhibit 3 stems from the fact that although it clearly lists the position title as Administrative Secretary, the date indicated is March 1998. Myers testified that this was an error on his part in that he failed to change the date when he finalized the position description. Employer Exhibit 5 bears the position title of Secretary and a date of January 2003, a date that coincides with the date that the Employer wrote to the Union that it wanted to create the position of Secretary. Adding to the confusion was Myers’ testimony when he first referred to Employer Exhibit 3 as the Administrative Secretary position that was posted but later said that Employer Exhibit 5 says Administrative Secretary and was posted. The undersigned is persuaded that Employer Exhibit 3 is the position description for the position at issue in this proceeding. The testimony of McBain supports this as she testified that Employer Exhibit 3 was the one she used in discussing the test with WCCS and that although she had seen Employer Exhibit 5, she was not familiar with it.*

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The Union next challenges the appropriateness of the test largely because it is based on old technologies and hand calculation of mathematical problems. Three applicants testified about the test, and all commented that it was out of date. The test itself was not put into evidence. There was no testimony as to how many of the 135 questions were “out of date”. The Employer provided a letter from WCCS that purports to describe the skills that the exam tested:

The test was designed to measure competencies in four different areas. The first dimension is knowledge of spelling, punctuation, capitalization, other basic grammar usage and public relations. The second dimension of this exam evaluates the test taker’s ability to edit or “proof accurately.” Reading comprehension and the ability to analyze what has been read is the third dimension. And the final part of the exam measures fiscal management, budget knowledge and basic math skills; providing administrative support in the development and management of the budget.

The position posting indicates that persons interested in the position “must be able to perform clerical, secretarial, administrative support, record keeping, communication center operation and customer service duties for efficient operation and to provide accurate information regarding department programs and services.” These job qualifications are closely aligned with the four areas that the exam tests. The four components of the exam also match up with the essential duties and responsibilities listed in the position description. While the test utilized may not have been the best test that could have been utilized, it did measure skills that are related to the position in question and demonstrated that all applicants were not equal. Thus, while it would appear that the test was not the most appropriate test to utilize to determine relative qualifications for the Administrative Secretary position, it was an appropriate test.

The Union does not contest the use of 70% as a reasonable grade to be considered “passing.” Using this cut off, only three of the applicants were permitted to proceed to the interview stage. On its face, this seems to be reasonable. However, the testimony of the three unsuccessful applicants all indicates that they were advised that the test would not be a “major factor” in the hiring process. Clearly, such was not the case. Based on the information that had been provided to the applicants, all would have proceeded to the interview. Inasmuch as the test scores already provided the City evidence that all applicants were not all relatively equal, it is difficult to see how the end results would have changed if all applicants were interviewed.

The three applicants who passed the test achieved scores ranging from 71.9% to 84.4% and all should be considered to be relatively equal, at least with respect to the skills tested on the written exam. These individuals were then interviewed by a panel of four (4) interviewers,

and each was asked the same seven (7) questions that were scored on a scale of one (1) to five (5), with five (5) being the best answer. The numeric scores were 109, 81, and 89.5. When converted to percentages, these are 77.9, 63.9, and 57.9 percent, respectively. If the same 70% cut-off were to be used for the interview as for the written test, only one individual, the successful applicant, Darci Jackson passed.

If the numeric scores for the written and interview portions of the evaluation process are combined, and the percentage of the total possible points (275) is calculated, the results are 81.1% for Ms. Jackson, 64.7% for Ms. Babler and 70.0% for Ms. Waefler. Although Ms. Waefler's score is passing by the standard used by the City in determining which applicants would move from the written to the interview stage, it is apparent that there is a difference in qualifications, skill and ability among the applicants. They are not all relatively equal.

The contract language is clear that seniority is the determinative factor when the "employee applicants are relatively equal." Were all applicants relatively equal, they would all have achieved scores of 70% or more on each part of the application process, written test and interview. Such is not the case here. Only one candidate achieved a passing score on both parts of the process. As such, the candidates are not "relatively equal in qualifications, skill and ability." Accordingly, seniority did not have to be considered by the Employer and it was free to award the position to the applicant with the highest scores, Ms. Jackson.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

**AWARD**

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 12th day of November, 2003.

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Arbitrator

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