BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SUPERIOR CITY EMPLOYEES UNION
LOCAL #244, AFSCME, OF THE AMERICAN FEDERATION
OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO**

and

**CITY OF SUPERIOR,
A MUNICIPAL CORPORATION**

Case 188
No. 62469
MA-12302

Appearances:

James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, appearing on behalf of the Superior City Employees Union Local #244, AFSCME, of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mary Lou Andresen, Human Resources Director, City of Superior, 1314 - 14th Street, Room 300, Superior, Wisconsin 54880, appearing on behalf of the City of Superior, a municipal corporation, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to serve as Arbitrator to resolve a grievance filed on behalf of Walter Larson, who is referred to below as the Grievant. Hearing on the matter was held on October 7, 2003, in Superior, Wisconsin. The parties did not however, agree that the evidentiary record could be closed at the conclusion of that hearing. Further hearing was discussed at a conference call on October 20, 2003, and the parties agreed to hold

January 14, 2004 open if further hearing proved necessary. In a letter filed on November 24, 2003, the parties stipulated that further hearing was not necessary, and agreed to a briefing schedule. The October 7, 2003 hearing was not transcribed, and the parties filed briefs and reply briefs by February 25, 2004.

ISSUES

The parties were unable to stipulate the issues for decision. The Union states the issue thus:

> Did the Employer violate the terms of the Collective Bargaining Agreement when it denied the Grievant the position of Maintenance and Construction Worker?

The City states the issue thus:

> Did the City violate the AFSCME Union Local #244 contract when it denied the Grievant a 90-day promotional probationary period through an outside open recruitment for the Maintenance & Construction Worker position?

I adopt the Union's statement of the issue as that appropriate to the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE 4
PROBATIONARY PERIOD AND SALARY PLACEMENT DURING THE PROBATIONARY PERIOD

. . .

4.04 Promotional Probationary Period and Salary Placement During the Promotional Probationary Period: Promoted employees shall serve a probationary period of ninety (90) calendar days which shall be a trial period to demonstrate their ability to perform the work. . . .

. . .

ARTICLE 8
PROMOTION

. . .

8.01 . . . The divisional units within the Public Works Department for the purpose of this Article are as follows:

1. Street Division - including the Landfill
2. Maintenance and Construction Division

. . .

8.02 The following rules regarding promotion shall apply:

A) Promotion within the Division: First consideration shall be given to employees in the division in which the vacancy occurs. In the event employees are not considered qualified by the Employer or if the employee wishes, he/she may be returned to their former position without loss of seniority rights. In this event, the next senior employee in that division, if interested, will be offered the position. . . .

B) Promotion Considering Unit-Wide Seniority: The above procedure shall prevail until the position is filled. In the event no employee within the division is considered qualified, unit-wide seniority will prevail among qualified employees in filling that position.

C) In the event no City employee is considered qualified by the Employer, the Employer may then advertise publicly for applicants for the position. . . .

8.04 In the event a dispute arises regarding the qualifications of any employee, the matter may be submitted to the grievance and arbitration procedure of this Agreement.

BACKGROUND

The grievance is dated October 22, 2002, and states its "contention" thus:

> Management denied Employee a promotion he qualified for and the probationary period to demonstrate his ability to perform the work. Article's 4.04/8.02A & B/8.04. In addition, the denial did not live up to the intent of Human Resources Policies and Procedures 07.03 I and II.

The grievance requests the following remedy: "Allow employee to advance to said position, to serve the normal and customary 90 day probationary period, and to make the employee whole."

Subsections I and II of Section 07.03 of the City's Human Resources Policies and Procedures, read thus:

> I. A "probation period" is a period of service used for employee training, adjustment, and evaluation, which is served upon initial appointment to a class and upon promotion to a new class after employment with the City.
> II. The probation period is an extension of the selection process, where the department head has an opportunity to evaluate the employee's knowledges, abilities, and skills to perform the work of the class in an on-the-job capacity.

The position sought by the Grievant is Maintenance and Construction Worker.

The Position of Maintenance and Construction Worker

The position description reads thus:

DEFINITION:

Under general supervision, to perform a variety of semiskilled carpentry, painting, plumbing and electrical work in the repair and maintenance of City buildings and equipment; and to do other work as required.

DISTINGUISHING CHARACTERISTICS:

Building and Maintenance Worker is the journey level class. Incumbents perform a variety of semiskilled carpentry, masonry, painting, plumbing, welding and electrical tasks in the construction, remodel, repair and maintenance of City buildings and equipment.

TYPICAL TASKS:

- Performs rough and finish carpentry work in construction of structures, repairing and hanging doors, remodeling through construction of walls and ceilings, building window frames and making repairs to wooden fixtures and furniture.
- Does minor electrical work such as installing simple wiring, replacing switches, sockets, wall plugs, floor receptacles, light bulbs or fluorescent fixtures, fuses and breakers.
- Repairs or replaces leaky faucets, pipes, toilets, sinks and drains.
- Performs routine maintenance on mechanical equipment such as greasing, oiling, and replacing worn or defective parts.
- Constructs park structures, fixtures and fences, which may include basic welding requirements.
- Replaces broken windows.
- Paints interiors and exteriors of buildings.
- Reads plans and blueprints in performing assigned work.
- Pours or assists with pouring concrete slabs.
- Inspects facilities and equipment for safe and efficient operation, repairing as necessary.
- Documents inspections and keeps records related to maintenance and construction activities.
- May direct the work of staff assigned to assist in a project including seasonal staff.
- May provide vacation or other temporary relief for other classes as required.

EMPLOYMENT STANDARDS:

Knowledges:
Working knowledge of:
- Basic methods, materials and tools used in the building maintenance trades.

Ability to:
- Use and care for standard hand and power tools utilized in the building trades;
- Follow oral and written instructions;
- Prepare and maintain accurate records and reports;
- Work in cramped, confined surroundings and on ladders;

- Perform heavy manual labor;
- Maintain simple records;
- Establish and maintain working relationship with co-workers, supervisors and others contacted in performing the duties and responsibilities.
- Perform a wide variety of semiskilled tasks connected with repair and maintenance of City buildings and fixtures;
- Work from sketches and blueprints; and
- Safely lift up to 100 pounds.

Training and Experience: Any combination of training and experience which would provide the required knowledges and abilities is qualifying. A typical way to obtain these knowledges and abilities would be:

Two years of experience of either general building maintenance work or in any of the building trades.

Parks Assignment: It is desirable that the employee possess and maintain the National Playground Safety Institute Certification within three years of appointment to the assignment.

SPECIAL REQUIREMENTS:
Certification Requirement: Parks Assignment: It is desirable that the employee possess and maintain the National Playground Safety Institute Certification within three years of appointment to the assignment.
Driver License Requirement: Must possess and maintain a valid commercial driver's license.
Residency Requirement: Must reside within Douglas County.
Post Job Offer Medical Examination Requirement: Must pass the medical examination requirements established for the specified occupational grouping prior to hire. Must pass a lifting test at 100 lbs.
Drug/Alcohol Testing Requirement: Must pass a drug testing as required by the Federal Department of Transportation (DOT) prior to hire. Must pass drug and alcohol testing after being hired as required by the DOT and City policy.

. . .

The position is one of the highest rated positions in the unit, carrying a wage rate, effective January 1, 2002, of $19.05. The position has evolved over time, and the vacancy at issue resulted from the retirement of a Carpenter in the Parks and Recreation Division. The City combined that position with the Maintenance and Construction Worker position in the Maintenance and Construction Division. The parties agreed, during collective bargaining, to significantly upgrade the pay rate for the position.

On December 3, 2001, the City posted the position for in-house applications. There was one applicant from within the Maintenance and Construction Division (Wally Marlton), and four from outside of the division, including the Grievant, who works in the Street Division.

The Selection Process

The City determined to contract with Wisconsin City & County Services (WCCS) for a written test. WCCS supplied the City with a Maintenance and Construction Worker exam, which it broke into six components: Electrical and Plumbing/Water Systems; Painting; Diagrams, Blue Prints and Schematics and Related Computations; Welding; Building Maintenance and Construction; and Safety. Cammi Koneczny, a City Human Resources Analyst, reviewed the examination to determine if it was job related. Clarence Mattson, the Superintendent of the Department of Public Works, assisted Koneczny in adapting the WCCS exam for the City's purposes. The City set the contents of the written exam thus:

Carpenter	25%
Facility Repair	25%
Electrician	12.5%
Plumber	12.5%
Painter	12.5%
Welder	12.5%

Koneczny proctored the exam, which the City administered on March 13. It consisted of 120 written multiple choice questions, and took two and one-half to complete. None of the applicants received a passing grade. In a letter dated April 15, 2002, Koneczny advised the Grievant that he had correctly answered 68 out of the 120 questions, yielding a total score of 56.67%, which was below the minimum passing score of 70%.

On July 25, 2002, the City advertised the Maintenance and Construction Worker position to external applicants. The City received one-hundred seventeen applications, including the Grievant's. The Grievant was the only unit applicant who responded to the external application process. On September 14, WCCS proctored a written exam for roughly ninety external applicants. It was the same test proctored by Koneczny on March 13. Eleven

applicants passed the written exam. In a letter dated September 30, Koneczny advised the Grievant that his score was "84 out of 120 possible points." The letter added: "Your score was high enough to continue in our hiring process, you will be contacted within the next two weeks to schedule an interview."

The interview panel consisted of Mattson, Koneczny and Tom Fennessey, then the University of Wisconsin-Superior's Facilities Management Interim Director. On October 9 and 10, 2002, the Panel asked the applicants who had passed the written exam, the following questions:

1. The Maintenance & Construction Worker performs a variety of semi-skilled carpentry, masonry, painting, plumbing, welding and electrical work for the City, please describe your experience which relates to the requirements of this position.
2. What types of welding are you proficient at?
3. Please describe any experience you have operating tandem trucks, loaders and other similar construction equipment.
4. What type of foam insulation would you use below grade?
5. How many cubic feet are there in one cubic yard of concrete?
6. How do you feel about the following:
   Working below grade?
   Working at heights (such as roofs)?
   Working overtime?
   Performing snow removal?
7. Name two ways of squaring up a slab foundation without the use of a transit.
8. What is a 'benchmark' and describe it's purpose?
9. A metal building has purlins and girts, what is their purpose?
10. What is the purpose of lock-out tag-out?
11. Pease describe the following acronyms and terms:
    ADA
    MSDS
    GFI
    birds mouth
    slit water stop
12. What is digger's hotline?
13. What is the diameter of #6 rebar?
14. If a 6" thick poured concrete wall requires 3 rolls of concrete form ties, how many rolls of concrete ties are required for a 16" wall?

15. Why do you want to leave your current position (if currently working)? Why do you want to work for the City of Superior (if not currently working)?
16. Do you have any questions?

There was no passing score for the responses, and no formal scoring system. The panel discussed the applicants and reached consensus that Jeff Greenfield was the most qualified. Koneczny formally informed the Grievant in a letter dated October 16 that "you have not been selected to continue in the hiring process." On November 2, the City hired Greenfield.

The Grievance Process

The October 22 grievance was the second filed concerning the selection process. The Union filed the first on April 24, 2002, which alleged "unfair labor practices", specifying "unfair testing practices, test was a carpenter civil service test." The grievance sought that applicants be given a "carpenter civil service test." The City denied the grievance at each step of the process, with the Human Resources Committee (HRC) stating its formal denial in a letter to the Union dated August 21.

The October 22 grievance came to the HRC April 14, 2003. The Committee stated its formal position in a memo to the Union dated April 22, which states:

> Motion by Dalbec, seconded by Sigfrids, to state that it is the Committee's belief that Walt Larson was given a second chance to pass the written test, which he did, and should have been give a 90 day probationary period to show his abilities to do the position; and that the City has made an effort to hire from within, there has been an ongoing practice to hire and promote from within and the Committee adheres to that policy at this time.
>
> APPROVED UNANIMOUSLY

The memo states the following after the "cc" list:

> ***Note: This decision will be reviewed at the May 19, 2003 HRC meeting.**

In a letter dated April 29, 2003, Mary Lou Andresen, the City's Human Resources Director, summarized the status of the grievance and sought an opinion from the City Attorney on the following points:

> Given these facts, and considering the working agreement, the arbitration awards, and the City Code of Ordinances Chapter 11 governing personnel matters for the City, what options does the Human Resources Committee have in considering this grievance? Is the motion made by the Human Resources

> Committee in this matter consistent with these options? Also, what is the City Council's authority relative to this grievance?

In a letter dated May 12, the City Attorney stated his opinion that the grievance poses the following issues:

> 1) In filling the position for "Maintenance and Construction Worker," did the city breach the working agreement between the city and AFSCME #244?
> 2) Is Mr. Larson qualified for the position of "Maintenance and Construction Worker" within . . . the Maintenance and Construction Division of Unit #244?

The opinion states the following "Conclusion":

> Mr. Larson's grievance presents the Human Resources Committee with the two issues stated above. The determination of whether or not a breach of contract has occurred and/or whether Mr. Larson is qualified for a maintenance and construction position are properly before the committee. However, a determination by the committee that the contract has been breached and/or Mr. Larson is qualified for the position does not authorize the committee to appoint or promote.

In a memo to the Union dated May 21, 2003, the HRC stated:

> Motion by Dalbec, seconded by Finsland, to notify the Union that, in light of the legal facts and legal opinion provided by the City Attorney, the HRC has no authority to hire or promote. In the future, if the filling of a position is grieved, it should not be filled until the grievance has been settled.
>
> APPROVED

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

The Grievant

The City hired the Grievant in July of 1989. At the time he signed the posting, he was a Light Equipment Operator/Laborer, paid at $14.94 per hour. As of the posting, he had served in that position for roughly two years. Prior to that he had served as an Equipment Mechanic for roughly two years, and prior to that he had served as Central Stores Coordinator for roughly eight years. He has served the Union as a Steward and as an alternate member of its bargaining team.

A Union Steward informed the Grievant that the HRC's position, during the processing of the April 24, 2002 grievance, was that if he passed the written exam as an outside applicant, he would be given a trial period. He relied on this when he applied as an external applicant. A member of the HRC informed him that the "Note" portion of the April 22, 2003 memo was not part of the HRC's response to the grievance. He understood the April 24, 2002 grievance to be "on hold."

The Grievant testified that he could perform any of the "Typical Tasks" noted in the position description for Maintenance and Construction Worker. He has extensive carpentry experience, both as a rough and a finish carpenter. He has built homes and barns. Tim Schmid and John Krivinchuk work in the Maintenance and Construction Division. He has helped them in concrete pours and in the Department's extensive remodeling of its garage, earning out-of-class pay while doing so. He has extensive experience off the job working with Schmid on many residential construction projects. His family includes a number of contractors, and he has worked with contractors off the job for his entire working life. He is building his house. He has led work crews while working off-the-job. Beyond this, he has done electrical and plumbing work. He has extensive training and experience in welding, including experience with the City in wire-feed and heli-arc welding. He has experience reading blueprints for home construction and schematics for his work as a Mechanic, and has painted buildings.

He added that he could meet all of the Employment Standards specified in the position description. He did not possess all of the certifications noted in the position description, but felt he could acquire them. He noted that his application for the position was not fully completed, but he did not realize the missing material was significant for his application. He assumed the City knew of his experience because of his personnel records and employment history. He was nervous at his job interview, and acknowledged that he simply missed the conversion of cubic feet to a cubic yard.

He acknowledged that in June of 2003, he turned down a City offer of a Skilled Laborer position in the Maintenance and Construction Division. He was not interested in the work of the position, and viewed the Maintenance and Construction Worker as the position he most wanted.

John Krivinchuk

Krivinchuk has been a City employee for fifteen years. He currently serves as a Working Foreman/Maintenance and Construction Worker. Krivinchuk requested the Grievant's assistance for a construction project that took place while Schmid was on vacation. The Grievant capably filled in for Schmid, setting forms, establishing the grade, pouring cement, finishing cement and removing forms. In fact, the Grievant was "one of the better, if

not the best" fill-in available in the unit. He estimated he had worked with the Grievant for roughly three weeks in the past work year. Krivinchuk had "no doubt" that the Grievant could perform the work of the Maintenance and Construction Worker position description. Krivinchuk had to take a test to fill the position of Maintenance and Construction Worker, but he did not think it was the same test that the Grievant took. The position has changed over time, involving increasingly greater and wider skills. Krivinchuk has not completed a State-regulated apprenticeship program, and does not possess all of the certifications mentioned in the Maintenance and Construction Worker position description.

Tim Schmid

Schmid has worked for the City for fourteen years. He and the Grievant have worked together in off-the-job construction projects. The Grievant has extensive experience, and requires little training in any task he is given, including electrical and plumbing work. He did not doubt that the Grievant could capably work as a Maintenance and Construction Worker. Schmid has completed an apprenticeship program in carpentry. He played no role in the hiring process for the Maintenance and Construction Worker position. Mattson did not seek his opinion.

Cammi Koneczny

Koneczny currently serves as a Human Resources Analyst, and has been employed by the City for roughly eleven and one-half years. The City delegates the hiring process to the Human Resources Director, who delegated the oversight of the process to Koneczny. She testified that the City typically tests for substantive knowledge prior to authorizing an employee to fill a ninety day probationary period. A position description is the basis for written examinations, and the City typically uses WCCS to create them. The position description set the percentage weights for the components of the WCCS test. She proctored the March 13 test, which required her to explain its rules, enforce the timelines and turn the materials into WCCS for scoring. The City conducts interviews for virtually all of its vacancies.

The City created the Maintenance and Construction Worker position after the retirement of a red-circled employee in the Parks and Recreation Division. The employee retired at the Medium Equipment Operator rate, which, as of January 1, 2002, was $17.77. As Koneczny created the process to fill the position, she planned the process to include a written test and a structured interview. Marlton was the sole intra-divisional applicant, and would have been the preferred candidate under the labor agreement, if each applicant passed the hiring process. Marlton was more senior that Krause, who was more senior to the Grievant, who was more senior to the remaining internal candidates.

None of the intra-unit applicants passed the test, and Kozeczny then advertised the position to external applicants. The Grievant turned in an application, which had one of its three pages missing. The Grievant's personnel file had no updates to his resume from 1989. The interview panel included Mattson as a subject matter expert and Fennessey as an objective and qualified outside evaluator. Six of the eleven applicants passed the structured interview. The Grievant did not, and thus became disqualified. He gave generic answers, afforded little detail in answering and answered some questions incorrectly. Kozeczny testified that she learned more detail about the Grievant's qualifications at the arbitration hearing than she did at the interview. After discussing the interviews, the panel quickly came to consensus on Greenfield's qualifications, since he "blew us all away." He answered each right/wrong question correctly, expanded on his answers and had effectively completed a plumbing apprenticeship in Minnesota.

Kozeczny did not believe the WCCS tests were apprenticeship examinations. She acknowledged that the interview process was subjective in nature. The HRC chairperson requested the insertion of the "Note" section of the HRC's April 22 response in response to concerns regarding the validity of the HRC decision. The HRC did not include the "Note" section by motion.

Clarence Mattson

Mattson has served the City as Superintendent of Public Works, Street Superintendent and Carpenter. He worked in the building trades for eighteen years, and fifteen as a foreman or construction supervisor. He took a test to be hired by the City as a Carpenter, and has participated in the interview process for the City since 1985. The City has hired three carpenters from then until the position at issue here. Prior to the Grievant, there were no internal applicants for these positons. Mattson participated in Kozeczny's approval of the written examination. He thought a person with experience in the building trades should be able to pass it. Given the Grievant's family background, he thought if any unit applicant could pass the test, it would be the Grievant. He did not doubt the Grievant's competence as an employee.

The Maintenance and Construction Worker position has evolved in complexity over time. Krivinchuk and Schmid were more skilled than City-employed Carpenters had been in the past. In his view, the Maintenance & Construction Division benefited from Greenfield's plumbing skills.

The interview process necessarily involved communication skills, since employees in the Maintenance & Construction Division work across all departments, with little supervision and with considerable direct interaction with the public. That the Grievant could not convert cubic feet to cubic yards bothered Mattson considerably. In his view, the Grievant

responded to the testing process as a laborer, while the position seeks skills that are more pointed toward lead man. In his view, the Grievant's past experience in the Maintenance & Construction Division reflected that he worked well as Krivinchuk's helper. He did not believe, after the testing process, that the Grievant could organize and supervise a construction project. The Grievant's failure to get the right/wrong questions correct concerned him, as did the Grievant's inability to expand on his answers to the remaining questions. He viewed Greenfield as the best applicant. He was two weeks from taking the test to complete his apprenticeship. He did not view the completion of the apprenticeship as necessary to the job, but did reflect desirable experience. In his view, the external application process was to determine the best applicant available.

Tom Fennessey

Fennessey supervises employees in the building trades, including journeymen and their helpers. Fennessey served on the City Council for six years, including the role of President and member of the Public Works Committee and the HRC. He was aware that the City tested applicants, and used a structured interview process similar to that used by UW-Superior. He felt the Grievant gave "fairly basic answers" during the interview, and that he offered little insight into his personal experience in the building trades. He did not feel that the Grievant demonstrated specialist skills. Rather, he demonstrated the skills of a helper. Greenfield was more outgoing, showed more inter-personal skills and handled the interview far better than the Grievant. He did not score the applicants, but took notes to jog his memory when the applicants were discussed. After those discussions, consensus quickly emerged that Greenfield was the number one applicant.

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

THE PARTIES' POSITIONS

The Union's Initial Brief

The grievance poses the "violation of one of the basic contractual rights of an employee". More specifically, the Union contends the grievance questions the "right to bid for a promotional position and to be given the opportunity to demonstrate . . . qualifications." A second issue arose "with the reversal of the HRC's initial decision to allow the Grievant" a trial period.

By passing the September 14, 2002 test, the Grievant qualified for the opportunity to "demonstrate his abilities" in the ninety day trial period. An examination of the evidence establishes that the Grievant demonstrated considerable on and off the job experience that qualified him for the position. The sole disqualifying event was the administration of a test that no unit employee could pass.

The test was, in fact, unfair. This is the first time in at least eleven years that the City administered a test that no in-house applicant could pass. A review of the test establishes that the questions were not related to the duties of the position. In fact, the test was so geared to an Engineer position that the motive of the City in giving the test must be questioned. It appears that the City may have desired "to keep all current employees from having this opportunity to secure this promotional position".

Unlike the other applicants, the Grievant took the test with external applicants, and passed it. A review of the interview process further calls the City's intent into question. The City ignored incorrect answers and responded most favorably to those applicants who subjectively appealed to the interviewers.

Significantly, the third step of the grievance procedure grants "the City's Human Resources Committee with full authority to settle grievances presented to it." On April 22, 2003, the HRC granted the grievance. This was within its authority, and the Union relied on the determination. Without any reason to do so, the Human Resources Department undertook action to subvert this process, including securing a City Attorney opinion that the HRC was not empowered to determine qualifications. To permit this conclusion to stand subverts the labor agreement, and violates arbitral precedent. If the City's action is permitted to stand, it will adversely impact "the long term relationship of the parties." The Union concludes thus:

> (T)he Union requests the Arbitrator to direct the City to place the Grievant into the position of Maintenance and Construction Worker and to be allowed to serve the required ninety-day promotional trial period.
>
> The Union further requests the Grievant be made whole for any and all lost wages and benefits from October 20, 2002 for this arbitrary denial of the Grievant's contractual right to serve the ninety-day promotional period . . .

The City's Initial Brief

Of the unit employees who posted for the position, four applied under Section 8.02 B), and one under Section 8.02 A). Two prior arbitration awards in this unit have affirmed "that the City has the right (to) set up the testing process to determine the qualifications of the employee." The testing process consisted of two parts. One was a written examination created by an outside testing service, and the second was a structured interview. Because none of the unit applicants passed the written test, none were interviewed. One hundred and seventeen applicants signed the external posting. Eleven applicants passed the written test, including the Grievant. Under the outside process established by Section 8.02 C), the successful applicant had to be the best qualified, as confirmed through the structured interview. Seniority does not play a role under that subsection.

Under the structured interview process, each applicant was asked the same questions by a qualified panel of three interviewers. The panel determined that only six of the eleven applicants passed the interview, and the highest scoring applicant received the position. This is appropriate under Section 8.02 C).

At Step three of the grievance procedure, the HRC determined that the Grievant should be given an opportunity to take the ninety-day trial period. However, the body rescinded this determination and, acting under an opinion issued by the City Attorney, declined to find the Grievant qualified for the position. The Union could have, but declined to grieve the issue of the Grievant's qualifications. When it filed the grievance after the HRC's action, the issue was whether the Grievant was the most qualified applicant under Section 8.02 C). Against this background, the City's action cannot be considered to have violated the labor agreement. The grievance should be denied.

The Union's Reply Brief

The City's reliance on the interview panel is inappropriate and unduly subjective. The City's attempt to subvert the action of the HRC should not be accepted. The HRC is the City's agent, and the Union was entitled to rely, and did rely, on its exercise of authority. The grievance should be upheld.

The City's Reply Brief

Because the agreement specifies the parties' obligations in Article 8, any HRC action that modified the promotional steps was in excess of its authority and required full City Council approval. The HRC "had the authority to determine (the Grievant) qualified, but the contract and the City Code provisions bound the appointment of the position." The HRC's reconsideration was appropriate under its own rules and cannot be overturned in a grievance.

Rules of Agency play no role in this process. The HRC's initial determination exceeded its authority, and if the HRC had directed Human Resources to implement the decision, it would not have been implemented. This action could have been grieved, but the HRC's action cannot be, since it is an exercise of its authority under the City's administrative rules.

DISCUSSION

The Union's statement of the issue is broad, thus demanding some focus. The Union contends that Sections 4.04, 8.02 and 8.04 are the interpretive focus. This is correct, but the ultimate focus of the grievance is Section 8.02. Section 4.04 establishes the ninety day "trial period to demonstrate their ability to perform the work." This mandate is, however, afforded to "(p)romoted employees." The use of the past tense can be read to state the City's right to

determine qualifications prior to the probation period. Even if the term "promoted" is not read in that manner, the section begs the issue on whether or not the City must first establish qualifications before the mandated probation period is afforded. Section 8.04 makes a "dispute" regarding "qualifications" subject to the "grievance and arbitration procedure". If an applicant had a right to a trial period to establish qualifications, it is not clear why this provision refers to "qualifications" without reference to the probationary period. Even ignoring this, the section begs the question on whether the Employer appropriately used a written examination and structured interview to determine qualifications before permitting the ninety day trial period. That leaves Section 8.02, which specifically governs the grievance.

The Union's arguments on the facts of the grievance are forceful. However, the grievance poses an insurmountable series of contractual hurdles to the Grievant's claim to a trial period. The first hurdle is, in a sense, posed by the April 24 grievance. That grievance is not posed for determination here, but does highlight the difficulties in the Union's claims. Section 8.02 A) grants "(f)irst consideration" to an employee within the Maintenance and Construction Division. That preference is Marlton's to claim. If the testing procedure was invalid from the start, either Marlton has the superior claim to the position, or the process must be redone in a contractually appropriate way.

The Union seeks to avoid this by contending that the Grievant was the sole internal applicant to apply in the external process, and deserves the seniority preference granted in Section 8.02 B). This contention highlights fundamental contractual difficulties. The Union's assertion of the Grievant's claim to the job ultimately presumes the validity of the testing process the Union attacks. To be qualified under Section 8.02 B), the Grievant must either claim that he demonstrated his qualifications by passing the test in September, or that he did not have to and is entitled to a trial period to establish them. The first position presumes that the test was fairly administered and job related. Otherwise, it could not support his qualifications for the job. The second provides no reliable support for the Union. As noted above, if it is concluded that no test was necessary, it is unclear why the position would go to the Grievant. Marlton has the superior claim under Section 8.02 A), and although the evidence is unclear, it appears that one applicant had greater unit-wide seniority than the Grievant.

More to the point, the assertion that the City cannot test to determine qualifications has been rejected by two prior arbitration awards involving this labor agreement: CITY OF SUPERIOR, MA-9704 (Davis, 8/97), and CITY OF SUPERIOR, MA-10000 (Greco, 11/97). At page 4 of the first award, Davis states: "the City correctly interprets Article 8.01 B) as giving it the right to grant the 90-day probationary period only to employees it finds 'qualified.'" At page 2 of the second, Greco states: "there is no merit to the Union's claims that . . . senior employes are automatically entitled to demonstrate their ability during a probationary period." Whether or not these awards must be considered mandatory precedent, to depart from them would undermine the finality of the arbitration process. There is no fundamental difference between the language

construed in those awards and current Section 8.02. Thus, the Grievant has no right to claim the probationary period other than through a City determination of his qualifications, as subject to review under Section 8.04.

As noted above, however, this presumes the validity of the written examination the Union seeks to attack. Doing so, however, undermines the Union's claim. If the written test on September 14 establishes the Grievant's qualifications, then his initial failure on March 13 pushed the contractual process into Section 8.02 C), which provides that if "no City employee is considered qualified by the Employer" it may then "advertise publicly." Under Section 8.02 C), there is no seniority preference for the Grievant to assert.

Nor will a more factual review of the testing process support the grievance. Granting the force of the Union's arguments regarding the Grievant's qualifications, the City's use of the written examination/structured interview cannot be found unreasonable on this record. As noted above, the Grievant's passing the written examination in September is the strongest evidence of his qualifications. However, that evidence poses Section 8.02 C), rather than Section 8.02 B), which is the source of the Grievant's seniority claim to the position. Beyond this, the City has established that the testing process, including the structured interview, has strong historical roots. Mattson's testimony indicates that the predecessor position was uniformly filled from outside the unit, after a test, and Kozeczny's testimony establishes routine use of interviews.

More significantly, the examination/structured interview process can be considered fairly applied and reasonably related to the Maintenance and Construction Worker position. The examination was hard, but there was a significant wage differential, over four dollars per hour, between the Grievant's position and that of Maintenance and Construction Worker. Beyond this, the position involves independent work and, even short of the Working Foreman, the ability to organize and oversee projects. That it is the highest rated unit position underscores that the City could reasonably subject applicants to a rigorous test of skills. There is no persuasive evidence that as administered by the City or by WCCS the test was administered in a less than even-handed manner. Nor will the evidence support the assertion that the test was not job-related. Mattson's and Kozeczny's testimony that the test provisions were directly tied to the position description stands unrebutted. Viewing the record as a whole, Mattson's conclusion that the test was hard, and that if any of the unit applicants could pass it, it would be the Grievant is a reasonable assessment of the written examination.

This poses the issue of the structured interview, and the strength of the Union's attack must be noted. It was, by design and as applied, subjective. However, viewed factually, the subjective element of the interview cannot obscure that the Grievant's application was flawed, as were his answers to basic construction questions, such as the conversion of cubic feet to a cubic yard. The Grievant acknowledged he was nervous, but this cannot obscure that by the end of the interview, the panel knew far less about his experience than the arbitration record contains. Even

with the force of the Union's arguments, the panel's conclusions that the Grievant lacked necessary communication skills cannot be dismissed as unreasonable and their knowledge of his qualifications at the point of the interview is the contractually meaningful reference point. As a matter of contract, the interview process must be viewed under Section 8.02 C). The Grievant was applying in competition with external applicants. The Union's assertion that the competition was something other than an equal playing field has no support in Section 8.02 C).

In sum, the City's conclusion that, under Section 8.02 C), the Grievant did not have the qualifications as a Maintenance and Construction Worker to claim a Section 4.04 probationary period is not unreasonable, and does not violate the labor agreement. The assertion that the Grievant could claim the Section 4.04 probationary period has no support in the language of that section and is countered by two arbitration awards. The assertion that he qualified for the position because he passed the written examination on the second try cannot be accepted because the City had the right under Section 8.02 C) to consider the Grievant as an external applicant without the seniority preference granted in Section 8.02 B). The testing procedure cannot be faulted as a matter of fact. Doing so as a matter of contract subverts the Grievant's claim to the position, since the procedure would have to be repeated if the test is invalid or Marlton would claim first consideration under Section 8.02 A). Since the testing procedure was fairly administered and was reasonably related to the position, the procedure stands.

Before closing, it is appropriate to tie the conclusions reached above more tightly to the parties' arguments. The Union's assertion that the Grievant had a right to rely on HRC actions lacks sufficient support in the evidence to undercut the conclusions reached above. The Grievant testified that he was informed that some type of agreement had been reached during discussion of the April 24 grievance, which would have granted him the position if he passed the written examination in September. There is no solid evidence of a City promise to that effect, or conduct by City representatives that would have granted the Grievant unique rights by retaking the test. Such a promise would have constituted City agreement to effectively ignore two prior arbitration awards. The City could choose to do so. However, it is not persuasive to imply such an agreement, particularly in the face of express City denial of it. The Grievant did not attend the meeting at which he asserts the promise was made, and there is no testimony to support his assertion. This is too weak an evidentiary basis to imply a City/Union settlement agreement.

The HRC action of April 22, 2003 is more troublesome. The published motion can be read to grant the grievance. The appearance of the "Note" section is troublesome, since it did not arise from the motion itself. However, this cannot obscure that the notice to the Union of the HRC action was unclear on its face. There is no clear promise of the position in light of the "Note" section, and it cannot be said that the Union or the Grievant relied to their detriment on the document. Rather, the document extended a possible outcome that was taken back by the May 19 reconsideration. The parties have not stipulated that I should address the legal implications of the City's conduct. Thus, whether or not the City complied with its own rules on

reconsideration or on the application of its own policies is not posed on this record. However, as a matter of contract, the HRC action affords no reliable basis to depart from the conclusions stated above. The grievance procedure does not contain a provision that would make reconsideration an invalid process. Nor does it contain a provision that would limit what the HRC could review during a reconsideration process. More significantly, the April 22 motion is silent on how it can be reconciled to the provisions of Sections 8.02 B) and C). The persuasive force of the Union's concern with the reconsideration lies in the legal authority of the HRC or the City to adopt a solution that need not necessarily be reconcilable to the labor agreement. An arbitrator has less latitude, and must act only as authorized by the labor agreement. The silence of the April 22 action on the contractual significance of the HRC motion affords no basis for the assertion of arbitral authority under the labor agreement. As noted above, the suggested outcome has no evident support under the provisions of Sections 8.02 B) and C).

It warrants stating that the quality of the Grievant's experience in the building trades is not the crux of the interpretive dispute posed here. Schmid's and Krivinchuk's confidence in his abilities seems warranted. They had, however, far greater familiarity than the City with his work on and off duty. The on duty work was limited. More significantly, the issue is not whether a non-City contractor or I would hire the Grievant, but whether the City abused its authority by determining him unqualified for the position. As Mattson noted, his qualifications got him as far into the process as any unit applicant. The City's determination that, under Section 8.02 C), this is not enough to secure him the Maintenance and Construction Worker position cannot be dismissed as unreasonable. Under that section, the City has greater latitude than under Section 8.02 B). I thus lack the contractual authority to grant what the grievance seeks.

AWARD

The Employer did not violate the terms of the Collective Bargaining Agreement when it denied the Grievant the position of Maintenance and Construction Worker.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 22nd day of June, 2004.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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