

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, LOCAL 576B, AFL-CIO

and

ST. CROIX COUNTY

Case 202

No. 63845

MA-12727

(Maintenance Mechanic Posting Grievance)

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomomie, Wisconsin, appearing on behalf of Local 576B.

Mr. Stephen L. Weld, Attorney, Weld Riley Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of the St. Croix County.

ARBITRATION AWARD

AFSCME, Local 576B, hereinafter "Union," and St. Croix County, hereinafter "County," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator Lauri A. Millot to hear and decide the instant dispute between the Union and the County in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the Undersigned on December 7, 2004, in Hudson, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs, the last of which was received on March 18, 2005. Based upon the evidence and arguments of the parties, the Undersigned makes and issues the following Award.

ISSUES

The parties agreed that there were no procedural issues in dispute, but were unable to agree to the substantives issues.

The Union frames the issues as:

Did the County violate Section 8.03 or 8.04 of the collective bargaining agreement when it determined the Grievant did not meet the qualifications of the Maintenance Mechanic position? If so, what is the appropriate remedy?

The County frames the issues as:

Did the County violate the collective bargaining agreement when it failed to award the Maintenance Mechanic position to the Grievant? If so, what is the appropriate remedy?

Based on the relevant facts, I frame the issue as:

Whether the County violated Article 8 of the collective bargaining agreement when it determined the Grievant did not meet the minimum qualifications for the Maintenance Mechanic position? If so, what is the appropriate remedy?

RELVANT CONTRACT LANGAUGE

ARTICLE 2 – MANAGEMENT RIGHTS

Section 2.01 The County possesses the sole right to operate County government and all management rights repose in it, subject to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

. . .

c. To hire, promote, transfer, schedule, and assign employees in positions within the County.

. . .

f. To maintain efficiency of County operations.

. . .

ARTICLE 8 – JOB POSTINGS

Section 8.01 Notice of Vacancy. In the spirit of equal employment and promotional opportunity for all employees, the Employer agrees to post notice of all vacancies and new positions, which the Employer decides to fill, on all appointed bulletin boards, and send to the president and/or designee in the bargaining unit. The Employer agrees to notify the Union local president in a timely manner of a decision not to fill a vacancy.

Job postings shall be posted for seven (7) calendar days and shall include:

- 1.) the title,
- 2.) the applicable bargaining unit,
- 3.) reasonable qualifications for application,
- 4.) the job description,
- 5.) the applicable length of the trial and training period,
- 6.) the work schedule,
- 7.) the locations of the job, and
- 8.) wage rate of the job to be filed.

Section 8.02 Applications. Interested employees may apply for posted positions by notifying the Personnel Department by telephone, letter, fax, e-mail or in person.

Employees on leave or on vacation may request the Personnel Department advise them of posted vacancies. Applications by such employees may be made by fax within the posting period.

Section 8.03 Examinations. The Employer is entitled to give reasonable and appropriate written, oral, performance, and aptitude tests as aids in determining the ability of the job posting applicants.

Fairly and objectively administered tests are intended to avoid favoritism, improper discrimination, and subjective reactions.

Tests used in determining ability and qualifications must be:

- 1.) specifically related to the requirements of the job,
- 2.) fair and reasonable;
- 3.) administered in good faith and without discrimination
- 4.) properly evaluated

The Employer will consider other evidence and factors along with test results in judging the ability and/or qualifications of job posting applicants.

Section 8.04 Job Assignment. The posted position shall be assigned to the bargaining unit employee with the greatest seniority provided that employee meets all of the stated qualifications for the position.

If there are no qualified applicants among current bargaining unit employees, the Employer may recall qualified employee(s) qualified employee(s) on lay-off, if any.

If there are no qualified bargaining unit employee applicants, the Employer may fill the position by selecting any other qualified applicant(s). County employees will receive preference in selection when two or more final applicants are determined to be substantially equal.

Section 8.05 Trial Period. Successful applicants shall serve a trial and training period up to sixty (60) workdays depending on the job to be filled. The length of the trial and training period shall be consistent with the job to be filled and shall be uniform within classifications.

BACKGROUND AND FACTS

The Grievant was hired by the County on January 3, 1995. The Grievant is a full-time Custodian assigned to work at the Hudson facility. The Grievant's supervisor is Ralph Robole, County Facilities Manager. The Grievant does not have a disciplinary history.

The County posted the position of Maintenance Mechanic on March 1, 2004. The posting, in relevant part, read as follows:

. . .

Job Description: Cleans, maintains and repairs heating and cooling equipment, pumps, piping, filters, screens, etc.; repairs machinery, plumbing, wiring, and fixtures; assembles and repairs office equipment; performs carpentry and mechanical work on existing buildings, facilities, and equipment; provides for cleaning and upkeep of facilities and grounds.

Job Qualifications: Thorough knowledge of tools used in building and equipment maintenance work, good knowledge of carpentry, painting, plumbing, and electrical trades; good knowledge and repair ability with pressure

boilers and related equipment; basic understanding and use of computerized maintenance programs; mechanical aptitude; ability to work from sketches and blueprints; good physical condition.

. . .

There is no dispute that the Grievant timely applied for this position by the March 8, 2004 due date. In addition to the Grievant, there were two internal applicants, Verlyn Troftgruber and David Inlow.

On March 11, 2004, County Personnel Director Deb Kathan, responded to an e-mail inquiry from Union President Kim DuPree regarding the Maintenance Mechanic position. Kathan informed Dupree that there were three internal applicants who would be tested the following week and that the test was a state verified and authorized test.

The Grievant and the two other internal applicants took a test prepared by the Wisconsin City County Services (WCCS) titled Maintenance Mechanic test on March 18, 2005. The County received the internal applicant test results on March 23, 2004. The Grievant answered 79 of 137 questions correctly which is 58 percent correct.

On April 2, 2004, the County placed a "help wanted" advertisement in three local newspapers for the position of Maintenance Mechanic. The advertisement read as follows:

. . .

Maintenance Mechanic with St. Croix County, New Richmond location. Works with HVAC, plumbing and electrical operations. Performs carpentry and mechanical work and monitors pneumatic heating and cooling systems. Prefer advanced degree or certificate in HVAC, electrical, or mechanical engineering; three + years experience in HVAC, 480 volt 3 phase electrical systems, plumbing, and fire alarm maintenance. Top candidates will be tested. Entry rate: \$16.68/hour, top at \$18.61; attractive benefit plan including insurances and paid time off. Apply by April 23. . . .

The record is void as to how many additional individuals applied for the position, but there were only eight external applicants that on July 23, 2004, took the same test as the Grievant. Of the eight applicants, only two scored higher than 70%. The County interviewed the two applicants that scored higher than 70% and Paul Auckland was offered and accepted the Maintenance Mechanic position.

The Union filed a grievance on April 5, 2004, alleging that the County had violated “Article 8, 7 + any + all others that apply” and indicated that the “testing did not meet contract criteria in Section 8.03.” The grievance was denied at all steps by the County thus placing the matter properly before the Arbitrator.

POSITIONS OF THE PARTIES

The Union

The Union maintains that the County violated the collective bargaining agreement citing four reasons for which the Arbitrator should overturn the County’s decision to award the Maintenance Mechanic position to an external candidate rather than the Grievant.

First, the County has an established practice of including the testing component in all job postings if, in fact, a test will be required. The County did not do this with the Maintenance Mechanic position. Rather, the County informed the internal applicants less than 36 hours before the test was to be given that they would be required to take a test even though the County had made the testing arrangements almost a month prior. This late notice denied the internal applicants the opportunity to study to refresh their knowledge and skill. In contrast, the external posting informed the potential applicants of the requisite test. The County’s failure to inform the Grievant of the test denied him the opportunity to study and prepare for the test. This failure resulted in the Grievant not passing the test and hence, not meeting the minimum qualification for the position.

Second, the Union and the Arbitrator were denied access to the test. The Arbitrator issued a subpoena and the County failed to comply. The Union does not dispute that tests prepared by the WCCS are validated tests, but in this instance, the Union was unable to determine whether the test was “specifically related to the requirements of the job” as is required by the parties’ labor agreement. The fact that the County provided the test to Best to review is irrelevant because he has no expertise in the field of testing. As to Kathan’s reliance on a conversation with some unknown person at WCCS, that individual didn’t even bother to review the County’s Maintenance Mechanic job description before concluding that the test that was administered was the appropriate test for the County’s vacant position. The County is obligated to support its reliance on this test with more than “it looked good to us” and it has failed to do so.

Third, the County is refusing to give meaning to all sentences contained in Section 8.03 of the labor agreement. The parties included the sentence, “The Employer will consider other evidence and factors with test results in judging the ability and/or qualifications of job posting applicants” in Section 8.03. The County ignored this sentence. The County’s decision to rely solely on the test results negates the intent and specific language of Section 8.03.

Finally, the Grievant's un-refuted testimony of establishes that Robole would do everything in his power to deny the Grievant promotional advancement. Lead Worker Bob Hoehnen confirmed this. Robole's opinion of the Grievant and his knowledge that the Grievant was the most senior employee interested in the Maintenance Mechanic position caused the County to administer the test that deemed the Grievant unqualified.

The County

The County maintains that the Grievant did not meet the minimum qualifications for the Maintenance Mechanic position and therefore was not awarded the position. The Union's allegations that the testing procedure was defective and that the County harbored animus against the Grievant are unfounded and the grievance should be dismissed.

The County exercised its management rights and established minimum qualifications for the Maintenance Mechanic position. Inclusively, the parties' labor agreement recognizes that the County may administer a test to potential applicants and there are numerous arbitration decisions issued that have held that employers have the right to set and use minimum test scores to disqualify job applicants. See, County Brief p. 7-11. The County used the state test as its "first cut" to determine which candidates would continue in the selection process and applied the same minimum passing score - 70%, that it has used in the past.

There is no contractual requirement that the County must include in the internal job posting notice of the County's intent to require a written test. Moreover, this has not been the practice of the County. The County does not always specify that a test will be required. Personnel Director Kathan's unrefuted testimony established that the County sometimes includes notification that testing will be required. In addition, the external job posting did not include notification that testing would be conducted, thus the internal and external applicants were treated in the same manner.

With regard to the allegation that the internal candidates received short notice of the testing requirement, this is similarly inaccurate. The Union was informed seven days before the test was administered that a test would be required.

As to the test itself, it met the requisite contractual and arbitral standards of reasonableness. The Union's challenge to the relationship between the test and the job duties of the Maintenance Mechanic position lacks merit. The test was validated by Wisconsin City County Services (WCCS) and the testimony of the County's Service Technician, Dave Best, establishes that the test questions addressed all of the job requirements of the position.

The County determination that the Grievant did not meet the minimum qualifications was not arbitrary or capricious.

The County does not dispute that the Grievant has assisted in the performance of some mechanic functions throughout his employment as a custodian. But in all of these cases, when the Grievant was performing “maintenance mechanic work” his role was limited to *assisting*. Furthermore, for those instances in which the Grievant alleges that he solely performed “maintenance mechanic work,” he failed to distinguish the difference between custodial and maintenance mechanic work and the fact that the Maintenance Mechanic is completing the advanced mechanical, electrical, plumbing and HVAC work while the Custodian is working on lawn equipment and floor machines.

As to the Union’s belief that Section 8.05 obligates the County to award the Maintenance Mechanic position to the Grievant and then train him, the County strongly disagrees. Section 8.05 states that the successful applicant will serve a trial and training period. The Grievant was not the successful applicant since he was not minimally qualified for the position.

The Union, Reply Brief

The Union challenges the County’s assertion that passing the WCCS test is a minimum qualification for the Maintenance Mechanic position. Neither the job description nor the job posting indicate this as a minimum qualification. In contrast, evidence was offered at hearing showing that the County has included the testing requirement in other job vacancies. The County in this instance created the job qualification after the posting was up and the Grievant was known to be the most senior interested internal applicant.

The Union does not dispute that County testing of applicants is permitted by the labor agreement. But, the test must still meet the criteria bargained for by the parties and this test does not, or at least, there is insufficient evidence available for the Union to reach the same conclusion as the County.

With regard to the County’s request that the Arbitrator rule on the skills and abilities of the Grievant if a procedural contract violation is found, this conclusion fails to give meaning to the language of the parties agreement.

Finally, the Union asserts that the language that these parties’ bargained into Section 8.03 cannot be found in the numerous decisions cited by the County and as such, the conclusions are not relevant.

For all of the above reasons, the Grievant was denied the Maintenance Mechanic position which was in violation of the labor agreement. The Grievance should be sustained and the Grievant should be awarded the position, or at the very least, the position should be reposted.

The County, Reply Brief

The County first challenges the inaccuracies contained in the Union's initial brief. The evidence adduced at hearing established that 1) the County does not always include in the job posting notice to potential applicants that a test will be required, 2) the Grievant was not originally scheduled off of work on March 17, 2004, when the test was administered, and 3) the Grievant was not denied an opportunity to study for the test since it is not a test in which studying will be a benefit to the applicant.

The County did not ignore the Arbitrator's subpoena. Rather, the County attempted to obtain the test from WCCS and it was WCCS that failed to release the test. More importantly, the County is not required to involve the Union in the exam review process in order for the test to be valid.

As to the Union's belief that the County only relied on the test to determine the successful candidate, the County used the test to determine whether applicants met the minimal qualification so as to be considered further for the position. The applicants that met the minimum qualifications received interviews.

The County did not violate the labor agreement and the Grievance should be dismissed.

DISCUSSION

The Union is challenging the County's compliance with Article 8 when it awarded Auchland, an external candidate, the position of Maintenance Mechanic position after finding the Grievant to not meet the minimum qualifications.

Section 8.04 provides that the "posted position shall be assigned to the bargaining unit employee with the greatest seniority provided that such employee meets all of the stated qualifications for the position." This is a sufficient ability clause and limits the County's ability to compare candidates because the senior employee need only meet the minimum competency requirements in order to obtain the position. The Common Law of the Workplace, The Views of Arbitrators, National Academy of Arbitrators, Theodore J. St. Antoine, p. 143 (1998). The Grievant was the most senior bargaining unit employee to sign for the Maintenance Mechanic position and therefore was entitled to the position provided he met the "stated qualifications." The parties do not specify where the "stated qualifications" are stated, but the first section of the same article indicates that the job posting shall include "reasonable qualifications for the position." Given that all of these sections are contained in the Job Posting article, it is reasonable to conclude that the "reasonable qualifications for the position" as identified in Section 8.01 are the "stated qualifications" referred to in Section 8.04.

The “stated qualifications” in the job posting include:

. . . Thorough knowledge of tools used in building and equipment maintenance work, good knowledge of carpentry, painting, plumbing, and electrical trades; good knowledge and repair ability with pressure boilers and related equipment; basic understanding and use of computerized maintenance programs; mechanical aptitude; ability to work from sketches and blueprints; good physical condition.

The County did not evaluate the Grievant on any of these qualifications individually to determine whether he was minimally qualified. Rather, the County relied on a test prepared by the WCCS to determine whether the Grievant was minimally qualified for the Maintenance Mechanic position and concluded that he was not. The County found the Grievant deficient on the basis that “the employer considers the failure to pass the Maintenance Mechanic test a significant enough factor to eliminate the candidate from further consideration” and “. . . the Grievant did not qualify for the Maintenance Mechanic position based on his failing of the written test” Ex. 3.

The Union argues that passing the Maintenance Mechanic position is not a minimum qualification for the position. There is some merit to the Union argument. Section 8.04 requires the County to determine whether the Grievant met the “stated qualifications” which, as previously addressed, are the same as the qualifications contained in the job posting. The County did not include in the job posting that passing the WCCS test was a minimum qualification and that it would exclude applicants if they did not pass the WCCS test. As such, a 70 percent or greater score on the test was not a minimum qualification for the position.

The problem with the argument is that it is possible to utilize the WCCS test as a tool to evaluate whether applicants possess the job posting identified minimum qualifications and the parties have affirmatively bargained and granted the County the right to use of examinations, written, oral and otherwise, as a method of determining qualification for positions.

Section 8.03 of the labor agreement provides the County with the right to administer a examination to the Grievant if the examination meets specific criteria. The language provides that the examination’s use is to determine “ability and qualification” provided the content of the test is:

- 1.) specifically related to the requirements of the job,
- 2.) fair and reasonable,
- 3.) administered in good faith and without discrimination
- 4.) properly evaluated

The Union challenges the County’s use of the WCCS test for a number of reasons, all of which relate to the four referenced criteria.

As to criteria number one, whether the test was “specifically related to the requirements of the position,” the Union argues that it attempted to evaluate the test to determine whether it met this criteria, but the County refused to provide a copy of the test. The Union is correct in that the Maintenance Mechanic test administered to both the internal and external applicants was not made available for the Union and the Arbitrator to view. This does make it difficult to address the specificity of the test, but it does not make it impossible. The evidence establishes that there were 137 questions on the test and it was divided into three dimensions.

The first dimension was designed to “test individuals’ knowledge and skill in troubleshooting and recognizing unsafe conditions of mechanical, electrical and hydraulic equipment,” and contained 41 questions. Ex. 16. The County job qualifications do not address troubleshooting or unsafe conditions, but it is reasonable to conclude that they are encompassed by the “equipment maintenance” aspect to the qualifications. Given that a Maintenance Mechanic’s main function is to ensure that the County’s equipment is in working order, I conclude that this dimension was related to the specifics of the position.

The second dimension tested the applicants “knowledge of repair materials and hand power tools” and contained 64 questions. Ex. 16. This section is aligned with the first and second job qualifications. This dimension related to the job requirements.

The third dimension tested “knowledge of the function and operation of mechanical, electrical and hydraulic systems/machinery (i.e. relational concepts as to the how and why mechanical, electrical and hydraulic systems work as they do).” Ex. 16. This dimension contained 31 questions. The job qualifications identify a need for knowledge in pressure boilers and related systems. Although there is some relationship between this dimension and the job requirements, it is limited.

Upon review, the first two dimensions of the Maintenance Mechanic relate to the requirements of the position, while the third dimension is not so clear. WSSC prepares subject matter tests based on position descriptions that it collects from various employers and it places the burden of determining whether its test content represents the skills, knowledge and abilities of the vacant position on the employer. Kathan testified that she did not know whether the WCCS prepared examination tested areas beyond or outside the scope of the responsibilities of the County Maintenance Mechanic position. Given this, it is possible that the test included items which exceed the job qualifications on the job posting.

I am further persuaded that the WCCS test go beyond the job qualifications as evidenced by the fact that the County re-created the job qualifications for the external applicants. The external applicant job qualifications per the job posting were:

. . . Works with HVAC, plumbing and electrical operations. Performs carpentry and mechanical work and monitors pneumatic heating and cooling systems. Prefer advanced degree or certificate in HVAC, electrical, or mechanical engineering; three + years experience in HVAC, 480 volt 3 phase electrical systems, plumbing, and fire alarm maintenance.

There is no reference to pneumatic systems, HVAC, or fire alarm maintenance in the internal job posting. There was significant testimony at hearing regarding the infusion of HVAC into the job requirements of the Maintenance Mechanic position and both the approved and 2003 unapproved job descriptions document this. There is no question that the County has the management right to create and update job descriptions and inclusively minimum qualifications, but it does not have the right to evaluate an applicant on updated, more rigorous job qualifications when it posted different and less rigorous job qualifications.

As to criteria number two, the Union asserts that it was unfair to deny the internal candidates notice that a test would be required and that it was unfair to inform them just three days before the test was given, thus denying them the opportunity to study. I believe the Union's argument challenging the fairness and reasonableness of the test. With regard to the notice argument, nowhere in Section 8.03 is there a requirement that the County must place employees on notice that a written examination will be administered in the job postings. Kathan testified that the County does not always include the testing obligation on its job postings. While Kathan candidly admitted that the County's failure to identify the testing expectation on all postings was because "we didn't think of it that day," it does not change the fact that there is not a County practice of including the examination requirement in the job posting. As to the claim that internal candidates did not have the opportunity to study, the evidence establishes that this was not a test in which advance studying would be beneficial. On solely these two identified fairness concerns, I do not find the County acted in an unfair manner.

WCCS proctored the test and scored the results. WCCS is a recognized exam development and validation service. The Union has not alleged nor was evidence offered to challenge the reputation or integrity of WCCS. The County has met criteria three and four of Section 8.03.

There is insufficient evidence available to make certain the WCCS test was "specifically related to the requirements of the position" although if I was obligated to reach a conclusion on the evidence available, I would find in favor of the Union. The three remaining enumerated criteria support the County's position. Looking to the remaining language of the section, I find that the County has violated the labor agreement.

The last sentence of Section 8.03 provides that the County "will consider other evidence and factors along with test results in judging the ability and/or qualifications of job posting applicants." Emphasis added. The County did not consider any additional evidence or other factors when it determined that the Grievant was not qualified for the Maintenance Mechanic position. The evidence establishes that the County determined the Grievant did not meet the minimum qualifications solely based on his test score. The County responded to the grievance stating that the "employer considers the failure to pass the Maintenance Mechanic test is a significant enough factor to eliminate the candidate from further consideration" and "since the Grievant did not qualify for the Maintenance Mechanic position based upon his

failing of the written test.” Ex. 3. Additionally, Kathan confirmed this through her testimony. The County failed to consider any other evidence when it concluded the Grievant was not minimally qualified and it was obligated to do so by the last sentence of Section 8.03.

In conclusion, the Grievant was the most senior job applicant and was contractually entitled to the Maintenance Mechanic position if he met the “stated qualifications” for the position. The County utilized a test to determine whether the Grievant met the “stated qualifications” and did not consider “other evidence and factors along with the test” in violation of the labor agreement when it determined the Grievant was not minimally qualified.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

1. Yes, the County violated Article 8 of the collective bargaining agreement when it determined the Grievant did not meet the qualifications of the Maintenance Mechanic position.

2. The appropriate remedy is to re-post the Maintenance Mechanic position and evaluate applicants in accordance with the clear terms of the agreement.

Dated at Rhinelander, Wisconsin, this 23rd day of June, 2005.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator