

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SAUK COUNTY HEALTH CARE CENTER EMPLOYEES' UNION
LOCAL 3148, AFSCME, AFL-CIO**

and

SAUK COUNTY

Case 156
No. 64263
MA-12853

(Woodruff Grievance and Peper, et al Grievance)

Appearances:

Mr. Bill Moberly, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin, appeared on behalf of the Union.

Mr. Todd Liebman, Esq., Sauk County Corporation Counsel, 505 Broadway, Baraboo, Wisconsin appeared on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, the Sauk County Health Care Employees' Union, Local 3148, AFSCME, AFL-CIO (herein the Union) and Sauk County (herein the Company) were parties to a collective bargaining agreement dated May 9, 2003, covering the period January, 2003, to December 31, 2005, and providing for binding arbitration of certain disputes between the parties. On December 13, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of Article 9, Section 9.07 the collective bargaining agreement when the County did not select the most senior applicant when it filled a vacant Laundry Aide position, and requested a panel of the WERC staff from which to select an arbitrator to decide the issue. The undersigned was subsequently selected to hear the dispute. Prior to the hearing, the parties agreed to have the Arbitrator also hear and decide another grievance involving an allegation of a similar violation of the same section in the filling of a vacant Activities Therapy Assistant position. The hearing was conducted on April 19, 2005 and the proceedings were not transcribed. The County filed its brief on June 20, 2005 and the Union filed its brief on

July 5, 2005. On August 19, 2005, the Union advised the Arbitrator that it would not file a reply brief. The County filed a reply brief on August 22, 2005, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

Did the County violate the Collective Bargaining Agreement when it denied Jessica Woodruff, Linda Peper and other affected employees of the Sauk County Health Care Center job postings based on their seniority?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Did the County violate the Collective Bargaining Agreement by selecting candidates based upon qualifications, recent work record, discipline imposed when other candidates, although more senior, were not relatively equal to the candidates selected?

If so, what is the appropriate remedy?

Having taken the parties' positions under advisement, the Arbitrator adopts the framing the issues proposed by the Union.

PERTINENT CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 The Employer possesses the sole right to manage and operate its affairs in all respects and retains all such rights it possessed prior to this Agreement which are not expressly modified or superseded by this Agreement. Such rights of the Employer to manage its affairs shall be liberally construed and modified only by the express language of this Agreement. Those management rights include, but are not in any way intended to be limited by, the following:

- A) To manage, direct, and control the operation of the work force;
- B) To determine the type, quality and amount of services to be provided and the appropriate means of providing those services;

- C) To hire, transfer and promote, and to demote, discipline, and discharge employees for just cause;
- D) To make, modify and enforce reasonable rules or regulations and standards of performance applicable to the work force;
- E) To evaluate employee performance and to plan and schedule training programs;
- F) To contract with others for goods and services for sound business reasons and, if a subcontract results in the layoff of bargaining unit personnel, the Employer agrees to bargain the effects thereof;
- G) To establish the qualifications and duties of the members of the work force and to determine the equipment, supplies and physical facilities to be utilized in the performance of those duties;
- H) To relieve employees from their duties because of lack of work or any other sound and legitimate business reasons;
- I) To take any action necessary to comply with state or federal requirements applicable to its programs;
- J) To establish work schedules and service hours for its facility; and
- K) To determine the size and composition of the work force.

...

ARTICLE 9 – SENIORITY

...

9.07 Filling Positions: In permanently filling open positions, the Employer shall make the appointment on the basis of qualifications, recent work record, discipline imposed within the previous twelve month period, and abilities of those persons applying for said positions. Employees on steps of discipline may submit an explanatory statement for the employer to consider in the selection process. No applicant shall be considered to be hired for a vacancy where appointment to such vacancy would result in members of an immediate family being employed in a direct supervisor-employee relationship. When qualifications, recent work record and abilities are relatively equal, selection shall be made on the

basis of seniority. All employees who apply for open positions and are not selected shall be notified in writing by the Employer. Upon request of the employees affected, the three most senior applicants shall be entitled to the reasons why they were not selected, in writing. The Employer may fill a vacant position on a temporary basis pending consummation of the procedures relating to a permanent filling of such position. The temporary filling of a vacant position shall not be used to avoid or delay the permanent filling of any position on a permanent basis.

OTHER RELEVANT LANGUAGE

ARTICLE 9 – SENIORITY

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9.06 Job Posting Procedure: Whenever there is a job opening within the bargaining unit, either as a result of termination, promotion, transfer or creation of a new position, the Employer shall post a notice on all bulletin boards. Such notice shall provide the job title, rate of pay, job shift, department, when the applications must be submitted, and the place to apply. Such notice shall remain posted for at least one (1) week before the receipt of applications will be closed. A copy of the notice shall be given to the Union secretary

Employees going on vacation or leave of absence may leave an open bid with the Personnel Department prior to starting their vacation or leave. This open bid must indicate the specific job and/or shift for which the employee wishes to bid. Should a job opening occur in the job or shift indicated, the employee will then be considered for such opening in accordance with the job posting procedure.

...

9.08 Trial Period: All promoted or voluntarily transferred employees shall be on a trial period for the first thirty (30) days in a new position and may returned to their former position by the Employer if the employee does not perform in accordance with reasonable standards or at the request of the employee, within that time period. Such decisions of the Employer are not grievable unless action is taken by the Employer within the first thirty (30) days after transfer or promotion.

...

BACKGROUND

Sauk County operates a Health Care Center facility which provides nursing home and health care services to persons within the County. The represented employees of the Health Care Center, which encompasses a broad range of job classifications, are members of the Sauk County Health Care Center Employees' Union, herein the Union. The collective bargaining agreement between the parties contains language specifying the process to be used in filling vacant positions within the bargaining unit. The operative language, contained on Section 9.07, states that "...the Employer shall make the appointment on the basis of qualifications, recent work record, discipline imposed within the previous twelve month period, and abilities of those persons applying for said positions." The section further states: "When qualifications, recent work record and abilities are relatively equal, selection shall be made on the basis of seniority."

On January 16, 2004, the County posted a vacancy for a full-time Laundry Aide position, for which there were two applicants from within the bargaining unit - Jessica Woodruff, who had a seniority date of September 11, 2000, and Geraldine Bindl, who had a seniority date of August 12, 2002. After a review process conducted by the Laundry Department Manager and the Personnel Manager, Bindl was selected as the successful candidate and was offered the position on the basis of ostensibly superior qualifications under the factors specified in the contract. On February 18, 2004, Woodruff grieved the action on the basis of her greater seniority and the relative equality of her qualifications to Bindl's. The grievance was denied and the matter proceeded forward to arbitration.

On June 24, 2004, the County posted a vacancy for a full-time Activities Therapy Assistant position, for which there were numerous applicants from within the bargaining unit. After a review process conducted by the Activity Director and the Personnel Manager, Penny Shrank was selected over the other applicants, seven of whom had greater seniority than she. On August 26, 2004, the Union filed a grievance on behalf of Linda Peper, the most senior of the applicants, on the basis of her greater seniority and the relative equality of her qualifications to Shrank's. The grievance proceeded through the contractual steps and was denied at each level. Prior to the arbitration hearing, the parties agreed to consolidate the Peper grievance with the Woodruff grievance for purposes of arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that when the qualifications, recent records, discipline imposed and abilities of competing applicants for a position are relatively equal, the selection must be based upon seniority. In this case, Jessica Woodruff was the senior applicant for the Laundry Aide position. A review of the selection criteria used by the County reveals that with respect to attendance, disciplinary record and job performance, she was relatively equal to the successful

candidate, Geraldine Bindl. The only significant difference is that Bindl had substantially more hours of laundry experience than Woodruff, nevertheless the record shows that the selection should have been made based on seniority.

Arbitrators have held that a “relatively equal” clause requires a junior employee to have significantly greater qualifications in order to be promoted over a senior employee. Other arbitrators have held that the ability factor merely means that the senior applicant must be minimally qualified to do the job. (*Citations omitted*). Further, Section 9.08 of the contract provides for a trial period so that if the senior applicant is unable to do the job he or she can be returned to his or her former position within thirty days.

The Laundry Aide position is an entry level position for which employees have in the past been hired off the street. The Department Manager testified that new hires have been trained on the job for the position. Further, selection criteria document produced by the County was prepared for arbitration only after the selection and was not shared with the Union prior to the hearing.

The essential duties of the position are loading and unloading washers and dryers, sorting and folding laundry. These are not highly skilled tasks and require minimal training. The Department Manager, himself, was hired off the street as a Laundry Aide twenty-five years ago. He testified that Ms. Woodruff was a good worker and performed all her duties well. Since she was qualified for the position, she should have been awarded it.

The Activities Therapy Assistant position is also an entry level position which has been filled in the past by hiring people off the street. In filling the position, the County used the same criteria to evaluate candidates as with the Laundry Aide position, as well as a personal interview. While appearing thorough and sophisticated, however, the process was actually unsound.

The process should determine whether all candidates are relatively equal or not. If one is clearly superior, they should be chosen, but otherwise seniority should prevail. The process here did not establish benchmarks for determining qualifications. The applicants were simply ranked in different areas and the candidate with the lowest overall score prevailed. The candidates were ranked according to total number of hours worked in the position, but the ranking did not take into account the time frame in which the work took place. Thus, an employee who worked full-time hours for a short period received a lower ranking than one who worked more total hours but due to the passage of time averaged only half an hour per week in the position during her years of employment.

With the attendance ranking the County also merely used total numbers of attendance occurrences and did not adjust the figures to account for shorter or longer measurement periods, which led to skewed results. Thus two employees with three occurrences in two and three month periods, respectively, received the highest rating, whereas an employee with no occurrences in 2004 and only four in all of 2003 was ranked lower. Averaging the

occurrences over time would have achieved different and more reliable results. As to discipline, only one candidate had received any discipline in the past twelve months, so the candidates should have been rated as relatively equal.

In performance evaluation, the candidates were rated in eight areas and then also received an overall rating and given a rating of Excelled, Met Expectations, or Unsatisfactory in each area. Again, the candidates were ranked one through six based on their evaluations even though two had an overall rating of Excelled and the reset had a rating of Met Expectations. This scoring system had the effect of creating an impression of a wider divergence between the candidates than actually existed.

The interview process involved a face to face interview with the Department Head and Personnel Manager, scored answers to three questions and an evaluation of a written patient assessment and activity program. The composite scores of the candidates were then ranked. The interview process did not use established benchmarks, so the evaluations were necessarily subjective. Only one of the interviewers took notes, the evaluations were done at least two days after the interviews and took an additional two days. The Department head scored the answers first and then gave her score values to the Personnel Manager to review before she scored them. The process was also flawed in that it was designed to determine not who was qualified to do the job, but who was most qualified.

On the written portions, no benchmarks were developed to assess the answers and no explanation was given for the scores that were assigned to different answers. The results show that, with the exception of Penny Shrank, all the candidates' scores were relatively equal. Because the scores were based on subjective impressions, however, they are not reliable. At the hearing, Ms. Burgraff was asked to rank two of the answers given and assigned different scores than she had in the interviews. Further, some of the actual scores given vary between candidates even though the answers were nearly identical, without explanation. On the whole, therefore, the process was flawed. The candidates were relatively equal and seniority should have been used to fill the position.

The County

The County asserts that the selection process used in both instances was similar and appropriate. The selection criteria were developed from the plain language of the contract and were fair and objective. The laundry Aide recruitment was performed using a review of qualifications and abilities, as well as an interview. The recruitment for the Activities Therapy Assistant was more involved, using a more extensive interview and written exam. In each case, the supervisors in charge of the recruitment determined that the candidates were not relatively equal. In such a case, Section 9.07 of the contract states that a clearly superior candidate is to be selected over others, regardless of seniority.

The contract also contains numerous management rights, giving the Employer significant authority over direction and management of the workforce and to determine the

services to be provided and the means for doing so. Thus, management has great discretion over the process for selecting and promoting employees beyond what is stated in Section 9.07.

In this case, the contract contains a “relative ability” clause. In such cases, seniority comes into play only when the abilities of respective candidates are nearly equal. Where management determines that abilities are not equal and promotes without reference to seniority, the only inquiry is whether management’s selection process was valid. The standard applied by arbitrators is whether management’s determination was “...unreasonable under the facts, or capricious, arbitrary or discriminatory.” The Union has not made such an allegation and the facts do not support such a finding. The Union merely contends the matter should have been decided based on seniority without regard to the validity of the selection process. Had the decisions been made on the basis of seniority, however, the Union Steward testified that grievances would probably have been filed contending that the selections should have been based on qualifications.

The selection of the Activities Therapy Assistant was based on interviews and testing, which is an approved methodology. The tests were specifically related to the job and were administered and scored by the Department Head and Personnel Manager, who also conducted the interviews. There has been no allegation of bias, discrimination or favoritism, therefore, the process must be presumed to be fair and objective.

In the case of the Laundry Aide, Geraldine Bindl had significantly more relevant work experience than Jessica Woodruff. According to Elkouri & Elkouri, relevant work experience is a tangible, objective factor, which may be considered in determining fitness and ability. In both cases, the direct supervisor made the selection, which, when supported by objective, tangible evidence, is entitled to great deference. WOOD COUNTY, WERC CASE 110, No. 47491, MA-7286, (Gallagher, 1993). Further, where the applicants are not deemed to be relatively equal, management is correct in not considering seniority in the selection process. SUN PRAIRIE SCHOOL DISTRICT, WERC CASE 81, No. 46649, MA-7036, (Knudson, 1992). In both cases, the County used objective criteria and its decisions are entitled to deference. The grievances should be denied.

The Union in Reply

The Union declined to submit a reply brief.

The County in Reply

In this case, the contract is silent as to how and by whom the determination of qualifications is to be made, therefore, the decision is a management prerogative, which must be sustained unless it is found to be unreasonable under the fact, capricious, arbitrary or discriminatory. The Union has made no such allegation. The County determined, after an objection review process, that the candidates were not relatively equal and was, therefore permitted to choose the most qualified candidate.

In the case of the Laundry Aide, Ms. Bindl had no attendance occurrences, whereas Ms. Woodruff had four, which is a significant difference in a skilled nursing facility that cares for ill and infirm residents 24 four hours a day and requires state licensure. The record reveals the importance of attendance in processing the large volume of laundry generated in the facility on a daily basis. The Union also concedes that Ms. Bindl had significantly more hours of work experience than Ms. Woodruff, which the County was entitled to consider in evaluating their relative qualifications for the position.

The Union asserts that Section 9.08 which provides for a trial period, somehow supports its theory regarding relative equality. It does not exist, however, to give employees a chance to prove their ability, but rather to give the employer recourse short of discipline if the employee cannot perform to reasonable standards. The Union also notes that employees have in the past been hired off the street for this position, which is true. This, however, has no impact on how the County is to apply the contract language where existing bargaining unit members have posted for a vacant position internally. Although the Union contends that the Laundry Aide position is unskilled, which the County does not concede, nevertheless the issue is not the skill level required, but the qualifications, recent work record and discipline history of the applicants.

As to the Activities Therapy Assistant position, the Union tries to ignore the clear language of the contract and merely rely on seniority. The contract calls for the selection to be based on specific criteria and requires that, where the candidates are not relatively equal, qualifications should take precedence over seniority. The County evaluated the qualifications of the candidates using objective standards based on the contract and established specific guidelines. Again the Union makes the argument that employees have previously been hired "off the street," but this is irrelevant in a bargaining unit posting case. Also, as before, the trial period provided in Section 9.08 applies to all transferred or promoted employees and has no bearing on the selection process.

The Union argues for its own criteria and methodology, but the determination of the process is a management right as long as the County uses a fair and objective process, which it did. The Union's proposal, by contrast, is convoluted and is based on erroneous analysis and data. The tests administered by the County were reasonable and appropriate and the interviews were fairly and consistently conducted and evaluated, although by definition somewhat subjective. In sum, the union's arguments in opposition to the selection methods used are unsupported. The selections were appropriate and the grievances should be denied.

DISCUSSION

In making determinations as to how vacancies are to be filled internally, parties to collective bargaining agreements usually employ one of a variety of formulae, which, to a greater or lesser degree, take into account the candidates' relative seniority and qualifications for the position. Strict seniority clauses require that such determinations be made based on seniority alone, but frequently also provide for trial periods, in the event the chosen employee

proves incapable of performing the work. There are also a variety of modified seniority clauses that are frequently used. Sufficient ability clauses provide that the position must go to the most senior applicant who demonstrates sufficient ability to do the work. Relative ability clauses provide that seniority prevails in selection between candidates of relatively equal qualifications and ability. Hybrid clauses combine comparisons of both seniority and ability.

Section 9.07 of the contract here adopts the relative ability model. The operative language is as follows:

In permanently filling open positions, the Employer *shall* make the appointment on the basis of qualifications, recent work record, discipline imposed within the previous twelve month period, and abilities of those persons applying for said positions...When qualifications, recent work record and abilities are *relatively equal*, selection *shall* be made on the basis of seniority. (emphasis added)

In its brief, the Union suggests that by the inclusion of Section 9.08, which provides for a thirty day trial period, this provision becomes more of a sufficient ability clause in that its purpose is to allow a minimally qualified senior employee to be given an opportunity to prove competence in the position. I disagree. It is a basic precept of contract interpretation that contracts should be read in such a way as to give effect to all their terms, if possible. To say that a mandatory trial period in effect converts a relative ability clause into a sufficient ability clause would render meaningless the criteria listed in Section 9.07 and the clear proviso that seniority only applies when candidates are deemed relatively equal in qualifications and ability, which would be unreasonable. The purpose of Section 9.08 is to permit the County to evaluate a recently transferred or promoted employee and, if they prove incapable of performing the work satisfactorily, to return them to their previous position, nothing more.

The effect of Section 9.07 is to subordinate seniority to the listed selection criteria in filling open positions. Put another way, seniority does not become a consideration unless, after weighing all the other factors, the candidates are considered to be relatively equal in ability and qualifications. There are several implications of this choice of language for these grievances.

In the first place, the provision does not specify how, or by whom, the assessment of qualifications and ability is to be made. Typically, where the contract is silent on this point the making of such determinations is presumed to be the prerogative of management, either under its residual management authority or as an extension of its reserved rights to manage the workplace. Here, the management rights clause contained in Article 3 reserves to management the rights to “manage, direct and control the operation of the workforce,” and to “hire, transfer and promote, and to demote, discipline, and discharge employees for just cause.” Absent other language to the contrary, the right to determine how best to evaluate the relative merits of employees applying for a vacant position may be considered to be subsumed within those powers. It is the Union’s prerogative to challenge a decision it feels was arbitrary, capricious, discriminatory, or based on criteria not reasonably related to the listed job duties.

Second, because the provision applies specifically to filling an open position from within the bargaining unit, whatever process the County uses for filling positions from outside the bargaining unit is immaterial. The collective bargaining agreement does not address County hiring policies outside the bargaining unit or the standards it applies when screening external applicants for job openings, nor are they relevant to the interpretation and application of internal standards that have been collectively bargained.

Third, the criteria listed in Section 9.07 are applicable to all vacant positions, regardless of the skill level required to do the work. In these cases, there was testimony that these are entry level positions that have, in the past, been filled by hiring persons off the street. On this basis, the Union argues that minimally qualified persons are capable of doing these tasks and, therefore, within the boundaries of these job descriptions, all minimally qualified applicants are “relatively equal.” There is some logical merit to this line of argument. The underlying supposition, however, is that all external candidates are viewed as being “relatively equal,” as well, but there is no evidence to support this. Rather, one supposes that where there are multiple external candidates the County also employs some process for choosing between them based on relative ability. Further, the testimony of the Department heads and the incumbents revealed that, whether or not entry level, there is a definite learning curve with each of these positions. Thus, it is quite possible that one employee, based on superior experience or training, might be presumed to have a much shorter orientation period and more threshold competence than another. There is also the fact that some of the contractual criteria have to do not so much with ability as with past job performance, taking into account such factors as attitude, initiative, past discipline and attendance record. These are relevant considerations, but go beyond mere ability to perform the job functions and an inquiry that went no further than whether the applicants had the necessary job skills would not address them.

What remains is a situation where the County developed screening processes for the two positions in question, and in each case promoted someone other than the most senior applicant based on an assessment that the candidates were not relatively equal. The inquiry to be made in each case is whether the County’s selection process properly applied the contractual criteria, was reasonably related to the work to be performed and was conducted in a fair and impartial manner to all applicants. It does not matter if the selection process used was not the best that might have been devised, only whether it adequately and properly served the purpose for which it was designed – to measure the comparative merits of the job applicants without bias or discrimination. If the process meets that standard and the record supports the County’s contention that the candidates were not relatively equal then its determinations will not be disturbed.

Laundry Aide position

The job description for the position of Laundry Aide provides, in pertinent part, as follows:

Purpose of Position

The purpose of positions in this classification is to perform laundry cleaning tasks for the Sauk County Health Care Center.

Essential Duties and Responsibilities

The following duties are normal for this classification. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Sorts linen and residents' personal laundry according to type and weight.
- Loads washing machines and adds detergent. Empties washing machines and loads dryers. Empties dryers and folds and sorts linen and laundry according to type.
- Fills linen carts and stores linen and distributes laundry.

Additional Tasks and Responsibilities

While the following tasks are necessary for the work of the unit, they are not an essential part of the purpose of this position and may also be performed by other unit members.

- Performs housekeeping tasks in laundry area including sweeping and mopping floors, cleaning of washing machines and dryers, dusting carts, cleaning bathroom.

Minimum Training and Experience Required to Perform Essential Job Functions

Ability to read and comprehend general operating manuals, policies and procedures, with previous laundry experience preferred, or any combination of education and experience that provides equivalent knowledge, skills and abilities.

The County employed a process for evaluating the Laundry Aide applicants that involved consideration of the candidates' past job performance, attendance record, discipline record, relevant work experience and a scored interview conducted by the Department Manager, Tom Renzelman, and the Personnel Manager, Katie Pope. Upon completing the process, Renzelman and Pope concluded that Geraldine Bindl had superior qualifications and offered her the position, even though she had eleven months less seniority than the other candidate, Jessica Woodruff.

The interview process involved a meeting between the individual applicants, Renzelman and Pope wherein the applicants were asked eight identical questions, as follows:

1. **Please start by telling us a little bit about yourself.**
2. **What interested you in applying for this position?**
3. **Please summarize your experience and training as they relate to the requirements of this position.**
4. **If you were to be hired, what length of service commitment would you be able to give the Sauk County Health Care Center?**
5. **If I were to speak with your former supervisor, what would they tell me about your work performance? What do you consider to be an acceptable attendance record?**
6. **You have been taught the proper way to do the job by your supervisor. The supervisor is unavailable this day, but a senior employee has been placed in charge to handle any problems that may occur. A washer breaks down and changes in the process are needed to get the work finished. The senior employee directs you to do things different from the “normal” routine. What would you do?**
7. **You are given your schedule for the next 4 weeks. A short time into the schedule, problems develop that require adjustments in staffing. You are asked to switch days or starting time. How would you respond to this?**
8. **Please provide us with a description of how you organize your work day and how you set priorities.**

Renzelman and Pope each had a form on which they wrote the applicants' responses to the questions and gave each answer a score of between 1 and 5, 1 being poor and 5 being exceptional. Renzelman's and Pope's scores for each applicant were then combined and the composite scores of the applicants were compared. Theoretically an applicant could score as low as 16 or as high as 80. Renzelman and Pope gave Bindl scores of 30 and 27, respectively, for a composite score of 57. They gave Woodruff scores of 27 and 26, respectively, for a composite score of 53.

In the area of recent work record, Renzelman and Pope also reviewed and compared Bindl's and Woodruff's most recent performance evaluations. Woodruff's evaluation was completed by the Housekeeping Manager, Ronald Birdd, on August 22, 2003 and Bindl's evaluation was completed by Renzelman on June 20, 2003. The employees were given a

rating of Excelled, Met or Unsatisfactory in each of nine areas – job knowledge, productivity, quality, initiative, use of time, interpersonal skills, attendance, safety and overall rating. Woodruff received a rating of Met in each area. Bindl received a rating of Excelled in the area of attendance and a rating of Met in the eight other areas. In the previous year, Bindl had had perfect attendance, whereas Woodruff was absent two days, tardy one day and left work early on one occasion. Neither employee had any recent discipline.

Finally, in the area of qualifications and abilities, the relevant work experience of the two employees was compared. In that regard, Bindl had accumulated 952.5 hours of direct working experience as a part-time Laundry Aide, whereas Woodruff had accumulated only 25.5 hours working as a Laundry Aide.

At the hearing, Renzelman testified that work experience was a key factor in the decision, in that Bindl had worked in the laundry two days per week for a year and a half and had performed approximately 75% of the duties of a Laundry Aide in that time, whereas Woodruff had only limited experience in the laundry and had only done some folding and delivery of clothes to the floors, which constitutes about 5% of the Laundry Aide duties, so she would have a much steeper learning curve. He indicated that it usually takes months for a new employee to become proficient in the laundry duties, although he acknowledged that Woodruff was a good employee and he had no reason to believe she couldn't learn the job over time. Given the laundry workload and importance of keeping up, Bindl's exemplary attendance record was also indicated to be a factor in her favor. Woodruff conceded that she had only performed limited functions, but felt she could learn the rest within the thirty day trial period.

Ultimately, the Grievant conceded, and the Union does not dispute, that Bindl had vastly greater direct job experience. Rather, the thrust of the Union's argument is that in all other respects the candidates were relatively equal and that job experience is not an important factor because laundry work is not difficult to learn and the thirty day trial period would give Woodruff ample time to prove she was capable. The County, of course, takes the opposite view that relevant work experience, along with a better attendance record, made Bindl significantly more qualified than Woodruff and that the trial period is not an opportunity for an employee to develop or show competence, but is a vehicle for the County to return an employee who is incapable of doing the job to his or her former position without consequence.

While the Union makes several good points, in my view the County gets the better of the argument in this instance. Section 9.07 clearly makes qualifications and recent work record central criteria in a job filling analysis and does not limit them to certain positions, or state that they do not apply to positions considered "entry level." Thus, it is relevant to such an analysis that one candidate had the equivalent of nearly six months of full-time experience as a Laundry Aide, whereas the other had less than a week's worth of full-time experience. This is particularly true if one credits Renzelman's testimony, and there was none to the contrary, that it takes several months for a Laundry Aide to become proficient in the job. Thus, after a thirty-day trial period, Woodruff might well have proved herself competent enough to remain in the position, but still would not be as proficient in the job as Bindl with

her significantly greater experience. While it cannot be disputed that Bindl's perfect attendance record outmatches Woodruff's, her record of two absences along with one tardy and one instance of leaving early was considered acceptable by her supervisor.¹ Nonetheless, when seeking promotion, an employee cannot be surprised if a relatively better or poorer attendance record is a factor weighed in the balance between candidates and, while perhaps not enough to tilt the balance alone, in this case it contributed, along with Bindl's superior experience, to the final determination. The trial period argument would have greater force if sufficient ability was the standard for filling a position, but it is not. I am less persuaded that there was a significant difference in the respective attendance records of the candidates. Where the standard is relative equality I cannot say on this record that the County erred in preferring Bindl over Woodruff without regard to seniority. Grievance denied.

Activities Therapy Assistant position

The job description for the position of Activities Therapy Assistant provides, in pertinent part, as follows:

Purpose of Classification

The purpose of positions in this classification is to promote and maintain residents physical, mental and emotional potential through a variety of individual and group craft, social, and recreational activities at Sauk County Health Care Center.

Essential Duties and Responsibilities

The following duties are normal for this classification. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Guides residents in group and individual activities at appropriate level.
- Instructs residents, volunteers and staff regarding activity tasks. Monitors residents' progress. Assesses appropriate activity for resident's ability.
- Prepares resident progress notes and reports resident performance. Reviews individual care plans with supervisors. Changes care plans regarding activities with supervisor.

¹ The record does indicate the reasons for Woodruff's absences or tardiness, but evidently the the occurrences were not considered transgressions meriting discipline.

- May manage different aspects of facility activities as assigned by supervisor such as resident craft store pricing and selling goods, etc.
- Engages resident in activity.
- Assigns duties to volunteers involved in activities.
- May coordinate resident schedules with other departments and special events. Responsible for residents while off Facility grounds. Escorts residents if required.
- Operates SCHCC bus for outings.
- Schedules residents for activities with supervisor.
- Attends Department meetings and in-service training.
- Plans and prepares for activities such as obtaining materials, setting chairs and tables. Assists clean-up after activity. Develops and adapts activity to resident abilities.

Minimum Training and Experience Required to Perform Essential Job Functions

Previous experience working with the elderly preferred. Education and experience that involves training others in group process, arts and crafts, music and/or recreation preferred. Ability to obtain Wisconsin CDL required within three months of employment.

Eleven employees applied for the position. Of the eleven applicants, seven – Linda Peper, Gloria Schneider, Jennifer Schmitt, Lori French, Barry Beier, Kara Wildenradt and Paula Thurber – all had more seniority than Penny Schrank, who was ultimately selected for the position with a seniority date of April 22, 2003. Linda Peper, the Grievant herein, was the most senior applicant, with a seniority date of February 9, 1987.

The selection process was conducted by the Activity Director, Margaret Burggraf, along with the Personnel Manager, Katie Pope. The evaluation process consisted of a scored interview, a review of the applicants' past job performance, attendance record, discipline record and relevant work experience, and a written test consisting of two questions focusing on assessing and developing a care plan for a hypothetical resident. The interview and test scores from both Burggraf and Pope were combined and the applicants were ranked according to their composite scores. The applicants were also ranked according to their relevant work experience, attendance, past performance evaluation and past discipline. The rankings were then totaled for each applicant, resulting in a composite score, with the lowest score

representing the most qualified candidate overall. The scores ranged from 8 to 25 and Schrank, with 8, had the lowest composite score. The lowest score among the more senior applicants was 13 by Beier. Peper had a composite score of 20.

The County asserts that the selection process was rational and that Schrank's low score justified the County's conclusion that she was the clearly superior candidate, making reference to seniority unnecessary. It further asserts that it had authority to determine the selection process under its management rights and that unless the process is found to be arbitrary, capricious, discriminatory, or not reasonably related to the work, its decision must be sustained. The Union maintains that the County's selection process was seriously flawed, that the scoring process did not accurately reflect the relative qualifications of the applicants and that seniority should have been the determining factor, resulting in Peper being awarded the position.

As with the Laundry Aide position, the interview process involved a meeting between the individual applicants, Burggraf and Pope wherein the applicants were asked eight identical questions, as follows:

- 1. What interested you in applying for this position at the Sauk County Health Care Center?**
- 2. Now that you have had a chance to review the job description are you able to perform the job duties as they are listed in the job description? Please summarize your experience and training as they relate to the requirements of this position.**
- 3. Please explain your education and experience as it relates to training others in a group process, arts and crafts, music and/or recreation.**
- 4. Excellent communication skills are required for this position as ATAs are required to communicate effectively with residents, SCHCC department supervisors, volunteers, nursing, visitors, resident's families, etc. What is your communication style and what skills do you have that help you to effectively communicate?**
- 5. What is your greatest strength, and how would you apply this strength in your role as ATA?**
- 6. What is your greatest area of opportunity? What personal action plan do you have in place to develop in this area?**
- 7. ATAs are responsible for planning and preparing for activities. What process do you use when planning and preparing for an event that you are responsible for? Please be specific.**

- 8. ATAs are required to work closely with their supervisor in adapting resident care plans, managing different aspects of facility activities as assigned as well as keeping close communication and information exchange as it relates to developing and adapting activities according to resident needs. How is your relationship with your current supervisor and what skills/abilities do you have/utilize when communicating with your supervisor?**

Again, Burggraf and Pope each had a form on which they wrote the applicants' responses to the questions and gave each answer a score of between 1 and 5, 1 being poor and 5 being exceptional. The scores for each applicant were then combined for a composite interview score. The applicants also answered two essay questions about assessing and developing a care plan for a resident, which were also scored separately by Burggraf and Pope. The composite test scores were added to the interview scores and the total scores of the applicants were ranked. Theoretically an applicant could score as low as 26 or as high as 130. Schrank ranked first, with a total score of 118. The next highest scores among the more senior applicants were achieved by Thurber and Beier, who each had a score of 86. Peper had a score of 78.

In the area of direct work experience, the applicants were ranked according to the number of hours each had worked as an Activities Therapy Aide in the past. Only three of the applicants had any experience in the position and were ranked 1-3 based on the actual hours worked. The other applicants were ranked equally at 4. Schrank, with 579.75 hours worked, received a 1. The only more senior employee with actual experience was Schneider, with 333.3 hours, who received a 3.

With respect to attendance, the applicants were ranked according to the number of attendance related incidents - defined as sickness, tardy, left early, personal leave, family sickness, or no call/no show - they had in the previous twelve months. Schrank received a 3, with five total incidents. Peper received a 5, with seven total incidents. The only more senior employees ranking higher than Schrank were Schmitt and Schneider, who received a 2, with four total incidents each.

Past job performance was evaluated by comparing the most recent performance evaluations of the applicants, which were all completed by the applicants' supervisors using the same standardized form described above. A rating of Excelled was given a value of 3, Met was given a value of 2 and Unsatisfactory was given a value of 1. Where an applicant was rated between two levels an additional half point was given (i.e., where the form was marked between Excelled and Met, a score of 2.5 was assigned). The applicants were then ranked according to their total scores. In this area, Beier and Louise Kohls, a less senior employee, received a 1, with 20 total points each. Schrank received a 2, with 19 total points. Peper received a 5, with 16 total points.

Finally, the employees were ranked according to discipline received in the previous twelve months. Here, seven of the applicants had no discipline and all received a 1, including Schrank, French, Beier and Schmitt. Peper, with one instance of past discipline, received a 2. As described above, the rankings in all five areas were then consolidated and the applicants were again ranked according to their composite score, with the lowest score being best. Schrank, who with an 8 ranked highest, was awarded the position.

As stated above, the question to be answered is whether the process employed by the County was arbitrary, capricious, not reasonably related to the position, or unfair. If it was not, the County's decision must be sustained. To be arbitrary or capricious, the process, and resulting decision, must be so without basis in fact or reason as to be virtually irrational. To be considered unrelated to the position, the process must rely on factors that are irrelevant to the job description and the contractual criteria. To be unfair, the process must have been designed or conducted in such a way as to put one or more of the applicants at an unacceptable advantage or disadvantage.

There is no question that the process employed by the County was designed to evaluate the contractual criteria of qualifications, recent work record, past discipline and ability. Further, the methods used to evaluate the criteria – interviews, testing, performance evaluations and attendance and disciplinary records – are recognized as legitimate means with which to make such determinations. On its face, the scoring system, with the exception of the interview and test scores, was objective and was based on statistical data rather than the impressions of Burggraf and Pope. The interview and essay scoring were necessarily subjective, but only accounted for 20% of the overall ranking. Finally, there was a wide enough divergence between Schrank and Peper in total score, 8 and 25 respectively, that the County was justified in its conclusion that the candidates were not relatively equal, thus excluding seniority as a determining factor. Indeed, because of the way the rankings were developed, the divergence between Schrank and Beier, the highest ranked more senior employee, who had 13, was wide enough to not constitute relative equality.

There are certainly some aspects of the selection process that raise questions as to whether the numbers truly support all the conclusions for which they form the basis. For instance, the written essay questions concerning resident assessment and care plan preparation were scored separately by both Burggraf and Pope, yet there is no evidence that Pope, the Personnel Manager, has any experience or underlying knowledge in the area of Activities Therapy. It is open to question, therefore, what independent basis she had for evaluating the test answers of the applicants. As it happens, however, Pope's test scores mirrored Burggraf's in each instance, except in the cases of Peper, Beier and Kohls and in those cases she scored the applicants higher than Burggraf did. Thus, whether or not Pope had the necessary knowledge to properly evaluate the essays, it cannot be said that her participation put the more senior employees at a greater disadvantage than if Burggraf had scored the essays alone.

Another problem is that the method of ranking the applicants in different areas according to objective data and then comparing the composite scores achieved by adding the

rankings may tend to give greater weight or lesser weight to the actual underlying data than it deserves. For instance, on the interview/test portion of the process, five applicants had total scores of 87, 86, 86, 84 and 83, a difference of four points between them, and were accordingly ranked 2, 3, 3, 4 and 5, respectively. A difference of three points is significant among eleven employees whose collective scores range between 8 and 25, perhaps more significant than is justified by the closeness of their actual scores. Put another way, one might be inclined to say the numbers 87 and 83 demonstrate relative equality more than do the numbers 2 and 5. Contrariwise, when comparing direct work experience, the applicant who received a 3 had 333.3 hours of direct work experience, whereas all the applicants who received a 4 had none. A comparison of the rankings would lead to a conclusion that all those applicants were relatively equal in that area, yet a comparison of the underlying numbers tells a different story. In another instance, the employees who had no discipline in the previous year received a 1, whereas an applicant who received two final warnings received a 3. Whereas one could conclude that respective scores of 1 and 3 demonstrate relative equality, the underlying facts would suggest otherwise. Ideally, the process should give accurate weight to the data it relies on.

Nevertheless, despite the imperfections noted above, I conclude that the process employed by the County was not arbitrary or capricious. It was a rational process, based on the criteria established by the contract, and was designed to objectively evaluate the applicants' relative abilities to do the Activities Therapy Assistant job, in particular, and their measurable positive and negative characteristics as employees, in general. Further, nothing in the record suggests that the evaluators were biased in any way toward or against any applicant, or that the evaluation of the various criteria was slanted in order to achieve a predetermined result. Finally, despite its imperfections, the process seems to have served its purpose. The successful candidate, Schrank, scored a 1 in the area of Interview/Testing, Direct work experience and Discipline, a 2 in the area of Performance evaluation and a 3 in the area of Attendance. No other applicant scored nearly as well in all areas. Further, despite the misgivings expressed above, the data appear to justify the result. In the Interview/Testing process Schrank, with 118 scored 42 points more than the nearest more senior applicants, Thurber and Beier with 86. In comparing Direct work experience, Schrank had the most with 579.75 hours, whereas only one more senior employee - Schneider with 333.3 hours - had any. She received no discipline in the previous year and so justifiably received a 1. In Performance evaluation, she had 19 total points, whereas French and Beier, who received 1s, had scores of 20. In the area of attendance, she had five incidents in the previous year, whereas the only more senior applicant with a better score, Schneider, had four. Thus, while there may be said to have been relative equality among candidates in the areas of Performance Evaluation, Attendance and Discipline, in the areas of Interview/Testing and Direct work experience Schrank was demonstrably superior, justifying the County's choice. The grievance is denied.

For the reasons set forth above and based upon the record as a whole, I hereby enter the following

AWARD

The County appropriately applied the language of Section 9.07 in filling Laundry Aide and Activities Therapy Assistant positions and did not violate the Collective Bargaining Agreement when it denied Jessica Woodruff, Linda Peper and other affected employees of the Sauk County Health Care Center the job postings based on their seniority.

Dated at Fond du Lac, Wisconsin, this 17th day of November, 2005.

John R. Emery /s/

John R. Emery, Arbitrator

