

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
GREEN BAY AREA PUBLIC SCHOOL DISTRICT

and

**GREEN BAY BOARD OF EDUCATION EMPLOYEES
(CLERICAL) UNION LOCAL 3055B, AFSCME, AFL-CIO**

Case 229
No. 65572
MA-13255

(Level 5 Selection Grievance)

Appearances:

Jack Walker, Attorney at Law, Melli, Walker, Pease & Ruhly, S.C., 10 East Doty Street, Suite 900, Madison, Wisconsin, 53701, appeared on behalf of the School District.

Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 65 Webster Heights Drive, Green Bay, Wisconsin, 54301, appeared on behalf of the Union.

ARBITRATION AWARD

The Green Bay Area Public School District, herein the District, and the Green Bay Board of Education Employees (Clerical) Union Local 3055B, AFSCME, AFL-CIO, herein the Union, are parties to a collective bargaining agreement which was in effect at all relevant times and which provides for the final and binding arbitration of certain disputes. The Union requested and the District agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed by the Union on behalf of its members, herein the Grievants, as to the selection process for certain open positions. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on November 15, 2006 in Green Bay, Wisconsin. A transcript was prepared. A briefing schedule was set and the record was closed on January 13, 2007.

ISSUES

The parties did not stipulate to a statement of the issues. The Union states the issues as:

Did the District violate the collective bargaining agreement in filling the Level 5 positions? If so, what is the appropriate remedy?

The District states the issues as:

Did the District use a process that included testing and other evaluations that were not reasonably related to the positions? If so, what is the remedy?

The undersigned phrases the issue best supported by the record as:

Did the District use a process that violated the collective bargaining agreement by including testing and other evaluations not reasonably related to filling the Level 5 positions? If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

**ARTICLE II
MANAGEMENT RIGHTS**

The Employer, on its own behalf, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the constitutions of the State of Wisconsin and of the United States including the rights:

1. To the executive management and administrative control of the school system and its properties and facilities;
2. To hire all employees and, subject to the provisions of law and this Agreement, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion, and to promote and transfer all such employees;
3. To determine the hours of duty and the assignment of work;
4. To establish new jobs and abolish or change existing jobs; and
5. To manage the work force and determine the number of employees required.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employer's right of appeal.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Employer, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes, Section 111.70, and then only to the extent such specific and express terms are in conformance with the constitution and laws of the State of Wisconsin and the constitution and laws of the United States.

ARTICLE IV
PRACTICES

All existing practices pertaining to hours, working conditions, rules and regulations not specifically mentioned in this Agreement shall continue in force as at present until they are adjusted by mutual agreement between the Employer and the Union. The Employer further agrees to maintain all existing benefits not contained in this Agreement.

. . .

ARTICLE XXIV
JOB POSTINGS

A vacancy shall be defined as a job opening not previously existing in the Table of Organization or a job opening created by the termination, promotion or transfer of existing personnel when the job continues to exist in the Table of Organization.

When new jobs are created or vacancies occur, such jobs shall be posted immediately and a job outline shall be included. The postings shall contain the following information: school or business location, hours of work and rate of pay. All postings will be electronically sent to Union members through email. Such notice shall be posted at least seven (7) workdays before the vacancy is filled. Any employee off work must notify the Human Resources Department to have a copy of the job postings mailed or emailed to the address provided by the employee. Copies of all job postings will be sent to Union Officers.

Positions which are only upgraded shall not be posted. Positions which are upgraded and have the number of days and/or hours changed, or only have the number of days and/or hours changed, except as described in Article XXIV, shall be posted.

. . .

Qualifications being equal, the most senior employee shall be given the opportunity to familiarize h/erself with that job.

Said vacancy shall be filled within five (5) workdays after the applicant is notified. The employee, if not transferred to the new job within that five (5) day period will be paid at the higher of two rates: the job from which the employee will be transferred or the job to which the employee will be transferred. The employer shall notify the Union when the position is filled and who received the position. Said employee shall demonstrate h/er ability to perform the job posted within ten (10) workdays starting with the date of the transfer to the new position and if deemed qualified by the Employer shall be permanently assigned the job.

Should such employee not qualify or should s/he desire to return to h/er former job, s/he should be reassigned to h/er former job without loss of seniority. In such event, the person next in line of seniority who has bid on the job and is qualified shall be given the opportunity to familiarize h/erself with that job. This procedure shall continue until the vacancy is filled.

Qualification Disputes: Differences of opinion as to qualifications shall be resolved through the grievance procedure.

BACKGROUND AND FACTS

In 2005 the District created three new Level 5 positions and changed another position into a new Level 5 position. All four positions were posted in November of 2005. They are: Facility Planning and Related Services Executive Secretary; Executive Secretary to the Executive Director of Accountability and Program Improvement; Textbook Processing Executive Secretary; and, Secretary to the Executive Director of Instruction. Employees in the Union had the opportunity to apply or bid for these positions.

Job Descriptions for each position were developed by the District prior to posting. The District also developed a list of screening questions which were distributed to all applicants, developed a set of interview questions and determined several other skills tests to be given for the various positions. The skills tests included such things as computer programs for Adobe, Microsoft Word, Excel, AutoCad, Zangle and internet searching, as well as the use of some specific pieces of equipment. The District had used various skills-related tests in filling various positions in the past. There had also been a prior pass/fail Level 5 test which some applicants had taken and passed in the past. Applicants who had not taken that particular test were also required to take it. This test is a generic test for typing, grammar, filing and other clerical activities. If passed, the person commonly was allowed a familiarization period to demonstrate their qualifications. The screening questions and interview process had not been used before. The Union was not informed of the addition of those two processes until the same day they began.

The notice of job posting for each of the positions contained many, but not all, of the qualifications and most of the specific responsibilities for each position. These were drawn from the job descriptions, which also contained examples of responsibilities and general responsibilities. The postings used the word "include" when describing the qualifications and specific responsibilities. Each is set out, in relevant part, below:

Facility Planning and Related Services Executive Secretary

Qualifications include a general clerical background with proficiency in typing at the rate of 40 words per minute; knowledge of business English and business mathematics; knowledge of Microsoft Word, Excel and Access (or similar types

of programs) and spreadsheets; knowledge and skills in the operation of CADD (Computer Aided Drafting and Design) or the ability to acquire said skills; ability to take electronic dictation, compose letters and type correspondence, ability to follow directions and to establish and maintain effective working relationships, ability to calmly listen to and assist parents, principals and others along with the ability to function effectively with moderate to minimal direction from a supervisor.

Specific responsibilities include assisting in updating K-12 enrollment projections on an annual basis; assisting in updating the building capacity reports for each school in the district on an annual basis; assisting in preparing a building utilization report for each school in the district on an annual basis; assisting in updating elementary and secondary long-range planning guides; extracts and analyzes data from district's student and planning software systems; assisting in facilitating planning meetings with teachers, principals and district office building staff as needed; assisting in coordination of all intensive school studies; assisting in preparing budgets for all building projects; assisting in coordinating the census process; maintaining a planning document for each school in the district; maintaining records of construction costs and changing orders; assisting in the formulation of the annual budget for the department; scheduling meetings and appointments as well as keeping an up-to-date calendar for the Director; and, performing other job-related tasks as directed by the Director. The position may also be utilized for projects from the office of the Executive Director for Accountability and Program Improvement.

Executive Secretary to the Executive Director of Accountability and Program Improvement Qualifications include a general clerical background with proficiency in typing at the rate of 70 words per minute; knowledge of business English and business mathematics; knowledge of Microsoft Word, Excel and Access (or similar types of programs) and spreadsheets; ability to take electronic dictation, compose letters and type correspondence, ability to follow directions and to establish and maintain effective working relationships, ability to calmly listen to and assist parents, principals and others along with the ability to function effectively with moderate to minimal direction from a supervisor.

Specific responsibilities include assisting in establishing and maintaining schedules, making appointments, scheduling conferences, meetings, workshops, etc.; coordinating the Wisconsin Student Assessment System and the TerraNova tests by checking upon arrival, distributing to the schools and sending to the scoring vendor; preparing charts, graphs, transparencies and other graphics for reports; performing complex electronic record keeping activities; maintaining confidential information about the student data system; designing test booklets and other assessment; coordinating the assessment training sessions and other

workshops compiling data for reports requiring a high degree of analysis and judgment; working with the SPSS software to calculate results and create reports for analysis and also using word processing, presentation, graphic design and data display software; traveling within the District at the direction of the Executive director; extensively uses Microsoft software and query reports; and performing other job-related tasks as directed by the supervisor. This position may also be utilized for projects from the office of the Director of Facility Planning and Related Services.

Textbook Processing Executive Secretary

Qualifications include a general clerical background with proficiency in typing at the rate of 70 words per minute; knowledge of business English and business mathematics; knowledge of Microsoft Word, Excel and Access (or similar types of programs) and spreadsheets; ability to take electronic dictation, compose letters and type correspondence; ability to follow directions and to establish and maintain effective working relationships; ability to calmly listen to and assist staff and others along with the ability to function effectively with moderate to minimal direction from a supervisor.

Specific responsibilities include serving as a liaison between purchasing, curriculum, staff development and technology; serving as the main contact person for textbook processing inquiries and questions; participating in negotiations of curricular adoptions; monitoring textbook costs based on contracts with textbook vendors; preparing and distributing curriculum adoption sheets, new adoption purchase orders, and related budgets; assisting in preparation of textbook materials for staff development offerings associated with new curriculum adoptions and distribution of materials to staff; creating, distributing and receiving textbook catalog orders; analyzing textbook expenditure data; maintaining and managing excess stock and obsolete materials; managing textbook databases; maintaining textbook costs and contacting vendors for updated pricing; updating and revising course description books and registration materials; organizing resource data using spreadsheets and databases, compiling data from many sources; traveling within the district as necessary to complete responsibilities; assisting in completing and filing district and/or state reports; importing data from the student system into textbook management system(s); understanding, using and training others in textbook management system(s); and performing other job-related tasks as directed by the supervisor.

Secretary to the Executive Director of Instruction – Preble/East Quadrants, Executive Director of Instruction – Southwest/West Quadrants and Manager of School and Community Relations qualifications include a general clerical background with proficiency in typing at the rate of 70 words per

minute; knowledge of business English and business mathematics; knowledge of Microsoft Word (or similar word processing) and spreadsheets; ability to interpret and follow written and verbal directions; ability to maintain effective working relationships along with the ability to function effectively with moderate direction from a supervisor.

Specific responsibilities include the following: coordinate School Choice process and respond to inquiries regarding School Choice; assist in developing data for state performance report; take and prepare rough draft of minutes of meetings as required; prepare meeting notices and all support materials; schedule appointments for the Executive Director on Instruction and the Manager of School and Community Relations; type curriculum materials, organize for duplicating and distribute as needed; organize charts using compiled data from many sources; travel within the District at the direction of the Executive Director in Instruction and the Manager of School and Community Relations; assist in filing Federal reports; input data into student system software and generate reports, as requested; ability to understand, use and train others in software applications; assist in the formulation of the annual budget for the department; assist in receiving feedback from various publics through survey, focus groups and forums; assist in the preparation of all District publications (except student publications); assist in publishing internal monthly employee newsletter; assist in implementing all public information initiatives for the District and assist staff members with building-based public information initiatives; assist in preparation and implementation of multi-media programs involving the District; assist in the display of District data compiled for public use; and assist in the maintenance of a District media scrapbook for historical purposes; requires extensive Microsoft Word, spreadsheets and query reports; interact with high level personnel internally and externally requiring a high degree of interpretation and/or explanation and perform other job-related tasks as directed by the supervisor.

The District sent a list of screening questions to applicants by e-mail on November 8, 2005 to be returned by November 14th. This e-mail also stated, among other things, that:

These questions along with an interview and software testing will be used to determine your qualifications related to the position(s) for which you have applied.

You must complete this process in order to be considered for any position.

The interviews were scheduled for November 17th and 18th. The same day the email was sent out there had been a meeting between district management and Union personnel wherein the screening questions, interviews and testing was discussed.

Approximately 50 Union members initially applied for the positions, many seeking more than one of the positions. When it became known to applicants that the screening questions needed to be answered and sent in and that there would be an interview process (in addition to the skills related tests), about half of the applicants, approximately 25, withdrew or declined to go further in the process. The remaining applicants did complete and return the screening questions, attended the interviews and took the various skills related tests.

The screening questions, performance assessments and interview protocols were developed by the District's executive director of accountability and program improvement, Nicholas Dussault, the supervisors of three of the new positions,¹ and the assistant superintendent for human resources. Dussault has an academic and employment background in testing and evaluation, including interview construction, performance test assessment, and matters related to the selection of personnel. He has developed interview protocols and criteria for positions for which he has hired employees. He also is in charge of the District's formal assessment programs such as the WKCE state tests and the MAP test, developing classroom and district-wide assessment, program assessments, long range school improvement plan, accountability plan and other data analysis requested by the Board or superintendent. He is in charge of the technology department and is the chief information officer for the District.

This group went through each of the job descriptions and selected out those characteristics that were in common to the Level 5 positions and looked at those elements of the job description that they felt were important and critical for a Level 5 position. They conceptualized those into 10 traits they felt were essential for the position. They then rechecked the job descriptions to be sure that there were elements in the job description that matched every one of those. There were several in each of the traits they were looking for. They then constructed questions that they thought would be able to measure those particular traits for the interview process and for the screening tests. They went through the job description looking for skills and products that the successful candidates would have to produce, and constructed performance test or tasks for each of those with exemplars of good work. There were seven of those – four in common and three position-specific.

Besides developing 25 interview questions with specific items to listen for in each answer, they also developed a rubric for use in the screenings and interviews. The rubric contained the traits they were concerned with. It is set out as follows:

Assessment of Management Skills – Level 5 Secretarial Test –
Rubric for Use in the Structured Oral Interview Portion of the Assessment

Ability to manage multiple tasks,
Ability to set an annual calendar
Reflectiveness
Analytical Skills

¹ Dussault would be supervising the fourth position.

Ability to compose simple correspondence
 Ability to use new technology with minimal formal training
 Ability to represent information symbolically
 Ability to act autonomously to respond to needs
 Ability to see the gestalt in the areas of accountability and assessment
 Exceptionally strong organizational skills

Below Expectation	Marginally Proficient	Highly Proficient

The Level 5 Screening Questions which they produced and distributed are as follows:

Please provide a brief history of your job responsibilities over the past five (5) years.

1. List your background in using various computer software, e.g., Adobe, AutoCad, Bitech, Microsoft Word, Excel, Access, and Power Point, Oasys, Zangle, etc. Be sure to give a clear description of your level of proficiency in each software package and list any formal training you have had in any of the software you list.
2. Please describe your responsibility in managing significant tasks with minimal supervision from a supervisor.
3. Describe your work on compiling data for presentation in longer reports (over 25 pages).
4. Describe any background you have in understanding statistical methods.
5. Describe in detail your experience in developing graphs, complex tables, data displays or electronic or non-electronic presentations.
6. List the types of confidential information you have had access to in your previous positions.
7. Describe, in detail, your experiences in entering and querying databases (e.g., Zangle, Bitech, Oasys, etc.)
8. Describe your experiences in interpreting rules, policies, state or federal regulations to individuals outside of the office.
9. Describe your experiences in authoring procedures, checklists, timelines, or other management documents for use with recurring tasks.
10. Describe your experiences of doing research on the Internet.
11. Describe some successful tactics you have utilized in dealing with a difficult or confrontational person.
12. Describe your experience in tracking budgetary or project expenditures and analyzing budget-to-actual costs.
13. Describe your experience with managing construction documents (building plans and specifications).

When the screening questions were returned by the approximately 25 people they were used to give the interview group some background data on each of the candidates. The answers were scored by each evaluator on a three point scale based on the rubrics. The higher the score, the higher the ranking. No one was excluded from the oral interviews based upon their responses to the screening questions. Each candidate was given a 45 minute oral interview. The interview group was the same, but one member did not participate in all the interviews.

The interview questions were grouped under various headings and each question contained one or more subjects that the interviewers were to listen for. The listen for components were designed to be an answer that was being looked for so that there was some standard or expectation. The questions are as follows:

Organizational skills to manage multiple tasks and act autonomously to respond to needs

1. This position requires that you deal with a large variety of duties and frequent interruptions. Tell us about the work experience you've had that contained these elements. How do you organize and prioritize work in that kind of environment?

(Listen for: according to deadlines; importance; seeks clarification from Supervisor when unsure)

2. Sometimes it can be difficult to understand what your supervisor expects of you. Describe the work assignment you were given that was most unclear or difficult to follow. How did you handle the situation?

(Listen for: Seeks clarification from Supervisor)

3. This position requires a commitment of time and energy with minimal supervision. Describe your initiative in getting the job done in a timely and professional manner.

(Listen for: Prioritize; stays on task; communicates with Supervisor if additional time is needed; manages time; and support)

4. Give us your best example of deadline pressure you've faced in the last two months. What did you do, etc.?

(Listen for: Made sure job gets done using strategies in #3)

Sets an annual calendar

5. As a secretary, what responsibility do you have to help your supervisor stay on top of projects and special assignments?

(Listen for: Understands nature of Supervisor's job; plans ahead, is responsible, helps supervisor succeed)

6. Describe any policies or procedures that you have written.
(Listen for: Has written policies or procedures)

Self-Management

7. In some situations, an error in judgment may have adverse effects on students and the District. Describe the decision you made that you most wish you could take back
(Listen for: Clearly describes; is reflective and learns from mistakes)
8. If you were assigned a task that was something you did not like to do, how would you handle the assignment?
(Listen for: The same as any other task – get it done or do it first)

Analytical Skills

9. Describe the time you felt you were most resourceful in solving a work-related problem or coming up with an improvement.
(Listen for: Clearly describes evidence of problem-solving)

Composes simple correspondence

10. Describe your experience in composing routine and complex correspondence.
(Listen for: Describes experience in complex correspondence)
11. Describe your experience in proofreading and editing the work of others.
(Listen for: Describes – lengthy and complex)

Uses new technology with minimal formal training

12. Describe your knowledge of and experience with the following computer software programs, and how you acquired that knowledge:
Microsoft Word:
Microsoft Excel:
Microsoft PowerPoint:

Represents information symbolically

13. Describe your knowledge of and experience with the following computer software programs:
(Listen for: Has used Visio or Inspiration software)
Microsoft Visio:

14. Describe your experience in translating data into graphical representation, e.g. graphs, charts, etc.

(Listen for: Can describe)

Sees the “big picture” of the organization

15. Can you describe for me the difference between public, private and confidential information?

(Listen for: Understands differences and can describe)

16. What do you expect of your supervisor?

(Listen for: Wants Supervisor to tell purpose, why doing, give reason, offer support)

Communication and conflict resolution

17. Do you think it is more important to remain open-minded or be final and confident with your decisions? Why?

(Listen for: Confident w/decision – open-minded when presented with additional information)

18. Describe how you would handle a co-worker that does not put forth the same amount of effort and energy as you are putting forth.

(Listen for: Tactfully inquire as to deadlines, etc., and asks for help and gives help)

19. As a Secretary, you will often be working cooperatively as part of a team. Tell us about a time you feel you were most able to make a significant contribution to the success of a team or group’s efforts.

(Listen for: Clearly describes how worked as part of a team and understands contribution of self and others. Listen for ‘we’ vs. ‘I’)

20. Tell us about the worst disagreement you have had with a co-worker, boss, or someone else at work.

(Listen for: Listens; see other points of view; compromises; deals respectfully; looks for solution)

21. Tell us how you react to criticism.

(Listen for: Positively; puts self in other’s shoes; reflects; develops action plan)

22. Tell us about the most irate person you have dealt with and describe the situation.

(Listen for: Calming; listening; seeking solution)

23. Have you had problems trying to get others to accept your ideas or point of view? Give us an example.
(Listen for: Puts self in other's shoes; reflects; is persuasive; accepts; see big picture; support decision)

General

24. Which of your previous jobs did you enjoy the least and why?
(Listen for: No learning; no chance to grow; not work with people; little or no variety)
25. Describe your best work-related achievement and how you accomplished it.
(Listen for: Just opposite of #24)

During the interview process each interviewer recorded their observation as to each question separately. This part of the evaluation was based upon the criteria and the judgment of the evaluator. An interview total score was based on the sum of the individual candidate rankings by individual interviewees. The lower the score, the higher the ranking. An interview average was calculated as the average of the interview total divided by the number of interviewers.

After the interview process the applicants took the four common tests and the three position related tests if applicable. These tests were administered and scored by District personnel who were considered expert in each particular software package. These tests included an Adobe/survey test for the executive secretary to the director of instruction, a CAD test for the position involving facilities planning and, a textbook selection computer program for the textbook processing executive secretary.

After the interviews and tests were conducted the supervisors got together and compiled, in written form, all of the data from all of the elements of the process and made a determination after ranking the scores to see which ones were deemed to be qualified and substantially equal in those qualifications – substantially equally qualified ahead of and more qualified than the others. There was no total score for each employee. The candidates were ranked-ordered based on the measurement devices used in the selection process. All of the observations and assessments were rated equally in order to provide, in the view of the District, the broadest possible evidence for qualifications. The District took each of the measures and ranked the candidates on those against the other applicants based on scores, and then identified those candidates who were generally on the top of the rankings by position. These were the substantially equally qualified applicants in the District's view. Wilson then took that list of names and offered the positions to the most senior person on that list. For three of the four positions, there were more senior applicants than those on the substantially

equally qualified list who were offered the positions. One of the persons selected later declined to remain in the position after a short time, and the next senior person on the substantially equally qualified list was offered the position. The fourth position was awarded to the most senior, who had been the incumbent in the position before it was changed.

The District did not consider employee evaluations, attendance records, prior discipline or letters of commendation that were part of employee personnel files. After the positions were offered Wilson had a meeting with some of the Union members wherein he made statements to the effect that “the first group of applicants that were substantially equal”, “everyone that was interviewed or tested was qualified to do the job” and, “if any of the jobs are turned down we will look at the next group of substantially equal applicants”.

On December 7, 2005 the Union filed a grievance over the process. In July, 2006 the Union requested information from the District which was supplied by the District in both the form the District used in making the selections and also in additional formats requested by the Union. There were some errors made by the District in filling out the data in the additional formats requested by the Union. The grievances having been denied by the District at the various stages of the process, this arbitration followed. Further matters appear as in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that the District violated Article XXIV of the agreement by changing the process of determining qualifications. Article XXIV contains a “relative ability” modified seniority clause. Job posting decisions are expressly restricted by provisions of the agreement. When the qualifications of the bidders are “relatively” equal, the most senior applicant must be awarded the posting. Citing arbitral authority, the Union argues that a junior employee’s ability and qualifications must be substantially above those of the senior employee’s ability and qualifications, and the junior applicant “head and shoulders” above the more senior to be awarded the posting. Citing authority, the Union argues that the district must prove the junior employee has greater ability than a senior employee by explicit and convincing evidence showing a rational and objective basis for the comparison of qualifications. This should consider work records and fair appraisals by direct supervisors based on factual evidence.

The Union contends the screening scores are not consistent, are subjective and irrational. The scores varied wildly from one manager to another and the questions were not specific to particular positions. We can see the variation in the screening scores here, up to 9.5 points. Citing arbitral authority, when determining relative ability in a modified seniority clause, an unfair and irrational variation of a few points can mean the difference between being

awarded the position and not. The validity of the scores from the screening questionnaires here must be called into question. Goals of consistency and objectivity were not met. The results do not and cannot demonstrate that junior applicants are head and shoulders above the more senior applicants.

The Union argues the interview rankings do not demonstrate which employees are more qualified than others. The interview total and interview average have two problems. Interviewers did not score, but ranked applicants. This says nothing about their qualifications or ability relative to one another. There is no way to know if one is head and shoulders above the others. Scoring would provide this. The second problem is the District incorrectly determined totals with faulty math resulting in incorrect totals in Exhibit Union 6, p. 3, where the District only added correctly in 2 out of 15 applicants. This is unacceptable. There is no total score. There is nothing more arbitrary and irrational than faulty math. It is impossible to determine whether a junior is head and shoulders above a senior when rank order results are wrong.

The Union also argues the awarding of positions was unfair and completely subjective. The District did not award positions on the basis of tests, screenings and interviews. The positions were awarded based on the discussion and consensus of managers who were not bound to make decisions based on scores, but on their own interpretations of data. They were free to ignore the data. The decision was in the subjective hands of managers and there is no way to demonstrate each portion of the evaluation process was weighed equally. The arguable objective tests (Word, Excel, etc.) may have been totally disregarded. There is no way to know what weight any portion of the process was given without a total final score. This arbitrary nature is demonstrated in the Stuebs case. Although more senior than some others, she was put into a second, or lower tier. Some of her scores were higher and some lower than her junior, Mueller, who was in a higher tier. The District decided Mueller was head and shoulders above Stuebs in qualifications and ability.

The Union further argues that senior employees are entitled to demonstrate their qualifications during a familiarization period. Citing arbitral precedent that an employee cannot be required to demonstrate proficiency as a condition of getting the familiarization period, the District has operated under the scenario with the familiarization period for years. As testified to, previously, an applicant was given a clerical test and received a score. The most senior person with the highest score had the opportunity to familiarize themselves with the job. The prior testing process for clerical employees had been used for twenty or more years. There is a strong presumption the most senior employee will have the opportunity to prove their qualifications during a familiarization period. The changes here screened out qualified employees. Wilson said everyone interviewed and tested was qualified to do the job. More senior employees were passed over without the opportunity to demonstrate they were qualified as they had been able to in the past.

The Union also argues that the District made this change unilaterally and did not give notice to the Union. In the past the posting process consisted of such things as typing tests, clerical tests, grammar tests, etc. This testing of the applications of the job evolved from typing to word processing to computer programs, such as WordPerfect and Word. This process had been in place for over twenty years. In 2005 the District unilaterally decided to change the process by adding a screening questionnaire and interview. The District also altered the way it scored the components of the process and how it awarded the posting. Over twenty years a practice has developed regarding how qualifications are determined for postings. These practices are incorporated into the agreement in Article IV. The Union did not agree to change this practice. The District has not conveyed the rationale for their change. The prior method was the subject of arbitration which had factors viewed favorably in the practice. The Union did not have the opportunity to consent, to give feedback or even to react before the changes were put in place. The neglect to inform the Union of the changes it was contemplating demonstrates the arbitrary nature of these changes.

The Union requests the District be ordered to repost the positions while discontinuing those processes offensive to the collective bargaining agreement.

District

In summary, the District argues that the authority to determine qualifications and promote employees is reserved to the District, limited only by the express terms of the agreement. Qualifications being equal, the senior employee will be given the job posted. There is no basis to treat oral interviews as improper and they cannot be presumed improper, citing arbitral authority. Here the AFSCME grievance adopts the view that the proper issue in such a case is whether the tests adopted are reasonably related to the jobs. The only testimony or evidence is that all the tests, including the interviews and screening questions were related to the job. The process was structured, organized and carefully focused on the job descriptions. There is no evidence to suggest the interviewers did not have competence in personnel selection. With a group of seven administrators no person could have been blackballed by arbitrarily high or low marks which are there for all to see. The process dilutes a worst case scenario.

The District argues that the judgments made are rational conclusions based upon the numbers. Where there is room for debate the interviewers had the debate, with no basis for substituting their judgment the administrators are responsible under the contract and law to make the judgment. The Union did not prove that anyone was qualified. The QWERT test did not test for any of the important skills and abilities required by the jobs. Wilson's statements do not bind the District, and were merely conciliatory. The District did prove the groups described in the exhibits were substantially more qualified. The Matzke case validates the process and its application.

The District also argues there can be no finding of a binding agreed past practice which might limit testing to use of the QWERT test as a qualifier. The contract says “qualifications being equal”, not “level five test being passed”. There is no evidence the District ever agreed to the proposed past practice as a past practice. There has been a wide variety of variances from the proposed practice and other measurements used. There are changes in circumstances surrounding the proposed past practice with new or modified jobs heavy with management skills, and the level five test does not even test for word processing systems.

The District further argues that all tests are ranked. To state that ranking is improper for any test is to state that tests are improper, except as pass fail tests. There is no difference between an oral test and a written test for this purpose. With multiple interviewers the result of the numbers when combined can be that there are people who are mathematically equal, though individual interviewers did not rank any two people equally. Also, the interview and screening scores were viewed in groups, not mathematical equivalents. Groups with different but close mathematical scores were put in the same pool as substantially equal as to that test.

The District contends it should not be necessary for an employer to adduce evidence to show the importance to all the interests of having the best person, or at least the person who is part of a group which is substantially the best, in the job. Here it was important that there be a shorter learning curve, choose the most qualified candidates, and get immediate performance, citing the \$300,000.00 text book savings in the face of a revenue shortfall. The contract leaves the judgment calls where they should be – in the hands of employer agents responsible to the public. The process was thorough, relevant, rational and not shown to suffer from any bias.

Union Reply

In Summary, the Union replies that it does not object to any of the computer program tests. Rather, at issue are the new screening and interview portions of the process. Those changes instituted by the District for determining the qualifications violated Article XXIV of the agreement. The Union faults the manner that the screenings were scored, that the interviews were ranked rather than scored, and the interview totals were in most instances added incorrectly. There was no notice to the Union of this change and no opportunity to demonstrate ability during a familiarization period.

The Union argues that tests that are only ranked do not differentiate between the abilities or qualifications of applicants. A 1 and a 20 ranking could be substantially equal. Without a score there is no way to tell. Combining the ranks of a given applicant does not demonstrate their abilities or qualifications compared to another applicant. Groups of applicants are still determined by pure ranking, and offer no insight into the relative qualifications of the applicants.

The Union argues that the issue it offered at arbitration is appropriate. During the grievance process it made the District aware of its objections to the changes in the determination of qualifications. There is no evidence that the District was unaware of the issues raised by the Union and no objection was raised at the hearing. The District violated Article XXIV when it changed the manner of filling the Level 5 positions. Due to the large number of employees who withdrew from the evaluation process because of perceived unfairness, as well as the District's inability to legitimately determine the relative qualifications of the applicants, the only fair remedy is to repost the positions.

District Reply

In summary, the District replies that the arbitral authority cited by the Union concerned a case where the posting was for a full time version of a job the applicants were doing only part time, the supervisor had only worked with one applicant and asked questions not related to the job description. Here, there is ample evidence based on tests and interviews tied to the job descriptions that the substantially equal groups were better qualified than the others. And here, there is no close connection between the other jobs and the new positions to assess past performance.

The District argues that rather than the scoring varying wildly from one manager to another, they are remarkably consistent. The same is true for other marks of other applicants. The screening is for assessment based upon job descriptions. Each person would emphasize what stood out on their own job description. The point is to judge comparative qualifications, not minimal or absolute qualifications. The District argues that arbitral authority concludes that the test is whether the process is arbitrary or capricious, not whether it is perfect. Here, raw numbers were subject to rational assessment and groupings based on job related criteria. That is what the equal qualifications clause calls for. The screening and interview questions were cross checked with the job descriptions.

The District also replies that rank ordering does more heavily assess relative ability, as compared to scoring. The District does not agree with the formula of "head and shoulders", but rank can and does here demonstrate that. With multiple interviewers it was possible for people to be ranked equally or substantially equally. The Union's assertion that interview totals are incorrect in 13 of 15 cases is not correct. There is one error in the gross score of one person, Galvin. The interview score incorrectly listed was a benefit to that person because the correct, higher, score would have ranked her lower. The mistake did not affect the outcome. An error in the Matzke calculation had no effect on anyone because she was included in the substantially equal group for the interview portion. With the correct calculation she would still have been in the group. Neither error affected the outcome.

The District argues there could not have been a final numerical score in the process because the scoring for various components is on different systems. There has to be judgment made to correlate the systems. The test to review that correlation should be whether there is a showing that it was arbitrary or biased. There is nothing arbitrary in human judgment. Evaluations from past positions, as argued for by the Union, and arbitral authority ratifies the

use of human judgment. There is no evidence that the interviewers ignored the data. As to the Stuebs case, there is nothing arbitrary on its merits about the ultimate choice of Mueller over Stuebs. Stueb's Microsoft skills are clearly outweighed by Mueller's interview and CAD skills.

The District also argues that cited arbitral authority permits scrutiny into relative qualifications and rejects a pass-fail test bar. The contract permits a determination of equal qualifications with that person allowed to get a ten-day chance to actually qualify in and become familiar with the job. The prior award was construing a 30-day familiarization period where neither applicant was more qualified, so the senior got the chance.

The District further argues that there is no past practice which binds it here. Arbitral authority supports the use of tests, and tests have been added in the last 20 years. These are new positions with different qualifications. Mere longevity does not establish an agreement to do a certain thing, and nothing else. Following arbitral authority, to inquire into all major areas of the job description the District must, in these cases of managerial thinking skills, use screening questions and interviews keyed to the job descriptions.

The District continues that the question of notice is therefore immaterial. The Union was given notice on the day of the procedure and did not object or request more time or information then. The testimony does not address whether notice had ever been given for any other tests ever used. Other arbitration awards to the contrary being issued after the posting and unknown at the time of testing, the District has no requirement to give notice in this case. Notice is not within the arbitrator's jurisdiction or within the scope of the pleadings or issue tried. No contract provision is cited. There was no additional notice as to the CAD or Adobe tests, to which the Union apparently or impliedly does not object. This distinction converts arbitration into a game of gotcha. The Union is not seeking a prospective remedy as was awarded in cited arbitral precedent. The District disagrees with any such requirement of notice, there being no law, policy or contract requiring notice of the exercise of a contract right. And the notice given in fact by the District was sufficient and reasonable. There is no evidence whether the District articulated the value of the changes before implementing them. Not articulating a value before the test being evidence that it had no value, is illogical.

The District questions what the Union's remedy request is, and requests the grievance be dismissed.

DISCUSSION

In this case the District created three new Level 5 positions and modified another position making it a Level 5 position. Screening questions and an interview with prepared interview questions and "listen fors" were used by the District for the first time in conjunction with the posting process. Additional computer program tests were also employed by the

District. Over the years various tests have been added by the District in conjunction with the posting process. In this case the Union is not objecting to the use of the seven computer program tests that were variously administered as part of the process in determining qualifications. The Union does object to the use of the screening questions, the interview (with its questions) and the process used by the District to determine from the screenings, interviews and computer program tests which applicants had equal qualifications from which the most senior would be given the opportunity to familiarize herself with the job to demonstrate her ability to perform the job. The process here resulted in most, if not all, of the positions being offered to employees who were not the most senior of the applicants. However, the positions were offered to the most senior of those applicants the District found to be substantially equally qualified above the other applicants.

This is not the first time the parties have arbitrated over the qualifications and posting provisions of their contract.² Since at least 1982 the parties have disagreed over the application of the management rights, past practices and new jobs – vacancies provisions of their agreements in their respective various forms over the years when it comes to the determination of qualifications. Other than a shortening of the familiarization period in the new jobs – vacancies/job postings articles, and some changes in phraseology, the essential relevant provisions have remained the same.

Now, as in the past, the management rights in Article II retains in the employer the right:

2. To hire all employees and, subject to the provisions of law and this Agreement, to determine their qualifications and the conditions for their continued employment.

As to those qualifications, the job postings in Article XXIV provide for what is commonly recognized as a modified seniority clause.³ It states:

Qualifications being equal, the most senior employee shall be given the opportunity to familiarize h/herself with that job.

. . .

² See below.

³ How Arbitration Works, *Elkouri & Elkouri*, 6th Ed. pp. 873 – 876. Modified seniority clauses are sometimes grouped into those termed “relative ability”, “sufficient ability” or a “hybrid” clause. Here, Article XXIV states: Qualifications being equal, the most senior employee shall be given the opportunity to familiarize h/herself with that job. This puts the qualifications first, then a determination if the qualifications are equal, followed by applying seniority to those equally qualified. It is a relative ability clause. It does not read to provide that any qualified employee is entitled to the familiarization period based upon seniority, a sufficient ability clause. Neither does it read merely for consideration of seniority and ability, a hybrid clause.

. . . Said employee shall demonstrate h/er ability to perform the job posted within ten (10) workdays starting with the date of the transfer to the new position and if deemed qualified by the Employer shall be permanently assigned to the job.

Any practices applicable to the job posting procedure would be generally memorialized in Article IV, which provides:

All existing practices pertaining to hours, working conditions, rules and regulations not specifically mentioned in this Agreement shall continue in force as at present until they are adjusted by mutual agreement between the Employer and the Union. . . .

The Union does not contest the District's right to determine the qualifications for the positions. The Union does contest the way the District determined those qualifications by using screening and interview questions, compounded by mathematical calculation errors, and also contends the District violated the past practice provisions of the agreement by adding the screening questions and interviews without notice or bargaining. The District maintains it determined the qualifications in an appropriate manner within its management rights, which include using screening questions, interviews tied to the new position descriptions and groupings based on that data in the exercise of its sound judgment. It denies there was any binding past practice that prevents its use of these measures or that any notice of their use was required.

The most basic question to first answer is whether the District has the right to use the screening and interview questions in the process of determining qualifications and if any applicants' qualifications were equal. It is first noted that the agreement does not prohibit the District from using screening questions, interviews or any other manners in determining qualifications. The agreement does not specify how qualifications are to be determined other than retaining that right in the District, subject to the provisions of the agreement. Again, the agreement does not limit the District in the determination of qualifications. Once qualified, the agreement does then apply the modified seniority clause and familiarization period in then filling the position from among equally qualified employees.

The determination of those qualifications in view of a modified seniority clause is a determination of fitness and ability to do the job along with seniority. The contract here clearly gives the District the right to determine those qualifications. More narrowly, the inquiry requires examining how an applicant's fitness and ability makes them qualified for the job, or how well their fitness and ability reflect the qualifications for the job. This is discussed, generally, in How Arbitration Works, *Elkouri & Elkouri*, 6th Ed. p. 882:

The determination of ability is by no means susceptible to any set formula applicable to any and all circumstances. The precise factors or criteria applicable in one set of circumstances involving one contract may not be proper or sufficient in another situation under another contract. Nevertheless, reported

arbitration awards show that, in the absence of contract provision designating the method to be used or the factors to be considered in determining ability, management has been permitted broad discretion to determine ability so long as the method used is fair and nondiscriminatory. Thus, employers have properly employed written or oral performance or aptitude tests and trial periods on the job. They also properly have relied on merit rating plans and opinions of supervision. Likewise, they properly have considered production, attendance, or disciplinary records and the relative education, experience, and physical fitness of the candidates.

(citations omitted)

The District is not bound by contract, as noted above, to use any particular method in selecting qualifications or determining fitness and ability in view of those qualifications beyond application of seniority to those equally qualified. Neither is it bound to use all of the above cited methods, even though the Union suggests it should consider prior evaluations from supervisors. As a general matter, an employer's use of an interview is not unusual in accessing qualifications. As stated in *Elkouri & Elkouri*:

Interview results, while not always determinative, may have a bearing on fitness and ability if they are fair and related to the job performance. Therefore, and employer may, under a relative ability clause, properly select a junior employee with a few months' experience over a senior employee with several years of experience on the basis of superior performance during an interview.

An employer's promotion of a junior employee was upheld, even though the labor agreement listed job performance as a criterion of relative ability, because two interviewers rated the grieving senior employee less qualified than the junior employee in 8 out of 10 comparative categories. Moreover, where a junior employee and the grievant had the same technical skills, but the junior employee's answers to interview questions revealed an aptitude for handling the supervisory responsibilities of the job, the company was found to have been justified in awarding the job to the junior employee.

An interview, however, must be validly structured and fairly conducted. If the evaluation is deemed to be too subjective, or the questions put to the candidates too far removed from the nature of the duties required, the results may not be relied on. It is questionable whether a company may utilize the interview as the sole criterion for awarding the job.

How Arbitration Works, *Elkouri & Elkouri*, 6th Ed. pp. 920 – 921. (Citations omitted).

Thus, as a general matter there is nothing inherently wrong or prohibitive with the District having used an interview as part of the assessment of qualifications. The screening questionnaire would be the same, especially as it has been reviewed by the District using the same rubric developed from the position descriptions and used in conjunction with both screening questions and the interviews.

The screening questions and interview questions, including the listen fors, were fair and related to the positions. They were designed with the use of relevant experience, particularly that of Dussault. The rubric showing the ten traits were derived directly from the position descriptions for the job. The questions in the screening and interviews were job related and reflected, for the most part, the rubrics and traits from the job descriptions. No inappropriate questions were involved. The question having to do with a decision you made that you most wish you could take back, was in the context of the work environment, and was preceded by a contextual statement of fact which referenced an error in judgment may have adverse effects on students and the District. There has been no persuasive argument that, in this context, the question was improper. Every applicant was given the same screening and interview questions. There was a scoring system used that was applied to each question.

The Union raises a concern that the scoring of the screening questions, interviews and overall groupings is subjective. It is, in that it is an exercise of judgment. That does not make it automatically wrong, erroneous or unreliable. It does not demonstrate, in and of itself, that anyone black balled any applicant or tried to choose one over another. Certainly there has been no evidence presented in this case which shows or even suggests that happened. Nothing in the record implies that happened. The questions were scored by supervisory level staff people who have responsibility for making such decisions. They were guided by the rubrics and listen fors, and thus it was not totally subjective. The use of multiple people to score the questions and use an average further limits the ability or effect of any bias, had there been any - conscious or otherwise. And, as the District points out, the use of judgment would also be involved if the prior performance evaluations had been considered as suggested by the Union. The same points apply in the way the various computer program test results, interviews and screening components were ultimately grouped both by test and by overall ranking. The Management Rights Clause does recognize that the District has the right, in conformance with the agreement, to use judgment and discretion.

Both parties have cited some of the prior arbitration awards which have considered provisions for qualifications, postings, the application of seniority and the selection process in predecessor agreements between these parties which are essentially the same as those here. In JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, ET. AL, (HOULIHAN, 8/26/82), the District posted a position which two then current employees applied for. They were required to take a shorthand/typing test, and both did not pass. The District did not allow either a familiarization period in the position to demonstrate their qualifications. Instead, the District reposted the position and an outside candidate who took and passed the same test was given the

job. In deciding that the District, in those circumstances, breached the agreement by not allowing either the senior, or more qualified, employee the familiarization period from the first posting, Arbitrator Houlihan found that:

. . . Article XXIV does entitle the senior applicant to a trial period “qualifications being equal”. Thus written, the clause requires, or at least permits, that the District make a determination as to the relative qualifications of promotion applicants.

I believe that the District is entitled to utilize a valid, properly administered test to draw the qualification distinctions necessary to administer the Article. I do not agree with the Union contention that Article IV preserves a benefit of promotion without testing. Article XXIV specifically authorizes the District to draw relative distinctions between the qualifications of competing promotional candidates. The drawing of such distinctions is a task reserved to the District. The use of a proper test simply rationalizes the existent decision making process.

Arbitrator Houlihan found that Article XXIV could not be read to screen out internal candidates from the familiarization period because they were employees. The District was not authorized to establish an absolute qualification or standard to be demonstrated in order to be entitled to the familiarization period. In this sense, the case is not controlling here, because for these Level 5 positions all applicants were allowed to go through the process and the familiarization period, and all positions went to current District employees - as opposed to outside applicants. What is instructive from the Houlihan reasoning is that the District is entitled to draw a qualification distinction in order to determine whether there exists a qualification override to a seniority based right to the familiarization period. Once the senior, or more qualified employee applicant, is identified that employee is entitled to the familiarization period. Such an employee cannot be required to demonstrate proficiency as a condition of getting the familiarization period. Here, the Union does not argue that the District cannot draw a qualification distinction, nor does it argue that there may exist a qualification “override” to seniority. The Union argues that the screening questionnaire and interviews, along with the ranking of each test result and overall rankings, was improper in the determination of the qualifications. As shown above, the Houlihan award would allow for valid, properly administered tests to draw qualification distinctions. The award does not read the Articles to prohibit questionnaires, interviews or relative rankings in that process. If anything, by analogy, the use of a proper questionnaire, interview and ranking process would, also, simply rationalize further the existent decision making process which is reserved to the District.

The Parties both argue for the application of GREEN BAY AREA PUBLIC SCHOOLS, No. 33265 (HONEYMAN, 5/29/84). In arbitrator Honeyman’s award, one of the issues between these Parties had to do with the effect of an unsigned application. That part of the award has no bearing here. Another issue in the Honeyman award was the failure of the District to test

or significantly inquire into job characteristics other than familiarity with a particular accounting system in awarding the position. Arbitrator Honeyman found that the District's heavy reliance on a single attribute given a two page job description with a large number of qualifications was not a reasonable exercise of permissible discretion in determining which employees among the applicants were qualified for the position. Here by contrast, the interviews and screening questionnaires were given equal weight with the other test results. There was no single attribute considered or valued more than others. Although certain job specific tests were given to applicants for those particular jobs, all test results were weighed with the other results. There has been no argument that the inquiry into relative qualifications was too narrow, as in the Honeyman award where too much weight was placed on a single factor. This part of the Honeyman award does not fault the use of questionnaires, interviews, rubrics, or relative rankings by combining a number of results. Those matters were not present in the case. The Honeyman award did uphold the District's use of objective testing to fill a position, stating:

. . . While it is undoubtedly not perfect, the use of a standardized, objective test at least represents a step in the direction of fair consideration of all applicants' qualifications. . . .

While the award found approbation with the use of objective testing, it did not specifically fault the use of screening questions, interviews or relative rankings on other than pure mathematical scoring.⁴ Those things simply were not part of the issue.

It is interesting to note that in this part of the award, the Union had objected to the use of an objective test because it interfered with the broad application of the seniority principle. And the District argued in favor of objective testing because it refused to be bound by subjective opinions of a number of different supervisors to employee qualities which cannot easily be quantified or standardized. Although it may be difficult to reconcile the differing arguments of the parties between these two cases, what a party may have argued in the past on a case does not bind it to that position in the future. More importantly, the decision on how to determine qualifications, consistent with the agreement, is with the District. It need not consider subjective opinions. But in this case it used a rubric and listen for to guide the use of judgment of the supervisors, averaged their scores, and compared those rankings with the results of other more objective test results. This was also a step in the direction of fair consideration of all applicants' qualifications.

Although not cited by either Party, there is at least one other arbitration award that concerned the determination of qualifications and application of the posting process in an agreement between the District and AFSCME Local 3055. Although it concerned a different

⁴ Although use of such scoring would arguably be a way to read the award in view of the approval of giving the trial period to the first employee to score an average of 80% in the testing given in turn by seniority. But that would be reading too much into the award, which, on this point, merely approved the use of objective tests. It did not exclude anything containing some subjectivity or requiring the use of judgment by the District.

bargaining unit, the terms of the agreement were essentially the same⁵ in GREEN BAY AREA PUBLIC SCHOOL DISTRICT, NO.33412, (JONES, 9/23/85), as in the Houlihan and Honeyman awards. There the issue was simply whether the District violated the agreement by using tests to determine the qualifications of bidders for two vacant engineer positions. Several tests, which the parties stipulated were valid and reliable, were given to the six most senior ranked employees of 15 applicants. Two, who were the most senior, passed the tests and were awarded the positions. Prior to that the District had never tested in that bargaining unit to determine qualifications, relying instead on the personal judgment of the Director of Building and Grounds to determine who was to be promoted. The Director had always promoted the most senior applicant. Arbitrator Jones ruled that the Management Rights clause and Job Posting provisions authorized the District to use reasonable and normally acceptable techniques as aides in making the qualifications determination, and a written test is one such aide. As noted above, the Union does not contest the use of the tests in this case. Therefore, that part of the Jones award does not add much to the analysis. But what is instructive from the Jones award is the reasoning applied to a past practice argument made there by the Union. In the instant case the Union argues that since 1980 a practice has developed regarding how qualifications are determined for postings. These practices had stood the test of time, and practices are incorporated into Article IV. The Union did not agree to change this practice. The Union describes the practice as an applicant was given a clerical test and received a score. The most senior person with the highest score had the opportunity to familiarize themselves with the job. The testing of applicants evolved from typing to word processing to computer programs. The Union argues that the District's adding of a screening questionnaire, interview and component scoring, which had not been done before, violated the practice and Article IV.

The Jones award addressed the same issue:

The Union argues that the District is precluded from testing by Article IV (the Practices provision) because a past practice exists that the District has never tested. It is uncontested that the District never tested in this bargaining unit until the instant case. At issue therefore is whether the fact that the District never tested before in this bargaining unit created a past practice against testing which is covered by Article IV. It is initially noted that the fact that something has occurred or failed to occur in the past does not mean that every practice becomes fixed, binding or continues unchanged. Such is the case with the fact that the District has not tested before now. Just because the District has not tested in the past to determine qualifications does not give rise to a past practice that precluded the use of a test by the employer to determine qualifications. This is because the District has the right to determine

⁵ Article XXIII: Job Posting, stated, in pertinent part: “. . . Seniority shall govern which employee gets the job if other qualifications are equal in the opinion of the Director of Buildings and Grounds. . . .”

qualifications and the institution of testing is simply another method of determining qualifications. Inasmuch as no past practice against testing has been found to exist, Article IV is inapplicable herein. Moreover, the undersigned will not imply a restriction against testing absent an express provision in the agreement.

Id. pp. 4, 5. (citations omitted).

The clear analogy here is the use of screening questions, interviews and test component rankings. I find the Jones reasoning instructive. The absence of the use of these items in the past does not make such absence a past practice. There is nothing in the record which indicated the District considered such absence, if it considered it at all, to be binding. The evidence generally required to establish a binding past practice is discussed in How Arbitration Works, *Elkouri & Elkouri*, 6th Ed.

When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Indeed, many arbitrators have recognized that, “In the absence of a written agreement, ‘past practice’, to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.”

Another commonly used formulation requires “clarity, consistency, and acceptability.” The term “clarity” embraces the element of uniformity. The term “consistency” involves the element of repetition, and “acceptability” speaks to “mutuality” in the custom or practice. However, the mutual acceptance may be tacit - an implied mutual agreement arising by inference from the circumstances. While another factor sometimes considered is whether the activity was instituted by bilateral action or only by the action of one party, the lack of bilateral involvement should not necessarily be given controlling weight.

pp. 607-608 (citations omitted).

This record does not support the conclusion that there is a binding past practice wherein the District cannot use screening questions, interviews, component rankings and groupings to aide it in determining qualifications.

Related to the past practice issue is the Union argument that the District did not give the Union notice that it was instituting the new parts of the process. Apparently the first time the Union would have been aware of this would be from the November 8th email to the applicants that included the screening questions and stated the questions along with an interview and software testing will be used to determine qualifications. The email noted screening questions needed to be answered by November 14, with interviews set for November 17 and 18. The

Notice of Job Posting for each position was August 18th. No such notice contained information that screening, interviews or other testing would be part of the selection process. Beyond the past practice argument discussed above, the Union does not point to any language in the agreement as to any notice required to be given to add these matters to the qualification determination process. Indeed, there is none. The Union does cite the arbitration award of CLEO INC., 121 LA 1707 (CURRY, 10/31/05), in arguing the District's neglect to inform the Union of the changes it was contemplating demonstrated the arbitrary nature of these changes. The Union argues that the District cannot articulate the value of the changes, and questions their value.

The Curry award, as cited by the Union, stated:

The oddity of the Employer's position is its failure to provide the Union with a cogent rationale for changing its requirements for miscellaneous jobs. The sole right to determine qualifications does not mean absolute or unfettered discretion. The lowest common denominator of procedural fairness requires the Employer to inform the Union and its members when and why it is making a unilateral job requirement change, including testing and examination to confirm ability prior to the posting of the position.

Id. p. 1719.

It is noted that the reference in the above language to "miscellaneous jobs" is to a particular job classification contained in the collective bargaining agreement. As the District points out, Arbitrator Curry said ". . . the Employer did not violate the Collective Bargaining Agreement by selecting employees for the miscellaneous position of Battery Tissue Converter based on both seniority and qualifications". Id. p. 1719. The violation found by the arbitrator was that the Employer ". . . acted in an arbitrary and inconsistent manner by not providing the Union with sufficient notice of a change in job requirement for the miscellaneous position of Batter[y] Tissue Converter prior to posting it for bid". Id. p. 1719. The District questions what arbitrator Curry actually found, noting the statement in the decision:

The addition of the written test and practical examination for the Battery Tissue Converter job represents a change in job requirements for a miscellaneous job.
Id. p. 1718.

The District points out the question left from the award as whether Arbitrator Curry found that the testing was a change to the job itself – as opposed to a determination of qualifications. Of greater concern with the application of the Curry award to this case is, as noted, the lack of any language in the agreement requiring such notice. The Curry award would call for adding something to the agreement which is not there. Arbitrator Curry ordered the Employer to adopt a policy or procedure to provide the Union with reasonable notice and an opportunity to have its input considered with respect to unilateral changes made in job requirements for

miscellaneous jobs prior to posting them. *Id.* p. 1720. A notice requirement, to the undersigned, would be the equivalent of adding language to the collective bargaining agreement between the District and the Union, regardless of the length of notice, form of notice, or nature of opportunity, if any, of the Union to have input. Moreover, the agreement between the parties leaves the exclusive right to determine qualifications with the District. That is subject only to the terms of the agreement, which do not limit that right beyond the modified seniority clause and the posting process. Again, nothing else in the agreement limits the District. The agreement between the parties does not allow an arbitrator to add to or subtract from or modify any term(s) of the agreement. See, Article XVIII GRIEVANCE PROCEDURE. Additionally, it appears inherently consistent that adding screening questions, interviews and ranking test components is not much, if any, different than adding the objective tests without additional notice which the Union does not complain of. Accordingly, the undersigned declines to apply the CLEO award or its reasoning.

The Union argues forcefully that the ranking process used by the District was inadequate and the groupings offer no insight into the relative qualifications of the applicants. There was no overall scoring here. There was only scoring of individual tests, screenings and interview rankings. These were ranked and those rankings again ranked together. The Union argues that there is a difference between tests that are scored and subsequently ranked and tests that solely result in ranking. Tests that are only ranked do not differentiate between the abilities or qualifications of applicants. The person ranked 1 and the person ranked 20 could be substantially equal, and without an accompanying score there is no way to tell. The Union argues that the junior employee must be qualified head and shoulders above the more senior in order to get the job. But, as the District points out, that is not the contract standard. This is a modified seniority clause which looks for relative abilities. It is not a minimally qualified clause. A problem with the Union's advocacy for an overall score is the fact that on the screening questions, the higher the score the better, while on the interview questions, the lower the score, or ranking, the better. Indeed, it is not clear how there can be an overall score of any value here. That is part of the Union's criticism of the process. But it is clear that the individual scores for each part of the process can be and were ascertained, with those scores⁶ then used to rank the applicants for that part of the process. It is also clear that those who were consistently at the top (whether on a higher is better or lower is better basis) in the individual scorings, or rankings, were grouped together to arrive at the substantially equal group for each position. This is demonstrated in the compilation of data for each position in Exhibit School District-6. Each part of the process was given equal weight in the overall groupings. Even though the individual parts' scores might be close, the ability to ascertain consistently higher scores or rankings across all the processes does provide a factual, rational basis to group the qualifications relative to one another. Contrary to the arguments of the Union, the rankings do demonstrate consistency. Arriving at a grouping then brings seniority

⁶ Here the ranking is considered to be a form of scoring. The lower the better.

into play as the final, determinative factor, qualifications being equal. If a total mathematical score were used to determine qualifications that would be a practical elimination of seniority because this is a relative ability clause⁷, not a minimally qualified one.

The statements made by Wilson at the meeting of November 23rd as to qualifications were not part of the decision making process. In context, there is something to be said about the mollifying nature of his statements. Yet, everything he said can be considered accurate. He said three things, all in context with each other. He said all the applicants were qualified. But he did not say they were equally qualified. It is only after qualifications are equal that the agreement applies seniority. He did say the first group were substantially equal, which is what the process showed. All were qualified, but not substantially equally qualified. Under the agreement seniority comes in only after qualifications are equal. The most senior is only entitled to the familiarization period to demonstrate their ability if they are equally qualified with the other candidates. Wilson did say that if the jobs are turned down he would look at the next group of substantially equal applicants. This, like the first statement, clearly shows that there were differences in the qualifications of the applicants. That did happen in one of the positions. There can be no doubt that in this context he said nothing contrary to the agreement's provisions.

Nothing in the agreement, nothing in the arbitral precedent concerning these clauses between these parties, nothing in general arbitral principles, and no procedural or mathematical irregularities demonstrate any violation by the District in the process it used to determine qualifications and apply the posting process to the new positions. The testing and other evaluations were reasonably related to the Level 5 positions. Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The District did not use a process that violated the collective bargaining agreement by including testing and other evaluations not reasonably related to filling the Level 5 positions. The grievance is denied.

Dated at Madison, Wisconsin, this 14th day of June, 2007.

Paul Gordon /s/

Paul Gordon, Arbitrator

⁷ The Union brief recognizes this is a relative ability modified seniority clause. p. 8. The Union does point to some mathematical errors in some of the data compilations. However, as the District points out, these do not affect the relative rankings of the applicants. The scores noted in Exhibit Union-6, p. 3 are without the supervisor, VandeSande, who was not at all the interviews, and the Galvin math error was actually in Galvin's favor. The mistake on the Matzke average did not keep her from the top group of substantially equally qualified.