

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WALWORTH COUNTY

and

LOCAL 1925-C, AFSCME, AFL-CIO

Case 172
No. 67100
MA-13755

Appearances:

Lisa Bergersen, Lindner & Marsack, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appeared on behalf of the County.

Nick Kasmer, Staff Representative, and **Laurence Rodenstein**, Staff Representative, 8033 Excelsior Drive, Madison, Wisconsin 53717, appeared on behalf of the Union.

ARBITRATION AWARD

On July 9, 2007 Local 1925-C, American Federation of State, County, and Municipal Employees and Walworth County filed a request with the Wisconsin Employment Relations Commission requesting the Commission to appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following appointment, the matter was heard on October 9, 2007 in Elkhorn, Wisconsin. A transcript of the proceedings was made and distributed on October 15, 2007. Post-hearing briefs were submitted and exchanged by December 3, 2007.

This grievance addresses whether or not the County may keep a failing score on a job related test in effect for six months.

BACKGROUND AND FACTS

On, or about February 14, 2006 the Walworth County Board of Supervisors passed the following Ordinance:

ORDINANCE NO. 342-02/06

...

**THE WALWORTH COUNTY BOARD OF SUPERVISORS DOES
ORDAIN AS FOLLOWS:**

PART I: That Section 15-54 of the Walworth County Code of Ordinances is hereby amended to read as follows (additions shown by underline; deletions shown by strikethrough):

“Sec. 15-54. Selection Process.

(a) *Testing.* The human resources director may administer job-related tests to measure an applicant’s or employee’s qualifications and aptitudes for performing the job and to allow the county to make good hiring decisions. The results of tests which are administered shall be valid for a period of six (6) months from the date of testing and shall serve as the applicant’s or employee’s score during said period.”

PART II: This Ordinance shall become effective upon passage.

...

County Board Meeting Date: February 14, 2006

That Ordinance was accompanied by a fiscal note:

**Ordinance No. 342 – 02/06
Fiscal Note and Policy Impact Statement**

...

II. Purpose and Policy Impact Statement: For many positions in county service, various tests are administered. Under current practice, it is possible for an applicant or employee to take many of these tests each year. The purpose of this ordinance is to make clear that a test score will be valid for a period of six (6) months from the date of testing and shall serve as the applicant’s or employee’s score during said period. The county has outsourced certain employee testing to the job center. Reducing the number of times an applicant or employee can test each year will save on the costs of testing.

The impetus for the changes brought about by the Ordinance arose when the County moved the task of job testing out of the Human Resources office and had the job testing done at a local job center. The move allowed for a savings in staff time and expanded test hours. The job center utilized the same tests as were previously administered, and evidently charged the

County on a per capita basis. A witness for the County testified that there existed a practice among some employees of repeatedly taking the test. No examples were identified. There was a concern that such repetition compromised the integrity of the test.

Prior to the enactment of the Ordinance employees took whatever job performance tests were associated with posted positions for which they applied. If the employee passed the test, the passing score was good for six months. And so, if an employee applied for a second opening for which the same test was a requirement, within a six month period, the passing test score would be a part of the application credentials of the employee. If, on the other hand, the employee failed the first test he or she could re-test for the second opening. The impact of the ordinance was that employees who failed the first test could not re-test within six months and would therefore not qualify for a second opening which arose within a six month period, if the subsequent job required the same test.

Following enactment of the Ordinance, County Administrator David Bretl sent the following letter to the Union Presidents of each of the seven Unions representing County employees, and copied Tom Berger, who was at the time the AFSCME Staff Representative. AFSCME represents four of the seven County bargaining units.

February 23, 2006

Joe Conboy

Mary Price

Dave Britton

Pat Sharp

Gary Mandel

Bob Wierenga

Vickie Blakeslee

Re: Employee Testing

Ladies and Gentlemen:

On February 14, 2006, the Walworth County Board adopted an ordinance amending section 15-54 of the county Code of Ordinances relating to the employment selection and testing process. A copy of the ordinance is enclosed.

The purpose of this letter is to let you know about the ordinance and changes to the testing process for many county jobs, primarily clerical positions.

As part of the 2006 budget, the board approved funding an arrangement with the Walworth County Job Center to conduct the following performance tests:

- Typing, data entry, math, filing, language arts
- Microsoft Word
- Microsoft Excel
- Legal Terminology
- Medical Terminology

Applicants for employment or those employees posting for promotion or transfer to positions requiring the above-stated tests will apply for positions with Employee Relations, as they have in the past. The above-listed tests, however, will take place and be proctored at the Job Center located at 1000 E. Centralia in Elkhorn. The test results will be forwarded, confidentially, to the Employee Relations department. Keep in mind, however, that pursuant to the ordinance, a test result will be in effect for a period of six months from the date of testing. The balance of the selection process will be unchanged. The Job Center should be able to provide greater hours of service than we have been able to offer with “in-house” testing.

If you have any questions or concerns, please let me know or contact your Employee Relations specialist.

Very truly yours,

David A. Bretl /s/
David A. Bretl
County Administrator

C: Tom Berger

There was no response from any of the AFSCME locals or from their Staff Representative.

In January, 2007 four members of Local 1925-C, the Clerical bargaining unit, failed to pass one or more job performance tests administered as a part of the process of filling posted positions. Three of those individuals subsequently applied for positions which required them to have a passing score on a test previously failed within six months. Each was denied the right to re-test, and each was deemed unqualified to fill the subsequently posted position.

Ms. Rogers took a test on January 11, 2007. She was advised that she did not pass on January 22, 2007. Her applications for other positions which required she pass the test previously failed were denied on February 26 and March 28, 2007.

Ms. Mohr-Smith took a series of tests on January 19, 2007. She was advised she did not pass two tests on January 31, 2007. Her subsequent application for jobs requiring a passing score on the same test were rejected on February 26, 2007.

Ms. Peters tested on January 11, 2007. She was advised she had not passed a test on January 15, 2007. Her subsequent application for a position which required a passing score on the test she failed was rejected on February 14, 2007.

On February 21, 2007 Pat Sharp, President of Local 1925-C sent Suzy Hagstrom, Human Resources Director, an e-mail, to which Hagstrom replied:

Pat Sharp/WALCO
02/21/2007 06:59 AM

Brenda Peters has applied for recent Clerk openings within our agency and has not received a call for the testing. Is this because of the ordinance stating that if you had failing test scores within six months of the posting you are not eligible to retest? Thanks for a prompt response. Pat S.

...

Suzi E. Hagstrom/WALCO
2/21/2007 08:16 AM

...

Pat -

That is correct. A letter will be sent to her this week outlining her test scores and ordinance excerpt stating that scores stand for six months.

A grievance was filed on February 23, 2007. The County answered by denying the grievance. Neither the Union nor the County has submitted this matter to the Labor-Management Committee referenced in Sec. 8.10 C, of the Collective Bargaining Agreement.

ISSUE

The parties could not stipulate the issue.

The Union would frame the issue as follows:

Did Walworth County violate the terms of the Collective Bargaining Agreement when the County Board amended Ordinance 15-54 and restricted the ability of employees to use the posting system provided in Article VIII of the Collective Bargaining Agreement? If so, what is the appropriate remedy?

The County believes the issues to be:

Is the Grievance timely under the provisions of Article IV of the Collective Bargaining Agreement?

and

Did the Amendment to Ordinance 15-54 violate any provisions of Article VIII of the Collective Bargaining Agreement?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - RECOGNITION

1.01 Recognition. The County hereby recognizes the Union as the exclusive bargaining representative for purposes of conferences and negotiations concerning wages, hours and other conditions of employment for all regular full-time and part-time non-professional employees of Walworth County employed in its Health and Human Services Department, excluding supervisors, confidential employees, managerial employees, temporary employees, casual employees, independent contractors and professional employees, as certified by the Wisconsin Employment Relations Commission on May 27, 1988.

...

ARTICLE II - MANAGEMENT RIGHTS

2.01 In General. The management of the Walworth County Health and Human Services Department and the direction of the employees in the bargaining unit, including, but not limited to, the right to hire, the right to assign employees to jobs and equipment in accordance with the provisions of this Agreement, the right to assign overtime work, the right to schedule work, the right to relieve employees from duty because of lack of work or for other legitimate reasons, except as otherwise provided in this Agreement, shall be vested exclusively in the County.

...

ARTICLE IV - GRIEVANCE PROCEDURE

4.01 Grievance Defined. The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Any complaint concerning wages, hours, or other conditions of employment, and

including the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below.

It is expected that an employee and his/her supervisor try to resolve problems through open and informal communications. To this end, an employee shall make every reasonable effort to discuss the matter informally with his/her supervisor in an effort to resolve the matter before invoking the formal grievance procedure set forth below. An employee may be accompanied by a Union steward at this discussion.

- 4.02 Procedure. Grievances may be initiated by employee(s) covered by this Agreement or their union representative and shall be processed as follows:

Step 1 (Department Management). A grievance shall first be presented in writing to the Supervisor in charge of the work being carried on by the aggrieved employee. Said grievance may be presented by the employee either alone or accompanied by one (1) Union representative within thirty (30) working days from the date of the event or knowledge thereof which gave rise to the complaint or the grievance will be barred. Within fifteen (15) working days from the presentation of the grievance, the Health and Human Services Director or designee will meet with the Supervisor, employee and Union representative to discuss the grievance. A decision will be furnished to the employee and Union representative in writing within ten (10) working days from the date of the meeting.

...

Step 4 (Arbitration).

...

The impartial arbitrator shall, after hearing both sides of the controversy, hand down his decision in writing within ninety (90) calendar days. Such decision shall be final and binding on both parties to this Agreement, providing such decision is within the scope of his authority. The arbitrator shall have no authority to add to, subtract from, amend or modify any provisions of this Agreement. . . .

...

- 4.04 Extension of Time Limits; "Working Day" Defined. Time limits in this Article may be extended by written mutual consent of both parties. The

failure of either party to file, appeal or process a grievance in a timely fashion as provided herein shall be deemed a settlement in favor of the other party. The term “working day” as used in Article IV shall not include Saturdays, Sundays or the holidays specified in section 14.01.

...

- 4.06 Policy Grievances. The Union shall have the right to submit policy grievances regarding provisions of this Agreement in matters that do not necessarily apply to any one employee.

...

ARTICLE VII – SENIORITY

...

- 7.04 Application of Seniority. Seniority shall be followed in promotions, demotions, layoffs, recall from layoffs, vacations and transfers where an employee is able to perform the work.

...

ARTICLE VIII – JOB POSTING

...

- 8.03 Filling of Vacancy. In filling a vacancy, the employee applying with the greatest seniority in the bargaining unit shall be given first consideration. Skill, ability and efficiency shall be taken into consideration only when they substantially outweigh considerations of length of service.

...

- 8.09 Grievance Procedure – Qualifications. Questions of qualifications of an employee shall be subject to the grievance procedure.

- 8.10 Selection Process for Vacancies. Prior to initiating the posting requisition, the immediate supervisor will review the vacant bargaining unit position to ensure that the job requirements and disqualifications listed on the requisition accurately relate to the current duties of the position.

- A. The Human Resources Department, in coordination with the appointing authority, will develop selection methods which objectively measure the skills and abilities that are related to the duties of the vacant position. These selection methods may include any one, or combination, of the following: skills tests, written examinations, oral examinations, oral examination panels, and/or achievement history questionnaires. The selection methods and passing criteria will be made known to, and applied equally to, all eligible applicants.
- B. Only those bargaining unit applicants who meet the education and/or work experience requirements listed on the job posting will be allowed to participate in the selection method(s) applied to the position. Applicants allowed to participate in the selection methods will be provided a reasonable notice of the date and time when the selection methods will be administered.
- C. Any concerns which arise concerning the job posting and selection process will be referred to the Health and Human Services Department's labor-management committee for resolution.

POSITIONS OF THE PARTIES

It is the view of the County that the grievance is not timely. The Union is protesting the implementation of the amended Ordinance. The County served written notice of the change on all Unions. The Union had 30 working days to respond to the changes under Sec. 4.02, Step 1 of the Agreement or the grievance is "barred" under Step 1, and "settled" under Sec. 4.04.

The County asserts that it has a right to set the minimum job related qualifications for the job. It has done so after concluding that allowing employees to repeatedly take tests compromised the test integrity.

Finally, it is the view of the County that Sec. 8.10 C requires the Union to take its objections to the Labor-Management Committee. Its failure to do so is alleged to be either a bar to Arbitration or at least a condition precedent to invoking Arbitration.

It is the view of the Union that the grievance is timely. No cause of action existed until a member was adversely affected. Once that occurred, the Union response was prompt.

The Union contends that the County has violated the Agreement, by limiting certain employees from using the posting procedure. In the view of the Union, Sec. 8.10 B sets limits on who can participate. The ordinance expands the scope of who may not participate, and so violates the contract. It is the view of the union that the ordinance amendment is neither a qualification nor a method of selection.

It is the view of the union that there exists a practice which confirms that employees who fail the exam may participate again, within six months, by re-taking the exam. This practice of allowing re-takes of failed exams confirms the Unions construction of Sec. 8.10 B that the only applicants excluded from participation from the selection methods are those who fail to meet the "...education and/or work experience requirements listed on the job posting..."

The Union disputes the County contention that the integrity of the tests is compromised under the facts surrounding this dispute.

DISCUSSION

As a practical matter, the Union had notice that the County was going to change its treatment of failing test scores. Bretl's letter, with the Ordinance attached, advised specifically of the change, and indicated that the change had occurred. It appears that the Union sat, and allowed the County to proceed. There is no record of a written or verbal protest or of any informal indication that the Union would challenge the action. I think the Union should have responded if it believed the amended Ordinance violated the Collective Bargaining Agreement. As a matter of courtesy, the Union could have advised the County that it felt the contract was applicable. Such a response would have put the County on notice that its action was under challenge. This assumes the Union understood that the ordinance would be applied to represented employees and would be administered so as to impact the retesting practice.

I am reluctant to treat the enactment of the Ordinance, or the subsequent notice letter, as the "...event...which gave rise to the complaint..." To so construe the words of the Collective Bargaining Agreement would give rise to speculative grievances. The facts underlying a dispute frequently play a significant role in the construction of the words of the Agreement. How the Ordinance is administered, not how it might be, provides a concrete basis to determine whether or not the contract is violated. The Union should not be obligated to anticipate when and how its contract will be violated by an enactment of the County Board. I think the Union is entitled to proceed on the assumption that its contract will be honored until such time as it believes an actual breach has occurred.

The County Board should be able to govern without facing a stream of grievances, filed to protect real or imagined rights. If the Union is required to challenge Ordinance changes, which may impact the collective bargaining agreement, within 30 days of their enactment, or waive its right to proceed, there arises an incentive to challenge all that might possibly apply under all imagined circumstances. I do not think it healthy for either the County or the Union to proceed in that fashion.

Arbitration Awards should be based upon factual records, and not conjecture and hypothetical applications of policy. I believe the “event” which gives rise to the grievance is the application of the Ordinance to the individuals who were denied the opportunity to re-test. The grievance is timely.

Section 8.10 is titled “Selection Process for Vacancies”. The Section describes how a vacant position will be reviewed, selection methods, including “skills tests”, and who may participate in the process. Paragraphs A, B, and C are all a part of the “Selection Process”.

Par. C directs, through use of the phrase “...will be referred...” that any concerns relating to the selection process be referred to the Labor-Management Committee. The term is one of command. It does not indicate that this is an option. The parties have negotiated over the process they will use to post and fill vacancies. As a part of that agreement they have provided that concerns over the selection process be submitted to the Labor Management Committee. That was not done here. The status of a skills test falls squarely within the selection process. Referral to the Labor Management Committee is for the purpose of “resolution” of the concern. It is my reading of this provision that it operates as a dispute resolution mechanism built into the Agreement to handle disputes of this sort.

Section 8.10 is set aside and treated separately from the other provisions of the Agreement. It reflects a conscious decision on the part of the parties. There was thought given at the time to having job posting and selection disputes go to this forum.

Neither party availed itself of this Committee. However, it is the Union that has the “concern” that would prompt referral. Sec. 4.02, Step 4 of the Grievance Procedure directs that I not “...subtract from, amend, or modify any provisions of this Agreement.” The requirement that concerns over the selection process be referred to the Labor Management Committee is as enforceable as is any other provision of the Agreement.

AWARD

The Union is directed to submit its concerns over the selection process to the Labor Management Committee.

JURISDICTION

I will retain jurisdiction over this matter, to address any dispute which may arise or exist should the matter not be resolved by the Labor Management Committee.

Dated at Madison, Wisconsin, this 20th day of February, 2008.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
7260

