

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WALWORTH COUNTY**

and

**AFSCME LOCAL 1925-C, AFL-CIO**

Case 172  
No. 67100  
MA-13755

(Testing Restriction Grievance)

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**Appearances:**

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

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

**SUPPLEMENTAL 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.

On February 20, 2008, I issued an Award directing the parties to submit their dispute to the Labor-Management Committee referenced in Article VIII, and retained jurisdiction. On March 24, 2008, the parties advised me that the Labor-Management Committee was unable to resolve the matter and requested an Award.

This Supplemental Award incorporates the original Award by reference.

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

## DISCUSSION

Both parties ask if Article VIII has been violated. Sec. 8.10 sets forth the process for posting and filling vacancies. Par. A authorizes the Human Relations Department to "...develop selection methods..." These methods may include "...skills tests, written examinations, ..." There is no dispute in this proceeding that the County has the right to develop and administer skills tests. The Union does not challenge the test validity or passing threshold.

The Union makes two essential claims in this proceeding. The first is that the County has restricted the number of people who may apply for a position under Sec. 8.10 B by altering the testing procedure. In essence, someone who failed the first test but who would have passed the second is denied access to the subsequently posted job. I agree that result may occur. I do not agree that Article 8.10 is thus violated.

The test is a selection method, as defined in Sec. 8.10 A. All of the grievants were allowed to participate in the selection method. Each took and failed the test. Par. B is a paragraph of exclusion; i.e. it limits the selection method pool to those who lack the requisite experience or education from proceeding through the selection process. The Union essentially asserts that it is a provision that guarantees entry to the selection process. I do not read it to provide such a guarantee.

Similarly, the last sentence of Par. A provides for the equal application of the selection criteria to all eligible applicants. The revised policy of keeping failing, as well as passing, test scores in effect for six months treats all equally.

The Union asserts the existence of a practice of allowing re-tests. The traditional elements of a practice are in place. The re-tests have occurred consistently over a long period of time. Both parties were aware of the re-tests and knowingly allowed them to occur. The amended ordinance and Bretl's letter acknowledge the existence of a prior way of testing, and explicitly modify that process.

Notwithstanding the above, I do not believe an enforceable practice exists, such that the County is precluded from acting. Par. A authorizes the Human Resources Department to "...develop selection methods which objectively measure the skills and abilities that are related..." The common use of the term develop is to "evolve the possibilities" or to "cause to unfold gradually".<sup>1</sup> The notion that the *status quo* is frozen by operation of past practice undercuts the development of selection methods. Stated otherwise, there can be no development of selection methods if the status quo must be preserved.

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<sup>1</sup> Webster's Seventh Collegiate Dictionary (G & C Merriam Company, Springfield, Massachusetts, 1972) at p. 227

I believe that Par. A authorizes the County to develop selection methods. The possibility of change is inherent in the development of selection methods. Par. A is drafted in a way that offers the County a degree of flexibility. The parties disagree as to whether the changes produce a better testing process. Par. A requires that the selection methods "...objectively measure the skills and abilities..." and that "... they be made known to and applied equally to, all eligible applicants." The County has satisfied those standards in this proceeding.

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 29th day of July, 2008.

William C. Houlihan /s/

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William C. Houlihan, Arbitrator

