

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**RUSK COUNTY COURTHOUSE AND HEALTH AND HUMAN SERVICES  
EMPLOYEES LOCAL #2003, AMERICAN FEDERTION OF STATE, COUNTY AND  
MUNICIPAL EMPLOYEES, AFL-CIO**

and

**RUSK COUNTY, WISCONSIN**

Case 126  
No. 69122  
MA-14487

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**Appearances:**

**Steve Hartmann**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, for Rusk County Courthouse and Health and Human Services Employees Local #2003, American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

**Mindy K. Dale**, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for Rusk County, Wisconsin, which is referred to below as the County.

**ARBITRATION AWARD**

The County and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Barb Phillips, who is referred to below as the Grievant. On February 1, 2010, hearing on the matter was conducted in Ladysmith, Wisconsin. No transcript was prepared of the hearing, and the parties filed briefs and reply briefs by April 19, 2010.

**ISSUES**

The parties stipulated the following issues for decision:

Did the County violate Section 7.03 of the agreement by not awarding the Clerk I position in the Health and Human Services Department to the Grievant?

If so, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### **ARTICLE 7 – JOB POSTING**

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**SECTION 7.02** When a vacancy is to be filled, the position shall be posted for seven (7) working days. The posting shall list a summary of the duties, minimum qualifications, rate of pay and the effective day of the position.

**SECTION 7.03** An employee interested in such promotion may sign the posting.

The employee having the greatest seniority, who is qualified for the position shall be given the position. The County shall set the minimum qualifications with input from the Union. Internal candidates will not be tested in order to determine minimum qualifications. The County may interview any and all candidates and shall select on the basis of seniority and qualifications. Qualifications shall be presented in the form of a resumé when a posting is signed by an internal candidate.

If within 30 working days the employee wishes to return to his/her former job he/she shall return. If, after thirty (30) working days, the employee's performance is not up to the standard of qualifications required he/she shall be returned to his/her former job. In either event, the position shall be again posted, following the same procedures above. To help the employee better understand the qualifications for the job a written performance evaluation will be conducted with the employee after 15 working days and again at the completion of 30 working days.

Present employees shall be given preference before a new employee is hired.

When seniority and qualifications are not recognized in the job preference, the case shall be subject to the Grievance Procedure.

### **BACKGROUND**

Cassandra McKittrick, the Union's President, signed the grievance form, dated June 9, 2009 (references to dates are to 2009, unless otherwise noted), which alleges the County violated Section 7.03 by failing to award "the posting . . . to the most senior qualified employee that signed the posting." The Grievant was the sole employee to sign the posting, which was for the position of Clerk I.

The posting reads thus:

. . .

#### **General Summary:**

This Clerk I position, under supervision of the Financial & Support Staff Manager would provide support services to the Health and Human Services Department.

#### **Essential Functions:**

- Receives and directs customers by phone or in person
- Gathers and enters program/financial data into computers
- Provides direct assistance and information to program participants
- Provides general office support
- Works with the general public, other agencies/departments and other Health & Human Services employees in providing information and assistance related to programs and services of the Department.
- Other duties as assigned by Supervisor

#### **Qualifications:**

- High school diploma; Post secondary education such as an Associate Degree from an Accredited Technical Vocational School in a related field or commensurate work experience.
- Good oral and written communication skills
- Must have excellent customer service skills
- Accurate computer, typing and keyboarding skills
- Working knowledge of word processing and spreadsheet computer programs
- Correct spelling, grammar, punctuation and composition skills

- Ability to work independently and/or cooperatively on assigned tasks
- Ability to establish and maintain a good working relationship with other staff, governmental departments, private agencies and the general public
- Ability to acquire a working knowledge of services and programs and apply knowledge for successful customers assistance;
- Ability to prioritize workload;
- Knowledge of appropriate safeguards of and ability to protect all privileged and confidential information in the Department

. . .

The Clerk I position description reads thus:

**General Summary:**

A clerk I will provide supportive services to the Health & Human Services Department that include but (sic) not limited to technical assistance in the delivery of Health & Human Services related programs and services, direct assistance to program participants, gathering and tracking of program information and other general office support.

**Reporting Relationship:**

1. Reports directly to the Financial & Support Staff Manager
2. Directs the work of: None

**Essential Functions of the Job:**

1. Receives and directs customers by phone or in person
2. Gathers and enters Program/financial data onto computers
3. Provides direct assistance and information to program participants
4. Provides general office support
5. Works with the general public, other agencies/departments and other Health & Human Services employees in the providing information and assistance related to programs and services of the Department. . . .

**Qualifications Needed:**

1. High school diploma: experience and/or post secondary education in customer service and office practices preferred.
2. Good oral and written communication skills.
3. Good computer, typing and keyboarding skills.
4. Correct spelling, grammar, punctuation and composition skills.

5. Ability to work independently and/or cooperatively on assigned tasks.
6. Ability to establish and maintain a good working relationship with other staff, governmental departments, private agencies and general public.
7. Knowledge of appropriate safeguards of and ability to protect all privileged and confidential information in the Department.
8. Reading, writing and math is needed for basic office skills.
9. Ability to understand and follow directions.
10. Must possess (sic) good human relations skills and have ability to work with frequent interruptions and function effectively under pressure.
11. Must demonstrate a positive and helpful style of interaction with customer
12. Must be willing to learn new technical skills related to the position in order to maintain satisfactory performance.
13. Ability to acquire and apply knowledge of programs and services and directly apply knowledge for successful customer assistance.
14. Must have a valid Wisconsin Drivers License

The Grievant has worked for the County for nineteen years, primarily as a Home Health Aide. The position description for Home Health Aide states:

. . .

**PURPOSE OF POSITION:** Assist the nurses to meet patients' health maintenance needs by providing personal care to maintain good hygiene. Record vital signs. Observe patient and environment. Report to nurse in charge. Duties are on an as needed basis.

**FUNDAMENTAL JOB DUTIES AND RESPONSIBILITIES:**

A. Essential Functions: Take vital signs of patient and record information (5%). Take care of patient's personal care needs, such as bathing, oral hygiene, etc. (55%). Transfer patient and assist with ambulation (10%). Other delegated or assigned duties to patient (5%). Create or update charts for nurses (15%). Clean and disinfect equipment (5%). Attend educational and training programs (5%). . . .

**EQUIPMENT USED TO PERFORM ESSENTIAL FUNCTIONS:** Items include: copy machines, hand tools, automobiles, gloves. Various types of patient lifting equipment is used. Requires proof of auto insurance.

**QUALIFICATIONS NEEDED:** (Education, Skills) Three to four years of highschool and a driver's license is necessary, Certification requirements are to be a certified nursing assistant or to have the ability to become one, and to be registered as a Home Health Aide by the State. Basic everyday living skills are necessary for this position, as well as the ability to understand and follow directions of a prescribed care plan by a Registered Nurse, and to read, write, add and subtract to maintain records and inventory.

...

The Grievant is a Certified Nursing Assistant (CNA).

Gary Rivers is the Executive Director of the County's Health and Human Services Department. He has served in that position for roughly thirteen years and has worked for the County for over thirty years. The Grievant was the only employee who signed the posting, and did not supply any supplementary documentation. Rivers has considered prior applications from the Grievant and reviewed a copy of her resumé from a prior application. The resumé states:

#### **EXPERIENCE**

- 1983-1990 Rusk County Nursing Home and Hospital, Ladysmith, WI.**  
Nurses Aide
- 1990-1992 Cornell Care Center, Cornell, Wi. 54732**  
Nurses Aide
- 1992-1994 Rusk County Respite, Ladysmith, WI. 54848**  
Respite Aide
- 1994-Present Rusk County Health Department, Ladysmith, Wi. 54848**  
**Home Health Aide:** Assist patients with personal cares, wound care, exercises.  
**W.I.C. Aide:** Finger pokes for Hemoglobin and Lead test. Chart and record results on computer, type and send letters to parents with Lead results. I see an average of 10-30 clients on W.I.C. days.  
**Equipment Coordinator:** Take care of health Deptment's (sic) medical equipment loan closet. Keep inventory of what is loaned out and send letters to have equipment returned. Clean equipment when returned.  
Communicate with public by phone and face to face.  
**Supply Coordinator:** Keep inventory of medical supplies, order needed supplies for all Public Health, Home Care, WIC by phone and internet.  
**Care Call Tech.:** Install and repair Care Call emergency phones. Charting, some computer charting.

I do all of the above jobs weekly.

## **EDUCATION**

- 1982**            **W.I.T.C. Rice Lake, WI.**  
Nurses Aide Program
- 1983-1984**    **Mount Scenario College, Ladysmith, WI.**  
3 semesters Pre-nursing classes - Biology, Sociology, Chemistry,  
Typing, Math, Communications.
- 2007**            **Skillsoft Computer Courses:**  
Microsoft Office 2000:        New features for users  
Microsoft Excel 2000:                Spreadsheets  
Microsoft Windows XP:        Getting started  
Word Processing in Microsoft Word 2000

The Resumé includes certificates of completion for the Skillsoft courses, which are online tutorials.

Rivers reviewed the resumé and the Grievant's personnel file, and concluded she did not meet the minimum qualifications for the Clerk I position. He met with the County's Personnel Committee and recommended that it accept his recommendation that she be considered unqualified. The meeting took perhaps twenty minutes. He did not supply the resumé or her personnel file to the committee, but assumed it had the documentation as a result of the Grievant's application for another position.

The parties addressed Section 7.03 in a side letter, executed in August of 1989, which was attached to the parties' 2007-08 labor agreement. The side letter states:

1.     The Union agrees to drop the Payroll Clerk vacancy grievance with prejudice;
2.     The County agrees that it will not test internal candidates in order to determine minimum qualifications;
3.     The Union agrees that pre-hire testing may be conducted;
4.     The parties also agree that in administering Section 7.03, (sic) shall contain the minimum qualifications for the vacant position. The County shall set the minimum qualifications with input from the Union. Management may interview any and all candidates and shall select on the basis of seniority and qualifications.

5. The parties agree that the entire 30 day trial period need not be exhausted before returning the employee to his/her original position.

The background to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

### **The Grievant**

The Grievant felt she met the Clerk I qualifications. Her work as a Care Call Technician demanded that she do billing by computer. As a Supply Coordinator, she ordered supplies for Home Health Care and tracked their delivery online. She spent seven years as a WIC Aide. Her computer duties included drafting letters to advise parents of lead test results. She tracked equipment on the computer and prepared mileage sheets on the computer. Like other County employees, she regularly uses Group Wise software.

She took the 2007 Skillsoft tutorials on McKittrick's recommendation as a means to upgrade her computer skills. She understood the recommendation to have been initiated by Rivers, after the Grievant had unsuccessfully applied for a different position. She has no on-the-job experience with computers outside of that noted on her resumé.

In response to Rivers' testimony, the Grievant noted that the "fire alarm incident" resulted from a child tripping a County fire alarm. She left the building and responded to a nurse, who asked her what had happened to cause the building to be evacuated. The Grievant neither spoke the child's name nor did anything to identify the child or the parent.

### **Gary Rivers**

Rivers is the ultimate supervisor for the Clerk I position. It requires a number of functions, all turning on serving as the County's first line of contact with departmental clients, including receptionist duties; phone operation; computer usage; and data tracking. Required software includes Microsoft Office, and three to four other sources for word processing and spread sheet work. Some of the software is unique to the County and not routinely offered in public educational offerings.

Rivers drafted the posting, which McKittrick posted. There is a difference regarding the educational qualifications set in the Clerk I job description and the posting. The posting reflects Rivers' view of the "core competencies" of the position, which in turn, reflects his assessment of the successful performance of the last three incumbents in the position, who had training and experience beyond High School offerings on computer skills. He acknowledged that the job description and posting language regarding qualifications did not use the same words, but the "meaning was the same."

The Health and Human Services Department is minimally staffed, and cannot afford the luxury of on-the-job training. Job applicants like the Grievant must be able to demonstrate the



present ability to perform the work. The Grievant's failure to supply any documentation led him to review the resumé submitted for an earlier opening. He did not supply any documentation to the Personnel Committee prior to their meeting regarding the posting. He assumed the committee had, or remembered, the documentation of her qualifications. He was unsure if the committee had the same members for the Clerk I position as it had for the prior opening.

Rivers detailed to the committee that he determined that the Grievant was unqualified. He viewed her skill set as a Home Health Aide not to be transferable to the Clerk I position. Her hands on experience with residents did not transfer to office work. None of the areas of work detailed in her resumé transferred to Clerk I, other than a general acquaintance with computers. She needed formal coursework to demonstrate the core competency required of a Clerk I. Rivers and the committee members spoke generally of her qualifications, and reviewed her skill set as determined by the committee regarding the prior application. Neither the committee nor Rivers offered the Grievant the opportunity to interview or to explain her qualifications. He did not inquire into her qualifications outside of his own and the committee's review.

The Grievant's performance of the Skillsoft tutorials was "helpful" but not what the County was looking for in a Clerk I. He acknowledged that he had informed the Grievant to try to enhance her computer skills. This occurred after her failure to get another posting. He told her that to get serious consideration in the future, she should get training from a vocational school or through other employment.

Rivers also concluded the Grievant's work record showed an inability to handle confidential information. In June of 2006, the County had to evacuate a building after a fire alarm sounded. While employees and members of the public stood outside the building, the Grievant opened a window and yelled, "a WIC kid set off the fire alarm." The child and the child's mother were then leaving the building. He was also aware that her file contained disciplinary material related to charting accuracy. She did not grieve the verbal reprimand she received for the fire alarm incident. He has had to discipline other employees, including nurses and social workers, for breaches of confidentiality.

Rivers felt that the Grievant got the process required for any applicant. The Personnel Committee is the ultimate hiring authority, and Rivers does not police their processes. They sought his opinion and he supplied it. In the past he has reported to such meetings, sometimes with documentation and sometimes without. He detailed her qualifications to the committee based on their request, and could not speak for their deliberations outside of his presence.

### **Steve Hartmann**

Hartmann noted that McKittrick is classified as an Auditor II. As of the date of hearing, the County and Union were negotiating the removal of her position from the bargaining unit.

Further facts will be set forth in the **DISCUSSION** section below.

## **THE PARTIES' POSITIONS**

### **The Union's Brief**

After a review of the evidence, the Union asserts “that the grievant is in fact qualified for the position” and that the Grievant “was denied the position in an arbitrary and capricious manner.” Significantly, “there is a significant discrepancy between the qualifications listed on the job posting and . . . the job description.” Rivers “modified (increased) the qualifications for the Clerk I unilaterally without approval from the Personnel Committee” which demands that the qualifications determination be made from the job description, not the posting. The significance of the discrepancy is underscored by the Side Letter, which demands Union input. The absence of such input makes County reliance on the Greco award misplaced.

A review of the Grievant's qualifications under the job description establishes her qualifications. She has a diploma and relevant experience “in customer services and . . . office practices.” Significantly, she has made efforts to upgrade her office skills on her own time. Rivers' testimony establishes that he had no reason to deny her the position. He failed to inform the Personnel Committee of her skills and made no effort to investigate her efforts to improve her skills. A detailed examination of the evidence shows that the Personnel Committee accepted Rivers' evaluation uncritically, and that neither Rivers nor the committee made an objective analysis of the position's demands, the Grievant's skill sets, or her performance of similar duties in the past. An objective evaluation of the evidence demonstrates that this “is a receptionist position with some clerical duties to fill in the slow period” and that there “is no reason this employee should be denied an opportunity to demonstrate her ability to perform the work of this position”. Section 7.03 “demands” a conclusion that she “is at least minimally qualified” and that she “should be awarded the position . . . and made whole for all losses suffered because of the County's violative actions.”

### **The County's Brief**

After a review of the evidence, the County contends that the Grievant failed to establish she met the minimum qualifications of the posted position. The job descriptions for Home Health Aide and Clerk I establish sets of qualifications that “are in sharp contrast to one another” with “no clear overlap in terms of qualifications.” The qualifications are “job-specific and job-related.” The hands-on, closely supervised work of a Home Health Aide does not resemble the “independent thinking or problem-solving skills or team skills” of a Clerk I. Detailed review of the Grievant's experience establishes that her work as a WIC Aide shows that “computer ‘savvy’” is (not) needed for these tasks; that her work as an Equipment Coordinator does not track any essential skill required of a Clerk I; that her work as a Supply Coordinator is “not clearly applicable to a specific Clerk I requirement in terms of qualifications”; and that there is no link between her work as a Call Care Technician and the qualifications needed for Clerk I. What computer work she does as a Home Health Aide is incidental to her duties and falls short of the skills needed of a Clerk I.

The Grievant failed to turn in a resumé with her signing of the posting, but Rivers considered the resumé she submitted for a prior opening. That the Grievant completed on line courses for the enhancement of computer skills establishes no more than a start toward the qualifications demanded of a Clerk I. That a prior Union President recommended the courses to the Grievant does not bind the County and fails to show the completion of any course that the County would deem relevant. That Rivers knew from past experience that the Grievant had violated client confidentiality underscores the objective basis of his analysis, since “the disciplinary consequences of the two incidents had not been grieved.” On balance, the evidence does not show a close call regarding the Grievant’s meeting the minimum qualifications. Rather, “There is no evidence of training, experience or demonstrated effectiveness in Clerk I qualification requirements.” Rivers’ experience in evaluating past occupants of the position is significant.

The County cannot be required to train job applicants. Rather, applicants must establish their qualifications. This is established by RUSK COUNTY, MA-6763, DEC. NO. (Greco, 1992). If the Union wants to mandate that the senior interested applicant be awarded a job in which they are interested, then it needs to secure that result at the table prior to seeking it through arbitration.

Rivers recommended to the Personnel Committee that it reject the Grievant as an applicant because she lacked the minimum qualification for Clerk I. It is not unusual for the committee to seek the opinion of a department head and there is no evidence the committee departed from long-established practice in its review of the Grievant’s qualifications. That the job description and posting differ on their statement of qualifications is unremarkable. The variance is minimal and there is no evidence the Grievant met the qualifications of either document. In any event, job requirements change over time. More to the point, there is no evidence the County acted “in an arbitrary, capricious, discriminatory or unreasonable manner.” Nor is there evidence of bad faith on the County’s part. The grievance should be dismissed.

### **The Union’s Reply Brief**

The County’s “primary argument is that an employee who is a CNA cannot by definition have the skills to perform any other county job”, and this argument is “false and insulting . . . sexist and contemptible.” The assertion that computer duties do not play a predominant role in the Home Health Aide job description ignores that this says nothing about the Grievant’s experience with keyboards or that “Rivers had no idea what programs she did or did not use or indeed what the grievant did besides CNA work.” That the software the County uses is not the same as that used by the Grievant says something about County software, but nothing of the Grievant’s ability to handle software. Rivers told McKittrick to recommend computer classes to the Grievant. The County’s attempt to dismiss the recommendation “is arbitrary and capricious behavior.” Since the Grievant is not the only departmental employee to have violated confidentiality policy, it is unclear why this would disqualify her from “a receptionist position”.

### **The County's Reply Brief**

The County emphasizes that the grievance questions minimum qualifications. The Grievant's resumé will not establish them. She did not submit a current resumé with the posting, thus forcing the County to rely on an earlier resumé. Even ignoring the absence of computer skills and crediting the Grievant with completing online tutorials fails to establish whether she demonstrated competency in any of them. The tutorials did not concern the software used by the County. Whether the qualifications are those of the posting or the position description, there is no evidence the Grievant met them. It is her burden, not Rivers', to "make her case".

Union attempts to denigrate the clerical responsibilities of the Clerk I position cannot substitute for qualifications. The same Union President who recommended the tutorials to the Grievant put up the posting, and there was no objection to it from the Union. Even if the posting's statement of qualifications is dismissed, the evidence shows no reason to believe the Grievant demonstrate(d) qualifications #2 - #13". Union attempts to brand Rivers' decision as arbitrary and capricious ignore his experience. Nor can the Union demonstrate any deviation from past hiring processes. The assertion Rivers unilaterally "increased" the education requirements does not stand up to scrutiny, since both the posting and job description demonstrate that "the County is simply looking for evidence that the applicant can do the job."

The side letter referred to by the Union "was a part of the 2007-08 Bargaining Agreement" and was incorporated into the 2009-11 agreement, with the insertion of "minimum" in the reference of Section 7.02 to qualifications. Read together or standing alone, the provisions establish that "applicants must therefore, possess, not be poised to acquire, the listed qualifications at time of hire." The Greco award confirms this, and the evidence fails to establish that "the Grievant can type accurately, compose a professional memo, transcribe a message, print an Excel spreadsheet or successfully perform any of the routine *clerical* tasks associated with the Clerical I position. There being no establishment of qualifications, there can be no violation of Section 7.03. The grievance must be dismissed.

### **DISCUSSION**

The stipulated issue questions the application of Section 7.03. Section 7.03 establishes processes that govern a case-by-case evaluation of individual qualifications. However clear its terms may be, its application is subject to question. The parties' arguments underscore common agreement on what Section 7.03 requires.

Section 7.03 establishes a preference for "Present employees" over "a new employee." The senior "Present employee" who signs the posting and "who is qualified", "shall be given the position." The mandated preference for a unit employee turns on qualifications, which is defined as "minimum qualifications." "Minimum qualifications" require "input from the Union", and cannot involve testing regarding "Internal candidates".

The parties both read the Greco award to establish that:

Section 7.03 . . . recognizes that posted jobs will be given to the person with the greatest seniority “who is qualified for the position”. This latter phrase indicates that employees must be qualified before they are given a trial period. DEC. NO. 4381 AT 3.

The County’s case is that the Grievant failed to meet the minimum qualifications and thus cannot claim a trial period under Section 7.03.

To accept the County’s position on this record would render the unit and seniority protections of Section 7.03 meaningless. As a matter of contract, the County’s view is troublesome. Rivers’ testimony that his insertion of the “Associate Degree . . . or commensurate work experience” requirement in the posting left the operative qualifications essentially the same is tenuous. The Union had input in the job description, but not in the posting. That McKittrick hung the posting falls short of establishing Union assent to the alteration of the qualifications stated in the job description. Even if it did, Rivers’ testimony establishes that the “core competency” traceable to an Associate Degree is a “preference” rather than a “requirement”. A “preference” is something beyond the “minimum qualifications” required by Section 7.03.

Whether viewed as a matter of fact or of contract, there is no persuasive evidence that the County reviewed the Grievant’s “seniority and qualifications” prior to determining she failed to meet the minimum qualifications of a Clerk I. The second paragraph of Section 7.03 is clear that “seniority and qualifications” are the criteria by which it “shall select” an employee to fill a vacancy. The fourth paragraph highlights that a failure to recognize “seniority and qualifications” points the selection to the grievance procedure. That the Grievant was the sole unit employee to sign the posting establishes there is no more senior unit employee to claim the preference for unit employee that Section 7.03 grants, but this does not render seniority meaningless. Viewed separately or together, “seniority and qualifications” connote experience.

This poses a troublesome backdrop to the evidence, since there is no evidence that the County viewed the Grievant’s experience as a Home Health Aide to play any positive role in their assessment of qualifications. Rather, Rivers treated the “or commensurate work experience” to preclude any need to consider the Grievant’s past service with the County. The assertion that there can be no overlap between a Home Health Aide and a Clerk I is problematic. As a matter of contract, Section 7.03 affords no support for the assertion, since an assessment of seniority and qualifications is inevitably an individual determination. Past this, the assertion that “commensurate work experience” cannot mean prior unit experience reads the preference for unit employees out of existence. As a matter of fact, the evidence affords little support for the assertion. Even using the “Qualifications” criteria of the job posting rather than of the job description affords little support for the County’s view. Criteria 2 and 3 turn on communication and customer service skills. It is not a persuasive reading of those criteria to assert that a CNA required to attend to the most basic medical and living needs of a client need not demonstrate skill in these areas. Nor is it evident how a person who must maintain a health plan that may

demand the attention of more than one care giver can avoid meeting the demands of Criteria 7, 8 and 9. Nor is it evident how a CNA who addresses the basic needs of multiple residents can avoid meeting the demands of Criteria 10.

The evidence regarding County assessment of the Grievant's qualifications turns on Rivers' testimony. There is no persuasive evidence that the Personnel Committee independently viewed them. Rather, the committee sought and accepted Rivers' recommendation. There is nothing in the contract that requires more, but this focuses analysis of County compliance with Section 7.03 on the basis for Rivers' recommendation.

The evidence fails to establish the basis underlying Rivers' conclusion that the Grievant was unqualified. There was no interview, nor any explanation of why one was unneeded. There was no input from the Grievant on any aspect of Rivers' conclusion. This underscores the need for clarity on how he reached it.

The evidence affords no clarity on this point. The assertion that the County cannot afford to train employees in positions new to them is understandable, but fails to explain how the County integrates an applicant with an Associate's Degree into the application of software for which the applicant has no training. That the County uses software that is not subject to general coursework is undisputed. The assertion that the degree provides assurance that the core competency exists can be accepted, but affords no basis on which to conclude Rivers actually assessed the Grievant's skill or lack of it. His assertion that the skill set of a Home Health Aide is "not transferable" to a Clerk I does not detail an assessment of the Grievant's skill set. The assertion that a Clerk I skill set is not transferable to a Home Health Aide is no more persuasive. The County requires certification as a Certified Nursing Aide or the ability to become certified as a requirement of the Home Health Aide position. Even the determination of a lack of certification demands an individual assessment of qualifications, to say nothing of a determination on whether an individual has the ability to be certified.

It is the absence of an individual assessment of the Grievant's qualifications that makes it impossible to defer to the County's determination that she was unqualified. Rivers' assertion that skill sets are not transferable fails to establish an individual assessment of the Grievant's skill set. Rather, it asserts a rationale for not doing it. Nor will his testimony supply a basis for concluding he assessed the Grievant's qualifications. Rivers acknowledged that he had limited understanding of the Grievant's past duties, including those reflecting computer usage. He admitted he did not check into the Grievant's experience with computers or her performance of the Skillsoft tutorials. The absence of such inquiry cannot be held, as a matter of contract, against the Grievant. Under the final sentence of the second paragraph of Section 7.03, qualifications "shall be presented in the form of a resumé" regarding an internal applicant. The use of the passive voice makes it impossible to place this obligation solely on the Grievant. Rivers' testimony that he used a past resumé because she failed to supply a new one is persuasive and binds the Union to that resumé. However, it affords no basis to preclude inquiry into any aspect of the Grievant's experience. His willingness to communicate an opinion on her qualifications to the Personnel Committee without reference to or use of the resumé underscores

the evidentiary problem. That he did not know if the occupants of the Personnel Committee had changed since their rejection of the Grievant's application for another position affords no basis on which to conclude any County representative actively considered the resumé that asserts qualifications under Section 7.03.

At no point in Rivers' testimony was there any acknowledgement that the Grievant possessed any skill relevant to the Clerk I position. Her past duties were dismissed as not transferable. Even though Rivers did not inquire into the content of the Skillsoft tutorials, he concluded their content was too rudimentary to demonstrate competence in Microsoft Office software. The conclusion may be valid, but the absence of any basis for it provides no demonstration of compliance with Section 7.03. Rivers did not view any of the skills asserted in the Grievant's testimony or resumé as any indication of qualification. For example, he did not know what she did to order supplies, but concluded he would never ask an applicant if "you order supplies." This summary conclusion underscores the problem. Whether or not it is necessary to interview a new applicant by questioning whether they ordered supplies, it is impossible to know if that duty manifests the "Ability to prioritize workload" in the absence of an attempt to assess what the employee did.

It is not necessary to question Rivers' experience or dedication to note that it is a rare assessment of an individual employee's qualification that demonstrates no redeeming experience, even if that employee is found unqualified. It is the active balancing of positive and negative aspects of individual experience that defines the assessment of qualifications. His testimony manifests that he did not undertake an assessment of her individual skills. Rather, he "knew" her work and "knew" she was unqualified. Even if his conclusion is in some sense valid, it demands an evidentiary basis which reflects an individual assessment of her seniority and qualifications. In the absence of that basis, there is no demonstrated compliance with Section 7.03.

The Grievant's asserted deficiency regarding client confidentiality does not undercut this conclusion. Even ignoring the dispute on what was said and to whom during the false alarm incident, it is undisputed that the verbal warning dates from June of 2006. Use of the warning to disqualify the Grievant compounds the absence of an individual assessment of her qualifications. Even presuming the accuracy of the County's depiction of the incident, there is no evidence Rivers assessed its impact on the issue of the Grievant's qualifications. The roughly three year gap between the incident and the posting can as reasonably be seen as proof that she learned the significance of confidentiality as that she lacks sensitivity to it. The assertion that Home Health Aide skill sets are not transferable to Clerk I affords no support for the County's position, because there would be no basis for the discipline unless confidentiality plays a role in a Home Health Aide's job performance. Since the assertion of the incident demonstrates the significance of patient confidentiality to a Home Health Aide's job performance, how was the incident and the absence of further incidents weighed regarding her application to be a Clerk I? The evidence is silent on this point, underscoring the absence of the individual assessment of qualifications that is the core weakness of the County's position.

The County raises a series of forceful arguments on whether the Union has established the Grievant's qualifications to be a Clerk I. It does no disservice to those arguments or to the Greco award to conclude the Union has demonstrated the Grievant has sufficient competence to meet the minimum qualifications needed for a trial period under Section 7.03. Rivers' testimony documents his reasons to be concerned that she starts the job less qualified than the three prior incumbents. This establishes his "preference", but the standard is "minimum qualifications." County assertion that the Union failed to demonstrate her present ability to competently handle a keyboard ignores that testing is not permitted under Section 7.03, and the Union seeks, in part, to secure the trial period at which she can prove herself. She has demonstrated she has a basic knowledge of Microsoft spreadsheet and word processing software used by the department. That the department uses software no applicant necessarily has experience in cannot be held against her. The County persuasively questions the risk of turning the "trial" period under Section 7.03, as interpreted in the Greco award, into a "training" period. The force of the argument must be granted, but the greater risk posed on this record is the evisceration of seniority and unit protections established by Section 7.03 by affirming a County decision that lacks a demonstrated individual assessment of the Grievant's qualifications. That some element of training enters the trial period is evident from the evidence as well as from the final sentence of the third paragraph of Section 7.03.

In sum, the evidence shows no factual basis for Rivers' conclusion that the Grievant was not qualified for the Clerk I position. The evidence establishes no persuasive reason to conclude Rivers conducted an individual assessment of the Grievant's qualifications and seniority. The Union has demonstrated she meets the minimum qualifications for the position. The County's denial of a trial period thus violates Section 7.03.

The Award entered below grants the Grievant the Clerk I position, subject to the requirements of Section 7.03, including its third paragraph. There is no specifiable make-whole component to the Award, since Section 7.03 permits either the Grievant or the County to determine that she will not continue in the position. The section grants the Grievant that choice "within 30 working days" if she "wishes to return to . . . her former job" and the County that right if "after thirty (30) working days" her "performance is not up to the standard of qualifications required." The impossibility of foreseeing what might transpire during this roughly thirty day period precludes detail on a make-whole remedy. This uncertainty is the basis of the retention of jurisdiction noted in the final portion of the Award.

### **AWARD**

The County did violate Section 7.03 of the agreement by not awarding the Clerk I position in the Health and Human Services Department to the Grievant.

As the remedy appropriate to its violation of Section 7.03, the County shall award the Clerk I position to the Grievant, subject to the requirements of Section 7.03, including its third paragraph. If the Grievant successfully complies with the requirements of Section 7.03, including its third paragraph, the County shall make her whole by compensating her for the



difference in wages and benefits she actually earned between the date she would have occupied the Clerk I position had the County awarded her the position following the original job posting and the date that she first occupies the position under the terms of this Award, as compared to the wages and benefits she would have earned but for the County's violation of Section 7.03.

I will retain jurisdiction over this matter for a period of not less than forty-five days from the date of this Award to address any remedial issues.

Dated at Madison, Wisconsin, this 13th day of July, 2010.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator