

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**SAWYER COUNTY COURTHOUSE EMPLOYEES,
LOCAL 1213-COURTHOUSE, of the
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

SAWYER COUNTY

Case 166
No. 69562
MA-14650

Appearances:

James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, for Sawyer County Courthouse Employees, Local 1213-Courthouse, of the 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 Sawyer County, which is referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union and the County jointly requested the Wisconsin Employment Relations Commission to appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Jacquelyn Thompson, who is referred to below as the Grievant. Hearing was held on May 20, 2010, in Hayward, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by August 10, 2010.

ISSUES

The parties did not stipulate the issues for decision. The Union's "Statement of the Issue" reads thus:

Did the Employer violate the terms of the Collective Bargaining Agreement when it denied the Grievant the opportunity to bump into an ADRC Secretary III position? The Employer administered a test and used the results to deny the Grievant her bumping rights. The Grievant should have been afforded a ninety (90) day trial period to demonstrate her abilities to perform the duties of the position she had elected to bump into.

The appropriate remedy is for the Employer to allow the Grievant to bump into the ADRC Secretary III position and to demonstrate her ability to perform the duties of this position.

The County's reads thus:

Did the County violate the collective bargaining agreement when it submitted Grievant to a typing test and determined that Grievant was not qualified to fill the ADRC Secretary position?

Did the County violate Article 9, Section C, of the collective bargaining agreement when it did not grant her a 90-day trial period in order to demonstrate her ability to do the job?

I adopt the Union's statement of the issue as that appropriate to the record and modify it thus to reflect the issues for decision:

Did the Employer violate the terms of the Collective Bargaining Agreement when it denied the Grievant the opportunity to bump into an ADRC Secretary III position?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 8 – SENIORITY

A. Definition: It shall be the policy of the Employer to recognize seniority.

. . .

B. Layoff: When the County determines that a reduction in staff . . . is necessary, the County may lay off . . . employees according to the following procedure:

...

2. Employees shall be laid off within classifications based upon the employee's seniority. . . . Employees who are laid off may bump less senior employees in equal or lower classifications provided they can demonstrate that they are qualified. Employees wishing to utilize their bumping rights pursuant to this section must notify their supervisor of their intentions within seventy-two (72) hours.
 3. The County shall give employees two (2) weeks notice prior to any layoff. . . .
- F. Section . . . B . . . of this Article shall not apply to personal care workers.

...

ARTICLE 9 – JOB POSTING, TRANSFERS AND PROMOTIONS

- A. Seniority: When the County chooses to make a promotion, fill a vacancy or create a new job, the policy of seniority shall prevail provided, however, that the senior employee considered for the job is able and qualified to perform the work. . . .
- C. Trial Period: An employee who is awarded a position through the posting procedure shall serve a three (3) month trial period in the new position. Should the employee not qualify, or should the employee so desire, he/she shall be reassigned to his/her former position or equivalent without loss of seniority. After said trial period, the employee shall be permanently assigned to the position.

BACKGROUND

The grievance form, dated December 31, 2009, (references to dates are to 2009, unless otherwise noted) states the “Circumstances of Facts” thus:

21 years of service employee, was asked to test for skill evaluation in order to bump into the ADRC position; employer said employee did not pass speed requirement for typing. Request for re test denied. Placement to ADRC position denied.

The “ADRC position” refers to the Aging & Disability Resource Center Secretary position, which is a Secretary III position in the County’s Health & Human Services Department (HHSD), and which is within the Courthouse bargaining unit. The grievance form states the “Article or Section of contract which was violated if any” section thus:

Testing is not a part of our contract, management can test to evaluate skills to see where employee may need additional training but cannot use it to keep an employee out of a job. Article 9 Section C – Trial Period – Employee has 90 days to demonstrate ability to do job.

The form seeks as the “corrective action desired” that the Grievant be placed in the ADRC Secretary position and be made whole for “all lost wages and benefits.”

Pete Sanders is the Director of the County’s HHSD, and answered the grievance in a memo dated January 5, 2010, which states:

The courthouse Union contract contains the following provisions regarding bumping:

Article 8 - Seniority, B. Layoff . . .

Having the ability to type a minimum of 40 words per minute (adjusted for errors) is a qualification of the ADRC Secretary position. (The Grievant) was given the test and did not qualify.

The County can and does use testing to determine employees’ qualifications for positions. The County tests all external applicants for this standard and tested at least three internal candidates for this standard within the last year. All three were courthouse union employees . . .

To utilize the bumping procedure, the employee must demonstrate they are qualified to do the job at the time they start. Some orientation to the specific duties unique to the job is anticipated, but the employee must be qualified at the time they start. The employee does not have a 90 -day trial period to demonstrate ability to do the job. The trial period applies to posting, not bumping. However, even in a posting situation, the County has the right to determine if an employee does or does not meet the qualifications for the position. . . .

These documents set out the essential themes of the grievance.

The County first hired the Grievant on January 1, 1989. She worked for the County as a Personal Care Worker and as a Home Health Aide. On the Union’s October seniority roster, she ranked ten of sixty-eight employees.

On August 21, the County posted a newly created ADRC Secretary position. Attached to the posting was a position description, which states the “Qualification Requirements” for the ADRC Secretary position thus:

1. Education and Experience – (a) minimum of high school education or its equivalent; (b) two years of office experience with competency in computer use and data base software.
2. Knowledge: (a) considerable knowledge of modern office methods and procedures; (b) considerable knowledge of business English and spelling; (c) some knowledge of data base systems; (d) cultural competence; (e) must be AIRS certified within one (1) year of employment;
3. Abilities: (a) to perform difficult clerical tasks; (b) to make arithmetical computations and keep accurate records; (c) to meet public and work well with professional staff, co-workers, clients and outside agencies, including with individuals with mental and physical challenges; (d) to understand and carry out oral and written instructions; (e) to work independently. Must successfully complete clerical and computer skills test.
4. Personal Attributes: - (a) should be neat in appearance and work; (b) have a pleasant personality; (c) attentive, courteous, dedicated; (d) good memory; (e) maintain confidentiality; (f) work well under pressure or emergency situations. . . .

The Posting stated the “Requirements” section thus:

High School diploma, two years of office experience with competency in computer use and data base software required; **Must successfully complete clerical and computer skills test**

The Grievant signed the posting. The test given by the County included a typing component, which the County administered on September 8, on the personal computer of a member of the Courthouse bargaining unit. The test was administered and scored via an internet web site. The Grievant completed the test with a speed rating of thirty-two words per minute, with sixteen mistakes, which the internet site rated, “(adjusted speed 16 WPM).” The Grievant did not grieve her disqualification from filling this opening.

Carol Larson is the County’s Human Resources Manager, and in a memo dated October 22, advised the Union of the elimination of the Personal Care Worker Program. The memo states,

At the October 15, 2009, County Board meeting, the Board approved eliminating the Personal Care program effective December 31, 2009. The Personal Care program has not been able to recoup its cost of operation. This program is not a required service of County government and the Board determined they could no longer subsidize it through the tax levy.

The Personal Care Workers are in the Courthouse Union but, under the terms of that collective bargaining unit agreement, are not covered under the Layoff and Recall Provisions of Article 8, Seniority. They do not have bumping rights. The County is not required to give a two-week layoff notice. The effective date of their layoff will be dependent upon transitioning clients from Sawyer County care, but we anticipate it will be no later than December 31, 2009.

Jacqueline Thompson, the remaining Home Health Aide will be subject to the same layoff as the PCWs, but does have bumping rights under the Courthouse Union collective bargaining unit agreement for positions in equal or lower classifications, providing she is qualified to perform the work. . . .

I will provide the required two-week notice of lay-off to Ms. Thompson . . . when we determine the date we can transition from providing services to clients. . . .

Larson issued the Grievant the lay-off notice in a memo dated December 3, which states:

This letter is the official notice that you will be laid off from your Home Health Aide position with the Sawyer County Health & Human Services Department effective December 31, 2009.

You are being laid off because your position was eliminated in the 2010 Sawyer County budget. You may exercise your bumping rights as described under the terms of the collective bargaining agreement between Sawyer County and the AFSCME, Local 1213-Courthouse Union. The contract requires that you notify your supervisor within seventy-two (72) hours if you intend to exercise your bumping rights. In that notice, you must include the position you intend to bump into. The time line to provide your notice to your supervisor starts on the date and time when you receive this notice, which is shown above.

Please be advised that you must demonstrate that you are qualified to perform the work of the position you are bumping into. Also be advised that the Trial Period described in Article 9, Paragraph C, does not apply to bumping. That is, if you determine you do not want the position you bumped into, you do not have a right to bump into a different position or to accept the layoff at a later date. Similarly, if you are unable to successfully perform the duties of the position you bumped into, you may be subject to discipline for failure to adequately perform your job duties.

Please be advised that a new 12-hour per week Level III Administrative Assistant position is being created for the Ambulance/Emergency Government Department. If you wish, you may post for that new position. However, at 12-hours per week, the position would not be eligible for the health insurance

benefit unless you were awarded the position and were also able to bump into a part-time position with compatible hours.

If you do not exercise your bumping rights, you will be laid off and will have recall rights for two years. You will receive your final pay on the January 8, 2010, payroll date. It will include pay for all hours worked through 12/31/09 and any balances you have of vacation or compensatory time. Under the layoff, you could not use vacation or compensatory time to remain in pay status after 12/31/09. . . .

In a memo dated December 3, the Grievant advised the County that,

I am planning to exercise my bumping rights. At this time I am looking at bumping into the ADRC secretary position.

In a memo dated December 9, Larson responded thus:

. . . One of the provisions of the bumping process is to demonstrate that you are qualified for the position.

The Health & Human Services Department has developed a three-part test that they administer to both internal applicants who post and external applicants who are considered for clerical/secretarial positions. It is my understanding that Patty Dujardin is making arrangements for you to take the test. We will inform you of our decision on whether you meet the qualifications for the position after you take the test.

The “three-part test” had a written, a computer, and a typing component. The Grievant took and passed the written component.

As with the September 8 test, the Grievant reported to the workstation of a Courthouse bargaining unit employee, who logged onto the computer and accessed the website from which the Grievant took the typing test. The Grievant’s duties as a Home Health Aide required her to travel around the County and she reported to the Courthouse from her field duties to take the typing test, at roughly 1:00 p.m. on December 21. She asked and was denied permission to warm up for the test. She was permitted to use her own keyboard. The Grievant completed the test with a speed rating of forty words per minute, with twelve mistakes, which the internet site rated, “(adjusted speed 28 WPM).” The County did not permit the Grievant to take the remaining component of the test.

In a memo dated December 28, the Grievant advised the County that she wished to retake the typing test, and that if the County refused she wished to bump “into the Child Support position.” Sanders was then out of the office, and in a memo dated December 31, Larson advised the Grievant that,

. . .

You will be on layoff status pending the determination of:

- Whether you will be allowed to re-test for the ADRC Secretary position; or
- Whether you meet the qualifications for the Child Support - Paternity Specialist position; and
- Whether the County has the ability to change the person authorized through ARRA funding.

I expect these determinations will be completed by the end of next week. Please be advised that during next week's consideration of these issues, we will continue the calculations for your health insurance contribution split at their current level and pay you for the January 1, 2009, holiday at your current level. By copy of this memo, I am informing you and the Courthouse union that this does not set a precedent for continuation of benefits during a layoff. It is only being done for a temporary, one-week time period while the County makes decisions on the issues.

The Grievant reported to the Courthouse for work after December 31, asking what work was available for her. In a memo issued January 6, 2010, Larson informed the Grievant of the testing process for "the Child Support – Paternity Specialist position." In a memo issued January 8, Larson informed the Grievant that, "Sawyer County has determined that you are not able to demonstrate that you are qualified for the Child Support Paternity Specialist position", adding, "your layoff status will continue." The Grievant continued to report to the Courthouse for work until January 12, when she phoned Larson to determine if the County would assign work for her. Throughout this period, Larson would respond to the Grievant's request for work assignment that the Grievant was in layoff status.

In a January 13, 2010, memo to the Grievant entitled "Bumping Rights Expired", Larson stated:

On Friday, January 8, 2010, at 10:50 a.m., I provided you with a notice that you were not able to demonstrate that you were qualified for the Child Support Paternity Specialist position. In that notice, I informed you that your layoff status would continue and that you had 72-hours to notify the County of your intent if you wish to bump into another position.

The 72-hour time frame ended at 10:50 a.m. on Monday, January 11, 2010. I did, however, wait until today, Wednesday, January 13, 2010, to provide you with this notice in the event you believed weekends did not count toward the notification timeline. As of 11:00 a.m. on Wednesday, January 13, 2010, you have failed to notify the County of your intent to bump into a different position. Therefore, you have forfeited your bumping rights. . . .

Larson's memo also detailed the Grievant's recall rights. The background set forth to this point is undisputed. The balance of the background is best set forth as an overview of witness testimony.

The Grievant

As a Home Health Aide, the Grievant drove from her home in the southern portion of the County to client residences to assist with their care needs. She was aware in August that the County was considering eliminating the Personal Care Worker Program.

She took the September 8 typing test in Kathy Garbee's office. Garbee did not permit her to warm up, but directed her to the website from which the Grievant read the test instructions and took the test. The Grievant noted that she was "very uncomfortable" and "very nervous", correcting her mistakes as she made them. Patty Dujardin is a supervisor, and informed the Grievant that she had failed the typing test and that she would not be able to take the remaining test components. She also advised the Grievant to practice typing at home or take courses to sharpen the Grievant's skills. The Grievant accepted the advice, and did practice on-line at home. The Grievant did not file a grievance because she knew she still had employment as a Home Health Aide.

Sometime in October, Sanders and Larson met with the employees in the Personal Care Worker Program to alert them to the probable termination of the program. The meeting became heated, with the Grievant attempting to "stick up for" the Personal Care Workers. The Union had fought for some years to get bumping rights for all of the Personal Care Workers, and the Grievant felt Sanders and Larson treated her dismissively during the meeting, implying that as one of two employees with bumping rights, she should keep quiet.

She was surprised that the County put her through the testing process in December after she advised Larson of her desire to bump into the ADRC Secretary III position. She believed her experience as a Home Health Aide and her abilities made her a good fit for the position, which would have paid her considerably less than she earned as a Home Health Aide. That she sought to bump into a new position made the transition as smooth as possible for the County and for her. The County used the same process for the December 21 test, with the exception that Garbee let the Grievant use her own keyboard.

Louise Ladenthin advised her to report to the Courthouse for work after December 31. Larson would simply advise her that she was on layoff. Sanders did invite her into his office, but gave her the same response, and questioned whether she really wanted to drive into Hayward to ask if the County had work for her.

Debra Hammerel

Hammerel has worked for the County for roughly thirteen years, including a brief period of time as the ADRC Secretary III. She posted for that position, and was given a

computer test and a typing test. She passed the former and failed the latter. After her first failure, she sought a re-test from Dujardin, so that she could use her ergonomic keyboard. Dujardin advised Hammerel to practice at home, and at some point, the County granted her request to retake the test with her own keyboard, but she again failed the test.

Hammerel took the test a third time. Garbee administered the test on that occasion, and Hammerel passed. She estimated that there was perhaps a week between each of these tests. In her view, the computer test was more closely related to the ADRC Secretary III position than the typing test, but the position does require typing. Hammerel thought that she took each of the three typing tests for the ADRC Secretary III position, but could not specifically recall and did fill another position during the period of time over which she took the tests.

Louise Ladenthin

Ladenthin worked for the County from March 1, 1979 through her retirement on January 15, 2010. She held virtually every Union position a person can hold during that period. She played an active role in all of the grievances processed by the Union during her tenure with the County.

The County has seldom been required to lay off employees. During the late 1980's, however, the County had to implement a lay off that affected roughly twelve employees. The Union and the County cooperated in this process and the County honored seniority without the use of any test. The County permitted employees to experiment with other positions, then return to their old position within a ninety day trial period. The contract was essentially the same then as when the Grievant sought to exercise bumping rights. Ladenthin could recall no County assertion that any employee was unqualified to bump a less senior employee. At least two of the employees who went through that process remain on the seniority roster.

Ladenthin was not on every Union bargaining team that negotiated contracts during her tenure, but she was, as a Union official, aware of the give and take surrounding each negotiation. At no point in her tenure did the Union agree to give the County the right to test to determine employee qualifications.

Ladenthin attended the October meeting at which Sanders and Larson gave Personal Care Workers a "heads up" that the program would terminate at the end of December. Ladenthin was part of the laborious process by which the Personal Care Workers were brought into the Courthouse unit. Ladenthin thought that Sanders and Larson singled the Grievant out as the only employee in the program who could bump, highlighting, in Ladenthin's view, that the Grievant should just "move on."

In Ladenthin's view, bumping should permit the Grievant "a position of her choice based on her choice." The only limitation on this choice should be the ninety day trial period. The bumping process should operate to guarantee more senior employees work over less senior employees. Ladenthin filed the December 31 grievance and advised her to report for work and

ask the County to assign her work. From January 5 on, the Grievant reported to work. Ladenthin accompanied her to a meeting with Sanders and Larson. At that meeting, Ladenthin informed them that the Grievant had the right to bump, was willing to work and was willing to be trained. Sanders and Larson responded only that there was no work for the Grievant for which she was qualified. Throughout an extended period of time, the Grievant sat in the lobby of the courthouse, bravely watching others work while she waited for the County to assign her some of the work that "there was to be had."

Ladenthin viewed the bolded reference in County job postings to indicate no more than that it reserved the right to test external applicants. Even if the Union agreed to grant the County the right to test, the County's typing test was subjective and should not have been administered by a unit member. The Grievant's twenty-one years of service made her sufficiently qualified to merit the ninety day trial period.

Carol Larson

Larson has served in her current position since February of 2003. Throughout her tenure, the County has used tests to determine qualifications in many, if not most, openings. Clerical positions are no exception and the Union has never grieved County administration of a test until this grievance.

Hammerel's experience affords no exception. In an e-mail to the Union President dated February 25, Larson noted:

We've been going through a soap opera with our position postings.

The background is that we created a new ADRC Secretary position. Brenda Johnson and Deb Hammerel both posted for the ADRC Secretary position. Deb was more senior, but did not pass the typing test. The position was awarded to Brenda Johnson - which vacated Brenda's Information & Referral Secretary position.

Vicky Gray posted for and was awarded the Information & Referral Secretary position - which vacated Vicky's Receptionist/Secretary position. Deb Hammerel posted for (passed the typing test this time) and was awarded the Receptionist/Secretary position.

A few days ago, Vicky determined she did not want the Information & Referral Secretary position. Today, Brenda decided she did not want the ADRC Secretary position. Our intent is to allow Vicky and Brenda to go back to their former positions and award the ADRC Secretary position to Deb Hammerel.

I think this will work to everyone's satisfaction, but I do want to make sure that the union doesn't have an issue with us awarding the ADRC Secretary position

to Deb without re-posting it. Again, the first time it was posted, only Brenda and Deb signed for it.

Please let me know asap so we can proceed.

The Union President responded in a February 25 e-mail thus:

The Union does not feel that it is necessary to re-post the Aging & Disability Resource Center Secretary III position. If Deb Hammerel who re-tested and passed the skills test wants this position it should be awarded to her.

After her failure to pass the typing test for ADRC Secretary III, Hammerel did retake and did pass the typing test for a posted vacancy for a secretarial position in public health.

Larson could not recall the specific date of the October meeting regarding the probable termination of the Personal Care Worker program. She could recall discussion of bumping rights and she did recall that a number of employees were upset.

Larson kept the Grievant fully informed regarding her bumping rights, but her failure to pass the tests for the two positions she sought to bump into precluded further County action to place her in a position. The Grievant sought no other positions. The Grievant continued to report for work and Ladenthin asked repeatedly if the County was ordering the Grievant to go home. Larson was unsure what Ladenthin meant, but assumed Ladenthin was seeking to have the County put the Grievant on paid administrative leave.

The Union and the County did not bargain regarding testing in bumping situations during Larson's tenure. The lay off of employees in the Personal Care Worker program was the first layoff in Larson's tenure.

Pete Sanders

Sanders has been a County employee for roughly thirty years. The HHSD, as currently constituted, reflects the merger of two departments in 1993. The Social Services Department required tests for at least thirty years for various positions and used typing tests at least that long. Civil service testing has a longer history, which includes clerical staff.

Typing tests date at least from the late 1980's. At that time, a Courthouse unit employee, Cindy Yackley, who had been hired for her mapping skills, was permitted a trial period in a clerical position posted in the Community Services program. She lacked clerical skills but was afforded a trial period after discussions between the County and the Union. Sanders dismissed her from the trial period because she could not type and lacked clerical skills. Yackley was, however, offered a position in a different program and was able to complete its trial period. Since that time, the Community Services program has used typing tests. Sanders' experience with lay offs was limited, and he could not recall any instance,

prior to the Grievant's, in which an employee bumped into an occupied position. His supervisory duties in the late 1980's were in a building separated from the Courthouse and he did not observe the impact of the layoffs on Courthouse employees. The employees he supervises are spread across three separate bargaining units.

The current typing test sets a low threshold of forty words per minute as the minimum qualification for a position requiring typing. Larson selected the actual test, which had been used for some time by a State-run job center. Dujardin oversaw the procedure, but had her clerical staff administer it. The website self-scores and requires no active County involvement. No employee was permitted to warm-up. Rather, they were expected to arrive at the test site and perform the test as soon as they were logged onto the testing website. Retesting was not permitted, except as an accommodation, such as Hammerel's, to permit use of an ergonomic keyboard. Sanders did not believe the Grievant had an appropriate skill set for the position, but did not know if she was incapable of passing a trial period.

The ADRC Secretary position was created as the sole clerical support for an entire unit of employees. The duties of the position do not permit a training period. There is no particular order for the three components of the testing, but the County has not permitted any exceptions to the testing requirement.

The October meeting was a "heads-up" for the then possible termination of the Personal Care Worker program. He could not recall if the discussion centered directly on bumping or on posting into vacant positions. He recalled the meeting's atmosphere as "tense but not uncomfortable."

Sanders saw the Grievant in the Courthouse lobby after his return to work in early January of 2010. He asked her why she was there, and the Grievant gave him a copy of Larson's December 31 memo. Sanders had not yet seen the document. He asked her to come with him to Larson's officer, where they discussed the memo, and informed the Grievant that her presence in the Courthouse would not affect her layoff status, or have any bearing on whether she would be allowed to retest for the ADRC Secretary III position. Sanders denied the request for a retest.

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

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the record, the Union argues that testing constitutes "the County's act of arbitrarily and unilaterally limiting an employee's seniority and bumping rights." Seniority is a significant contractual right, particularly in lay off situations. It is "the reward of many years of service to an employer."

Examination of the labor agreement demonstrates that the Grievant should “be allowed to bump” into a position occupied by a less senior employee and then demonstrate “her ability to perform the duties of the position to which she has elected to bump into.” Contrary to the County’s assertion, there never has been any agreement between the parties that authorizes the use of testing. The proper means of testing qualifications is objective, and should be based on actual performance rather than an individual’s ability to be a “good test taker”. Article 9, Section C offers “a proper direction to follow in the handling of employees bumping into other positions” by permitting a three month trial period. Such a period offers a clear, open and objective means of determining qualifications.

Ladenthin’s testimony clearly and unequivocally establishes that the “Union has never agreed to nor accepted testing.” There have been few layoffs in the County and the earlier lay off situation confirms that seniority, rather than testing, governs the bumping process. Viewed more factually, the evidence shows the “quality assurance and the objective procedures were very poor” in the administration of the Grievant’s tests. In each test, the Grievant arrived from her field duties on a cold day and was forced to take the test without warming up. The test administrator was a fellow employee. Beyond this, Hammerel’s testimony establishes that she was given three attempts to pass the typing test.

Viewing the record as a whole, the Union concludes that the arbitrator should “sustain this grievance and direct the County to place the grievant into the ARDC Secretary III position.” Beyond this, the County should be ordered to “make her whole for any and all lost wages and benefits” attributable to “her unjust loss of employment with the County.” The County should also be ordered to “cease and desist from imposing tests upon employees electing to bump into positions held by less senior employees due to layoffs.”

The County’s Initial Brief

After a review of the record, the County asserts that the grievance “boils down to whether the grievant must be considered qualified before being allowed to bump into the . . . (ADRC) Secretary position or whether her seniority rights allow her to be placed into the position in order to demonstrate that she is qualified.” Section 8, B2, governs this issue and, through the use of “provided”, clearly requires that a condition be met. The condition is that a bumping employee must demonstrate their qualifications before “being allowed to bump an existing, less senior employee from their position.” This reflects sound policy, which is confirmed in arbitral precedent. Taken to its logical extreme, the Union’s reading of the contract would demand the County to allow a senior employee to bump into any position occupied by a less senior employee without any demonstration of minimum qualifications.

The labor agreement states no “training period” for bumping and, significantly, states a “trial period” for job postings. Section 9C confirms that the parties could have adopted the Union’s position regarding bumping, but chose not to. Rather, they agreed to restrict the ninety day trial period to job postings. Even if the parties had a trial period for bumping, arbitral precedent confirms that an employee must have minimum qualifications to secure a

trial period. Evidence of past practice will not establish the entitlement the grievance asserts. Ladenthin's testimony stretched back twenty years and was undocumented. That such documents may exist cannot obscure that none were offered. Beyond this, examination of her testimony fails to establish the County did not test. What examples she could recall consist of employees transferring between secretarial positions rather than from a non-secretarial to a secretarial position. Thus, "there may have been no need for testing". Sanders testimony contradicts Ladenthin's. His roughly thirty years of experience was that civil service requirements required testing well before the layoffs that Ladenthin's testimony is based on.

Arbitral precedent confirms that the County "has the right to establish minimum qualifications for any bargaining unit position." As the Union notes, the contract is silent regarding testing, but this cannot obscure that the County set the minimum standards for the ADRC Secretary position at a typing proficiency of forty words per minute. Ungrieved job postings confirm that the County requires this threshold in a number of positions. Arbitral authority confirms that an employer may use a test to establish whether an applicant meets the minimum qualifications for a position. There can be no doubt the test required of the Grievant was specifically related to the job; was fair and reasonable; and was administered in good faith without discrimination. If an employer can require a job applicant to pass a typing test, then that right cannot be less valid in a bumping situation. That the Grievant had over twenty years of experience in a non-secretarial position highlights the significance of the need for testing.

The requirement that applicants meet a minimum passing test score has been long established in arbitral precedent. In fact, employers have been faulted for failing to establish such a standard. In any event, the threshold was low in this case, and the Grievant could not meet it. The Grievant twice failed the test. In each instance, she showed a propensity to make mistakes which lowered her score well below the minimum. The County's conclusion that she was not qualified was neither arbitrary nor capricious.

Contrary to the Union's assertions, the test was administered fairly and without discrimination. The typing test was one of three required to demonstrate skills for clerical positions. No applicant was allowed to warm up; the Grievant's nervousness has no bearing on the test's administration; and the administrator was not obligated to inform any applicant that errors would count against the measurement of typing speed. The high number of errors in the Grievant's tests manifests that in spite of advance notice that her prior position was coming to an end and that she would need to have typing skill to bump, the Grievant did not address the typing deficiency evident from her first effort in September. Hammerel was not permitted to take a typing test three times. Rather, she was permitted to retake a test due to her past use of an ergonomic keyboard. The Grievant had two opportunities to pass the typing test and was permitted to use her own keyboard for one of them. There "is simply no evidence that the testing procedure prevented grievant from meeting the required qualification or that she was in any way treated differently than others." Viewing the record as a whole, the County concludes that the grievance should be dismissed.

The Union's Reply Brief

The County's arguments cannot obscure that "the fairest and most objective means to determine whether an employee is qualified to perform the duties of a position is to allow the senior employee the opportunity to perform the duties of the position in question." Article 8 confirms this by demanding that employees "demonstrate that they are qualified." The Union's arguments do not seek a training period, but a fair trial period.

The County's arguments obscure that the Grievant was not permitted "the simple courtesy of being able to warm up" after coming in from the cold. She was denied the ability to take the non-typing portions of the test. The County failed to use a qualified administrator to give the test. The lay offs in the late 1980's establish that employees did not have to test to fill secretarial positions. Rather, the County honored seniority. That Ladenthin had no specific documentation cannot obscure the clarity of her recall, or the absence of any County documentation to refute it. Whatever concerns the County has with the Grievant's testimony would be fully addressed by giving her a fair trial. If she is not qualified, the County "has the tools and legal right to discipline and to eventually remove the unqualified employee". The County's lack of compassion for an employee with twenty-one years of experience is evident. The contract and evidence demand that the grievance be sustained and that the Grievant be made whole.

The County's Reply Brief

The Union's arguments ignore that there "is no language in the contract which requires the County to fill a position with an unqualified individual" or precludes the County from testing for qualifications. The Union's failure to grieve the Grievant's attempt to secure the ADRC Secretary position through posting cannot be turned into a successful effort to secure the position, without testing, through bumping. The Union's assertion of how qualifications are demonstrated is "irrational." Taken to its logical extreme, the Union's view would permit any employee to "try out" for a position with no more qualification than seniority. This view "is an interpretation clearly without foundation in the contract."

Nor can the test's administration be faulted. There is no evidence that the Grievant was actually cold when she took her test. The request that she be allowed to "warm up" implies she should have received a practice period other applicants did not. It is regrettable that the Grievant lacked the qualification to bump, but that lack of qualification fails to establish a contract violation.

DISCUSSION

The parties did not stipulate the issues for decision, but the difference between their opposed views is not great. I have adopted a single issue on the merits of the grievance that broadly questions a contract violation. The County's statement of two issues accurately reflects that the interpretive issue turns on the application of Articles 8 and 9, which govern bumping and posting.

The logical statement of the issue masks the depth of feeling surrounding the dispute. It is evident that the dislocation following the termination of the Personal Care Worker program had a deep impact on the Grievant individually and, as noted in Ladenthin's testimony, on the Union more generally. That impact was not restricted to employees. The pain and discomfort experienced by the Grievant as she waited in the Courthouse for the assignment of work following her December 31 layoff extended to Larson and Sanders, who brought the Grievant into Larson's office to attempt to fathom the basis for her reporting for work that, in their mind, no longer existed.

Ladenthin's testimony speaks eloquently to the depth of her belief in seniority and in the obligation of the County to provide work for a long-term employee. The Union's arguments on the contract reflect this, but this returns this discussion to the analysis of the labor agreement. The authority of an arbitrator is granted by, and limited to, the contract. Because this involves the exercise of coercive authority, either party's depth of feeling must yield to the necessity of rooting the power to coerce on the terms of the labor agreement. Without that, coercive authority rests on whim.

As noted above, the interpretive issue turns on the application of Article 8, Sections A and B read with Article 9, Sections A and C. Section A of Articles 8 and 9 broadly recognizes the significance of seniority without specifying how to do so. The parties note that the agreement does not specifically address the County's right to test to determine qualifications. Thus, the interpretive issue does not involve clear and unambiguous language.

In my view, bargaining history and past practice are the most persuasive guides to resolve contractual ambiguity, since each focuses on the behavior of the bargaining parties, whose intent is the source and goal of contract interpretation. However, these guides afford limited guidance in this grievance. The parties have not addressed the issue of testing in bargaining. The lay off experience of the late 1980's affords no support for the County's use of testing to assess employee qualifications in bumping situations. It fails, however, to afford conclusive support for the Union's view. It is not evident whether Yackley bumped or posted into the clerical position for which she was afforded a trial period. Past this, the Union's view fails to address Sanders' and Larson's testimony on extensive County use of testing throughout their employment tenure.

Against this background, the language of Articles 8 and 9 must be honored in a fashion that does not violate what evidence there is of bargaining history and past practice. This demands that the language be addressed narrowly, because these guides offer less than definitive guidance. Because the Grievant sought to displace an existing employee based on seniority, Article 8 is the governing provision. More specifically, Subsection B2 of Article 8 governs the grievance, and the specific issue is whether the record shows the Grievant "can demonstrate that (she is) qualified" to bump.

By its terms, Article 9 cannot be applied to the grievance. Section A limits Article 9 to County choice "to make a promotion, fill a vacancy or create a new job". None applies to the

grievance. Nor can the “Trial Period” of Section C be applied to a bumping situation. It addresses two possible outcomes of a trial period. The first is “should the employee not qualify” and the second is “should the employee so desire”. Each outcome mandates that the employee “shall be reassigned to his/her former position”. The termination of the Personal Care Worker program highlights the inapplicability of this provision to the grievance.

Against this background, the parties’ dispute requires application of a reasonableness standard. The force of the Union’s position is that recognizing the principle of seniority reasonably requires that an employee with the Grievant’s seniority be granted the objective opportunity to prove herself. The force of the County’s position is that it cannot reasonably be required to provide a Trial Period to an employee until the employee can demonstrate minimum qualifications for the job.

The governing language and the evidence provide greater support for the County’s view than the Union’s. Use of “Trial Period” rather than “Training Period” in Article 9, Section C supports the County’s view that Article 9 cannot support a view that only on-the-job performance can measure qualifications. More significantly, the record will not support the Union’s view that the Grievant can “demonstrate that (she is) qualified” under Article 8, Section B2. It is undisputed that the ADRC Secretary position demands typing and demands the position offer typing support for a number of employees. There is no dispute that forty words per minute states a minimum standard. Nor is there any dispute the Grievant failed to meet that standard in September and in December. She did not grieve her failure to qualify under Article 9, Section A in September. Against this background, the Union’s arguments unpersuasively read “qualified” in Article 8, Section B2 to have a different meaning than “qualified” in Article 9, Section A.

The interpretive issue is, in fact, more stark. The Grievant failed to qualify in September and in December. To accept the Union’s view renders the reference to “qualified” in Article 8, Section B2 meaningless. Ignoring that access to a Trial Period in Article 9, Section C demands an employee be “qualified”, the Union’s argument seeks more than voiding the County’s asserted authority to test. It implies, without restriction, that a senior employee can displace a qualified job incumbent by claiming a trial period without regard to demonstrating qualifications. There is no dispute that the ADRC Secretary III whom the Grievant sought to bump passed the test that the Grievant twice failed. This reads the “provided” reference in Article 8, Section B2 out of existence. Interpretation of a contract that renders language meaningless cannot be considered reasonable.

Viewed on a more factual basis, the County’s implementation of the test has not been shown unreasonable. The Grievant was not coming into the test cold, in the low temperature sense, for either test. The “warm-up” was not a temperature issue, but a rehearsal issue and no test-taker got to rehearse. As noted above, the required forty words per minute states a minimum threshold and is related to the requirements of the position. The most forceful challenge to the test is that Hammerel took the test on three occasions. If Hammerel’s testimony was clearer and stood alone, this challenge would be persuasive. However, she

could not recall clearly if each test was for the ADRC Secretary III position. Larson's testimony establishes that Hammerel's third attempt was actually a distinguishable test given for a separate position. The County's accommodation of Hammerel's request to use an ergonomic keyboard cannot be seen as unreasonable conduct toward the Grievant, who was permitted use of a personal keyboard for her second test.

It does not follow from this that the County has demonstrated an unlimited right to test in bumping situations. The County's proposed issue on this point is far broader than the evidence will support. What happened in the layoff situation of the late 1980's is not sufficiently clear to establish the broad right the County asserts. It appears the County assessed employee qualifications less formally than with the Grievant in this case. Their proof of a history of testing establishes that they have, for a variety of positions, used tests to determine qualifications, but fails to establish agreement on the scope of that right. With this as background, the grievance must be resolved on the narrowest basis possible. The County's assertion that it could demand a minimal level of typing proficiency from the Grievant as a condition of bumping the ADRC Secretary III is reasonable, particularly contrasted to the Union's sweeping assertion that the sole means to test qualifications is a trial period. No more can reliably be concluded on this record.

Before closing, it is appropriate to tie this conclusion more closely to the parties' positions. The depth of Ladenthin's support of seniority is noteworthy. This cannot obscure that the contract is the source of coercive authority, and the contract will not support the breadth of her views. Section B2 of Article 8 establishes a laid off employee "may bump". This, read with the notice provision of the final sentence of that subsection, establishes that an employee must initiate the bumping process. The awkwardness felt by the Grievant as she awaited County assignment of work is unfortunate, but cannot establish a County duty to find such work. The bumping process, viewed from the contract, starts with the laid off employee and does not operate as a County guarantee of work. That the Grievant chose not to bump for other positions reflects a choice, not a contract violation.

The Union's concern regarding testing as a general matter has considerable force. Contract silence on the point, however, points to a case-by-case analysis of when and how the County uses tests to determine qualifications. The use of a reasonableness standard assures the case-by-case analysis. This does not demean the Grievant's seniority. If her seniority included typing experience, then County use or County administration of the test could be questioned under the contractual recognition of seniority. In the absence of such experience, "seniority" cannot be read as a substitute for "qualified" without undermining the contract.

AWARD

The Employer did not violate the terms of the Collective Bargaining Agreement when it denied the Grievant the opportunity to bump into an ADRC Secretary III position.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 20th day of October, 2010.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator