

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

APPLETON MUNICIPAL EMPLOYEES UNION,  
WASTEWATER DIVISION, LOCAL 73, AFSCME,  
AFL-CIO

and

CITY OF APPLETON

Case 330  
No. 47614  
MA-7327

Appearances:

Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901 by Mr. Gregory N. Spring, Staff Representative, appearing on behalf of Local 73.

Mr. Gregory J. Carmen, City Attorney, City of Appleton, 200 North Appleton Street, Appleton, Wisconsin 54911, appearing on behalf of the City of Appleton.

ARBITRATION AWARD

AFSCME, Local 73 (hereinafter referred to as the Union) and the City of Appleton (hereinafter referred to as the City) jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the posting of a Liquids Operator position. The undersigned was so designated. A hearing was held in Appleton, Wisconsin on October 12, 1992, at which time the parties were given full opportunity to present such testimony, exhibits, stipulations other evidence and arguments as were relevant to the case. No stenographic record was made of the proceeding. The parties submitted the case on closing arguments at the end of the hearing, and the record was thereafter closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole the undersigned makes the following award.

I. ISSUE:

The parties were unable to agree on a statement of the issue and stipulated that the undersigned should frame the issue in his award. The issue may be fairly stated as follows:

Did the City violate Article XVII of the collective bargaining agreement by not awarding the Liquid Operator's position to Dave Konetzke? If so, what is the appropriate remedy?

## II. PERTINENT CONTRACT LANGUAGE:

### ARTICLE XVII - NEW JOBS, VACANCIES AND TEMPORARY ASSIGNMENTS

DEFINITION: A vacancy shall be defined as a permanent position with no incumbent when the job continues to exist.

When filling a new job or vacancy within the Division, the following procedure shall be used:

- 1) Posted on the Division bulletin board located by the time clock five (5) working days before the job operation begins.
- 2) Copy furnished to the Division Steward.
- 3) Employees desiring posted jobs will sign the notice.

At the end of the bidding period, the vacancy or new job will be awarded on the basis of the following provisions.

- 1) Seniority
- 2) Skill and ability
- 3) Physical fitness

Seniority shall govern when factors 2 and 3 are relatively equal in the judgement of the Employer and the Union. The employee shall demonstrate his ability to perform the job posted within sixty (60) days and if deemed qualified by the Employer shall be permanently assigned the job. This trial period may be extended by mutual agreement between the Employer and the Union. Should such employee not qualify or should he desire to return top his former job, he shall be reassigned to his former job without loss of seniority or pay. If no qualified applicants bid on the posted job, the City shall have the right to recruit personnel from outside the work force. In the event it becomes necessary to discontinue or suspend a job for a period of time, a notice to that effect shall be posted immediately.

An employee promoted to a higher classification shall be paid the rate of the new classification which is next higher than his/her rate, prior to promotion but in no case shall the new rate be lower than the rate such employee earned while performing in the position as a temporary assignment. Subsequent increases shall be at the appropriate intervals as outlined in the Agreement, Exhibit "A", until the maximum rate of the new classification is reached.

Temporary assignments to higher classifications shall be offered by seniority within a job classification. If no employee accepts the temporary assignment, the Employer may assign qualified employee(s) by reverse seniority within the classification. Temporary assignments shall be for a defined period of time.

. . .

### III. BACKGROUND FACTS:

The Employer is a City providing general governmental services to the people of Appleton, Wisconsin. Among the services provided is the operation of a wastewater treatment facility. The Union is the exclusive bargaining representative for the wastewater facility's employees, including those in the classifications of Solids Operator and Liquids Operator. The grievant, David Konetzke, is a Solids Operator who has been employed by the City since February 26, 1979.

On January 29, 1992, the City posted an opening for a Liquids Operator. Five employees signed the posting, including the grievant and Joe Kelderman, another Solids Operator who had been with the City since May 21, 1979. The grievant and Kelderman were the two most senior employees to sign the posting.

The Liquids Operator job has a detailed job description, as follows:

SECTION: Operations Control  
JOB TITLE: Liquid Process Operator

#### GENERAL STATEMENT OF DUTIES:

This is skilled work in the Liquid Process facilities of the Waste Water Treatment Plant. Work is performed with some latitude for independent judgment and action is reviewed by Operations Control Supervisor through reports, inspections and results obtained.

### DISTINGUISHING FEATURES:

Work involves responsibility for operation and minor maintenance of the liquid process facilities. Operation of units involve a large working area and cover several types of sophisticated equipment. Employees normally work independently on the basis of general and specific instruction for the day. Work is reviewed by the Operations Control Supervisor.

### EXAMPLES OF WORK:

The duties of this position include, but are not limited to, the following:

Makes adjustments to the wastewater flow through the treatment plant in accordance with prescribed standards as directed by the Operations Control Supervisor.

Skims primary and final tanks and drains traps. Drains tanks such as the primary, final, final contact tanks and flotation thickeners.

Prepares log sheets and reports.

Inspects motors, bearings, and gear boxes for overheating, proper lubrication and does minor maintenance.

Analyses local readings to determine proper process control.

Makes adjustments to the ferrous sulfate feed rate in accordance with test results as directed by supervisor.

Collects samples of wastewater and effluent at various stages of processing and conducts some routine physical and chemical analysis at various points in the wastewater stream. These include settleable solids, suspended solids, nitrogen, phosphorous, biochemical oxygen demand and dissolved oxygen profiles.

Conducts chlorination tests and makes adjustments as directed.

Monitors the operation of the flotation thickeners and makes flow and chemical adjustments as directed.

Makes air feed adjustments to the aeration tanks as determined by dissolved oxygen profile.

Makes regular reports to the Operations Control Supervisor regarding plant operations.

Sees to the handling and disposal of grit collected in the process.

Custodial tasks to keep work area clean. Clears snow in designated areas.

Performs related work as required.

Works independently on weekends. Monitors the computer, lift station alarms and the ansafone. Obtains gas reading and reset/changes the rain chart. Responsible for plant operation with supervision limited to on-call supervisor.

#### REQUIRED KNOWLEDGE:

Ability to work under general instructions and make independent judgments.

Knowledge of the methods, practices and principles of operation of large capacity pumps and related wastewater treatment plant equipment.

Knowledge of standard practices, techniques and principles of water pollution control.

Ability to maintain and evaluate records.

Ability to inspect sewage plant machinery and mechanical equipment in operation and to detect flaws and defects in operation.

Ability to react promptly, and efficiently in emergencies.

DESIRABLE EXPERIENCE AND TRAINING:

High school graduation.

Six months of experience in the operations of pumps and similar equipment. Certification as a Grade III Operator within one year of appointment.

\*Note: This qualification may be increased depending on requirement mandated by the State.

PHYSICAL DEMANDS:

Light to medium work; involving walking, stooping, reaching, handling, fingering, talking, hearing, visual acuity, depth perception and color vision.

WORKING CONDITIONS:

Both inside and outside work; exposure to extremes of weather. Normal exposure to fumes, odor and dust generally associated with processing in a Wastewater Treatment Plant. Normal potential hazards associated with working around machinery and low pressure steam.

This is a shift work position, 3 shifts/day on a rotating basis, including weekends.

The grievant had worked in the Liquids Process for a very brief period of time when he was first hired with the City. He had not worked with the Liquids Process since, although in 1987 he took a test to qualify as a fill-in Liquids Process Operator and received an overall grade of 87 percent. The City's training supervisor who had administered the test said that the grievant did "quite well" but noted several areas in which he needed additional information and training and suggested that he not work unsupervised in the position. Kelderman had spent between six months and a year in the Liquids Division six years ago, during a bumping situation. During that time he received training in the duties of the Liquids Process Operator.

Mike Fox, the Manager of Operations at the wastewater treatment plant, designed and administered a written test and practical test to both the grievant and Kelderman. The practical test was intended to measure the applicants familiarity with three job functions of the Liquid Operator's position: switching and draining a grit channel, draining the primary effluent water pits, and taking the number one aeration tank out of service. The procedures and controls used to

perform these tasks are used in many other facets of the Employer's operation. Fox had each of the applicants describe how they would accomplish these functions and walk through the plant showing which controls would be used and in what order to accomplish the task. The applicants were allowed to refer to the plant's operation and maintenance manual while taking the exam. The two men were graded on whether they correctly identified each element of the three jobs and how that element would be accomplished. The grading sheet for the Liquid Operator's practical exam listed each of these elements:

## LIQUIDS OPERATOR PRACTICAL EXAMINATION

### SWITCH AND DRAIN A GRIT CHANNEL

1. Turn the air on to the channel to be placed in service.
2. Open the valve on the channel to be placed in service.
3. Close the influent valve on the tank to be placed out of service.
4. Turn on the collector on the channel to be placed in service.
5. Open the drain valve on the channel to be placed out of service.
6. Start the tank drainage pump.
7. Turn off the collector on the channel to be placed out of service.
8. Turn off the air to the channel to be placed out of service.

### DRAIN PRIMARY EFFLUENT WATER PITS

1. Open drain valves.
2. Open valves to drainage pump and start pump.

### #1 AERATION TANK OUT OF SERVICE

1. Turn off the R.A.S. flow to #1 Aeration Tank. This can be done in the computer room.

2. Increase the R.A.S. flow to #2 aeration tank to 6.0 M.G.D.  
This can also be done from the computer room.
3. Do not change the W.A.S. flow.
4. Close valve 1A on #1 aeration tank.
5. Close the effluent valve on #1 Aeration tank.
6. Open the drainage pump discharge valve.
7. Start the tank drainage pump.
8. Turn air off to #1 Aeration Tank when the liquid level is below the diffusers.

Kelderman correctly identified the first seven steps involved in switching and draining a grit channel, missing only the eighth and final step. The grievant missed the fifth, seventh and eighth steps of that procedure. Both Kelderman and the grievant correctly identified the first step in draining the primary affluent, and missed the second step. On the third element of the test, taking the #1 aeration tank out of service, Kelderman correctly identified and demonstrated six of the eight steps, missing only the second and third step of the procedure. The grievant correctly identified only the fourth step of the procedure.

Both Kelderman and the grievant adequately completed the written examination for the position, and both had the physical fitness to perform the work. Kelderman was awarded the position based solely on his 88 percent performance on the practical exam versus the grievant's 44 percent performance. A grievance was thereafter filed, alleging that the grievant should have been awarded a 60-day trial period to determine and demonstrate his skill and ability. The grievant challenged the test as not being an objective evaluation of skill and ability and asserted that the grievant's greater seniority should have resulted in his receipt of the job. The City denied the grievance taking the position that the grievant had demonstrated that his skill and ability was not "relatively equal" to Kelderman on a fair and objective test. The matter was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

Additional facts, as necessary, will be set forth below.

#### IV. THE POSITIONS OF THE PARTIES:

##### The Position of the Union

The Union takes the position that the practical examination was flawed, in that it was solely geared to familiarity with the layout and operation of the treatment plant, rather than measuring the applicant's skill and ability. The job functions selected for testing are minor aspects of the actual job, and are performed for a few hours per year. The test completely ignores the more routine and regular functions of the Liquid Operator's position, which were more accurately measured for this grievant on the comprehensive test he took in 1987 to qualify as a fill-in Liquids Operator. Kelderman's higher score was solely the result of his more recent experience in the City's liquids operation, and not due to any greater skill or ability.

The Union argues that the grievant should be awarded a 60-day trial period to prove his capability in this job. While acknowledging that the relative ability standard in the contract is a threshold requirement to receiving the trial period, the Union argues that the grievant could very quickly acquire the familiarity with the layout of the plant and locations of the controls that gave Kelderman an advantage on the examination. The Union notes that no one has ever failed to successfully complete a 60-day trial period in this bargaining unit. The Union points to the grievant's testimony, during which he went through the job description element by element and affirmed that he had each of the listed qualifications. In light of this, and given that even the City's witnesses admitted that there would be a relatively brief period of learning required for any applicant, the Union urges that the grievant be given the opportunity to demonstrate his ability on the job. The Union further urges that the grievant be made whole for his losses, by being paid any lost overtime or premium pay that he would have received had he been awarded the job at the time of the initial posting.

#### The Position of the City

The City notes that seniority controls in job posting under this contract, unless there is a significant difference in skill and ability. An objective test was used to measure the relative skill and ability of these two applicants, and no one could credibly argue that the grievant's 44 percent score was relatively equal with Kelderman's 88 percent score. Both candidates had essentially identical backgrounds in their employment with the City, but Kelderman showed the initiative to use the Operation's manual during his examine while the grievant did not. The difference in their scores can only be explained by Kelderman's greater initiative and inherently greater skill and ability.

The City argues that the Union is attempting to use this case to turn the trial period under the contract into a training period. It is clear under the contract that an employee must have the skill and ability to do the job before qualifying for a trial period. The essence of the Union's position is that seniority should control from the outset, and that is simply not what the contract says.

On the question of remedy, the City argues that there should be none. However, should a violation be found, the City urges that any payment of premium time or overtime to this grievant

would be purely speculative since it is impossible to say whether he would have been assigned to work on Sundays or holidays, and whether he would have accepted available overtime. Thus, in the event that a violation is found, the remedy should be limited to awarding a trial period to the grievant.

## V. DISCUSSION:

This case involves the validity of a practical exam used to measure the relative skill and ability of two applicants for the position of Liquid Process Operator. The contract establishes seniority as the governing factor only where skill and ability are relatively equal, and both parties acknowledge this as the threshold to securing a sixty day trial period. The measurement of skill and ability, as reflected in the scores on the practical exam, shows a substantial difference in favor of the junior employee. Thus, if the exam is a valid and conclusive measure of relative skill and ability, the successful junior applicant is entitled to the job.

Arbitrators have generally recognized the right of management to employ objective tests as an aid in determining skill and ability. 1/ Indeed, the use of tests is widely recognized as preferable to selections made solely on the basis of subjective opinions. 2/ In order for a test to be credited, there must be proof that it was:

- (1) specifically related to the requirements of the job;
- (2) fair and reasonable;
- (3) administered in good faith and without discrimination; and
- (4) properly evaluated. 3/

---

1/ The Union does not challenge the City's right to employ tests, and this right has previously been recognized in arbitrations between these parties (Joint Exhibit #7, City of Appleton, Cases CLXII, CLXIII, (Greco, 6/83).

2/ A valid test will generally be given great weight in determining an employee's skill and ability. However, absent contract language or a past practice to the contrary, a test cannot stand alone as conclusive proof of skill and ability. The contract in this case does not limit skill and ability to test results, and a fair comparison of these employees must give at least some consideration to other reliable evidence of their relative skill and ability, such as past work history, certifications and the like. See Containers, Inc., 49 LA 589 (Anderson, 1967) at page 594.

3/ See Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th Ed., (BNA, 1985), hereinafter cited as "Elkouri", at pages 618-623 and cases cited therein. The level and type of proof required for these elements will vary with the individual circumstances of the case and the type of test employed.

The first of these criteria basically requires that a test measure abilities actually required for the job, rather than simply measuring general aptitudes and/or skills. This goes to how narrow the test may be in its subject matter. 4/ The second criterion looks to the breadth of the test and its difficulty. A fair and reasonable test is one which covers all of the critical qualifications it purports to measure, and seeks a degree of knowledge consistent with the level at which the job will be performed. 5/ The third criterion, that of good faith administration, goes to whether all applicants were playing on a reasonably level playing field when they took the test. An unfair advantage to one applicant in the manner of administration draws into question the validity of the results and the motives of management. Finally, the results must be properly evaluated. This encompasses properly scoring the answers, properly evaluating what the overall score means relative to the ability of the applicants, and properly applying the overall rankings so that any resulting disqualifications are consistent with the contract language. 6/

There is no serious dispute about the job-relatedness of the exam given in this case, nor about the fairness of administration. The three functions tested are performed by the occupants of this position, and are thus job related. Both applicants took the test under the same conditions and had access to the operations manual. Nor is there actually much dispute about the scoring of the test. While the Union argues that the scores do not relate to ability, this complaint actually goes to the substance of the exam, rather than whether the results produced by the instrument were properly evaluated. The focus of the Union's concern is that the test is too narrow, because it measured only three relatively minor job functions, and was geared to familiarity with the layout of the plant rather than the skills needed for the job.

Mike Fox, the City's Manager of Operations testified that he selected the three functions -- switching and draining a grit channel, draining the primary effluent water pits, and taking the aeration tank out of service -- as the test's focus because they were important tasks which required skills used in many day-to-day duties of the job. Grit channels are drained about twenty times each year, and are switched on a weekly basis, more often if there is a heavy rain. Fox conceded that the effluent water pit is capped off, and is only drained on a quarterly basis for maintenance purposes. The aeration tank had been taken out of service four times in the first nine months of the year. Fox acknowledged that he usually gave instructions to employees before having them perform this work, and that anyone who was shown the location of the pumps and valves and given a sheet with the eight steps listed on the practical exam grading sheet could perform this

---

4/ See Central Soya Co., 41 LA 1027 (Tatum, 1963) at pps. 1031-32, and cases cited therein; Caradco, Inc., 35 LA 169 (Graff, 1960) at pps. 172-73.

5/ Blueside Companies, Inc., 82 LA 1011 (Thornell, 1984) at page 1013; Hussman Refrigeration Co., 66 LA 554 (Yarowsky, 1974) at page 556.

6/ Nicholson File Co., 34 LA 46 (Warns, 1959) at page 48; Stauffer Chemical Co., Inc., 8 LA 219 (Blair, 1947) at page 222.

function.

The test used by the City does seem to stress familiarity with the layout of this specific work site to an inappropriate extent. The "walk-through" each applicant did with Fox would naturally favor someone who knew the plant over someone with an equal technical knowledge but no experience with the location of this plant's controls. Although the City is correct in arguing that it is not required to use the trial period for basic training, any employee in a new job can be expected to have a brief orientation during which he learns the general physical layout of the facility so as to bring his existing skills and abilities to bear on his work. Likewise, there may be variations in the specific procedures used to accomplish the same tasks in different facilities which a new employee will have to learn. Knowledge of these specifics may not be used as a barrier to obtaining a position that a worker is otherwise capable of performing. A new employee is not unqualified simply because he is new. This flaw in the test, however, does not appear to have been nearly so significant as the Union contends. Fox had the applicants tell him how they would accomplish each task and then show him by indicating the controls they would use. The grievant was not able to show Fox how he would go about taking the #1 aeration tank out of service, but neither was he able to describe the process he would employ. The inability to describe the process raises a reasonable doubt about whether the grievant has the technical understanding to perform this aspect of the Liquids Operator's job.

The more serious problem with the test used by the City is that it purports to measure the skills and abilities needed for the job while measuring only a very small portion of those actually required. Even granting the City's point that many of the principles and control systems used in the three tasks tested have applicability to other aspects of plant operations, the test ignored important areas of knowledge. Terry McKee, a Liquids Operator for 13-1/2 years, testified without contradiction that the test did not address the daily functions of operations control and laboratory work. Fox testified that the test did not go into necessary and important subjects such as disinfection, flotation thickening and waste treatment. A review of the examples of work given on the job description for this posting suggests that a majority were not measured in any way by the practical exam administered to the grievant. 7/

An employer has the right to use exams when determining skill and ability. As a practical

---

7/ A test need not be comprehensive in order to be valid. The City is free to decide that some skills and abilities are not important enough to weigh in choosing between applicants. There is always a difference in the relative importance of the various skills required for a job. It may also decide to use the test as a measure of only some skills, while using another basis for comparing the other required areas of expertise. The record in this case is devoid of any evidence that the City made a conscious decision to discount all skills beyond those measured by the test, and it was stipulated that the test results were the only thing the City considered in deciding to award the job to Kelderman.

matter, not even the most comprehensive examination will measure all of the skills and abilities needed for a given job. Some may be so minor that they don't require testing, others so generic that they may be assumed to have been acquired in previous work, and still others so difficult to test for that some other evidence of competence is required. However, where exam results are used to comprehensively compare skills and abilities, the test instrument must measure all of the significant skills and abilities required for the position. Otherwise it is not a fair comparison of skills and abilities as demanded by the contract.

In this case, the City used its practical examination as the sole evidence that Kelderman had relatively greater skills and abilities than the more senior applicant. What this test actually showed was that Kelderman was somewhat more knowledgeable about switching and draining a grit channel, equally knowledgeable about draining the primary effluent water pits, and much more knowledgeable about taking the #1 aeration tank out of service. It revealed nothing about the relative abilities of the two men in the broader and more commonly performed duties of the job. By narrowly focusing the test on three intermittently performed tasks, and thus failing to draw comparisons between the two in other equally important areas, the City failed to establish that Kelderman had a sufficient advantage in skills and ability to overcome the preference given by Article XVII to the grievant's greater seniority. For that reason, the grievance is sustained.

#### VI. REMEDY:

Article XVII provides for the awarding of jobs on the basis of seniority, skill and ability, and physical fitness. Physical fitness is not an issue in this case, and the test results do not establish a significant difference in the level of skill and ability between the grievant and Kelderman. Thus, the grievant, as the more senior employee, is entitled to a sixty day trial period in the Liquids Operator position. The City is therefore directed to award him such a trial period within fourteen days of the date of this Award. This two week period is intended to allow the City an opportunity to make whatever adjustments are necessary in its work schedules as a result of this Award.

The Union has also asked that the grievant be made whole for his losses. Although both jobs pay the same hourly rate, opportunities for overtime and premium pay are more readily available to Liquids Operators than Solids Operators. The City argues that such a remedy is purely speculative, since the grievant worked less overtime than Kelderman did when both were Solids Operators and there is no way to be sure that he would have accepted overtime had he initially been awarded the posting.

In making an employee whole, it is appropriate to consider overtime and premium pay. Pay for scheduled overtime, and scheduled work on holidays and Sundays, is not speculative, since the grievant would have had no option of refusing the work. As for discretionary overtime, it may indeed be the case that Kelderman is substantially more likely than the grievant to accept this work when offered. Different people have different preferences when it comes to working extra hours, and if there is a significant difference between these two men, then awarding the

grievant the same amount of overtime as was worked by Kelderman would be an inaccurate measure of his damages. This does not mean that discretionary overtime may simply be ignored. Since the basis for the City's claim is that the grievant accepted less overtime than Kelderman did when both were Solids Operators, the pay for discretionary overtime may be adjusted by calculating the proportion of discretionary overtime accepted by the grievant as a Solids Operator and that accepted by Kelderman as a Solids Operator during the same time period. All other things being equal, it is reasonable to assume that both men would have maintained their relative preferences for working discretionary overtime. If Kelderman worked 90% of the available overtime as a Solids Operator while the grievant was working only 45% of the overtime offered to him, it is fair to conclude that the grievant would have accepted roughly half as much discretionary overtime as Kelderman did in the Liquids Operator job.

It may be that the discretionary overtime calculation described above will prove cumbersome. The parties are free to agree on some other basis for compensating the grievant for lost overtime opportunities if they so choose. In crafting the remedial order, the undersigned will leave it to the parties to arrive at a figure, and will retain jurisdiction to resolve any disputes that may arise on this or other aspects of the remedy.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The City violated Article XVII of the collective bargaining agreement by not awarding the Liquids Operator's position to Dave Konetzke. The appropriate remedy is:

- (1) To award Dave Konetzke a sixty day trial period in the Liquids Operator's position;
- (2) Upon successful completion of the sixty day trial period, to make Dave Konetzke whole for lost opportunities for overtime and premium pay, by paying him an amount equal to that which he would have earned but for the City's failure to award him the position.

The undersigned will retain jurisdiction over this case, solely for the purpose of clarifying the remedy ordered herein, for a period of ninety (90) days from the date of this Award.

Signed this 3rd day of December, 1992 at Racine, Wisconsin.

By           Daniel Nielsen /s/            
Daniel Nielsen, Arbitrator