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PSYCHOLOGICAL TESTING AND INDUSTRIAL RELATIONS

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Center for Labor and Management

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FOREWORD

In recent years, psychological testing has attracted a great deal of attention in the industrial setting, since it has affected, and at times even altered, labor-management relationships. In addition, testing itself has been affected by legislation and government policy. In 1967, in response to these developments, the departments of research and education of the AFL-CIO and the Center for Labor and Management jointly sponsored a week-long institute for full-time union representatives on the subject of psychological testing and its relationship to collective bargaining.

Since that first institute in 1967, the participating staff of the institutes has attempted to seek new sources of materials and develop new approaches to teaching in the area. In seeking the objectives, they found a dearth of resource materials. Consequently, the Center for Labor and Management encouraged the development of this monograph and offered its resources for its production. This publication is a result of that effort.

This monograph attempts to bridge the gap between theory and practice of psychological testing by bringing together in a single publication a number of different points of view. Included are the contributions of Mr. Reginald Newell, Economist with the International Association of Machinists and Aerospace Workers, who explains a union view; Professor Duane Thompson of the Center for Labor and Management, who offers the position often taken by management; Professor George Hagglund from the University of Wisconsin's School for Workers, who reports on the results of labor-management disputes involving psychological testing; and Professor Irving Kovarsky of the Business Administration Department of The University of Iowa, who deals with the legal aspects of psychological testing as it relates to the protection of the rights of the disadvantaged.

A special note of thanks to Professors Hagglund and Thompson who took on the burdensome task of coordinating the contributions to this monograph. In addition, the Center appreciates the work of Professor Edith Ennis from the College of Business Administration who offered her editorial assistance.

The Center for Labor and Management is indebted to those foundations and other organizations whose continued interest, support and financial assistance has made the publication of this monograph possible.

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INTRODUCTION

During recent years, increasing numbers of employers have turned to psychological tests in an effort to improve the effectiveness and efficiency of their selection and promotion procedures. Although there are many cases where the use of psychological tests has resulted in improved personnel decisions, there are other situations in which the efficacy of psychological tests have been limited by such factors as poorly qualified testing personnel, inappropriate use of tests, and inadequate strategies for test design, development and validation.

Labor union leaders, as representatives of workers, have become increasingly conscious of management's use of psychological tests, particularly since the passage of the 1964 Equal Employment Opportunities Act and similar state legislation directed at reducing discrimination in employment. Also, as management's use of psychological tests has increased, so has the number of grievances and collective bargaining issues in which psychological testing is involved. Most frequently the union case is based on the promotion clause of the labor agreement. These clauses typically state that management must consider some combination of seniority, ability, and other factors in making promotion decisions. Some labor agreements provide that more weight be given to seniority than ability, while others give primary emphasis to the latter factor, with seniority to rule only in cases where applicants are judged to have equal ability. With this type of clause, when ability has been measured by psychological tests, union challenges of relative ability frequently are challenges to the test itself or the particular use of the test.

The effect of these and other developments has been to move psychological testing from the exclusive domain of the personnel department to a position of prominence in industrial relations. In the future, we may expect the divergent points of view held by management and unions concerning seniority, skill, ability and the use of psychological tests as measures or predictors of skill and ability to find expression through the collective bargaining process.

Even though the issues frequently rest on technical data, there appears to be little evidence that psychologists have been called upon by manage-

ment or unions to play a significant role in the grievance or bargaining procedures. Similarly, although psychologists are acutely aware of and concerned over possible employment discrimination resulting from the use of psychological tests, as evidenced by the APA Task Force on Employment Testing of Minority Groups report in the July issue of the *American Psychologist*, there appears to be relatively little direct participation of psychologists as arbitrators in disputes involving psychological tests. Nor is there evidence that arbitrators in general possess the expertise required to evaluate technical aspects of cases involving psychological testing.

There is, therefore, a two-fold objective of the collection of papers which follow. One objective is to provide labor and management practitioners with up-to-date information on aspects of the controversy over psychological testing which has become an integral part of their day-to-day work. The second objective is to provide psychologists with an overview of some of the industrial relations aspects of the controversy.

George Hagglund
Duane E. Thompson

CHAPTER I

MANAGEMENT'S USE OF PSYCHOLOGICAL TESTS

DUANE E. THOMPSON

Introduction

The past seven years have been particularly stormy for psychological testing. Books such as *They Shall Not Pass*, *The Brain Watchers*, and *The Tyranny of Testing* popularized the attack.[1,2,3] Public concern and Congressional attention were focused on problems of testing during debate on the Civil Rights Act of 1964 and the congressional hearings of 1965.[4,5] Recent years have witnessed growing concern over the use of tests and equal employment opportunity.[6] Yet, despite the strong antitest sentiment, there is evidence to suggest that managers are turning to psychological testing with increasing frequency for assistance with the complex task of matching men and jobs.[7]

The purpose of this chapter is to explore why, in view of the controversy, managers not only continue, but also increase, their use of tests in selection, in spite of resistance and criticism. Background for this question is provided in the next sections of this chapter which are devoted to a brief statement of the objectives of personnel assessment and a short summary of the history of the use of psychological tests for personnel assessment.[8]

Objectives of Personnel Assessment

Ideally, the objective of personnel assessment would be to assist in the

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1 H. Black, *They Shall Not Pass* (New York: Morrow, 1963).

2 M. L. Gross, *The Brain Watchers* (New York: Random House, 1962).

3 B. Huffman, *The Tyranny of Testing* (New York: Crowell-Collier, 1962).

4 Philip Ash, "The Implications of the Civil Rights Act of 1964 for Psychological Assessment in Industry," *American Psychologist*, XXI, No. 8 (August, 1966), pp. 797-803.

5 Special Issue: Testing and Public Policy, *American Psychologist*, XX, No. 11 (November, 1965), pp. 857-1006.

6 "Validation of Employment Tests by Contractors," *Federal Register*, XXXIII, No. 186, Part II (September 24, 1968).

7 *Ibid.*, p. 14392.

8 Personnel assessment as used here is a general term which includes measurement used for selection, placement, classification, and guidance.

placement of each individual on a job for which he would be optimally suited and on which he could make the maximum contribution to society.[9] As stated, this objective consists of two separate and potentially conflicting subparts. The first, that of assisting the individual to find the job for which he is most suited, implies service to the individual through some form of vocational guidance. The second part implies service to society or one of its parts such as government, business or industry, by ascertaining which members of a group of job applicants or candidates for promotion will be most successful.[10] It is to this second part of the objective that personnel selection is normally, though not exclusively, directed.[11] Through the years a number of techniques such as interviews, application blanks, reference checks, and the like have been developed to assist with these kinds of selection decisions. Of these, the most recent and perhaps most controversial is psychological tests.

Historical Background of Psychological Testing

The history of psychological testing spans two world wars, a great depression, and periods of industrial growth and expansion.[12] The first large-scale use of group psychological tests was during World War I when the newly developed Army Alpha Examination was administered to a million and a half servicemen. This test met the problem of finding a method of measuring the potential abilities of military personnel; its success in predicting performance also served as a stimulus for the proliferation of group tests which was to follow.

During the postwar decade there was a rapid amassing of data on problems of individual differences.[13] In the business and industrial sector, attention was directed toward "testing the tests" through validity studies and to the development of tests of special abilities. The rapid adoption of the new tests by industry was not without resistance, however. Organized labor, for example, represented an almost immediate source of resistance. One analysis of this resistance follows the line of reason that since some of the same

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[9] Marvin D. Dunnette, *Personnel Selection and Placement* (Belmont, California: Wadsworth Publishing Company, Inc., 1966), p. 2.

[10] Samuel Messick, "Personality Measurement and the Ethics of Assessment," *American Psychologist,* XX, No. 2 (February, 1965), pp. 136-146.

[11] For a discussion of changing corporate philosophy toward socioeconomic problems indicating a reconciliation of conflicting responsibilities, see Kenneth R. Andrews, "Toward Professionalism in Business Management," *Harvard Business Review,* XLVII, No. 2 (March-April, 1969), pp. 49-60.

[12] For a more complete history of testing, see David A. Goslin, *The Search for Ability* (New York: Russell Sage Foundation, 1963).

[13] Anne Anastasi and John P. Foley, Jr., *Differential Psychology* (New York: Macmillan, 1947), pp. 18-19.

employee organizations sponsoring vocational tests in the twenties were also actively involved in open shop campaigns, an immediate antitest orientation developed on the basis of this kind of association. In later years, as the bulk of test publication activities was taken over by organizations such as Psychological Corporation, the basis for union resistance to testing shifted. Whereas many unions might well be sympathetic to management's desire to effectively select "the best man for the job," the union's view, particularly when tests are used for promotion decisions, falls closer to the vocational guidance situation of assisting the individual to progress to those jobs for which he is qualified and to which he might aspire.[14]

The depression of the next decade created its own unique manpower problems. In 1935 the United States Employment Service initiated its test research program. This program and the research of the Employment Stabilization Research Institute of the University of Minnesota contributed to increased precision of testing, the development of tests for specific jobs, and the development of new tests.[15]

The 1940s found the United States involved in another gigantic military classification and selection program in which one or more psychological tests were administered to some fifteen million men and women. In contrast with 1917, the demands of the war in 1941 were more complex. The Air Force, for example, was faced with the problem of selecting from large numbers of candidates those most likely to be successful in highly specialized tasks.

Not only were the war years an impetus for military testing, but also information gained from the Aviation Psychology Program and other military test projects found rather immediate translation to the problems of personnel selection in business and industry.[16] Of the 522 firms using tests surveyed by the National Industrial Conference Board in 1947, 203 indicated their testing program had been established during the years 1941-1945.[17]

The unheralded economic growth and the frenetic rate of technological change following World War II posed urgent problems for the personnel managers of the private sector and resulted in a concomitant surge of interest in psychological testing. By 1954 the National Industrial Conference Board reported that 43 per cent of the companies surveyed made use of

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14 William Gomberg, "The Use of Psychology in Industry: A Trade Union Point of View," *Management Science*, III, No. 4 (July, 1957), pp. 348-370.

15 Edwin E. Ghiselli, *The Validity of Occupational Aptitude Tests* (New York: John Wiley & Sons, Inc., 1966), p. 6.

16 See for example Robert L. Thorndike, *Personnel Selection: Test and Measurement Techniques* (New York: John Wiley & Sons, Inc., 1949).

17 "Experience with Psychological Tests," *Studies in Personnel Policy No. 92* (New York: National Industrial Conference Board, Inc., 1948), p. 4.

selection tests for nonexempt salaried employees.[18] By way of comparison, a 1960 survey of testing within industry revealed that more than 50 per cent of the responding companies used psychological tests for personnel selection;[19] and a 1964 National Industrial Conference Board Survey of 473 firms indicated that 80 per cent of the firms used tests.[20] More recently, a letter issued by the Secretary of Labor indicated that, based on an examination by the Office of Federal Contract Compliance, "there has been an increase since 1963 in total test usage."[21]

Why Management Tests

The question remains, however, as to the motives for the increased utilization of psychological tests in the selection of personnel. In the absence of survey data specifying the motives of managers for using psychological tests, one can only make some assumptions. The basic assumption made here is that managers today, as in the past, turn to psychological tests for the solution of unresolved problems. It is further assumed that the nature of the specific problem will dictate the purpose of testing. In periods of near full employment and industrial growth, for example, an approach close to vocational guidance or that of assisting the individual to make full use of his abilities finds more emphasis. Currently, industry's problem of providing equal employment opportunity has stimulated interest in tests and validation procedures which do not discriminate against specific groups. It is not suggested, however, that all problems to which testing has been directed are solvable through this technique, nor is it implied that in all cases the solutions sought by managers have been noble.

In general, the problems of the personnel manager and the appeals of psychological testing appear to center about two distinct activities. The first is the process of selection—the techniques of gathering information concerning individual differences among applicants for employment or candidates for promotion. The second is the prediction of the success of those selected leading to the development and maintenance of an efficient work force.

Process Problems

Managers today are faced with the problem of finding procedures for the

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18 "Personnel Practices in Factory and Offices," *Studies in Personnel Policy No. 145* (New York: National Industrial Conference Board, 1954), p. 67.

19 Lewis B. Ward, "Putting Executives to the Test," *Harvard Business Review* (July-August, 1960), p. 6ff.

20 S. Hobbe, "Trends in Employee Testing," *Conference Board Record* (December, 1965), pp. 46-47.

21 "Validation of Employment Tests by Contractors," *Federal Register*, XXXIII, No. 186, Part II (September 24, 1968).

rather rapid, systematic processing of relatively large numbers of candidates for jobs or promotion. From the past history of psychology and psychological testing, as well as their own experience, managers are aware of the individual differences within and among people. Also they are aware that any given individual is not equally apt or proficient in all areas of aptitude or ability. They are similarly aware that the differences between people are more appropriately described quantitatively as more or less rather than qualitatively as present or absent.[22]

In the manager's quest for procedures and techniques to resolve his problems in the light of this understanding of differential psychology, psychological tests by their very nature have a special appeal. Tests are relatively fast, easy to use, and inexpensive. Compared to other techniques such as the interview, they are reliable and relatively free from personal bias. They are objective and normally yield a quantitative measure of individual differences presumed to exist.

Prediction Problems

Important as the above advantages may be to the solution of some personnel problems, the major problems to which psychological tests have been directed pertain to the results of selection rather than to the process of selection. The literature is replete with examples of how various types of tests have been used for the prediction of success in selection.[23] Managers are also acutely aware of the costs of poor selection. A recent survey, for example, projected a 70 million dollar loss on salesmen hired in 1963. The same survey indicated that in terms of performance, 27 per cent of the sales force accounted for 52 per cent of the sales.[24] Other estimates are even more impressive. Dr. William C. Menninger of the Menninger Foundation has estimated the annual cost of alcoholic hangover, accidents, and absenteeism at 22 billion dollars per year.[25]

Although the average validities of tests for predicting criteria such as job tenure,[26] trainability, and performance[27] are on the average quite low, they are sufficiently high to lead one reviewer to conclude,

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[22] Ghiselli, *op. cit.*, p. 2.

[23] For a wide variety of examples, see Joseph Tiffin and Ernest J. McCormick, *Industrial Psychology*, fifth edition (Englewood Cliffs, New Jersey: Prentice-Hall, 1965).

[24] "Picking and Training the Wrong Salesman is a Costly Business, Survey Finds," *Business Week* (February, 1964), p. 52.

[25] "Mental Health—Labor Questions Management's Techniques," *Occupational Hazards* (December, 1965), pp. 37-40.

[26] Allen J. Schech, "The Predictability of Employee Tenure: A Review of the Literature," *Personnel Psychology*, XXII, No. 2 (Summer, 1967).

[27] Ghiselli, *op. cit.*

> It is apparent that even the most optimistic supporter of tests cannot claim that they predict occupational success with what might be termed a high degree of accuracy. Nevertheless, in most situations, tests can have a sufficiently high degree of predictive power to be of considerable practical value in the selection of personnel.[28]

Surely even the limited success of psychological tests for selection of personnel has been sufficient to whet the interest of managers in their attempts to alleviate the problems attendant to poor selection.

Summary

Through the years we have seen a continual increase in the use of tests for personnel selection problems. In spite of the criticism, the nature of tests and the success of tests in specific situations has established a rather pervasive faith in testing. This faith has been given expression by Willard Wirtz, former Secretary of Labor:

> The order is founded on the belief that properly validated and standardized tests, by virtue of their relative objectivity and freedom from the biases that are apt to characterize more subjective evaluation techniques, can contribute substantially to the implementation of equitable and nondiscriminatory personnel policies. Moreover, professionally developed tests, carefully used in conjunction with other tools of personnel assessment and complemented by sound programs of training and job design, can significantly aid in the development and maintenance of an efficient work force.[29]

If this kind of faith is to be justified and if the potential advantages of psychological testing are to be realized, much remains to be done. General theories of psychology must be developed.[30] Psychologists must effect a greater integration of testing practices and psychological theory.[31] More sophisticated models for test validation must be implemented.[32,33] All are tasks of the psychologist.

Others, however, are involved. Managers must choose more carefully those problems to which they set psychological testing. They must recog-

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28 *Ibid.*, p. 127.

29 "Validation of Employment Tests by Contractors," *Federal Register*, XXXIII, No. 186, Part II (September 24, 1968).

30 William A. Owens, "Toward One Discipline of Scientific Psychology," *American Psychologist*, XXIII, No. 11 (November, 1968), pp. 782-785.

31 Anne Anastasi, "Psychology, Psychologists and Psychological Testing," *American Psychologist*, XXII, No. 4 (April, 1967), pp. 297-306.

32 Dunnette, *op. cit.*

33 Abraham Tesser, Allan R. Stormy, and Frederick B. Chaney, "Toward Better Prediction: A Subgrouping Approach," *Proceedings of the 75th Annual Convention of the American Psychological Association*, 1967, II, pp. 261-262.

nize that of all the things testing is, it is not a panacea. Managers must become aware that the very source of the appeal of tests, their ability to differentiate among individuals, can inadvertently result in unintended, illegal discrimination against individuals or groups.[34] Finally, those occasionally involved with psychological testing must also become aware of the nature, interpretation, and limitations of tests if they are to form their opinions intelligently rather than to react emotionally.

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34 Philip Ash, "Race, Employment Tests and Equal Opportunity," *Journal of Intergroups Relations*, V, No. 1 (Autumn, 1966), pp. 16-26.

CHAPTER II

A UNION VIEW OF PSYCHOLOGICAL TESTING

REGINALD NEWELL

To anyone who has studied the history of American trade unionism it seems clear that because trade unions are highly complex and diverse institutions it is difficult to generalize about them. It seems safe, however, to say that the trade unions are primarily, though not exclusively, engaged in advancing the interest of their members through seeking improvements in wages, hours, and working conditions. Over the years, an expanded definition of working conditions has afforded the unions an opportunity to obtain a voice in areas which had long been considered sacrosanct as management preserves. As a result, certain management decisions in the personnel field have been brought securely within the orbit of collective bargaining. One such facet of personnel decision making which has recently drawn considerable interest from trade unions has been the use of psychological testing by industry.

Organized labor is coming face to face with this rapidly growing practice of American firms to use various psychological testing procedures when hiring new workers and/or promoting present employees. More striking than the growth, perhaps, is the fact that the tests are no longer given to only highly educated young men applying for executive trainee jobs with giant corporations. Increasingly, they are found in the blue-collar field. Companies claim that such procedures are merely part of "scientific management" to help insure impartiality in the selection of employees, while the personnel people consider themselves progressive since they are taking advantage of recently developed personnel techniques.

Indeed, some unions have even supported these tests honestly, believing the company's statements that these types of "objective" procedures prevent favoritism and give workers an even chance at better jobs. Young union members share the impatience and restlessness which seem to be the mark of today's youth. These young workers are increasingly challenging what they consider outmoded principles, including that of seniority. They feel that a strict application of seniority in promotions creates a stumbling block to their quick advancement and, therefore, have sometimes eagerly sup-

ported psychological testing as a way of getting around the "old-timers."

Union Opposition to Psychological Tests

Why, then, has organized labor generally opposed the use of psychological tests? In the first place, it does not take much more than a superficial examination of this practice to see that, if accepted without question, testing would rapidly subvert and circumvent the protection afforded trade union members by existing seniority provisions. The seniority rule has become the most prominent principle in the settlement of conflicts over job rights, and a principle that was won only after a long, hard, and bitter battle. A seniority system is designed to prevent favoritism by foremen or other company representatives in the making of layoff, promotions, work assignments, etc., and gives the worker a vested right in jobs which were once held at the pleasure of supervisors.

The use of psychological tests, however, makes it more difficult for the union to rely upon seniority as the most decisive factor, especially with regard to promotion. Management seems to be relying more and more upon test results than previously accepted criteria of ability such as seniority, job performance, and the like. It is important to keep in mind the basic conflict in the approach of labor and management to seniority. *The Union fights for the senior employee who meets the minimum requirements of the job while the Company seeks the best qualified employee regardless of seniority.*

The second objection that trade unions have against psychological testing concerns the tests themselves. Studies of many of the tests used in the industrial area give rise to grave doubts as to whether these tests are as objective and impartial as they are portrayed. While the technical aspects of testing are covered elsewhere in this monograph, several points are of vital importance to the trade union position regarding testing.

The person taking a test will receive a certain score. This score is compared with the scores received by the group on which the test itself was evaluated. In the industrial setting, this has particular significance. For example, let us assume that a particular test has been validated against 10,000 high school seniors. The scores received by these seniors wou'd be ranked from low to high and the scores divided into percentiles. Of the 10,000 individual scores, let us assume that 5,000 scored 65 or better. This means that 50 per cent of the scores would be 65 or below and 50 per cent above; in other words, among the 10,000 seniors, 65 was a "normal" or median score. However, does that mean that 65 should be considered the "normal" score for, say, 20 machine operators who are required to take the same exam for promotional consideration? Certainly not, since the two groups are entirely different. The norm group, consisting of high school students is totally irrelevant to factory workers. Yet, all too often, company personnel men

arbitrarily choose some figure from the range of scores achieved by the test group as a "cutoff" below which a person will not be considered for a particular job. In this example, it is impossible to say with any great degree of certainty that the machine operator who scored below the arbitrary cutoff of 65 could not successfully perform the job in question.

Another point to be made concerns the characteristics allegedly being measured by the test. Let us assume that the test is both valid and reliable and that the test's norm group was closely related to the workers who are taking the test. Even here, the question can be raised as to whether or not the characteristics being measured are required or even related to the specific job. For instance, many general aptitude exams give a large weight to mathematics. However, *is* a knowledge of math an essential requirement of the particular job for which the worker is being tested?

A third reason that the labor movement exercises great caution in accepting the principle of testing is that by doing so it can easily find itself aiding in the perpetuation of discriminatory hiring practices. Elsewhere in this monograph some of the factors that may influence a person's score on an examination quite apart from the actual aptitude and/or ability being tested are described. In recent years an additional factor has come to light which is of a special significance; namely, the question of the "culturally deprived." This term is generally applied to those minority groups which, through no fault of their own, have fallen behind the rest of the population in terms of education, socialization, cultural background, etc. These deficiencies become especially pointed in the field of aptitude testing when tests, which are generally created by the white, middle-class psychologist, for the middle-class, and which tend to reflect middle-class values, are extended to these minority groups.

The extent to which a cultural factor influences measured performance on a trait being measured also affects test reliability and validity. This is especially true for that segment of the population whose culture differs appreciably from the normative groups. For example, a language deficiency can affect a score on an arithmetic reasoning test as can other early learning experiences such as putting odd-shaped blocks together. For a person so affected, the test may underestimate his true potential and deprive the employer of a capable and willing worker. In other words, the inherent bias of the tests may discriminate against those individuals who have been short-changed with regard to schooling, job opportunities, etc. It should be stressed here that "cultural deprivation" is not unique to any particular racial or ethnic group. Whether a white coal miner from Kentucky, a Mexican-American farm worker in California, or a Puerto Rican clothing worker in New York City, each would encounter the bias in testing as would his Negro co-worker from a big city ghetto.

Because of the possible adverse effects of culture on test scores, the Federal Government's Equal Employment Opportunity Commission (EEOC), after consultation with acknowledged experts in the field, has established a set of general guidelines to be followed regarding employer testing procedures. In September of 1968, the Department of Labor issued an order to the heads of government contracting agencies directing them to require contractors to present evidence of the validity of any employment tests they may utilize as a condition of eligibility for federal contracts.

In this regard it should be noted that unions are not always merely the critics of testing programs. Sometimes they find themselves in the position of administering the test. The Iron Workers Union has a national testing program as one factor in determining admittance to its three-year apprenticeship program. With increased federal interest in this area, the Iron Workers were required to see that their testing program met EEOC requirements. Various city Building Trades Councils with testing programs for apprentice applicants have been required to examine these tests in terms of inherent cultural bias. A pioneer program of pretest "training" in New York City substantially increased the number of minority group applicants who successfully entered the Building Trades apprentice program in that area.

In this decade of discrimination awareness, another form of discrimination has come to the surface, i.e., the element of age difference. Psychological studies seem to indicate that the younger the person who takes a test today, the greater the chances are that he will score relatively higher than the older person. The reason is not that the 20 year old is necessarily any more intelligent than the 40 year old. Rather, it is that: one, the 20 year old is only a few years removed from his schooling and, therefore, his experience is fresher in his mind; and, two, the tremendous increase in the use of tests in primary and secondary schools in recent years means that the 20 year old will have much more experience in "test taking" than the 40 year old. Thus the younger employee may score higher even though the older employee may be better qualified to handle the new job because of his greater on-the-job experience. In the industrial setting, there has been little attempt to establish norms which account for this factor. In schools, the age difference is minor, i.e., all high school graduates are about the same age. In the plant, however, age differences can be substantial. The union should, therefore, seek to insure that any test given in the plant allows for this factor.

In the preceding discussion, one point should be kept in mind. A union, by law, is required to represent all the workers coming under its jurisdiction and to represent all the workers fairly and equally. It is, therefore, absolutely imperative that the union demand a voice in the adoption and/or

administration of any testing program, which, by its very nature, might lead to unfair or unequal treatment of workers.

Courses of Action

It is clear that organized labor views psychological testing with considerable misgiving. However, to take a negative view is one thing, to do something about it quite another. The scope of action open to a trade union to protect its members from the abuse of psychological testing is rather narrow. The union must, of necessity, limit its action to the area of collective bargaining and to contract language in particular. For purposes of discussion, there are two alternate, but not mutually exclusive, approaches which may be taken. One might be called the prohibitive approach while the other is a protective approach.

It is possible that, from the union point of view, the most desirable tactic would be to stop psychological testing before it starts. This can be done either by incorporating language which prohibits the company from initiating the use of psychological tests or by negotiating a seniority clause so strong that seniority is the sole consideration in layoffs, promotions, etc. In the latter case, where the contract states that seniority is the sole governing factor in promotion, management has clearly bargained away its right to evaluate qualifications of candidates by either written or nonwritten tests. Aside from seniority as the sole consideration, there is one other common type of seniority clause which unions can utilize, i.e., seniority plus ability (senior qualified employee). In applying the seniority plus ability standard, arbitrators have generally held that it is inappropriate to compare the qualifications of the senior employee with those of other applicants. Under this standard, the senior employee is entitled to the job if he has the required ability and willingness, and it is improper to give consideration to the possible superior qualifications of the other bidders.

If the union is unable to prevent testing in the manner described above, it must then seek to protect its membership from abuses through specific contract language. Because the practice of psychological testing in the blue-collar field is relatively new and trade union experience so limited, it is difficult to recommend specific contractual guidelines, especially since appropriate language will vary from situation to situation depending upon the actual circumstances with need for an approach tailored to meet special problems. However, certain principles can be outlined and should be kept in mind when negotiating such language:

(1) As mentioned previously, unions have generally been unsuccessful in preventing the introduction of testing procedures when a contract makes any reference to skill and/or ability. Therefore, if the tests are being used or if they are proposed, the contract should clearly indicate the relative

weight assigned to seniority and/or ability as related to promotion, layoffs, transfers, etc.

> Employees to be transferred as a result of a reduction in the work force, will be transferred in accordance with the provisions of the Collective Bargaining Agreement, that is to say, even though said employees may be required to take tests if the transfer is to a new job as defined herein, the results of such tests shall not be a bar to the transfer of said employees into said new job.[35]

(2) Where ability is a consideration, the contract should be clear as to exactly how it is to be measured, i.e., whether through the use of supervisor ratings, tests, trial periods, performance records, personal interviews, etc., or some combination thereof. The union must seek a definitive voice in the determination of ability. For instance, if the company says that a test is only one factor being considered, the union should be able to require management to show what these other factors are, how much weight is given them, and how the relative weights were determined.

> It is further understood and agreed that with the exception of promotion to machine operations, the test alone shall constitute only a portion of the overall qualifications necessary in the proper selection of a successful bidder.[36]

(3) The contract should indicate which employees or groups of employees are to be included in the company's testing program. Through joint consultation, a specific list of jobs can be drawn up to which testing will be applied and the relative importance of testing, as opposed to seniority, should be agreed upon. A compromise position would be to specify that ability is to be given more weight in connection with filling of certain jobs, while seniority is to be considered more heavily in other jobs.

> Tests will be used for the purpose only of determining the eligibility of employees to be trained on tape-controlled machinery or on other equipment with new and different characteristics.[37]

(4) The contract should stipulate whether tests are to be used in connection with specific personnel decisions such as gate-hiring, promotion, layoffs, or alternatively, whether the company is barred from using tests in connection with specific personnel decisions.

> The Company agrees that the psychological test designated as the Wonderlic Problem Solving Test shall not be used for determining an employee's ability

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35 Fansteel Metallurgical Corporation, Chicago, Illinois, IAM Local 1777.
36 General Precision Incorporated, Glendale, California, IAM Local 1600.
37 Motch & Merryweather Company, Cleveland, Ohio, IAM Local 2155.

to perform a job under the job application of the layoff and recall procedures of this Agreement.[38]

(5) The contract would require the Company to validate tests within company confines or against the same kind of work or jobs that such tests are intended to be used. In 1965, the Amarillo, Texas, Metal Trade Council successfully challenged the unilateral introduction of psychological testing and required the company to properly validate the tests being used, and any future tests, against existing jobs within the plant.[39]

(6) If workers are entitled to a trial period on the job, does the contract indicate whether ability is to be considered in determining eligibility for the before-mentioned trial period? Companies often attempt to control the factors which determine who is eligible for the trial period. The contract should indicate whether psychological tests may be used to determine eligibility for training programs sponsored or run by the company.

Employees interested in learning a trade will be considered eligible for the learners program if the following requirements are met:

1. High school graduation or the equivalent (Sufficient educational background to master the rudiments of the trade demonstrated by ability to perform aptitude tests—such as the Wonderlic with a raw score of at least 16, or the Purdue Mechanical Adaptability with a raw score of at least 100).[40]

(7) An employee should be entitled to retesting if a low score prevents him from moving to a higher job or holding another job within the company or if a substantial period of time has lapsed since the test was first administered. There is also the question of periodically updating the test itself.

(8) The union should be entitled to secure all necessary information where tests are used in personnel decisions involving the bargaining unit. The courts have generally extended the union's right to technical data in the areas of job evaluation, timestudy, etc., to encompass psychological testing. This right should include the right of the union to bring in outside experts. Criteria which decide whether a person "passes" a particular test also should be subject to negotiation. Once the decision to test is made by the company, the union should make clear its interest. It should seek all pertinent data as soon as testing procedures are introduced—not after a test has been given and the results made known.

Where an aptitude test has been given and the results of such test are the

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38 Brunswick Corporation, Muskegon, Michigan, IAM Local 1813.

39 Atomic Energy Labor-Management Relations Panel; Panel Recommendation Docket 5-65.

40 F.M.C. Corporation, Indianapolis, Indiana, IAM Local 1917.

deciding factor in the filling of a job, the Union shall have the right to examine the tests and scores of the employees concerned.[41]

(9) The contract should require the company to consider relevant experience as a substitute for test scores in instances where an employee substitutes for another on vacation or during illness and yet is denied a permanent transfer to that job because of insufficient test results.

(10) There should be a contractual assertion that neither the company nor the union will support the misuse of tests and test procedures.

(11) There must be no limitation on the union's right to file grievances related to psychological testing including those related to testing procedures, test validity, and/or reliability, etc. It may be that the union will want to use existing means (grievance procedures and arbitration) and/or special procedures for disputes involving testing.

(12) A specific procedure should be followed when questions arise concerning reliability, validity, etc. Either or both parties should have the right to bring in an expert witness on their behalf. An alternative approach might be to secure a mutually agreed upon expert to assist from the beginning in devising the testing program.

The Company and the Council agree that within 30 days:

a. The Council will retain an expert of their own choice and will defray all the expenses of such expert.
b. The Company will retain an expert of their own choice and will defray all the expenses of such expert.
c. The experts in a. and b. above will mutually agree upon an expert (a qualified professional person) who, at the expense of the Company will prepare a method of validating aptitude tests for use in connection with promotion or transfer.
d. The expert selected in c. above will proceed to validate the existing Differential Aptitude Tests, and other similar tests or other tests he may propose or prepare as criteria for use in connection with promotion or transfer including the establishment of appropriate cutting scores.
e. The parties agree that during such pending validation, promotion and transfers will be made to the most senior qualified employees as provided in the Seniority provisions of this agreement.[42]

(13) Arbitrators have generally felt that the use of testing is restricted in contracts where the use of tests is specifically mentioned. When specific tests are mentioned in a contract to be used to evaluate qualifications, then the use of other tests would be a violation of the agreement. In other words,

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41 United Industries, Incorporated, Beloit, Wisconsin, IAM Local 1197.

42 Memorandum of Understanding; Mason & Hanger–Silas Mason Company, Amarillo, Texas, Metal Trades Council.

when testing is expressly mentioned in the contract, only those tests can be administered unless another agreement between the company and the union has been reached.

Sec. 7 Uniform Ability, Aptitude and Mathematics Tests

A. 1. In the selection of apprentices, and skilled trainees, as outlined under this Appendix B, reference is made to the use of uniform mental ability, aptitude and mathematics tests. It is agreed that where such tests are used under the provisions of the agreement, one test from each of the following types of tests may be selected and the following passing scores will apply:

	Time Limit	*Passing Score*
Mental Ability		
Wonderlic Test Forms A or B	12 minutes	20
Mechanical Aptitude		
SRA Mechanical Aptitude Test		
Mechanical Knowledge Section	10 minutes	34
Spare Relations Section	10 minutes	21
Shop Arithmetic Section	15 minutes	11
Total		66
Purdue Mechanical Adaptability		
Form A	15 minutes	94
(Use author's formula to score)		
Bennett Mechanical Comprehension Form AA	30 minutes (max.)	44
Mathematics Tests		
P.T.I. Numerical Test Forms A or B		
Verbal Section	5 minutes	35
Numerical Section	20 minutes	20
Total		55[43]

(14) Most disputes will be concerned with postemployment testing practices since, by law, the union does not represent the employee until he has been hired by the company and has worked a minimum of thirty days. It is possible, if not probable however, that the union will become increasingly concerned with preemployment testing for two reasons in particular. First, these preemployment tests are often used for postemployment personnel procedures including promotions. Secondly, certain personality tests have proven relatively effective in pointing out potential union activists, and these people often end up "failing" the preemployment test. A test contain-

[43] American Can Company—Master Agreement IAM.

ing questions about union sympathies directly would constitute an unfair labor practice and therefore could be challenged through the National Labor Relations Board.

(15) The union should seek to negotiate language which will give it a voice in the introduction and/or implementation of a testing program:

> The Company reserves the right to develop tests to assist in determining qualifications of bidders for job openings in the more highly skilled classifications of work. It is understood that all tests used as outlined herein are subject to approval by the Union.[44]
>
> Tests may be required by the Company, after full disclosure and consultation with the Union has occurred, if an employee is under consideration for transfer to a new job.[45]

The more foresight used in drafting contract language regarding psychological or aptitude testing, the easier it will be to avoid disputes which have in the past generally ended in unsatisfactory arbitration decisions.

As the practice of psychological testing continues to grow, unions will find themselves increasingly involved in collective bargaining and arbitration regarding testing. As part of meeting their responsibility to their members, union representatives will have a need to become more and more knowledgeable in the field of testing. This need has already been recognized by the AFL-CIO, which sponsors an annual institute for the training of full-time union representatives in the fundamentals of testing.

Conclusions

The trade union movement is skeptical of the use of psychological tests both in principle and in practice. Tests are not yet sufficiently accurate to be the only device for selecting persons for any specified purpose whether it is for selecting a mate, attending college, or, as in the instance we are concerned with, choosing individuals for a particular job. Used properly, and with all due caution, tests may be helpful in selecting qualified individuals, *but only when used in conjunction with other criteria.* Above all, unions contend seniority should remain the main consideration for promotion.

Furthermore, even if the tests could do what their proponents say they can, the trade union movement would still feel that those workers who had contributed years of service to a particular company deserve a preferred right to be trained and given an opportunity to assume jobs which will enable those workers to earn more and make an even greater contribution to that company.

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44 General Precision, Incorporated, Glendale, California, IAM Local 1600.
45 Fansteel Metallurgical Corporation, Chicago, Illinois, IAM Local 1777.

CHAPTER III

PSYCHOLOGICAL TESTS AND GRIEVANCE ARBITRATION

GEORGE HAGGLUND

Personnel managers and industrial relations specialists for years have been engaged in a search for employees who are better fitted for the jobs at which they are to work. A wide variety of selection methods and procedures has been employed to assist personnel men in their attempts to increase industrial efficiency. Some devices, such as use of handwriting analysis (graphology) or analysis of skull configurations (phrenology), turned out to be transparent failures as employee selection devises.[46,47] Industrial psychologists responded to the efficiency objective in private industry by developing general trade or aptitude tests for use in industry or by adapting psychological tests used in the clinical or educational setting for use as employee selection tools. Personnel specialists began to develop psychological, trade, and aptitude tests for use in their own organizations. A commerce in psychological tests came into being, with organizations formed for the purpose of capitalizing upon industrial and educational demands for psychological tests. Until unions began challenging use of these tests in industry, workers were dependent to a great extent upon the management personnel man to see that their best interests were being protected in the selection and promotion process.

Paralleling the development of psychological testing during the 1940s and 1950s was the striking growth in the American labor movement, which presented workers with a means for challenging management decisions which were believed to do collective or individual harm to union members. Union interest in psychological testing and other personnel techniques was low at first, while maximum attention was devoted to consolidating membership gains and developing organizational security. But, by the early

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46 Forrest Kirkpatrick, "Psychological Racketeers," *Personnel Journal*, Vol. XX, 8 (February, 1942), pp. 283-286.

47 Wayne Sorenson and Robert E. Carlson, "Handwriting Analysis as a Personnel Tool," *IPX Highlights*, University of Minnesota Industrial Relations Center, Vol. 3, Spring, 1963, p. 9.

1950s, a few labor union officials, including Solomon Barkin[48] and Otis Brubaker,[49] had begun to express misgivings about the manner in which employers were using psychological tests. By the mid-1960s the labor movement reacted more strongly by seeking legislative controls on uses of psychological tests and sought contractual limitations in collective agreements. Thus the labor movement sought collective safeguards in the form of protective state and federal legislation and through collective agreements with individual employers, the purpose of which was to bring use of psychological tests under some measure of surveillance and control. While passage of controlling federal and state legislation has been largely unsuccessful, individual labor unions have experienced some initial success in negotiating contractual agreements with employers relative to use of psychological tests in industry. In addition, unions have sought to protect workers and members by processing grievances under existing agreements which do not necessarily refer to the specific matter of testing.

Therefore, the purpose of this chapter is to review individual disputes arising during the life of various collective agreements that appeared to involve various aptitude or psychological tests which culminated in the arbitration step of the grievance procedure. "Psychological testing," hereafter referred to as "testing," is defined as objective and more or less standardized samples of behavior involving elements of intelligence, special or general abilities, interests, and personality. Tests may include those which seek to ascertain the performance of persons in certain areas as well as those tests purporting to measure motivation, emotional stability, honesty, and other social traits. An attempt will be made to report on the nature of disputes involving testing, the reactions of labor unions to use of such tests, arguments of the parties, and arbitrators' decisions. Included will be an outline of salient characteristics of companies, unions, and arbitrators involved in these disputes, and some general conclusions about use of tests in industry as challenged by unions in grievance arbitration disputes.

The major source of information upon which this chapter is based was drawn from an unpublished study[50] later updated by Parks[51] in an unpublished report. The source of most of the arbitration cases reported in both

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48 Solomon Barkin, "A Trade Unionist Appraises Management Personnel Philosophy," *Harvard Business Review,* XXVIII, 5 (September 1950), p. 62.

49 Loren Baritz, *The Servants of Power* (Middleton, Connecticut: Wesleyan University Press, 1960), pp. 157-159.

50 George Hagglund, "Psychological Testing and Arbitration Disputes," *Unpublished Study,* The University of Wisconsin, 1964.

51 George Hagglund and Robert W. Parks, "The Arbitration of Psychological Testing Disputes," *Mimeographed Paper,* The University of Iowa Center for Labor and Management, Iowa City, Iowa, 1967.

studies was the Bureau of National Affairs' (BNA) *Labor Arbitration Reports*, augmented by written decisions and supporting material given the author by labor unions and arbitrators. The BNA *Labor Arbitration Reports* were carefully combed for relevant decisions published during the period 1947-1966. Since the period studied includes years in which industrial testing was in its infancy, some disputes are included in which tests used appeared to fit only marginally the definition of testing employed herein. It is interesting to note that the number of published disputes involving mention of testing is miniscule compared to the thousands of arbitration decisions reported by BNA during a twenty-year period.

Unions Involved

Table I shows that industrial unions were more likely to become involved in disputes than, for example, building trade unions, who control the hiring process to a greater extent. The United Steelworkers of America were most often reported as representing the aggrieved workers, with the International Association of Machinists running second.

Companies Involved

Large corporations were involved most often in arbitration disputes, with a variety of industries represented. Fourteen disputes were reported in miscellaneous manufacturing; eight in steel fabrication; the mineral and

Table I
Union Involved and Outcome of Arbitration Disputes

	Arbitrator's Decision	
Union	*Grievance Denied*	*Grievance Sustained*
United Steelworkers of America	12	4
International Association of Machinists	4	3
United Auto and Aerospace Workers	2	3
International Union of Electrical Workers	3	1
International Union of Operating Engineers	3	–
Pulp, Sulphite and Paper Mill Workers Union	3	–
United Rubber Workers Union	2	1
International Chemical Workers Union	2	–
Independent Unions	2	–
United Mine Workers–District 50	2	–
International Brotherhood of Electrical Workers	1	–
Communication Workers of America	–	1
Aluminum Workers International Union	1	–
Bridge . . . Iron Workers Union	–	1
Carpenters and Joiners–Midwestern Millmen	1	–
Brewery Workers Union	–	1
Total	40 (71%)	16 (29%)

chemical industries as well as public utilities and basic steel each accounted for six disputes; mining, petroleum, and aluminum each reported two; and, finally, one dispute each involved food products and airlines.

Nature and Outcome of Disputes

Approximately nine out of ten disputes—93 per cent—were focused primarily upon promotion to higher jobs within a defined bargaining unit. Of the cases not involving promotions, half focused upon the employees' right to bump to lower jobs following a reduction in work force; one case challenged a company attempt to validate a psychological test on bargaining unit employees; and another disputed the right of management to use tests as part of the promotion process. Generally speaking, arbitrators tended to respond more favorably to management than to unions in cases reported by BNA and analyzed in this chapter, with employee grievances denied in part or in entirety in about 75 per cent of the cases.

Management testing procedures, as they related to initial hiring, were not disputed by unions in any reported decisions. Since "gate hiring" is normally a unilateral management decision in manufacturing, from which the vast majority of BNA arbitration decisions were drawn, and given the usual probationary period clauses in collective agreements, unions almost never have occasion to challenge a management decision on new hires in the grievance procedure. Since 1964 such a complaint might be handled under state or federal equal employment opportunities statutes discussed in another chapter.

The Arbitrators

Biographical sketches of arbitrators are published in *Labor Arbitration Reports*. Of the men involved in the fifty-six reported cases, thirty of the forty-three arbitrators either were currently practicing attorneys or had their advanced training in law. Six of the remaining arbitrators were economists; three had an industrial relations background; and one each reported sociology and education as their formal educational training. A majority of the arbitrators evaluated were connected in some manner with academic institutions.

There was little in most arbitrators' educational data to indicate formal training in psychological testing. One arbitrator stated he ". . . had considerable experience in test development and use, both in army training and at the graduate school level."[52] In his written decision, however, he appeared to depend as much on use of adages such as "you can't teach an old dog new tricks" to justify bypassing an older worker seeking a promotion

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[52] Stauffer Chemical Co., *23 LA 322*.

as upon test scores. In general, there appeared to be little in arbitrators' background information or written decisions to indicate a fundamental grasp of the strengths and weaknesses of psychological testing as applied in industry.

Use of "Experts"

The arbitration decisions published in *Labor Arbitration Reports* and available supporting documents such as transcripts and posthearing briefs disclosed that company management and unions made little use of persons familiar and expert in theory, construction, application, and analysis of aptitude, intelligence, and personality tests. BNA reports showed few instances where expert testimony was relied upon. Few personnel men attempted to portray themselves as experts in the field of psychological testing.

An electric utility hired a consulting psychologist to testify as to validity of company psychological tests as used.[53] The consulting psychologist testified that the tests were administered and scored by qualified, trained people, and answered "yes" when asked whether the tests were valid as used. Validity evidence introduced by the company consisted mainly of normative data assembled by the original test developers on jobs and norm groups unrelated to the job in dispute. The same company was the only one which appeared from the records to employ a psychologist in their industrial relations department. The union made no attempt to use outside expert testimony in any of the fifty-six BNA cases, which is not surprising, since use of psychological tests was rarely challenged on technical grounds. Since 1966, however, several recent arbitration decisions indicate an increasing use of expert testimony by unions for purposes of challenging psychological tests on grounds that the test was poorly related to the disputed job. This development may be attributed in part to articles in the national labor news media[54] as well as two institutes on psychological testing cosponsored by the national AFL-CIO and The University of Iowa's Center for Labor and Management.

Union Arguments

Table II summarizes arguments used by unions in attempts to persuade arbitrators to sustain grievances. The summary indicates that no single argument provided an infallible "win" for aggrieved workers, as might be expected, given the varied nature and intent of collective agreements. Union attempts to rule out use of tests were generally unsuccessful. Unions argued that tests were invalid or unreliable in only four arbitration cases, and

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53 Wisconsin Electric Power Co., *36 LA 1401.*

54 Reginald Newell, "Psychological Testing and Collective Bargaining," AFL-CIO *American Federationist,* February, 1968.

Table II
Major Union Arguments Used in Arbitration Disputes and Arbitrator's Decision

Union Argument°	*Arbitrator's Decision*		
	Grievances Denied	*Grievances Sustained*	*Per Cent Union Successes*
Ability to perform work is enough, or on-the-job trial is required	14	7	33.3
Tests unbargained, unilaterally installed; union permission not given	15	6	28.6
Seniority intended to be major promotion criterion	7	2	22.2
Contract bans or limits company use of tests	7	1	12.5
Tests are an improper means for determining employee ability	7	1	12.5
Use of tests by company is unjust, unfair, or inequitable	6	1	14.3
Testing is an arbitrary, discriminatory, or a bad faith action	3	2	40.0
Tests are invalid or unreliable	3	1	25.0
Test requirements unrealistic, unreasonable or illegitimate	2	1	33.3
Past practices should be continued	1	2	66.7
Physical fitness is the determinant of ability	1	1	50.0
Alternative criteria for promotions provided by agreement	2	–	0
Previous arbitration decisions do not apply in present dispute	1	–	0

°*Note*–Since more than one argument was used in individual disputes, the preceding do not total 56.

grievances were denied in three decisions. Unions appeared to do even less well when they argued that tests were an improper means for determining employee ability, with only one arbitration decision out of eight favoring the aggrieved worker.

Newell[55] pointed out that unions might experience more success in challenging management use of tests by securing advance information on tests being used in specific instances, attacking management test usage in terms of validity, reliability, and other technical grounds, and by limiting test usage through writing of specific contract language. Recent developments

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55 Newell, *ibid.*

related to bargaining of testing controls or limitations are discussed in another chapter. In addition, Newell suggested that more joint union-management consultation regarding psychological test usage would be helpful from the union's and worker's point of view. Given the technical and complex nature of testing as practiced in industry, it is clear that unions are severely handicapped in the arbitration process by a lack of understanding of the basic principles of psychological testing.

Table III
Major Company Arguments Used in Arbitration Disputes and Arbitrator's Decision

	Arbitrator's Decision		
Company Argument°	*Per Cent Company Success*	*Grievances Denied*	*Grievances Sustained*
Seniority not primary consideration when promoting	52.3	11	10
Determination of ability is a management function or right	84.2	16	3
Contract allows, or does not prohibit, use of tests by company	92.3	12	1
Company acted in good faith or did not act arbitrarily, capriciously, or in discriminatory manner	80.0	8	2
Employee gave up right to promotion by refusing to be tested	60.0	3	2
Earlier arbitration award decided management's right to test for promotions	100.0	4	–
Employer has right to remove worker from job before end of trial period	50.0	1	1
Trial period intended for qualified employees only	0	–	2
Employee violated plant rules by refusing to take test; discharge justified	100.0	1	–
Promotion of senior man places "undue burden" upon company	0	–	1
Merit rating a company practice of long standing never challenged by union before	100.0	1	–
Arbitrator not empowered to decide upon issue at dispute	0	–	1
Tests are a valid requirement for promotion	100.0	1	–

°*Note*–Since more than one argument was used in individual disputes, the preceding do not total 56.

Company Arguments

Table III summarizes major company arguments made in the course of fifty-six arbitration hearings. Where the contracts appeared to give seniority primary consideration in promotions, the arbitrators were more likely to sustain the aggrieved workers' positions, although a strong seniority clause did not necessarily result in arbitrators ruling in favor of the union. Arbitrators consistently refused to overturn earlier arbitration decisions which permit use of tests. Company arguments that they themselves had acted in good faith, or not in an arbitrary, capricious, or discriminatory manner were not often challenged successfully by union spokesmen. Company spokesmen pointed out in thirteen cases that the contract either allowed or did not prohibit use of tests, and the arbitrator sustained the aggrieved employee in only one decision. Arbitrators appeared to be persuaded in three out of five cases that employees had given up their right to a promotion by refusing to take a test. Interestingly, in one of these cases the arbitrator denied the aggrieved worker even though he had not refused to take the test specifically involved in the promotion but had actually declined to take another test. The company attorney established during the hearing that the aggrieved would have refused to take the test in question had he been asked.[56]

Based upon a study of arbitration decisions published by the Commerce Clearing House, the Personnel Testing and Research Unit at Lockheed, California, made four recommendations concerning several test-related conditions that would tend to be upheld by arbitrators. Implicitly, the conditions may be used as successful arguments by management when faced by union challenges arising from use of tests:[57]

1. When the test used was "job related."
2. When the test was only one of several tools used in judging an employee's qualifications.
3. When the company can demonstrate to the arbitrator that the test was administered fairly and scored fairly and consistently.
4. When the union has been afforded an opportunity to see (but not keep) the test and offer comments as to fairness and relevance. Thus the union cannot later argue that tests were unilaterally installed and applied by management alone.

The Contract

A large number of the cases involved arguments over the relative weight

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[56] Caradco, Inc., *35 LA 169*.

[57] Jacobs and Biddle, "A Review of Arbitration Cases Involving Tests for Promotion," *Research Report*, Lockheed-California Company, 1967.

of seniority versus ability, with the union arguing for promotion of the senior man (who had been bypassed) and the company arguing for a more able (according to test results) junior individual. Table IV indicates the importance arbitrators attributed to contract clauses in making determinations concerning use of psychological tests. Where seniority was attributed more weight than ability, union greivances were sustained in a majority of cases. Where seniority and other factors were relatively equal, the company action prevailed in a majority of instances. Where seniority was given lesser importance in promotions, the company action was sustained in a far larger proportion of arbitration decisions.

Table IV
Types of Contract Clauses* Governing Promotions
and Decisions of Arbitrators

	Arbitrator's Decision		
Contract Clause	*Grievance Denied*	*Grievance Sustained*	*Per Cent Union Success*
Seniority plus an on-the-job trial	2	3	60%
Seniority for some jobs, skill and ability for others	1	1	50%
Seniority, other considerations relatively equal	6	4	40%
Seniority prevails where skill and ability relatively equal	12	3	20%
Seniority has lesser or no weight for promotion purposes	8	3	27%

*Type of seniority clauses not ascertainable in several cases

Jacobs and Biddle concluded from another study of arbitration cases that tests could be used where the labor-management agreement: (a) states that promotions will be based upon ability, aptitude, or skill, or, (b) states that promotions will be based upon qualifications, or (c) does *not* state that promotions will be based upon seniority, or (d) does *not* state that tests are expressly forbidden.[58] The study of BNA arbitration decisions corroborates these conclusions—where the contract calls for evaluation of ability, or tests are not expressly barred from consideration, arbitrators will uphold use of psychological tests as a basis for management promotion decisions.

Validity and Reliability

The question of whether psychological and aptitude tests actually separated "good" from "bad" performers was raised only in four arbitration

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[58] Jacobs and Biddle, *ibid.*

cases reported by BNA. In three of these cases, the arbitrator upheld the company decision to promote a junior employee. Test validity, defined as an attempt to forecast an individual's future standing or to estimate an individual's present standing on some variable or particular significance that is different from the test,[59] was a matter seldom discussed during arbitration proceedings. Unions and workers appeared to accept test validity at face value in most cases, or alternatively were not prepared to show the arbitrator that a given test was invalid.

Test reliability, defined as the likelihood of a person taking a test to score approximately the same if he were to take it again at some other point in time, was brought up directly in one dispute.[60] The union submitted in evidence an aggrieved employee's second set of test scores, which were passing in terms of the company's cutoff score. Both company and union representatives demonstrated an imperfect understanding of what was meant by validity and reliability. None of the companies involved in the arbitrations presented evidence that they had completed professionally acceptable validation studies of tests relative to performance on disputed jobs. There was no mention of any studies of test reliability done by any of the companies involved in reported disputes. Arbitrator L. C. Brown was an exception to the general level of understanding concerning the complexities of test validity when he wrote:

> When a test has been given to a large number of candidates for an occupation and the test results correlated with performance in the occupation, and when this correlation reveals a consistent relationship between particular test performances and success (or failure) in the occupation, we may be in a position to affirm with confidence that the tests are a reliable screening device . . .[61]

Aside from his error in confusing test validity with reliability, arbitrator Brown came closer than most dispute participants to an understanding of the two terms.

A related issue had to do with the setting of minimum passing scores believed by management to separate "good" from "bad" employment risks. Among the cases cited, there were few instances of management showing a valid basis for setting a particular cutting score relative to a test or test battery. In several disputes, management set the cutting score at or slightly below the arithmetic mean for a group of workers, or the population norm

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59 *Standards for Educational and Psychological Tests and Manuals*, American Psychological Association, Washington, D.C., 1966, p. 12.

60 Bergstrom Paper Co. and Pulp, Sulphite and Paper Mill Workers, *Unpublished Arbitration Decision*, April 12, 1961. Arbitrator: Arvid Anderson, Wisconsin Employment Relations Board.

61 National Cooperative Refinery Assn., *44 LA 92*.

group was unrelated occupationally to the job in dispute. Arbitrators rarely questioned management decisions as to whether or not a cutting score actually separated good from bad workers.

A related undesirable practice was evident from testimony at a hearing where a company personnel man first evaluated the performance of trainees to be tested and then developed the test items to be used as an independent evaluation. The same personnel man set cutting scores separating passing employees from failures. Because of the techniques used in setting up criteria for training performance and then constructing the aptitude test and cutting scores, it is not surprising that a positive relationship was found between test score and employee performance. Properly done, the test performance should have been an independent evaluation which then could be compared with actual performance in the training program as evaluated by someone else.

Performance Criteria

Tests are supposed to measure human characteristics believed to be related to specific jobs. Most tests are assumed to sample human behavior in a manner to predict future behavior of the tested individual. Analysis of arbitration decisions disclosed that few employers had given much thought to the relationship between the test and specific job characteristics useful to predict future successful performance of employees on specific jobs. In twenty-four cases analyzed, six companies failed to mention desirable performance criteria; eleven specified "ability to perform work"; nine looked for mathematical, reading, or writing ability; six wanted ability to perform technical aspects of the job; six desired mechanical skill and mechanical dexterity; and three employers wanted employees with aptitude to read and interpret drawings. Several employers were less specific about the performance criteria on which employees were judged: vague criteria included skill, general efficiency, general background, the ability to think, memory, judgment, and emotional stability.

Metzler and Kohrs pointed out that many companies incorrectly assume that a mechanical aptitude test predicts success for any jobs which are mechanical in nature.[62] It is entirely possible, for example, that a given employer may be concerned with high turnover among mechanics, another with alcoholism, and a third with ability of individuals to get along with others in a small maintenance crew. None of these employers would be well served necessarily by a mechanical comprehension test unless some study was given of how well the test identified potential absentees or quits, alcoholics, or personality problems. Employers as well as unions must concern

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[62] John H. Metzler and ElDean V. Kohrs, "Tests and 'The Requirements of the Job,'" *The Arbitration Journal,* Vol. 20, No. 2, 1965, pp. 109-110.

themselves to a greater extent with identification of reasonable performance criteria in terms of both selection and promotion. Since arbitrators may know only what they are told at the hearing, both sides to a dispute have a responsibility to educate the arbitrator toward understanding of this complex subject.

Summary and Conclusions

Psychological tests are prevalent in private industry today. With the growth of trade unions has come a growing interest on the part of workers and union leaders with regard to tests of ability used as a basis for promotion decisions in particular. The issue of testing has been raised in a number of arbitration cases—the final step in most grievance procedures. Most disputes—approximately 75 per cent—were settled by the arbitrator in a manner most favorable to management. Industrial unions were most likely to be involved in testing disputes with their employers, which is not surprising given the nature and variety of jobs found in a typical industrial bargaining unit. The large unions and large corporations appeared to be involved most often in such disputes. Most arbitrators had law backgrounds, several were trained in economics or industrial relations, but few appeared to have a sufficient understanding of psychological testing. Transcripts of arbitration cases, where available, disclosed that union and management representatives also lacked training in and understanding of the field of psychological testing. Of the participants, union representatives were in the weakest position educationally to challenge use of tests on technical points.

Perhaps to counteract their own lack of technical proficiency, recent arbitration decisions indicate a growing union use of testing "experts." In addition, the Research Department of the AFL-CIO sponsors an annual training session for affiliated union representatives, which, if successful, should result in more testing sophistication among trade union leadership. A favorite union argument in support of promotion of the senior employee was that ability to perform the work was the most desirable means of determining ability as called for by the agreement. Companies favored the argument that determination of ability is a function of management, and if they wished to use tests in making that determination, it was their right. Contract clauses in arbitration decisions reviewed rarely referred to testing directly; where seniority was given greater weight in the agreement than other considerations, unions prevailed in a majority of cases. Where seniority was given equal weight with ability and other considerations, or lesser weight, management thinking was most often favored by arbitrators. Test validity and reliability were challenged in a few instances, and unions had a difficult time convincing arbitrators that tests did not predict worker

performance on specific jobs or that test scores did not reliably indicate worker test performance. Companies were usually able to convince arbitrators that tests were valid on the basis of direct, unsupported testimony. Performance criteria used by employers to select employees were very often vague and poorly related to the tests being used. Unions seldom took issue with management on this point. Both employers and unions must concern themselves with educating arbitrators in the complexities of psychological testing if they desire an intelligently conceived, well-reasoned resolution of a dispute.

APPENDIX

Arbitration Cases Involving Tests

Acme Steel Co., *9 LA 432*
Perry-Fay Co., *10 LA 429*
American Can Co., *10 LA 613*
Standard Oil Company of Indiana, *11 LA 810*
Southern California Edison Co., *15 LA 162*
Hammerlund Manufacturing Co., *19 LA 653*
Castle Dome Copper Co., *19 LA 828*
U.S. Steel Corp., *22 LA 188*
International Mineral & Chemicals Co., *22 LA 446*
Stauffer Chemical Co., *23 LA 322*
M. A. Hanna Co., *25 LA 480*
Kuhlman Electric Co., *26 LA 885*
National Seal Co., *29 LA 29*
Allied Chemical & Dye Corp., *29 LA 394*
Wallingford Steel Co., *29 LA 597*
Bethlehem Steel Co., *29 LA 710*
Acme-Newport Steel Co., *31 LA 1002*
General Controls Co., *33 LA 213*
Wisconsin Electric Power Co., *33 LA 713*
Kaiser Aluminum Co., *33 LA 951*
Latrobe Steel Co., *34 LA 37*
Nicholson File Co., *34 LA 46*
Caradco, Inc., *35 LA 169*
Mead Containers, Inc., *35 LA 349*
Alan Wood Steel Co., *36 LA 240*
International Nickel Co., *36 LA 343*
Fansteel Metallurgical Corp., *36 LA 570*
Wisconsin Electric Power Co., *36 LA 1401*
Wisconsin Electric Power Co., *37 LA 1079*
Bergstrom Paper Co. and Pulp, Sulphite and Paper Mill Workers Union, 4-12-61. Unpublished arbitration decision and related material loaned to author by the Union.
Russell, Burdsall & Ward Bolt & Nut Co., and Steelworkers Local 1113, 4-12-61. Unpublished arbitration decision and related material loaned to author by the Union.
Dayton Steel Foundry Co., *38 LA 63*
Yuba City Heat Transfer Corp., *38 LA 471*
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Stackpole Carbon Co., *38 LA 704*
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Monsanto Research Corp., Mound Laboratories, *39 LA 735*
St. Regis Paper Co., *40 LA 562*
American Motor Co., *41 LA 856*
Westinghouse Electric Corp., *41 LA 902*
Central Soya Co., *41 LA 1027*
Armstrong Cork Co., *42 LA 349*
Perfect Circle Corp., *43 LA 817*
John Strange Paper Co., *43 LA 1184*
Pretty Products, Inc., *43 LA 779*
National Cooperative Refinery Assn., *44 LA 92*
Link-Belt Co., *44 LA 720*
Bethlehem Steel Co., *44 LA 967*
R. D. Werner Co., *45 LA 21*
Trans World Airlines, Inc., *45 LA 267*
Capital Manufacturing Co., *45 LA 1003*
Equitable Gas Co., *46 LA 81*
U.S. Steel Corp., *46 LA 414*
Martin Co., *46 LA 1116*
Square D Co., *47 LA 382*
Vulcan Materials Co., *49 LA 577*
Wisconsin Electric Power Co. and I.B.E.W., 5-5-59. Unpublished decision furnished author by the Union.
Wisconsin-Michigan Power Co. and I.B.E.W., 2-26-60. Unpublished decision, transcript, and exhibits furnished author by the arbitrator with permission of the Union.
Union Carbide Corp., Chemicals Div., and Machinists Lodge 598, 3-11-67. Unpublished decision loaned to author by the Union.
The Beryllium Corp., and Steelworkers Local 2317, 2-28-69. Unpublished decision loaned to author by the Union.

CHAPTER IV

SOME LEGAL ASPECTS OF TESTING

IRVING KOVARSKY

The use of tests to hire and promote employees has received considerable attention from academicians trained in psychology. Generally, the comments which appear in print have been unfavorable and point to the discriminatory nature of many tests and the failure to validate them. One aspect centering about testing that has received little publicity is the legal implications. To fully appreciate the legal difficulty, the reader must consider the psychological aspects of testing together with section 703 (h) of the Civil Rights Act, which protects the employer relying on the industrial test.

In court, considerable difficulty will be encountered in proving intentional or unintentional discrimination. To highlight the social and legal problems, the pertinent decisions and implications of section 703 (h) will be discussed in this chapter.

The Motorola Case

The controversial *Motorola*[63] decision was given widespread newspaper coverage that was often confusing and unfair.[64] As a matter of fact, the *Motorola* decision bristles with social and legal questions that were not reviewed or properly highlighted by newspaper reporters. This commentary is dedicated to a more thorough and technical review of the problems raised in *Motorola* and the subsequent legislation that was passed on a state and federal[65] level to protect the employer who tests candidates for a job. Although a surface climate favoring fair employment has emerged, public and private support of a questionable caliber can retard rather than

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63 Motorola, Inc. v. Illinois FEPC, 58 LRRM 2573 (1965).

64 *Chicago Tribune,* Nov. 21, 1964, p. 14, col. 1; *Chicago-American,* Nov. 23, 1964, p. 8, col. 1; *Chicago Daily News,* Nov. 23, 1964, p. 14, cols, 1-2; *Chicago Sun-Times,* Nov. 23, 1964 (editorial); Krock, "Fair Employment Issue, Decision in Illinois Case Involving Aptitude Test Raises Questions," *New York Times,* Nov. 22, 1964, Sec. E, p. 9, col. 1.

65 42 U.S.C., Sec. 2000(a) (1964).

advance fair employment. Tests that are valid and fair are more difficult to conceive than is acknowledged, and the legislative and judicial protection accorded tests can retard the public goal calling for fair employment.

The Motorola Co. tested a Negro trained to service radio and television receivers; he was refused employment when he failed the test. The Motorola Co. refused to participate in the conciliation meeting called by representatives of the Illinois FEP Commission because a stenographer would not be permitted.[66] Since the conciliatory effort failed, a public hearing was scheduled. A hearing examiner was appointed. He decided that the firm was guilty of discrimination because:

> No testimony was offered from the administrator who administered the test and graded it. In the absence of the test which the Complainant took, his answers thereto, and the overlay key for checking the Complainant's answer, the Hearing Examiner is denied sufficient means for holding with the Respondent that Complainant was accorded equal opportunity with all other applicants without regard to Complainant's race. Moreover, the complaint alleges that Complainant passed the company test, the Commission Investigator testified that when he administered test No. 10 to Complainant as part of the investigation about two months later, Complainant passed . . .[67]

In a nutshell, two reasons were given for holding the Motorola Co. responsible for violating the Illinois Fair Employment Practices Commission (FEPC): (1) Motorola could not or would not produce the test taken by the complainant, and (2) an investigator administered the test orally to the complainant, who passed it.

The hearing examiner engaged in dictum by alleging that tests are inherently discriminating, i.e., tests even without intent discriminate against the Negro.[68] The hearing examiner took note that the complainant had passed the examination which was orally administered by the investigator; therefore, it was unnecessary to discuss the inherent discriminatory nature of all testing. The legal problems faced in considering whether or not a test is discriminatory are numerous, and proving an intent to discriminate is difficult. However, the decision in the *Motorola* case may prove to be a social boon because many papers which are critical of testing have been prepared.[69]

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[66] Motorola, Inc. v. Illinois FEPC, 58 LRRM, 2576.

[67] Decision and Order of Hearing Examiner, Charge No. 63 C-127, pp. 7-8 (Nov. 18, 1964).

[68] *Ibid.*, p. 8.

[69] Lopez, "Current Problems in Test Performance of Job Applicants," 19 Personnel Psychology 10 (1966); Katz, "Review of Evidence Relating to Effects of Desegregation on the Intellectual Performance of Negroes," 61 American Psychologist 448 (1964); Lockwood, "Critical Problems in Achieving Equal Employment Opportunity," 19 Per-

An interesting facet of the decision made by the hearing examiner pointed to the role of the Personnel Department, which has

> a supreme responsibility to move positively to eradicate unfair employment practices in every department. . . . The task is one of adapting procedures within a policy framework to fit the requirements of finding and employing workers heretofore deprived because of race, color . . . . The employer may have to establish in-plant training programs and employ the heretofore culturally deprived and disadvantaged persons as learners, placing them under such supervision that will *enable* them to achieve job success.[70]

Although the Illinois FEPC on review approved the decision made by the hearing examiner, the administrative agency was unwilling to declare testing inherently discriminatory because the complainant passed the examination.[71]

On review, the Chicago Circuit Court ruled that the Illinois FEPC could not award damages although the finding of discrimination by the employer was not disturbed. The judge noted that "both sides are guilty of some actions that perhaps would not be condoned . . . in a courtroom . . ."[72] and went on to hold:

> Arriving at a decision in this case has been particularly difficult . . . because I am frank to say that had this been a trial de novo, my judgment . . . might . . . have been different than that arrived at by the Commission . . . .[73]

As a practical matter, the action taken by the Chicago Circuit Court was tantamount to a reversal of the decision made by the Commission. Since the Commission decreed that Motorola would have to pay $1,000 to the complainant but would not have to hire him, the Court impliedly reversed the decision by holding that the Commission was without legislative authority to award damages.

On appeal to the Illinois Supreme Court, the decision of the trial court was reversed, and the charge of discrimination made against the firm was dropped.[74] The Illinois Supreme Court noted that an inference was possible that the Motorola Co. had discriminated in the past but "(w)hile a back-

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sonnel Psychology 3 (1966); Guion, "Employment Tests and Discriminatory Hiring," 5 Industrial Relations 20 (Feb., 1966); Ash, "The Implications of the Civil Rights Act of 1964 for Psychological Assessment in Industry," 21 American Psychologist 797 (Aug., 1966).

[70] Decision and Order of Hearing Examiner, p. 10.

[71] Commission Decision on Review, Charge No. 63C-127, State of Illinois FEPC (Nov. 18, 1964).

[72] Motorola, Inc. v. Illinois FEPC, 58 LRRM, p. 2574.

[73] *Ibid.*

[74] Motorola, Inc. v. Illinois FEPC, 61 LRRM 2590 (1966).

ground of prior discrimination could be taken into account in appraising other evidence, it was not, in itself, sufficient to justify" a finding of guilt in this case.[75] The Court concluded:

> When all the evidence in this case is considered, some suspicion might reasonably remain that the plaintiff had falsely recorded . . . (the complainant's) test score. Under the . . . Act, however, that suspicion is not enough. The (Illinois) act provides that "A determination sustaining a complaint shall be based upon a preponderance of the evidence . . . ." On the record in this case, we are of the opinion that the alleged unfair employment practice was not established by a preponderance of the evidence.[76]

The Illinois Supreme Court did not weigh the possibility that the test used in *Motorola* might have been inherently discriminatory. Rather, the court was unable to find "a preponderance of the evidence" which is required under Illinois law to show that the employer intentionally discriminated against Negroes.

Technical Aspects of Testing

1. Section 703 (h)

The late Senator Dirksen, prominent congressman from Illinois, the "home" of *Motorola*, was concerned with the protection of industrial testing.[77] Although prior to the Civil Rights Act some senators felt confident that employers could test without legislative protection, Senator Tower of Texas did not share this opinion. Senator Tower, who was interested in protecting the employer, suggested the following addition to Title VII:

> . . . it shall not be an unlawful employment practice for an employer to give any professionally developed employment test . . . if such a test is designed to determine or predict whether such individual is suitable or trainable . . . and such a test is given to all individuals seeking similar employment . . .[78]

The proposal submitted by Senator Tower and the final draft differ in a number of respects. In the initial proposal the employer was protected when a test "is given to all individuals seeking similar employment," while section 703 (h) does not require the testing of "all individuals seeking similar employment." The difference is probably rhetorical since, in the version enacted, a violation can be shown only if a Negro or white is tested—disparate treatment establishes a discriminatory motive. The proposal by Senator Tower could have led to a requirement of validation because of the terminology "if such test is designed to *determine or predict* (emphasis added) whether such individual is suitable or trainable. . . ." To persons with high

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75 *Ibid.*, p. 2594.
76 *Ibid.*, p. 2596.
77 110 Cong. Rec. 6993 (daily ed., 4-8-64).
78 110 Cong. Rec. 13018 (daily ed., 6-11-64).

standards "determine or predict" means establishing the validity of a "professionally developed ability test." Per section 703 (h), the employer can use a "professionally developed ability test," and validity is not emphasized unless a "professionally developed ability test" means validation.[79]

Another difference between the proposed and enacted version hinges upon finding an illusory intent. Curiously, neither sections 703 (a) nor 703 (d) require that an employer must intentionally violate the law, while section 703 (h) calls for an intentional infraction. Intent is a state of mind which can be proven only by looking at external events. Merely because the external act, failing to hire or promote, injures a Negro does not necessarily mean that the employer harbors a discriminatory motive. Establishing intent is difficult because discrimination in most instances must be inferred from external circumstances. The original proposal made by Senator Tower did not require, at least expressly, intentional wrongdoing. On the other hand, section 703 (h) backs the employer unless the test is "designed, intended, or used to discriminate." Based upon the terminology approved by Congress, tests which are unintentionally discriminatory may be protected. Thus, suspecting the discriminatory nature of a test may not be enough to establish employer responsibility. Unless he is informed in no uncertain terms that a test is discriminatory or that positive evidence establishes discrimination, the employer has extensive protection under section 703 (h).

If an employer harbors a suspicion that a test is unfair, he will experience little difficulty in finding expert opinion which upholds its "scientific" fairness. The difficult problem of securing proof of discrimination is not encountered so long as the EEOC engages only in persuasion. However, under Title VII, a suit is necessary in cases where the employer refuses to follow the recommendations of the EEOC. Not only must the evidence establish discrimination, but the suit brought in the federal district court begins *de novo* (a new hearing), and a preponderance of evidence is necessary to establish wrongdoing.[80] If required to rule on the inherent discriminatory nature of a test, a federal district court—in cases where technical rules of evidence apply—could reach the same decision as the Illinois Supreme Court reached in *Motorola*.

The federal law states that a test cannot be "design(ed) . . . or used to discriminate. . . ." If the test is not validated, the employer should be aware that it may be unsuitable as a selection device and may possibly be discriminatory. Such a law would require the validation of all tests. Yet validation cannot be equated with intentional discrimination. An employer

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[79] Ash, "The Implications of The Civil Rights Act of 1964 For Psychological Assessment In Industry," 21 *American Psychologist*, pp. 797, 799.

[80] Sec. 707 (b).

using an unvalidated test is possibly negligent, but negligence is not the same as engaging in an intentional malpractice. Gross negligence can be treated as an intentional wrong, but facts to establish gross negligence must be presented.[81] Relying on an unverified test is not gross negligence, particularly if "professional" testers endorse the use of such tests.

If an unvalidated test is questioned before a state commission which is unhampered by technical problems of proof, nonfeasance, a failure to validate may establish a discriminatory motive. The failure to validate a test can be reasonable evidence of a violation of fair employment practice legislation. And theoretically a court is required to support the decision of a commission backed by reasonable evidence. Where a commission follows court rules or where the suit begins *de novo* in a federal court, a failure to validate may not constitute proof that a test is discriminatory. The need of an employer to test has to be balanced against the need of Negroes to find employment as skilled, professional, and managerial workers. It is at this point that the Illinois and federal legislation unduly burdens the public goal of fair employment.

The federal legislation prohibits the use of tests in a discriminatory manner. Personnel administrators know that scores on tests are not sufficiently foolproof to judge the prospective worth of an employee. A failure to arrange an interview, to call for references, or to examine merit ratings may establish discrimination even if tests are professionally developed. If an employer tests white applicants but turns away Negro candidates for a job, discrimination is established.[82] If Negro and white job applicants are tested but only white candidates are interviewed, discrimination may exist. Should an employer turn to testing *after* the passage of the Civil Rights Act, evidence of an unlawful motive may be discernible.[83] Discrimination can be detected when a professionally developed test is unrelated to the job. But there is the difficulty of proof—an employer may claim a desire to hire only the best possible workers rather than those who can only satisfactorily fill a job. If a Negro successfully completes a test and is not hired by a recruiting employer, discrimination is apparent.[84]

2. State Law

Most state laws do not mention testing or its proper use. Where state laws are silent, state commissions have greater freedom to decide whether a test is proper than they do under the federal law. Illinois, differing from

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81 Prosser, *Law of Torts*, pp. 187-190 (1964).

82 Thompson v. Erie Rd. Co., 2 Race Rel. Rep. 237, 240 (1956). But see Whitfield v. Steelworkers Union, Local 2703, 156 F. Supp. 430 (S.D. Tex., 1957).

83 Silberman, *Crisis in Black and White*, p. 258.

84 *Third Annual Report of the Ohio Civil Rights Commission*, pp. 21-22 (1962).

other states, amended its law after the *Motorola* case, and the legislation provides:

> Nor shall anything in this Act preclude an employer from giving or acting upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate . . . .[85]

Under its rule-making authority, the California Commission, probably influenced by *Motorola,* established a framework to regulate testing. The California Commission suggests that employers "(r)eview tests . . . to see that they are valid for the position, uniformly applied, and free of inadvertent bias against persons not experienced at this kind of testing. Retrain . . . testers to make sure that your equal opportunity policy will be carried out. As new personnel people are hired, this should be part of their indoctrination."[86] Later, the California Commission endorsed the use of the professionally developed test.[87] Although the California rules are only suggestive, a firm which fails to follow them is susceptible to a charge of discrimination. But evidentiary problems abound if court manipulation proves necessary.

3. The EEOC Guidelines

The EEOC guidelines indicate that the tests used by employers who have discriminated in the past will be scrutinized closely.[88] It is interesting to note that Illinois legislation forbids looking to the past to establish current discrimination.[89] Further, the EEOC feels that only a validated test can be "free of inadvertent bias."[90] The "inadvertent bias" referred to by the EEOC is not the equivalent of intentional bias required in section 703 (h). "Inadvertent" suggests negligence but not an intentional state of mind. Unless "inadvertent bias" was intended to be synonymous with gross negligence, the EEOC instructions and congressional mandate conflict. However, it is possible to reason that Congress was concerned only with the preparation of a test and not with the subsequent validation suggested by the EEOC. Thus, there would be no conflict between the intent required under federal law and the subsequent negligent action of the employer referred to by the EEOC. Also, a claim can be made that there is no "professionally developed test" until there is validation.

EEOC guidelines were issued to help employers establish plant policy

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85 23 SLL 202, sec. 3(e).
86 14 SLL 208(d) (4-4-66).
87 14 SLL 203(f), (g) (8-29-66).
88 LRX 2051.
89 See sections 8(b) and 9(a) of the Illinois legislation.
90 LRX 2052.

which is free from criticism. From the view of the legal technician, some of the EEOC guidelines are questionable. Suggestions that, evidently, need not be followed by employers are:

> The Commission encourages employers to seek out minority group applicants . . . .[91]
>
> . . . employers are encouraged to provide an opportunity for retesting to those "failure candidates" who have availed themselves of more training or experience.[92]

Aware that few cases reach the stage of a public hearing, the EEOC could possibly use the guidelines to pressure employers to do more than section 703 (h) requires. If a dispute should go beyond the conciliation stage, the employer might fear adverse publicity and follow the recommendations of the EEOC. The EEOC, in order to control testing, can take advantage of the fact that few charges are publicly aired. The EEOC did not suggest that an employer who fails to follow guidelines violates the law.

If the validating of a test is more than a suggestion, the EEOC guidelines run into another snag. Section 703 (j) of the federal law unequivocally protects the employer who is unwilling to grant preference to a Negro.[93] The guidelines published by the EEOC definitely help the Negro jobseeker, possibly to the disadvantage of the white person. If the guidelines demand more of the employer than does Congress, EEOC favoritism for the Negro can be claimed. But if the guidelines are construed as protective criterion following the general flavor of section 703 (h), the will of Congress is not usurped by the EEOC. In the writer's opinion, Congress never considered the possibility that a test may be inherently discriminatory or the difficult problems of proving discrimination; and the EEOC justifiably protects the Negro.

Both the Illinois law and the federal law protect the employer who uses an "ability" test. Since the "ability" test alone is mentioned, did Congress intend to extend the same protection to an employer who uses other kinds of tests? "Ability" tests uncover learning capacity, performing capabilities, industrial judgment, etc. Tests ascertaining morality, social presence, social views, personality, stability, etc., are not "ability" tests. Since the Illinois and federal legislation do not extend blanket protection to any but the "ability" test, employers relying on other types of tests are more easily charged with discrimination. The distinction between "ability" and other tests is more than a philosophical exercise since the moral and social views of minority groups differ from accepted norms. Tests developed "profes-

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91 *Guidelines On Employment Testing Procedures*, p. 3.
92 Ibid., p. 5.
93 78 Stat. 243.

sionally" to weigh moral and social views could constitute *per se* violations under the Illinois and the federal law. However, tests other than an "ability" test are not necessarily discriminatory.[94]

The EEOC guidelines provide that the "(s)creening of applicants should be based on the qualifications required for a specific job"[95] and "(t)he characteristics of a test, apart from the situation in which it is used, are not sufficient evidence on which to judge its quality."[96] The EEOC demands more of the employer than a "professionally developed test" when it states that tests "should be based on the qualifications required for a specific job."

If an employer *intentionally* uses a test which is unrelated to the job, he presumably violates Title VII. If an irrelevant test is used *unintentionally*, there is doubt as to whether an employer can be held legally responsible. The *Guidelines on Employment Testing Procedures* refer to tests that are based on "specific job-related criteria" and concern tests "professionally developed in one situation" that may be misused "in another situation."[97] The position taken by the EEOC does not fit the situation when an irrelevant test is innocently given. If the same irrelevant test is given to white and Negro job candidates, an intentional violation cannot be established.

Since 1965 the Department of Labor has been charged with tending to Executive Order 11246 and the letting of government contracts requiring fair employment. The Department of Labor has issued a directive to all federal agencies that "each contractor regularly using tests" must submit "evidence that the tests are valid for their intended purposes."[98] The directive further states that "(u)nder no circumstances will the general reputation of a test, its author or its publisher, or casual reports of a test's utility be accepted in lieu of evidence of validity."[99] This directive differs from the EEOC *Guidelines* which urge but do not require validation. But the directive does not flatly state that a failure to validate will automatically result in the cancellation of a government contract or other penalty.

The meaning of a "professionally developed . . . test" is conjectural. The EEOC guidelines pertain to "the professional application of tests,"[100] while the Illinois law and section 703 (h) refer to "professionally developed . . . tests." The guidelines often cover the giving of a test, while the legislation

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94 Cooks v. Carmen's Local, 338 F.2d 59 (CA5, 1964), *cert. denied*, 380 U.S. 975 (1965). In this case, a test was used to determine psychological maladjustment. The case did not arise under Title VII.

95 *Guidelines On Employment Testing Procedures*, p. 3.

96 *Ibid.*, p. 4.

97 *Ibid.*

98 *Validation of Employment Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246*, Sec. 2(a), p. 3.

99 Work cited at footnote 14, at Sec. 6(a), p. 3.

100 *Ibid.*, p. 7.

refers to the preparation of a test; the similarity is due to the requirement of professionalism. But to develop or give a professional test should require professionally trained people.

Consulting firms specializing in testing and other management techniques are often staffed by competent personnel who hold graduate degrees. A test developed by such personnel should satisfy the requirement of professionalism. If the test is prepared by a university-trained person who is employed by an independent firm, the examination should be presumed to be free of intentional bias toward the Negro. A competent employee may prepare a test for his employer; yet a presumption of fairness should not be indulged in because of employer control. Satisfying section 703 (h) may require an examination prepared by an "outsider" before a professional label is considered proper. Nevertheless, section 703 (h) does not expressly exclude the house man from a professional rating.

The wording in section 703 (h) does not necessarily mean that a test developed by a nonprofessional violates Title VII. Rather, section 703 (h) could protect the employer who gives a professionally developed test, while more careful evaluation by the EEOC is in order when an employer is considering a nonprofessional test. The general type of evaluation is indulged in by state commissions in states where the legislation does not refer to testing.

What constitutes professionalism has not been defined. Lawyers and doctors reach professional status after passing a state bar or board examination. In psychology and education, broad disciplines concerned with testing, a definitive measure to determine professional status has not been established. Should a professional tester be certified by some board? Is a doctorate necessary? Can a person with a master's degree qualify? Nothing in the Congressional hearings hint at the meaning of "professional." *Guidelines on Employment Testing Procedures* refers to *Standards for Educational and Psychological Tests and Manuals*[101] as the "biblical" authority. Yet this latter treatise does not define professionalism. Rather the reference is to the means used to develop a test and not the person. Yet, how can the quality of a test be judged without looking to the person? Must a "professionally developed test" be equated with a "professionally" qualified individual?

4. Other Aspects

Strangely, both the Illinois and federal laws refer only to the employer—neither unions nor employment agencies are mentioned. Since a union[102]

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101 Prepared by American Psychological Association, American Educational Research Association, and National Council on Measurement in Education (1966).

102 Sec. 703(c).

and employment agency[103] can be held responsible for discrimination, the failure to mention their testing programs is odd. These laws can be interpreted as protecting the employer who tests, while unions and employment agencies are not accorded the same protection. Since section 703 (h) is the only indication of Congressional intent, only the employer can claim blanket protection. Some justification is essential to treat unions and employment agencies differently than employers. There is no apparent reason for omitting unions and employment agencies from section 703 (h)—either Congress was only interested in protecting the employer or there was an oversight. In the writer's opinion, there was legislative oversight rather than willful omission. In order that unions and employment agencies may claim the same legislative treatment as an employer, the judiciary will have to supply the Congressional intent.

The Illinois legislation and section 703 (h) refer to testing without mention of other selective techniques. Neither provision precludes a decision that an employer who depends exclusively upon a test score discriminates. To assess the merit of a prospective employee, personnel managers should not place exclusive reliance on one method of selection. A satisfactory score on a test is only one indicator that the job will be successfully filled.[104] A number of reasons can be advanced as to why an employer should not look to tests alone. A test free of cultural discrimination is difficult to find. People coached or those who prepare to take a test should fare better than others without preparation.[105] The person who is not prepared is not necessarily an inferior job candidate. Deciding between a passing and a failing score necessitates the establishment of an arbitrary dividing line. Someone scoring slightly below the cutoff point may be just as good an employee as someone who barely manages to pass the test. An employer who denies employment to a candidate who barely misses a passing score acts suspiciously unless such an employer resorts to other selective devices.

If a person can score higher by retaking a test, as indicated in *Motorola*, does an employer discriminate by refusing to retest? A similar question arises if an employer refuses to test someone who is coached. The EEOC guideline encourages employers to "provide an opportunity for retesting to those 'failure candidates' who have availed themselves of more training or experience."[106] It should prove easier to fix responsibility for discrimination on an employer who refuses to test coached job applicants than on

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103 Sec. 703 (b).

104 Lockwood, "Employment Tests and Discriminatory Hiring," 5 Industrial Relations, pp. 34-35.

105 In the *Motorola* case, testimony was presented that employees retaking a test can score higher.

106 *Guidelines On Employment Testing Procedures*, p. 5.

one who refuses to retest. An employer following a fair employment policy should test most if not all applicants for a job, but an obligation to retest failures is difficult to impose. Should doubt exist as to whether a test was passed—there was doubt in *Motorola* because the employer could not produce the test and refused to supply first-hand witnesses[107]—an examination by an impartial agency has been required.[108] The Illinois Supreme Court decision in *Motorola* emphasized that retesting can result in a passing grade if the same examination is retaken.

Concluding Comments

Proving discrimination when a test is used is difficult. The hearing examiner in *Motorola* was convinced that the company discriminated because it failed to produce the written test or the testimony of an employee who administered the test. Without overt declamation, the hearing examiner shifted the burden of proof to the employer to introduce evidence of innocence. Since the employer controlled the entire testing situation, shifting the burden of proof seems logical and acceptable courtroom technique. A doctrine, *res ipsa loquitur*, is dogma well known and used in respectable legal circles as a means of shifting the burden of proof in tort cases.[109]

The doctrine of *res ipsa loquitur* had its origin in negligence cases as an aid to a plaintiff injured by a defendant who had exclusive control over the instrumentality causing the accident. The use of a similar evidentiary aid seems desirable where the motive of an employer, who holds tight control over the testing process, is questioned. Fair employment does not involve the proving of negligence but does involve establishing intent. But the technique used to shift the burden of proof seems apropos in a fair employment controversy centered about a test.

Unfortunately, the concept of shifting the burden of proof was not expressly referred to by the hearing examiner, and there is no indication that this point was argued before the Illinois Supreme Court in *Motorola.* Because some states and Congress require commissions to follow court rules of evidence, every possible legal evidentiary advantage should be permitted to aid the disadvantaged. There seems to be little reason to deny shifting the burden of proof to the Motorola Co. to establish innocence.

Achieving the goal of fair employment is to a great extent an economic problem, and the burden of proof has been shifted to employers in cases where economic problems have been raised under the Sherman Act. Where

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107 Decision and Order of Hearing Examiner, Charge No. 63C-127, pp. 7-8.

108 An impartial testing agency was designated by the court in *Commission For Human Rights* (N.Y.), 57 LRRM 2005 (1964).

109 McCormick, *Handbook of the Law of Evidence,* 640 (1954); Prosser, *Selected Topics On The Law Of Torts,* pp. 302-309 (1953).

a company controls 90 per cent of the relevant market, the burden of proof was shifted to the employer to show that there was not a deliberate attempt to monopolize.[110] In cases in which the United States Supreme Court has adopted a *per se* violation rule to establish an infringement of the Sherman Act, the employer was unable to show a legitimate business goal to support a claim of innocence.

It should be emphasized that the shifting of the burden of proof and the *per se* approach are evidentiary tactics used in court simply because economic data are not sufficiently conclusive to meet the courtroom need for evidence. Yet few will deny that controlling 90 per cent of a market is not a monopoly situation. Where an employer controls the test in an economic situation, it seems fair to shift the burden of proof in the same manner as in a case arising under the Sherman Act.

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110 U.S. v. Aluminum Co. of America, 148 F.2d 416 (1945).

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