

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
SHEBOYGAN COUNTY SUPPORTIVE SERVICES :  
LOCAL 110, AFSCME, AFL-CIO :  
and : Case 119  
SHEBOYGAN COUNTY : No. 42174  
: MA-5596  
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Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Street, Sheboygan, Wisconsin 53081 for the Union.  
Mr. John Bowen, Personnel Director, Sheboygan County, 615 North Sixth Street, Sheboygan, Wisconsin 53081, for the County.

ARBITRATION AWARD

Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO, hereafter the Union, and Sheboygan County, hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance over the interpretation and application of the provisions of the agreement relating to promotions. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Sheboygan, Wisconsin, on July 25, 1989; it was not transcribed. Briefs were submitted by September 20, 1989; the Union filed a reply brief by October 12, 1989; the County waived its right to file a reply brief.

ISSUE

The Union frames the issue as follows:

"Did the Employer violate the contract when it promoted Melody Thurman rather than Christine Wuestenhagen to the position of Court Secretary? If so, what is the remedy?"

The County frames the issue as follows:

"Whether the County's Clerk of Courts Department violated the Agreement in its interpretation and application by selecting a Clerk Typist II junior in seniority to an Account Clerk I for the position opening of Court Secretary."

The undersigned frames the issue as follows:

"Did the Employer violate Article XXIV, par. B1, of the collective bargaining agreement when it promoted Melody Thurman rather than Christine Wuestenhagen to the vacancy in the position of Court Secretary? If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE

B. Vacancy-Job Posting

1. Whenever an approved vacancy is to be filled within the bargaining unit, notice of said vacancy shall be posted for five (5) working days prior to the public posting for the

information of all employees on appropriate bulletin boards where bargaining unit employees work.

The vacant position shall be awarded to the most senior qualified applicant in the department where the vacancy exists. If no one within the department applies for the position, the position shall then be offered to the most senior qualified bargaining unit employee before filling the position with a non-bargaining unit employee. Any employee filling a position under this section shall serve a probationary period of six (6) months, unless waived or lessened by the department head.

#### BACKGROUND

Christine Wuestenhagen, the grievant, is an Account Clerk for the Sheboygan County Clerk of Courts. This grievance concerns the process which the County followed in selecting Melody Thurman, a less senior but higher classified Clerk Typist II, for a position opening for Court Secretary.

On October 26, 1988, the County posted a notice of a vacancy for the position of Court Secretary. The position description for same reads as follows:

#### **SHEBOYGAN COUNTY**

#### **POSITION DESCRIPTION**

**TITLE:** Court Secretary                      **CLASS:** 12  
**DEPARTMENT:** Clerk of Courts              **EEO:** \_\_\_\_\_  
**LOCATION:** Court House                      **DATE:** \_\_\_\_\_  
**REPORTS TO:** Office Supervisor          **APPROVED BY:** \_\_\_\_\_

#### **I. PURPOSE AND SUMMARY**

Performs court secretarial and record keeping functions; routine typing and general clerical duties.

#### **II. DUTIES**

Types forms, form letters, invoices, vouchers, records, reports, index cards, licenses, and similar materials from rough drafts or clear copies.

Address envelopes and other correspondence.

Performs a variety of clerical tasks in connection with maintenance of county court files and records.

Keeps records of court actions.

Receives supplies and records costs of supplies.

Takes orders for and prepares copies of court certificate.

Maintains and files materials in the Law Library.

Performs routine work in the County Clerk's office; Xeroxing, etc.

Assembles, distributes mail and inter-office correspondence. (sic)

Performs other duties as may be assigned.

#### **III. QUALIFICATIONS**

High school education or equivalent with supplemental course in typing.

Knowledge of the court system and justice system.

Knowledge of office terminology, office machines, and business arithmetic and English.

#### **IV. ACKNOWLEDGEMENTS**

I have read and understand the facets of my job. I

understand I may be called upon to perform duties not specifically listed in the above job description.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

There were five bargaining unit members who applied for the vacancy. After two were eliminated (one voluntarily, the other because she submitted her bid in an untimely manner), the three remaining applicants were the grievant (date of employment December 10, 1986), Thurman (date of employment August 31, 1987), and another who did not figure further in this matter.

At the time of the posting, Wuestenhagen was an Account Clerk I; Thurman was a Clerk Typist II. Their respective position descriptions read as follows:

**SHEBOYGAN COUNTY**

**POSITION DESCRIPTION**

**TITLE:** Account Clerk I                      **CLASS:** 10  
**DEPARTMENT:** Clerk of Courts                      **EEO:** \_\_\_\_\_  
**LOCATION:** Court House                      **DATE:** 05-86  
**REPORTS TO:** Supervisor-Accounting                      **APPROVED BY:** \_\_\_\_\_

**I. PURPOSE AND SUMMARY**

Performs a variety of accounting and clerical tasks used in keeping financial records and accounts to standard account practices; do related work as required.

**II. DUTIES**

Prepares and classifies receipts and expenditures according to standard accounting practices and checks for accuracy of computations.

Balances daily collections and disbursements, and prepares reports as instructed.

Codes vouchers and general receipts.

Sorts and receipts checks and money orders received.

Operates adding machine, calculator, and other office machines.

Types necessary forms and prepares for the collection of delinquent accounts.

Keeps records and maintains files.

Answers telephone inquiries regarding accounts.

Performs other duties as may be assigned.

**III. QUALIFICATIONS**

High school education and/or equivalent education supplemented by business or technical school courses.

Knowledge of and proficiency in the use of office terminology, accounting procedures, equipment operation and proficiency in the use of the same.

Ability to type a minimum of 35 words per minutes (sic) accurately.

**IV. ACKNOWLEDGEMENTS**

I have read and understand the facets of my job. I understand I may be called to perform duties not listed specifically in the above job description.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

SHEBOYGAN COUNTY

POSITION DESCRIPTION

TITLE: Clerk Typist II CLASS: 10  
DEPARTMENT: Clerk of Courts EEO: \_\_\_\_\_  
LOCATION: Court House DATE: 05-86  
REPORTS TO: Supervisor-Office APPROVED BY: \_\_\_\_\_

I. PURPOSE AND SUMMARY

Performs a variety of clerical and typing tasks; does related departmental work as necessary.

II. DUTIES

Types correspondence, form letters, notices, envelopes, forms and any other required forms.

Receives and processes mail.

Reviews reports, and other documents for completeness, accuracy and conformity to standards.

Prepares and maintains cross indexes, files, documents and any other correspondence alphabetically, numerically or by other classification.

Operates adding machines, calculators, or other office equipment.

Answers telephone and gives general information in response to public inquiries and direct caller to proper person.

Assist the public with forms and information.

Prepares statistical reports, calendars, dockets, satisfactions.

Prepares executions, transcripts.

Issues receipts and records payments.

Performs other duties as may be assigned.

III. QUALIFICATIONS

High school education and/or equivalent.

The ability to type a minimum of 50 words per minute accurately.

Proficient use of office terminology, procedure and skills to operate office equipment.

Knowledge of business math and english.

Ability to follow complex oral and written instructions.

Ability to maintain accurate court records.

Ability to keep court records and paper confidential.

IV. ACKNOWLEDGEMENTS

I have read and understand the facets of my job. I understand I may be called to perform duties not listed specifically in the above job description.

\_\_\_\_\_  
Signature Date

Following testing for secretarial skills by the Wisconsin Job Service Division, the applicants were interviewed by Jane Schetter, Clerk of Courts, and Daun Bratzen, Office Supervisor. Both Wuestenhagen and Thurman were interviewed on February 13, 1989, and rated on their experience, training, responsibility, manners and appearance, cooperation, poise, and aspirations. With a ranking of (1) being "poor," and (5) being "excellent," Wuestenhagen was scored (3), or "average," on all seven categories, while Thurman received a (3)

on every category but experience, where she scored a (4), "above average." For Wuestenhagen, the report adds as strengths, "Good work record and a lot of ambition to advance," and as weaknesses, "Unknown abilities in file office." For Thurman, the report adds "Has worked with family office files on a daily basis," as a strength, and "Courtroom experience" as a weakness.

Following the interviews, Schetter and Bratzen compared the two candidates, and decided to promote Thurman. The Union grieved this decision on February 16, 1989, alleging that the County had violated the collective bargaining agreement by not hiring the most senior qualified applicant, Wuestenhagen. On February 22, 1989, Bratzen answered the grievance as follows:

I feel that after interviewing the applicants for the Court Secretary position in the Clerk of Courts Office MELODY THURMAN was found to be the senior most qualified to handle the job requirements (Capitalization in original; emphasis added).

On March 1, 1989, Schetter responded to the grievance as follows:

After interviewing the applicants for the Court Secretary position MELODY THURMAN was found by me to be the senior most qualified applicant (Capitalization in original; emphasis added).

On March 22, 1989, County Personnel Director John Bowen responded to the grievance as follows:

Article 3 and 24 provide the County the ability to promote the senior qualified employee. In this instance, the employee selected for the vacancy questioned, had already been working on the job. Whereas, the grievant would have had to be trained for three to six months. The County did no(t) violate the labor agreement and thus denies this grievance.

#### POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

The best evidence of the grievant's qualification for the vacancy is the interview report; since the two applicants scored identically on six of seven topics, and were apart by one point on the seventh, it is clear that Wuestenhagen did pass this threshold test. This document is much more probative than the after-the-fact rankings based on a list of job duties.

The County's reliance on progression from Clerk Typist II to Court Secretary is not supported by the collective bargaining agreement. Nor is there support in the contract for the "senior most qualified" standard which the County is now attempting to implement. That this was the County's original position, before this arbitration, is clear from the responses to the grievance. Only now, after the fact, does the County contend that Wuestenhagen was not qualified at all.

The determination of qualification is a matter of credibility and evidence. The best and most credible evidence is the interview report, which establishes that the grievant was qualified. As the most senior qualified applicant, Wuestenhagen is entitled to the job, and is entitled to being made whole.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The relevant contractual language is an example of a "modified" or "hybrid," seniority clause; under such language, arbitrators generally find for management discretion in employee selection.

Further, the record evidence showed the promotion linkage between Clerk Typist II and Court Secretary, and that the relative qualifications varied and that seniority can not be used as the sole determining factor.

Wuestenhagen's background was in accounting; Thurman's was in office/secretarial, in the very program area in which the Court Secretary would be operating. That there is persuasive validity in the linkage between Clerk Typist II and Court Secretary was established when the Union

could not identify a single instance of an Account Clerk I being promoted to Court Secretary.

Thurman's qualifications were further established when the Clerk and Office Supervisor reviewed the job duties, declaring that she was capable of performing the majority of duties listed, while the grievant was not.

The Union apparently contends that the interview process is irrelevant, and that selection must be limited to the senior candidate. But there is a purpose to the pre-selection interview, namely to identify the senior qualified candidate.

Finally, during the arbitration hearing, a sincere effort was made to resolve this grievance. The County's offer was reasonable, and would have been a satisfactory settlement to all parties.

In its reply brief, the Union posits further as follows:

The arbitrator should totally discount all references made by the County to the attempts at settlement. Such discussions were never entered into the record, and their inclusion in the County's brief is improper and contrary to sound labor/management relations.

The County errs in describing the contractual clause at issue as a modified or hybrid clause, when in fact it is a sufficient ability clause. When applying such a sufficient ability clause, the only determination necessary is whether the senior employe can perform the job; comparisons between applicants are unnecessary and improper.

The County has never required in the job description that an applicant for Court Secretary have prior experience as a clerk typist, and has further failed to either argue or establish that the grievant was in fact not qualified to perform as Court Secretary.

#### DISCUSSION

The County is correct that, where the contract provides for a hybrid seniority clause (e.g., "seniority and qualifications shall govern,"), arbitrators may often defer to the reasonable exercise of managerial discretion. The County errs, however, in describing the clause at issue in this contract as being of such a nature. Rather, the clause at issue is clearly a "sufficient ability," provision, under which the only relevant determination is whether the applicant with the greater seniority can in fact do the job. As the Union correctly states under such a structure, comparisons between employees are not only unnecessary, but improper as well.

On the record, I am convinced that Thurman was, at the time of the promotion, more qualified than Wuestenhagen. But that is not the issue. Rather, the only issue is whether, as of February, 1989, Wuestenhagen herself was qualified to perform the duties of Court Secretary. I find that she was.

In making this determination, I recognize that I am discounting the sworn testimony of the Clerk of Courts and the Office Supervisor, who have fifty (50) years of combined service in this field. While I am loathe to do so, the record leaves me no choice.

At hearing, both Schetter and Bratzen declared that, not only was Thurman more qualified, but that Wuestenhagen was not even minimally qualified at the time of the posting. Contemporaneous documents which they prepared, however, lead me to the contrary conclusion.

The first step in the posting process was the submission of bids; both Wuestenhagen and Thurman did this in a timely manner. The qualifications indicated on the position description for Court Secretary were a high school education or equivalent with supplemental courses in typing; knowledge of the court system and justice system, and knowledge of office terminology, office machines, and business arithmetic and english. The qualifications for Account Clerk I, the position Wuestenhagen then held, were high school education and/or equivalent education; business or technical school desirable; knowledge of office terminology, procedures and equipment; knowledge of accounting practices; knowledge of business math and english, and ability to type fast from clear copy or rough drafts. Inasmuch as she was currently performing in one position which had essentially similar prerequisites as the other, there is a prima facie case that Wuestenhagen was qualified for the Court Secretary position. Were this not the case, the County presumably would not have gone to the trouble of having the Job Service Division test her for her secretarial

skills; had she not performed adequately on that test, the County would not have gone to the next step of the oral interview.

On the applicant interview report, Wuestenhagen scored 21 of 35 points, while Thurman scored 22. It simply defies common sense to declare, as the County implicitly does, that this one point differential denotes the demarcation between qualified and unqualified. Wuestenhagen's score shows she was found to be "average" as to "the objective statements which may be supported as reflecting the actual requirements of the position." (emphasis added). That is, she was two grades better than poor, and two grades below excellent; this is in keeping with the explanation in the American History Dictionary of the English Language that "average" implies "both sufficiency and lack of distinction." Inasmuch as sufficiency necessarily connotes adequacy, this report further supports the prima facie finding that Wuestenhagen was indeed qualified for the position.

That view is strengthened by review of the responses which the Clerk of Courts and the Office Supervisor gave to this grievance, both of which described Thurman as "the senior most qualified" applicant. Again, that may well have been the case -- but that is not the test which the contract calls for. It is true that, by the time this matter reached the attention of the Personnel Director, the response was couched in terms of "senior qualified employee." However, other elements of the Personnel Director's response, and the County's post-hearing brief, raise further doubts about the County's interpretation of this aspect of the contract.

The County has relied heavily on the concept of "linkage" between the Clerk Typist II position and that of Court Secretary, contending that such progression is routine and expected, and that there has never been a direct advance from Account Clerk I to Court Secretary. Both these assertions may well be true -- but, again, they are answers to questions not properly asked. The contract never makes any reference to such progression, but provides instead for the promotion of the senior qualified candidate; when the terms of the contract are so clear and explicit, they will not be overcome by this sort of purported practice, especially when the position description which the County published itself makes no reference to such language.

The County has also relied on the fact that Thurman had already been working in this classification, while Wuestenhagen would have to be trained to perform her duties. Again, that may be true. But the generally accepted understanding of "qualified" assumes not that someone has already been doing the job, but that, given the normal period of orientation and training, they could do the job. Thus, the fact that Thurman far outscored Wuestenhagen on the list of duties performed does little to answer the critical question of whether Wuestenhagen herself could perform these duties. Moreover, the contract implicitly assumes such a training period, and explicitly protects the County's interests in case the promoted employe is unable to perform adequately, by its provisions for a six month probationary period following a successful bidding.

As stated above, this type of seniority provision does not involve comparisons between candidates, but rather independent assessments; the surest way to implement its procedures is to review the candidates in order of seniority, and to consider the qualifications of one applicant only after all more senior applicants have been determined to be not qualified. Clearly, that was not what the County did here. As the County states in its brief, "(a)fter research of the two (2) candidates experience and backgrounds, comparisons of abilities and interviewing, a decision was made in favor of Melody Thurman." (emphasis added). That is, by its own admission, the County did not consider Wuestenhagen's qualifications independently, but rather measured her in comparison to Thurman. That would have been alright to determine the senior most qualified candidate -- but when the contract calls for the most senior qualified candidate, it was wrong.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

AWARD

That this grievance is sustained. The County shall award the position of Court Secretary to Christine Wuestenhagen, and make her whole as she would have been upon receiving the position on February 13, 1989.

I shall retain jurisdiction for 45 days to resolve any disputes which may arise in the implementation of this award.

Dated at Madison, Wisconsin this 27th day of October, 1989.

By \_\_\_\_\_  
Stuart D. Levitan, Arbitrator