

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 RACINE PROFESSIONAL :
 EMPLOYEES ASSOCIATION :
 :
 and : Case 329
 : No. 42272
 : MA-5638
 CITY OF RACINE :
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Appearances:

Mr. Robert K. Weber, Attorney at Law, Schwartz, Weber, Tofte & Nielsen, S.C., 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of Racine Professional Employees Association.
Mr. William R. Halsey, Consultant, Lang & Halsey Associates, Inc., 1100 Commerce Drive, Suite #115, Racine, Wisconsin 53406, appearing on behalf of City of Racine.

ARBITRATION AWARD

Racine Professional Employees Association (hereinafter Association) and City of Racine (hereinafter City or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of an unresolved grievance by a representative of the Wisconsin Employment Relations Commission (hereinafter Commission) appointed by said Commission. On May 25, 1989, the Association filed a request to initiate grievance arbitration with the Commission. On July 19, 1989, the Employer concurred in the request. On July 27, 1989, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on August 22, 1989, in Racine, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. No stenographic transcript was made of the hearing. The parties submitted briefs and waived the submission of reply briefs on October 23, 1989, at which time the record was closed in this matter. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

Dale Kaske (hereinafter Grievant) was hired as Payroll Supervisor by the City of Racine (hereinafter City or Employer) on February 20, 1984. On or about March 26, 1984, the City, by Finance Director Jerome Maller (hereinafter Finance Director), prepared Progress Report 1 on the Grievant, indicating the Grievant's record was satisfactory. On or about July 30, 1984, the City, by the Finance Director, prepared Progress Report 2 on the Grievant, indicating that the Grievant was above average in the following areas: Attitude, Attendance, Punctuality, Quality of Work and Ability to Follow Instructions. The report indicated that the Grievant was average in Quantity of Work and Safety Habits. The report indicated no areas in which the Grievant was poor or unacceptable. The report concluded that the Grievant was satisfactory and recommended permanent hire.

On or about September 24, 1984, the City promoted the Grievant to Accountant III, the position he presently occupies. According to the job description, the type of work performed by the Accountant III is senior level professional accounting work. The job description listed the following typical duties performed:

Prepares formal financial statements, financial statistical reports and other periodic or special reports.

Audits financial records, reports and statements.

Prepares monthly worksheets and reports for various Federal and State grant projects, including cash reconciliation.

Prepares various exhibits and schedules for the annual financial statements.

Supervises the maintenance of general and subsidiary ledgers, journals, registers, control accounts and other fiscal records.

Prepares various Federal and State tax reports.

Has supervision over Accountant's (sic) I and II and accounting technicians and other clerical employees as to accounting procedures and maintenance of financial records.

Renders decisions under direction from Finance Director, for

changes in the established accounting systems; participates in the study of accounting systems and makes improvements; assists in the installation of accounting systems.

Performs related work as assigned.

The job description listed the following minimum qualifications:

Degree in accounting from accredited University or College, or equivalent combination of training and experience equal to four years of senior level accounting. Public accounting experience desired.

Knowledge of accounting theory, principles, auditing, governmental accounting and taxation.

Experience in use of data processing.

Ability to supervise and work under pressure.

On or about November 1, 1984, the City, by the Finance Director, prepared a Progress Report on the Grievant. Said report showed the Grievant was above average in the following areas: Attitude, Punctuality, Quality of Work, Safety Habits and Ability to Follow Instructions. The Grievant was rated average in Attendance and Quantity of Work. The Grievant was not rated poor or unacceptable in any area.

Dan DeBonis (hereinafter Payroll Supervisor) received a two-year associate degree in accounting from Gateway Technical Institute and is finishing a degree in accounting from Carthage College. He has 34 credits to go.

He was hired as an Accountant I by the City in April, 1985. It was his first accounting job. He was promoted to Payroll Supervisor, a position he held for about two years and a job he continues to do. In this position he filled in during the absence of the Accountant IV, who subsequently retired.

On or about March 9, 1989, the City posted a vacancy for Accountant IV. Said posting listed the position's description of duties as follows:

Comptroller for the complete financial reporting of transit system operations. Prepares formal financial statements, financial statistical reports and other periodic or special reports. Audits financial records, reports and statements. Prepares monthly worksheets and reports for various Federal and State grant projects including cash reconciliation. Assists in the preparation for administration of annual budgets and regular or special financial reports. Supervises the maintenance of general and subsidiary ledgers, journals, registers, control accounts and other fiscal records. Prepares various Federal and State tax reports. Has supervision over Accountants I, II, and III, accounting technicians and other clerical employees, as to accounting procedures and maintenance of financial records. Renders decisions under direction from Finance Director, for changes in the established accounting systems; participates in the study of accounting systems and makes improvements; assists in the installation of accounting systems. Performs related work as assigned.

The posting listed the position's minimum qualifications as follows:

Degree in accounting from accredited University or College, or equivalent combination of training and experience equal to four (4) years of senior level accounting. Public accounting experience desired. Knowledge of accounting theory, principles, auditing, governmental accounting and taxation. Experience in use of data processing and payroll accounting. Ability to supervise and work under pressure. Must be a self-starter with the ability to take control of difficult situations by anticipating problems, analyzing alternative solutions and initiating appropriate corrective measures. Must be tactful, courteous and be able to relate well with others.

The Grievant and the Payroll Supervisor were among the four persons who applied for the position. The candidates were interviewed by the Finance Director and Personnel Officer William Dyess. On or about March 30, 1989, the Personnel Director appointed the Payroll Supervisor as the Accountant IV.

PERTINENT CONTRACT LANGUAGE

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ARTICLE VIII

GRIEVANCE PROCEDURE

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K. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

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ARTICLE X

JOB POSTINGS

A. Posting Procedure: Any job vacancy which occurs in the bargaining unit due to retirement, resignation, death, new position or for any other reason shall be posted.

The posting shall set forth the job title, duties and qualifications desired, pay classification and rates, work location and hours of work. Each posting shall be posted for five working days in overlapping consecutive weeks. Bargaining unit members wishing to post for the position shall do so at the Personnel Department during the period of the posting, which shall be stated on every posting.

Interviews of bargaining unit members shall be held by the Personnel Director within ten days of the close of the posting.

Preference for the position shall be given to bargaining unit members on the basis of bargaining unit seniority within the Administrative Manager's jurisdiction. The position shall not be given to anyone who is not found to have the skills and ability to perform the work required.

Employees working on a job obtained through posting shall serve a thirty (30) calendar day probationary period and shall be guaranteed the right to return to his/her previous position if he/she is unable to properly perform the work required in the new position within the probationary period. If the employee elects to return to his/her former position while still in the probationary status, he/she must return to his/her previous classification.

The skill and ability of the unsuccessful candidate(s) to fill a posted position shall not be subject to the Grievance and Arbitration procedure of this collective bargaining agreement.

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ISSUES

The parties stipulated to the framing of the issues at hearing as follows:

1. Does the contract allow the filing and processing of this grievance given the language contained in the last paragraph of Article X?

2. Did the City violate Article X when it failed to promote Dale Kaske to the position of Accountant IV on March 30, 1989?

If so, what is the appropriate remedy?

POSITION OF THE PARTIES

1. Association

As to the issue of arbitrability, the Association asserts that the dispute is arbitrable. Specifically, the Association argues that harmonizing the last sentence of Article X with other relevant contract provisions compels the conclusion that the dispute is arbitrable; that two uniformly recognized arbitral principles argue in favor of arbitrability of the grievance; that, first, an interpretation of language leading to harsh or nonsensical results should be avoided; that, second, facially confusing or contradictory provisions should be harmonized to give meaning and effect to the instrument as a whole;

and that Article X supports the arbitrability of issues concerning the relative seniority of the candidates for promotion, the reasonableness of the Supervisor's selection, and the minimal qualifications of the successful applicant. The Association also argues that the skill and ability of the successful candidate for a promotional position is subject to arbitration in all situations; and that promotional decisions may always be challenged through arbitration on the basis of being unreasonable, arbitrary, capricious or in bad faith.

As to the issue of contract violation, the Association asserts that the Employer violated Article X of the collective bargaining agreement when it failed to promote the Grievant in March of 1989. Specifically, the Association argues that paragraph four of Article X is a sufficient ability clause; that the burden of proving that the Grievant did not meet the minimum requirements falls on the Employer; and that the fact that the successful candidate falls short of the minimum qualification ends the inquiry. The Association also argues that the Employer's decision to bypass the Grievant was arbitrary and unreasonable; and that there is no doubt that the Grievant exceeded the objective, minimum qualifications contained in the job posting.

As to the issue of remedy, the Association argued that the Employer will not be harmed by a remedy giving it the probationary opportunity to adequately assess the Grievant's job performance in the Accountant IV position.

2. Employer

As to the issue of arbitrability, the Employer asserts that the issue should be resolved in favor of the Employer. Specifically, the Employer argues that the last sentence of Article X is an express, negotiated limitation on the right of the Association or affected employees to grieve certain determinations made by management; that holding that the dispute is subject to the grievance and arbitration procedure of the collective bargaining agreement renders said sentence of Article X meaningless and void; that the language in this case is clear and unambiguous; that the arbitrator has an obligation in such a situation to honor the terms of the negotiated language; that it must be assumed that the language barring access to the grievance and arbitration procedure was negotiated purposefully; and that because of the widely different classifications within the bargaining unit, it is easy to envision why the City, when faced with a demand for job-posting rights, may have reasonably demanded that decisions on skill and ability not be subject to the grievance and arbitration procedure. The Employer also argues that to hold that this dispute is subject to grievance arbitration would renegotiate the initial collective bargaining agreement between the parties, a task that should be left to the parties; that arbitrators historically have refused to disregard clear and specific contract language absent a showing of misrepresentation or illegal motivation by an employer; that arbitrators have consistently held the parties responsible for the impact of their negotiations; that the result of denying the arbitrability of this matter is neither harsh nor unduly burdensome; that it is the result of the negotiated agreement of the parties with all of the compromises that exist in bargaining a first contract; that by accepting the Employer's position on this issue does not render the rest of the posting article meaningless; and that a decision by the arbitrator that this dispute is subject to the arbitration clause would supercede the powers given the arbitrator by the parties in Article VIII of the agreement.

As to the issue of contract violation, the Employer asserts that it did not violate Article X when it did not promote the Grievant to Accountant IV. Specifically, the Employer argues after the interview of the Grievant, the Finance Director determined that the Grievant lacked the initiative and drive to be successful in the position of Accountant IV; that the Finance Director testified to additional areas of the Grievant's deficiency; that these differences led the Finance Director to conclude that the Grievant did not have the skills and ability to perform the duties of Accountant IV; that the Payroll Supervisor had performed some of the Accountant IV duties; that absent a showing of bad faith or discrimination, arbitrators normally uphold a decision by management regarding skill and ability; and that the City's decision that the Grievant did not have the skill and ability to perform the duties of Accountant IV was reasonable and should be upheld by the arbitrator.

DISCUSSION

A. Arbitrability

The City argues that the last sentence of Article X is an express, negotiated limitation on the right of the Association to arbitrate certain determinations made by management. The sentence reads as follows: "The skill and ability of the unsuccessful candidate(s) to fill a posted position shall not be subject to the Grievance and Arbitration procedures of this collective bargaining agreement." The City argues that a holding that the dispute is subject to the arbitration procedure renders the last sentence of Article X meaningless and void.

The City reads the language too broadly. It does not say that the Association is barred from arbitrating any alleged violations of Article X.

Nor does the language say that the filling of a posted position is barred from arbitration. The language is very specific as to what it bars: the skill and ability of the unsuccessful candidate(s) to fill a posted position. If the Association's case involved only the skill and ability of the Grievant to fill the posted position, the City would be right: the Association would be barred from arbitrating the case.

However, the last sentence in Article X does not bar an arbitration involving the seniority of the unsuccessful candidate to fill a posted position. In fact, Article X requires that preference for a position shall be given on the basis of seniority. The Association asserts that the Grievant was the most senior candidate for the position and should have been given preference. This aspect of the Association's case is certainly arbitrable.

Article 10 also includes the following language: "The position shall not be given to anyone who is not found to have the skills and ability to perform the work required." While the last sentence of Article 10 bars arbitration of the skill and ability of the unsuccessful candidate, it does not bar an attack on the finding of not having the skill and ability. Since Article 10 gives preference to the most senior member, the finding that the most senior member is not qualified is subject to arbitration.

Finally, the last sentence of Article X applies only to unsuccessful candidates. It does not limit the Association's right to arbitrate the skill and ability of the successful candidate.

The City argues that to find this grievance to be arbitrable would modify, add to or delete from the express terms of the agreement, which the arbitrator is specifically barred from doing in Article VIII(K). As to the skill and ability of the unsuccessful candidate to fill a posted position, the City is correct. As to the other issues in this case, Article 10 does not bar this arbitration so the arbitrator has jurisdiction to proceed.

B. Merits

The merits of this dispute revolve around paragraph four of Article X, which reads as follows:

Preference for the position shall be given to bargaining unit members on the basis of bargaining unit seniority within the Administrative Manager's jurisdiction. The position shall not be given to anyone who is not found to have the skills and ability to perform the work required.

The record is clear that the Grievant has more seniority than the Payroll Supervisor. If sentence one above existed by itself in the contract, the Grievant would be awarded the job, for sentence one, standing alone, is a strict seniority clause; that is, the bargaining unit member with the most bargaining unit seniority gets preference, without regard to other considerations.

But sentence one is followed by sentence two, the effect of which is to modify the strict seniority language of sentence one to a standard of one of a sufficient ability. In other words, preference is given to the senior bargaining unit member, provided he/she has the skills and ability to perform the work required.

These two sentences together require the Employer to look at the member with the most bargaining unit seniority and determine whether he/she has the skill and ability to perform the work required. If the finding is made that the most senior employe has the skill and ability to perform the job, the selection process is over, regardless of the skill and ability of the less senior candidate. Thus, this language requires the Employer to select the most senior qualified candidate, even if a junior applicant is more qualified.

In this case the Employer argues that it made a finding that the most senior candidate did not have the skill and ability to perform the work required. Traditionally, arbitrators have placed the burden of proving that the senior employe is not qualified for the job on the Employer. In doing so, the Employer is entitled to use any method to determine ability as long as the method used is fair and nondiscriminatory; however, the more objective factors have the greatest acceptability and the more of such factors properly considered by the Employer strengthens the case for its decision. Said methods include considerations of education, experience, production and other work records; reliance upon merit ratings or the opinions of supervisors; and use of tests and trial periods on the job.

In this case the Employer did not rely upon a test or a trial period on the job. Instead, the Employer relied upon an interview conducted by the Finance Director and the Personnel Officer. The record is cloudy as to whether the Employer took into consideration education, experience, work records or merit ratings. This is true even though experience is ordinarily considered a tangible, objective factor to be considered in determining fitness and ability.

In addition, technical training is pertinent since such education relates to the requirements of the job in question. In fact, the posting established a minimum standard for a successful candidate in the areas of education and experience. Instead, the Employer relied exclusively upon the opinion of the Finance Director, the Supervisor of both the Grievant and the Payroll Supervisor. When supervisory opinion is substantiated by objective, tangible evidence, it may be the basis for management determination. Here the decision was based on the criteria of initiative. The Finance Director determined that the Grievant did not have the initiative, whereas the Payroll Supervisor did, to do the job. This determination was not supported at hearing by any evidence other than the Finance Director's assertions. This is not a case in which the Finance Director's decision to bypass the Grievant was based upon a composite of the opinions of several supervisors who observed or supervised his work, nor is this a case in which several levels of supervision, familiar with the work performance of the Grievant and with the requirements of the job being bid upon, reached a unanimous decision. The opinion expressed here is not supported by any tangible evidence in this record. The opinion is subjective, without the support of documentation or other qualified opinions.

This raises the question of whether the Employer properly determined that the Grievant was not found to have the skills and ability to perform the work required. As noted in the Employer's brief, arbitrators will normally uphold an Employer's decision which is viewed as fair and nondiscriminatory. The subjective nature of the Employer's decision to pass over the most senior employe also raises the question of the fairness of this decision by the Employer. This is especially true when combined with the issue of whether the successful candidate, the Payroll Supervisor, has the skills and ability to perform the work required.

The posting is clear. The minimum qualifications include the following:

Degree in accounting from accredited University or College,
or equivalent combination of training and experience
equal to four (4) years of senior level accounting.
Public accounting experience desired.

The Payroll Supervisor has a two-year associate degree in accounting from Gateway. He is working on a degree in accounting at Carthage College. He was hired as an Accountant I in April, 1985, and was promoted to Payroll Supervisor in 1987. The Finance Director testified that Accountant II is the entry position for senior accounting, and that the positions of Accountant III and IV are senior accounting positions. The Payroll Supervisor testified he did no public accounting until his promotion to Accountant IV. Thus, the record is clear that the Payroll Supervisor does not meet the minimum qualifications of the Accounting IV position.

To bypass the most senior employe on the basis of the totally subjective criteria of "initiative", unsupported by any documentary evidence, and to give the position to a less senior employe who does not have the minimum objective qualifications, raises not only the question of fairness but the question of whether such a decision is arbitrary. An arbitrary decision is one which is "so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct." Pleasant Prairie v. Johnson, 34 Wis.2d 8, 12, 148 N.W.2d 27 (1967); Olson v. Rothwell, 28 Wis.2d 233, 239, 137 N.W.2d 86 (1965). The decision of the Employer in this matter rises to the level of arbitrary.

Because the Employer bypassed the most senior employe who posted for this position using a subjective criteria unsupported in any manner other than by the Finance Director's judgment and because the Employer selected an applicant who did not have the objective minimum qualifications for the position, the Employer violated Article X of the collective bargaining agreement. Nothing in this decision should be read as concluding that the Grievant is qualified for the position. The arbitrator is barred from reviewing his skills and ability by the last sentence of Article X. This decision should be read as concluding that when the Employer bypasses the most senior employe for a posted position, it must do so after determining in a fair and nondiscriminatory manner that the most senior employe does not possess the skill and ability to perform the job. That was not done here. It should also be read as concluding that the Employer violates Article X when it gives the position to someone who does not have the skills and ability to perform the work, as stated in the job's qualification determined by the Employer.

C. Remedy

The Association seeks the remedy of placing the Grievant in the Accountant IV position, subject to the probationary opportunity to assess the Grievant's performance in the position. This requires a finding that the Grievant has the skill and ability to perform the work required. The last sentence of Article X prevents this arbitrator from determining that. Since at this point the Grievant has not been found not to have the skills and ability to perform the work required, and since the record shows that the Payroll Supervisor does not have the skills and ability to perform the work required, the only remedy available is to vacate the results of the flawed posting

procedure and to order the position to be reposted.

For these reasons, based upon the foregoing facts and discussion, the arbitrator renders the following

AWARD

1. That the contract allows the filing and processing of this grievance, even given the language contained in the last paragraph of Article X.

2. That the City violated Article X when it promoted the Payroll Supervisor to the position of Accountant IV on March 30, 1989.

3. That said position is hereby vacated; that the City shall repost the position consistent with Article X of the collective bargaining agreement and this Award; and that the Grievant shall be allowed to repost for said position.

Dated at Madison, Wisconsin this 6th day of April, 1990.

By _____
James W. Engmann, Arbitrator