

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CALUMET COUNTY EMPLOYEES
LOCAL 1362, AFSCME, AFL-CIO

and

CALUMET COUNTY

Grievances of Jan Mader and
Sharon Brokaw regarding
non-selection as
Child Support Specialist

Case 54
No. 42098
MA-5566

Appearances:

Ms. Helen Isferding, AFSCME Council 40 Staff Representative, 1207 Main Avenue,
Sheboygan, WI 53083, appearing on behalf of the Union.

Mr. Charles E. Carlson, Carlson Associates, 555 D'Onofrio Drive (Suite 75), Madison,
WI 537191, appearing on behalf of the County.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievances pursuant to the grievance arbitration provisions of the parties' 1988-89 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the Calumet County Courthouse in Chilton, Wisconsin, on August 24 and October 19, 1989. Lisa Fox and both of the Grievants were present throughout the hearing, and all three testified. At the hearing, the parties waived a contractual time limit for award issuance. The hearing was transcribed. Briefing was completed on February 12, 1990, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the County violate the Agreement when it selected Lisa Fox as Child Support Specialist, rather than Sharon Brokaw or Jan Mader?
2. If so, what is the appropriate remedy?

PERTINENT PORTIONS OF THE AGREEMENT

ARTICLE IV - SENIORITY

4.04 Job Posting

A. In filling vacancies, new positions or in making promotions, preference shall be given to the most qualified applicant. If qualifications are relatively equal, the position shall be awarded to the most senior qualified applicant.

B. A notice of such vacancies shall be posted on the bulletin board for six (6) working days to give all employees an opportunity to apply for the position.

C. Any interested employee may apply for the position by signing the posting.

D. At the end of the six (6) day posting period, the position, within five (5) days, shall be awarded to the most qualified applicants, or, qualifications being relatively equal, the most senior qualified applicant.

E. Promotion is the movement of an employee from one class to another class having a greater pay range maximum. When an employee is promoted to a position in a higher class, he shall serve a two (2) month familiarization period. If the employee fails the familiarization period, he shall return to his former job. When promoted an employee's pay shall be increased to the lowest rate of pay in the new salary range which provides an increase.

F. If there is any difference of opinion as to the qualifications of an employee, the employer representative, and the Union committee and/or Union representative, shall take the matter up for adjustment through the Grievance Procedure.

4.05 Reclassification - Any reclassification of a bargaining unit position recommended by the home committee must be submitted to the Administrative Coordinator in writing for his review. Said request shall be reviewed by the Salary and Personnel Committee within sixty (60) days of submission to the Administrative Coordinator by the home committee.

ARTICLE VII - MANAGEMENT RIGHTS RESERVED

7.01 Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him for such period of time involved in the matter.

FACTUAL BACKGROUND

The County's Child Support Agency (herein CSA) has for many years consisted of two full-time positions: a supervisory CS Coordinator position held at all material times by Nanci Adams, and a bargaining unit CS Secretary position, both full-time. Lisa Fox held the Secretary position for approximately two years immediately preceding January 1989, and Grievant Jan Mader held that position for some eight years prior to that before transferring to an Income Maintenance (herein IM) Assistant position in the Department of Human Services.

Adams and Mader had attempted to upgrade the Secretary position to a CS "Worker" position, when it was held by Mader, but without success.

In 1988, Adams again sought to upgrade the position and to add another secretary position in response to a steadily increasing case load of increased complexity and a federally-imposed transition to state-wide automated processing using State software called Child Support Data System (herein CSDS). The CSDS system involved two modules, one for the Clerk of Courts, and one for the CSA. Recent County turnover in the Child Support Clerk position in the Clerk of Courts office also contributed to an increasing CSA workload. Adams, who admits that she does not have a strong computer background, assigned Fox responsibility for the County's participation in the CSDS project.

Also in 1988, in response to Adams requests the County decided to upgrade the CS Secretary position to CS Specialist and to add a half-time CS Secretary position. The County created a new job description for CS Specialist, and, following discussions with the Union, the pay range for the new classification was set at that of IM Worker which is above that for the CS Secretary and IM Assistant classifications. The County sought initially to reclassify Fox's position as CS Specialist, but when the Union objected that the change should be treated as a promotional opportunity and posted, the County agreed. Accordingly, the County posted the CS Specialist position in January of 1989, accompanying the posting with the job description attached at the end of this Award.

The County also posted a part-time CS Secretary position after Fox told Adams that if she did not attain the CS Specialist position she would exercise bumping rights to maintain full-time employment. Fox and Mader bid for the CS Specialist position, along with Grievant Sharon Brokaw.

Fox was initially employed by the County in April of 1983 as Secretary in the Land Conservation office. She was then reclassified as Secretary/Technician and in 1987 she transferred to become CS Secretary when Mader transferred to IM.

Grievant Brokaw was hired early in 1981 as an IM Assistant in the Human Services Department. She was reclassified as an IM Worker some two years later and presently holds that position.

Grievant Mader was hired by the County in November of 1979 as CS Secretary, and she transferred to her present IM Assistant position in September of 1987.

Adams interviewed the three applicants, reviewed their respective written applications and found both of the Grievants unqualified and Fox very qualified. Adams selected Fox for the position.

The Union grieved each of the non-selections and the grievances remained unresolved following exhaustion of the grievance procedure. Accordingly, the matter was submitted to arbitration as noted above.

POSITION OF THE UNION

The County's selection of Fox was done arbitrarily, capriciously, discriminatorily and in bad faith. Adams' actions were biased in favor of Fox before the posting, throughout the selection process and thereafter. Adams tried to give the job to Fox by reclassification before the Union insisted that it be posted. Adams made the selection without the early-on committee involvement called for in the County's Personnel Policies. Adams added Family Law to the Specialist job description for the first time after Fox took a course in it. The interviews were flawed since Brokaw and Mader did not know they were being scored and Brokaw had to be called back a second time to be questioned about the CSDS questions. The County failed to release the competitive scores of the applicants in the selection process until the Salary and Grievance Committee meeting. Fox was pushing the Union about the Specialist wage rate in December, before the job was even posted, and Fox was talking as if she had the Specialist job before the selection decision was announced. Adams posted Fox's old position before posting the Specialist position, showing that Fox was destined to be the new Specialist. Adams was not even-handed since she solicited a letter of recommendation in support of Fox. And finally, it is suspicious that Mader's evaluations done after the first one which is in evidence, are missing. For those reasons,

Adams' judgments about the absolute and relative qualifications of the candidates cannot be allowed to stand.

When the qualifications of the three candidates--as they existed at the time of the posting--are objectively compared, it is clear both that Mader and Brokaw are qualified for the Specialist position and that both are better qualified than Fox for that position. Experience in Child Support work is not identified as a requirement and neither is a course in family law. Each Grievant meets the required qualifications set forth on the posted job description.

Mader's eight years of experience in the Child Support office plus her income maintenance experience and her formal training in Word Perfect and Lotus make her more qualified than Fox. Brokaw's eight years of income maintenance experience and her own background on computers make her better qualified than Fox, as well. At the end of 1988, just prior to the posting, Fox's on-the-job use of the personal computer was limited to pulling up information from the IM network, pay sheet payments information, birth records and WordPerfect forms. Similarly, as of that time, Fox had received only limited CSDS training: 8 hours CS Tax Intercept Workshop in August of 1988; 2 days of training in May of 1988 on CSDS Fiscal Module data entry; and 1 or 2 days of training in May of 1988 on CSDS Case Management Data Entry. This does not amount to enough training to outweigh the courses on WordPerfect and Lotus that Mader took or the course in programming and the personal experience with word processing that Brokaw has. Brokaw is just three credits short of a Bachelor's degree in Business. Mader worked eight years as CS Secretary compared with Fox's two, and Adams had sought in 1982 to reclassify Mader to a CS Worker position paralleling the Specialist position at issue here. Both Grievants have substantially more years of public assistant program experience than Grievant does. The Grievants' work experiences in Income Maintenance are worthy of weight since that is the background Adams brought to the CSA.

At a minimum each Grievant's qualifications is relatively equal to Fox's. As used in the Agreement, relatively equal does not mean exactly equal. It means only an approximate or near equality of competing employees. Only where the junior employee is substantially superior in ability may the County give that individual preference over a qualified applicant who is more senior. Citing, Elkouri and Elkouri, How Arbitration Works, 611-612 (BNA, 4 ed., 1985) (herein Elkouri).

Accordingly, the Arbitrator should set aside the County's selection of Fox and award the Specialist position to either Mader or Brokaw and order the County to make the recipient of that job whole for interim losses.

POSITION OF THE COUNTY

When a Union challenges Management's determination it must sustain the burden of proving discrimination, caprice, arbitrariness on the part of the employer or proving that the

employer's evaluation of abilities was clearly wrong. Citing, Elkouri at 615. In general arbitrators defer questions of skill and ability to management unless the Union proves arbitrary, discriminatory or capricious behavior. If management's position has reasonable evidentiary supports it must be upheld. Citing, Batesville Mfg. Co, 55 LA 268 (Allen Roberts, 1970).

The County's selection was not arbitrary, capricious, discriminatory or in bad faith. None of the Union's nine contentions to the contrary have merit for the following reasons.

Deciding whether to reclassify or post as a promotional opportunity is often not an easy choice, and one with no Agreement guidance in this relationship. The County reconsidered its initial inclination to reclassify by agreeing with the Union's stated position that posting was appropriate. Furthermore, Adams and Mader previously sought unsuccessfully to reclassify the Secretary's position when Mader held it. While the 1982 reclassification would have been to a CS Worker classification that would have been less demanding than the instant Specialist position, it nonetheless shows that the effort to reclassify the position was not something Adams was doing just because it was Fox who would benefit.

There was appropriate County committee involvement and delegation. The Protection of Persons and Property Committee deferred to Adams' judgment as County Administrative Coordinator John Keuler testified commonly occurs and was appropriate. This was wise since Adams was in the best position to know the needs of the CS Agency and the requirements of the Specialist position. That committee ultimately confirmed the choice on review.

The County did not make Family Law a requirement. Fox took such a course on her own initiative, time and expense, before there was any reason to know it would help her get promoted. The evidence shows such a course would given an applicant who had taken it greater likelihood of having the knowledges and abilities required of the Specialist.

Adams' rechecking with Brokaw regarding her CSDS experience was because of a simple oversight by Adams the first time around. It would have been arbitrary to assume Brokaw had none without asking.

Fox had good reason to think she had the job before it was posted, because the County was on record as believing it should be reclassified. Fox therefore also had reason to want the Union to place an appropriate wage rate on the position.

Adams posted the part-time secretary position early on because Fox made it clear she would bump to a different full-time County position rather than accept a reduction to part-time status, if she were not selected as Specialist.

Adams' solicitation of Patty Brill Hammes' letter of recommendation occurred well after

the position had been awarded to Fox. The letter showed the complexity of the CSDS project.

The County initially withheld the selection process scores from the Union over an honest question about the propriety of releasing them. Once that was resolved, the Union was given the scores.

Finally, Mader's prior evaluations are not missing because they did not exist. Both Adams and Keuler testified that the County had no performance evaluation system that would have required such evaluations and it is notable that Mader did not have a copy of any of the allegedly missing evaluations either.

For Fox and Mader the position would be a promotion with the contractual two-month familiarization period. For Brokaw it was a lateral transfer such that she needed to be able to step right in and perform the job without any contractually-provided familiarization period. In each instance, however, Agreement Sec. 4.04(A) requires the County to select the most qualified applicant. Seniority only comes into play if two or more applicants are relatively equally qualified.

The Union has failed throughout the investigation and processing of the grievances to gather or reasonably assess the facts. The only materials the Union considered were those submitted by the Grievants in application process, the position descriptions, and five-minute interviews with each Grievant. The Union did not interview Adams or Fox. Hence, the Union cannot presume to know who is the most qualified applicant, and its failures to properly investigate this matter should result in summary dismissal of the grievances for that reason alone.

Adams is best qualified to make the selection. She understands the job responsibilities of all three applicants, is familiar with both CS and IM functions, and best knows the nature of the Specialist position. Moreover, the vacancy occurred at critical time in the CSA's functioning. Adams wanted someone who could carry a caseload and who could effectively complete implementation of the CSDS procedures. It was clearly in Adams self-interest to select the most qualified applicant as her assistant.

The County developed a clearly written, reasonably specific and yet balanced job description by which to make its selection. Adams reviewed applications submitted by each applicant and interviewed each, asking the same questions. Adams objectively considered the three applicants' applications and answers to interview questions and concluded that neither Grievant was qualified but that Fox was very qualified. Adams therefore properly selected Fox. That selection was affirmed by her policy committee, affirmed by Keuler, and reviewed and affirmed again in the grievance procedure.

Even if the Arbitrator concludes that one or both of the Grievants was qualified, the evidence more than reasonably supports Adams' and the County's judgment that Fox was the best

qualified of the three. To prevail, the Union "must prove that the County clearly erred by showing that there is substantial evidence that one or both of the grievants was more qualified than Fox." County reply brief at 2. The Union has failed to meet that burden.

The Union's analysis of the respective qualifications relies on length of experience without considering quality. Fox's experience in CSA's complicated and rapidly-changing CS support programs was substantial current and proficient. Mader's was dated and marred by the fact that she had been disciplined for poor performance in CSA just before transferring to IM. Brokaw has no experience in CS, and the evidence establishes that the knowledge required in CS is more extensive and complex than that required in IM. Furthermore, neither Grievant has a strong Word Perfect background as compared with Fox's training and substantial work with Word Perfect in applications directly involving CS.

Since the Union has failed to sustain its burden of proving that the County was clearly wrong in its selection, the County's selection must stand and the grievances must be denied.

DISCUSSION

The parties have presented varying views regarding the nature and application of burden of proof under the language contained in Agreement 4.04 (A) and (D). A review of the authorities cited by the parties reveals that there are "several basic approaches as to which party should have the burden of proof in cases involving managerial action taken under 'relative ability' clauses." Elkouri at 615. The Arbitrator's responsibility in this case is to answer the STIPULATED ISSUES. Doing that does not require a detailed burden allocation analysis here.

Rather, for purposes of this case, the Arbitrator finds it necessary only to reach two conclusions regarding interpretation of the parties' language in Agreement 4.04. First, there are some situations in which the Agreement would not require or permit County selection of the most qualified applicant. Specifically, the second sentence of 4.04(A) and the last clause of 4.04(D) both mean that if qualifications are relatively equal, the position shall be awarded to the senior qualified applicant, even if that individual is not the most qualified applicant. Second, even if it were shown that the County's selection had been made in an arbitrary, capricious, discriminatory or bad faith manner, that alone would not be sufficient to warrant granting the position involved to someone else; it would only preclude giving deference to management's judgments about absolute or relative qualifications. In that circumstance, an independent review of the evidence by the Arbitrator would determine who should have been selected under the abovenoted Agreement standards.

Because the Arbitrator is satisfied that an independent review of the evidence establishes that Fox's qualifications for CS Specialist are substantially superior to those of either of the Grievants, it is not necessary in this case to more precisely define and allocate the burden of proof or to decide whether the Grievants were qualified for that position or to decide whether the

County's mode of selection was tainted by arbitrary, capricious, discriminatory or bad faith conduct.

For, even if it is true that the County's mode of selection was tainted (such that Adams' and the County's judgments about qualifications were entitled to no deference) and even if it is also true that both Grievants were qualified for the position, Fox would nonetheless be entitled to the position and the Grievants would not be entitled to it because the record evidence, independently viewed by the Arbitrator, establishes that Fox's qualifications were substantially superior to those of the Grievants at the time the selection was made.

Attention is first appropriately be turned to the applicants' respective qualifications as regards the "Essential Knowledge and Abilities" listed on the job description.

Knowledge of resources available for obtaining needed information related to the agency's program

Fox has been an integral part of CS program for the 2 years immediately preceding the posting. She has added to her knowledge by taking a substantial Family Law course which the evidence shows covers numerous topics relevant to the work of the CSA and of the CS Specialist.

Mader's knowledge of such resources is two years oldt and the evidence establishes that there has been a substantial number of statutory and regulatory changes in the recent past that make that two year difference more significant.

Brokaw's knowledge of CS resources is limited to those related to IM.

Knowledge of office procedures

Fox has been shown to have substantial knowledge of the procedures utilized in the CS office, and that knowledge is current.

Mader has substantial knowledge of CS office procedures as they were followed two years ago. However, the quality of her knowledge is put somewhat in doubt by the fact that her record contains a written reprimand for, among other things, not following office procedures, shortly before she transferred to IM. Mader also has prior office experience with other employers.

Brokaw has worked in several office environments and is just three credits short of completing a bachelor's degree in business management. However, Brokaw is not as familiar as Fox is with CSA office procedures.

Skill in operation of a typewriter, calculator, personal computer or terminal, and Word Perfect or word processing

All three applicants have skills in operation of a typewriter calculator and personal computer.

As of the time of the posting, Fox had demonstrated competency in operating computer systems pertinent to CS. As of that time, she had take a 15-hour course in Word Perfect, but more importantly had used that software on the job on CS-related documents. In addition, she had received separate specialized training sessions provided by the State as regards data entry in the CSDS Fiscal Module and CSDS Case Management and had assumed the lead in the complex and challenging CSDS transition project.

Mader has taken courses on Word Perfect and Lotus 123, but she has not had occasion to sharpen those skills on the job and her use of word processing at home has not been extensive and has not involved CSDS or CS-related documents.

Brokaw uses personal computer word processing software with some regularity though she does not have a working knowledge of Word Perfect, which is the software that is used for forms creation and modification under CSDS. Brokaw has also taken a course in computer programming. Brokaw's work in IM involves some use of a computer terminal in data processing, but that has not involved use of the County's word processing software and it has not been anything approaching the word processing and CSDS related work Fox was doing as of the time of the posting.

Ability to document in detail my findings and actions related to the agency's program

Fox's two years of recent experience make her more able to know what and how to document in connection with CS work as it is currently being done in the CSA.

Mader has more years of CS experience but that experience is two years old and there have been numerous changes in applicable statutes and regulations. Mader also has IM documenting experience as well.

Brokaw has IM documenting experience but no direct CS experience, and would not be familiar with some of the details of CS documentation that her prior IM experience would not have exposed her to.

Ability to communicate clearly in interviews with applicants and others, both orally and in writing

The evidence establishes that Fox has demonstrated her ability in these regards in the CSA itself, both on the telephone, in person and in writing. Fox's written application was done with more care than those submitted by the Grievants.

Both grievants have demonstrated the ability to communicate effectively in IM interviews with applicants and others.

Ability to work with employees of other departments

It appears that all three applicants have demonstrated ability in this area.

Ability to maintain confidentiality of information and resources

It appears that all three applicants have demonstrated ability in this area.

Attention can now be turned to the "Desirable Training and Experience" listed on the job description.

HS graduation

All three applicants have graduated from high school.

Completion of family law course

Only Fox has taken such a course. The Arbitrator would find it appropriate to consider that an element in her favor whether it had been separately listed as a desirable qualification or not. The course has relevance in numerous respects to CS work, and it is to Fox's credit that she took the course on her own initiative, time and expense.

Two years increasingly responsible office experience, preferably in a public assistance, law or court-related area or any equivalent combination of experience and training which provides the required knowledge, skills and abilities

Brokaw deserves credit for pursuing and nearing completion of a bachelor's degree in business management. Such a course of study would unquestionably provide her with skills and insights of value to her and to the County in the CS Specialist position. So would her other work experiences outside the County's employ.

Mader deserves credit for taking Word Perfect and Lotus spreadsheet courses on her own initiative as well. She also has had secretarial experience outside the County in addition to her County service in CSA and IM work.

Both Grievants have worked in public assistance more years than Fox has. Mader worked eight years as CS Secretary to Fox's two. However Fox's experience is of sufficient length to expose her to the full range of situations the CSA office faces. Especially so when it is noted that she worked alone in the CSA during a lengthy injury absence of Adams. Fox has a demonstrated

ability to work effectively with Adams, and she was becoming conversant with and responsible for the CSDS transition at the time of the posting. Mader's CS office experience ended two years ago, depriving her of the benefit of the interim changes that Fox is familiar with. Mader's working relationship with Adams was not as good as Fox's, at least toward the end of Mader's years at the CSA. Adams rated Mader above average (the highest ranking on the form) in all respects on a probationary evaluation prepared in May of 1980. Mader asserts that she was similarly evaluated in subsequent years but Adams asserts there were no such evaluations prepared. In view of Keuler's testimony that the County did not have a County-wide evaluation system and the fact that the CSA was just a two-person office when Mader worked there and the fact that Grievant Mader has not produced even one of those documents from her own records, the Arbitrator is not persuaded that the evaluations were in fact completed for Mader in the intervening years. Even if she had been highly evaluated in the ensuing years, it is clear that Mader's work was not satisfactory as of the time she was issued a written reprimand for attendance problems and failing to follow CSA office procedures, shortly before her transfer to IM.

Brokaw's work in IM has been highly evaluated and highly regarded over the years by her Social Services supervisors. However, Brokaw's additional years of public assistance experience as compared to Fox are in the IM area, leaving gaps in CS office procedures and statutes and regulations that would take her substantial time to fill. The same can be said about the time it would take for Brokaw to become proficient at the Word Perfect applications in use in the CSAL not to mention the CSDS implementation work she would need to learn about. While the County, to its credit, did not limit its statements of required and desired qualifications in the job description to CS work experience alone, it is appropriate in assessing applicants' relative qualifications to give more weight to job knowledge and experience that is more closely related to the work the CS Specialist will be doing and to give less weight to knowledge and experience that is less closely related to that work.

Finally, it can be noted that both of the Grievants appeared less than enthusiastic in their pursuit of the CS Specialist position. Neither prepared a fresh application form, but rather both made modifications on existing ones. Neither asked questions during the interview that would have reflected a keen interest in CS work generally or in the role the Specialist would be playing in particular. While there appears to have been some uncertainty on the Grievants' part as to what impact their interview responses would have in the selection process, it is only common sense to present oneself in as positive, complete and interested a fashion as possible as regards a job one is highly motivated about.

When all of the foregoing factors are considered along with the balance of the record as a whole, the Arbitrator concludes that Fox's qualifications for CS Specialist were substantially superior to those of each of the Grievants.

In many ways, Fox is the beneficiary of being in the right place at the right time. Because

she has been in the CSA for the two years immediately preceding the posting, she was in an ideal position to become familiar with the changes in statutes and regulations that have affected the Agency's operations. Similarly, because she was there when CSDS training and implementation began, she received that training and began to participate hands-on in the implementation, enabling her to develop and demonstrate specialized skills and knowledge in an area critically important to the CSA and the County.

For the foregoing reasons, then, Fox was entitled to be selected as the CS Specialist, under the terms of the Agreement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. The County did not violate the Agreement when it selected Lisa Fox as Child Support specialist, rather than Sharon Brokaw or Jan Mader.

2. The grievances are denied.

Dated at Shorewood, Wisconsin this 5th day of June, 1990.

By Marshall L. Gratz /s
Marshall L. Gratz, Arbitrator