

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 MANITOWOC COUNTY SHERIFF'S : Case 219
 DEPARTMENT EMPLOYEES, LOCAL 986-B, : No. 42927
 AFSCME, AFL-CIO : MA-5851
 :
 and : Case 221
 : No. 42929
 MANITOWOC COUNTY : MA-5853
 :

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40,
 AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. Mark Hazelbaker, Corporation Counsel, appearing on behalf of the

County

ARBITRATION AWARD

Manitowoc County Sheriff's Department Employees, Local 986-B, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Manitowoc County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide two grievances over the meaning and application of the terms of the agreement. The undersigned was so designated. A hearing was held in Manitowoc, Wisconsin on June 13, 1990. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on October 18, 1990.

BACKGROUND

Since about 1980, the County's Sheriff's Department has assigned Detectives on a part-time basis to investigate welfare fraud cases for the County's Human Services Department and its predecessor, the Social Services Department. 1/ The welfare fraud investigations were funded by the Human Services Department and the Sheriff's Department billed the Human Services Department for its Detectives' work on welfare fraud investigations. 2/ Different Detectives over the years were assigned to investigate welfare fraud cases. 3/ Effective January 1, 1990, the County obtained federal funding for a full-time welfare fraud investigator. 4/ Thomas Stanton, Deputy Director of the County's Department of Human Services, met with the Sheriff and indicated that a requirement of anyone filling the position was that they be an experienced investigator. 5/ The Human Services Department would train the Welfare Fraud Investigator in the Department's programs but could not provide training in how to conduct criminal investigations. 6/ In early 1989, the County Board created the position of Welfare Fraud Investigator 7/ which required a minimum qualification that the person "must have a minimum of three years of criminal investigation experience." 8/ The position was posted and awarded to Fred Nicholson, a detective, who has been employed in that capacity for almost 19 years. 9/ The grievant, a Patrol Officer with over 23 years of service with the County, applied for the Welfare Fraud Investigator and upon Detective Nicholson's selection, filed a grievance as the grievant had greater seniority than Nicholson. 10/ The grievant insisted he was qualified for the Welfare Fraud Investigator and the County maintained he was not qualified as he did not have three years of criminal investigation experience.

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- 1/ Tr-183.
 - 2/ Tr-13.
 - 3/ Tr-46.
 - 4/ Tr-13, 15.
 - 5/ Tr-14, 15, 22-23, 37-38, 45, 47, 52, 56.
 - 6/ Tr-16, 22-23, 47.
 - 7/ Tr-15.
 - 8/ Ex-8.
 - 9/ Tr-179-180.
 - 10/ Tr-89, 92, Ex-3.

After Nicholson accepted the Welfare Fraud Investigation position, the Detective position he previously held was not posted. 11/ In processing the grievant's grievance noted above on the Welfare Fraud Investigator, the Union met with the County's acting Personnel Director, and a verbal settlement was reached that the Detective vacancy would be posted and filled. 12/ It is undisputed that the grievant meets the qualifications for a Detective and with his seniority, he would be selected for a vacant Detective position. 13/ At this same time, the Sheriff was interested in getting a position of Investigative Supervisor. 14/ This position had existed in the past but when the incumbent left, the County Board cut the position. 15/ The Sheriff tried to get the position refilled during prior budget discussions but was unsuccessful. The Sheriff now proposed to the County Personnel Committee that it abolish the Detective position vacated by Nicholson and create a new Investigative Supervisory position in its place. 16/ The Sheriff made his case and asked the County's Personnel Committee to reject the settlement worked out by the Acting Personnel Director. 17/ The Personnel Committee went along with the Sheriff over the Acting Personnel Director's objections and rejected the settlement and abolished the Detective position. 18/ The grievant filed another grievance over the refusal and failure of the County to post the position vacated by Nicholson and later abolished by the County Personnel Committee. 19/ That grievance was denied and processed to the instant arbitration.

ISSUES

The parties stipulated to the following:

1. Did the Employer, Manitowoc County, violate the agreement by awarding the newly-created position of Welfare Fraud Investigator to Fred Nicholson, who had less seniority than the grievant, William Gamble?

If so, the remedy is to award the position to Gamble with back pay to March 22nd, 1989.

2. Was the County required to post the Detective position vacated by Fred Nicholson because of the settlement of the grievance at Step 3?
3. Did the Employer, Manitowoc County, violate the agreement by not posting said Detective position?

If so, what is the remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just 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 or here for such period of time involved in the matter.

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ARTICLE 8 - GRIEVANCE PROCEDURE

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- 11/ Tr-90-91.
 - 12/ Tr-84.
 - 13/ Tr-153-154,168.
 - 14/ Tr-156-157.
 - 15/ Tr-157.
 - 16/ Tr-85, 156.
 - 17/ Id.
 - 18/ Tr-85-86.
 - 19/ Ex-2.

- A. Definition of Grievance: Should any differences arise between the Employer and the Union as to the meaning and the application of this Agreement, or as to any question relating to wages, hours and working conditions, they shall be settled under the provisions of this Article.

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- C. Steps in Procedure:

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Step 3: If the grievance has not been settled in Step 2, or if the parties mutually agree to waive steps 1 and 2, the grievance shall be submitted in writing to the Personnel Director within ten (10) working days after receipt of the Department Head's written decision. Original grievances as provided for in Step 1 shall be reduced to writing and submitted to the Personnel Director. The Personnel Director shall offer to meet with the Union to discuss such grievances with the Union upon written request including identification of all grievances to be discussed within ten (10) working days after receipt of such request. Following such meeting, If any, the Personnel Director shall respond in writing to the Union within ten (10) working days.

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ARTICLE 22 - JOB POSTING

- A. Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in the department as well as the bulletin board in the office of the County Clerk for five (5) working days. Any employee desiring to fill any such posted vacancy or new position shall make application in writing and submit it to the Personnel Office. After the conclusion of the posting period, the envelope shall be opened at the Personnel Office in the presence of a representative of the Union and a representative of the County Personnel Committee, or its designee, at a time to be mutually agreed upon.
- B. Whenever any vacancy occurs it shall be given to the employee with the greatest seniority, provided the applicant for such position is qualified and eligible for the position. The awarding of the position shall occur within seven (7) days after the completion of the posting period.
- C. When objections are made by the Sheriff's Department regarding the qualifications of an employee to fill the position, such objections shall be presented to the employee and the Union in writing by Sheriff or the Sheriff's designee.
- D. If there is any difference of opinion as to the qualifications of an employee, the County Personnel Committee and the Union Committee shall take the matter up for adjustment through the grievance procedure.

UNION'S POSITION

The Union points out that welfare fraud investigation is not new to the County but Detectives have been assigned to perform such investigations on a part-time basis for at least ten years. It notes that the federal grant simply expanded the amount of time available for this assignment and the federal grant did not specify any amount of experience but simply that the incumbent of the position have the power of arrest. It submits that the various detectives

assigned to welfare fraud investigations performed satisfactorily and the program did not change, i.e., welfare fraud cases were the same as before the new funding and the only change was the amount of time the detective would perform this function, i.e. from part-time to full-time. It asserts that the new job description was written by the Sheriff and improperly included the requirement of three years of criminal investigation experience, which is not a standard for the Detective position and detectives performed this assignment previously, but was written in so senior patrol officers who were qualified for Detective positions would have difficulty getting the Welfare Fraud Investigator position. It contends that the Sheriff selected Nicholson because he more appropriately met the minimum requirements for the position, i.e., he was better qualified than the grievant. The Union argues that Article 22 provides that the most senior employe who is qualified gets the job over a junior employe who may be more qualified. It claims that the Sheriff's evaluation of the grievant did not constitute objections to his qualifications as required by Article 22, Section C. Thus, the three year requirement, the selection of more qualified rather than senior qualified employe and the failure to state objections to the grievant's qualifications all violate Article 22.

The Union contends that the grievant is fully qualified as a Detective and Welfare Fraud Investigator. It notes that the Sheriff testified that the grievant was qualified to be a detective. It takes the position that there is little difference between the job descriptions of Detective and Welfare Fraud Investigator with a minimum of three years of criminal investigation as the only basis for the grievant's alleged failure to meet the minimum job qualifications for Welfare Fraud Investigator. It refers to the County's standard activity display 20/ as establishing that the grievant engaged in criminal investigation by investigating burglary, vandalism, domestic disturbances, disorderly conduct and ordinance violations for 222 hours out of 1,730 hours from May of 1989 to May of 1990 which establishes that after 22 years of service, the grievant met the minimum three years of criminal investigation experience. It claims that had the grievant been given an interview, he would have been found to have met all the qualifications for Welfare Fraud Investigator. It insists that the failure to select the grievant violated Article 22, Section B.

The Union contends that for whatever reason the Sheriff selected Nicholson for the Welfare Fraud Investigator, the County violated the agreement by not posting the Detective position vacated by Nicholson. It submits that the Sheriff wanted to get a supervisory position for some time and his petition for one had been refused by the County Board. It claims that the Sheriff knew all along that to get the Investigative Supervisor position that he had to sacrifice a Detective position. It argues that the supervisory position was approved by the County Personnel Committee only after the Sheriff had persuaded the Committee to disavow the grievance settlement. It insists that the scenario followed by the Sheriff is only plausible if a current Detective position would become vacant by a Detective getting the Welfare Fraud Investigator position. It alleges that the requirement of three years experience was put in specifically to eliminate all patrol officers so that the Sheriff could put his plan into effect.

The Union contends that the settlement agreement reached at Step 3 of the grievance procedure is binding on the County. It maintains that the contract provides that the Personnel Director is authorized to adjust grievances and there was no understanding or notice that the Personnel Committee had a veto power over the settlement. The Union alleges that the Personnel Director settled the grievance in principal part because the Sheriff's Department admitted the three year qualification was put in solely to disqualify patrol officers. It submits that the settlement agreement is binding and must be enforced.

The Union, referring to Article 22, Section A, states that a vacancy must be posted within five working days, remain posted for 5 working days and awarded within seven days thereafter. It points out that the Detective position was not deleted until May 4, 1989, 21/ yet Nicholson was awarded the Welfare Fraud Investigator position effective March 27, 1989. 22/ It submits that the County violated the posting requirement by doing nothing between March 27 and May 4, 1989 and there is nothing in the record to explain why the County ignored the contractual posting provisions and the grievant should have been awarded the Detective vacancy when Nicholson became the Welfare Fraud Investigator.

In conclusion, the Union contends that the grievant met the qualifications for both Detective and Welfare Fraud Investigator and should have been awarded the Detective position because of the settlement agreement or

20/ Ex-26A, B.

21/ Ex-24.

22/ Ex-6.

the County's failure to timely post it or the Welfare Fraud Investigator position because of his greater seniority. The Union request that issue #2 be answered yes and if no settlement of the grievance be found, then issue #1 be answered yes but if issue #1 is no, then issue 3 be answered yes.

COUNTY'S POSITION

The County contends that nothing in the record justifies sustaining either grievance. It submits that the grievant failed to meet the qualifications for Welfare Fraud Investigator and the Personnel Committee acted in good faith in abolishing the Detective position and creating the Investigative Supervisor position.

The County maintains that it properly awarded the Welfare Fraud Investigator position to Fred Nicholson. It claims that the right to establish the qualifications for a position is a basic management right which it exercised reasonably and in good faith. The County insists that even if the Union's allegation that the qualifications were set solely to create a vacancy in a Detective position so it could establish a supervisory position, the result would be the same. The County insists that it has the legal right to eliminate a bargaining unit position and create a supervisory position, a right recognized by the Courts and the Wisconsin Employment Relations Commission. Even so, the County asserts that the record fails to establish a basis for the Union's allegations. It maintains that the qualification for an experienced investigator was based on the request of the Human Services Department and the Sheriff set the requirement to meet the needs of the Department. The County insists that there was no intent to exclude bargaining unit members from consideration for the position. The County points out that the qualification was set to meet the needs of the position and were not designed to establish the position for any particular person but the Human Services Department required an experienced investigator because of the complexity of the subject matter and the inability of the Human Services Department to train someone in criminal investigation. It suggests that nothing in the record establishes that the requirement for an experienced investigator was unreasonable or made in bad faith. The County claims that the grievant failed to meet the qualifications for the Welfare Fraud Investigator because his Patrol experience does not meet the requirements of the position. It takes the position that 90% of the grievant's work activities are related to traffic patrol and that although he has some exposure to criminal investigation, it is preliminary, general and not the kind of specialized investigation necessary for fraud or white collar offenses. It insists that there is a vast difference in the experience and investigative responsibilities of Detective and Patrol Officer respectively and the grievant does not meet the requirements of the Welfare Fraud Investigator position. It submits that his outside experience as a real estate broker and community leader in the Union and Youth Sports Associations is irrelevant and has no bearing on the issue presented. It does not dispute the grievant's qualifications for a Detective position but does maintain that he is not qualified to be a Welfare Fraud Investigator. It notes that Nicholson more than meets the requirements with 19 years experience as a Detective.

The County contends that it did not violate the agreement by failing to post the Detective vacancy. It insists that there was no final settlement of the Detective vacancy grievance and the evidence, at most, established a tentative settlement which was never reduced to writing. It further claims that any tentative settlement was subject to the Personnel Committee's approval. It asserts that the evidence established that it was customary for all grievances to be settled tentatively subject to Personnel Committee approval which is exactly what was done in this case.

The County maintains that even if there was a final settlement of the grievance with respect to posting it, the County had complete authority to reduce bargaining unit positions and create a supervisor position instead. At most, the County argues, it would be liable only for the short time the position should have been posted and awarded until the date it was abolished.

The County maintains that the Union has not met its burden of proof in this case. The County claims it adopted in good faith reasonable qualifications asked for by the Human Services Department for the Welfare Fraud Investigator position and the grievant did not meet those qualifications. It points out the weakness of the Union's case on the posting grievance by the Union's assertion of a settlement related to the posting rather than proving the substance of the underlying grievance.

It asks that both grievances be dismissed.

DISCUSSION

Article 22, Section B of the parties' collective bargaining agreement provides that a vacancy shall be given to the most senior employe provided the employe is qualified for the position. In the instant case, the grievant has greater seniority than Nicholson and would be entitled to the Welfare Fraud Investigator position if he is qualified for the position. Thus, the first issue to be resolved is whether the grievant has the qualifications for the

Welfare Fraud Investigator position. The evidence established that the grievant meet all the requirements for the position with the exception of Item 2 of the Minimum Qualifications which requires "three years of criminal investigation experience."

As the County has pointed out, it has the right to establish new job classifications and to establish the minimum requirements for the position, and additionally, under the agreement, the County has the sole authority to determine whether an employe is qualified for the position as long as the decision regarding qualifications is not arbitrary, capricious, discriminatory or unreasonable. 23/ The burden of proof is on the Union to show that the County erred in determining the qualifications and that the County acted arbitrary, capriciously, discriminatorily or unreasonably. 24/

The Union has argued that the requirement of three years of criminal investigation experience was not a valid job requirement as Detectives had always been assigned this job so only the requirements for a Detective position were needed. The fallacy with this argument is that while Detectives had always been assigned to this duty, each Detective assigned may have had a great deal of criminal investigation experience prior to receiving such an assignment. The evidence failed to show that a new Detective or one with little or no experience or with less than three years experience had ever been assigned to perform this duty. In the past, the Sheriff was free to assign experienced Detectives, but with the posting, the only way such an assignment could be made is by establishing the minimum requirement of three years criminal investigation experience. The evidence fails to prove that this requirement was arbitrary or unreasonable.

The Union also argued that the Sheriff saw an opportunity to get a supervisory position that he had sought for some time and needed a Detective vacancy to carryout his scheme to get the supervisory position, so he deliberately included the three year requirement to eliminate all but Detectives simply to further his plan. The record fails to support a conclusion that the three year requirement was solely to further the Sheriff's alleged scheme. First, the Detectives who had been assigned this duty may have had more than the three years of experience. Secondly, the Deputy Director of the Human Services Department informed the Sheriff that the Department needed a trained investigator for the position. 25/ Thirdly, the Sheriff had no way of knowing who would post for this job. None of the Detectives may have posted for it so that someone from the outside or someone other than a Detective would get the job and there would be no Detective vacancy to abolish in furtherance of the scheme. The evidence presented as to establishing the three year requirement in furtherance of a scheme to create a new position is too speculative to sustain the Union's position. The evidence supports a conclusion that the County's decision with respect to the three years of criminal investigation experience was contractually proper.

The Union claims that even if the three years of criminal investigation experience is a valid qualification for the Welfare Fraud Investigator position, the grievant has the requisite experience. The Union has the burden of proving that the County's determination that the grievant fails to meet this requirement is erroneous, not based on fact or is arbitrary or capricious. The evidence establishes that the County made its decision after consideration of the available and pertinent data furnished by the grievant regarding his work record. 26/ It does not appear that an interview with the grievant who had been employed by the County for 23 years would have revealed any additional information such that the failure to interview him would have made the County evaluation invalid or discriminatory. The evidence presented with respect to the grievant's criminal investigation experience related to the approximately 10% of his duties as a Patrol Officer which differs in complexity from that of a Detective and that required for Welfare Fraud Investigator. Patrol officers are first responders to criminal cases and do preliminary investigations, whereas the Detectives do more lengthy, long-range detailed investigations of criminal cases, i.e., they follow-up and complete the investigations. 27/ This difference in experience justified the County's conclusion that the Patrol Officers and the grievant lacked the necessary criminal investigation

23/ Barbers Point Federal Credit Union, 84 LA 956 (Brown, 1984); Leach Manufacturing Co., Inc., 82 LA 235 (Harrison, 1984); E-Systems, Inc., 84 LA 194 (Steele, 1985); Southern California Gas Company, 91 LA 100 (Collins, 1988); Equitable Bag Company, Inc., 83 LA 317 (Modjeska, 1984).

24/ GTE Products Corp., 91 LA 44 (Dworkin, 1988); Barbers Point Federal Credit Union, 84 LA 956 (Brown, 1984); E-Systems, Inc., 84 LA 194 (Steele, 1985).

25/ Tr-14-15, 30-42.

26/ Ex-13, 14, 15, 17, 18.

27/ Tr-130-132, 145, 180-181.

experience required for Welfare Fraud Investigator. It cannot be found that the decision regarding this distinction in experience was made on an arbitrary, capricious or discriminatory basis such that the County's conclusion on qualifications was in error. Thus, the record fails to establish that the grievant was minimally qualified for the Welfare Fraud Investigator position and Issue #1 must be answered in the negative. It is undisputed that Nicholson was qualified and based on the above discussion that the grievant lacked the minimum qualifications for the position, the County's selection of Nicholson, even though he was junior to the grievant, did not violate Article 22, Section B.

The Union has argued that the County failed to comply with the requirements of Section C of Article 22 in that the Sheriff's letter of March 22, 1989 informing the grievant that he was not selected for the position of Welfare Fraud Investigator did not constitute objections to his qualifications. 28/ While the letter is not as artfully drawn as it could be to expressly state that the grievant didn't meet the minimum qualifications, the language that Nicholson was selected "because his experience as a detective and Welfare Fraud Investigator more appropriately meet the minimum qualifications" sufficiently infers that the grievant did not meet the minimum qualifications. Thus, it is concluded that no violation of Article 22, Section C has been established.

The next issue to be determined is whether the parties entered into a final settlement agreement on the posting of the Detective vacancy created by Nicholson's filling the Welfare Fraud Investigator position. The Union argues that a settlement was reached at the Third Step of the grievance procedure which is binding on the County. A review of the record fails to establish a binding settlement. Fred Reese, Local 986-B's President, testified that he was involved in processing both grievances which are the subject of the instant arbitration and there was not a resolution of either one. 29/ Reese testified that there was a verbal conversation about settling the Welfare Fraud Investigator position grievance by posting the Nicholson Detective vacancy. 30/ The Personnel Director testified without contradiction that the parties reached a tentative oral settlement of this grievance which by custom and the parties' course of dealing over a period of time was that anything agreed to by him was subject to ratification by the County's Personnel Committee. 31/ It is undisputed that the Personnel Committee rejected the tentative settlement agreement and it therefore never became binding. Therefore, the evidence fails to show a binding settlement agreement. The parties merely reached a tentative settlement which was not ratified so no grievance settlement was established by the record. Thus, Issue #2 must be answered in the negative.

The Union has asserted a violation of Article 22, Section A in that the Detective vacancy was not posted within the time limitations set forth therein. This argument is based on the premise that a vacancy existed. Certainly, the position previously occupied by Nicholson was vacant but generally a vacancy requires not only a vacant position but the intent to fill it. 32/ Here, the Sheriff had no intent to fill the vacancy in the Detective position because his intent was to abolish it so he could get an Investigative Supervisor position created. Nothing in the agreement prevents the County from changing the number of Detective positions and eliminating any number of them. Inasmuch as the record fails to establish that there was an intent to fill the vacant Detective position, there was no obligation to post it and fill it within the time limits set forth in Article 22, Section A. The Personnel Committee's abolishment of the Detective position made the issue moot. Thus, the evidence fails to establish any violation of Article 22, Section A and Issue #3 must also be answered in the negative.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievances are denied.

Dated at Madison, Wisconsin this 12th day of November, 1990.

By _____
Lionel L. Crowley, Arbitrator

28/ Ex-7.

29/ Tr-69-71.

30/ Tr-71.

31/ Tr-84-86.

32/ City of Pawtucket, 88 LA 356 (McAuliffe, 1986).