

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 LABOR ASSOCIATION OF WISCONSIN, INC., :
 BROOKFIELD DISPATCHERS AND CLERICAL :
 ASSOCIATION, LOCAL 502 :
 :
 : Case 77
 : No. 44207
 and : MA-6211
 :
 CITY OF BROOKFIELD :
 :

Appearances:

Vanden Heuvel & Dineen, Law Firm, by Ms. Linda S. Vanden Heuvel,
 appearing on behalf of the Union.
 Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh,
 appearing on behalf of the City.

ARBITRATION AWARD

Labor Association of Wisconsin, Inc., Brookfield Dispatchers and Clerical Association, Local 502, hereinafter referred to as the Union, and the City of Brookfield, hereinafter referred to as the City, 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 City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Brookfield, Wisconsin on August 29, 1990. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on November 23, 1990.

BACKGROUND

The basic facts underlying the grievance are not in dispute. On May 24, 1990, a Clerk/Dispatcher/Operator on the first shift resigned effective June 19, 1990. Certain employees including the grievant, a Clerk/Dispatcher/Operator on the second shift, applied for the first shift opening. The City selected Brenda Bourdo, who was in the clerical section, to fill the first shift position. Bourdo has more seniority than the grievant. The grievant performed dispatching duties on the first shift from June 19, 1990 until July 2, 1990, then returned to his shift. Bourdo began performing dispatching duties on July 2, 1990. The grievant filed a grievance alleging that Bourdo should not have been selected because she was not qualified to fill the vacancy on June 19, 1990. The grievance was denied and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the City violate the collective bargaining agreement by not selecting the grievant, Tracy Lewis, to fill a day shift vacancy?

If so, what is the appropriate remedy under the collective bargaining agreement?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE XIII - SENIORITY

Section 13.01 - Definition: Seniority for full-time employees shall be determined from the last date of hire with the Employer in this bargaining unit. Employees who are classified as part-time shall not have seniority. Provided however, if a part-time employee becomes a full-time employee, the employee shall be given seniority based on forty (40) hours equals one week and fifty two (52) weeks equals one (1) year. Seniority shall be used to determine layoffs and recall, shift selection, vacation selection, the appropriate wage pay level and where two employees request the same day off pursuant to Section 12.08.

. . .

Section 13.03 - Shift Selection: Whenever a vacancy occurs regarding a position covered by this Agreement any employee may apply to fill the vacancy. The vacancy shall be filled by the person who applies with

the most seniority, provided that the employee is qualified to fill said vacancy.

Section 13.04 - Vacancy or Open Positions: For the purpose of this Article, a vacancy shall be deemed to exist when the employee who had filled the position on a regular basis is no longer in that position or when a new position has been created or authorized by the Employer.

Section 13.05 - Temporary Assignment: The selection process in 13.03 will not apply for a temporary reassignment of an employee from one shift to another. Temporary involves not more than several days to a week. If a specific investigation requires a change of shift for a longer period, the Chief shall advise the Association of the reason. No employee shall be reassigned under the provisions of this Article more than once during a calendar year unless some unforeseen necessity requires it.

. . .

ARTICLE XXVII - MANAGEMENT RIGHTS

Section 27.01 - Exclusive Rights: The Association recognizes the right of the City and the Chief of Police to operate and manage its affairs pursuant to law, and the exclusive right of the Chief of Police to promulgate reasonable departmental rules and procedures which do not relate to or impact on mandatorily bargainable issues. The following rights are among those reserved for management consistent with the terms of this agreement and applicable City, State and Federal laws.

- A. To direct the operations of the Police Department.
- B. To establish reasonable work rules.
- C. To hire employees.
- D. To lay off employees.
- E. To suspend, demote, discharge and take any other disciplinary action against employees for just cause, pursuant to Article XVI.
- F. To take whatever action is necessary to comply with an emergency.
- G. To determine the kind and amount of training.
- H. To develop and publish job descriptions.
- I. To determine the need for and to schedule overtime.

UNION'S POSITION

The Union contends that the City violated the agreement by not selecting the grievant for the day shift vacancy because he was the most senior active dispatcher qualified to perform the required duties at the time the vacancy occurred. The Union relies on Sections 13.03 and 13.04 of the agreement and argues that the intent of these Sections as demonstrated by bargaining history supports its position. It submits that Section 13.04 identifies the exact moment that a vacancy exists and establishes the date by which an employee must be qualified to do the work. The rationale for this language, according to the Union, was to preclude the City from arbitrarily selecting a person and then training that person to fit the position after it became available, rather than selecting the most senior, then qualified, person for the job. It asserts that under 13.04, the individual must be qualified to perform the job on the date the vacancy occurs.

The Union submits that Bourdo was not qualified to perform the dispatcher job on June 19, 1990 nor was she qualified as of July 2, 1990. It accepts the City's definition of qualified as "ability to do the job" and "perform the required tasks." It points to the Police Chief's grievance response as an admission that Bourdo was not qualified as of July 2, 1990 as well as Bourdo's testimony that she could not work alone as of that date and the testimony of Dispatcher Zentner as establishing that Bourdo was not qualified for the

position on the vacancy date or on July 2, 1990.

The Union contends that although Bourdo had greater seniority than the grievant, Lewis, this did not override the grievant's priority shift selection privilege as a dispatcher pursuant to Section 13.03. It notes that the grievant was the senior most active dispatcher available to fill the day shift position and the grievant was merely requesting a change in shifts, whereas Bourdo was seeking a transfer from her position as an Operator/Clerk to the position made available after the reassignment of dispatcher personnel, and Bourdo was not qualified as a dispatcher as of June 19, 1990. The Union further argues that the temporary transfer of the grievant violated Section 13.05 because it extended beyond one week in length and was not a specific investigation requiring a longer temporary assignment.

The Union concludes that the City has violated Sections 13.03, 13.04 and 13.05 by its failure to select the grievant and requests that the grievant be assigned to the day shift dispatcher position and Bourdo be reassigned to the dispatcher position made available after the grievant's transfer, or alternatively, that after the grievant's assignment to the day shift, all subsequent positions that opened be filled in a similar manner.

CITY'S POSITION

The City contends that the determination of an employe's qualifications is solely within its discretion. It relies on the Managements Rights clause as reserving to it the determination of the qualifications needed for a job as well as determining whether a particular employe possesses those qualifications. It submits that as long as its determination is reasonable and is not arbitrary, capricious or discriminatory, the Arbitrator cannot substitute his judgment for the City's, absent contractual authorization to do so and this agreement contains no such authorization. It cites arbitral authority for the proposition that an employer's determination of qualifications will presumptively be done objectively because it is against an employer's interest not to have the best qualified person assume a vacancy. The City argues that all Section 13.03 of the agreement requires is that the applicant possess the minimum qualifications for the job and the more senior employe must be selected even though the junior employe is better qualified.

The City maintains that the City's determination that Bourdo was minimally qualified for the position was neither unreasonable, arbitrary, capricious nor discriminatory. The City claims that Bourdo is qualified for the dispatcher position based on her passing the test for the position, her familiarity with the Department's policies and procedures because of transcribing tapes into Police reports, her use of the same computer equipment used in the Dispatch Center, as well as meeting the qualifications listed on the job description. It insists that all Bourdo needed was familiarization with specific job functions in the Dispatch Center and that she was "qualified" as she had "the ability to do the job or to perform the required tasks." It maintains that "qualified" does not mean fully trained. It asserts that the record demonstrates that after five or six full days of familiarization - training, Bourdo was able to work on her own and prior to that she had all the basics and simply needed more confidence.

The City contends that its selection of Bourdo is consistent with the Union's position in the negotiation of Section 13.03. It notes that the Union's initial proposal was that shift selection be made by seniority only. It notes that the City wanted a number of other considerations for shift selection and the final agreement provided for seniority, the Union's consideration, and minimum qualifications, a concern of the City. The City argues that the bargaining history of Section 13.04 does not support the Union's argument that it was inserted to establish a point in time that an employe had to possess the requisite qualifications but simply established the type of opening that triggers the shift selection procedures, i.e. a temporary vs. a permanent opening. The City denotes the Union's argument that Section 13.04 was to prevent the manipulation of training so a junior person could be selected, a sham contention. The City points out that this argument only makes sense where the agreement would provide a preference to the most qualified but because the agreement only requires minimum qualification, seniority would control and the senior employe would be selected even though minimally qualified even if the junior employe received training to become more qualified and the "timing" of when an employe is qualified is immaterial to the desire to have the most senior employe be given the assignment. The City concludes that the purpose of Section 13.04 as espoused by the Union is not supported by bargaining history.

The City contends that the alleged violation of Section 13.05 was first raised in the Union's brief and must be disregarded. The City requests that the grievance be denied.

DISCUSSION

Section 13.03 of the parties' agreement provides, in part, as follows: "The vacancy shall be filled by the person who applies with the most seniority, provided that the employe is qualified to fill said vacancy." This language is

a modified seniority clause and is unambiguous and provides that the City must select the most senior employe from among the applicants provided that employe is qualified. There is no contractual definition of the term "qualified". The Police Chief's definition of qualified was "the ability to do the job or to perform the required tasks". The instant arbitration is unusual because generally the employer has selected a junior employe over a senior on the basis that the senior is not qualified. 1/ Here, the parties have the reverse of this scenario. The City selected the most senior employe and the Union is arguing that such selection is improper because the senior employe is not "qualified". Where specific language is lacking as to how qualifications are to be determined, great deference is given to the employer's determination that an employe is qualified and that determination will stand absent a showing that the decision was arbitrary, capricious, discriminatory or unreasonable on the facts. 2/ The burden of proof is on the Union to demonstrate that the City's determination regarding Bourdo's qualifications was unreasonable on the facts, arbitrary, capricious or discriminatory. 3/

The Union has raised an argument based on Section 13.04 that an applicant must be qualified at the instant the employe who fills the position on a regular basis is no longer in that position. The express language of Section 13.04 only states when a vacancy is deemed to exist and then Section 13.03 would require the City to fill it. The Union has argued that bargaining history supports its interpretation of Section 13.04. The Union argued that Section 13.04 was bargained between the parties in an attempt to preclude the Chief from arbitrarily training a person to fit the position after the position became available, rather than selecting the most senior, then qualified person for the job. This interpretation is not persuasive. If the most senior employe is qualified, then under the plain language of Section 13.03, the senior employe would get the job no matter how much training the junior employe would receive. If the language is interpreted as requiring the job be given to a qualified junior employe even when the most senior employe is given training to be qualified, then the bargaining history would be contradictory. The Union's initial proposal in bargaining was that employes shall be allowed to select these shifts by seniority. 4/ The City countered with essentially determining shift selection twice a year on a wide variety of bases. 5/ Some modifications occurred in mediation and at one point the Union sought selection by seniority with an appeal by junior employes to the Union's Board of Directors who could allow a more qualified employe a shift selection not according to seniority. 6/ Eventually, the present language was agreed to. 7/ This history demonstrates that the Union's greatest emphasis was selection of shift by seniority and without discretion by the Chief to make such selection consistent with the needs of the Department. 8/ Inasmuch as the Union clearly emphasized seniority in shift selection, why would it object to the training of a senior unqualified employer over a qualified junior employe? Additionally, the City knew on May 24, 1990, that there would be a vacancy on June 19, 1990 and it could have trained Bourdo for three weeks so she would be qualified on June 19, 1990 and there would be no potential violation of Section 13.04. An employe could leave without any notice or become incapacitated or die and if the next day was used for qualification purposes, then the least senior dispatcher that day, with say one year's seniority, would get priority over the most senior employe, with say 10 years of seniority, because the more senior employe needed a week or two of training to handle the dispatcher position on his/her own. This is so unusual a result it might be termed absurd or at least unreasonable. The Union's contention with respect to Section 13.04 makes sense only if it was intended to prevent the Chief from selecting junior employes for training so they would get the job over senior employes who did not get the training and were not qualified for the job, i.e. selectively

1/ General Telephone Co., 87 LA 942 (Daniel, 1986); Cleveland Board of Education, 83 LA 234 (Klein, 1984).

2/ 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 (Steel, 1985); Southern California Gas Company, 91 LA 100 (Collins, 1988); Equitable Bag Company, Inc., 83 LA 317 (Modjeska, 1984); Whirlpool Corp., 56 LA 40 (Johannes, 1971).

3/ 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).

4/ Ex-12.

5/ Ex-13.

6/ Ex-15.

7/ Ex-16.

8/ Ex-14 & 15.

qualifying junior employes rather than senior employes who were not qualified so the junior employe would get the job. This is not the scenario in the instant case and the undersigned finds the Union's arguments with respect to Section 13.04 not to be persuasive. Therefore, it must be concluded that Section 13.04 has not been violated by the City in its selection of Bourdo.

Even if the Union's argument with respect to Section 13.04 is accepted, the City maintains that Bourdo was qualified as of June 19, 1990. The Union contends that she was not qualified because she couldn't handle the Dispatch Center by herself. As noted above, the City's determination as to qualifications must be accepted absent proof by the Union that the City's decision was unreasonable on the facts, arbitrary, capricious or discriminatory. The Union's interpretation of "qualified" is too narrow because Bourdo merely needed familiarization with the Dispatch Center. As pointed out by the City, she passed the test given for the job and met all the formal requirements for the position, so all she needed was some on the job training. She had the skill and ability to do the job and only needed a short time to become acquainted with the job. Under these circumstances, she was "qualified". If the grievant had gotten the first shift and had Bourdo been given the grievant's second shift that he vacated, Bourdo would be doing the same work after a short familiarization anyway so the proof fails to show that the City's determination that she was qualified was unreasonable, arbitrary, capricious or discriminatory. In short, the Union has failed to prove that Bourdo was not "qualified", and therefore, she was entitled to the vacancy on the basis of her greater seniority.

The Union's alleged violation of Section 13.05 was first raised after the hearing herein and must be considered waived. Even if there had been a finding of a violation of Section 13.05, the relief would not result in the grievant's assignment to the first shift. At most, this was a technical violation and a cease and desist order would be the appropriate remedy.

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 grievance is denied.

Dated at Madison, Wisconsin this 13th day of December, 1990.

By _____
Lionel L. Crowley, Arbitrator