

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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PEPIN COUNTY HUMAN SERVICES :  
AND COURTHOUSE EMPLOYEES LOCAL 1946-A, :  
AFSCME, AFL-CIO, :  
 : Case 37  
and : No. 44310  
 : MA-6252  
PEPIN COUNTY :  
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Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of Pepin County Human Services and Courthouse Employees Local 1946-A, AFSCME, AFL-CIO.

Mr. Richard Ricci, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 S. Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Pepin County.

ARBITRATION AWARD

Pepin County Human Service and Courthouse Employees Local 1946-A, AFSCME, AFL-CIO (hereinafter Union) and Pepin County (hereinafter Employer or County) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of disputes involving the interpretation or violation of the agreement by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission. On July 17, 1990, the Union filed a request to initiate grievance arbitration with the Commission. Said request was concurred with by the County on July 23, 1990. On August 1, 1990, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on October 2, 1990, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. No transcript was made of the hearing. The parties submitted briefs, the last of which was received on October 24, 1990, and the parties waived the submission of reply briefs. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

On April 20, 1987, the Director of the Pepin County Department of Human Services, Richard M. Sundbo (hereinafter Director), posted a notice and job description for the position of Social Worker I. The job description stated in relevant parts as follows:

Function of the Job: This is the entry level social work position where under the supervision of the Social Work Supervisor (Intervention Services Section) or the supervision of the Director and the regular monitoring of the Social Worker V (Long Term Support Section Lead Worker) provides social case work for a wide range of persons and families in need of human services, provides counseling and makes recommendations for administrative Purchase of Service decisions. Performs other related work as assigned.

. . .

Qualifications:

Minimum Training and Experience: Graduation from an accredited college with a degree in Social Work or a related human services field; or any combination of training and experience that provides the required knowledge, skills and abilities.

A member of the bargaining unit, Alice Baldini (hereinafter Grievant) posted for the Social Worker I position. On April 24, 1987, the Director offered the Grievant the position, which she accepted on April 27, 1987. On May 12, 1987, the Director retracted the offer made to the Grievant because the original posting was not done properly. Upon reposting, the position of Social Worker I was not offered to the Grievant; instead, it was offered to a more senior bargaining unit employee.

On August 9, 1988, the job description for the position of Social Worker I was revised by action of the Human Services Board. The only revision occurred in the qualifications section, which was revised to read as follows:

Minimum Training and Experience: Graduation from an accredited college with a degree in Social Work. An equivalent combination of

training and experience may be considered.

On April 16, 1990, the County posted a notice and job description for the position of Social Worker I. The qualifications for said position were those contained in the job description as revised on August 9, 1988. Two bargaining unit employees, including the Grievant, posted for the position. Neither of the two bargaining unit employees had a degree in social work, although the Grievant did have a degree in education.

In a letter to the Grievant dated April 30, 1990, the Director stated in relevant part as follows:

I wish to acknowledge receipt of your posting for the vacant position of Social Worker I with the Pepin County Department of Human Services. Unfortunately, I am not permitted to consider your application for the position because you do not meet the minimum qualifications, specifically, "graduation from an accredited college with a degree in Social Work."

On May 10, 1990, a grievance was filed by the Union, stating that the two bargaining unit employees had been denied the posted position because of a lack of qualification, that the new qualifications were not relevant to the duties of the position, and that the position should be awarded to the most senior applicant with that employee made whole. At hearing the parties stipulated that the Grievant was the most senior employee to post for the position. The grievance was not resolved through the grievance procedure and is properly before this Arbitrator.

#### PERTINENT CONTRACT LANGUAGE

##### ARTICLE III - MANAGEMENT RIGHTS

Except as herein otherwise provided the Employer retains the rights as established by law, including the management of the work and the direction of the working forces, including the right to hire, promote, suspend, discharge or otherwise discipline for proper cause and the right to determine the table of organization is retained and vested in the Employer.

##### ARTICLE IV - SENIORITY

Section 2. The County recognizes and agrees to comply with the principles of seniority. Seniority rights shall, among other things, be applicable to increases and decreases in the work force, promotional opportunities, including lateral changes.

##### ARTICLE VI - JOB POSTING

Section 1. When a position covered by the Agreement becomes vacant or a new position is created, such vacancy shall be posted for seven working days on the main bulletin board in the courthouse, with copies sent to the individual employees through interoffice mail, and then published in the official newspaper. The posting shall list the pay, duties, on what day the job is to be filled, and qualifications. Employees interested shall apply by signing such posting within the seven working days period.

Section 2. All bargaining unit employees, including those on vacation or leave of absence, will be allowed to apply. Seniority and qualifications shall be considered in the selection of the successful applicant. The most senior qualified applicant shall be selected for the position.

Section 3. The successful applicant shall be given a ninety (90) day probation period on the new position at the applicable rate of pay. Employees on probation under this section shall be entitled to all rights and privileges of the contract. Should such employee not qualify or should he/she desire to return to his/her former position during this probationary period, he/she shall be reassigned to his/her former position without loss of seniority.

##### ARTICLE XVIII - MISCELLANEOUS

Section 1. The terms and conditions of this agreement supercede any County or department resolutions, ordinances, or rules and regulations which may be in conflict with this Agreement.

Section 7. The Employer has the right to establish reasonable work rules.

#### ISSUE

The parties stipulated to formulation of the issue as follows:

Did the Employer violate the collective bargaining agreement when

it failed to award the posted Social Worker 1 position to the grievant Alice Baldini?

If so, what is the remedy?

#### POSITION OF THE PARTIES

##### A. Union

On brief the Union asserts that it is undisputed that the Employer unilaterally changed in two ways the minimum job qualifications for the Social Worker 1 position prior to the April 1990 posting in that, first, the educational requirements were upgraded so that a specific degree in Social Work would be required instead of a college degree in social work or related human services field and, second, that equivalent training and experience would no longer automatically be considered as it had in 1987. The Union states that it agrees that it is a management right to change job qualification but only if such new qualifications are necessary to perform new job duties, if such new qualifications are neither unreasonable, arbitrary nor capricious, and if such new qualifications are not established in a manner that violates the rights of employees as provided in the labor agreement. The Union asserts that if those three conditions are met, the only recourse for the Union is to bargain the impact of such a change. But, the Union argues, the Employer failed to meet all three of the conditions listed above.

Specifically, the Union argues that there are no new job duties; that the new job qualifications are unreasonable simply because they are not needed to do the job; that the idea that a specific degree in social work is needed to perform job duties in the human services department is simply specious; that several other employees of the human services department have performed well without the benefit of a degree in social work; that the new qualifications serve no legitimate interest of the Employer; that the 1988 Social Worker 1 job description states that an equivalent combination of training and experience "may" be considered; that the word "may" is being used arbitrarily by the Employer; that the County did consider such training and experience when it hired one employee; that the County is picking and choosing when the word "may" will apply; that such actions are irrefutably arbitrary; that the new qualifications are merely at the whim of the County; that the County changed the qualifications because it was displeased with the delay in filling positions, a delay caused in part from a grievance over a posting; and that the bargaining unit employees' lawful use of the grievance procedure cannot be used by the County as a reason to capriciously change job qualifications.

The Union argues that the Management Rights clause of the collective bargaining agreement applies a "just cause" standard to promotions; that the Employer did not have just cause to deny the Grievant the promotion to Social Worker I; that the agreement guarantees that seniority be considered in promotional opportunities; that by offering this job to someone outside the unit, the County will violate the Grievant's seniority rights; that the agreement guarantees bargaining unit members that the most senior qualified applicant for the position shall be selected; that the Grievant is qualified; that the Grievant was found to be qualified for the position of Social Worker I in 1987; that no change in job duties has occurred since then; that no evidence was introduced that the State considers her unqualified; that she should have been given a 90 day probationary period to qualify for the position; that the agreement guarantees that the Employer will not establish unreasonable work rules; that job qualifications that unreasonably deny employees promotional opportunities are unreasonable work rules; that the agreement states that County resolutions and rules cannot violate the provisions of the contract; and that the County violated the just cause, seniority and posting provisions of the contract in an unreasonable, arbitrary and capricious manner.

For a remedy, the Union requests the Arbitrator to order the County to reinstate the 1987 Social Worker I job description language concerning job qualifications or, in the alternative, to order the County to consider any combination of training and experience that provides the required knowledge, skills and abilities of the Social Worker I position. In addition, the Union asks the Arbitrator to order the County to award the Social Worker I position to the Grievant and to make her whole for any lost wages suffered as a result of her disqualification.

##### B. County

The County argues that it has retained the right to determine specifications and employee qualifications; that an employer possesses the inherent authority to make determinations as to relative skills and abilities required for a position unless the employer has bargained that authority away; and that an employer's determination in this regard must be deferred to and, in fact, cannot be disturbed unless the employer has exercised its authority in an arbitrary and capricious manner. Specifically, the County argues that it has not bargained away its right to determine the duties and qualifications for a given job, its right to determine employment procedures or its right to assess an employee's qualifications for a specific job; that it has retained these rights as part of the Management Rights clause of the collective bargaining

agreement; that the County has retained those rights "established by law" which includes the authority to establish the qualifications it deems necessary for its positions; that the County has established certain duties for the position of Social Worker I; that it has also established the qualifications it believes a Social Worker I should possess in order to perform the duties required; that the County has the authority to prescribe the minimum qualifications necessary for a position within the organizational structure; that the County is in the best position to establish the qualifications of employees to meet its needs; that the County also has the right to change the qualifications for a position if it determines this is in the best interest of its clients; and that the County revised the qualifications for the Social Worker I position in 1987, giving the Grievant ample time to know about the college degree qualification that the County requires.

The County also argues that its past practice in hiring for the human services department does not apply to these circumstances; that while the Grievant may have been minimally qualified for the previous Social Worker I position in 1987, the present position has different responsibilities; that the Grievant has not been found to be qualified for the present position; that in one case in which the County hired an employee without a social work degree, it did so only after offering the job to a candidate with the degree who rejected the position; that to give effect to a past practice and to imply a contract provision which is not reflected in the written word of the contract, the record must demonstrate that this practice was (1) unequivocal, (2) clearly enunciated and acted upon and, (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties, citing Ashland School District, MA 5327 (Burns, 10/89); and that the Union has failed to show that the present matter is covered by any alleged past practice.

The County also argues that it has acted in good faith in changing the job description and required qualification for the Social Worker I classification based on sound business reasons; that no evidence has been presented that the County has been arbitrary, capricious or discriminatory in its determination of duties and qualifications for the Social Worker I position and its determination that the Grievant does not meet the requirements; that there has been no violation of the collective bargaining agreement; and that the arbitrator should dismiss the grievance in its entirety.

#### DISCUSSION

The facts in this case are not in dispute. In essence, the dispute boils down to whether the County violated the collective bargaining agreement when on April 30, 1990, it denied the Grievant a promotion to Social Worker I based upon qualifications revised on August 9, 1988. Prior to August 9, 1988, the qualifications required were a college degree in social work or a related human service field. The revision limited the qualifying degree to one in social work. In addition, prior to that date, the job description provided for "any combination of training and experience that provides the required knowledge, skills and ability." The revision stated that an "equivalent combination of training and experience may be considered."

The Union asserts that it is a management right to change job qualifications, but only as follows: (1.) if such new qualifications are necessary to perform new job duties; (2.) if such new qualifications are neither unreasonable, arbitrary nor capricious; and (3.) if the establishment of such new qualifications do not violate the rights of employees as provided for in the collective bargaining agreement. According to the Union, the County has failed on all three counts, and therefore the Union seeks various remedial and make whole remedies.

As to point 1 above, the Union asserts that there were no changes in the function or in the characteristic duties of the job, in the knowledge, skills and abilities required for the job, nor in the personal attitudes and attributes sought in the employee performing the job. The Union asserts that testimony showed that there were no mandatory state rules as to the educational requirements for county social workers. The inference is that since there were no changes in the job and no state mandate to change the qualifications, the County was in error in changing the qualifications necessary to be considered for the Social Worker I position.

But this entire line of argument is based on the assumption that the County can only change the qualifications for the position if the job description changes. The Union does not point to any precedent to support this argument. Indeed, absent language limiting the County's right to do so and assuming the qualification are not unreasonable, arbitrary or capricious, the County can change the qualifications for a position even if nothing in the job description has changed. This case is a good example. The County does not wish to change the duties of Social Worker I, but it does wish to have the work performed at a higher level of competence. The decision to change the level of competence at which it wants its jobs performed is certainly within the power of an employer. The County's use of a college degree in the particular field as an indication of said competence is common and appropriate. Under the Union's argument, the County could never raise the level of competence at which its jobs are performed unless it changed the job description in some way. I

disagree.

As to point 2 above, the Union is correct when it argues that said qualifications must not be unreasonable, arbitrary or capricious. The Union argues that the County's action in this matter is all three.

The job qualifications are unreasonable, according to the Union, simply because they are not needed to do the job, pointing to various other social workers for the County who do not have a degree in social work. The fact that the work has been done in the past by employees without a degree in social work cannot be used to prevent the County from raising the level of competence at which it wants its work performed. The Union's argument would require the employer to promote people without said degrees, precluding the County from hiring social workers with degrees in social work. Such an approach would prevent an employer from ever upgrading the educational level of its employment force. Such a decision would be unreasonable. The Union also argues that the new qualifications are unreasonable because they serve no legitimate employer interest. It is in the County's interest to hire the most qualified person for the job. One way to secure such employees is to require appropriate educational training. Thus, contrary to the Union, I find that establishing a degree in social work as a qualification for Social Worker I is reasonable.

The Union also argues that the revised job qualifications are arbitrary in that the County is simply picking and choosing when it "may" consider an equivalent combination of training and experience, choosing in this case not to do so which, in the opinion of the Union, is irrefutably arbitrary. The fact that an employer retains discretion in some matter does not necessarily mean that the employer is acting arbitrarily if it chooses not to exercise its discretion. Indeed, the County testified it would consider equivalent training and experience if it was unable to hire a person with a degree. This is not an arbitrary use of discretion but a rational use.

The Union contends that bargaining unit employees' use of the grievance procedure was a reason the County capriciously changed the job qualifications.

Said contention is not supported in the record. The Union also contends that the County Board in revising the job qualifications lacked consideration for the rights of bargaining unit members which shows a capricious attitude. Again, the record does not support this contention. In either case, the County's revision of the qualifications and the qualifications themselves are not capricious.

Thus, I find that, absent contract language to the contrary, the County was within its rights to change the qualifications for the position of Social Worker I, provided said qualifications are not unreasonable, arbitrary or capricious, and I find that said qualifications are not unreasonable, arbitrary or capricious.

As to point 3 above, the Union argues that the County violated the collective bargaining agreement in several ways. First, it contends that under the Management Rights clause, promotions are controlled by the "just cause" provision, and that the County did not have just cause to deny the Grievant the promotion to Social Worker I. While this is a creative reading of the language, it is not an acceptable reading. To read the clause as proposed by the Union would apply a "just cause" standard to the hiring decisions of the Employer. No, just cause refers to discipline and, as no discipline is involved in this case, the County did not violate Article III - Management Rights in this case.

The Union also argues a violation of Article IV - Seniority which states, in part, that seniority shall be applicable to promotional opportunities. This section cannot be read in a void, however, for more is involved in promotions than seniority. In this case, Article VI - Job Posting states that seniority and qualifications shall be considered in the selection of the applicant and the most senior qualified applicant shall be selected. The Union also argues that the County violated this section in that the Grievant was the most senior qualified applicant for the position of Social Worker I.

There is a difference between competent and qualified. On this record the Grievant appears to be a very competent employee. But on the face of the job posting, she is not qualified for the position of Social Worker I. Said posting requires a degree in social work, and the Grievant does not have such a degree. As discussed above, the qualifications as revised by the County are not unreasonable, arbitrary or capricious and, therefore, the County was within its rights to change the qualification. As it is only when the employee meets the qualifications for the position that the seniority of the employee determines who will get the position and as the Grievant is not qualified for the position, seniority is not applicable to this promotion. Therefore, I find no violation of either Article IV - Seniority or Article VI - Job Posting.

Some apparent unfairness appears to exist in this case since the Grievant was previously offered a Social Worker I position three years ago, which offer was rescinded some time later. As nothing has changed in the job description, the Union sees the situation as ludicrous that the Grievant is no longer considered qualified. The County testified that this Social Worker I position,

while having the same job title, has different job duties than the previously vacant position. The position in dispute requires skills that one would learn in getting a degree in social work, as opposed to the earlier opening for which the Grievant qualified which required skills which could be learned on the job. This testimony was not refuted. Therefore, even though it appears, in some sense, to be unfair, I believe that the Grievant was not qualified to apply for the position of Social Worker I.

The Union also argues that the change in job qualifications violated the collective bargaining agreement and, therefore, violated Article XVIII, Section 1. As I find no other violation of the collective bargaining agreement, I do not find a violation here. Finally, Article XVIII, Section 7, states that the Employer will not establish unreasonable work rules. Job qualifications that unreasonably deny employees promotional opportunities, according to the Union, are unreasonable work rules. I do not find any unreasonableness to the Board's action and, therefore, no violation of Article XVIII, Section 7.

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

#### AWARD

1. That the Employer did not violated the collective bargaining agreement when it failed to award the posted Social Worker I position to the Grievant, Alice Baldini.

2. That the grievance is dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of January, 1991.

By \_\_\_\_\_  
James W. Engmann, Arbitrator