

BEFORE THE ARBITRATOR

-----  
 In the Matter of the Arbitration :  
 of a Dispute Between :  
 :  
 GENERAL TEAMSTERS UNION LOCAL 662 : Case 7  
 : No. 45265  
 and : MA-6543  
 :  
 VILLAGE OF SPENCER :  
 :  
 -----

Appearances:

Mr. John D. Day, Attorney, appearing on behalf of the Employer.  
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by  
Ms. Marianne Goldstein Robbins, appearing on behalf of the Union.

ARBITRATION AWARD

The Employer and Union above are parties to a 1989-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the promotion grievance of Verlyn Hoops.

The undersigned was appointed and held a hearing on May 9, 1991 in Spencer, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on May 30, 1991.

STIPULATED ISSUE:

Did the Employer violate the terms of the collective bargaining agreement when it promoted Gerald Seitz to working foreman instead of the senior applicant, Verlyn Hoops?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 16 - JOB POSTING

Section 1. Newly created jobs or all vacancies, except Waste Water Operator and Water Department Operator classifications, shall immediately be posted for a period of five (5) working days. Seniority shall govern which employee gets the job, provided such employee is qualified to learn the job.

. . . .

## FACTS

The Village maintains a four-person Department of Public Works, in which grievant Verlyn Hoops is the senior employe. Hoops and the other employes have a wide range of duties including road repair, snow removal, well-digging, and water supply and waste water treatment plant operation. The City has at times had a Director of Public Works; from 1979 to the spring of 1990 the Director of Public Works was Larry Pokallus. In Pokallus' absence, Hoops substituted for him, including for extended periods. Hoops served in effect as director or foreman for a full year in 1976, when the position was vacant, and served again as leader of the employes from Pokallus' departure in spring, 1990 until January, 1991. It is undisputed that Hoops performed the duties assigned him without criticism from the Village's management, and the record does not show any discipline given to Hoops.

In December, 1990 the Village determined to create the position of Working Foreman, a bargaining unit position with responsibility to coordinate employes' work, perform orientation and training, and other duties described in the posting as follows:

### Primary Objective:

Supervise and maintain all Village Parks, Streets, Buildings and Equipment and maintain employee relations in a manner which will assure safe and efficient completion of assigned tasks consistent with Standards and Policies set by the Spencer Village Board.

### Major Accountabilities/Responsibilities:

1. Coordinates all work activities of the Public Works employees to make the most efficient and effective use of available personnel and equipment.
2. Keeps personnel currently informed and properly motivated to capably carry out their responsibilities.  
--- Delegates daily work assignments and maintains a high level of discipline at all times so full use is made of all available hours.
3. Calls attention to performance deficiencies and make suggestions for how work can be improved, and reports improved or outstanding work performance.
4. Recognizes employee dissatisfaction and problems before they become serious, and keeps the Chairman of the Personnel Committee informed on all important developments in employee relations.
5. Performs orientation and training of personnel to make them useful and effective as rapidly as possible. Makes effective recommendations as to discipline and termination to the Personnel Committee.

6. Ability to maintain lift stations and man holes and be able to train other employees in such maintenance.
7. Maintains preventive maintenance program on all Village Equipment.
  - Keeps accurate, up-to-date records and inventory of all Village Equipment.
  - Prohibits unauthorized use of Village Equipment for public or private use.
  - Prohibits the sale or disposition of any Village Equipment of assets without the consent of the Chairman of the Equipment Committee.
8. Performs tasks assigned by Village Board at the direction of the respective committee chairman. Responsible use of authority necessary to complete task in a timely manner.
9. Makes daily, periodic checks with the Village Clerk, informing of work being performed and location.
10. Responsible for the proper operation and maintenance of the Village Waste Water Treatment Plant, sewer system, Village wells and water systems and be knowledgeable in all areas.
11. Conduct themselves in a manner which displays good relationships with the Village residents.
  - Displays a positive attitude when answering residents grievances.
  - Encourage other personnel to display the same mannerisms.
  - Attends all regularly scheduled village Board Meetings.
12. All items purchased will require a requisition to the Village Clerk followed by a Purchase Order.
13. Performs other duties and responsibilities as assigned or required.
14. Has demonstrated leadership qualities in his every day work.

The Village also retained Tony McGrath, an employe of a private contractor, as an overall but part-time manager.

At a Village Committee meeting, at which all of the employes were present, the Village Board polled the employes as to whether they were interested in the Working Foreman job. It is undisputed that Hoops said "it depends how much it pays." Two other employes expressed no interest in the position, and Gerald Seitz said "definitely, I want to get this work done." This was before the position was posted; Hoops, acting in what amounted to the same position, had been paid 25 cents per hour when acting in the position since 1988. On January 7, 1991 the Village Board met again and unanimously voted to give the Working Foreman position to Gerald Seitz. Bettye Nall,

Village President, testified that the Board decided to give Seitz the job because the members felt that he was "qualified to learn the job," in turn because he was willing to participate in training to learn whatever needed to be learned. Nall testified that Hoops had been free to take classes in various specialties related to the department's operations, but had never expressed any desire to. Nall stated that the Village has never refused an employe an opportunity for training and that this is encouraged, but she admitted that she could not recall the Village Board ever asking Hoops to undergo such training.

Gerald Seitz testified that he has taken no classes concerning the operation of the waste water treatment plant, but has taken a number of other classes. Seitz also worked as a plumber for five and one-half years, and does most of the underground work for the Village. Seitz testified that he can operate the grader, but not as well as Hoops, because the employes tend to have different areas of strength. Seitz testified that Hoops has not gone down into an underground hole in ten years, because he does not fit. But Seitz also stated that he would expect to go down in the hole himself because he is the junior employe of the two.

Hoops testified that he has gone down in holes when there is a universal pipe which breaks, because he knows how to remove the pipe. Hoops also testified that he has taken day-long courses on hydrants and water fittings, but has not been asked to attend any schooling in the last three years. Hoops testified that he did not give much thought to additional training in the last year because he took on the project of conforming all of the Village's water meters to the water meter registers, and that this took every spare minute all spring and summer. Hoops testified that with the exception of attending Village Board meetings, he had performed all of the functions listed in the job posting without complaint from management over the years. Hoops made an exception for item 10, in which he testified he does not hold the licenses necessary to operate the Waste Water Treatment and Water Treatment Plants, because Gerald Mardin has the full qualifications for the Waste Water Plant and Larry Tobin was the Water Department Operator and held that license.

Arlyn Ewart, former Village Clerk, testified that Seitz was recommended by the Personnel Committee for selection as Working Foreman because Seitz had taken the trouble to learn how to operate and maintain the new Waste Water Plant, with which the Village had been having problems, while Hoops didn't seem to have much interest in it. Ewart also testified that he felt Hoops was qualified to do the work of the Working Foreman but didn't seem to have the interest.

#### The Union's Position

The Union contends that Article 16, Section 1 is a "sufficient ability" clause in which the senior employe is promoted even if another applicant is more qualified as long as the senior applicant is also qualified. The Union cites several arbitration decisions to this effect, and contends that the burden of proof is on the Employer to show that the bypassed senior employe is not competent for the job. The Union asserts that the Village has failed in this burden because Hoops demonstrated his competence not only to learn but to perform the duties of Working Foreman over a period of many years. The Union argues that Hoops trained virtually all the current staff, has served as acting director, has performed work in all of the various operations of the Village, and has done so without criticism from management. The Union notes that the Village witnesses testified not that Hoops was not competent to perform the duties of the position, but that Seitz was deemed to be more competent. The Union contends that this is irrelevant under the standard applied by this collective bargaining agreement.

### The Employer's Position

The Employer contends that Mr. Ewart is the key witness, because he was well qualified to know the qualifications of both applicants. The Employer notes that Ewart testified that Seitz was more qualified, because he was willing to learn everything necessary to perform effectively in the position. The Village notes also that Bettye Nall, the elected chief official of the Village, testified that Seitz was better qualified based on attitude and job performance, and that Hoops was not qualified to learn all of the parts of the job. The Village also argues that it should not be forced to pass up the "younger man with demonstrated ability" in favor of a man "the age of Mr. Hoops". The Village argues that the appointment of Gerald Seitz as Working Foreman should stand.

### DISCUSSION

It requires little analysis to conclude that there is nothing in this record which demonstrates that grievant Hoops does not meet the contractual standard for this promotion. Article 16, Section 1 clearly gives primary focus to seniority, and provides only that the employe must be "qualified to learn the job." Here, the job of Working Foreman has been filled in effect, though perhaps not under that name, by Hoops on and off for over a decade. The fact that no substantial criticism of his job performance was brought forth in testimony on behalf of the Employer speaks volumes as to Hoops' capacity to learn the job, and indeed perform it effectively as he stands.

In promoting Seitz instead of Hoops, the Village has misread this clause in two ways. First, "qualified to learn the job" is a lesser standard than "qualified to perform the job effectively from day one," a standard which Hoops clearly has met. "Learn the job" does not include "learn every aspect of any Village function which could conceivably be relevant." Such a standard is so open-ended that it would be an open door to an employer finding any employe unqualified. There may indeed be differences between Hoops' willingness to learn additional facts and Seitz' willingness, but in the absence of any evidence that Hoops was ever requested to engage in such learning, management can hardly pin significance on it. The second aspect of the Village's misreading of this clause is that no comparison between the two employes is actually permitted under this language. There are many contracts which provide for a balance between seniority and qualifications, in varying terms, but this is not one of them. Finally, it appears that there may have been aspects of age discrimination in the Village's decision not to promote Hoops, because there was testimony that he had considered retirement as an option (though he denied any serious intention to retire). A desire to favor "younger men" than a 62-year old is hardly a defense.

The parties stipulated at the hearing that in the event that the Union prevailed, the remedy would be that Verlyn Hoops would be entitled to the position of Working Foreman as of January 8, 1991, with backpay as of that date in accordance with the rate being negotiated in the course of the parties' negotiations for a successor to the 1989-91 agreement. The result of this matter therefore makes that stipulated remedy applicable.

For the foregoing reasons, and based on the record as a whole, it is my decision and

### AWARD

1. That the Employer violated the terms of the collective bargaining agreement when it promoted Gerald Seitz to Working Foreman instead of senior

applicant Verlyn Hoops.

2. That the Employer shall, forthwith upon receipt of a copy of this Award, enact the stipulated remedy.

Dated at Madison, Wisconsin this 3rd day of September, 1991.

By \_\_\_\_\_  
Christopher Honeyman, Arbitrator