

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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ONEIDA COUNTY COURTHOUSE EMPLOYEES, : Case 82  
LOCAL NO. 158, WPPA/LEER : No. 45707  
 : MA-6717  
and :  
 :  
ONEIDA COUNTY (COURTHOUSE) :  
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Appearances:

Mr. Gerald W. Gravesen, Business Agent, WPPA/LEER, appearing on behalf of  
the Union.  
Mr. Lawrence R. Heath, Corporation Counsel, appearing on behalf of the  
County.

ARBITRATION AWARD

Oneida County Courthouse Employees, Local No. 158, WPPA/LEER, hereinafter referred to as the Union, and Oneida County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a staff member as Chairman of a three member Arbitration Board to hear and decide a grievance over the meaning and application of the terms of the agreement. On June 5, 1991, the Commission designated Lionel L. Crowley as Chairman of the Arbitration Board. Ms. Marilyn Tucker was designated the Union representative and Mr. Charles Rude was designated the County representative on the Arbitration Board. Hearing was held in Rhinelander, Wisconsin on July 17, 1991. The hearing was not transcribed and the parties submitted post-hearing briefs and reply briefs, the last of which were exchanged on September 6, 1991.

BACKGROUND

On February 4, 1991, the County posted two newly created Social Service Aide positions. The posting listed the qualifications as well as the training and experience required as follows:

QUALIFICATIONS:

- Ability to communicate effectively both orally and in writing;
- Knowledge of office practices and procedures, terminology and equipment;
- Knowledge of Agency rules, regulations, policies and procedures;
- Skill in typing, transcribing, wordprocessing and computer data input;
- Ability to compile, analyze, record and assemble data and information in a meaningful and effective manner;
- Knowledge of business math, bookkeeping practices and business English;
- Ability to generate, initiate and complete projects and programs;
- Ability to maintain confidentiality of Agency files and information;

-- Possession of a valid Wisconsin driver's license.

TRAINING AND EXPERIENCE: Graduation from high school, supplemented by a minimum of six (6) credits of course work in psychology, sociology and/or related areas and considerable office experience; or any combination of training and experience which provides the required knowledge, skills and abilities.

Six employees signed the posting and all were interviewed by a panel consisting of Ruth Peterson, Social Services Supervisor, Tara Vandenberg, Social Services Supervisor and Peggy Horne, Fiscal Administrator. All employees were asked the same questions by Peterson and each member of the panel separately rated the response on a 1-5 point scale.

Each member's points for the questions were totalled and then all three totals were totalled. One of the employees selected for a position had greater seniority than the grievant and the filling of that vacancy is not an issue in these proceedings. The County selected Debra Jensen whose date of hire is November 11, 1988 and whose total score was 91 to fill the second vacancy. The grievant's date of hire is September 8, 1986 and her total was 59. The grievant filed a grievance which was stipulated to meet all procedural requirements for appeal to the Arbitration Board.

#### ISSUE

The parties stipulated to the following:

Did the County act appropriately and consistent with the collective bargaining agreement in filling the Social Services Aide position?

#### PERTINENT CONTRACTUAL PROVISIONS

##### ARTICLE 6 - SENIORITY - PROMOTIONS - LAYOFF

. . .

Section C: Department Seniority: The principal of departmental seniority with ability and qualifications shall govern in promoting, demoting, transferring, filling vacancies and new positions. Departmental seniority shall apply in any office having two or more Union employees.

. . .

Section E: Whenever a vacancy arises or a new position is created which would be under union jurisdiction, the County will post a notice of such vacancy or new position on the union bulletin board for a period of five (5) working days. This posting shall include job qualifications and wage scale. At the end of the five (5) working day posting, the County will remove the notice and the job will be filled within five (5) working days. Employees on vacation or sick leave will be notified of job postings by the Union. Present non-probationary employees who meet the minimum qualifications and abilities as defined in the job description within the bargaining unit shall be given

preference before any new employee is hired. An employee who is selected to fill a posted position cannot post for another job at the same or lower rate for a period of six (6) months, except for health reasons. The posting procedure shall apply to vacancies in all deputy positions so that consideration may be given to employees within the Courthouse; however, the elected official shall have the right to appoint the deputy of his/her own choice. A copy of all job postings shall be mailed to the secretary of Local #158.

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Section G: Whenever the County finds it cannot follow the principal of seniority, the question is subject to grievance procedure between the County and the Union.

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#### ARTICLE 7 - VESTED RIGHTS OF MANAGEMENT

Section A: The right to employ, to promote, to transfer, to discipline and discharge employees, and to establish work rules is reserved by and vested exclusively in the Oneida County Board through its duly appointed Personnel Committee and duly appointed department heads. (The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure).

#### UNION'S POSITION

The Union contends that since 1973 the criteria for promotion has remained unchanged and is departmental seniority in conjunction with ability and qualifications. It submits that the County selected a junior employee over the grievant to fill the Social Services Aide vacancy and the County must demonstrate by specific and understandable evidence that the junior employee is more qualified. It argues that the selection of the junior employee was based solely on the oral interview and that the collective bargaining agreement was not considered. It asserts that the interviewers rated applicants on personal opinion and not objective facts and no facts were produced to support their opinions. It insists that the opinion of the interview panel may reflect their personal bias. The Union acknowledges that the interview process may be utilized as a tool in determining fitness for a position but it insists it cannot be the sole criteria in determining fitness. It submits that the evidence established that the County's past practice has been to promote the senior applicant who had the necessary qualifications for the position and then to use the probationary period to determine if the promoted applicant had the ability to perform the job. It claims that the County's attempt to prove that oral interviews provided the sole basis for promotion in the past, particularly 1990, must be rejected. It notes that the Union was never notified of this unilateral change in promotion criteria nor was there ever any offer to bargain the impact of such a change. Additionally, the Union denies that it ever acquiesced in such a change and the mere fact that no grievances were filed or that an individual withdrew a grievance fails to establish that the Union waived any contractual rights with respect to promotions.

The Union maintains that the grievant possessed the minimum qualifications for the vacant position and her performance appraisals rated her as "Competent" or "Exceeds Requirements." It alleges that the interview panel's conclusion that the grievant did not meet the minimum qualifications contradicts the prior performance appraisals. The Union submits that the County produced no factual evidence that the grievant was not qualified and that the County is obligated to comply with the seniority provisions of the parties' agreement.

The Union asks that the County be ordered to cease and desist from basing promotions solely on the results of an oral interview and that the grievant be promoted to the position of Social Services Aide with benefits retroactive to February 15, 1991.

#### COUNTY'S POSITION

The County contends that the plain and full meaning of Article 6, Section C of the parties' agreement applies to the process of filling the vacancy of Social Services Aide. It insists that the Union is attempting to gut this provision by making seniority paramount and ignoring the phrase: "with ability and qualifications." It submits that all three criteria must be taken into consideration. The County claims that all the criteria were considered by it as the Personnel Department noted the seniority of each applicant and reviewed each applicant's training and experience. The County points out that the contract does not prescribe the method of assessing abilities and qualifications and its method of evaluation is neither arbitrary nor capricious. It notes that three interviewers uniformly asked a series of questions of each applicant and each rated the response. The County submits that there was no bias in the interview process and the result was that the grievant was found not to be qualified for the vacancy. It submits that there were no inconsistencies in the scoring and the determination that the grievant did not meet the qualifications for the position is underscored by the disparity in cumulative scores, 59 for the grievant and 91 for the successful

applicant.

The County refers to the testimony of Carey Jackson that in the recent past, candidates have been interviewed and a junior employee selected for a number of vacancies including Assistant Real Property Lister, Assistant Register in Probate, Account Clerk I, Deputy Treasurer and Deputy Registrar of Deeds. It submits that the Union did not challenge the process for those positions. The County argues that it has not changed the manner in which it has utilized the interview process and the mere claim that the Union did not know about it makes no difference. It maintains that the evidence demonstrates that the County's selection process was neither arbitrary nor capricious and the interview process and its determination that the grievant was not qualified should be allowed to stand. It asks that the grievance be dismissed.

#### UNION'S REPLY

In reply, the Union contends that it is not seeking to remove ability and qualifications as requirements for promotions and while it recognizes that oral interviews may be used as a tool, it takes the position that it cannot be the sole criteria for promotion as the County desires. It insists that the interview may be used as an aid in judging ability or to verify ability but cannot be the sole basis for determining ability, and other factors must be taken into account. The Union claims that in the past the County has considered seniority, ability and qualifications, and if the senior applicant possessed or exceeded minimum qualifications, that person was awarded the position and the County utilized the probationary period to determine ability.

Here, according to the Union, the County only considered the oral interview and used a process outside the agreement to fill the position. The Union reiterates its position that the interview panel's conclusion was not based on any evidence submitted in this case. The Union also asserts that any failure to file grievances or the withdrawal of any grievance does not establish a "past practice" for any future grievances. The Union requests that the grievance be sustained and the grievant be made whole.

#### COUNTY'S REPLY

The County contends that contrary to the Union's arguments it has not used the oral interview as the sole criteria for promotions. It points out that the seniority clause is a "modified seniority clause" and the order of listing factors does not determine the weight to be given the factors but the weight varies from case to case. In the instant case, it notes that there is not a significant difference in the seniority of the grievant and the successful applicant but the interview panel, based on uniformly asked questions, determined that the grievant did not demonstrate the necessary qualifications for the job and the successful candidate did. According to the County, it may properly use the oral interview process to determine ability so long as this method is fair and nondiscriminatory. The County submits that the probationary period is not intended as the means of determining qualifications of applicants rather it permits the County to assess whether an employee qualified in theory is qualified in practice. It notes that Carey Jackson testified that the applicants' employment histories were reviewed for the necessary training and experience and then given an oral interview, thus the oral interview was only one element of several utilized by the County. The County maintains that the evidence failed to prove that the interview questions were not appropriate or meaningful or that the evaluation by the panel was internally inconsistent.

The County asserts that the prior evaluations of the grievant in a different job do not rebut the oral interview scores. The County maintains that its interview process was reasonable and the Union has failed to show any

violation of the contract and it asks that it be found to have acted appropriately in filling the Social Services Aide position.

#### DISCUSSION

Article 6, Section C of the parties' collective bargaining agreement states as follows: "The principal (sic) of departmental seniority with ability and qualifications shall govern in promoting, demoting, transferring, filling vacancies and new positions." This is a modified seniority clause described as a "hybrid" clause which requires consideration and comparison of both seniority and relative ability. 1/ The Union has argued that the County has given no consideration to seniority but has relied solely on the results of its oral interview, whereas the County has argued that the Union is ignoring the ability and qualifications criteria and relying solely on seniority. The plain language of Article 6, Section C requires that seniority with ability and qualifications must be considered and the weight given to each factor must be determined on a case by case basis. The main issue in dispute is the oral interview conducted by the County. The Union is not challenging the County's right to conduct an oral interview but is challenging the weight given by the County to the results of the oral interview. An oral examination must be reasonable and objective, fair, impartially administered and scored, and cannot be arbitrary, capricious, or discriminatory. 2/ Thus, it is necessary to review the oral interview and its administration to determine whether the oral interview met the requirements set out above.

A review of the interview questions themselves does not reveal that these were improper or unrelated to the job. 3/ No evidence was presented nor was any arguments made that the questions themselves were objectionable. Therefore, it must be concluded that the questions were job related, valid and fair.

The thrust of the Union's argument is that the oral interview was subjective and not supported by any facts. The questions as well as the answers are facts. Additionally, with any oral interview, subjective decisions with respect to the answers are going to be made. With three interviewers, the possible subjectivity of any one interviewer is diminished by the average of all three. Inconsistencies in the scoring of one interviewer would show up when the scores are tabulated so that any subjectivity could be eliminated. A review of the scores fails to establish any inconsistency and all three interviewers' ratings reflected the same approximate standing. 4/ All the applicants were asked the same questions by the same person and there was no evidence to show that any applicant was given consideration over any other applicant. The evidence fails to establish that the interview procedure was not fair or reasonable or that the interviews were administered and scored in an arbitrary, capricious or discriminatory manner. Therefore, the undersigned concludes that the oral interviews were valid and fair.

Additionally, the undersigned credits the testimony of Ruth Peterson that the grievant in the oral interview failed to demonstrate to the panel that she

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1/ Elkouri & Elkouri How Arbitration Works, (4th Ed. 1985) at p. 612.

2/ R.D. Werner Co., 45 LA 21 (Kates, 1965); Dakota Electric Association, 84 LA 114 (Boyer, 1985).

3/ Exs.- 10 and 11.

4/ Ex. - 12.

was skilled in certain areas, that the grievant lacked detailed knowledge of the job and did not communicate effectively. There is nothing in the record to indicate that Peterson's conclusion that the grievant was not qualified for the job was erroneous. The disparity in interview scores; 91 for the successful applicant compared to the grievant's 59, supports the conclusion that the grievant was not qualified for the job. As the grievant was determined to be not qualified for the job, the Union had to prove that the County erred in reaching this conclusion. 5/ The Union's reliance on the grievant's job evaluations in her prior assignments fail to establish that she was qualified for this particular job. The grievant's performance in her past and present jobs was that she was always competent or exceeded expectations but this is not sufficient to establish that she was qualified for an entirely different position. Therefore, it must be concluded that the County's decision that the grievant was not qualified is supported by the evidence.

The Union argued that the County was required to give the grievant the probationary period to prove her qualifications. This argument is not persuasive as the grievant did not meet the qualifications for the job. While the grievant met the minimum training and experience requirements, the evidence indicated she failed to have the necessary qualifications for it. 6/ Nothing in the agreement allows a trial period to establish qualifications. The probationary period allows a qualified employee to demonstrate she can successfully perform the job rather than allowing an unqualified employee to prove she is qualified for the job.

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5/ Ex-Cell-O-Corp. 86 LA 111 (Keefe, 1985).

6/ Ex. - 3.

Article 6, Section C provides that a minimally qualified employe has preference over new hires. Here, the position was not filled by a new hire but rather a qualified junior employe was selected. Therefore, no preference is automatically given the grievant. Where two employes are qualified, seniority and qualifications are weighed and the more senior may get the job where qualifications are relatively equal or the less senior may get it where there is a wide disparity in qualification and little in seniority. Inasmuch as the results of the oral interview were valid and demonstrated that the grievant was not qualified for the position, the grievant's greater seniority did not automatically entitle her to the position. In short, her seniority was outweighed by her lack of qualifications, and the County's selection of a less senior employe who had the qualifications to fill the position was therefore proper and did not violate the agreement.

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

AWARD

The County acted appropriately and consistent with the collective bargaining agreement in filling the Social Services Aide position with an employe junior to the grievant, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 18th day of October, 1991.

By Lionel L. Crowley /s/  
Lionel L. Crowley  
Chairman of Arbitration Board

UNION

I CONCUR:

\_\_\_\_\_  
Marilyn Tucker

\_\_\_\_\_  
Date

I DISSENT:

Marilyn Tucker /s/  
Marilyn Tucker

October 23, 1991  
Date

COUNTY

I CONCUR:

Charles Rude /s/  
Charles Rude

October 24, 1991  
Date

I DISSENT:

\_\_\_\_\_  
Charles Rude

\_\_\_\_\_  
Date