

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 MARATHON COUNTY DEPARTMENT OF : Case 206  
 SOCIAL SERVICES, PROFESSIONAL : No. 46607  
 EMPLOYEES UNION, AFSCME, AFL-CIO : MA-7017  
 :  
 and :  
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 MARATHON COUNTY :  
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Appearances:

Mr. Phil Salamone, Staff Representative, on behalf of the Union.  
Ruder, Ware & Michler, S.C., by Mr. Jeffrey T. Jones, on behalf of the County

ARBITRATION AWARD

The above-entitled parties, hereinafter the Union and County, are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on April 27, 1992, in Wausau, Wisconsin. The hearing was transcribed and the parties thereafter filed briefs and reply briefs which were received by July 10, 1992.

Based upon the entire record, I issue the following Award.

ISSUE:

Since the parties were unable to jointly agree upon the issue, I have framed it as follows:

Did the County violate Article 7, Section D, of the contract when it failed to award the vacant Social Worker II position in the Adult Services Unit to grievant Douglas W. Thomas and, if so, what is the appropriate remedy?

DISCUSSION:

Thomas, a Social Worker II in the Children's Unit with 17 years seniority, in April, 1991 bid for a vacant Social Worker II position in the Adult Services Unit. Such a lateral transfer would not have resulted in any increase in pay. The only other applicant for the position was Social Worker II Sandra Free who had about 6 years seniority. She was ultimately given the position after Tom Buttner, the Deputy Director of the Department, and Lee Goede, Social Worker Supervisor, gave oral examinations to both candidates on April 25, 1991, and decided that Free was better qualified for the position than Thomas because of her higher test scores. Thus, Buttner gave Free 17 points and Thomas 10 points; Goede gave Free 16 points and 10 points to Thomas. A score of 15 points was needed for passing.

Thomas subsequently requested and received documentation from the County pertaining to how the test was graded and he filed the instant grievance on May 7, 1991, where he claimed that the County's refusal to award him said position violated Article 7 of the contract.

In support thereof, the Union primarily argues that the County's "evaluation process was extremely limited in scope"; that the test given "had a number of serious problems"; that it was "not standardized or professionally administered"; that "its scoring was irrational and inconsistent"; and that

overall it was not "reasonable", hence violating Article 7 of the contract. It also asserts that Thomas at least should have been given a trial period. As a remedy, it requests that Thomas be awarded said position.

The County replies that it properly determined Free was better qualified than Thomas because of the test results; that its test was fair; that it was vested with the authority to make that determination; that its selection of Free over Thomas was not arbitrary or capricious; and that the County's determination as to who was the better candidate should be deferred to.

The pertinent contract language regarding this issue provides in Article 7, Section D, that:

"Filling Vacancy: When management reasonably determines that aptitude and ability are equal, seniority shall govern the promotion, transfers and filling of vacancies. The Union acknowledges that the employer need not follow seniority rules for management and other nonunion positions. The union acknowledges that the employer has a right to choose any persons within or without the agency for management and nonunion positions." (Emphasis added)

The key word here is "reasonable" because it establishes the standard by which the County's actions must be judged.

To be sure, the testing procedure herein was not perfect since there was some subjectivity in how the County determined that Free was better qualified than Thomas and since there were no clearly right or wrong answers for the test questions. Furthermore, Thomas is an excellent employe whose evaluations are relatively equal to Free's and whose credentials are at least as good as the ones which Free possesses. Indeed, it was Goede who encouraged Thomas to bid for the position because he, Goede, thought that Thomas was better qualified for the job. It therefore is readily understandable why he believes that he should have been awarded the position.

At the same time, however, the fact remains that both Buttner and Goede independently graded the oral exams given to Thomas and Free and that both of them independently determined that Free received higher grades than Thomas, with Buttner giving 17 and 10 points to Free and Thomas and with Goede giving them 16 and 10 points respectively. These remarkably similar scores establish that Free did much better in the test than Thomas, as her answers were more elaborate and detailed. 1/

In addition, the County before the exam determined that a score of 15 points was needed to pass the exam. Free met this requirement, while Thomas did not. The County therefore had the right to determine that Thomas was not qualified for the position, pursuant to Article 2(I) of the contract, entitled "Management Rights", which provides that the County retains the right "to determine the competence and qualifications of employees."

Having failed to meet this threshold requirement, the County therefore had no obligation to give Thomas a trial period, as it is well-established that

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1/ A possible reason for this is that while Thomas took only 15 minutes to answer the questions, Free took about 60 minutes.

an employe is entitled to a trial period only after he or she is qualified for the position. That did not happen here.

In light of the foregoing, it is my

AWARD

That the County did not violate Article 7, Section D, of the contract when it failed to award the vacant Social Worker II position to grievant Doug Thomas; the grievance is therefore denied.

Dated at Madison, Wisconsin this 21st day of October, 1992.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator