

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
WINNEBAGO COUNTY HIGHWAY DEPARTMENT : Case 223
EMPLOYEES UNION LOCAL 1903, AFSCME, : No. 47674
AFL-CIO : MA-7350
and :
WINNEBAGO COUNTY (HIGHWAY DEPARTMENT) :

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40,
AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. John A. Bodnar, Corporation Counsel, Winnebago County, appearing on

behalf

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to resolve the grievance of Robert Wodenjak. A hearing was held on October 15, 1992, in Oshkosh, Wisconsin, and the parties were given the opportunity to present their evidence and arguments. The parties filed initial briefs by December 17, 1992; the Union notified the undersigned on January 28, 1993, that it was not filing a reply brief, and the County notified the undersigned on February 18, 1993, that it was not filing a reply brief.

ISSUE:

The parties stipulated that the following issue is to be decided by the Arbitrator:

Did the County violate the collective bargaining agreement by awarding the Class 3 landfill position to Ken Haase instead of Bob Wodenjak? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE 5

PROBATIONARY EMPLOYEES

All newly hired employees shall be considered probationary employees for the first six (6) months of their employment. All such employees shall enjoy holiday pay benefits as hereinafter provided in this Agreement during the probationary period. All such employees, during the probationary period, shall not have seniority rights, vacation benefits, sick leave accumulation, or County contribution of the participating employee's mandatory contribution to the Wisconsin Retirement Fund. Upon completion of the probationary service, such employees shall enjoy seniority, vacation benefits, sick leave accumulation from the date of hiring, and County contribution of the participating employee's mandatory contribution to the Wisconsin Retirement Fund.

. . .

ARTICLE 6

SENIORITY

The County recognizes seniority. Seniority is defined as the length of County service as it is measured from the last date the employee was hired by the County and continuing until he quits or is discharged. Persons who move from temporary or seasonal positions to permanent positions without a break in their continuous service shall have such service recognized for purposes of establishing a last date of hire.

Eligibility for benefits shall be determined in accordance with the above.

The term "departmental seniority" shall mean length of service within a specific department.

. . .

ARTICLE 10

JOB POSTING

. . .

The County shall determine the qualifications of the applicants and in the event that qualifications as determined by the County are relatively equal, the applicant with the greater departmental seniority shall be selected to demonstrate his ability to perform the job during a trial/training period of not more than thirty (30) days actual performance on said job. The County agrees that if a selection is to be made, it will be done within ten (10) working days after the close of the aforementioned positing period. If said employee is deemed qualified by the County, he shall be assigned to fill the vacancy. Should such employee not qualify within the aforementioned thirty (30) day period or should the employee desire to return to his former position at any time within the said thirty (30) day period, he shall be reassigned to his former position without loss of seniority. In this event, the applicant next in line of seniority with the department shall be given preference pursuant to the above procedure until the vacancy is filled. Should no employee within the department apply or qualify for the vacant position, employees in the two remaining departments who have signed the positing shall be eligible for such vacancy in accordance with the above procedures using bargaining unit-wide seniority as the determining factor should qualifications be relatively equal. Should no bargaining unit employee apply or qualify for the vacancy, the County may fill the position from outside the bargaining unit.

QUALIFICATIONS DISPUTES: If there is any difference of opinion as to the qualifications of an employee, the Union may take the matter up for adjustment through the grievance procedure.

. . .

BACKGROUND:

In March of 1992 the County posted the following position:

DEPARTMENT: Highway - Landfill

POSITION CLASSIFICATION NUMBER: 3

SALARY RANGE: \$11.11 - \$12.14 Per Hour

POSITION PURPOSE: Operates heavy equipment in maintaining county highway operations including county and state roads and the county landfill. May perform snow removal relief during the winter.

WORK SCHEDULE: Hours and days are as per Union Agreement.

MAJOR DUTIES:

1. Operates heavy equipment such as graders, scrapers, dozers, etc.
2. Services, fuels, greases, and makes minor repairs.
3. Performs general unskilled and semi-skilled labor for the operation of the Highway Department.
4. Records the time, machinery, and materials used.
5. May oversee the work of a small crew of unskilled and semi-skilled workers.
6. Performs other related duties as assigned.

GENERAL QUALIFICATIONS:

1. Significant experience in the operation of and minor servicing of heavy equipment.
2. General knowledge of traffic regulations and practices.
3. Some knowledge of internal combustion engines, including ability to make minor repairs and adjustments.
4. Working knowledge of geographical area locations.
5. Ability to establish and maintain effective working relationships with fellow employees.
6. Ability to oversee the work of unskilled and semi-skilled laborers.
7. Ability to work under limited supervision.
8. Ability to understand and carry out instructions.
9. Possession of a valid Class A or Class B Commercial Driver's License.
10. High School or its equivalency, plus related experience preferred.

PHYSICAL QUALIFICATIONS:

1. Ability to perform strenuous or heavy manual labor.
2. Ability to work in continuous exposure to extremes in temperature and inclement weather.

Any Winnebago County Highway Department Employee Union Local 1903 employee interested in applying for this position, may do so by signing below. Other county employees may apply by completing the Winnebago County Personnel Department Application for Departmental Transfer/Position Change.

The posting was placed in different locations. At the highway shop, it was signed by Ken Haase, Paul DeLap and Kurt Hein. Hein was a temporary employee. Haase and DeLap were both probationary employees. Haase was hired by the County to work in the Highway Department on December 5, 1991, and DeLap was hired on November 25, 1991. Haase was awarded the position.

The Grievant, Bob Wodenjak, signed the posting at the landfill site. Wodenjak was originally hired by the County on December 1, 1975, and worked in the maintenance department in the courthouse and was a member of a different bargaining unit until he transferred on June 7, 1990, to his current position and became part of the Local 1903 membership. Wodenjak's title is utility groundsperson, and he is assigned to work at the County landfill.

Wodenjak spends most of his time operating a large piece of equipment called a tub grinder. The tub grinder is a stationary piece of equipment with a 500 horse power diesel engine. It operates like a crane, with a boom with claws that picks up material and moves the material to the tub which then grinds the material to be recycled. The operator must use four hand levers that control the boom and hook, as well as two foot levers that swing the boom back from right to left.

The parties disagree on whether the tub grinder is a piece of "heavy equipment" as defined in the collective bargaining agreement. Wodenjak calls it heavy equipment due to the size of it. Union steward Larry Buehring, who also works at the landfill, calls it heavy equipment and noted that the boom can inflict damage, as well as the tub which is spinning around while operating. County Highway Commissioner Raymond Grigar does not consider the tub grinder to be heavy equipment, because he considers heavy equipment to be pieces of equipment that are generally moving.

Wodenjak operates other pieces of equipment, such as a front end loader, a skid loader, a tandem dump truck, and lawn mowers. He also repairs and maintains all this equipment. He has never had any problems operating any of the equipment he has used. Wodenjak has not operated a large bulldozer, a large earth mover, scraper, grader, or garbage compactor.

The posted position requires running heavy equipment, such as the compactor, a large dozer, a crawler, an earth mover, most of the time. Grigar preferred someone with experience in those specific pieces of equipment. He has hired employees in the past without experience in specific pieces of equipment.

Bill Demler, an employee with the Highway Department for almost seven years, has no prior experience when he signed a posting to go to the landfill. Demler started as a janitor-watchman, went to Class 2, then to Class 3, and then to the landfill. Each time, he signed a posting to move up, and each time, he got a 30-day trial period. He described his start at the landfill in a dozer as a "learn as you go situation."

John Peterson, a mechanic and Union chief steward, investigated the grievance and found that other employees, such as Chris Karoses and Steve Krumenauer, moved from the janitor-watchman class to Class 3, without prior experience in operating Class 3 equipment. Grigar stated that both Karoses and Krumenauer had operated Class 3 equipment in jobs before coming to the County.

Louis Clark, who transferred from maintenance in the courthouse, is now in Class 3, and Grigar noted that Clark had no experience in Class 3 prior to getting that job. Clark went from a watchman to Class 3, and the only experience on Class 3 equipment came from what he got in the Highway Department. Grigar stated that there are times when he has accepted less than several years of experience, but that he has never accepted an employee with

the same or lesser qualifications than those of Wodenjak for a Class 3 position.

Grigar interviewed both Wodenjak and Haase for the posted position. Grigar felt that Wodenjak was not qualified because he had not been on the job at the landfill for a long time and Grigar felt he had no experience operating heavy equipment. Haase had worked for other employers where he had operated a bulldozer and crawler, and had some experience with a scraper, although none with a compactor. Grigar considered Haase to be highly qualified based on his past two employers, and Haase's references were favorable.

Grigar considers that Wodenjak's current work at the landfill is comparable to working with Class 2 equipment. Grigar believes that Wodenjak could post for a Class 2 position and he might qualify for that. Most of the employees who operate heavy equipment at the landfill are transferred in laterally from Class 3 in the Highway Department.

THE PARTIES' POSITIONS:

The Union:

The Union argues that since Haase was still a probationary employee at the time of the posting, he should not have been given a seniority right to post for any vacant position during that time period, and that the County must consider Wodenjak before considering any individual without seniority rights. The Union submits that the County cannot apply a relatively equal standard when comparing the qualifications of employees with seniority rights with those employees with no seniority rights.

In the past, a probationary employee has never been given a vacant position if a non-probationary employee applied for it. The only relevant question is whether Wodenjak met the minimum qualifications for the position, and the Union argues that he did. He met all of the general and physical qualifications as listed on the job posting, and testified that he had the experience, knowledge, ability, degree or license to perform the duties of the position. He had extensive experience operating the tub grinder, which is more powerful than other engines in equipment at the landfill. The tub grinder is as difficult to operate as the crawler tractor to which Haase was routinely assigned.

Moreover, other employees had been awarded jobs at the landfill without experience on the specific equipment located there. Demler never operated any of the landfill equipment before being awarded a Class 3 landfill position. Wodenjak should have been given the same opportunity to prove himself on the equipment, just as others had this opportunity. The Union contends that the County did not objectively evaluate Wodenjak's qualifications, since it incorrectly compared his qualifications to those of Haase.

The County:

The County notes that the bargaining agreement includes a modified seniority clause, in which departmental seniority controls the filling of vacancies where two or more applicants are relatively equally qualified. The County asserts that the burden of proof falls on the Union to prove arbitrariness, discrimination or bad faith before reversing management's decision.

The County has no duty to consider hiring an applicant for a position if the applicant is not qualified. Management is not required to respect seniority in relationship to job bidding qualifications where a bidder is not

qualified or would require significant training if hired. The County considered the Grievant unqualified for the position. The Grievant had no experience in the operation of graders, scrapers, bulldozers, etc., while the successful applicant, Haase, had 12 years of experience operating heavy equipment such as graders, scrapers, and dozers.

The County submits that neither Article 10 nor Article 5 of the contract prevented Haase from posting for the position. Article 10 differentiates the word "applicant" and the word "employee." It calls for the applicant with the greater departmental seniority to be selected in the event that qualifications as determined by the County are relatively equal. Once the Grievant minimally qualified for a position, he would have to show that he was equally or better qualified than other applicants, and he failed to sustain this burden of proof that he was equally or better qualified than Haase.

DISCUSSION:

Seniority rights are rights of employees which are balanced against other employees. They arise from the language of the collective bargaining agreement and exist to secure certain privileges to those employees with greater service on the job. In this contract, as in many, seniority allows employees to be promoted to better jobs under certain circumstances.

The parties bargained for a modified seniority clause to fill vacancies or posted positions. The contract gives recognition to the more senior employee in the event two or more applicants are relatively equal in qualifications. Article 10 also reaffirms the preference for senior employees by giving bargaining unit employees preference over those outside the bargaining unit. The parties also bargained for a six-month probationary period during which those on probation have no seniority rights.

It is often said that a contract must be construed as a whole. When one reads Article 5 (probationary section) in conjunction with Article 10 (job postings), it becomes clear that Article 10 excludes probationary employees from any consideration when non-probationary employees, or those with seniority, have bid for jobs.

Therefore, the County should not have considered Wodenjak and Haase together for the same position. The County should have considered Wodenjak's qualifications without giving any consideration to Haase, since Haase was a probationary employee with no seniority and due no consideration vis a vis a bargaining unit employee with seniority. 1/

The County needed to consider Wodenjak's qualifications in isolation, since he was the only employee with seniority to bid for the posted position. The question is -- would the County have given Wodenjak a shot at the job if Wodenjak were the only employee to have signed the posting? It is difficult to answer in the midst of this factual setting, where Haase had been hired and had the type of experience that the County wanted on the posted position. However, one needs to look at the situation as if Haase never existed at all and then

1/ It is hardly a matter of dispute that Haase's qualifications were far above Wodenjak's for the posted position, based on Haase's prior experience with private companies. Haase could have met a "head and shoulders" test of superior qualifications if he had been off probation and applied for the job against the more senior employee.

ask -- would the County have given Wodenjak a chance at least at the trial/training period?

The answer appears to be yes, even though the County disputes that now, taking the position that Wodenjak did not meet the qualifications for the job.

The County is more likely to have given Wodenjak the opportunity to prove himself than not, had Haase not been in the picture, because of the following reasons.

First of all, Wodenjak has operated equipment that is similar to Class 2 equipment. The parties disagree on how to classify the tub grinder, and that is a matter for negotiations, not arbitration. To say the least, the tub grinder is large and complex, although it does not move on wheels. Wodenjak has operated other equipment that moves. Wodenjak's work is satisfactory. Grigar admits that Wodenjak's work is comparable to working with Class 2 equipment and believes that Wodenjak could qualify for a Class 2 position. It may be somewhat unfortunate that Wodenjak's position is classified as a utility groundsperson, because it appears that Grigar is most reluctant to skip someone over various classes. If Grigar would be more comfortable moving an employee from Class 2 to Class 3, he should be equally as comfortable moving an employee from working on equipment that is comparable to Class 2 equipment to a Class 3 position, no matter where that employee is in the classification position scheme. The County's history on this has demonstrated that employees have moved from janitor-watchmen to Class 3, such as Karoses and Krumenauer. Clark and Demler got their experience on Class 3 equipment on the job.

Why wouldn't the County give Wodenjak the same trial period that it gave to Karoses, Krumenauer, Clark and Demler? The only logical reason is that it hired Haase. The County was not giving fair consideration to Wodenjak because of Haase's presence. However, as noted earlier, the County could not give any consideration to Haase because of his lack of seniority. The County should have considered Haase to be the same as someone outside of the bargaining unit, like a new employee. 2/

In a very similar case, Arbitrator Prasow noted in Borden Chemical Co., 32 LA 697, that a probationary employee (Kelso) was head and shoulders above other job applicants, but because of his status with no seniority, he should not have been considered in a head to head competition with employees with seniority:

It was stipulated by the parties that Kelso had no seniority when he was selected to fill the vacancy.

He was still a probationary employee and Section A of Article XVII explicitly provides that during such probationary periods he shall not be regarded as a "regular employee." Since he was not a regular employee, he had no competing rights in the "application of seniority" with which Section C is concerned. Thus, despite his excellent qualifications, he was not eligible to be considered to fill the vacancy as long as other employees with seniority had also bid for the same job.

2/ See SKF Industries, Inc., Hornell Division, 69-2 CCH ARB Para. 8664 (Shister, 1969), where a company had no obligation to consider a probationary employee without seniority for a posted vacancy and was justified in hiring a new employee for the position.

The same holds true here -- Haase was not eligible to fill a vacancy where an employee with seniority bid for the job -- with one note of caution. If Wodenjak (or any employee with seniority) was simply unqualified under any analysis for the posted position, the County would not be required to place a clearly unqualified employee into a position by virtue of that employee having seniority. The problem here is that the County was unable to give Wodenjak an objective evaluation because of its belief that it could put Haase in the position. Grigar testified that Haase was "absolutely more qualified than the Grievant." That is probably true, but irrelevant where Haase had no seniority and could not be judged in relationship to an employee with seniority. The only way for the County to now give an objective evaluation of Wodenjak's work is to give him the 30 day trial/training period and see if he can do the job.

Accordingly, I find that the County violated the collective bargaining agreement by awarding the Class 3 landfill position to Ken Haase instead of Bob Wodenjak.

Now for the remedy. 3/ The County is ordered to give Bob Wodenjak the

3/ The County asked in a letter dated January 27, 1993, that the Arbitrator refuse to consider the Union's brief which was submitted about three weeks later than originally scheduled. The County further asked that should the Arbitrator consider the Union's brief, that the Arbitrator set a new date for reply briefs, and that back pay, if any, be reduced by the time the Union delayed filing its brief. I am rejecting those requests for the following reasons. Briefs are aids for arbitrators, and it is common for arbitrators to give them due consideration whenever they come in. The Union's initial brief arrived about the time reply briefs were due, and the Union declined to file any reply brief. The County has not been prejudiced by the delay of the initial brief, and the County could have filed its reply brief by the beginning of January or notified the Arbitrator in a more timely fashion of its intent not to file a reply brief. In any event, the Arbitrator has not delayed issuing this Award due to the briefing schedule, and has made every effort to give both parties full consideration while making an award as timely as possible. Further, the purpose of back pay awards is to make whole a grievant where a contract violation has occurred. The Grievant is not to be penalized due to any misunderstanding or dispute regarding the briefing schedule in

contractual trial/training period of 30 days for the position it posted and gave to Ken Haase, the position of Class 3 landfill. If Wodenjak demonstrates that he is able to perform the job, he shall retain the job following the trial/training period, and the County shall make Wodenjak whole by paying to him the difference in wages and benefits from the time it awarded the job to Haase.

AWARD

The grievance is sustained.

The County is ordered to take the remedial action noted above.

The Arbitrator will retain jurisdiction until June 1, 1993.

Dated at Elkhorn, Wisconsin, this 3rd day of March, 1993.

By _____
Karen J. Mawhinney, Arbitrator

this case.