

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

OCONTO COUNTY SHERIFF'S DEPARTMENT  
LABOR ASSOCIATION

and

OCONTO COUNTY

Case 107  
No. 47981  
MA-7459

Appearances:

Mr. Michael G. Perry, Attorney at Law, appearing on behalf of the Association.  
Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader and Ms. Angela M. Samsa, appearing on behalf of the County.

ARBITRATION AWARD

Oconto County Sheriff's Department Labor Association, hereinafter referred to as the Association, and Oconto County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties waived the Arbitration Board provided in the agreement and jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as the sole arbitrator to hear and decide a grievance over the meaning and application of the terms of the parties' agreement. The undersigned was so designated. Hearing was held in Oconto, Wisconsin, on November 6, 1992. The hearing was transcribed, and the parties submitted post-hearing briefs on January 20, 1993. The parties reserved the right to file reply briefs and the County submitted a reply brief on February 5, 1993, and the hearing was closed.

BACKGROUND:

The County created a new position of Data Entry/File Clerk and posted it on April 24, 1992. The grievant was the only employee to sign this posting. The posting was taken down and the position was re-posted on April 30, 1992, and this second posting included an additional page listing the requirements for the position. The grievant again was the only employee to post for the position.

The job posting provided as follows:

## DATA ENTRY/FILE CLERK

### OCONTO COUNTY POSITION DESCRIPTION

#### SHERIFF'S DEPARTMENT

Reports to the Sheriff, Director of Police Services, and/or Lieutenants.

Is responsible for performing a variety of typing, word processing, transcription, and data entry tasks requiring a qualified typist and/or stenographer with data entry knowledge.

#### DUTIES AND RESPONSIBILITIES

- 1) Computer/statistical data secretary in daily operations and data entry.
- 2) Setup (sic) and maintain filing system. Duplicate, update, and record agency forms.
- 3) Type from rough draft, finished copy or from dictation, various correspondence, letters, reports and legal documents.
- 4) Operate all office equipment to include but not limited to typewriter, work (sic) processor, dictaphone and computer.
- 5) Shall prepare the Oconto County Sheriff's Department Traffic Calendar.

#### KNOWLEDGE, SKILLS, ABILITIES, AND EXPERIENCE REQUIRED

- 1) Operate computer terminal.
- 2) Type accurately at 60 words per minute and file information properly and consistently.
- 3) Receive and transcribe dictation proficiently at a reasonable rate of speed and level of quality.
- 4) Able to make accurate, rapid, independent decisions regarding planning, scheduling and completing work priorities and duties. Excellent organizational skills, high level of maturity and a strong degree of self direction and motivation is required.
- 5) Able to use tact, diplomacy, discretion, and integrity to process office

information and data in a confidential and professional manner. Much information is of a personal nature and if disclosed, could cause serious adverse legal and community reaction and concern for the Sheriff's Department, Oconto County and/or this position.

- 6) Must be capable of working beyond the regular office hours of this position to complete deadline assignments.
- 7) Must have ability to read, comprehend, follow oral and written instructions.
- 8) Be able to communicate at a level normally associated with completion of a high school degree. Additional courses beyond high school in the fields of typing, filing, word processing, organizational skills, shorthand, data entry, as well as general business, are necessary to performing the duties of this position.

### REQUIREMENTS

- 1) Mechanical aptitude to perform routine maintenance of PC's and related equipment is required.
- 2) A minimum of three years of satisfactory work experience in computer operation and data entry is required.
- 3) Must have knowledge of PC operations, as well as DOS operation systems, networking and emulation. Must be able to provide programming support in applications such as Word (sic) Processing, Spreadsheets, Graphics and Database Management.
- 4) Post-high school training in data processing, systems design and mathematics, with a degree in Data Processing/Computer system operation is preferred.

### WORKING CONDITIONS

Normal office working environment with little or no discomfort from temperature, dust, noise, wetness or the like.

### DISCLAIMER

'The attached statements are intended to describe the general nature and level of work being performed by people assigned to this job. They are not intended to be an exhaustive list of specific responsibilities, duties, and skills required of personnel

so classified.'

The grievant was given a micro computer examination on May 11, 1992, scoring 26 out of 100 points. 1/ The grievant was also given a typing test on May 14, 1992, by the Wisconsin Job Service Office with the result that she typed 46 words per minute and had 14 errors. 2/ On May 19, 1992, the Sheriff informed the grievant that she was being rejected for this vacancy on the basis that she did not have sufficient qualifications for the job. 3/

The County advertised for outside applicants who were given the same typing test in July, 1992, and the same micro computer exam thereafter. 4/ Eleven of these applicants typed more than 60 words per minute and five attained an overall score above seventy, and these five were interviewed. 5/ The County selected an employee who typed 79 words per minute with 2 errors and did 86 words per minute with 97 percent accuracy on the computer. 6/ The employee began work on August 31, 1992. 7/

The grievant filed a grievance on May 27, 1992, which was denied on that same day by the Sheriff. The grievance was denied by the Personnel Committee on June 9, 1992, and appealed to the instant arbitration. 8/

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1/ Ex. 8.

2/ Ex. 10, 11.

3/ Ex. 6.

4/ Tr. 15.

5/ Ex. 9.

6/ Ex. 9, Tr. 17.

7/ Ex. 10.

8/ Ex. 5, 7.

## ISSUE

The parties were unable to agree on a statement of the issues. The Association states the issue as:

Did the County violate Article XXVII of the 1991-92 Labor Agreement by failing to give Betty Cain the opportunity to satisfy the requirements of a new job posted within the Department Group?

The County states the issue as follows:

Did the County violate the collective bargaining agreement when it refused to give Betty Cain a 30-day training period after it was determined, by objective means, that she was not even minimally qualified for the Data Entry position?

The undersigned frames the issue as follows:

Did the County violate Article XXVII of the parties' collective bargaining agreement when it refused to give Betty Cain 30 days to qualify for the Data Entry position?

If so, what remedy is appropriate?

## PERTINENT CONTRACTUAL PROVISIONS:

### **ARTICLE XIX**

#### **MANAGEMENT RIGHTS**

The County possesses the sole right to operate County government and all management rights repose to it, subject only to the provision of this Contract and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedules of work with the Sheriff, Sheriff's and Traffic Committee. Approval of schedule and shift changes must be obtained from the Personnel and Wages Committee, who shall negotiate such changes with the Union;
- C. To hire, promote, transfer, schedule and assign employees to

positions within the County;

- D. To suspend, demote, discharge and take other disciplinary action against the employees;
- E. To relieve employees from their duties because of lack of work or any other legitimate reasons;
- F. To maintain efficiency of County government operations;
- G. To take whatever action is necessary to comply with State or Federal law;
- H. To introduce new or improved methods or facilities;
- I. To change existing methods or facilities;
- J. To determine the kinds and amounts of services to be performed as pertains to County government operation, and the number and kinds of classifications to perform such services;
- K. To determine the methods, means and personnel by which County operations are to be conducted;
- L. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

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## **ARTICLE XXVII**

### **PROMOTION AND LAYOFF PROCEDURES**

1. All promotions of employees shall be in an orderly manner as provided herein. All permanent vacancies on any new and/or permanent job openings or other positions shall be posted upon the determination to fill such vacancy or opening. Vacancies shall be posted on all bulletin boards for five (5) working days, giving a summary of the duties, qualifications and rate of pay. Any employee interested in such promotion may sign the posting. The Employer shall select from the signatories an employee to fill the new or vacated job based on the employee's qualifications. The jailers, jail officers and dispatchers and desk sergeant shall be considered in one

department group for purposes of promotion and the field sergeants, and deputies, investigators, and floater relief deputies shall be in one department group for purposes of promotion. When the Employer determines that two (2) or more employees are relatively equal in qualifications, the more senior employee shall be selected. If within thirty (30) working days, he/she fails to qualify or if after within thirty (30) working days he/she wishes to return, he/she shall be returned to his/her former job and the next applicant shall be placed in the job until a qualified person is found.

If no qualified persons apply for the job in a department group, then the Employer may consider applicants from outside the unit. The job shall be filled based on the applicant's qualifications, but if a unit member, not in the same department group applies for the job and his or her qualifications are relatively equal to a non-unit applicant, the unit member shall receive the job. When seniority is not recognized in job preferences, the case shall be subject to the grievance procedure.

#### ASSOCIATION'S POSITION:

The Association contends that under Article XXVII, the County is required to give applicants from a department group a period of 30 days to qualify for a new job. It points out that Article XXVII states that the County "shall" select from the signatories "based on the employee's qualifications," which enables the County to choose the best qualified applicant of those signing the posting. It asserts that once the most "qualified" applicant is selected, that applicant has 30 days to return to his/her former position, or if he/she fails to qualify, to return to his/her old position. It claims that this language does not permit the County to select an outside applicant as long as an "inside" employee is seeking the position and only when all "inside" applicants have been considered and rejected can the County select from the outside.

The Association submits that an applicant need not be qualified for the job before the 30 day period applies and Article XXVII makes no reference to the 30 day period as a "trial period" or "training period." It notes that the language simply states that the applicant has 30 days in which to qualify for the job. It maintains that the period is not a training period but a time for the employee to "test the waters" and become acquainted with the nature and techniques of the job, including receiving instruction in the unique requirements, procedures, equipment and techniques of the job. It submits that had the grievant been given the 30 days, she would have qualified for the job, but she was denied the opportunity in clear violation of the language.

The Association argues that the second paragraph of Article XXVII makes it clear that the parties intended to select "inside" applicants first and only when none were qualified could the County select "outside" applicants.

The Association takes the position that the grievant was capable of performing all the duties of the Data Entry position. It submits that her teletype experience demonstrates that she had the ability to operate a computer terminal and the ability to type 60 words per minute was not shown to be relevant to the position and it remains unknown whether the grievant could satisfy this "requirement." It contends that even though the grievant's test scores were low, the test does not demonstrate how she would do in the job, and the grievant could have easily acquired the appropriate knowledge by the use of tutorials included in the software or easily purchased.

The Association asserts that it has been the custom and practice of the County to train employees who may lack certain requirements of the job. To illustrate this point, the Association refers to the training of officers on new equipment such as computers and breathalyzers. The Association further contends that the custom and practice is to select an employee first from the posting and then allow him/her an opportunity to do the job. It submits that the grievant was qualified for the job and should have been given the opportunity to perform the duties of the job before the selection of outside applicants. It asks that the grievance be sustained and the grievant be put in the position.

#### COUNTY'S POSITION:

The County contends that it is required to provide a "trial period" only to qualified applicants. It submits that the clear and unequivocal language of Article XXVII requires it to fill the position with an individual who is already qualified as applicants must be considered "based upon (their) qualifications." It insists that a 30 day trial period is required only after it is determined that an individual is qualified. It further asserts that the "trial period" is to determine whether a qualified employee can, in fact, perform the job and to give the employee the opportunity to determine if he/she likes the new job and, if not, to return to his/her former position. It argues that nothing in the language of Article XXVII requires it to train applicants to do the job. It alleges that the Association is seeking to create a training period rather than a trial period. The County cites arbitral authorities to support its position that a trial period is not a training period and employees must be qualified before they are given a trial period. It submits that the grievant is asking for a training period to enable her to perform the duties of the Data Entry position. The County disputes the Association's assertion and the lack of evidence that the grievant could quickly acquire the necessary skills for the job. It asserts the record is devoid of any evidence that supports such a claim. The County points out that the job description put applicants on notice that certain minimum qualifications were required for the job.

The County asserted that it has the inherent management right to set qualifications for the Data Entry position, and it did so in this case. The County also maintains that its determination of qualifications may not be set aside unless it is shown to be "arbitrary and capricious." The County insists that it exercised reasonable care in determining the grievant's qualifications by the use of accurate, objective tests and experience related inquiries and then made the objective decision that



the grievant was not qualified for the position. It points out that the grievant scored 26 out of 100 on the County's examination and was unqualified for the position and not entitled to a trial period.

The County denies that other "unqualified" employees were provided training periods. The County submits that custom and past practice cannot be used to interpret clear and unambiguous language, and there is no evidence with respect to how clerical positions have been filled. It alleges that training given to other employees involved statutorily required training periods. The County states that it is non-analogous to compare training on breathalyzers or computers to individuals already in the job to training that someone needs before they can undertake the primary duties of a job he/she is applying for.

The County also contends that the Data Entry position was not placed in a departmental group for purposes of promotion and thus is not subject to the "relatively equal" standard. The County notes that the plain language refers to dispatchers, jailers and deputies and to these groups alone without any reference to clerical positions. It submits that the groups spelled out in the contract do not include the Data Entry position, and in any event, the grievant is simply unqualified for the position. The County asks that the grievance be denied and dismissed.

#### DISCUSSION:

Article XXVII of the parties' collective bargaining agreement states that new job openings will be posted, and the County will select from those signing the posting based on the employee's qualifications. The second paragraph states that if no qualified persons apply, the Employer may consider applicants from outside the unit. Clearly, the language of the contract indicates a preference for employees over non-employees and for the most qualified applicant because only where the qualifications are relatively equal does seniority become a factor. The Association contends that employees do not have to be qualified at the time of posting but must be given 30 days to prove qualifications, and only after this 30 day period can the County hire outside applicants. The Association's argument is not persuasive. First, it is contrary to the language of Article XXVII. Article XXVII states employees shall be selected based on the employee's qualifications. It follows that if they are not qualified, they would not be selected. The second paragraph states, "If no qualified persons apply for the job . . .," the County can hire from the outside. This states that the person must be qualified when they apply, otherwise the language would read, "If no person is qualified after a 30 day period, then the County may hire from the outside."

Secondly, the Association's interpretation would lead to absurd results. Suppose seven employees applied for the job and none were qualified. The Employer would be required to give each of the seven 30 days to qualify. If none qualified within the 30 days, seven consecutive 30 working day periods would be required and would result in almost a year going by before the County could fill the position with a qualified person. The parties certainly never intended such an unusual procedure or they would have clearly said so.

Thirdly, the language of Article XXVII sets up a trial period only for qualified employees. The Association argues that the 30 days is not a trial period, nor is it a training period. Yet, it looks like a "trial" period provision, sounds and reads like a "trial" period and its effect is the same as a "trial" period, thus it must be concluded that it is a trial period.

Finally, parties do not agree to provisions that have no purpose. If an employee has no qualifications for a position and could not demonstrate that they are qualified in the trial period, it would be a futile and useless exercise to require the County to grant an employee a trial period.

Therefore, it must be concluded that Article XXVII provides a trial period only for employees who are already qualified for the position at the time they apply for it.

Arbitrator Volz stated the purpose of a trial period as follows:

The purpose of a trial period is to determine whether an employee who possesses the basic qualifications can satisfactorily do a job which she does not regularly perform. It is assumed that she will not have to be trained in all aspects of the job; for a trial period is not a training period, but simply an opportunity to demonstrate ability to do the job. A trial period, in effect, is a lengthened familiarization or orientation period in which the employee is acquainted with the nature and techniques of the job. It presupposes that the employee will be given instruction and assistance and that she will not simply be turned loose to 'sink or swim.' But, it also assumes that she brings with her to the trial period by virtue of prior experience or education considerable knowledge, background, and skill for performing the duties of the new position. She still needs instruction in the peculiar requirements, procedures, equipment, and techniques of the job; but an intensive on-the-job training program, such as would be appropriate for a novice, is not contemplated." 9/

Article XXVII assumes that the applicant is already qualified and only requires a brief orientation and familiarization to perform the job. The trial 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.

The next issue is whether the grievant was minimally qualified such that denial of the trial period would violate Article XXVII. Under the agreement, the County has the sole authority to determine whether an employee is qualified for the position as long as the decision regarding

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9/ Reynolds Metal Co., 66 LA 1276 (1976).

qualifications is not arbitrary, capricious, discriminatory or unreasonable. 10/ The burden of proof is on the Union to show that the County erred in determining the qualifications and that the County acted arbitrary, capriciously, discriminatorily or unreasonably. 11/ The record indicates that the grievant was given a typing test by an outside agency as well as a computer test by a supervisor. The job required the ability to type 60 words per minute. 12/ The grievant got only 46 with 14 mistakes. The Association argues that typing was a small part of the job, and this had no bearing on word processing on the computer. The evidence established no support for this argument. The incumbent's job initially was to load up the system and transcribing would be more significant later. 13/ The County used the 60 word per minute standard for typing from another clerical position. 14/

The incumbent of the position does a great deal of data entry work on the computer, so the requirement of computing proficiency is well established in the record. 15/ The grievant got only a 26 out of 100 on the computer exam. 16/

The Association has asserted that with 30 days of experience in the job, the grievant would be able to perform the job based on the tutorials in the programs and a typing tutorial. No proof

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10/ Barbers Point Federal Credit Union, 84 LA 956 (Brown, 1984); Leach Manufacturing Co., Inc., 82 LA 235 (Harrison, 1984); E-Systems, Inc., 84 LA 194 (Steele, 1985); Southern California Gas Company, 91 LA 100 (Collins, 1988); Equitable Bag Company, Inc., 83 LA 317 (Modjeska, 1984).

11/ GTE Products Corp., 91 LA 44 (Dworkin, 1988); Barbers Point Federal Credit Union, 84 LA 956 (Brown, 1984); E-Systems, Inc., 84 LA 194 (Steele, 1985).

12/ Ex. 3, 4.

13/ Tr. 21, 28.

14/ Tr. 121-122.

15/ Tr. 17, 101, 107.

16/ Ex. 8.

was offered to support this claim. The best indication of whether an employee can perform the job is whether he/she meets the minimum qualifications, and unfortunately, the grievant did not have the minimum qualifications. Thus, the County's determination that she was unqualified is supported by the objective evidence. The County was not obligated to consider an unqualified employee and give her the opportunity to show she could at some future date meet the minimum qualifications. Given the duties of the Data Entry position, it would appear unlikely that the grievant would be up to minimum speed in 30 days. The Association's arguments are not supported by any evidence in the record and therefore it has failed to establish that the requirements of the position or the County's determination that the grievant was not minimally qualified were arbitrary, capricious, discriminatory or unreasonable. Inasmuch as the grievant was not qualified, nothing in the agreement allows a trial period to establish qualifications. Therefore, the County did not violate Article XXVII of the parties' collective bargaining agreement when it refused to give the grievant 30 days to qualify for the Data Entry/File Clerk position.

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

AWARD

The grievance is denied in all respects.

Dated at Madison, Wisconsin this 18th day of March, 1993.

By Lionel L. Crowley /s/  
Lionel L. Crowley, Arbitrator