

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
MARATHON COUNTY DEPARTMENT OF SOCIAL	:
SERVICES AND COURTHOUSE EMPLOYEES,	:Case 216
LOCAL 2492-A (PROFESSIONAL UNIT),	:No. 48640
AFSCME, AFL-CIO	:MA-7667
	:
and	:
	:
MARATHON COUNTY	:
	:

Appearances:

- Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of Marathon County Department of Social Services and Courthouse Employees, Local 2492-A (Professional Unit), AFSCME, AFL-CIO.
- Mr. Jeffrey T. Jones, Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54401, appearing on behalf of Marathon County.

ARBITRATION AWARD

Marathon County Department of Social Services and Courthouse Employees, Local 2492-A (Professional Unit), AFSCME, AFL-CIO (hereinafter Union) and Marathon County (hereinafter County or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission) from its staff. On January 19, 1993, the Union filed a request with the Commission to initiate grievance arbitration. Following concurrence with said request by the Employer, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on April 12, 1993, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was not transcribed. The parties filed briefs and reply briefs, the last of which was received on June 28, 1993. Full consideration has been given to the evidence and the arguments of the parties in reaching this decision.

BACKGROUND

Nancy Disbrow (hereinafter Grievant) has been a professional social worker in the Marathon County Department of Social Service for over nine years. Immediately prior to that, she worked for a year and a half for the Marathon County Shelter Home as a youth worker. For almost 11 years preceding her Marathon County employment, the Grievant held a position as a juvenile probation officer in Rock County.

On July 30, 1992, Marathon County (hereinafter Employer) posted a social worker position of Foster Home Coordinator. Said position is primarily responsible for foster home licensing, recruiting, orienting and training. The pay rates were consistent with those provided for all professional social workers by the collective bargaining agreement.

The qualifications for the position were as follows:

Bachelors degree in social work, sociology, or directly related field, or a bachelor's degree in a non-related field and two years' of increasingly responsible social work experience in a social services agency.

Four employes initially indicated interest in the position. One employe withdrew early in the process. The Grievant, an employe named Richard Burden Leonard (hereinafter "less senior bidder") and another employe completed the interview process, at which time the third bidder withdrew.

To fill the position of Foster Home Coordinator, the Employer established three evaluative criteria: minimum qualifications; review of prior job evaluations; and outcome of a structured interview. In developing the structured interview, the Employer identified what it believed were five critical dimensions of the position: organization skills/time sensitivity; interviewing skills; technical expertise; assessment/evaluation skills; and written and verbal communication skills. The Employer then developed four problematic situations for the interview which were to be used to measure a candidate's knowledge, skills and abilities with respect to these dimensions. The Employer prepared separate documents for use by the three interviewers for the scoring of the applicant's responses, and rating guidelines which set forth acceptable responses were established. Only correct responses were scored. The Employer established 21 as the average passing score.

The Grievant's three scores were 14.7, 14.9 and 14.5 for an average score of 14.8 points. The less senior bidder's scores were 21.5, 20.5 and 22 for an average score of 21.3 points. The evaluations of the respective performance evaluations revealed that the two candidates were relatively equal. The Employer therefore relied exclusively upon the results of the graded

interview as a basis for selection. Said process did not give formal recognition of the relative experience of the competing job applicants.

The less senior bidder was selected by the Employer to fill the position. The Union filed a grievance, alleging that the Employer had violated Article 7(D) of the collective bargaining agreement. The grievance proceeded through the parties agreed-upon grievance procedure unresolved and is properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

Article 2 - Management Rights

The County possess (sic) the sole right to operate the department and management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include but are not limited to the following:

- A. To direct all operations of the Social Services Department;
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- C. To hire, promote, transfer, assign and retain employes;
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- F. To maintain efficiency of department operation entrusted to it;
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- I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;
-
- K. To determine the methods, means and

personnel by which operations are to be conducted;

. . .

The rights of management set forth above are not all inclusive, but indicate the type of matters or rights which belong to and are inherent to management. Any of the rights, power and authority the County had prior to entering into this collective bargaining agreement are unqualified, shall remain exclusively in the County, except as expressly and specifically abridged, delegated, granted or modified by this Agreement.

Article 7 - Job Posting

. . .

D. Filling Vacancy: When management reasonably determines 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.

ISSUE

The parties were not able to agree as to the framing of the issue.

The Union would frame the issue as follows:

Did the County violate the collective bargaining agreement by offering the position of Foster Home Coordinator to Richard Leonard rather than the Grievant, Nancy Disbrow?

If, what is the proper remedy?

The Employer would frame the issue as follows:

Whether the County violated 7(D) of the labor agreement by awarding the vacant Foster Care Coordinator position to Richard Leonard rather

than to the Grievant?

If so, what is the appropriate remedy?

The parties agreed that the Arbitrator would frame the issue in the Award. I frame the issue as follows:

Did the County violate Article 7(D) of the collective bargaining agreement by denying the Grievant the position of Foster Care Coordinator?

If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

Union

On brief, the Union argues that the burden to prove the case should lie squarely on the shoulders of the County; that using objective standards, the Grievant clearly had aptitude and abilities in excess of those of the successful junior bidder; that if the Arbitrator finds that the qualifications of the bidders were equal, the Grievant should have been selected and offered the position; that the County's process for filling the vacancy was in violation of the expressed terms of Article 7(D) in that it failed to "reasonably determine" the relative aptitudes and abilities of the competing bidders; that the test utilized by the County was acknowledged to be subjective and was seriously flawed as a means of accurate, reliable, and valid evaluation of abilities and aptitudes; that the County's selection was arbitrary, capricious, discriminatory and unreasonable under the facts; and that the County should have allowed the senior bidder a trial period if there was any doubt about her qualifications.

On reply brief, the Union argues that the Employer's brief seems to suggest that its authority is unchallengeable; that, in fact, the contract language clearly supports an interpretation that such managerial determinations are limited and subject to challenge; that the contract language clearly states that the Employer must "reasonably determine" respective applicants' abilities and aptitudes; that the Employer's argument that it did not act in an "arbitrary and capricious" manner is a highly inappropriate standard which is clearly not supportable and inconsistent with the contract language at issue; and that the Union believes that the essential threshold question is whether or not the Employer acted reasonably, not whether or not its actions were arbitrary and/or capricious.

The Union also argues that any reasonable person would fully

expect that the experience component should be an integral and important part in any job selection process; and that the fact that the process in the instant case did not do so effectively renders it inherently unreasonable and in clear violation of the expressed terms of Article 7(D) of the labor agreement.

In addition, the Union argues that the Employer's selection process was unreasonable in two other important respects; that, first, in addition to its failure to consider work experience, the Employer's evaluation process was otherwise unreasonably limited in scope; that there was total reliance on the prior two performance evaluations and a subjective non-standardized test; that there is no evidence that the test was either reliable or valid as an evaluator of either aptitude or abilities; that no consideration of other important criteria, such as education, certification, immediate supervisor opinion, personnel records and evaluations prior to the arbitrarily-set last two was given; that, second, the test, which was the ultimate determinant, had a number of serious problems; that the test was acknowledged by the Employer to be subjective; that it was not standardized or professionally administered; that there is no evidence that the outcome of the test would be a reliable predictor of future performance; and that there was no opportunity given for the Grievant to re-test.

Finally, the Union argues in several ways that the two cases argued by the Employer are distinguishable from the present case; that the Employer's arguments regarding res judicata and collateral estoppel are absurd; that based upon all these reasons, the grievance should be sustained; that the position should be offered to the Grievant; and that the Grievant should be made whole for any losses incurred as a result of the Employer's violation of the contract.

County

On brief the County argues that its determination that the less senior candidate was better qualified for the Foster Care Coordinator position was within its authority and reasonable; that under arbitral law and the terms of the labor agreement, the County was vested with the authority to determine the Grievants's qualifications for the Foster Care Coordinator position; that the County's determination that the less senior candidate was better qualified for the position than the Grievant was not arbitrary, capricious or unreasonable; that prior arbitration awards are res judicata and collateral estoppel with respect to the proper interpretation of Article 7(D) and the County's right to utilize structured interviews to determine the qualifications of job applicants; that prior rulings as to the County's right under the labor agreement to determine the qualifications of applicants for

positions and to utilize structured interview devices should be given effect; that the evidence unequivocally establishes that the County properly determined that the less senior candidate's aptitude and ability to perform the duties of the Foster Care Coordinator position exceeded that of the Grievant; and that the Arbitrator should defer to the County's determination.

On reply brief, the Employer argues that the Union's arguments are totally without merit and unsupported by the record; that the Union's contentions in regard to the burden of proof and the proper standard to be applied are without merit; that the Union's contentions that the Grievant was better qualified for the position than the less senior candidate are unsupported by the record; that the Union's contentions that the Employer failed to consider the Grievant's prior work experience and that the less senior candidate possessed no relevant prior work experience is contrary to the evidence in this matter; that the Union's challenges to the Employer's use of an examination are without merit and contrary to the evidence; that the Union's challenges to the dimensions evaluated as part of the structured interview are without merit; and that the agreement's probationary period provision, Article 7(E), is totally irrelevant to this dispute.

In addition, the Employer argues that the Union's contentions are unsupported by the record and totally without merit; that the terms of Article 2(I) and 7(D) and arbitral law establish that the County's determination in regard to the aptitude and ability of the Grievant and the less senior candidate to perform the duties of the Foster Care Coordinator position is only subject to challenge as being unreasonable, arbitrary, capricious, or discriminatory; that in light of the language of Articles 2(I) and 7(D), which expressly grants the County the authority to make these determinations, such a conclusion is particularly compelling; and that the Union bears the burden of establishing that the County's determination was unreasonable, arbitrary, capricious or discriminatory.

Finally, the Employer argues that its determination as to the Grievant's and the less senior bidder's qualification was not unreasonable, arbitrary, capricious or discriminator; that the Employer utilized an objective examination during a structured interview in making its determination as to their qualifications to perform the duties of the position; that all three interviewers scored the less senior bidder higher than the Grievant; and that, based upon all these reasons, the grievance should be dismissed in its entirety.

DISCUSSION

The Union is correct when it argues on brief that the

essential threshold question is whether or not the Employer acted reasonably in this matter. And irrespective of upon which side the burden of proof is placed, this Arbitrator, although a little hesitantly, finds that the Employer did act reasonably under all the circumstances of this case.

Under Article 2(I) of the collective bargaining agreement, the parties agreed that the Employer possesses the right "to determine the competence and qualifications of employes," although such right "must be exercised consistently with the other provisions of the contract." Article 7(D) establishes the standard by which the Employer must fill a vacancy; that is, the Employer must "reasonably" determine aptitude and ability.

To fill the position of Foster Home Coordinator, the Employer established three evaluative criteria: minimum qualifications; review of prior job evaluations; and outcome of a structured interview. In developing the structured interview, the Employer identified what it believed were five critical dimensions of the position and then developed four problematic situations for the interview which were to be used to measure a candidate's knowledge, skills and abilities with respect to these dimensions.

The Employer prepared separate documents for use by the three interviewers for the scoring of the applicant's responses, and rating guidelines which set forth acceptable responses were established.

Thus, the Employer went to elaborate lengths to prepare and administer its structured interview. On its face, the structured interview appears to measure what the Employer believed were the necessary qualifications for the position. (The Union notes that some of the questions seem unrelated to foster care; yet, those questions went to the qualities needed to be a coordinator. The Employer was not testing for a social worker or even a foster care worker position; it was testing for a coordinator of foster care.)

The Employer chose not to rate experience directly, limiting the determination of "qualified" to minimum qualifications, review of the last two years of job evaluations, and performance in a structured interview. Ignoring experience is cause for some concern to this Arbitrator and, yet, nothing in Article 7(D) requires the Employer to specifically consider experience, although it certainly is related to aptitude and ability. Indeed, Article 2(I) grants the Employer wide discretion in determining competence and qualifications, as long as the Employer meets the "reasonable" standard of filling vacancies under Article 7(D). The Employer asserts that the test was designed so as to permit the bidders to demonstrate their prior work experience. Nothing in the record discounts this assertion.

On paper, it appears that the Grievant has substantially more social work experience than the less senior bidder for this

position. In that and many other ways, this case is very similar to one between these same parties decided by Arbitrator Amedeo Greco in which Arbitrator Greco wrote as follows:

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 (the less senior bidder) was better qualified than the (grievant) and since there were no clearly right or wrong answers for the test questions. Furthermore, (the grievant) is an excellent employe whose evaluations are relatively equal to (the less senior bidder's) and whose credentials are at least as good as the ones which (the less senior bidder) possesses. Indeed, it was (the supervisor) who encouraged (the grievant) to bid for the position because he, (the supervisor), thought that (the grievant) 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 (evaluators) independently graded the oral exams given to (the two candidates) and that both of them independently determined that (the less senior) received higher grades than (the grievant), with (one evaluator) giving 17 and 10 points to (the less senior bidder) and (the grievant) and with (the other evaluator) giving them 16 and 10 points respectively. These remarkably similar scores establish that (the less senior bidder) did much better in the test than (the grievant), as her answers were more elaborate and detailed....

In addition, the County before the exam determined that a score of 15 points was needed to pass the exam. (The less senior bidder) met this requirement, while (the grievant) did not. The County therefore had the right to determine that (the grievant) 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 (the grievant) a trial period, as it is well-established that an employe is entitled to a trial period only after he or she is qualified for the position. That did not happen here.

Marathon County, 10/21/92 (emphasis in original). Arbitrator Greco therefore denied the grievance.

So it is here. The test is not perfect. Yet the record shows that the Employer went to great efforts to create an evaluative tool to measure success in the position it was trying to fill. There is no evidence to suggest that the structured interview was created to favor or disfavor any candidate. Indeed, by using three evaluators, all of whom agreed very closely as to the end results, the Employer greatly lessens the chance of bias for or prejudice against one particular candidate. And these three evaluators were very consistent with each other in how they rated each candidate

individually and how their ratings compared the two candidates, giving scores of 14.7, 14.9 and 14.5 to the Grievant and 21.5, 20.5 and 22.0 to the less senior bidder.

As the Employer had established a passing score of 21 and as the Grievant did not meet that score, the Employer had the right to determine that she was not qualified for the position. As the less senior candidate did meet the passing score of 21, the Employer had the right to determine that he was qualified for the position. As the Employer reasonable determined that the two candidates were not equal in aptitude and ability, the Employer did not violated Article 7(D) in awarding the position to the less senior bidder.

Therefore, for the reasons stated above, the Arbitrator issues the following

AWARD

1. That the County did not violate Article 7(D) of the collective bargaining agreement by denying the Grievant the position of Foster Care Coordinator.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 21st day of September, 1993

By James W. Engmann /s/
James W. Engmann, Arbitrator

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