

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 75
 CALUMET COUNTY : No. 48292
 : MA-7565
 :
 and :
 :
 CALUMET COUNTY COURTHOUSE EMPLOYEES, :
 LOCAL 1362, AFSCME, AFL-CIO :
 :

Appearances:

Ms. Helen Isferding, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing for the Union.
Mr. Charles E. Carlson, Senior Manager, David M. Griffith & Associates, Ltd., appearing for the County.

ARBITRATION AWARD

Calumet County Courthouse Employees, Local 1362, AFSCME, AFL-CIO, herein the Union, pursuant to the terms of its collective bargaining agreement with Calumet County, herein the County, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The County concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Chilton, Wisconsin on April 7, 1993. The parties completed the filing of post-hearing briefs on July 6, 1993.

ISSUES

The parties were unable to stipulate to the wording of the issues and agreed that the arbitrator would frame the issues in his award.

The Union stated the issues as follows:

Did the Employer violate the contract when it promoted Connie Daun, rather than Jayette Marsicek, to the position of Deputy Clerk of Courts/Child Support Clerk?

If so, what is the appropriate remedy?

The County stated the issues as follows:

Did the County violate the agreement when it did not promote the grievant to the position of Deputy Clerk of Courts/Child Support Clerk?

If so, what is the appropriate remedy?

The undersigned believes the following to be an accurate statement of the issues:

Did the County violate the contract when it did not promote the grievant, Jayette Marsicek, to the position of Deputy Clerk of Courts/Child Support Clerk?

If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE IV - SENIORITY

. . .

4.04 Job Posting

A. In filling vacancies, new positions or making promotions, preference shall be given to the most qualified applicant. If qualifications are relatively equal, the position shall be awarded to the most senior qualified applicant.

. . .

F. If there is any difference of opinion as to the qualifications of an employee, the Employer representative, and the Union committee and/or Union representative, shall take the matter up for adjustment through the Grievance Procedure.

BACKGROUND

In August of 1992 the County posted a position of Deputy Clerk of Courts/Child Support Clerk. The incumbent in said position, Barbara Grube, was running without opposition for

Circuit Clerk of Court in the November election.

Employees who applied for the position included the following members of the courthouse bargaining unit, in which unit the vacancy would be: Sherie Anhalt, Sharon Brokaw, Connie Daun, Jayette Marsicek and Betty Schneider. Anhalt was an Income Maintenance Secretary with a seniority date of February 18, 1991.

Brokaw was an Income Maintenance Worker with a seniority date of May 1981. Daun was a Terminal Operator with a seniority date of November 12, 1984. Marsicek was a Receptionist/Deputy County Clerk with a seniority date of September 5, 1978. Schneider was an Account Clerk II with a seniority date of August 1, 1981. The posted position was in a lower pay range than were the positions held by Brokaw and Schneider.

The County gave the applicants a terminology test. The scores were as follows: Marsicek-120, Schneider-119, Daun-104, Brokaw-103, and Anhalt-83.

Grube put some questions on the computer system and requested anyone in the Clerk of Circuit Court office for anonymous responses concerning their experiences working with Marsicek. Grube did not make similar inquiries of the other four applicants.

Five responses were received: one was positive, one was negative and three were general in nature.

Grube contacted the respective supervisor of each of the applicants for their comments and evaluations. Those comments were shared with the County's Salary and Personnel Committee.

Each of the applicants completed an application form which included a description of their education and experience. Marsicek's application showed that she was a high school graduate and had completed a word processing course in 1990. She had worked for ten years as a Case Aide in the Manitowoc County Department of Social Services. She then became employed by the County in 1978 and worked for ten years as the Child Support Clerk in the Clerk of Circuit Court office and for the past four years in the office of the County Clerk, first as the receptionist and since April 9, 1991, as a Deputy Clerk also.

Daun's application showed that she was a high school graduate with one year of college credits. She had worked as a Secretary for three years before becoming employed by the County as a Terminal Operator in the Human Services Department.

Each of the applicants was interviewed by Grube, who asked a common set of questions of each one. Subsequently, each of the applicants was interviewed by the Personnel Committee, at which interviews Grube was present.

The County concluded that Daun and Schneider were the most qualified applicants. Schneider had more seniority than Daun and was offered the position. Schneider declined to accept the position. The position then was offered to Daun and she accepted the position.

Marsicek grieved the promotion.

POSITION OF THE UNION

Marsicek had the necessary experience, since she had held the position for ten years. She had better and more work experience outside the County. She had the top score in the terminology test given to the applicants. She was the most qualified candidate, as well as being the most senior candidate.

The County allowed Barbara Grube, the employe for whom the posting was seeking a replacement, to poll anonymous employes in the Child Support office as to their opinions of Marsicek. Similar polls were not conducted for the other candidates. Such arbitrary and capricious actions demonstrate the absence of a fair approach to the selection process.

POSITION OF THE COUNTY

Article 4, as applied to the appointment of the Deputy Clerk of Courts/Child Support Clerk, is a violation of statutory law. The decision of the County Personnel Committee was null and void because it restricted the power of the Clerk of Circuit Court to make the appointment. The arbitrator cannot award the position to another employe. The arbitrator can direct the parties to negotiate a new Article 4.

However, the County also believes that it did not violate the contract on the merits. The Union offered no supporting evidence for its claim that the County acted in an arbitrary and capricious manner. Neither did the Union offer any substantial evidence as to the qualifications of the other four applicants.

The duties of the Child Support Clerk position which Marsicek left in 1980 are substantially different than the duties of the position at issue herein.

The County objectively considered the qualifications of all the applicants and chose the most qualified applicant.

DISCUSSION

The undersigned is not persuaded that he has to determine the relevance of the constitutional powers of the Clerk of Circuit Court in order to decide if he has authority to issue a decision on the merits of the instant dispute. If a party believes that the arbitrator's award is in conflict with some point of constitutional law, then the award can be challenged in court. The role of the undersigned as an arbitrator is to first interpret the collective bargaining agreement between the parties.

The County accurately argues that the Union has the burden of showing that Marsicek was relatively equal in qualifications to Daun, in order for Marsicek's seniority to become a factor in the selection process.

Grube and the County's Salary and Personnel Committee interviewed each of the five applicants, during which interviews the same basic questions were asked of each applicant. Following the completion of the interviews, Grube and the Committee evaluated the applicants based on their test scores, their completed applications, their prior experience, the comments of their supervisors and their interviews. Wilma Springer, the Committee Chair, testified that she thought Marsicek had a poor interview and failed to convey certain information to the Committee, e.g., Marsicek testified to more computer experience

during the hearing than she had described to the Committee during her interview. However, the application submitted by Marsicek was a fairly detailed outline of her computer experience. Certainly, the Committee could have questioned Marsicek further during her interview if they were unclear as to the amount of computer experience and skills which she possessed. Marsicek's application also listed several accounting activities, in addition to the bowling league bookwork. Springer testified that the Committee did consider Marsicek's experience as the Child Support Clerk when comparing the qualifications of the candidates. It would appear that Marsicek's experience in general was more varied and more extensive than was Daun's experience, except in the area of computers. The County judged Daun to have a better background than Marsicek in working with computers. That factor was quite significant to the County in this process. However, experience is only one component of qualifications. Attitude and temperament are also valid considerations in examining qualifications. Grube testified that she was told by the County Clerk, who was Marsicek's supervisor at the time, that Marsicek could come to work in a bad mood or could develop one during the day, that she sometimes got upset when interrupted and had sworn out loud at her machines, that the Clerk had received calls from members of the general public who were unhappy with Marsicek's mood and attitude on the telephone, and that the Clerk had talked to Marsicek about her attitude on several occasions. Grube testified that, in comparison, she had received excellent comments and references from the supervisors of Schneider and Daun.

There had been some changes in the child support duties since Marsicek left that position in 1988, although at least half of the listed duties either were the same or similar to duties which existed at the time Marsicek held the position. Also, more of the work, which had been performed manually, was now done on a computer. Grube was familiar with the background in computers of both Marsicek and Daun. While Marsicek had taken a word processing course in 1990, her current position required her to spend less time on the computer than Daun spent. Grube concluded that Daun had better computer experience and skills than did Marsicek. Such a conclusion was not unreasonable in light of their job duties.

Although certain aspects of an applicant's qualifications can be judged on a relatively objective basis, e.g., education, prior work experience and current job duties, subjective elements are inherent in those judgments when evaluating the level of skills shown in performing the duties and the ability to apply one's education and experience to new tasks and processes. In the instant case, the County made the subjective determination that Marsicek's qualifications were not relatively equal to the qualifications of either Schneider or Daun and, therefore,

Marsicek's greater seniority was not the deciding factor. The evidence is not sufficient to justify overturning the County's judgment that Daun's better references, computer skills and interview made her more qualified than Marsicek, even though Marsicek had more experience and a higher test score. It seems

clear that the County reasonably relied on other factors in addition to experience in judging the qualifications of the respective applicants.

The Union accurately asserts that in prior arbitrations involving the same contractual language, experience was found to be the controlling difference in qualifications. However, the decisions in those cases do not make experience the only element of qualifications. As discussed above, the County considered experience along with exam scores, supervisory comments and the interviews. The County had a rational basis for judging Marsicek not to be relatively equal in qualifications to Schneider and Daun. Thus, the County's decision should not be overturned.

The Union contended that Grube's poll of anonymous employes demonstrates the arbitrary and capricious nature of the selection process which prevented Marsicek from being treated fairly. The resulting comments were of a very mixed nature; one was positive, one was negative and three were general in type. The testimony of the witnesses was that the responses were given very little weight. This case involved the first time in which Grube was involved in the hiring process. While a more experienced supervisor might not have requested anonymous comments as Grube did, there is nothing in the record which indicates that Grube's intent was anything other than the seeking of information which would assist her in selecting the most qualified applicant. Grube's decision to request comments only for Marsicek was based on the fact Marsicek had worked in the office previously. Such a basis was logical. Moreover, Grube did solicit responses from the respective supervisor of each applicant. Consequently, the undersigned is not persuaded that selection process was designed to prevent Marsicek from receiving a fair comparison to the other applicants.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the County did not violate the contract when it failed to promote the grievant, Jayette Marsicek, to the position of Deputy Clerk of Courts/Child Support Clerk; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 23rd day of September, 1993.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

