

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 GENERAL TEAMSTERS UNION LOCAL 662 :Case 74  
 :No. 49118  
 :MA-7828  
 and :  
 :  
 CLARK COUNTY (SHERIFF'S DEPARTMENT) :  
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.,  
 Attorneys at Law, by Ms. Naomi E. Eisman, on behalf of  
 General Teamsters Union Local 662.  
 Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Ms.  
Kathryn J. Prenn, on behalf of Clark County.

ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter the Union, and  
 Clark County, hereinafter the County, jointly requested that the  
 Wisconsin Employment Relations Commission designate a staff  
 arbitrator to hear and decide the instant dispute. The Commission  
 designated the undersigned, David E. Shaw, of the Commission's  
 staff, to arbitrate in the dispute. The parties submitted a  
 Stipulation of Facts on June 25, 1993, and completed the  
 submission of briefs by August 27, 1993. Based upon the  
 stipulated facts and the arguments of the parties, the undersigned  
 makes and issues the following Award.

ISSUES

The Union would frame the issue as follows:

Did the County violate the collective bargaining agreement when it promoted Jeff Parker to the sergeant position through its procedures for hiring outside candidates, yet allowing Parker to maintain his original seniority date; and if so, what is an appropriate remedy?

The County states the issues as follows:

A. Did the County violate the collective bargaining agreement when it hired Deputy Jeff Parker for the sergeant position following his application for the position as an external candidate?

B. If so, what is the appropriate remedy?

The Arbitrator concludes that the issue may be stated as follows:

Did the County violate the parties' Collective Bargaining Agreement when it awarded Deputy Jeff Parker the Sergeant position?

If so, what is the appropriate remedy?

#### CONTRACT PROVISIONS

The following provisions of the parties' 1992-1993 Agreement are cited, in relevant part:

#### ARTICLE 4 - SENIORITY

Section 1. Seniority shall be determined by length of service within the Department plus such additional time as is required or granted for vacation, leave of absence, illness and accident. An employee's seniority is nullified:

. . .

B. If employee quits;

. . .

#### ARTICLE 5 - GRIEVANCE PROCEDURE

Section 1. Grievance. A grievance is defined to be a controversy between the Union and the Employer, or between any employee or employees and the Employer as to:

A. A matter involving the interpretation of this Agreement;

B. Any matter involving an alleged violation of this Agreement in which an employee, or group of employees, or the Employer maintains that any of their rights or privileges have been impaired in violation of this Agreement; and,

C. Any matter involving working conditions.

. . .

Section 4. Arbitration.

B. The grievance shall be submitted to arbitration by requesting the WERC to provide the parties with a list of five (5) impartial arbitrators. The parties shall alternately strike names from such list until one remains. A coin toss shall determine which party strikes first. The parties shall exercise the strikes within fifteen (15) (sic) following receipt of the panel from the WERC. The remaining arbitrator shall then be notified of his/her appointment to conduct the grievance arbitration. The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to, or delete from the express terms of this Agreement.

. . .

ARTICLE 26 - JOB POSTING AND NOTICE

Section 1. Postings. Clark County shall provide a bulletin board at the Clark County Jail for the purpose of posting official Union business. The Law Enforcement Committee or its designee shall place on said bulletin board all new positions or vacancies for a period of seven (7) working days prior to receiving applications. Moreover, a written notice shall be sent to all employees, at their current address, of all jobs open at least ten (10) days prior to receiving applications. No outside applicants shall be considered as long as there is a qualified employee applicant available. The seniority list shall be posted and revised yearly by Employer. All positions filled and the name of the successful applicant shall be posted and written notice sent to the Union within

ten (10) days after hiring the successful applicant.

Section 2. Basic Qualifications. Promotions to other job classifications within the bargaining unit shall be determined as follows:

- A. A standardized test developed by an outside agency shall be administered to all eligible applicants. The scores shall carry a weight of not more than thirty percent (30%) of the final grade. To qualify, applicants must score 70% or more of the maximum raw test score. Applicants will receive a written certified notice of their test scores, provided such disclosure does not violate any state testing regulations or policies.
- B. An oral interview shall be conducted by the Law Enforcement Committee and shall carry a weight of not more than twenty percent (20%) of the final grade.
- C. The management personnel of the Sheriff Department shall provide documents and/or information which shall evaluate the applicant's job performance, ability and educational background, the total weight of which shall be no more than twenty-five percent (25%) of the final grade. All employees shall receive written annual evaluations, with additional evaluations to be provided at the Administration's discretion.
- D. Credit for length of service as an employee of the Sheriff Department shall be calculated at one final grade point for every twelve (12) months of service as of the date of the written test, not to exceed twenty-five (25) final grade points.

- E. If two or more applicants achieve the same highest final grade, the person with the most seniority shall be promoted.
- F. A person must have a minimum of three (3) years on the Clark County Sheriff Department to qualify for a bargaining unit position above Deputy Officer.

Section 3. Trial Period. An employee, upon being promoted to another position, shall serve a trial period of six (6) months in that classification. An employee who does not satisfactorily complete the trial period at the end of six (6) months shall be returned to his/her former position at his/her former rate of pay with no loss in benefits. In the event that County determines an employee is not qualified to fill a position before the end of the six (6) month period, the County reserves the right to return the employee to his/her former rate of pay. The employee shall be allowed to return to his/her former position and former rate of pay within the said trial period upon request. The six (6) month trial period may be extended one time by a maximum of ninety (90) days upon the mutual consent of the Employer and the employee.

Any dispute as to qualifications and seniority of any employee applicant for any job shall be subject to the grievance procedure. All employee applicants shall be notified in writing as to the reasons why they were not accepted for the position. All employees shall receive written annual evaluations, with additional evaluations to be provided at the Administration's discretion.

. . .

ARTICLE 33 - MANAGEMENT PREROGATIVES

Except as otherwise specifically provided in this Agreement, the County retains all the rights and functions of management that it has by law.

Without limiting the generality of the foregoing, this includes:

- A. The determination of services to be rendered and the right to plan, direct and control operations.
- B. The determination of the equipment to be used, as well as the right to introduce new methods, jobs and classifications, to change, delete, or combine existing methods, jobs or classifications.
- C. The determination of the size of the workforce; the assignment of work or workers; the determination of policies affecting the selection and training of employees, and the right to hire, recall, transfer, promote, lay off, suspend, or dismiss employees for just cause.
- D. The establishment of reasonable quality and workmanship standards except as provided herein.
- E. The maintenance and disciplining control in use of County property.
- F. The taking of necessary action to carry out the functions of the County.
- G. The taking of necessary action to comply with state or federal laws.

Provided, however, the Union does not waive the right to bargain the impact or the exercise of these management rights on wages, hours and conditions of employment. The County agrees that none of these rights shall be used for the purpose of discriminating against any employee because of membership or non-membership in the Union, or against any member of the Union because of proper union activities.

#### FACTS

#### **STIPULATION OF FACTS**

The parties in the above-referenced matter hereby waive their right to a hearing

before the Arbitrator and stipulate to the following:

1. At all times relevant to the instant grievance, the parties have been subject to a collective bargaining agreement. (Attachment A)

2. Article 26 of the collective bargaining agreement sets forth the job posting procedures, including basic qualifications for promotion of bargaining unit members to other job classifications within the bargaining unit. The basic qualifications include a score of 70% or more of the maximum raw test score on a standardized test developed by an outside agency and, in the case of a promotion to a position above Deputy Officer, at least three (3) years of experience with the Clark County Sheriff's Department.

3. A Sergeant position in the Clark County Sheriff's Department became vacant in late May, 1992, due to the disability retirement of Arlin Jenness.

4. On or about June 8, 1992, the Sergeant position was posted internally pursuant to Article 26 of the parties' collective bargaining agreement.

5. Two employees with the requisite years of experience, Deputy Edwards and Deputy Herricks, timely posted for the Sergeant position.

6. Deputy Jeff Parker's application for the Sergeant position was rejected because he did not have three (3) years of experience with the Clark County Sheriff's Department, having first been hired by the Department in March, 1990.

7. On or about July 18, 1992, the law enforcement sergeant examination, developed by the Wisconsin City and County Testing Service, was administered in Eau Claire to both Deputy Edwards and Deputy Herricks. Neither officer achieved the required eligibility score of at least 70%. Therefore, both officers were deemed ineligible for further consideration

for the position.

8. There being no internal applicant who met the basic qualifications for the position as set forth in Article 26, Section 2, the Department decided to advertise the position to the outside.

9. The Sergeant position was advertised for one week in each of the County's five newspapers on or about September 11, 1992. (Attachment B). 1/

10. In response to the external posting, the Department received six (6) applications, including an application by Deputy Jeff Parker.

11. All six (6) external applicants were administered the same examination as referenced in statement 6 above. Deputy Parker scored 84% on the examination, the highest score among the six external applicants. (Attachment C)

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1/ The following is Attachment B:

#### **Employment Opportunity**

Deputy Sheriff, Sergeant -- Clark County Sheriff's Department is accepting applications for the position of Sergeant. **Salary:** \$26,334 per year (1993). Health insurance, paid retirement, and uniform allowance are also provided. **Qualifications:** Valid Wisconsin Driver's License; current certification by Wisconsin Law Enforcement Standards Board; at least 18 years of age; be in good health; at least 7 years of law enforcement experience with supervisory experience preferred. **Apply:** By September 28, 1992. Submit Wisconsin Law Enforcement Standards Board form DJ-LE-330 along with resume to the Sheriff, Clark County Sheriff's Department P.O. Box 111 517 Court Street, Neillsville, WI. 54456 **Note:** Applicant must successfully pass a written exam, psychological exam, oral interview, and background investigation. AN EQUAL OPPORTUNITY EMPLOYER.

12. Prior to the date of the examination, Deputy Parker had at least seven (7) years of experience in law enforcement.

13. On or about October 16, 1992, the Sergeant position was awarded to Deputy Parker.

14. Deputy Parker retained his bargaining unit seniority when he was awarded the Sergeant position.

15. A copy of the grievance is attached as Attachment D. 2/

POSITIONS OF THE PARTIES

Union

The Union takes the position that while the County had the right to hire Parker for the Sergeant position as an outside candidate, it did not have the right to promote Parker to the position, since Parker did not meet the contractual requirements for a promotion. The Union concedes that if there are no qualified internal candidates, the County has the right under Article 26 of the Agreement to look to outside candidates and apply standards differing from those applied to internal candidates. The Union notes that the County could not apply the same standards to outside applicants as it does to internal applicants, since internal applicants are contractually required

2/ Attachment D reads, in relevant part, as follows:

. . .

Violation Alleged: Article & Section ARTICLE 26

Date of Occurrence: 16 OCT. 92 Date of Filing  
20 OCT. 92

State nature of grievance: Use back of form if more space is needed.

PROMOTION OF JEFFREY PARKER IS A VIOLATION OF THE ABOVE ARTICLE. SINCE MR. PARKER IS COVERED BY THE CONTRACT, HE SHOULD NOT HAVE BEEN ALLOWED TO APPLY FOR THE SGT. POSITION.

Settlement Requested:

SGT. POSITION GIVEN TO A QUALIFIED APPLICANT.

to have at least three years of seniority to qualify for a promotion, and, by definition, an outside applicant would not have any bargaining unit seniority. Since there were no qualified internal applicants for the promotion, the County had the right to hire an outside applicant in this case.

While the County may set its own standards for hiring outside applicants, it may not unilaterally establish promotion standards that violate provisions of the parties' Agreement. In this case, the County hired Parker as an outside applicant, hiring him for the Sergeant position even though he did not have the required three years of seniority in the Department, but treated him like an inside candidate in that it permitted him to retain his seniority as though he had been promoted from within the unit.

By treating Parker as though he had been promoted from within, the County violated the provisions of Article 26 that required three years of seniority in the bargaining unit in order to be promoted to Sergeant. The contractual restrictions on promotions may not be disregarded by the Arbitrator. Citing, Bridgeport Gas Co., 26 LA 289 (Arbitrator Stutz, Williams and Curry, 1956). By treating Parker as an outside candidate, but allowing him to retain his bargaining unit seniority, the County violated Article 4, Section 1, B, of the Agreement, which provides that an employe's seniority is nullified if he quits. The only way Parker could be hired for the Sergeant position from the outside was if he first quit the Department. Noting that the Agreement gives unit employes certain rights and benefits based upon seniority, the Union asserts that by permitting Parker to retain his seniority the County not only violated the clear language of Article 4, 1, B, it also violated the seniority rights of the rest of the bargaining unit. In its reply brief, the Union also asserts that the County accorded Parker special treatment and discriminated against other officers who also did not have three years of seniority, but who did not want to quit in order to be treated as an outside applicant.

As a remedy, the Union requests that the County be ordered to change Parker's seniority date to October 16, 1992, or to remove Parker from the Sergeant's position with loss of seniority for the time he served in the position.

#### County

The County takes the position it did not violate the parties' Agreement when it awarded Parker the Sergeant position. First, the County asserts that Article 26 does not apply in this case. That provision controls internal postings. The County concedes that Parker did not meet the basic qualifications under the internal procedure and therefore was not eligible to post into the Sergeant position under that procedure. However, since no bargaining unit employe met the basic qualifications so as to

allow them to take advantage of the internal procedure, Article 26 was no longer relevant and the County advertised to the outside to fill the position. Article 26 is a restriction upon the County and gives internal applicants the "first crack" at positions. Before the position can be opened up to all applicants, internal applicants must be given the opportunity to apply, and if there is an internal candidate that possesses the basic qualifications, that candidate must be awarded the position and external candidates cannot be considered. If application of Article 26 does not result in the position being awarded to an internal candidate, it is no longer relevant.

The County views the Union as arguing that the same standards that apply to internal candidates must be applied to external candidates, and the County asserts there is no support for that argument in the law or the Agreement. Further, establishing qualifications for external candidates has been expressly reserved to management.

Next, the County cites Article 33, Management Prerogatives, as expressly reserving to management the right to determine policies affecting the selection of employees and the right to hire and promote employees. There is no provision in the Agreement that limits or modifies those rights once Article 26 has been complied with and the County advertises the position to the outside. The County asserts it knows of no authority for either the Union or the County to prohibit an employee from applying as an outside applicant. The employee, in doing so, no longer has an inside advantage, seniority is irrelevant, and the employee must demonstrate that he is the best candidate for the position. The evidence shows that Parker was the best applicant in this case.

The County also cites an award where the arbitrator upheld management's actions in promoting two qualified employees who were technically ineligible because they had already accepted other job postings in that twelve-month period. The arbitrator found that it would be absurd to force the employer to follow language that was designed to avoid a problem so as to tie management's hands in a context where it needs flexibility rather than protection. KLC Corp., 100 LA 188 (Duff, 1992). In this case, Parker competed as an external applicant without any advantage or special treatment and was awarded the position because he was the best candidate.

The County notes the restrictions on the arbitrator's authority at Step 4 of the Grievance Procedure and asserts that to find that Parker was prohibited from applying as an external candidate would be to add a prohibition to the Agreement in violation of that restriction. The Union's demand that the Sergeant's position be awarded to a qualified candidate is also beyond the Arbitrator's authority to grant. Since there were no internal applicants with the basic qualifications, the County could look to external applicants and the basic qualification of

three years in the Department obviously cannot apply to those applicants.

In its reply brief, the County notes that the Union concedes that the County had the right to hire Parker for the Sergeant position, that it had the right to hire an outside applicant and that it was not bound to apply the standards it applies to internal candidates. Given those admissions, it is clear the County did not violate Article 26. It appears to the County that the Union's real complaint is that Parker was allowed to keep his seniority after getting the Sergeant position through the outside procedures. The County asserts that the Union has not raised the issue of Parker's being allowed to retain his seniority prior to raising it in its brief. Since that issue was not raised as a grievance, the Arbitrator lacks jurisdiction to decide that matter. Even if it is concluded that the Arbitrator has jurisdiction to decide the seniority issue, there is no authority to change Parker's seniority date. Article 4, Section 1, of the Agreement provides that seniority is determined by length of service in the Department, which was done, and is only lost by certain actions, none of which occurred. In that regard, the County notes that Parker did not quit the Department to apply as an outside candidate and asserts there is no requirement that a person do so. Parker's seniority date is consistent with the Agreement and no other bargaining unit member's seniority was negatively impacted by Parker being awarded the Sergeant position.

#### DISCUSSION

The question posed by the facts in this case is whether an employe who does not meet all of the qualifications for a promotion under the contractual promotion procedure, may then be awarded the position when the County has the right under that procedure to go to outside applicants. For the reasons set forth below it is concluded that the question must be answered in the negative.

First, it is noted that the County's right to go to outside applicants to fill the Sergeant position is not challenged, nor is the County's conclusion that Parker was the best qualified among those who applied as outside applicants. The Arbitrator shares, to some degree, the County's puzzlement at the Union's position in this case. Be that as it may, resolution of this dispute is a matter of applying clear contract language; it is not a matter of doing equity or even of doing what might appear to be the most beneficial to all concerned.

Article 26, Job Posting and Notice, of the Agreement, provides, in relevant part, as follows:

#### Section 1. Postings.

. . . .

No outside applicants shall be considered as long as there is a qualified employee applicant available. . . .

Section 2. Basic Qualifications. Promotions to other job classifications within the bargaining unit shall be determined as follows:

. . . .

F. A person must have a minimum of three (3) years in the Clark County Sheriff's Department to qualify for a bargaining unit position above Deputy Officer.

. . . .

The language quoted above from Section 1 establishes a dichotomy as to "outside applicants" and "employee applicant(s)" and if any of the latter are qualified, the former may not be considered. Parker was an "employee applicant", and it was only because he and the other employee applicants were not "qualified", that the County had the right to go to "outside applicants". As an employee of the Department who is a member of the bargaining unit covered by the Agreement, Parker's eligibility for promotion 3/ is specifically addressed and established in Article 26, Section 2, Basic Qualifications. Under paragraph F. of that provision, a person cannot qualify for a bargaining unit position above Deputy Officer unless he/she has a minimum of three years in the Department. The Union concedes that it cannot require the County to impose that standard on outside applicants, but it demands that the contractual standards be applied to employee applicants covered by the Agreement. To avoid being covered by the Agreement, i.e., being disqualified by Section 2, F, Parker would have had to terminate his employment in the Department in order to apply as an "outside applicant".

The award in KLC Corp., 100 LA 188, cited by the County is distinguishable. In that case, the arbitrator relied on a broad management rights clause and the conclusion that language limiting eligibility to post for a position was designed to help management

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3/ The County's use of the word "hire" instead of "promote", is a matter of semantics. The facts show Parker was promoted to Sergeant, i.e., he went from a position in the Department to a higher-rated position in the Department without leaving the employ of the Department.

avoid a problem, i.e., was intended for management's benefit. The arbitrator concluded that management could "waive" that protection. 4/ It is not at all clear in this case that the qualification of three years in the Department imposed by Article 26, Section 2, F, of the Agreement was intended solely for the County's protection. To the extent the KLC case is not distinguishable, the Arbitrator disagrees with that award. Having negotiated the basic qualifications to be applied to employes bidding on positions in the bargaining unit, the County is not free to decide when they will be applied, and when they will not, absent an indication in the Agreement that it has retained such discretion. While Article 33, Management Prerogatives, C, of the Agreement, reserves to the County the "selection and training of employes" and the right to "hire" and "promote", those prerogatives retained are qualified to the extent "except as otherwise specifically provided in this Agreement. . ." As Article 26, Section 2, specifically sets forth the "Basic Qualifications", the County's rights under Article 33, C, are limited by that provision. Thus, the County has not retained the discretion to disregard any of the "basic qualifications" set forth in Article 26, Section 2, of the Agreement, as to employe applicants.

The violation found is that the County promoted Parker to the Sergeant position in violation of Article 26, Section 2, F, of the Agreement. Hence, the appropriate remedy is to void that action and place Parker in his former position. There is no loss of seniority, since Parker did not quit his employment in the Department, and has remained in a bargaining unit position. As to filling the Sergeant position, the County is required to act in compliance with the requirements of Article 26. If the County wishes to repost the position internally and wishes to deviate from those requirements with regard to employes who are applicants, it will have to first obtain the Union's agreement, or the County may opt to fill the position by selecting from outside applicants.

Based upon the above, the evidence, and the arguments of the parties, the undersigned makes and issues the following

#### AWARD

The grievance is sustained. The County is directed to place Parker in his former position without loss of seniority. If it wishes to fill the Sergeant position, the County may either repost

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4/ It is noted that the same arbitrator concluded in a prior case that the employer could not ignore the contract provision providing that employes on a leave of absence are not eligible to bid on posted vacancies and award the vacancy to a more senior employe who had bid, but who was off work on a worker's compensation injury. Elmwood Village Nursing Home, 94 LA 764 (Duff, 1990).

the Sergeant position internally or select from outside applicants, as discussed more fully above in the Award.

Dated at Madison, Wisconsin this 4th day of October, 1993.

By David E. Shaw /s/  
David E. Shaw, Arbitrator