BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
DODGE COUNTY SHERIFF'S DEPARTMENT SWORN EMPLOYEES, LOCAL 1323-B, AFSCME, AFL-CIO	Case 180 No. 49403 MA-7933
and	
DODGE COUNTY (SHERIFF'S DEPT.)	

Appearances:

Mr. James L. Koch, District Representative, Wisconsin Council 40, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by Mr. Roger E. Walsh, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning job postings for Sergeant.

The undersigned was appointed and held a hearing on September 16, 1993 in Juneau, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, the Employer filed a reply brief, and the record was closed on December 21, 1993.

ISSUES:

The parties were unable to agree upon the issue involved. The Union proposed the following:

1. Did the Employer violate the current collective bargaining agreement and the past practice for internal posting when it unilaterally and arbitrarily implemented "minimal education standards" which consisted of the need to possess an AA degree in police science or 60 credits towards a bachelor's degree in criminal justice in order to take the April 24, 1993 test for a Sergeant vacancy?

The County proposed the following:

1. Did the County violate the collective bargaining agreement by not allowing employes who did not possess an AA degree in police science or 60 credits towards a bachelor's degree in criminal justice to take the April 24, 1993 test of a Sergeant vacancy?

2. If it did, what is the appropriate remedy under the contract?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE III
MANAGEMENT RIGHTS

3.1 Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of their work and all other matters pertaining to the management and operation of the County, including the hiring, promoting, transferring, demoting, suspending or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this Section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

. . .

ARTICLE XIV
SENIORITY RIGHTS

14.1 It shall be the policy of the Employer to recognize seniority.

14.2 There shall be two (2) types of seniority: County-wide and classification.

14.3 Seniority shall be defined as the length of time that an Employee has been employed, dating from his/her most recent date of hire and excluding any unpaid leaves of absence except as hereinafter provided.

14.4 Seniority shall apply in lay-offs, recall from lay-offs, shift selection and vacation selection as herein provided.
Seniority shall be used as a consideration in promotions and transfers, but shall not be the sole basis on which promotions or transfers are granted.

. . .

14.6 **Job Posting.** Whenever a vacancy occurs or it is known that a promotion or a new position will be created, the vacancy shall be posted on all bulletin boards for a period of five (5) workdays, excluding Saturday, Sunday and holidays.

14.61 Shift vacancies shall be posted first and shall be filled from Employees within the classification and division and thereafter, remaining vacancies shall be posted. Shift changes may be posted for a shorter period with the approval of the Union.

14.62 Employees may apply for such position during this period by signing the posting.

14.63 All Employees seeking a change in classification shall be tested and shall be subject to examination by the Civil Service Commission.

14.64 All vacant bargaining unit positions not filled by the posting procedure shall be filled from established position eligibility lists approved by the Civil Service Commission and provided by the Personnel Department.

FACTS:

On April 24, 1993, the Department gave an examination for a Sergeant's opening. Five employes who had requested to take the test were denied the opportunity to do so, based on their educational qualifications. The Union filed a class action grievance on behalf of all employes on April 29.

It is undisputed that of the 34 employes in the department, only five would meet the educational requirements imposed by the Employer for promotion to Sergeant, including one who is already a Sergeant. It is also undisputed that the Sheriff himself, and other management members, do not meet these criteria. The Sheriff began to consider the imposition of such criteria about 1990, when legislative action appeared likely to create such criteria for new hires. Subsequently, new legislation did impose a minimum educational qualification, for applicants for initial hire as law enforcement officers, amounting to possession of an appropriate associate degree or 60 credits towards an appropriate bachelor's degree. It is also undisputed that these requirements do not in and of themselves apply to existing staff of law enforcement departments in Wisconsin who were hired before February 1, 1993.

When the Sheriff initially raised the subject of imposing minimum education qualifications, Union President Gerald Beier told him that the Union would have no objection to the application of such standards to new hires, but would object to their use in promotions of existing employes. The matter was discussed on several occasions between 1990 and 1993, and in 1991 the Sheriff announced the intention to require such standards in the future, and indeed promulgated the requirement in writing. But at that time there was no immediate opening for a Sergeant. A grievance concerning the application of these standards to two employes bidding from jail positions into patrol positions was settled on a non-precedential basis.

In the negotiations for the 1992-93 collective bargaining agreement, the Union initially proposed new contract language specifically to "grandfather" existing employes from the application of a minimum education qualification for

promotions. This language was subsequently withdrawn during negotiations. Also included in the Union's initial proposals, however, was the following language, on the front page:

> The Union reserves the right to add to, delete or amend their proposals prior to, and during negotiations, and furthermore movement, alterations, or withdrawals does not waive any rights to hours of work, wages and/or other conditions of employment already in existence prior to negotiations.

One of the employes who was unable to take the examination for Sergeant was Douglas Ninmann, who was promoted to Corporal in July, 1991. Ninmann testified that Corporals serve in place of Sergeants, and receive Sergeants' pay when no Sergeant is on duty, but that he does not have the minimum education required by the Employer in the 1993 posting to move up to Sergeant. Beier testified that lately some employes have signed up for classes in order to be eligible for promotion, but that since the enactment of the rules requiring such classes for new hires, it has become difficult to get into the college courses required. He estimated that for a working employe it could take five years to accumulate 60 credits. Beier also testified that in a two-person conversation concerning the matter, former County Personnel Manager Peter Witt agreed that a change of this kind could not properly be imposed unilaterally during the contract by the Sheriff.

A position description for Sergeant originally dating from 1980 was substantially amended by the County in or about February, 1991. Under "experience" in the latter job description, there is included "an AA degree in police science or 60 credits towards a Bachelor's degree in criminal justice. (Effective 1/01/93)." The January, 1991 Corporal job description does not contain such a requirement. But the March, 1992 position description for Deputy Sheriff does contain that requirement.

The Union's Position:

The Union contends that the implementation of minimum educational requirements for promotions to Sergeant was arbitrary and unilateral, and discriminates against the older, more senior employes in the work force by denying them the negotiated benefit of posting for and being offered such promotional opportunities. The Union points to the unrebutted testimony that most of the work force would be eliminated from competition by this action, and contends that even if these employes proceed back to school, it will take them up to five years and be a financial hardship. The Union contends that Article 3.1 of the Agreement prohibits discrimination in and for promotions, as do Wisconsin Statutes Sections 111.31 to 111.37. The Union also argues that the seniority rights specified in Article 14.6 are violated by this act.

The Union contends that there is no evidence that the Law Enforcement Standards Board requirements for new hires are intended to affect any existing law enforcement employes hired prior to February 1, 1993, whereas the County Board of Supervisors specified in Ordinance Number 186 a system of competitive examinations determining who is qualified. The Union further points to the parallel Ordinance Number 187, in that it states that ". . . the Commission shall conduct competitive examinations written and oral, for candidates who apply for any full-time Dodge County Sheriff position, said examination shall apply to all applicants and individuals who are currently Deputy Sheriffs, but who wish to compete for a higher classification."

With respect to the County's contention that the Union indicated, by proposing specific language grandfathering employes and later dropping it, that the existing collective bargaining agreement did not grandfather such employes,

the Union argues that its original proposals included a limitation on the treatment of any such withdrawal as a waiver. The Union notes that it has never objected to the imposition of such requirements for new hires, but has always opposed their application to existing employes. The Union cites several arbitration cases in which arbitrators found that employers were not permitted to change the definition of qualifications without bargaining. The Union requests that the Arbitrator order the County to cease and desist from unilateral changes in qualifications for job postings within the unit, and order that all employes not allowed to post for the April 24, 1993 Sergeant position be placed on the posting and given the contractual opportunity for promotion, and if promoted, receive full reimbursement for backpay, classification seniority and any other relevant benefits.

The County's Position:

The County contends first that the County supplied the Union with the new minimum qualifications for the Sergeant promotion in February, 1991, and that while discussions were held, the Union did not file any grievance or written objection in that year relating to the unilateral establishment of these requirements. Nor did the Union make any formal request that the County bargain over establishment of these qualifications; and, the County argues, the Union subsequently proposed language to grandfather existing employes, but withdrew it during negotiations; nor has the Union filed a prohibited practice complaint against the County relative to this action.

The County argues that under long-standing WERC case law, a municipal employer has the unilateral right to establish minimum qualifications for any position. The County cites a number of Commission and Examiner decisions to this effect, and contends that the minimum education standards set by the Sheriff in the instant case are similar to the Law Enforcement Standards Board's minimum educational qualifications for law enforcement officers employed on and after February 1, 1993. The County notes the Law Enforcement Standards Board added that these are minimum qualifications and that higher qualifications are strongly recommended. The County argues that it has the right unilaterally to establish these minimum qualifications where there is no provision in the contract explicitly restricting its right to set them.

The County further argues that the collective bargaining agreement cannot restrict the Sheriff's constitutional authority to provide law enforcement services, citing Manitowoc County vs. Local 986-B, AFSCME, AFL-CIO. 1/ The County argues that the determination of who is to be assigned to the position of Sergeant is one of the constitutionally protected powers of a Sheriff, and thus cannot be limited by a collective bargaining agreement. The County contends that even if there were some provisions in the collective bargaining restricting the Sheriff from requiring minimum education qualifications for this assignment, such provisions would be illegal, void and unenforceable. The County also argues that Section 3.01 of the contract provides that the County has "sole and exclusive right" to determine all matters not specifically referred to in other sections of the Agreement, including promotions. The County argues that the establishment of minimum educational qualifications is clearly within the "all other matters pertaining to" language in Section 3.01.

In its reply brief, the County objects to the Union's use of the details of a non-precedential settlement agreement, and contends that the Union errs in attempting to argue that this is a dispute of recent origin, noting that the Union was notified of the minimum education requirements in February, 1991. The County reiterates that it has no obligation to bargain with the Union over

1/ 168 Wis.2d 819 (1992).

the unilateral establishment of these requirements, and contends that they do not discriminate against any employe because of Union membership under Section 3.01, or on any basis listed in Secs. 111.31 to 111.37, Wis. Stats. The County also contends that the testimony of Union President Beier as to former Personnel Director Peter Witt's statements express at most the personal view of Mr. Witt, while it was the Sheriff's role to establish minimum qualifications.

The County argues with respect to the cases cited by the Union that one of them involved nothing to do with the ability to set minimum educational qualifications, while two others involved language in which the employers involved had specifically agreed to either lists of qualifications or a standard of reasonableness not present here. The Employer likewise distinguishes the contract clause involved in the fourth case cited by the Union (Pennsylvania Power and Light Company), on the basis that the contract there gave preference to the employe with seniority when "fitness and ability among employes are substantially equal," a different standard from that present here. The Employer requests that the grievance be denied.

Discussion:

I adopt the Employer's definition of the issues herein, as it adequately states them while the Union's version independently presupposes that the violation of a "past practice" would violate the Agreement.

I note that the parties' arguments have strayed somewhat beyond the bounds of an arbitrator's proper concern. In particular, arguments related to constitutionality and to the duty to bargain are not generally considered to be within the ambit of an arbitrator's powers, which by their nature are limited to the interpretation of contractual provisions and the enforcement of contractual terms. 2/ Furthermore, I note that the contract in question is between the Union and the Dodge County Personnel and Labor Negotiations Committee, and that whether or not an employer is obligated to bargain concerning qualifications is not the issue if a collective bargaining agreement in and of itself demonstrates that the employer has in fact done so.

I do not find the applicable sections of the collective bargaining agreement to be ambiguous in this respect. In particular, Article 14.6 specifies several terms which together make a disposition of this grievance clear. In the first paragraph, the phrase appears "whenever a vacancy occurs or it is known that a promotion or a new position will be created, the vacancy shall be posted . . ." After dealing with shift vacancies first, remaining vacancies are addressed by Sections 14.62 and 14.63: "Employees may apply for such position during this period by signing the posting." And "All Employees seeking a change in classification shall be tested and shall be subject to examination by the Civil Service Commission." By stating that "all employes" shall be tested if they seek a change in classification, the County has, in fact, bargained for a specific method of determining qualifications. The County has, furthermore, specified in its collective bargaining agreement that this shall apply to "all" employes who wish to apply for a position which remains vacant following the application of Section 14.61. It is undisputed that the position in question was not filled by application of Article 14.61. The County, however, refused to allow five employes to apply for such position

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2/ The parties' Agreement is typical: in Article 15.1 a grievance is defined as ". . . any matter involving the interpretation, application or enforcement of the terms of this Agreement," while in Article 15.3, an arbitrator is instructed to ". . . neither add to, detract from nor modify any of the provisions of this Agreement."

by signing the posting. On its face, this act violated Sections 14.62 and 14.63.

I express no opinion as to the constitutionality of this language; my interpretation is restricted solely to the collective bargaining agreement itself. Furthermore, it is not within my authority to determine the reasonableness or unreasonableness of the Employer's attempt to impose higher educational standards on employes generally. But I note, in this connection, that there is no evidence that the continued application of Section 14.62 and 14.63 would violate the Law Enforcement Standards Board's new rules governing appointment of new hires in the present context, since both parties agree that these rules apply on their face only to employes being hired from February 1, 1993 on.

Two other issues raised by the Employer do deserve attention, however. One is the assertion that the Union waived this grievance by inaction when the standards were first announced, in 1991. I reject this assertion because there is a great deal of arbitral opinion to the effect that a grievant or union is not required to act immediately upon the employer's announcement of a change in policy, but may wait until that policy change has actual impact upon an employe.

The County's remaining contractual argument is that the Union waived this grievance by first proposing and then withdrawing language in collective bargaining negotiations which would have grandfathered existing employes from the minimum educational requirement for Sergeant postings. In this instance, I need not delve into the sometimes complicated question of whether a party reveals the absence of a sound contractual argument, or merely tries for a "belt and suspenders" approach, when it proposes additional protection for its interests in collective bargaining, but is subsequently unable to obtain it. Here, that argument is vitiated by the express inclusion of a "no waiver" provision, cited above, at the front of the Union's 1992-93 initial proposals.

I note that Article 14.4 does not on its face specify any particular relative weight between seniority and other factors. It would be common practice for an employe wrongly promoted to revert to his or her original status, after a finding that another employe was wrongly disqualified resulted in a different employe being promoted. But the parties did not dwell on the County's past history of promotion decisions or on how the relevant factors under Article 14.4 have been weighed. I therefore cannot presume that even following successful examination, one of the five employees denied the opportunity to take the test will necessarily get the promotion. I am retaining jurisdiction for a period of time in order to provide a ready means of resolving any issues that may arise in this context.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the County violated Sections 14.62 and 14.63 of the collective bargaining agreement by not allowing employes who did not possess an AA degree in police science or 60 credits towards a Bachelor's degree in criminal justice to take the April 24, 1993 test for the Sergeant vacancy.

2. That as remedy, the Employer shall, forthwith upon a receipt of a copy of this Award, cease and desist from restricting any employes from posting for such open positions or being tested; and allow all employes who were not allowed to post for the April 24, 1993 Sergeant position to

be placed on said posting and given the contractual opportunity for promotion, and if promoted, receive full reimbursement for backpay, classification seniority and all other contractual benefits that may apply.

3. That the undersigned retains jurisdiction in this matter for at least 60 days, in the event of a dispute concerning the application of the remedy.

Dated at Madison, Wisconsin this 23rd day of February, 1994.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator