

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
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 MARINETTE COUNTY COURTHOUSE : Case 137
 EMPLOYEES, LOCAL 1752, AFSCME, AFL-CIO : No. 50179
 : MA-8173
 and :
 :
 MARINETTE COUNTY :
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Appearances:

Mr. David Ofria, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
 David M. Griffith & Associates, Ltd., by Mr. Charles E. Carlson, Senior Manager, appearing on behalf of the County.

ARBITRATION AWARD

Marinette County Courthouse Employees, Local 1752, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Marinette 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 Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a posting. The undersigned was so designated. Hearing was held in Marinette, Wisconsin, on March 9, 1994. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on May 17, 1994. The parties reserved the right to file reply briefs fifteen (15) days after receipt of the opposing party's brief. Neither party filed a reply brief and the record was closed on June 6, 1994.

BACKGROUND:

The grievant, Connie Gisenas, began her employment with the Marinette County Sheriff's Department on October 27, 1977, as a full-time Dispatcher. In 1984, Gisenas became a Clerk/Dispatcher and performed dispatching about 50 percent of the time. Since 1991, Gisenas has performed very minimal dispatch duties, five to ten minutes once a month as the part-time Dispatchers picked up dispatch duties.

In the summer of 1992, a new "911" console was installed. Gisenas was not trained on the new console and has had very little experience on it. In July, 1992, the County posted a full-time Dispatcher position. Gisenas was told by a Lieutenant Gable that she could not post for this vacancy because she was not qualified and the posting was for part-time Dispatchers only. Gisenas grieved the posting. The grievance was held in abeyance until a new Sheriff took office and the grievance was then resolved and the position was re-posted in January, 1993. Gisenas signed the new posting along with five other employes, one of whom was a clerical employe who later withdrew her posting, and four part-time Dispatchers.

The new Sheriff and new Captain interviewed all five remaining candidates and asked the same five questions:

1. When taking a 911 call where the caller needs a rescue squad, what are some to (sic) the questions that you should ask the caller?
2. What types of things can be done on the TTY?
3. What are some of the things we have in dispatch which are helpful to us -- to assist at times?
4. What are some of the things we can do on the in-house computer?
5. What are some of (sic) things you should remember to do and not do when on duty?

It was determined by Captain Waugus and the Sheriff that the grievant was not as qualified as the other applicants and they selected Karen Lauf for the position. Lauf has a seniority date of July 11, 1992. Gisenas grieved the County's decision to award the posting to a less senior employe and it was processed through the grievance procedure to the instant arbitration.

ISSUE:

The parties were unable to agree on a statement of the issue. The Union stated the issue as follows:

Was the grievant improperly denied the position of Dispatcher that was posted on January 27, 1993? If so, what is the appropriate remedy?

The County stated the issue as follows:

Did the County violate the collective bargaining agreement when it did not select the grievant to fill the Dispatcher position posted in January, 1993? If so, what is the appropriate remedy?

The undersigned adopts the issue as stated by the County.
PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 2

REPRESENTATION AND MANAGEMENT RIGHTS

2.01 Union Representation. The Union shall be represented in all such bargaining or negotiations with the County by such representatives as the Union shall designate.

2.02 Employer Representation. The County shall be represented in such bargaining or negotiations by such representation as the County Board shall designate.

2.03 Management Rights. The Employer possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

A) To direct all operations of the County; to maintain the efficiency of County operations; to determine the table of organization; to establish and enforce reasonable work rules, conduct, safety and schedules of work;

B) To manage and direct the work 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;

C) To uniformly enforce reasonable minimum standards of performance; to establish procedures and controls for the performance of work; to hire, promote, transfer, assign or retain Employees; to suspend, discharge, or take other appropriate disciplinary action against the Employees for just cause; to determine the fact that overtime work is necessary and the composition of the force to complete such work; to lay-off Employees in the event of lack of work or funds, or under conditions where continuation of such work would be inefficient and non-productive;

D) To introduce new or improved methods or facilities; or to change existing methods or facilities; to terminate or modify existing positions, departments, operations or work practices and to consolidate existing positions, departments or operations;

E) To determine the kinds and amounts of services to be performed as pertains to County operations, and the number and kinds of classifications to perform such services; the Union recognizes that the County has the right to subcontract work that is not prohibited by law, providing no present Employee shall be laid off or suffer a reduction of hours as a result of subcontracting;

F) To take whatever reasonable action is necessary to carry out the functions of the County in situations of emergency;

G) Such authority shall not be exercised in a manner which violates the provisions of this Agreement.

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ARTICLE V

NEW JOBS, VACANCIES

5.01 Definition. A vacancy shall be defined as:

A) A job opening not previously existing in the table of organization.

B) A job opening created by termination, promotion or transfer of existing personnel, when the job continues to exist in the table of organization.

5.02 Filling a New Job or Vacancy. A new job or vacancy within the County shall be filled as follows:

A) Posted on the County bulletin board five (5) working days before the job operation begins. Said posting shall contain the job requirements, qualifications and starting rate of pay;

B) Copy furnished to the Union secretary;

C) Employees desiring posted jobs will sign the posted notice or make a written application to the department head concerned.

5.03 Awarding Bid on New Job or Vacancy. At the end of the bidding period, the vacancy or new job will be awarded on the basis of the following provisions:

A) The department head shall confirm with the Union secretary the posted names.

B) Bargaining unit Employees from the department in which the vacancy exists shall have the first opportunity to fill the position if qualified.

C) If no bargaining unit Employee from the department applies or qualifies, it shall be open to any bargaining unit Employee from any department if s/he is qualified.

D) If no bargaining unit Employee bids on the posted job and is qualified, the County shall have right to recruit personnel from outside the workforce.

E) The bargaining unit Employee shall demonstrate h/er ability to perform the job posted within thirty (30) days and if deemed qualified by the Employer, shall be permanently assigned the job. Should such Employee not qualify or should s/he desire to return to h/er former job, s/he shall be reassigned to h/er former job without loss of seniority.

F) In the event it becomes necessary to discontinue or suspend a job for a period of time, a notice to that effect shall be posted immediately, and a copy furnished to the Union.

G) In contested cases, the County agrees to provide proposed designated Union representatives with sufficient information to show that the selected individual made a timely and proper application during the posting period.

H) Reclassification shall not be considered a vacancy and posting shall not be required.

ARTICLE 6

SENIORITY

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6.02 Application of Seniority.

A) Promotions, layoffs and recalls after layoffs will be determined upon the basis of the County's appraisal of the individual Employee's skill and ability, but where these are relatively equal, the Employee with the greatest seniority will be given preference over those with less seniority.

B) Employees shall be laid off in inverse order to their length of service and the last Employee laid off shall be the first to be called back from such layoff, providing remaining Employees are qualified. Recall rights shall be limited to eighteen (18) months.

C) The Employer will notify laid off Employees of recall by certified mail, addressed to the last known place of residence. It is the Employer's responsibility to inform the Employer of any address change.

D) An Employee has the right to refuse a temporary recall without loss of seniority or losing the right to permanent recall.

6.03 Termination of Seniority. Seniority will cease upon: a) discharge for just cause; b) quitting; c) absence from work without prior notification and explanation satisfactory to the County; d) continuous layoff for eighteen (18) months or the length of seniority to the time of layoff, whichever is less, e) if after being laid off the Employee does not return to work within five (5) calendar days after mailing written notice to return; and f) upon retirement.

6.04 Permanent Layoff. In the event of a permanent layoff, the County will give at least one (1) week's notice to those who are to be released.

6.05 Seniority List. The County will keep and maintain a seniority list of all Employees having seniority rights. This list will be open for inspection by a properly designated Union representative at all reasonable times.

6.06 Bumping. In the event of an indefinite layoff or a layoff of thirty (30) calendar days or more, the laid off Employee shall have the right to bump any other Employee within the bargaining unit who has less

seniority and whose job rate, according to the work agreement, is equal or less and the laid off Employee has the ability and skills to perform the job requirements. The bumping process shall then continue until the least senior Employee is laid off.

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UNION'S POSITION:

The Union contends that it is not challenging the County's right set forth in Sec. 2.03(B) to determine the competence and qualifications of employees. It notes that this right is subject to Sec. 6.02(A) which provides that promotion will be determined by seniority where skill and ability of the applicants are relatively equal. It asserts that the County's discretion in promotions is not absolute and it will demonstrate that the County has exercised its Sec. 2.03(B) rights in such a way so as to violate Sec. 6.02(A).

The Union insists that the instant grievance relates to a previous grievance in which the County violated the grievant's contractual rights. It asserts that the instant case really began back in July, 1992, with the posting of the full-time Dispatcher position. It admits that the grievant did not sign this posting based on Lieutenant Gable's statements that the posting was limited to part-time Dispatchers only and the grievant would lose shift preference. The Union points out that this denial was grieved and put on hold at the County's request until a new Sheriff took office. The Union claims that a summary of the grievance meeting held on January 11, 1993, acknowledges that the grievant was "misinformed by management" concerning the posting and lists three problems in the Sheriff's settling the grievance:

1. Displacement of the person hired;
2. Additional grievances filed if the grievant awarded the position;
3. Previous requests for movement within the Department were denied and others were approved.

It also notes that later on January 27, 1993, the grievance was settled with the position being re-posted. The Union suggests that the grievant was caught in the middle of the turmoil in the Department in that after the former Sheriff was gone, the new Sheriff took over and recognized there would be consequences from correcting past errors. The Union stated that it believed the events following the July, 1992 posting may have unfairly stigmatized the grievant in the eyes of the Department and that a fear of the reaction of other Dispatchers and a concern over possible grievances lead the Department to view the grievant's application in other than a completely neutral light.

The Union argues that the grievant was qualified for the Dispatcher position. It points out that the grievant had fourteen (14) year of dispatching experience, seven years full time and seven years half time. The Union acknowledges that after 1991, the grievant's dispatching duties were limited to occasional relief dispatching. The Union argues that the fourteen years of experience would not dissipate over two years. The Union maintains that it is difficult to imagine how someone with fourteen years experience would not be as well qualified as a part-time Dispatcher with only a little over one year's experience who was selected. The Union submits that the interviews conducted by the County were limited and strange. It notes that the ability to operate the console was 95 percent of the job, yet the interview consisted of only five questions and none were on the console. It points out that there was no practical exam. The Union alleges that the grievant was

predetermined not to be qualified and by excluding what constituted 95 percent of the job, there were no footprints to show what happened.

The Union suggests that the County ignored several relevant factors in selecting Karen Lauf for the vacancy. It notes that Lauf had been recently disciplined for dispatching mistakes. It also takes the position that all the grievant needed was a little orientation on the console. It claims that had the grievant gotten the job in 1992, she would have been trained on the console when it was installed. It alleges that the grievant would only need a day to get oriented on the console.

The Union concludes that the County's failure to select the grievant was not logical and the grievant's seniority rights were violated because the County used an arbitrary standard to rank her as not equally qualified to a junior employe. It contends that the County should be ordered to award the grievant the Dispatcher position and to make her whole.

COUNTY'S POSITION:

The County contends that the Management Rights clause of the parties' collective bargaining agreement gives it wide latitude to select and assign employes and to promote, transfer, assign or retain employes subject only to the limitation that the exercise of these rights shall not violate the provisions of the agreement. It notes that Article 5 requires vacancies to be posted and Article 6 provides that promotions will be determined upon the basis of the County's appraisal of the employe's skill and ability. It observes that only where skill and ability are determined to be relatively equal that the most senior employe is given preference in the selection.

The County states that in July, 1992, the County posted a full-time Dispatcher position and admits that the former Sheriff and his management subordinate were wrong by not allowing her to sign the posting. It submits that a grievance filed over this was settled by the County's agreeing to re-post the position.

With respect to the instant grievance, the County asserts that it did not violate the agreement because the person selected was by transfer from part-time Dispatcher to full-time Dispatcher and the selection was not by promotion.

Its position is that the County has the unlimited right to transfer without regard to qualifications or seniority. It submits that a promotion is the movement to a position having a higher pay grade, a position with greater responsibility. The grievant's move to a Dispatcher position would be a promotion but the movement of any part-time Dispatcher to full-time Dispatcher would be a transfer. It submits that the only limitation on a transfer is the requirement to post the vacancy which the County fulfilled. The County points out that the agreement provides a procedure for promotions but none on transfers, and because both are discussed in the Management Rights clause, the difference between these actions was understood by the parties. In summary, the County insists that all it had to show was that it posted the vacancy so all could apply, and having done this, its transfer decision cannot be challenged because it satisfied its contractual obligations.

Notwithstanding this argument, the County also takes the position that even if the movement of part-time to full-time Dispatcher is a promotion, the County must only demonstrate that it appraised the applicants' qualifications.

Article 6, according to the County, sets out the standard for selection which is the County's appraisal of the skill and ability of the applicants and seniority applies only if the County determines two or more applicants are "relatively equal" in skill and ability. It points out the Sheriff and Captain

Waugus asked all candidates the same five questions and weighed the applicants' experience. The County alleges that the standards of skill and ability used by the County were reasonable and related to a Dispatcher's responsibilities and applied them in a manner which was neither arbitrary nor capricious. It maintains that the grievant was not qualified and the four part-time dispatchers were qualified as the grievant did not know how to operate the console which was installed in 1992. The County notes that the grievant admitted that she had very little experience on the console, was not trained to operate it and was not competent to run it and the job required spending 95 percent of her time on the console. It concludes that the grievant is not experienced, trained or qualified to run the dispatch console and does not have the skill and ability of the four part-time employees, who have been qualified by their very recent experience. The County understands that the Union would prefer a stronger role for seniority in applicant selection, but this has to be negotiated and the clear terms of the agreement cannot be modified through grievance arbitration. The County insists that it has fulfilled its contractual obligations and considered the skill and ability of the applicants and picked a qualified, trained part-time Dispatcher bargaining unit employe by transfer. It requests that the grievance be denied.

DISCUSSION:

Article 6 of the parties' collective bargaining agreement provides in Section 6.02(A) that promotions will be determined upon the basis of the County's appraisal of the individual employe's skill and ability, but where these are relatively equal, the employe with greatest seniority will be given preference over those with less seniority. This is a "modified seniority clause" which is termed a "relative ability" clause because comparisons between the qualifications of employes posting for the job are necessary and proper and seniority becomes a factor only if the qualifications are relatively equal. 1/ The Union admits that the County has the right to determine the competence and qualifications of employes as provided in Sec. 2.03(B) of the parties' agreement. The Union, however, asserts that the instant grievance relates back to the grievance filed in July, 1992. 2/

The Statement of Grievance in that grievance 3/ provides as follows:

Connie was given incorrect info. regarding the last dispatch opening and was told she could not sign the sign-up sheet which was posted in dispatch - Connie was mis-informed by management.

The relief sought was:

Would like the job posted over in dispatch so Connie can sign.

On January 27, 1993, the new Sheriff settled the grievance on the basis

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- 1/ Elkouri & Elkouri, How Arbitration Works, (4th Ed. 1985) at p. 611.
 - 2/ Ex. 7.
 - 3/ Id.

that the position would be re-posted. 4/ There was no further appeal of this grievance and the relief sought had been granted. The Union's assertion that the grievant was unfairly stigmatized is not supported by any evidence. There was no showing of any hostility to the grievant for pursuing her grievance and the position was re-posted and the grievant signed it. There is no evidence in the record that the County did not treat the grievant the same as anyone else who signed the new posting. The Union's argument that the grievant's application was not viewed in a neutral light has not been proven and this argument is rejected.

The Union further asserts that the interviews were limited and strange. The County orally interviewed all the applicants except one who withdrew her posting and asked the same five questions of each applicant. An oral interview must be reasonable and objective, fair, impartially administered and scored and cannot be arbitrary, capricious or discriminatory. 5/ A review of the interview questions themselves does not reveal that these were improper or unrelated to the job. 6/ The Union questioned the use of these questions because 95 percent of the job was to operate the console. The Sheriff and Captain Waugus were aware of the applicant's experience. The grievant admitted that she was not trained on the console, had very little experience with it and was not competent on it. It appears the questions were aimed at determining ability and not experience and were more fair to the grievant than a hands-on test on the console. Thus it is concluded that the oral interview was appropriate.

The Union asserts that the grievant was qualified for the position based on her 14 years of experience. It is true that the grievant had a great deal of experience in the past but had little practical experience recently and her experience was gained prior to the installation of the new console. Here, the grievant was competing with other bargaining unit members who were experienced on the new console. The fact that the grievant's performance in the past as a Dispatcher was satisfactory or better is not enough to establish that she was presently qualified to operate the console when she admitted she needed training on it to be competent. The grievant may have the ability to learn the operation of the console but the contract provides promotions are determined on the basis of the County's appraisal of the employe's skill and ability. The County determined that those who were presently operating the console had greater skill and ability than the grievant who had minimal dispatch duties in the past two years. It cannot be concluded that the record establishes the County's appraisal was incorrect or wrong.

4/ Ex. 9.

5/ R. D. Werner Co., 45 LA 21 (Kates, 1965); Dakota Electric Association, 84 LA 114 (Boyer, 1985).

6/ Ex. 17.

The grievance filed in this matter states that the position was awarded to a less senior employe. 7/ However, seniority comes into play only when the skill and ability of the individual employes are relatively equal. The evidence failed to prove that the employes' skill and ability were relatively equal. On the contrary, the evidence established that the grievant's recent experience in dispatching was not sufficient to be able to operate the console, whereas other applicants had such experience. Thus, the skill and ability appraisal of the County was not shown to be incorrect and it must be concluded that the employes' skill and ability were not relatively equal and seniority did not come into play.

Although the County argued that the filling of the position should be considered a transfer, the undersigned has analyzed it in terms of a promotion and has found that the County did not violate the agreement so it is unnecessary to decide whether the County's transfer argument is valid.

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

AWARD

The County did not violate the collective bargaining agreement when it did not select the grievant to fill the Dispatcher position posted in January, 1993, and the grievance is therefore denied in all respects.

Dated at Madison, Wisconsin, this 8th day of August, 1994.

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

7/ Ex. 2.

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