

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 SHEBOYGAN COUNTY : Case 231
 : No. 50495
 and : MA-8271
 :
 SHEBOYGAN COUNTY SUPPORTIVE SERVICES :
 LOCAL 110, AFSCME, AFL-CIO :
 :

Appearances:

Ms. Louella Conway, Sheboygan County Personnel Director, 615 North 6th Street, Sheboygan, Wisconsin 53081, on behalf of the County.
Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, on behalf of Local 110.

ARBITRATION AWARD

According to the terms of the 1992-94 collective bargaining agreement between Sheboygan County (hereafter County) and Sheboygan County Supportive Services Local 110, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding the County's decision to fill the Sheriff's Department - Secretary II position with a non-unit individual rather than Grievant Jennifer Denis. Hearing was held at Sheboygan, Wisconsin on May 23, 1994. No stenographic transcript was taken of the proceedings. The parties submitted their written briefs by July 5, 1994, which were thereafter exchanged by the undersigned. As the parties had agreed to waive the right to file reply briefs at the hearing, the record was then closed.

Issues:

The parties were unable to stipulate to the issues to be decided herein but they agreed to allow the undersigned to frame the issues based upon the relevant evidence and argument submitted in the case. The Union suggested the following issues statement:

1. Did the County violate Article 24B when it tested internal candidates at the same time it tested outside candidates for the position of Secretary II in the Sheriff's Department?
2. Did the County violate Article 24B when it did not select Jennifer Denis for the position of Secretary II in the Sheriff's Department?
3. If so, what is the appropriate remedy?

The County suggested the following issues statement:

4. Did the Employer violate the labor contract when it did not offer Jennifer Denis the Secretary II position in the Law Enforcement Center?
5. If so, what is the appropriate remedy?

Based upon the relevant evidence and argument herein, the County's issues shall be determined in this case. 1/

Relevant Contract Provisions:

ARTICLE 24

SENIORITY

Sheboygan County shall, during the life of the herein contract, for the employees covered by the same, recognize seniority as herein provided.

. . .

B. Vacancy/Job Posting

1. Whenever an approved vacancy is to be filled within the bargaining unit, notice of said vacancy shall be posted for five (5) working days prior to the public posting for the information of all employees on appropriate bulletin boards where bargaining unit employees work.

The vacant position shall be awarded to the most senior qualified applicant in the department where the vacancy exists. If no one within the department applies for the position, the position shall then be offered to the most senior qualified bargaining unit employee before filling the position with a non-bargaining unit employee. Any employee filling a position under this section shall serve a probationary period of six (6) months, unless waived or lessened by the department head.

. . .

Background:

In May, 1993, the parties agreed to accrete the non-sworn employees employed at the Law Enforcement Center into the Union's collective bargaining unit. This agreement placed the Sheriff Department Secretary II (and other employees) in the Local 110 unit and subjected them to the Union's labor agreement except as specifically provided otherwise in the 1992-94 Addendum to that contract. Notably, the Addendum did not modify or otherwise affect the meaning and application of Article 24B, quoted above.

Inspector Tim Grasse, the person responsible for overseeing the selection of the Secretary II in this case and the only person who testified regarding

1/ The Union's first issue shall be discussed in the Discussion Section of this Award.

negotiations of the contract Addendum and agreement to accrete, stated that the County made clear to the Union in negotiations relating to accretion, that vacancies would be handled according to Departmental past practice after the accretion occurred.

In June, 1993, the Secretary II position became vacant in the Sheriff's Department. The County properly posted the opening, according to Article 24B(1). The position description for the job opening read as follows:

INTRODUCTION

This position is within the Administrative Division of the Sheriff's Department and is supervised by the Office Manager.

Normal work hours are 0900 to 1700 hours, Monday through Friday, 40 hours per week, all employees are subject to being required to work extra hours due to special events or major investigations.

It is absolutely necessary that the Secretary II maintain confidentiality of all information and reports with which he/she may have contact with in the course of his/her duties.

The Secretary II must be proficient in typing, spelling, communications, filing, coding, and PC entry/retrieval and updating.

The Secretary II has specific objectives, duties and responsibilities which are herein described as follows:

SPECIFIC JOB RESPONSIBILITY - Coding of incident reports and PSS forms. (Person, Article and Vehicle)

Duties and Objectives: Prior to entering incidents and other information into the computer, proof reading, correcting and/or updating and coding of this information is required.

SPECIFIC JOB RESPONSIBILITY - Incident entry and updating previously entered incidents.

Duties and Objectives: Enter coded incident reports, PSS forms and enter updated information to previously entered incidents via the computer.

SPECIFIC JOB RESPONSIBILITY - Recordkeeping/Filing

Duties and Objectives: All incident reports and related materials are required to be maintained and filed.

SPECIFIC JOB RESPONSIBILITY - Information Searches

Duties and Objectives: Comply with requests from Office Manager and other Division Commanders which need information retrieved either from the files or computer programs.

SPECIFIC JOB RESPONSIBILITY - Receptionist

Duties and Objectives: The duties and responsibilities of this role will be performed 1600 - 1700 hours, Monday

through Friday and also when the Secretary II - Receptionist is not present or is absent. This role represents the initial contact with the Sheriff's Department for members of the public who appear in person at the Law Enforcement Center. These individuals must be attended to in a prompt and courteous manner. This includes, but is not limited to:

- a. Contacting appropriate Departmental personnel to deal with requests or complaints.
- b. Providing of information as applicable.
- c. Copying and sales of accident reports.
- d. Providing blank forms as available.
- e. Providing information and forms for job applicants.
- f. Accepting and receipting money for various reasons.
- g. Answering and transferring administrative telephone calls.
- h. Serving civil papers.
- i. Record checks.
- j. Typing of accident reports.
- k. Typing of invoices.
- l. Coding of accident incidents.

Nine bargaining unit members applied for the above job opening, including the grievant, Jennifer Denis. Each of these employees took a standard typing test which was also given to eight individuals outside the bargaining unit who had also applied for the job. The results of the typing test (which was designed to test both speed and accuracy) were as follows:

<u>APPLICANT</u>	<u>TOTAL ERRORS</u>	<u>WORDS PER MINUTE</u>	<u>ERRORS PER MINUTE</u>	<u>ERRORS PER MINUTE</u>
	3	67.4	0.6	0.008
	5	48.14	0.71	0.0147
	5	67.4	1.0	0.0148
	8	42.13	0.875	0.02076
	7	67.4	1.4	0.02077
Jeff Miller	9	56.17	1.5	0.0267
Christine Jeske	10	48.14	1.42	0.0294
	10	56.17	1.66	0.0295
Jennifer Denis	10	42.13	1.25	0.0296
	11	56.17	2.83	0.03257
Andrea Austreng	11	37.44	1.22	0.03258
	13	67.4	2.6	0.0385 2/

In this proceeding, the County provided the following list showing the

2/ The County did not reveal the names of outside applicants in this proceeding and the Union did not take issue with this approach.

overall standings of the individuals who took the typing test:

<u>NAME</u>	<u>TYPING ERRORS</u>	<u>ORAL INTERVIEW SCORE</u>
Person #1	13	75.33
Person #2	3	75.0
Person #3	7	72.66
Jennifer Denis	10	68.66
Person #4	5	66.0
Person #5	11	58.66
Person #6	8	57.0
Person #7	10	56.33
Person #8	5	53.66
Christine Jeske	10	46.66
Andrea Austreng	11	DECLINED
Jeff Miller	9	DECLINED
Emilee Adamavich	15	
Cory Kaesermann	16	
Corrie Stempihar	21	
David Wehrwein	30	
Joyce Somers	45	

According to Inspector Tim Grasse, for 12 to 15 years the Department had set minimum typing qualifications for the Sheriff's Secretary position at 50 words per minute. During this period, the Department had given a typing test and an oral interview to fill this position. Inspector Grasse stated he decided to offer oral interviews to four internal unit applicants (Denis, Miller, Jeske and Austreng) even though only one of these employees, Jeff Miller, had tested at or above 50 words per minute the minimum cut-off on the typing test. Both Miller and Austreng declined to be interviewed, while Grievant Denis and employee Jeske agreed to be interviewed.

The interviews were conducted by Office Manager Linda Gruenke, Detectives' Lieutenant Dave Adams and Marion Fargo. These three people gave each candidate a spelling test and then asked each candidate the same set of eleven questions, taking turns doing so. (A twelfth question, seeking information regarding prior employment was asked of each candidate but was not scored). Each question was graded by the interviewers on a scale of 1 to 10 for a maximum of 110 points. 3/ According to Inspector Grasse, the

3/ The County refused to reveal the content of these eleven questions to the Union, or to introduce the questions into this record. However, the record showed that interview questions were asked regarding the content of the position description, the interviewee's feelings regarding the use of foul language or profanity, how the candidate would handle conflicts with fellow employees, why the candidate believed they were qualified for the position, how the candidate might handle confidential material. Linda Gruenke stated that the questions asked herein were almost identical to the ones that had been asked in a prior interview process and that Inspector Grasse merely changed two questions used previously

Department's practice over the past 12 to 15 years was to require a composite minimum score of 70 on oral interviews for a person to be deemed qualified. The results of the oral interviews were as follows:

<u>APPLICANT</u>	<u>DAVE</u>	<u>MARION</u>	<u>LINDA</u>	<u>AVERAGE</u>
	79	74	73	75.33
	83	76	66	75.00
	76	71	71	72.66
Jennifer Denis	75	67	64	68.66
	70	63	65	66.0
	63	55	58	58.66
	54	59	58	57.0
	57	56	56	56.33
	57	51	53	53.66
Christine Jeske	48	48	44	46.66

Both Lieutenant Adams and Office Manager Gruenke stated that the interviews were designed to determine whether the interviewees had the necessary communication skills, spelling skills and data entry and retrieval abilities and/or experience to fill the Secretary II position. Both Adams and Gruenke stated, and Denis admitted, that Denis did not go into detail regarding her prior work experience at her interview. Gruenke stated that based on the interview of Denis, Gruenke did not believe Denis had performed sufficient data entry and retrieval duties to show she was qualified for the Secretary II job. Adams stated that based on Denis' interview with the interview team, he did not believe that Denis was qualified for the Secretary II job.

After the interviews were completed, the County analyzed the overall performance of the interviewed candidates as follows:

<u>START DATE</u>	<u>APPLICANT</u>	<u>AVERAGE ORAL INTERVIEW SCORE</u>	<u>AVERAGE ERRORS PER WORD SCORE</u>	<u>OVERALL SCORE</u>
		75.33	0.0385	37.645
		75.0	0.008	37.496
		72.66	0.02077	36.319
4-08-92	Jennifer Denis	68.66	0.0296	34.315
		66.0	0.0148	32.992
		58.66	0.03257	29.313
		57.0	0.02076	28.489
		56.33	0.0295	28.150
		53.66	0.0147	26.822
3-03-86	Christine Jeske	46.66	0.0294	23.315

On August 17, 1993, Inspector Grasse sent the following letter to Denis and all other unsuccessful candidates for the Secretary II position:

. . .

We regret to inform you that you were not the applicant selected for the position of Secretary II.

This does not necessarily imply that you or other

slightly for use herein.

applicants were not qualified, but simply means that the candidate that we believe was the most qualified was chosen.

Thank you for taking the time to stop down for the interview. You are encouraged to apply in future hiring processes.

. . .

This letter was a form letter which the record showed had been in use since the 1980's, prior to the accretion agreement and effective date of the addendum. Inspector Grasse stated that he did not re-read the above-quoted letter for its content before he sent it out to Denis and the other unsuccessful applicants and that he did not consider the contractual implications of paragraph two of this letter before he sent it to Denis and the other unsuccessful candidates for the job in dispute.

Jennifer Denis, an Account Clerk I in the Human Services Department, was the only person who grieved not receiving the Secretary II position.

Positions of the Parties:

Union:

The Union has grieved the fact that the County processed internal applications for the Secretary II opening at the same time it processed applications from outside applicants. The Union also took umbrage with the language of County's form letter which notified the grievant and all other unsuccessful candidates,

. . . (t)his does not necessarily imply that you or other applicants were not qualified, but simply means that the candidate that we believe was the most qualified was chosen. . . .

Regarding the first point, the Union urged that Article 24 requires that positions must be posted internally "prior to the public posting" and that Article 24 also requires that the position must be given to a qualified internal applicant before it may be offered to an outside applicant. The Union argued that under Article 24, inside applicants should not have to compete against outside applicants as was done in this case. The Union noted that the County's ranking of all applicants on an eligibility list showed that it had impermissibly compared inside and outside applicants.

The Union contended that the most senior qualified candidate, Jennifer Denis, should have been promoted to the Secretary II position, as Denis was certainly most senior and that she was also qualified for the position. In this regard, the Union observed that the job description contains no list of specific qualifications. It merely lists typing, spelling, communications, filing, coding and PC entry/retrieval and updating. Regarding typing ability, the Union urged that Grievant Denis had fewer average errors per word on the typing test than the successful candidate. The Union also noted that no County witness claimed that Denis could not spell.

The Union urged that Denis' college background as well as her current and prior job experience show she is qualified for the Secretary II job and that issues of profanity and confidentiality occurred regularly in Denis' present job as well as prior jobs. The Union argued that the County's letter to Denis showed the County's true intent -- to select the most qualified candidate in violation of Article 24. Furthermore, the Union claimed that the oral interview of all candidates was done without proper guidelines for scoring, was fatally subjective and not a properly validated test. Therefore the interview (with the exception of the spelling test) should be thrown out entirely.

The Union urged that Denis, who only missed being qualified by 1.3 points under the County's assessment, should in fairness, be granted the position and made whole.

County:

The County observed that the job description stated that minimum typing qualifications for the Secretary II position is 50 words per minute and that a score of 70 out of 110 must be earned in an oral interview. Thus, the County asserted that the only senior internal applicant who met the minimum typing qualifications chose to drop out of the assessment process for the opening prior to the oral interview stage.

Although the other internal applicants, Grievant Denis and Jeske, were not minimally qualified in the area of typing, the County decided to invite them to interview. The County noted that the interviews were conducted, substantively and procedurally, in accordance with a ten-year Departmental past practice; that the interview questions were related to the requirements of the job and were fair and reasonable; that the interviewers tested applicants in skill and knowledge areas necessary for the job; and the interviews were administered using the same procedure, questions and scoring system, in good faith and without discrimination. The County urged that Grievant Denis, by her

own admission, did not prepare for her interview nor did she tell the interviewers the details of her prior employment experiences and Denis admitted she did not believe the interview was important.

The County therefore urged the Arbitrator to deny and dismiss the grievance in its entirety.

Discussion:

The Union has argued that Article 24B, Section 1 requires the County to post approved vacancies and to fully test and consider all internal bargaining unit applicants before the County may process, test and consider outside applications/applicants. The Union has misread Article 24B, Section 1. That section clearly states that notice of vacancies ". . . shall be posted for five (5) working days prior to the public posting. . . ." The section says nothing about when internal applicants must be tested, interviewed and considered. The section also does not specify when outside applicants must be considered, tested, interviewed and processed. In the absence of clear language on this point, the County is free to test all applicants at the same time. In addition, I note that the record in this case failed to show that the County improperly posted the Sheriff Department-Secretary II position internally before it publicly posted the opening. Hence, I find no violation of the posting requirements of Article 24B, Section 1.

I find that Jennifer Denis was minimally qualified for the Secretary II position and therefore she should have been awarded the position. Based upon the record, the County violated Article 24B, Section 1, (paragraph two) by not awarding Denis the disputed position. In this regard, I note that the Union is correct that the language of Article 24B, Section 1 is mandatory -- it states, ". . . (t)he position shall then be offered to the most senior qualified bargaining unit employee before filling the position with a non-bargaining unit employee . . ." (emphasis supplied). This language is clear and unambiguous. It requires that the successful internal applicant be the most senior 4/ and be minimally qualified before he/she is entitled to placement in the vacant position, with a new six month probationary period (unless the six month period is waived or lessened by the department head). This language does not state that the County may select the most qualified applicant for the vacancy and it makes absolutely no reference to the contract Addendum Agreement to accrete. 5/

4/ The County has asserted that the contract requires the County merely to offer the vacancy only to the most senior qualified applicant and if that most senior applicant drops out of the selection process, the County is off the hook. This interpretation is not supported by the language of Article 24 B(1) and is specifically rejected herein.

5/ The evidence offered by the County regarding bargaining history surrounding the Addendum Agreement to accrete employees may not be and has not been considered in reaching this Award because it constitutes parole evidence offered to vary or modify the clear language of Article 24 B, Section 1.

Nor does the contract specify or define how or by whom qualifications will be measured. In circumstances such as these, most arbitrators hold that management is entitled to set qualifications and to make the initial determination whether senior applicants are in fact qualified. Of course, the union may then challenge management's decisions regarding senior applicants' qualifications on the ground that these decisions were unreasonable under the facts, arbitrary, capricious or discriminatory.

In the instant case, the evidence showed that the County decision to disqualify Denis was arbitrary and capricious and was not reasonable, based upon the facts. In this regard, I note that nowhere in the position description (P.D.) does it state that the Secretary II must type 50 words per minute. Rather the P.D. states:

The Secretary II must be proficient in typing, spelling, communications, filing, coding and PC entry/retrieval and updating.

There was no evidence that Denis, the Union, or the other internal applicants who were offered oral interviews for the Secretary II position were ever told by the County that 50 w.p.m. were necessary to be minimally qualified for the position. In addition, the P.D. fails to state and there was no evidence to show, how many typing errors per minute were acceptable. Finally, there was no evidence to show that the County ever notified either Denis or the Union that a successful applicant would have to receive at least an overall score of 70 on the typing and spelling tests and the oral interview in order to be deemed qualified by the Department for the Secretary II opening.

In this case it is also significant that the County decided to offer Denis an oral interview despite the fact that she had (allegedly) failed to pass the typing test with at least 50 w.p.m. Although the Sheriff Department asserted it had a practice of requiring successful Secretary II applicants to type at a rate of 50 w.p.m., the Department failed to utilize this minimal qualification before offering oral interviews to applicants such as Denis. While the Department could set 50 w.p.m. if it was reasonably related to the job, the evidence fails to establish that the County formally did so.

With respect to the oral interview, Denis passed the spelling test with no problems. In addition, the County employed Lieutenant Adams, Marian Fargo and Office Manager Linda Gruenke as the interview panel. Lieutenant Adams had the greatest experience interviewing job applicants, according to this record. Adams scored all candidates but one significantly higher (from 1 to 17 points) than the other two panelists. I note that Adams gave Denis a score of 75, five points over the minimum of 70 required by the Department to be minimally qualified. Yet Adams testified herein that he did not think Denis was qualified for the Secretary II position. This contradiction between Adams' score of Denis and his testimony herein regarding her ability when taken in conjunction with Adams' tendency to score applicants up to 10 points higher than the other two panelists make Adams' assessment of Denis at best unreliable.

In regard to interview panelist Marian Fargo, I note that Ms. Fargo was not called as a witness in this case and no evidence was offered to show the basis for her score of Denis and the other applicants. Thus, Fargo's scoring of Denis must also be disregarded.

In regard to Gruenke's scoring of interviewees, there does not seem to be any internal or external consistency to her scores. On this point, the record shows that Gruenke scored all candidates significantly lower (with only three exceptions) than the other two interview panelists. It is also significant that Gruenke gave the second-rated applicant an interview score of 66 and that Gruenke gave Denis a score of 64, just two points less. Notably, the other two panelists gave the second-rated applicant scores of 83 and 76, scores sufficient to justify placing the second-rated applicant in the job. Yet

Gruenke gave this second-rated applicant a score of 66, from 10 to 17 points lower than the scores given this applicant by the other two panelists. In addition I note that the second-rated applicant received the top score for typing and accuracy: this applicant typed 67.4 w.p.m. with only 3 (or .008) errors per minute, the same w.p.m.'s as the successful applicant but with 10 fewer errors per minute than the successful applicant. In all of the circumstances of this case, I do not find that the interview results were reliable measures of the actual abilities of the applicants' for the actual requirements of the Secretary II job.

The August 17, 1993 letter sent by Inspector Grasse provides compelling circumstantial evidence of the Department's true intent in this case. Although Inspector Grasse inadvertently sent these rejection form letters out without reading them, the County nonetheless did not apply the proper contractual test for determining qualifications. I am convinced in all of the circumstances of this case that the Department did not follow the minimal qualifications requirement of the contract and that it chose to select "the most qualified" candidate, in its view. This action is contrary to the clear language of Article 24B, Section 1. As the record here shows that the County acted arbitrarily, capriciously and unreasonably in determining Denis was not qualified for the Secretary II position, 6/ the County violated the contract by not offering Denis that position. I therefore issue the following

AWARD

The Employer violated the contract when it did not offer Jennifer Denis the Secretary II position in the Law Enforcement Center.

The Employer shall therefore immediately place Ms. Denis in that job according to the language of Article 24B, Section 1 and make her whole from August 17, 1993 to date. 7/

Dated at Oshkosh, Wisconsin this 3rd day of October, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

6/ Gruenke's assertions that Denis lacked sufficient data entry and retrieval experience were not supported by the record evidence.

7/ I shall retain jurisdiction regarding only the remedy in this case.