

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 PORTAGE COUNTY PARKS DEPARTMENT :
 EMPLOYEES, LOCAL 662 GENERAL : Case 110
 DRIVERS UNION : No. 50576
 and : MA-8306
 :
 PORTAGE COUNTY (PARKS DEPARTMENT) :
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by
 Ms. Naomi E. Eisman, appearing on behalf of the Union.
 Mr. Brian G. Formella, Corporation Counsel, and Mr. Gerald E. Lang,

Person

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 the promotion grievance of Jerry Brzezinski.

The undersigned was appointed and held a hearing on July 7, 1994 in Stevens Point, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on August 24, 1994.

Stipulated Issues:

1. Did the County violate Article 7, Section C of the collective bargaining agreement when it denied Jerry Brzezinski the Maintenance Technician Foreman position?
2. If so, what is an appropriate remedy?

Relevant Contractual Provisions:

ARTICLE 3 - MANAGEMENT RIGHTS

The County 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 state law. These rights include, but are not limited to:

. . .

3. To hire, promote, transfer, schedule and assign Employees;

. . .

ARTICLE 7 - SENIORITY RIGHTS AND LAYOFFS

. . .

C. Application: Except as otherwise provided, seniority rights shall prevail, provided ability and skill are reasonably equal.

Discussion:

The facts are not seriously disputed. In the fall of 1993, the Parks Department Superintendent, Gary Speckmann, decided to reorganize the use of personnel in the Parks Department, with particular focus on the position that had been held by Lee Bergman. Bergman had recently retired as supervisor of the maintenance crew. Speckmann felt that an additional maintenance technician would be desirable, but that the only way to obtain one would be to convert the supervisory position to a bargaining unit position and to have the incumbent of that job perform minimal supervisory functions. In company with other members of management, but also in agreement with the Union, a new position was created by Speckmann which was given the title "parks foreman". The position, however, according to all of the witnesses and also the written position description, was to contain only ten percent time for "supervision/administration", within which one percent was to maintain inventories and keep cost accounting records.

Thus nine percent of the job included the statement "supervises the full-time and seasonal employes involving maintenance, development and construction of park equipment, grounds, buildings, roads and other facilities." The remainder of the job was agreed by all witnesses to be the same as the work of a maintenance technician, including park maintenance, operating equipment, repairing picnic tables, various kinds of construction-related work including roofing, painting, plumbing and electrical work, and the like. Under "education and experience" the position description listed:

At least ten years' experience in carpentry, construction, plumbing, electrical, heavy equipment operations, landscaping, etc.; at least three years' experience in the parks and recreation field or closely related field, or related education and experience that would provide the employe with the necessary knowledge, skills and abilities to perform the duties of the job and at least three years' supervisory experience. Applicant must have a valid driver's license and safe driving record. Upon hiring, must possess a commercial driver's license and maintain it.

Grievant Jerry Brzezinski, as steward of the Union, was involved in the discussions which led to the creation of the Parks Foreman position. In August of 1993, he was present at a meeting with Speckmann, Personnel Director Lang, and Union Business Representative Reggie Konop at which the basic specifications that this would be a "working foreman" were agreed upon. Konop testified that he did not object to the three year supervisory experience requirement because he felt Brzezinski, who had expressed some interest in the job, met the minimum. Konop further testified that later, in step one of the

grievance procedure, Speckmann admitted that the grievant was allowed to interview for the job because he did meet the three year minimum for supervisory experience. Speckmann did not deny Konop's testimony.

The grievant had been employed by the County for sixteen years as a maintenance technician, and there is no dispute that his work record in all respects was between good and excellent. When the grievant applied for the Parks Foreman position, however, he encountered competition in the form of Nick Wiza, a four-year maintenance technician who had extensive supervisory experience with other employers prior to employment by the County. There is no dispute that the interview committee found both employes qualified for the position, but following an interview and extensive discussion, determined to award the job to Wiza because of his greater supervisory experience.

Wiza had had 22 years of supervisory experience as a crew leader and as a supervisor at Del Monte Foods and Summers Landscaping. There is no evidence that management contacted either of the prior employers to determine Wiza's supervisory performance there independently. An interview board, however, asked a number of questions relating to supervision, and in particular found that Wiza gave a better answer than Brzezinski to a question about how to assign jobs that the employes disliked. Wiza answered that he would keep track of them and rotate the more unpleasant jobs. Brzezinski said he would try to decide who was best fitted for each job, but other than that, the assignments would be based on seniority. Jim Gifford, a County Board supervisor who served on the interview committee, testified that he thought that would result in an unpleasant working environment. There is no dispute, however, that for many years the employes on most occasions have decided by consensus which employe will do what. There has been little in the way of formal discipline in the Department, and Konop's testimony that he could find only two incidents of discipline in 18 years of Union records, both reversed in arbitration, was not disputed.

In a November 15, 1993 letter during the grievance procedure, the grievant listed as supervisory duties he had performed:

- A. The number of employees supervised varies in number from two (2) to six (6).
- B. The types of supervisory duties include:
 1. Instructing the mowing crew in operation, safety and maintenance.
 2. Training the crew in grass cutting techniques and standard procedure in cutting grass at all parks.
 3. Showing the WCC crew and seasonal employees the proper procedure in operating a chain saw, safety and maintenance.
 4. Showing the employees the proper procedure in cutting down trees.
 5. Supervising the WCC crew and assigning various duties in building bathrooms and retaining wall at the rifle range.
 6. Supervising the WCC crew and assigning various duties in building the erosion ditch on Brilowski Road.
 7. I have trained supervisor and employees on the running of the tow at the ski hill.
I have been asked over the years to

inspect the tow at the ski hill to insure proper working order prior to the ski hill opening.

8. At certain times I filled in for the supervisor when he was on vacation or leave.

C. Record Keeping duties included the following:

1. On building projects, it was my responsibility to plan the work day and submit the agenda to the supervisor.
2. I have costed out the price of building materials on various building projects. This also included estimating the amount of materials needed in building these projects.
3. When I first started working for the Parks Department I was assigned the duties of checking campers in and out of the campsites.

Speckmann, who first came to employment with the County in mid-1992, testified that Brzezinski may well have done all of these items and that he did not know anything on this list to be wrong. He noted, however, that the decision to give Wiza the job was made on October 22, and that he did invite the grievant to highlight his supervisory experience when the grievant said he was going to apply for the job.

In his testimony, County Supervisor Gifford noted that the interview board was "basically going for the best candidate they could get". He also stated that they would have gone for seniority if the candidates had been remotely equal; but at another point in his testimony, he stated that he was familiar with the fact that if all other things were "equal", seniority would be the determining factor.

The Union contends that the County has blatantly disregarded the grievant's seniority and has also disregarded the excellent record of the grievant, in promoting the less-senior employe. The Union contends that seniority governs promotions under this contract where skill and ability are "reasonably equal", and argues that the testimony demonstrates that the chair of the interview committee did not understand the foreman job's requirements. The Union also points to testimony that the committee's concern was to get the "best" candidate, and contends that the evidence shows that the Committee made one factor the acid test and then failed to pay attention to the word "reasonably" in even that measurement, contrary to the contract. The Union argues that the foreman's job does not actually require supervisory experience or authority, and that therefore the grievant was at least reasonably equal to Nick Wiza on all factors taken together. The Union requests that the County be ordered to promote the grievant and make him whole for economic losses involved.

The County contends that the Union never objected to the three-year minimum supervisory experience requirement established by the County for this position, and that the County appropriately took that into consideration in the interview. The County contends that the supervisory experience component of the requirements of this job is extremely important because decisions must be made in the field where consultation with the Parks Superintendent is not immediately possible. The County argues that the grievant has performed well in other respects, but that his supervisory experience and skills are not

reasonably equal to Wiza's. The County notes in this context that the grievant's supervisory experience, in a calculation by the former supervisor of the department, totals 912 hours, and that includes training and demonstration time which the County would argue is not supervisory. The County credits Wiza with 45,760 hours of supervisory experience, and contends that "one would need to considerably discount Mr. Wiza's supervisory experience or considerably magnify Mr. Brzezinski's experience for the two to appear reasonably equal". The County further contends that the grievant did not adequately answer a number of questions put by the interview committee with respect to supervisory issues. The County requests that the grievance be denied.

Following review of the record as a whole, I am convinced that the County in this instance has in effect misread the contractual clause at issue here as being a clause requiring "equal" ability and skill. To begin with, it is undisputed that the entire subject matter over which the grievance arose is at best nine percent of the job in question. There is no dispute that the grievant has performed extremely well at all of the rest of the job, and has done so for four times as long as the other applicant for promotion. I also note that while the grievant finished high school, the other applicant did not; while in many promotion cases employers have over-emphasized the value of educational credentials, here there is no evidence that the difference in the grievant's favor was even considered by management.

But the crux of the case is the nine percent of "supervisory" quotient in the foreman job. If in fact there were any evidence that the grievant was lacking in ability to perform this part of the work, the County might be justified, even on so small a percentage, in promoting a less-senior employe. The percentage alone is not determinative where the component of the job is essential and the employer has reasonably determined that the senior employe is not capable of performing that component.

But here, there is virtually nothing in the record to demonstrate that significant supervision of employes is required, or that the grievant cannot perform this function adequately. To begin with, his evaluations are exemplary, including the parts which relate to overseeing seasonal employes, which he has done for years. The County could find no incident in which the grievant's practical handling of situations involving other employes was deficient. Its focus on the question relating to the assignment of unpleasant work, moreover, is troubling in two dimensions. First, all of the evidence suggests that such work has historically been handled by consensus among the employes, and there is no evidence that management has ever found this to be undesirable or that a significant change in methods was required. This suggests that to find significance in the grievant's answer to this question is to make a mountain out of a molehill. And second, the interview committee placed significance in the grievant's answer, which was to the effect that where there was no palpable difference in the skill levels of employes to perform different particular unpleasant jobs, they ought to be assigned by seniority. This is a classical position taken by employes in a unionized environment, and while it may not always reflect management's preferences, the fact remains that the grievant was the Union steward and the job was a bargaining unit position. To reward another employe by deeming his answer to be more supervisory in nature seems to deny the essence of what this lead-worker type of job is. While, again, there may be situations in which that would be justifiable on the facts, here there is literally no evidence that management has ever found a problem with the employes' existing methods of mutual agreement on work assignment matters, or -- more to the point -- that the grievant would be reluctant or incapable of changing his manner of handling such assignment problems if instructed to do so by management. Finally, there is the fact that this job had been determined by management to be one which was not, in fact, a supervisory position to be excluded from the bargaining unit, but one which was almost entirely identical to the work which the grievant concededly had performed excellently for 16 years.

I conclude that on balance, the grievant was reasonably equal to Nick Wiza in his skill and ability to perform the Parks foreman position, and that the evidence of confusion over the meaning of the language in the interview committee supports the Union's contention that the County in effect replaced "reasonably equal" with "equal" in its handling of the competition between two candidates who were admitted to be close. It has often been observed by arbitrators that to allow this to happen undercuts the value of a seniority system considerably, because no two candidates are ever precisely equal at everything in a multi-faceted job. To allow a single component of a job to be exaggerated in its importance in this way thus has the effect of rewriting the collective bargaining agreement.

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

AWARD

1. That the County violated Article 7, Section C of the collective bargaining agreement by denying Jerry Brzezinski the Parks Foreman position.
2. That as remedy, the County shall, forthwith upon receipt of a copy of this Award, promote the grievant to the Parks Foreman position, shall make him whole for any losses suffered by reason of the County's prior action, and shall correct its records accordingly.

Dated at Madison, Wisconsin this 2nd day of November, 1994.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator