

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GRANT COUNTY EMPLOYEES UNION,
LOCAL 918, AFSCME, AFL-CIO

and

GRANT COUNTY

Case 59
No. 53255
MA-9283

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Frank A. Matel, Personnel Director, Grant County, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Grant County Employees Union, Local 918, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by Grant County, herein the County, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on January 23, 1996, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on April 2, 1996, at Lancaster, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on June 20, 1996.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated to the following:

1. Did the County violate the collective bargaining agreement when it failed to select the grievant for the Clerk I position in the Clerk of Court's Office?
2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

On or about June 7, 1995, the County posted a Clerk I position in the Clerk of Court's Office. The posting noted some minimum qualifications and provided that the position required "the ability to work effectively and harmoniously with others." Duties stated included the following: "Answer telephone, greet visitors and provide information to public."

On or about June 12, 1995, Carla Groom, herein the grievant, applied for the position. On her resume the grievant listed her job experience with the County's Department of Social Services including general secretarial work, typing, computer, records, mail, back-up receptionist and maintenance and filing of case files. Her education included Southwest Wisconsin Vocational-Technical College and computer courses.

At or about the same time, Carole Sturmer applied for the position. For her work experience Sturmer listed Assessor in Beetown Township for 20 years, teacher aide at Bloomington Elementary School for 11 years, and bookkeeper at Marshall Lumber Company for 5 years. In these positions she worked directly with the public and developed significant accounting and bookkeeping experience. She also has worked as a limited-term employe in the Clerk of Court's Office.

Thereafter, the two candidates for the position were interviewed by the Clerk of Court, Diane Perkins, and the County Personnel Director, Frank Matel. The interview lasted about 20 minutes. Perkins asked the questions. They included questions about the candidate's job experience, education and training, dealing with the public, personal attributes for the position and interest in the position.

Perkins testified that Sturmer, in contrast to the grievant, answered the interview questions in the confident, assured manner that her office was looking for "when dealing with members of the public." Perkins added that Sturmer had the experience and qualifications she was looking for and had successfully performed the duties in question in the past as a temporary employe.

Following the interview, Perkins contacted an employe at the Department of Social Services and discussed the grievant's duties at Social Services, and how they would fit in at the Clerk of Court's Office. She also spoke with Matel who informed her that the grievant was having problems at Social Services and had received discipline in the past.

On or about June 27, 1995, Perkins advised the grievant in writing that she was not selected for the position. The County awarded the job instead to Sturmer. Sturmer was not a bargaining unit employe prior to being awarded the position at issue here. Perkins testified that both candidates met the minimum qualifications for the position. However, Perkins added that Sturmer had the qualifications and experience she was looking for, had a better interview than the grievant and had performed the Clerk I duties in the past. In contrast, the grievant was not

performing her duties at Social Services as required, the grievant's work experience was not beneficial to the Clerk I duties in the Clerk of Court's Office, and the grievant did not have much relevant experience interacting with the public.

On July 10, 1995, the grievant filed a grievance alleging a violation of Section 9.02 of the agreement when "management did not select the most senior qualified applicant" for the position. The grievance was timely processed through the steps of the grievance procedure, and denied at all times material herein.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 It is agreed that the management of the County and the direction of employees are vested exclusively in the County, and that this includes, but is not limited to the following: to direct and supervise the work of employees; to hire, promote, demote, transfer or layoff employees; to suspend, discharge or otherwise discipline employees for just cause; to plan, direct and control operations; to determine the amount and quality of work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added or modified; to change any existing service practices, methods and facilities; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules.

2.02 The County's exercise of the foregoing functions shall be limited only by the express provisions of this contract, and the County and the Union have all the rights which they had at law except those expressly bargained away in this Agreement.

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ARTICLE 5 - GRIEVANCE PROCEDURE

5.01 Grievance. A grievance is defined to be a controversy between any employee, or the Union and the Employer, as to a matter involving the interpretation or application of this Agreement.

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Step Four - Arbitration:

A) General: If the grievance is not settled at the third step, the Union may proceed to arbitration by informing the chairperson of the County Employee Relations Committee in writing within fifteen (15) days from the date the written response of the County Employee Relations Committee was received or was due, that they intend to do so.

B) Selection of an Arbitrator. The Union shall thereafter request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. The decision of the arbitrator shall be final and binding on the parties. The arbitrator shall not modify, add to, or delete from the express terms of this Agreement.

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ARTICLE 7 - SENIORITY

7.01 Definition: For employees who are members of this unit on the date of ratification of the initial agreement, seniority shall be defined as an employee's length of service with the County based on the employee's most recent date of hire.

For employees who become members of this unit after the date of ratification of the initial agreement, seniority shall be defined as an employee's length of service in the bargaining unit from the employee's most recent date of hire or transfer into the unit. For the purposes of fringe benefit calculations only, an employee's seniority shall be calculated from the employee's most recent date of hire with Grant County. Seniority shall be deemed to have been terminated when an employee:

- A) Quits or retires; or
- B) Is discharged for cause or terminated during the probationary period; or
- C) Is laid off for a period of more than twelve (12) consecutive months; or
- D) Fails to timely accept recall; or

- E) Fails to return on time from a leave of absence.

7.02 The Employer shall furnish the Union a seniority list upon request, twice a year, showing each unit employee's name, classification, date of hire, and months of service.

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ARTICLE 9 - JOB POSTING

9.01 Job vacancies in the bargaining unit due to retirement, quits, new positions, transfers or whatever reason, that the Employer intends to fill, shall be posted on the County's bulletin boards in the Courthouse, and in each department outside the Courthouse for a period of seven (7) working days. The posting shall provide information concerning the qualifications needed for the position, whether regular full-time, regular part-time, or part-time, a brief description of the job duties, the salary range, starting date, and the closing date for applications and instructions on the application procedure. A copy of each posting shall be provided to the president of the Union.

9.02 Selection: The most senior applicant in the classification (who meets minimum job related qualifications) will be awarded the vacancy. Classifications are as listed in Appendix A. If no one in the classification applies for the posting, the most senior qualified applicant shall be selected provided that among internal applicants, no junior employee is objectively superior on the basis of skill and ability. In such case, the objectively superior junior employee shall be selected.

9.03 Trial Period: If within the first sixty (60) calendar days of filling a job vacancy a selected employee fails to make satisfactory progress for the position, he/she shall be returned to his/her former position and selection shall be made among the remaining qualified applicants for the position, if any, according to Section 9.02 above. An employee may also voluntarily return to his/her former position during the trial period at his/her discretion. In either case, if the former position has been eliminated, the employee shall exercise his/her rights under Article 10. Employees serving a trial period shall receive a written evaluation of their progress after thirty (30) calendar days.

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PARTIES' POSITIONS:

The Union initially argues that the clear and unambiguous language of Section 9.02 which provides that if no one in the classification applies for the posting, the most senior qualified applicant shall be selected, provided that among internal applicants, no junior employe is objectively superior on the basis of skill and ability requires that the grievant be selected to fill the vacancy. In this regard, the Union claims:

Since there were no internal applicants other than the grievant, it cannot be stated that there existed a junior applicant who was objectively superior on the basis of skill and ability. Therefore, the grievant is entitled to the job. Since the Employer refused to select the grievant for the position, a violation of the Agreement has occurred.

The Union adds that the grievant was qualified for the vacant position, that the Clerk of Court inappropriately considered extra-contractual factors such as the grievant's prior disciplinary record and another bargaining unit employe's opinion of the grievant's work record, and that the qualifications of the successful applicant are irrelevant.

Based on the foregoing and the record as a whole, the Union requests that the grievance be sustained and that the arbitrator make the grievant whole for her losses as a result of the County's action.

The County, on the other hand, argues based on its management rights and Section 9.02 it properly determined that the junior employe was objectively superior on the basis of skill and ability. The County asserts that its reasons for selecting the junior employe over the grievant are supported by substantial evidence, relate to the employe performance of the job subject to the promotion and are reasonable. In this regard, the County notes the successful applicant had more pertinent public relations, accounting and bookkeeping skills compared to the grievant's routine clerical experience, that said candidate previously worked successfully in the Clerk of Court's Office, that she demonstrated superior skill and ability to perform the duties of the Clerk I position based on the oral interview and that she received good references while the grievant did not.

The County notes that arbitrators generally have permitted management to consider multiple factors such as disciplinary records and references in determining employes' qualifications.

The County rejects the Union's assertion that "internal applicants" refers only to bargaining unit members stating the contract provides no such restriction. The County states

its policy is that all current County employees are considered "internal applicants" if they apply for a position. The County adds that contrary to the Union's assertion the grievant was not well qualified for the vacant position and the record supports such a finding.

The County concludes that it acted in good faith and in accordance with the agreement when it appointed a junior employee who was fairly found to be objectively superior on the basis of skill and ability to the Clerk I position and based on same, and the entire record, the grievance should be denied.

DISCUSSION:

At issue is whether the County violated the collective bargaining agreement when it failed to select the grievant for the Clerk I position in the Clerk of Court's Office. The Union argues that there is a contract violation while the County takes the opposite position.

Section 9.02 provides regarding selection that the most senior applicant in the classification who meets minimum job-related qualifications shall be awarded the vacancy. However, "if no one in the classification applies for the posting, the most senior qualified applicant shall be selected provided that among internal applicants" a junior employee is not objectively superior based on skill and ability. In that case, "the objectively superior junior employee shall be selected."

The Union argues that since the successful applicant was not a bargaining unit employee she was not an internal applicant within the meaning of Section 9.02. "Because there were no internal applicants other than the grievant, it cannot be stated that there existed a junior applicant who was objectively superior on the basis of skill and ability." Accordingly, the Union concludes that the grievant is entitled to the position.

The County, on the other hand, argues that the agreement does not define "internal applicants." The County adds that it defines "internal applicants" as current County employees who apply for a position, that this is a dictionary definition of the term, and that this is how the disputed position was posted. The County concludes that two County employees applied for said position who both were actively working and on the County payroll at the time of application; and that in accordance with the agreement, it selected an objectively superior junior employee.

Arbitrators normally try to give effect to all clauses and words when construing disputed contract language. In other words, "an interpretation which tends to nullify or render meaningless any part of the Contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect." 1/

1/ John Deere Tractor Co., 5 LA 632, 632 (Updegraff, 1946).

Applying the above standard to the facts of the instant dispute, the arbitrator notes that Section 9.02 first provides that the most senior applicant in the classification who meets minimum job related qualifications will be awarded the vacancy. Said contract provision next provides that if no one in the classification applies for the posting, the most senior qualified applicant shall be selected provided that no junior employe among the internal applicants is objectively superior on the basis of skill and ability. Both of the aforesaid criteria use the term "seniority." Seniority is defined in Article 7, Section 7.01 in the context of bargaining unit seniority. It makes no sense in the opinion of the arbitrator to define seniority in Section 7.01 as applying to bargaining unit members, then to make seniority an important part of the selection process in Section 9.02, and then to allow non-bargaining unit employes to compete for a bargaining unit position on equal footing with bargaining unit employes when applying the aforesaid criterion to job applicants. In other words, to agree with the County's argument that a non-bargaining unit employe is an "internal applicant" for purposes of applying the language of Section 9.02 to his/her application for a bargaining unit position renders the language of Section 7.01 superfluous or meaningless. Such a result, as noted above, is to be avoided. Read in its entirety, therefore, the agreement provides that Section 9.02 applies only to bargaining unit employes and the County cannot consider external applicants when filling the instant Clerk I vacancy in the Clerk of Court's Office prior to considering internal or bargaining unit candidates.

It does not follow however, as argued by the Union, that the grievant is automatically entitled to the disputed position. First, she must be "qualified" for the position according to the third sentence of Section 9.02. What is meant by the term "qualified"? The first sentence in said section provides that "the most senior applicant in the classification (who meets minimum job-related qualifications) will be awarded the vacancy." (Emphasis added) Where there are no applicants in the classification, the word "minimum" is not used before qualified. This indicates to the arbitrator that outside of the classification a successful internal applicant must possess something more than minimum qualifications for the job. In the case of a single internal applicant, this means, in the opinion of the arbitrator, that said applicant must have the qualifications necessary to perform the job. Such a conclusion gives meaning and effect to all the clauses and words found in Section 9.02 which governs selection for job vacancies.

The record demonstrates, contrary to the Union's assertion, that the grievant does not have the qualifications necessary for the position. It is true that she meets the minimum qualifications as pointed out by the County. However, based on her work record, the oral exam interview results, job-related education and experience, the opinion of a staff member who worked with both candidates, and her prior disciplinary record, the arbitrator finds that the County acted properly in deciding that the grievant does not possess the necessary qualifications to perform the job. In reaching this conclusion, the arbitrator rejects the Union's assertion that it was improper for the County to consider her past disciplinary record and opinions of other County employes who had worked with the grievant. Arbitrators have long held that consideration of disciplinary records is appropriate in the context of assessing ability. Nor did the Union point out any contractual or

other prohibition against getting input from employes who had worked with the candidates.

The County argues that it acted in good faith and in accordance with the agreement when it appointed someone other than the grievant to the disputed position herein. The arbitrator agrees. Where, as here, the agreement reserves to management the right to make selections for promotion on the basis of ability, at least in part, and management develops criteria reasonably related to the job; applies those criteria to the demonstrated qualifications of the bidders through fair and even-handed procedures, relying upon objective evidence wherever possible; and selects the bidder based upon qualifications necessary to perform the job, an arbitrator ordinarily will not "second guess" such a determination. The Union has offered no persuasive evidence or argument to overturn the County's decision. Since there were no "qualified" internal applicants, the County acted properly in going outside the bargaining unit to fill the position.

Based on all of the above, the arbitrator finds that the answer to the stipulated issue is NO, the County did not violate the collective bargaining agreement when it failed to select the grievant for the Clerk I position in the Clerk of Court's Office, and it is my

AWARD

That Carla Groom's grievance dated July 10, 1995, is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 9th day of August, 1996.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator