

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MAUSTON CITY EMPLOYEES UNION,
LOCAL 569-A, AFSCME, AFL-CIO

and

CITY OF MAUSTON

Case 35
No. 52361
MA-8935

Appearances:

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

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon E. Anderson, appearing on behalf
of the City.

ARBITRATION AWARD

Mauston City Employees Union, Local 569-A, AFSCME, AFL-CIO and the City of Mauston are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an arbitrator from its staff to resolve the Susan Bosgraaf grievance. The Commission appointed Thomas L. Yaeger, a member of its staff, pursuant to that request. Hearing in the matter was held on November 11, 1995, in Mauston, Wisconsin. The parties filed post-hearing briefs on March 18, 1996.

ISSUE:

The parties were unable to stipulate to a statement of the issue and the undersigned frames the issue as follows:

Did the City violate the labor agreement when it refused to permit Susan Bosgraaf to exercise her seniority rights under Article VI, Section 4 to bump either John Nicksic or Myrna Spohn because the City found that she was not qualified to perform the duties of their positions?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE VI - SENIORITY

. . .

Section 4 - Layoffs: When it becomes necessary to lay off employees, employees shall be laid off in the order of the shortest length of service in the division, provided the remaining employees are qualified to perform the remaining work. Employees shall be eligible, within ten (10) working days to bump less senior employees in the bargaining unit, provided they are qualified to perform the work.

. . .

BACKGROUND:

The grievant, Susan Bosgraaf, was hired in August, 1977, and served as a Utility Clerk/Secretary in the Department of Public Works. Sometime in April of 1991, Bosgraaf suffered tendinitis in her right wrist. Eventually, the grievant underwent surgery and physical therapy on her wrist to alleviate the condition. After the surgery and physical therapy, the grievant returned to work in December, 1991.

However, on January 6, 1992, the City Administrator, Joan Boyer, advised the grievant that she was being sent home indefinitely because she could not perform her job due to the grievant's Workers' Compensation injury and restriction on her job duties. Subsequently, in the summer of 1992, the City reorganized its operations, eliminated Bosgraaf's position, and laid her off in August of 1992.

On September 4, 1992, the grievant attempted to bump into the position of Disposal Plant Operator II, John Nicksic's position. The City refused to allow Bosgraaf to bump on September 9, 1992, because she was not qualified to perform the work, did not possess the required Commercial Driver's License, and was not a licensed wastewater operator.

Consequently, on September 11, 1992, Bosgraaf, "under protest," sought to bump into the Secretary/Meter Maid position. Again, on December 4, 1992, the City refused the grievant's request asserting that she was not qualified to perform the work in question, due to her injury. Prior to the City's December 14 decision, Bosgraaf, on September 18, 1992, filed a grievance contesting the City's refusal to allow her to bump into the Wastewater Operator position. The Union pursued the bumping grievance in the belief that the City violated Article VI, Section 4 of the collective bargaining agreement by now allowing Bosgraaf to bump into either the Disposal

Plant Operator II or the Secretary/Meter Maid position.

POSITION OF THE UNION:

The Union's position is that the grievant was qualified to perform the duties of the positions into which she requested to bump and that the City failed to demonstrate any justification to deny the grievant the right to bump into these positions.

First, the Union asserts that she was qualified for the position of the Assistant Wastewater Treatment Plant Operator. The Union relies on the City Administrator's statement that anyone could work as a Wastewater Plant Operator. In addition, the Union argues that, originally, Operators were not required to hold Operator's licenses and that the Operator did not need a Commercial Driver's License because the Operator did not drive a commercial vehicle as part of his normal duties. Also, John Nicksic, the current Operator, never did sewer repairs which would require the operation of heavy equipment, and concludes therefore, the grievant should not be required to have a CDL. Furthermore, the Union argued that the City was acting unfairly because certain Public Works employes were allowed extra time in order to obtain their CDL (Charles Lutz), and because the grievant's request to obtain a CDL was previously denied by the Public Works Director.

Next, the Union maintains that the grievant was also qualified to bump into the Secretary/Meter Maid position. Since most of the Secretary/Meter Maid duties are clerical in nature (typing, filing, parking meter enforcement, receptionist and radio dispatch duties), her prior experience as Utility Clerk/Secretary meant the grievant was qualified. Bosgraaf worked in a clerical position from 1977 until 1992. Her daily duties included data input, computing, preparation of bills, various typing and filing, receptionist's duties, telephone duties, and public works dispatch duties, all of which are very similar to the duties performed by the Secretary/Meter Maid.

The City argued that 75 percent of the meter maid position would entail typing and, therefore, use of grievant's right wrist for more than six hours a day. However, the Union countered that even with the six hour a day restriction, the Secretary/Meter Maid position would only require the grievant to type for a total of five and a half hours a day, including regular breaks and lunch.

Also, the Union asserts that the information that City Administrator Boyer used to determine that Bosgraaf could not perform the position of Secretary/Meter Maid was not accurate because the report was not based on the specific condition of the grievant and key tests were not performed. The Union also argues that since Dr. Siegert's supplemental report was not in existence at the time of the City's decision to reject the grievant's bump (December 14, 1992), Boyer relied on hearsay information. Boyer made the decision based on information received from Ms. Krell (Heritage Insurance representative), who had spoken to Dr. Siegert about his

initial Independent Medical Examination report. It reasons therefrom that the City failed to show the grievant was not qualified to perform the jobs in question.

Lastly, the Union argues that the City engaged in disparate treatment of the grievant. The Union cites various examples of the City making accommodations for employees who suffered from physical disabilities.

POSITION OF THE CITY:

On the other hand, the City argues that the grievant was not qualified for either position and, therefore, not entitled to bump into the positions. The City states that the right to bump into another position is not absolute; the employee must be qualified at the time he/she seeks to bump or have the present ability to perform the work.

The City contends that in order to be qualified for the Wastewater Disposal Operator position, the employee must be licensed by the State of Wisconsin and possess a Commercial Driver's License. Therefore, since the grievant did not possess either one, she is not qualified to bump into this position.

Furthermore, the City states that the reason certain employees were given an opportunity to obtain a CDL license is because the requirement was not implemented until April, 1992. After the requirement was implemented, the City allowed these current Public Works employees time to comply with the new policy.

Additionally, the City asserts that the grievant must come forward with adequate proof that she has the ability to perform the job in a competent and efficient manner. However, the grievant had no prior experience in performing the work required. In fact, she testified that she was unfamiliar with the duties performed by the Operator and that she did not have any experience with Mr. Nicksic's tasks. Therefore, she was not qualified to perform the job.

Next, the City maintains that Bosgraaf was not qualified to bump into the Secretary/Meter Maid position. The City argues that the grievant had no experience in the duties and responsibilities of this position. Additionally, the position required a significant amount of keyboarding that the grievant would not be able to perform with her physical limitations. Bosgraaf had certain permanent restrictions on the use of her right hand at the time she applied to bump. Her evaluation on October 14, 1992, stated that she could not perform more than six hours of wrist activity a day. Also, a supplemental independent medical examination recommended that she be restricted to maximum intervals of fifteen (15) minutes of sustained keyboard activities, followed by fifteen (15) minute intervals of alternative varied activities. Her writing is to be restricted to five (5) minute intervals. The Secretary/Meter Maid position entails many clerical duties and many of them typing, which the grievant was not able to perform on a full-time basis due to her restrictions. Therefore, she would not be able to perform the Secretary/Meter Maid job.

The City argues that physical ability to perform a job is a recognized determination when

considering if an employe is qualified or not. Consequently, the grievant was not qualified for the Secretary/Meter Maid position because she was physically unable to do the job.

DISCUSSION:

The grievant in this case, Bosgraaf, has filed several grievances surrounding the City's refusal to allow her to return to work for the City following her absence from work due to tendinitis in her right wrist. The grievance that is the subject of this proceeding is concerned with the grievant's bumping rights following the City's reorganization of its operations functions and the resulting elimination of the Utility Clerk/Secretary position and Bosgraaf's layoff. The parties stipulated that there were no procedural arbitrability issues and thus the question before the undersigned is whether Bosgraaf was, within the meaning of Article VI - Seniority, "qualified to perform the work," of either the Disposal Plant Operator or Secretary/Meter Maid positions. The City determined she was not and those decisions gave rise to this grievance.

After her job was eliminated and Bosgraaf received notice of her layoff, she attempted to bump into the Disposal Plant Operator position that was then held by the less senior John Nicksic. After interviewing Bosgraaf, the City determined she was not qualified for the position, was not a licensed operator and did not have a CDL.

It is undisputed that the grievant had no prior experience working in the Disposal Plant or in performing any of the listed duties of the position except possibly ". . . keeping and maintaining all required records." There was also no showing she was otherwise experienced in the duties listed in the job description. The Union relies on City Administrator Boyer's comment that anyone could work as a Disposal Plant Operator, and the fact that Nicksic was never required to assist in construction, repair and maintenance of sewer mains. The Union believes the latter to be significant because the Disposal Plant Operator II would not be required to hold a CDL license except if he/she were to be required to operate qualifying equipment associated with sewer main construction and/or maintenance. The undersigned, however, is persuaded that this argument misses the point. While Nicksic may never have assisted in the area of sewer main construction and/or maintenance, the Disposal Plant Operator II position description lists it as potential duties. Merely because the present Operator has never performed those duties does not mean he/she will not have to perform them at some time. Clearly, if it is a duty listed in the position description, it is reasonable to require that anyone applying for the position have that capability, including any necessary licenses. Consequently, it was not unreasonable for the City to find Bosgraaf did not possess sufficient knowledge and experience and failed to meet the criteria of "all State and Federal Licensing requirements," or keeping "proper accreditation to maintain license."

The undersigned is also not persuaded by Boyer's comment about anyone being able to be a Disposal Plant Operator. In the first place, were the undersigned to accept that statement it would render meaningless the "Qualifications" and "Training and Experience" section in the position description. Also, the fact that others may help out in the plant on a temporary basis is distinguishable from being the full-time operator. Finally, the City has the right to establish qualifications for the position, a point not in dispute herein.

The Union also contends that if it is found that a CDL license is a requirement for the position, based upon the prior treatment of other employees, the grievant should have been afforded the opportunity to obtain the license. The Union points to earlier years when employees were given time to obtain their CDL's. However, the undersigned has not found that argument persuasive because those employees already held City jobs at the time the CDL requirement came into existence. What occurred in the City of Mauston was occurring in many municipalities. That situation is quite different and distinguishable from this case where the requirement was already in existence when the employee wished to bump into the position without having a CDL. Consequently, there is no basis upon which to conclude the prior events relied upon by Bosgraaf support a claim of disparate treatment in this case.

Turning to Bosgraaf's desire to bump into the Secretary/Meter Maid position, I agree, in part, with the Union and find that, without considering her physical limitations, Bosgraaf was at least otherwise qualified to perform the job. Bosgraaf had been performing clerical duties for 17 years, and the duties described in the Secretary/Meter Maid job description were similar enough that she was prima facie qualified to perform the clerical duties. The City presented no persuasive evidence that the Secretary/Meter Maid position job duties were so technical that even with her approximate 15 years' experience as the Utility Clerk/Secretary the grievant was, without regard to her physical condition, unqualified to perform those duties within the meaning of Article VI, Section 4 of the parties' collective bargaining agreement.

The more significant issue concerning Bosgraaf's attempt to bump into the Secretary/Meter Maid position is whether her physical limitations resulting from tendinitis in her right wrist rendered her unqualified for the position. I believe the evidence establishes that her physical limitations would not allow her to perform the essential duties of the position on a continuous full-time basis. The job entailed 75 percent keyboarding duties, plus various filing, writing and other wrist activities. Even in light of her evaluation on October 14, 1992, which allowed her to perform six hours of wrist activity on any day, Bosgraaf would not be able to complete a full eight hour day performing the required activities. It is reasonable to conclude she could be required to perform more than six hours of wrist activity a day, and thus, she would not be able to fulfill some of the essential elements (typing, writing and filing) of the job. A functional capacity evaluation on September 30, 1992, indicated that her condition was aggravated by handwriting duties even though she was not working at the time. In 1991, her symptoms were aggravated by keyboarding duties. The City also argued that Bosgraaf had not yet reached a healing plateau by the time she applied for the Secretary/Meter Maid position; however, an independent medical examination conducted on September 21, 1992, stated that she reached a healing plateau on September 9, 1992. But that same independent medical examination also stated that she should not perform keyboarding activities full time. Furthermore, Bosgraaf's own doctor, Dr. Plooster, agreed with those findings. Consequently, the evidence supports a finding that she was not physically qualified to perform the job when she attempted to exercise her bumping rights.

The Union argued that the conversation that the City's representative had with the insurance representative should not be considered because it was hearsay. However, even if the conversations with the insurance representative were not considered, there is still sufficient evidence to establish that Bosgraaf would not be able to perform the essential elements of the Secretary/Meter Maid position on a full-time basis.

The final issue relates to the disparate treatment claim. The Union put in evidence of accommodations made for other employees and argues the City should have done the same for Bosgraaf. I find that the accommodations that were made for the other employees were only temporary, and their restrictions did not preclude them from performing the essential elements of their jobs on a full-time basis. Bosgraaf's restriction was permanent and did limit her ability to perform the essential elements of the position, such as keyboarding, handwriting and filing. In regards to the Equipment Operator who sustained a rotator cuff injury, who had a permanent injury but was able to return to work with a lifting restriction, I find that it was not established that lifting was an essential element of his job. Therefore, I do not find the grievant was the victim of disparate treatment as has been alleged.

In conclusion, Bosgraaf had the necessary experience to be able to perform the Secretary/Meter Maid position; however, her physical limitations restricted her from being able to complete the essential elements on a full-time basis of the job. This conclusion is supported by the doctors' evaluations that state that she is not to perform more than six hours of wrist activity a day. Clearly, therefore, she was unable to perform a full eight hours of such work in a day. If the position that Bosgraaf applied for was part-time, the result may have been different. However, the position was full-time, and it is not reasonable to conclude that she was physically qualified for such a position. Therefore, she was not "qualified to perform the work" of the Secretary/Meter Maid position under Article VI, Section 4 of the labor agreement.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The City did not violate the labor agreement when it refused to permit Susan Bosgraaf to exercise her seniority rights under Article VI, Section 4 to bump either John Nicksic or Myrna Spohn because the City found that she was not qualified to perform the duties of their positions. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 21st day of March, 1997.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator