

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WAUKESHA COUNTY EMPLOYEES,
LOCAL 2494, AFSCME, AFL-CIO

and

WAUKESHA COUNTY

Case 138
No. 53150
MA-9255

Appearances:

Mr. Michael J. Wilson, Staff Representative, on behalf of the Union.
Michael, Best & Friedrich, by Mr. Jonathan O. Levine, for the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration before a three-member panel. Pursuant thereto, I was selected as panel chair and Robert Chybowski and James H. Richter were designated as panel members by the Union and County respectively. Hearing was held in Pewaukee, Wisconsin, on July 29, 1996, August 5, 1996, and October 29, 1996. The hearing was transcribed and both parties filed briefs which were received by January 14, 1997. Based upon the entire record and arguments of the parties, the panel issues the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the County violate Section 10.02 A of the contract when it failed to offer an Economic Support Specialist III position to grievant Patricia Zaremba and, if so, what is the appropriate remedy?

DISCUSSION

The County on April 3, 1995, posted for two vacant Economic Support Specialist III (ESS) positions. Included with the posting was the job description for the ESS position which stated:

FUNCTION OF THE JOB

Under supervision, to perform complex work involving one or more specialty functions of economic assistance program administration; to function as a lead worker in the determination of initial and continuing eligibility and benefit levels for economic assistance programs; and to perform other duties as required.

CHARACTERISTIC DUTIES AND RESPONSIBILITIES:

1. Conducts reviews of cases to assure correct benefit decisions and issuance, records errors, determines corrective action, and assures that the corrective action is taken in a timely manner.
2. Compiles monthly statistical information regarding error types and amounts, and advises supervisors about error trends for both individual staff and the entire unit.
3. Assists the supervisors in training staff regarding new program policies and procedures and in remedial training.
4. Provides technical assistance and computer reporting network problem resolution to Economic Assistance staff.
5. Analyzes applications and recertifications identified as error prone as part of a front-end verification investigative function.
6. Serves as a resource to staff in determining initial and continued eligibility and benefit levels.
7. Recommends changes in processing, procedures, or forms which would enhance job performance of Economic Assistance staff.
8. Assists staff with interpretation of program policies presented in state sponsored training programs.
9. Implements special projects as assigned.
10. Provides caseload coverage for absent staff.
11. May conduct protective payee meetings.
12. May perform any of the duties of a Senior Economic Support Specialist.
13. Performs other duties as assigned.

QUALIFICATIONS:

Essential Knowledge And Abilities

1. Considerable knowledge of federal, state and county compliance standards, regulations and eligibility factors of need determination for complex financial assistance.
2. Considerable knowledge of available programs and services available through the Department of Human Services and community agencies.
3. Considerable knowledge of the socio-economic factors in the community.
4. Ability to interpret, analyze and apply federal, state and local laws, regulations, policies and procedures regarding economic assistance programs.
5. Ability to establish and maintain effective working relationships with clients, families, community agencies, and staff.
6. Ability to obtain necessary information from clients, verification sources, and other agencies and to main detailed records.
7. Ability to communicate effectively both orally and in writing.
8. Ability to analyze detailed information and perform detailed tasks with accuracy.
9. Ability to work independently and exercise judgment in organizing and prioritizing work within program time limits.
10. Ability to plan, organize, and direct the work of others.
11. Ability to train employees in duties and procedures.

Training and Experience

1. High school graduation or GED equivalent.
2. Two years of work experience performing the duties of an Economic Support Specialist.

Economic Support Supervisors Pat McElroy - Komppa and Terry McClung subsequently interviewed and ranked the six applicants for those positions. The six applicants and their seniority dates were as follows:

<u>Applicants</u>	<u>Seniority Date</u>
Kristine Smith	5/20/86
Jennifer Peters	6/27/88
Patricia Zaremba	4/1/89
Laura Long-Reichardt	9/24/90
Zulema Ocanpo	3/29/91
Debra Berg	1/6/92

The County ultimately awarded the positions to Laura Long-Reichardt and Debra Berg. Grievant Zaremba, an ESS II, was ranked last among the applicants and subsequently grieved over not being given one of those positions, hence leading to the instant proceeding. 1/

The Union argues that the County violated Section 10.02 A of the contract because it has not met its burden of proving that Berg is more qualified than Zaremba. It thus argues that the County violated the contract by failing to consider seniority and in-service training; that the County "misapplied the standards" of both "equal" and "best qualified"; that Zaremba's qualifications as an ESS III were not fairly evaluated; and that Berg was not "substantially better qualified for the ESS III in April, 1995."

The County, in turn, maintains that it did not violate the contract because the grievance is "moot"; because the clear and unambiguous language of Section 10.02 supports its decision; because the Union has failed to meet its burden of proving that the grievant was equally or better qualified than Berg; that Berg, in fact, was better qualified than Zaremba; and that a past practice and prior arbitration awards support its position. The County also argues that Berg was more qualified to be a lead person.

This case -- while taking several days of hearing and while containing a myriad of facts and claims which are not material to the issues presented herein -- is relatively simple: Did the County violate Section 10.02 A of the contract which states:

10.02 A. Promotion to a higher classification, demotion, and transfer shall be based upon prior work performance, experience, in-service training and seniority. Ability and experience being equal, the

1/ The initial grievance also encompassed other employes who since have withdrawn from the grievance, thereby leaving only grievant Zaremba. The Union acknowledges that Long received superior evaluations and it therefore does not contest her right to her position. Long has since quit her position and it is now vacant.

employee with the greatest County seniority shall be given the position.

Applying this language here, it thus must be determined whether Berg's qualifications outweighed Zaremba's qualifications and seniority. That can only be done by comparing the two.

Here, Zaremba had more experience as an ESS II than Berg since she has been an ESS II since July, 1991, whereas Berg did not become an ESS II until January, 1994. In addition, Zaremba has had about 54 more training hours than Berg, which is not surprising since Zaremba has worked for the County for a longer period of time.

The County tries to soft-peddle these differences on the ground that Berg's pre-County work experience for Blue Cross/Blue Shield counts more than Zaremba's experience. I disagree. The record shows that Zaremba has worked for the County as an ESS II for a longer period of time than Berg and that, moreover, Zaremba's prior work experience is at least as good as Berg's.
2/

The same is true for Zaremba's training. While supervisor Komppa asserted that Berg and Zaremba's training are a "wash", Komppa admitted that she did not review Zaremba's training record when she interviewed the candidates and that, moreover, she did not know about some of the training courses Zaremba took.

We thus are left with comparing the relative performance and ability of the two.

This is a very difficult issue to resolve because the parties have offered a microscopic examination of everything that Berg and Zaremba have done as County employees. That is why this record is so detailed and that is why it now is almost impossible to go back and review everything to determine whether Berg is a better employee as the County now asserts, or whether Zaremba is at least as good as Berg, as the Union now asserts.

Having reviewed the entire record, I find the following:

One, the County erred when it refused at step 1 of the grievance procedure on May 2 to compare Berg's qualifications with Zaremba's as requested by the Union, a point admitted by Komppa. The County was required to provide such information as demanded and its failure to do

2/ Komppa first asserted that Zaremba during her interview for the position should have raised her past experience in response to question two. She then said question three. She then said questions "five or seven". She then said questions "four or six". She then said question eight. In fact, if Komppa believed that Zaremba's past experience was important, she should have asked about it.

so is inexcusable. Ditto for the County's refusal at the second step on May 30 to make McClung and Komppa's interview notes available to the Union as requested. While the County breached its obligations to immediately provide that information, its failure to do so on both occasions did not impact on the ultimate issue before the panel, i.e., whether Berg should have been given the ESS III position over Zaremba.

Two, Zaremba is qualified for the ESS III position. The County never claimed otherwise when it initially passed over Zaremba and the record -- particularly Zaremba's January 28, 1994, evaluation -- independently establishes that she is qualified to be an ESS III.

Three, the County is estopped from raising any alleged deficiencies about Zaremba's work that it had never brought to her attention before this proceeding or that happened after the County passed her over. The reason for that is rather basic: the very purpose of yearly evaluations and counseling is to inform employees how well (or badly) they are doing and how they can correct their shortcomings. Hence, if an employer does not think it important enough to raise such matters earlier, it should not be allowed to raise them somewhere else down the road. To do otherwise is to make a mockery out of an evaluation system and it leads to the Union's charge here that "the evaluation of the Grievant's job performance for promotion was by ambush."

Four, Zaremba and Berg's prior evaluations are of paramount importance in resolving the issue presented. As to them, Zaremba received an evaluation on January 28, 1994, which had checks in places marked "Satisfactory" and "Very Good". Berg's January 28, 1994, evaluation had a check marked "Very Good". This was somewhat better than Zaremba's overall rating. Moreover, Berg's evaluation is all the more impressive because she by then was an ESS II for only one year.

Notably absent from Zaremba's evaluation were any of the criticisms the County has since lodged against her. Hence, there is no mention whatsoever in her evaluation that she is "unapproachable" or that she has difficulty in relating to her clients. To the contrary, the evaluation states: "Overall, I think Pat relates well with her clients and has been extended compliments." The only caution in her evaluation was the comment that she must be careful "how she uses humor". (Emphasis in original). This elliptical statement does not rise to the level of criticism which the County now raises against her. In this connection, Komppa admitted that she could not recall telling Zaremba at any other time in "those words to her specifically" that she was considered unapproachable by her peers.

Furthermore, while Economic Assistant Manager Kathleen Bink, Kompaa, and McClung all alluded to Zaremba's purported problems with fellow employees and clients, I find that there is insufficient proof in this record that Zaremba in fact encountered those problems. 3/ Moreover,

3/ Thus, Bink was unable to name even one client who ever complained about Zaremba. In addition, she stated on cross-examination: "I cannot give you any specific word-for- word

several of Zaremba's fellow workers -- Ann E. Oven, Jennifer Piteros, Kathy Horner, and Karen McKinney -- all praised Zaremba's work.

The bottom line here thus turns on whether - given the County's improper consideration of certain complaints lodged against Zaremba - Berg deserved to be promoted over Zaremba because she received about 3-4 more points in her last evaluation than did Zaremba and because Berg's last evaluation stated that she had performed "Very Good", whereas Zaremba's last evaluation was marked "Satisfactory" and "Very Good".

Ordinarily, Berg's slightly better evaluation and higher score during the interview process would carry the day. Here, though, it is not clear that the County's selection process was as fair and as objective as possible (even though the County tried to make it so) given management's colored views of Zaremba's ability and qualifications. When that is coupled with the fact that Zaremba's training and experience exceeded Berg's and that the qualifications between the two are roughly equal, I conclude that the County violated the contract when it bypassed Zaremba in favor of Berg.

The County, after all, is obligated to be fair in its evaluations and promotion procedures. That has not happened here since the County has tried to undo Zaremba's prior evaluations by claiming that she is not as good an employe as her evaluations state. In fact, those evaluations cannot be overridden which in essence is what the County has tried to do here. For just as an employe cannot challenge an adverse evaluation if it is not grieved, an employer by the same token cannot try to go behind that same evaluation to show that there is a lot more than meets the reader's eye. The County similarly cannot be given deference under a promotion procedure which is tainted by subjective, uninformed allegations and which also does not fairly consider all of the relevant facts supporting an employe's right to a particular job.

As a remedy, the County therefore will immediately promote Zaremba to an ESS III position and it will make her whole for any monies and benefits that she would have earned had she been promoted to an ESS III position earlier.

In order to resolve any questions that may arise over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

In light of the above, it is my

AWARD

complaints." If the County in the future ever wishes to rely on any such complaints against either Zaremba or any other employes, it must fully document them and tell employes about them at the time.

1. That the County violated Section 10.02(A) of the contract when it failed to offer Patricia Zaremba an ESS III position.

2. That as a remedy, the County shall immediately offer Patricia Zaremba that position and make her whole in the manner described above.

3. That I will retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin, this 31st day of March, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

Robert Chybowski /s/
I concur.

James H. Richter /s/
I dissent.