

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WINNEBAGO COUNTY

and

WINNEBAGO COUNTY HIGHWAY
DEPARTMENT EMPLOYEES
UNION, LOCAL 1903, AFSCME, AFL-CIO

Case 279
No. 54597
MA-9735

Appearances:

Mr. John A. Bodnar, Winnebago County Corporation Counsel, 448 Algoma Boulevard, P.O. Box 2808, Oshkosh, Wisconsin, 54903-2808, appearing on behalf of the County.

Mr. Richard C. Badger, Staff Representation, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, Wisconsin, 54913, appearing on behalf of the Union.

ARBITRATION AWARD

Winnebago County, hereinafter referred to as the County, and Winnebago County Highway Department Employees Union, Local 1903, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the promotion of an employe. Hearing on the matter was held in Oshkosh, Wisconsin on February 4, 1997. Post hearing argument were received by the undersigned by March 27, 1997. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon the framing of the issue and agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

"Did the County violate the collective bargaining agreement by awarding the position of Airport Foreman to a less senior candidate than the grievant?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 10

JOB POSTING

A job vacancy is defined as a position not previously existing in the job classification plan attached to and made a part of this Agreement or a vacancy in a position in the said job classification plan due to termination of employment, promotion, demotion, or transfer, death or disability of existing personnel, and in the judgment of the County the need to fill such job vacancy continues to exist. In the event the County determines not to fill any job vacancy in the job classification plan, the County agrees to post a notice of job discontinuance for a period of five (5) working days in the department within which the vacancy occurs.

Any such vacancy aforementioned shall be posted for a minimum of five (5) working days on the Union bulletin board in each department.

Postings shall be made only on the basis of job classification and department.

The job requirements, qualifications, wage rate, shift (if Recycling Center position or Highway Patrol Section 7) and position status (full-time or part-time) shall be a part of the posting and sufficient space shall be provided for interested persons to sign said posting. Employees desiring to apply for such vacancy shall sign the posted notice or shall arrange to have the names placed on the posting within the posting period.

The posting shall also contain the employee's primary job duties, however, this shall not prevent the County from temporarily assigning employees to vacant jobs within the classification until such time as said job is permanently filled, nor shall this prevent the County from assigning an employee to other job duties because of a lack of work in his regular job or because of unsatisfactory job performance.

The County shall determine the qualifications of the applicants and in the event that qualifications as determined by the County are relatively equal, the applicant with the greater departmental seniority shall be selected to demonstrate his ability to

perform the job during a trial/training period of not more than thirty (30) days actual performance on said job. The County agrees that if a selection is to be made, it will be done within ten (10) working days after the close of the aforementioned posting period. If said employee is deemed qualified by the County, he shall be assigned to fill the vacancy. Should such employee not qualify within the aforementioned thirty (30) day period or should the employee desire to return to his former position at any time within the said thirty (30) day period, he shall be reassigned to his former position without loss of seniority. In this event, the applicant next in line of seniority with the department shall be given preference pursuant to the above procedure until the vacancy is filled. Should no employee within the department apply or qualify for the vacant position, employees in the three remaining departments who have signed the posting shall be eligible for such vacancy in accordance with the above procedures using bargaining unit-wide seniority as the determining factor should qualifications be relatively equal. Should no bargaining unit employee apply or qualify for the vacancy, the County may fill the position from outside the bargaining unit.

QUALIFICATIONS DISPUTES: If there is any difference of opinion as to the qualifications of an employee, the Union may take the matter up for adjustment through the grievance procedure.

The County reserves the right to make immediate temporary assignments to fill any vacancy in the job classification plan attached hereto and made a part hereof until such time as said vacancy is filled pursuant to the procedures outlined herein.

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BACKGROUND

Amongst its various governmental functions the County operates an airport. At the airport the County had employed Dan Smith as foreman. This position became vacant during the spring of 1996 when Smith chose to leave County Service. Heavy equipment operator Ronald Powers, hereinafter referred to as the grievant, a seventeen (17) year employe and Scott Gross, a less senior employe, both informed management they were interested in the vacated position and filling it as "acting foreman" until the position was posted and filled. Airport Director Duncan Henderson appointed Gross as acting foreman. Thereafter, Duncan received the following letter from Smith:

Duncan Hedersen
Wittman Regional Airport
Oshkosh, WI 54901

Dear Duncan:

We would like to let you know how we feel about the memo that was issued 5/09/96 regarding the temporary placement of Scott Gross into the foreman's position. I realize that you have the ultimate decision making authority at the airport. I can't help but to think that this is not what you would have done, without being influenced to do so.

The problem with it is very blatant to the very small crew at the airport. Again the airport is bottle feeding an employee, while the others pick up the scraps that remain! It is very obvious that Scott is being groomed to become the next foreman, by means of the temporary assignment. You may not know this, but we do! It's just the way things are manipulated here at Wittman.

There was once a great crew that couldn't be beat. We would have went up against any other.

Danial F.

Smith

On April 30, 1996 the position was posted. Amongst its various requirements was a Class "A" Commercial Drivers License (CDL). Peter Raske, Gross (who only had a Class "B" CDL) and the grievant (who has a Class "A" CDL) signed the posting. Raske was awarded the position, accepted but subsequently declined the position. The County then posted the following position with a reduced the license requirement to a Class "B" CDL:

J O B P O S T I N G
REVISED

DEPARTMENT: AIRPORT (WITTMAN FIELD)

POSITION: FOREMAN (FIELD MAINTENANCE)

POSITION CLASSIFICATION NUMBER: 5

SALARY RANGE: \$13.73-\$14.96 PER HOUR

POSITION PURPOSE: PROVIDES COORDINATION
AND SUPERVISION OF
MAINTENANCE TO AIRPORT
BUILDINGS, STRUCTURES, AND
GROUNDS

MAJOR DUTIES:

1. Coordinates and supervises snow removal, maintenance of airport buildings, structures and grounds, including but not limited to plumbing, electrical and pavement repair.
2. Operates various heavy equipment to include large snowplows, blowers and brooms, front end loaders, tractors and mowers dump trucks, forklifts, crack-filling machines, paint strippers, generators, compressors, and pumps.
3. Performs routine daily preventive maintenance on all equipment operated and performs major maintenance as required to assist Mechanic with or without supervision.
4. Performs maintenance on electrically generated gates, replacing clutches, fuses, bearings and couplings, lubricates and adjusts pulleys and wheels, installs various types of fencing.
5. Performs maintenance on high voltage airport lighting systems to include replacing transformers, bulbs, making splices, installing new connectors, posts and couplings, trouble-shooting electrical faults, aiming and aligning runway and obstruction lights. Maintains and repairs flood lighting and safety lighting.
6. Performs landscaping to include grading work, seeding, fertilizing, applying chemical herbicides and pesticides; plants flowers, shrubs and trees; cares for and maintains grounds as required.
7. Performs minor masonry work to include excavation for pouring of concrete, walls, aprons, drains, etc.
8. Services and performs repairs on heating and cooling equipment in various buildings.
9. Performs general carpentry work on doors, shelving, walls, roof repairs ceilings and foundations.
10. Repairs asphalt roofs, shingles, etc. Glaze windows as required.
11. Performs airport safety conditions inspections in accordance with Federal regulations; prepares reports on field conditions and disseminates information.
12. Replaces or repairs water pipes, lines or air hoses, cuts and threads pipes, welds, solders metal pipe or tubing.
13. Fills in for Operations Superintendent during periods of absence.
14. Performs other duties as assigned.

GENERAL QUALIFICATIONS:

1. Knowledge and understanding of FAR Part 139 and Part 107 rules regarding airport operations and maintenance.
2. Ability to lead and motivate employees in the completion of their duties.
3. Good knowledge of basic mechanics, internal combustion engines, cooling systems, electrical systems, on vehicles.
4. General knowledge of electrical, plumbing, carpentry, mechanics, welding and metals.
5. Ability to read and write with an ability to follow oral and written instructions.
6. Ability to operate voice radios.
7. Ability to work well with others and the general public.
8. Ability to exercise good judgement and work well without supervision.
9. Ability to operate various equipment and demonstrate advanced knowledge in at least two areas of airport maintenance such as turf management, carpentry, pavement maintenance, electrical/mechanical/structural repair.
10. Completion of a standard high school course, preferably supplemented by two years of vocational-technical education; or a combination of experience and training which provides the required knowledge, skills and abilities.
11. Must have a valid Class B Commercial Drivers' License without vehicle restriction.

PHYSICAL QUALIFICATIONS:

1. Ability to perform some strenuous or heaving manual labor.
2. Ability to work at times in extremes of temperature and inclement weather.

Any Winnebago County Highway Department Employee Union Local 1903 employee interested in applying for the position, may do so by signing below. Other Winnebago County employees may complete the Winnebago County Personnel Department Application of Departmental Transfer/Position Change Form.

POSTED: MAY 9, 1996

REMOVED FROM POSTING: MAY 16, 1996

Thereafter Henderson and County Personnel Specialist Sandra Neisen interviewed the candidates for the position. Each candidate was asked the same questions. Henderson and Neisen concluded, based upon responses to the questions, that Gross was more qualified and offered him

the position. Gross accepted on July 8th, 1996 the instant grievance was filed by the grievant. Thereafter it was processed to arbitration in accord with the grievance procedure. At the arbitration hearing the interview questions and answers of Gross and the grievant were submitted to the undersigned. Pertinent questions to the instant matter are as follows:

29. What would you do if someone complained to you that an employe you supervise was sexually harassing them?
31. What would you do if an employe you supervised appeared to be under the influence of alcohol or drugs?
34. Should airport employes wear seat belts when operating snow plows on runways?
36. You find an airport tenant dumping waste oil down a storm drain, what would you do?
37. An employe you supervise is regularly out sick on Mondays and Fridays, what would you do?
39. An employe you supervise refuses to do a task you instruct him to do; what would you do?
40. You find the employe mentioned above screaming and cursing at you; what would you do?

Grievant's Responses:

29. Talk to Terry. Look at investigation. If supervisor, would go over his head.
31. Would go talk to Terry, reassign work assignment to something simple, and go talk to Terry.
34. No. Employe needs to be comfortable.
36. Notify supervisor, oil booms.
37. Turn the employe into Terry.
39. Do it himself and take up with Terry at a later date.
40. Tell the employe to cool off, ask Terry to talk to him at a latter date.

Gross's Responses:

29. Try to talk to person first, then go to Terry or Duncan.
31. Contact Terry or Duncan, pull employe out of equipment, send them home.
34. Yes, seat belts, if you were to hit a manhole cover could go thru windshield.
36. Notify Terry, get an oil rig from firestation.
37. Try to talk to employe, ask him to change his habits. Notify Terry.
39. Try to do it himself, give him something else to do. Notify Terry, ask employe what the problem is.
40. Have him escorted off by an officer.

On July 18th, the grievant received a written warning for failure to report to work on July 17th, 1996. The written warning was not grieved.

Union's Position

The Union contends the grievant should of received the opportunity to perform the contractual 30-day trial period required by the collective bargaining agreement. The Union argues the grievant's qualifications were relatively equal to or better than those of Gross, that those areas the County considers the grievant to be lacking are relatively minor aspects of the job, that questions asked during the interview were not relevant to the position, and that the County's actions were questionable and prejudicial to the grievant.

The Union questions the County's decision to lower the qualifications of the position and reposting the position. The Union points out this action is highly unusual for the County. The Union also points out that this would be the only County position where the foreman did not have a license to operate all the equipment under his direction.

The Union also asserts there was a degree of favoritism in existence. The Union contends this was substantiated by Smith's letter and Neisen's testimony that the grievant was not highly thought of by the County.

The Union argues the questions the County had concerning the grievant's qualifications centered on two areas, 2 and 8 on the job postings general qualifications. The Union points out

that Henderson testified that the grievant and Gross were relatively equal in all other aspects of the job. The Union asserts that if Gross and the grievant are relatively equal in 9 of 11 qualifications that the two are relatively equal overall. However, the Union contends the grievant is superior to Gross in several areas. The Union points out the grievant is a high school graduate, Gross is not. The grievant has superior mechanical skills and Gross acknowledged the grievant had to do some of the technical duties the previous foreman did because they were too confusing for him.

The Union also asserts the less tangible skills the County has used to claim that Gross is more qualified do not tie back to the major duties of the position. The Union points out this is a working foreman position that does not have the authority to perform the management functions of hiring and firing. The Union also asserts that Niesen acknowledged that working foreman have neither the training or authority to handle some of the situations raised in the questions, handling drunk employees or fighting amongst employees.

The Union concludes that the County may not believe it acted in a biased matter but questions raised at the hearing support such a conclusion. Why else did it mention an unsubstantiated sexual harassment claim dropped long ago or the fact that the grievant dated and married a seasonal employee as evidence of poor judgment and that it reflected poorly on the grievant's personal morality.

The Union would have the undersigned sustain the grievance, award the position to the grievant and make him whole for backpay to the date Gross was permanently assigned the foreman position.

County's Position

The County contends it has the right to control promotions except as modified by the agreement. The County points out the parties have a "modified seniority clause" which gives it the right to select the better qualified candidate when filling a position and it has the right to determine the qualifications for a position. The County contends the Union must demonstrate that the County was arbitrary, discriminatory or acted in bad faith before the job selection can be reversed. The County asserts the Union has failed to do so.

The County argues that both employees were asked questions regarding qualifications 2 and 8. Based upon the grievant's answers both Henderson and Neisen concluded that when the grievant was faced with a problematic situation his response was to go tell his supervisor about the problem, that he lacked insight into problems which might be presented to him and that he lacked initiative and ability to lead. In support of its position the County points to the grievant's responses to question 31, 34, 36, 37 and 40.

The County contends there is nothing arbitrary or capricious in its actions for the selection of Gross to be overturned. The County also contends there is nothing arbitrary or capricious with regard to the standard used in this matter in that the same questions were asked of all applicants and that both Henderson and Neisen expressed a consistent and honest opinion that on the basis of

the interview the grievant was less qualified than Gross. The County also argues great weight should be given to Henderson and Neisen if there is any evidence to support their conclusions even if the undersigned does not agree with the conclusion they reached absent a showing they were arbitrary or capricious.

The County also argues due weight should be given the grievant's written reprimand. The County asserts that had such an action occurred while the grievant was foreman during his trial period his job performance would have been found to be unsatisfactory and he would have been removed from the job. The County contends such an action demonstrates the grievant's lack of judgment and leadership.

The County would have the undersigned deny the grievance. If the undersigned should sustain the grievance the County would have the undersigned deny any backpay unless the grievant successfully completed a trial period.

DISCUSSION

Article 10 of the parties' collective bargaining agreement clearly allows the County to determine the qualifications of an employee, and, if the County determines the qualifications are relatively equal, the employee with the most departmental seniority shall be offered a thirty (30) day trial period. Herein the County has asserted the qualifications of the grievant and the employee it selected for the position are not relatively equal. The original posting for the foreman position required a "Class A" CDL. The County has not offered any rationale as to why, when the person it offered the position, accepted and then declined the position, it reposted the position. Under the parties' agreement when an incumbent desires to return to their former position the next in seniority is to be offered the position. This was not done, the position was reposted, and, as noted, no reasonable rationale was offered for why the position was not offered to the next most senior candidate.

The record also demonstrates that County foreman, including the previous incumbent to the position in dispute, have been required to possess a CDL that allows them to operate all equipment under their control. The County offered as rationale for the change that only one piece of equipment remained that needed a "Class A" CDL and that such a qualification was superfluous. However, as the Union has pointed out, such a change is questionable when equipment still remains that requires the "Class A" license, the original posting had the requirement and management's temporary replacement, Gross, did not possess such a license, nor would he have been able to qualify for the position if the "Class A" requirement had not been reduced by management.

The record further demonstrates that the position requires completion of a standard high school course. While the grievant has a high school diploma, Gross does not.

Given the grievant's higher CDL license and his high school education, clearly the grievant is the more qualified candidate for the position. The undersigned finds little merit to the questions

posed in the interview except to conclude that they lead to self serving conclusions with little validity or reliability. Some of the questions asked have no bearing to the position or to the qualifications of the position. For example, nothing in the job description or qualifications require the employe to have knowledge prior to entering the position of what sexual harassment is or how to determine whether an employe was under the influence of alcohol or drugs. Thus, if the position does not require candidates to have such knowledge prior to entry into the position to conclude one candidate is better than another based upon knowledge not required for the position would be capricious. Neisen testified that the County trains employes in these areas. Gross and the Grievant have not received such training. In some responses Gross indicated he would try to resolve the matter himself prior to going to management with the problem. Without the necessary training this could be the worse course of action. Thus Henderson's testimony that Gross' answers demonstrated a better train of reasoning, better thought processes have no basis in fact. The undersigned also finds Henderson and Neisen had preconceived opinions of the grievant and these opinions tainted their view of the grievant's responses. For example, Henderson testified that the fact the grievant dated and then married a seasonal employe demonstrated poor judgment on the grievant's part. Yet Henderson could offer no rationale as to why such an action would indicate the grievant was less qualified than Gross. Neisen also acknowledged that the grievant was not highly thought of. The undersigned also finds that to conclude that either candidate was superior to the other based upon the questions asked in the interview would require a factual determination that the questions asked were valid and that a predetermined answer key was developed to determine what were the valid answers. Henderson and Neisen concluded they believed Gross gave answers superior to the grievant's answers. However, there is no evidence they even discussed what appropriate responses would be prior to the interview. Their conclusions, absent a determination prior to the interviews of what correct or acceptable responses are, allows a subjective bias to enter into their opinion of the grievant's responses. Thus the undersigned concludes there is no basis to conclude that based upon Gross' and the grievants' responses in the interviews that Gross is the more qualified candidate.

The County also has argued the grievant's written reprimand demonstrates the grievant's qualifications are not equal to Gross'. However that reprimand was for a failure to report he was not coming into work, was after the County had determined to give Gross the position, and the one work infraction does not demonstrate the grievant would be incapable of performing the duties of foreman.

Based upon the above and foregoing the undersigned concludes the County violated Article 10 when it failed to award the foreman position to the grievant. The undersigned directs the County to award the grievant the foreman position. The County has argued that should the undersigned find for the grievant that there should be no backpay because the grievant has not completed a thirty (30) day trial period. The undersigned agrees the grievant must successfully pass a trail period in order to be permanently placed into the foreman position. However, it was the County's actions which denied the grievant his contractual rights and the grievant should not be harmed because of this action. Therefore the undersigned directs the County to make the grievant whole for any wages he has lost back to the date Gross was awarded the position. The undersigned will also retain jurisdiction pending the implementation of this Award.

AWARD

The County did violate the parties collective bargaining agreement when it failed to award the Airport Foreman position to the grievant. The County is directed to make the grievant whole for all lost wages and to provide him an opportunity to successfully complete the trial period for the position.

Dated at Madison, Wisconsin, this 6th day of August, 1997.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator