

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**MANITOWOC COUNTY HEALTH CARE  
CENTER EMPLOYEES, LOCAL 1288,  
AFSCME, AFL-CIO**

and

**MANITOWOC COUNTY  
(HEALTH CARE CENTER)**

Case 324  
No. 54968  
MA-9843

---

Appearances:

**Mr. Gerald Ugland**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Mr. Steven Rollins**, Corporation Counsel, appearing on behalf of the County.

**ARBITRATION AWARD**

The Union and the County 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 the undersigned to decide a grievance. A hearing, which was transcribed, was held on May 22, 1997 in Manitowoc, Wisconsin. After the hearing, the parties filed briefs and reply briefs, whereupon the record was closed on August 11, 1997. Based on the entire record, the undersigned issues the following Award.

**ISSUE(S)**

The parties were unable to stipulate to the issue(s) to be decided in this case. The Union framed the issues as follows:

1. Does the arbitrator have authority to enforce the provisions of the federal Family and Medical Leave Act of 1993 as a provision of the collective bargaining agreement?

2. Did the Employer violate the collective bargaining agreement by not awarding the position posted in October of 1996 to Susan Pieschel? If so, what is the appropriate remedy?

The County framed the issue as follows:

Does the Employer violate Article 21 of the agreement by refusing to award a posted job vacancy to the most senior bidder on the grounds that the employee is not qualified for the position when that employee is not available for work and is not physically or mentally able to perform the work at the time the position is awarded? If so, what is the remedy?

Having reviewed the record and arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

Did the County violate the collective bargaining agreement when it filled the housekeeping position in 1996? If so, what is the appropriate remedy?

### **PERTINENT CONTRACT PROVISIONS**

The parties' 1996-97 collective bargaining agreement contains the following pertinent provisions:

#### **ARTICLE 3 - MANAGEMENT RIGHTS RESERVED**

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reasons, is vested exclusively in the Employer.

The Employer retains the right to comply with the Americans With Disabilities Act. The Employer and the Union mutually agree that an employee who is a qualified individual as defined by the Americans With Disabilities Act is eligible for, upon request, reasonable accommodation as defined by the Act. In the event the Employer finds it necessary to accommodate the disability of an employee whose work is within the parameters of Article One, Recognition, it will inform the Union. The Union and Employer will meet to discuss possible accommodations. Any disagreement over the accommodations shall be referred to the grievance arbitration procedure defined in Article Seven.

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it, from time to time, deems necessary for the effective operation of the Institution.

...

#### **ARTICLE 10 - TRIAL PERIOD**

An employee upon being promoted or transferred to another classification, shall serve a trial period of thirty (30) calendar days in the classification. An employee who cannot do the work of the new classification within the thirty (30) calendar day trial period shall be returned to his or her former position. The Employer may step the employee back to his or her former position at any time during the trial period, subject to the grievance procedure. The employee may return to his or her former position if he or she so elects during the initial thirty (30) calendar days of the trial period upon written notice to his or her department director. As provided herein, the employee shall be entitled to the pay rate for the position he or she is promoted or transferred to effective the date the employee performs the functions of the new position, unless the employee is stepped back to his or her former position. Continued service beyond the thirty (30) calendar day trial period shall be deemed evidence of satisfactory completion of the trial period.

...

#### **ARTICLE 13 - SICK LEAVE**

...

B. Notice of Sick Leave

...

Manitowoc County recognizes and complies with both State and Federal Family and Medical Leave Acts, and when requested, will assist the employee in the utilization of those rights.

...

## **ARTICLE 21 - JOB POSTING**

Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in the institution as well as the bulletin board immediately outside of the Personnel Department for five (5) working days. A copy of each job posting shall be submitted to the Local Union Vice-President. The posting shall include a statement defining which weekend off and which holidays off the position has. An employee desiring to fill any such posted vacancy or new position shall make application in writing at the institution's Human Resource office or by signing a posting. After the conclusion of the posting period, the applications shall be reviewed at the institution's office in the presence of a representative of the Union at a time to be mutually agreed upon. The Employer shall notify this Union designee when those jobs are filled.

Whenever any vacancy occurs it shall be given to the employee with the greatest institutional seniority within the department within seven (7) work days after the vacancy date, provided the applicant is qualified for such position. If there is no qualified applicant within the department, then the position shall be given to the remaining employee with the greatest institutional seniority, regardless of the department, provided the applicant is qualified for such position. Once in a new position, institutional seniority carries forward and is applicable after the trial period for bidding on another vacant position, with qualifications pursuant to the Agreement.

If there is any difference of opinion as to the qualifications of an employee, the County Personnel committee and the Union Committee shall take the matter up for adjustment through the grievance procedure.

### **BACKGROUND**

On September 13, 1996, employe Susan Pieschel left work after being granted ten days unpaid leave to attend to personal problems. Pieschel did not return to work at the end of the ten day period as expected. Instead, on September 30, 1996, she submitted a written request asking for her (unpaid) leave of absence to continue through October 21, 1996. Her written request was accompanied by a medical statement seeking a "thirty day medical leave from work." The Employer granted this request. Pieschel was subsequently granted a series of unpaid leaves by the Employer. Pieschel did not return to work at the Health Care Center until February 21, 1997. Thus, she was off work continuously from September 13, 1996 through February 21, 1997. During her protracted medical leave, Pieschel bid for a posted position. This case involves her posting rights for that position.

### FACTS

In October, 1996, the Employer posted a vacancy for a housekeeping position. Three employees bid on the position: Pieschel, Peggy Marzinski and Lori Elfner. The exact date Pieschel signed the posting is unknown, but she was on medical leave (and thus not working) when she signed the posting. Pieschel was the most senior bidder and Marzinski was the second most senior bidder.

A day or two after the posting closed on October 14, 1996, the Employer's Human Resources secretary, Sharon Grzenia, called Pieschel at home and told her that since she was the senior employee who bid on the position, she would be awarded the posted position so long as she passed a qualifying housekeeping test.

Following her conversation with Pieschel, Grzenia learned from another secretary that Pieschel was off work on medical leave.

Upon learning that Pieschel was on leave, Grzenia called Pieschel a second time. This time, Grzenia informed Pieschel that she would not be awarded the housekeeping position because she was unavailable to work at the time. These two phone conversations between Pieschel and Grzenia occurred within a day or two of each other, and took place shortly after the job posting came down.

After taking this action, the Employer decided to defer final action on filling the position until Pieschel's medical leave expired. Employer representatives thought that Pieschel would be returning to work by October 21 or October 30, 1996 (depending on which leave document was relied on). Even if Pieschel did not return by that date, Employer representatives thought they would know when Pieschel would be returning to work.

In early November, 1996, Pieschel asked the Employer to extend her leave again. When she did so, she provided the Employer with a letter dated November 1, 1996 from her health care provider. This letter provided in pertinent part:

I have been seeing Susan on a regular basis. . .for psychotherapy and believe that she should continue her leave of absence for at least another two weeks.

After receiving this letter, the Employer concluded that Pieschel was still unavailable for work because of her mental health condition and that she would be out for an unknown period of time. The Employer further concluded that it was unwilling to leave the housekeeping position vacant until Pieschel returned to work. It therefore decided to fill the vacancy with someone other than Pieschel. The Employer awarded the position to the second most senior bidder, who accepted it on November 5, 1996.

The Union subsequently brought the instant grievance which contends that Pieschel should have been awarded the posted position even though she was on medical leave. The grievance was ultimately processed to arbitration.

Pieschel returned to work when she felt able to do so. This occurred February 21, 1997.

The parties dispute whether the Employer has previously awarded posted positions to persons who were unavailable for work because they were on leave. Union witness testified it has happened; Employer witnesses testified it has not. According to Union witnesses, employees Diane Schmidt, Patricia Haupt and Connie Babcock were awarded positions while they were on leave. Notwithstanding this testimony, the record indicates that none of these employees were awarded jobs while they were on leave; instead, all three were working and available for work when they accepted the jobs for which they had posted.

## **POSITIONS OF THE PARTIES**

### **Union's Position**

The Union contends that the Employer violated the collective bargaining agreement by not awarding the housekeeping position to Pieschel. As the Union sees it, Pieschel should have been awarded the job because she was the senior bidder and because she was qualified for the position. According to the Union, the fact that Pieschel was not immediately available to assume the position because she was on medical leave should not have prevented her from getting the job. The Union makes the following arguments to support this contention.

First, the Union notes that neither the job description nor the job posting says that an employe must be immediately available in order to get the job. The Union implies from this that availability must not be a prerequisite for the housekeeping job or it would have been listed on the job description and job posting.

Second, the Union argues that although Pieschel was unavailable for work when the housekeeping job was awarded, the Employer could still have awarded her the position and then had someone else do the work until she returned to work. The Union's suggestions for accomplishing this are as follows: the Employer could have used an existing full-time employe as a substitute, or hired a temporary non-bargaining unit employe to fill the position, or hired a part-time employe to fill the position, or used an existing on-call employe, or offered the housekeeping work as additional hours to present staff, or posted a temporary housekeeping position until Pieschel returned. The Union further asserts that the Employer made no effort to keep the housekeeping position open until Pieschel returned, or to find a temporary replacement for her. According to the Union, the Employer has done so for other employes, so it should have done so for Pieschel.

Third, the Union avers that the Employer has previously granted positions to employees who were on leave. To support this premise, the Union cites the testimony of Union witnesses concerning employees Patricia Haupt, Diane Schmidt and Connie Babcock. With regard to Haupt's situation, the Union claims that "when Haupt was granted her present position she was on leave, but she was allowed to start three weeks later." With regard to Schmidt's situation, the Union implies that Schmidt was also awarded a position while on leave. As the Union puts it in their brief, "Diane was awarded a vacancy which was to begin in December of 1996 while Schmidt was on leave." With regard to Babcock's situation, the Union simply asserts that "Babcock, who was out on leave due to surgery, was awarded a position." The Union asserts that since these employees were granted positions while on leave, Pieschel should have been treated similarly. The Union contends that since she was not, the Employer discriminated against her.

Finally, in addition to arguing that the Employer violated the contract, the Union also argues that the Employer's actions here violated the federal and state Family and Medical Leave Act (FMLA) and (possibly) the Americans With Disabilities Act (ADA). This contention is based on the following premises. First, the Union believes that these laws are incorporated into the contract. Second, the Union reads those laws to provide that an employee is not to be denied the benefit of seniority while on medical leave. According to the Union, Pieschel would have been awarded the housekeeping position but for the fact that she was on medical leave. The Union therefore contends that the Employer's failure to award the housekeeping position to Pieschel violated those laws.

In order to remedy this alleged contractual breach, the Union asks that the arbitrator award the housekeeping position to Pieschel effective with the date she returned to work, and to make her whole for lost wages and benefits.

### **Employer's Position**

The Employer contends it did not violate the collective bargaining agreement by not awarding the housekeeping position to Pieschel. According to the Employer, Pieschel was not qualified for the position because she was on medical leave when she bid on the position and therefore was unable to do the work. It is the Employer's position that an employee must be available for work and physically and mentally capable of performing that work in order to be qualified. The Employer asserts that was not the case with Pieschel so it did not have to award her the position. It makes the following arguments to support this contention.

First, the Employer disputes the Union's assertion that it (i.e. the Employer) has previously awarded posted positions to persons who were unavailable for work because they were on leave. According to the Employer, the Union has tried to create a past practice where none exists. The Employer argues that the Union's claim that employees have been awarded positions while on leave is simply false and unproven. To support this contention, the Employer

Page 8  
MA-9843

notes that while the Union raised five different employee situations at the hearing, they only referenced three of them in their brief. The Employer then addresses those three employee situations

in detail. With regard to Patricia Haupt's situation, the Employer cites the Union's brief wherein the Union claims that "when Haupt was granted her present position she was on leave, but was allowed to start three weeks later." The Employer avers this assertion is just plain wrong. It notes that while Haupt initially claimed she had been awarded a position while on leave, she later retracted that claim and admitted she was not on leave when the position was awarded. The Employer asserts that the Union's failure to disclose this latter testimony demonstrates a profound lack of candor. With regard to Diane Schmidt's situation, the Employer asserts that the Union's attempt to suggest that Schmidt was awarded a vacancy while on leave is also false. To support this view, the Employer cites Schmidt's own testimony that she was working when she accepted the job posting, that she was not on leave at the time, and did not start a maternity leave until sometime later. With regard to Connie Babcock's situation, the Employer notes that while her name was also put forth by a Union witness as someone who was awarded a position while on leave, that same witness later recanted that testimony and admitted she did not know whether Babcock was on leave when the position was awarded. Given the foregoing, the Employer believes the Union has not proven a single example where the Employer awarded a job to a person who was on leave.

Second, the Employer disputes the Union's assertion that it should have awarded Pieschel the position and then used a substitute to do the work for her until she was available to do it herself. According to the Employer, the flaw with this argument is that this action has no foundation in the contract. Additionally, the Employer submits that this action intrudes upon management's reserved right to direct the workforce.

Finally, the Employer disputes the Union's contention that it violated the Family and Medical Leave Act (FMLA) and the Americans With Disabilities Act (ADA) by not awarding the posted position to Pieschel. According to the Employer, the Union's contention that the Employer violated these laws is predicated on a misstatement of what these laws actually require. The Employer contends that what the Union did here was simply make the bald assertion that the Employer violated these laws; it never offered any proof of same.

In conclusion, the Employer contends that since Pieschel was on leave and unavailable to work when she bid on the posted housekeeping position, she was not qualified for same, and the Employer did not have to award her the position. The Employer therefore asks that the grievance be denied. In the event that the arbitrator finds otherwise, the Employer asserts that Pieschel is not entitled to any remedy because there is no evidence in the record showing that Pieschel lost wages and benefits as a result of being denied the posted position.



## DISCUSSION

I begin my discussion with the following introductory comments concerning this posting dispute. In this case, the Employer awarded a posted position to the second most senior bidder. The Union contends this violated the posting provision. In the Union's view, the position should have been awarded to Pieschel, the senior bidder. The Employer disagrees. It contends that in this particular case it did not have to give the position to the senior bidder because she (Pieschel) was on medical leave when she posted for the position and was therefore unavailable to fill it. Thus, the issue here is whether the Employer complied with the contract or violated same when it filled the housekeeping position in 1996.

In deciding this question, attention is focused initially on the job posting contract language. The job posting language is contained in Article 21. That provision specifies the procedure to be used in filling vacancies (i.e. it establishes a job posting procedure). Specifically, it provides in pertinent part: "Whenever any vacancy occurs it shall be given to the employee with the greatest institutional seniority within the department. . . provided the applicant is qualified for such position." This provision makes qualifications a factor to be considered along with seniority in filling vacancies. Another contract provision (Article 10) provides for a trial period for the employee selected to fill the vacancy. However, this trial period is not automatic for everyone who applies or even the senior applicant. Instead, the trial period only comes into play after someone has been found qualified for the job. The word "qualified" is not defined in the agreement. In the absence of a contractual definition of "qualified", the standards to be used in determining qualifications have been left to the County.

The standards which the Employer set for the housekeeping job are contained in that position's job description. In this case, there is no dispute *per se* about the specific qualifications which the Employer set for the housekeeping position. For example, the Union does not contend that any of the qualifications listed on the job description are not work-related. That being so, there is no basis for finding otherwise.

While there is no dispute about the qualifications which are specifically listed on the job description, there is a dispute about a qualification which is not specifically listed on the job description but was nonetheless imposed by the Employer. That qualification was that the employee be available to do the work in question. The Union implies that availability must not be a prerequisite for the housekeeping job or it would have been listed on the job description and job posting. I disagree. Some job prerequisites are so basic to the employment relationship that they traditionally are not mentioned in job descriptions and job postings. Take, for example, breathing. The undersigned has yet to see a job description or job posting that specifies that the bidder/applicant must be breathing, but it is nonetheless a job prerequisite. In my opinion, the reason it is not listed as such is because it goes without saying. This same point applies to availability. It is implicit that an employee who bids on a job must, as a job prerequisite, be available to do the work if selected.

In this case, Pieschel was unable to work when the housekeeping job was awarded. The reason she was unable to work was because she was on medical leave. If that had not been the case, she would not have been entitled to medical leave under the FMLA. Since Pieschel was on medical leave when the posting period ended, she was unavailable to perform the housekeeping job. As has just been noted, an employe who bids on a job must be available to do the work if selected. Pieschel was not available to work at that point in time, so it follows that she was not qualified for the housekeeping job at that point in time.

The Union argues that although Pieschel was unavailable to work when the housekeeping job was awarded, the Employer could have nonetheless awarded her the job and then had someone else do the work until she was available to do it herself. The problem with this is that the question herein is not what the Employer could have done; it is what the Employer is contractually obligated to do. After reviewing the contract, the undersigned can find no provision which requires the Employer to do any of the things suggested by the Union (i.e. use a full-time employe as a substitute for Pieschel, hire a temporary non-bargaining unit employe to fill the housekeeping position, hire a part-time employe to fill the position, use an existing on-call employe, offer the housekeeping work as additional hours to present staff, or post a temporary housekeeping position until Pieschel returned). That being so, the County's failure to take any of these actions did not violate the agreement.

Next, attention is turned to the Union's argument that the Employer has previously granted positions to employes who were on leave. As was noted in the **FACTS** section, the parties dispute whether the Employer has previously awarded posted positions to persons who were unavailable for work because they were on leave. Notwithstanding the testimony of Union witnesses that employes Diane Schmidt, Patricia Haupt, and Connie Babcock were awarded positions while on leave, the record indicates otherwise. Specifically, it indicates that these three employes were working and available for work when they accepted the jobs for which they had posted. Since the record does not support a finding that the Employer has previously granted positions to employes who were on leave, the Employer's failure to do so for Pieschel has not been shown to be discriminatory. Similarly, while the Union asserts that a practice exists of holding positions vacant until employes are available to perform the work, the record does not contain evidence of same. Consequently, the Employer's decision here to not hold the housekeeping position vacant until Pieschel returned to work has not been shown to be discriminatory either.

Finally, the Union contends that the Employer's actions here violated the FMLA and (possibly) the ADA. While Articles 3 and 13(B) certainly make reference to those laws, those contractual provisions do not expressly incorporate those laws into the labor agreement. The following language shows this. Article 3 merely says that "The Employer retains the right to comply with the Americans With Disabilities Act" and Article 13(B) provides that "Manitowoc County recognizes and complies with both the State and Federal Family and Medical Leave Acts. . ." As a practical matter, both sentences do little more than state the obvious. This is

because the County has no choice but to comply with those laws. However, it is not up to an arbitrator to enforce those statutory provisions. Thus, even if the County does violate those statutes, an arbitrator is not empowered to remedy same. This is because my authority is limited to interpreting the labor agreement in resolving questions of contractual rights. Any alleged statutory violation is separate and distinct from an alleged contractual violation. Consequently, nothing in this Award should be construed as a ruling on either the state or the federal FMLA or the federal ADA.

To summarize then, Pieschel was not available to perform the work when the position was filled. Availability is an implicit qualification for the job. Since she was unavailable, she was not qualified for the job as of that point in time. The Employer was not contractually obligated to keep the posted position vacant until she returned to work, or to give her the position and then have someone else do the work until she returned from leave. Thus, although she was the senior bidder, the County did not have to give her the position. As a result, the County did not violate the labor agreement in this particular instance by awarding the posted position to the second most senior bidder.

In light of the above, I issue the following

**AWARD**

That the County did not violate the collective bargaining agreement when it filled the housekeeping position in 1996. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 29th day of October, 1997.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

gjc  
5571.WP1

