BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 579

and

GREEN COUNTY HIGHWAY DEPARTMENT

Case 136
No. 55495
MA-10030

Appearances:

Ms. Andrea F. Hoeschen, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., P. O. Box 12993, Milwaukee Wisconsin, 53212, appearing on behalf of the Union.

Mr. Howard Goldberg, Attorney at Law, Brennan, Steil, Basting & MacDougall, S.C., Suite 100, 433 West Washington Avenue, P.O. Box 990, Madison, Wisconsin 53701-0990, appearing on behalf of the Employer.

ARBITRATION AWARD

On August 25, 1997, Teamsters Local Union No. 579 filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint either a Commissioner or a member of its staff to serve as the sole arbitrator to hear and decide a grievance pending between the parties. The matter was subsequently assigned to the undersigned who conducted an evidentiary hearing on October 28, 1997. Briefing was accomplished on December 20, 1997.

ISSUE

The parties stipulated to the issue as:

Did the employer violate the contract by not promoting the grievant, Mr. McNally, to the position of construction foreman and, if so, what is the remedy?

PERTINENT CONTRACTUAL PROVISIONS

Article 4 - Seniority

Section 1. Seniority rights shall prevail at all times during the life of this agreement provided ability and skill are reasonably equal.

. . .

Article 11 - Job Posting and Training

Section 1. All vacancies on existing or new job openings shall be posted within five (5) working days. A vacancy shall be posted for at least seven (7) calendar days and employees will be permitted to bid on such vacancies until posted and bid, the County will fill these jobs at its discretion. The Employer shall select from among the signatories and employees to fill the new or vacated job. Equal consideration shall be given to seniority and qualifications in making such promotions.

BACKGROUND AND FACTS

Green County and Teamsters Local Union No. 579 are signatories to a collective bargaining agreement, the relevant terms of which are set out above. This dispute involves the interpretation of the agreement relative to seniority and promotion.

A vacancy in the position of construction foreman was created with the resignation of Glen Smith. The construction foreman is a working foreman who supervises the construction crew, consisting of approximately twenty employees. Four union members posted for the position. The grievant, Michael B. McNally, with a date of hire of April 2, 1979, is the most senior of those who posted for the position. On or about June 2, 1997, the highway commissioner chose Jeff Lanz whose date of hire is October 6, 1980, to be the construction foreman. The instant grievance was filed and processed through the steps to this arbitration.

POSITION OF THE PARTIES

The Employer's Position

At the hearing the Employer, without accepting the burden of proof, went ahead with the evidence. It is the position of the Employer that the contract contemplates that seniority will be the deciding factor only in those cases where the qualifications of the candidates are reasonably equal. Further, it is the Employer's position that it is the Union's burden to prove that the Employer's decision was unreasonable, arbitrary, capricious, discriminatory or made in bad faith. The Employer argues that the Employer is "vested with the exclusive authority to determine the applicant's qualifications and its determination is only subject to challenge as being unreasonable, arbitrary, capricious, discriminatory or in bad faith."

The Employer asserts that in making the decision the highway commissioner took into consideration the seniority of the applicants and their qualifications as reflected in the opinions of supervisors, annual evaluations and work experience. The Employer submits that Elkouri & Elkouri commends consideration of these factors.

Relative to seniority the Employer points out that both applicants have lengthy seniority and argues that Article 11 of the contract should control only where qualifications are reasonably equal. Since Lanz has worked with the construction crew for seven years, knows the aptitudes of the other crew members, has operated the tools the crew uses and has consistently had higher evaluations, and received the recommendation of superiors, Lanz is more qualified than Mr. McNally who worked on the construction crew only three months.

The Union's Position

It is the Union's position that "this case arises because the Employer arbitrarily disregarded the contractual standards for promoting employees." The County chose Lanz even though there was no evidence that Lanz was better qualified than Mr. McNally who was entirely qualified for the job. As Mr. Lanz's qualifications were not substantially greater than Mr. McNally's, seniority should have been the determinative factor.

The Union asserts that the County has the burden of proving that Mr. Lanz was better qualified than Mr. McNally, and the County offered no evidence in that regard. Mr. McNally has "vast and varied experience in every aspect of the highway department,

including construction." The grievant has worked in the mechanic shop, the construction division and the patrol division. Much of the time he worked in the patrol division, he actually worked alongside members of the construction crew. The grievant has worked on every type of project a construction foreman would supervise and has operated most of the equipment used by the construction crew.

The grievant has assumed leadership on job sites and was often given responsibility for safety functions. Further, Mr. McNally testified that he never saw Mr. Lanz do anything else besides drive a truck.

The County made little effort to specify in what ways Mr. Lanz was superior to Mr. McNally and where the Employer did identify the details of Mr. Lanz's superiority, examination indicates that the Employer was unfamiliar with Mr. McNally's abilities. In sum, all the evidence shows Mr. McNally at least as qualified as Mr. Lanz for the position.

The Union further asserts that the County did not adequately consider Mr. McNally's qualifications in that they did not consult his supervisor, did not consider his experience nor interview him. The only standard would appear to be the length of service in the construction department which is overvalued since patrol workers often work alongside the construction crew.

The Employer's reliance on the evaluations of employees is misplaced since they are confusing, do not accurately reflect the employees' qualifications and were not announced as a basis for promotion. If the evaluation system is flawed, Mr. McNally should receive the position because the County lost the major support for its decision. If, as is possible, Mr. McNally's evaluations were better than the County's exhibits show, he should receive the position not only because he is most senior but also best qualified. Finally the evaluators had insufficient knowledge of Mr. McNally so qualifications weren't really measured.

Even if the evaluations were accurate and Mr. Lanz rated higher than Mr. McNally, they should not be used for this determination because no one told Mr. McNally that they would be used for that purpose so that he would have known to ask for a conference.

The highway commissioner's extrapolation of grades from the evaluations are really nothing more than his subjective conclusions. These subjective opinions are an insufficient basis for the promotion decision which must be supported by specific evidence.

The parties have negotiated a hybrid seniority clause which requires that the

> . . . relative claims of seniority and of ability must be determined by comparing and weighing against each other the relative difference in seniority of competing employees and the relative difference in their abilities. Thus comparing two or more qualified employees both seniority and ability must be considered and where the difference in length of service is relatively insignificant and there is a relatively significant difference in ability then the ability factor should be given greater weight; but where there is a relatively substantial difference in seniority and relatively little difference in abilities, then length of service should be given greater weight." Elkouri & Elkouri, How Arbitration Works, p. 840 (BNA 5th ed. 1997)

As there was no substantial difference in the employees' qualifications, the Employer

should have awarded the position to the more senior employee. Since the difference in their seniority is measurable and the difference in their qualifications is not measurable, seniority should have controlled.

DISCUSSION

Both parties assert that the other has the burden of proof in this proceeding. The Employer cites JACKSON COUNTY, WERC CASE 99, NO. 49676, MA-8024 (MAWHINNEY, APRIL 5, 1995); CITY OF OSHKOSH, WERC CASE 241, NO. 51724, MA-8718 (MAWHINNEY, MAY 8, 1995); and NICOLET AREA TECHNICAL COLLEGE, WERC CASE 13, NO. 51778, MA-8737 (GALLAGHER, JULY 21, 1995) to the effect that it is the Union's burden to prove the relative qualifications of the candidates. The Employer cites Arbitrator Yaeger in SCHOOL DISTRICT OF ANTIGO, WERC CASE 42, NO. 50318, MA-8213 for the proposition that where the qualification issue is not clear cut, then the union is required to prove that the employer's decision was unreasonable, arbitrary, capricious, discriminatory or made in bad faith.

The Union cites UNION CARBIDE CORP., 97LA771, 773 (HELBURN, 1991) for the proposition that as the party responsible for the promotion, the County has the burden of proving that Mr. Lanz was better qualified than Mr. McNally.

Likewise the parties have different positions regarding the meaning of the contract language relative to the role of seniority in the determination of promotions. The Employer takes the position that seniority controls only when the qualifications of the applicants are equal. The Union argues that the contract provides that the relative seniority and relative qualifications of the applicants must be weighed and compared, prior to a determination being made.

As pointed out by the parties, arbitrators have often assigned the burden of proof based upon a determination of whether the contract language constitutes a "relative ability" clause; a "sufficient ability" clause or a "hybrid clause." As previously noted the Employer holds that the language constitutes a relative ability clause and the Union holds that the language constitutes a hybrid clause.

After consideration of the arguments of counsel, I conclude that the Union is correct that the contract language creates what is known as a "hybrid clause" requiring the comparison and weighing against each other of the relative differences in seniority and ability. I reach this conclusion because the last sentence of Article 11 states: "Equal consideration shall be given to seniority and qualifications in making such promotions." Relative to the "burden of proof" the editors of Elkouri & Elkouri posit that "as a practical matter, whether or not the arbitrator speaks in terms of burden of proof, in most cases when management's determination is challenged, both parties are expected to produce whatever evidence they can in support of their respective contentions and they ordinarily do so. The arbitrator in turn considers all the evidence and decides whether management's determination should be upheld as reasonably supported by the evidence and as not having

been influenced by improper elements such as arbitrariness, caprice, or discrimination." Elkouri & Elkouri, How Arbitration Works, Fifth Edition p. 844-1996), Hereafter Elkouri. I find this analytical approach to the burden of proof issue to be persuasive and will apply it to the facts presented. We therefore turn to an examination of the relative seniority and qualifications of the employees.

Comparing seniority The grievant, Michael B. McNally, is the most senior applicant with a date of hire of April 2, 1979. The selected applicant, Jeff Lanz, has a date of hire of October 6, 1980. At the time the promotion decision was made, June 2, 1997, Mr. McNally had worked 6,631 days and Mr. Lanz had worked 6,077 days. Mr. Lanz therefore has approximately 92 percent as much seniority as Mr. McNally.

Comparing Qualifications When comparing the qualifications of Mr. Lanz and Mr. McNally, the Employer considered the relative experience, evaluations of the employees, and opinion of supervisors. Testing was not used.

Experience

Mr. McNally has some experience in most of the divisions of the department and substantial experience as a patrolman and has experience with most of the equipment used by the construction crew. Since 1981 he has worked as a patrolman other than three months in 1993 when he worked as a member of the construction crew. As a patrolman Mr. McNally often worked alongside construction crew members doing such things as road grading, hand sealing, patching and guard rail maintenance. Mr. McNally has used

the great majority of tools of the construction crew. Mr. McNally has tried to act in a leadership role on job sites. His normal job duties however since 1981 were as a patrolman responsible for the maintenance responsibility for a portion of road and his truck was the piece of equipment with which he had the greatest experience.

Mr. Lanz has worked on the construction crew continuously since 1990 and most recently Mr. Lanz worked as the asphalt distributor operator and chip spreader. Mr. Dallas Cecil, highway commissioner since 1995, and previously the general superintendent, testified that the person working as the asphalt distributor and chip spreader is considered the lead worker, but, like Mr. McNally, Mr. Lanz had no formal supervisory experience.

Mr. Dallas testified, in his role as superintendent, that he observed Mr. Lanz's work on the construction crew and that he observed that Mr. Lanz was familiar with all the personnel of the crew, their capabilities, the procedures used by the crew in getting its work done and that from his observation Mr. Lanz could perform the functions of construction foreman without training.

He further testified that he believed Mr. McNally would need training and that he didn't give great weight in his decision to the experience of the applicants with individual pieces of equipment.

Elkouri and Elkouri cite different arbitrators as holding that experience may be one of several factors, the major factor, or the sole or determining factor in promotion decision making. Here, I find experience is important to the job since the construction foreman is to a large extent responsible for the safety and productivity of roughly half of the department's workforce.

Neither employee actually had experience as construction foreman. However, it is reasonable to conclude that an employee who actually worked on the construction crew every day for seven years and has held the position considered to be the lead worker position would have a much greater familiarity with the capabilities of the personnel and the procedures used to accomplish its work, than an employee who works along side the crew only on a day-to-day basis when there is insufficient patrol work. While I don't know that the record supports the conclusion that Mr. McNally would require training, I find it reasonable for the decision makers to conclude that Mr. Lanz's extensive experience on the crew made him more qualified.

Evaluations

Mr. Dallas testified that one of the factors he considered was his general knowledge of results of the evaluations of the applicants for this position.

Evaluations constitute 90 percent of the exhibits in this case. It is argued that the Employer should be foreclosed from using the evaluations for this promotion determination because Mr. McNally wasn't informed that they would be used for this purpose. I reject this argument because the contract requires review of qualifications and evaluations are clearly a reasonable component of such a review. Further, Mr. McNally was free to inquire whether evaluations would be considered by the Employer.

The Employer entered exhibits showing the evaluation summaries for the years 1990, 1993, 1995 and 1996. (Testimony indicated that the evaluations were not done every year and I am satisfied that the exhibits represent the years for which evaluations were done). In 1990 five evaluators, including Mr. Meyer and Mr. Cecil rated the employees on fifteen traits. Three of the evaluators, including Mr. Meyer, gave Mr. Lanz a higher overall rating, Mr. Cecil gave Mr. McNally and Mr. Lanz the same overall rating and one evaluator gave Mr. McNally a higher overall rating. In total points awarded, Mr. Lanz outscored Mr. McNally 254 to 239, a mere six percent difference.

In 1993, eight evaluators including Mr. Cecil rated the employees on fifteen traits. Not one evaluator gave Mr. McNally a higher overall rating than Mr. Lanz. Mr. Lanz received 493 total points and Mr. McNally received 400 total points, a 23 percent difference.

In 1995 nine evaluators rated the employees on ten traits with eight giving more points to Mr. Lanz and one giving more points to Mr. McNally. (This evaluation was apparently done in the fall using the same categories that are contained in Union Exhibit 1, 1/ the evaluation dated May 1, 1995). In this evaluation Mr. Lanz received 811 total points and Mr. McNally received 645 points. Mr. Lanz scored 28 percent higher.

In 1996 seven evaluators including Mr. McNally's supervisor rated the employees on 25 traits. Mr. McNally received more total points from two evaluators and Mr. Lanz received more total points from five of the evaluators. Mr. Lanz received 763 total points and Mr. McNally received 649 total points. Mr. Lanz scored 17 percent above Mr. McNally.

The Employer also entered Exhibit 8 which is a bar graph evaluation summary of these evaluations. It indicates that for 1996 the best scoring employee scored 763 total points, which means that Mr. Lanz was the highest rated employee in the department in 1996 according to the 1996 evaluation.

Later, in October 1996 the Employer instituted a revised employee performance appraisal using fewer evaluators and rating employees on 25 traits using a "golf" score method (with a one being outstanding and five being unsatisfactory). Employer exhibits 9 and 10 are the evaluations for Mr. McNally and Mr. Lanz respectively and are by two evaluators- Dick Marti (Mr. McNally's supervisor) and Jeff Winchell (Mr. Lanz's supervisor).

Mr. McNally received 58 total points from Mr. Marti and 56 total points from Mr. Winchell for a grand total of 114 points. Mr. Lanz received 36 total points from Mr. Marti and 46 total points from Mr. Winchell for a grand total of 82 points. Mr. McNally received 32 more points than Mr. Lanz. In this "low score is better" methodology Mr. Lanz scored 28 percent better than Mr. McNally.

Relative to performance reviews, the editors of Elkouri, after listing many of the same traits as rated by the evaluations in this case, surmise that "arbitrators look upon merit rating plans as an aid in judging fitness and ability." While one may argue whether any one specific trait rated is more or less relevant to the requirements of the position in question, clearly many of the traits are very relevant.

A comparison of the evaluations indicates that the differential ranges from marginal in 1990 to significant in 1993 and 1995. The consistency of the differential since 1993 together with the breadth and diversity of the evaluators weighs in favor of a finding that there is objectively a qualitative difference between the qualifications of the applicants.

There is no doubt that the record here, as indicated by these performance reviews, is that Mr. Lanz's performance has been consistently superior to Mr. McNally's.

Opinion of Supervision

Mr. Cecil testified that before making the promotion decision he asked for recommendations from the supervisors of the employees. Mr. Winchell recommended Mr. Lanz. Mr. Cecil testified that Mr. Marti refused to recommend anyone. On cross examination Mr. Marti testified that he doesn't remember being asked but does acknowledge previously stating that his opinion wasn't sought. On redirect he testified that he wouldn't be surprised to be told that he rated Lanz as a superior employee to Mr. McNally.

Elkouri suggests that the opinion of supervisors is entitled to at least some consideration where it is substantiated by evidence including periodic merit ratings. The opinion of supervision would therefore appear to favor the appointment of Mr. Lanz.

In summary, Mr. McNally's seniority is eight percent greater than Mr. Lanz's seniority. Mr. Lanz's has substantially greater experience on the construction crew including service in the key position of distributor/chip spreader. Mr. Lanz consistently and substantially outscored Mr. McNally on performance reviews. Finally Mr. Lanz is the only employee to receive the recommendation of a supervisor.

Given the foregoing, I find the Employer did not violate the contract by failing to promote Mr. McNally since Mr. McNally's seniority is outweighed by Mr. Lanz's greater qualifications, as measured by his greater experience, better evaluations and greater esteem in the eyes of supervision.

The grievance is denied.

Dated at Madison, Wisconsin this 12th day of March, 1998.

James R. Meier /s/

James R. Meier, Arbitrator

ENDNOTE

1/ Union Exhibit 1 is Mr. McNally's evaluation issued May 19, 1995. It indicates that the employees were evaluated by nine department personnel including then highway commissioner Ken Meyer, general superintendent Dallas Cecil and Mr. McNally's supervisor, Dick Marti. The composite employee performance appraisal indicates that Mr. McNally scored average to very good in attendance and attitude and average in learning ability. He scored very good in his knowledge of the job and average in all other areas of general job skills. Relative to management traits he scored very good in two traits and average in seven traits. His overall performance appraisal for the period immediately prior to May 1995 was "very good, above average"-performance that exceeds the job requirements. Mr. McNally had a total score of 544 which ranked him seventh of thirty three employees. There is no comparable May 1995 exhibit for Mr. Lanz.

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