

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME COUNCIL 40, LOCAL 2239, AFL-CIO

and

THE CITY OF RACINE

Case 514
No. 54826
MA-9803

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appeared on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, City of Racine, 730 Washington Avenue, Racine, Wisconsin 53403, appeared on behalf of the City.

ARBITRATION AWARD

On January 22, 1997, the Wisconsin Employment Relations Commission received a request from AFSCME Council 40, Local 2239 and the City of Racine to appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. An evidentiary hearing was conducted on June 3, 1997 in Racine, Wisconsin. A transcript of the proceedings was made and distributed by July 8, 1997. Post-hearing briefs were submitted and exchanged by September 8, 1997.

This arbitration addresses the City's refusal to promote bargaining unit employe Janice Johnson-Martin.

BACKGROUND AND FACTS

On September 4, 1996, the City posted a position titled "Payroll Technician", a newly-created position assigned to the City's Finance Department. As part of a departmental reorganization, the position of Payroll Supervisor, previously held by Helen Nelson, was abolished following Ms. Nelson's retirement. The position of Payroll Clerk had traditionally reported to the payroll supervisor. With the abolition of the supervisor position, the Payroll Clerk positions were upgraded to Payroll Technicians. The newly-created Technician positions were expected to operate

far more independently than did the previous payroll clerk.

Page 2
MA-9803

Additionally, with the anticipated evolution of the department, certain manual procedures, routines, and tasks historically practiced were to be automated out of existence. In fashioning the new Payroll Technician position, Department Head Jerome Maller anticipated a position with greater systems-wide experience than had previously been required.

The posting brought forth a number of applicants, the most senior of whom was the grievant, Janice Johnson-Martin. Ms. Johnson-Martin has been employed by the City, in a variety of jobs, since November 11, 1985. Ms. Johnson-Martin was interviewed by Maller, his assistant Mr. DeBonis, and William Dyess, the Personnel/Affirmative Action officer of the City. At the conclusion of the interview, Ms. Johnson-Martin was considered qualified by Mr. Dyess, but was considered unqualified by Mr. Maller. 1/ Subsequent to the interview, Mr. Maller sent a letter indicating that no applicant had met the minimum standards required by the job and seeking to expand the search outside the bargaining unit. That request was denied by the City Personnel Director.

On September 30, 1996, the Union filed a grievance alleging a violation of the contractual posting requirement.

The posting for the Payroll Technician consisted of the following:

Date: September 4, 1996

Position: Payroll Technician

Department: Finance; Mon-Fri; 8 AM - 5 PM (Normal Schedule)

Salary: SU-9 Classification (\$11.33/hr. - \$13.52/hr.)

Essential Duties:

Responsible for the compiling and entry of payroll data from time cards or other forms of time reports. Maintains departmental reporting of hours and payroll reports through computerized record keeping. Audits payroll data to maintain internal control and accuracy. Schedules and coordinates batches of inputted data for processing. Reconciles computer printouts to maintain accounting and payroll integrity. Assists Accountant III in the preparation of payroll reports. Records and reconciles labor distribution for general ledger entry. Compiles employee time and hour reports for Personnel Department. Prepares and verifies various Federal and State payroll returns and reports. Prepares and distributes time reporting sheets and

payroll vouchers. Prepares various deferred compensation, insurance, savings reports, and Federal and State

Page 3
MA-9803

depository returns. Compiles wage and hour data for workers, and unemployment compensation returns, for submittal to Personnel Department. Prepares requests for payment on payrolls, tax deposits, payments for credit unions, Christmas and Bond savings, wage assignments, deferred compensation, and other deductions. Maintains a consistent and reliable attendance record. Performs related clerical assignments as assigned.

Minimum Qualifications:

Possess and maintain professional appearance and work ethics, with ability to establish effective working relationships with other employees and the public. Knowledge of municipal governmental organization. High school degree or equivalent. Two year Associate degree in accounting preferred. Work experience desired, five years of mid level payroll and/or personnel experience. Knowledgeable in word processing and spreadsheet applications. Applicant should be familiar with mainframe processing. Must possess confidence and ability to take control of difficult situations by anticipating problems and analyzing alternative solutions. Must be accurate in the use of mathematics. Ability to work in a complex and demanding environment, and be willing to accept cross training. Must display leadership and future supervisory ability.

Physical Demands:

Standing, walking, sitting and stooping. Kneeling, crouching, climbing, balancing and bending/twisting. Reaching, feeling, talking and hearing. Lifting, carrying, pushing/pulling -- up to at least 25 lbs. Handling, grasping, and fingering: filing, typing, writing, etc.

Environmental Conditions:

Air-conditioned office environment. Must be able to work long periods of data entry, sometimes under stressful conditions. Requires some overtime hours.

Equipment Used:

Personal computer, typewriter, fax machine, calculator, telephone, copy machine, and other miscellaneous office equipment presently in use.

Ms. Johnson-Martin testified, comparing her background, skills and experience against the various criteria laid out in the promotional opportunities announcement. It was her testimony that, with two exceptions, she performed some or all of the tasks deemed essential. She has not previously worked with federal or state payrolls, nor has she prepared requests for payment on payrolls, tax deposits, payments for credit unions, Christmas and Bond savings, wage assignments, deferred compensation, and other deductions. Ms. Johnson-Martin expressed confidence that with training she could perform those tasks and all others included within the essential duties.

Ms. Johnson-Martin further testified relative to her background measured against the minimum qualifications portion of the announcement. It was her testimony that she possessed all qualifications with two exceptions. Those exceptions included the two-year degree and the familiarity with mainframe processing. Again, Ms. Johnson-Martin expressed confidence that with training she could handle the assignment.

Ms. Johnson-Martin believes she has the background and aptitude to be trainable for the Payroll Technician position. She notes that both she and others have historically been trained for promotional opportunities. All testimony indicated that the department will be training staff as the payroll system evolves. Ms. Johnson-Martin's testimony in this regard was supported by that of William Dyess who indicated that she was qualified for the assignment and trainable for those tasks with which she was unfamiliar. Ms. Johnson-Martin's testimony was also supported by that of Helen Nelson, the prior Payroll Supervisor, who testified that she (Nelson) required training in order to perform all of her duties when she got the job of payroll supervisor. Nelson further testified that she had worked with Ms. Johnson-Martin and found her to be both competent and conscientious. Nelson testified that Johnson-Martin was qualified to do the job, and would do a good job. It was Nelson's testimony that Ms. Johnson-Martin did virtually everything that was required on the job description of the Payroll Technician.

Jerome Maller testified. It was his testimony that Ms. Johnson-Martin lacked both the two-year degree and the job-related work experience. According to Maller, those were the two predominant criteria lacking. Maller's testimony was that the various tasks of the payroll department would be evolving and changing and he was therefore not particularly interested in task familiarity. Maller was in search of someone with a background in payroll and the theory of payroll, and indicated, "First of all, the job requires a knowledge of payroll accounting. The data entry that is performed is performed by a data entry clerk at this point. It is true that the Payroll Technician must understand and know how to enter the payroll data entry. The basic understanding of the payroll is to be familiar with payroll laws, procedures of the contract, scheduling on a mainframe, working on a PC, on spreadsheets, and understanding the various deductions and the resulting reporting that has to take place over a period of time." (Tr. at p. 123). Maller wanted someone who could "come into

the position up and running". (Tr. at p. 122).

ISSUE

The parties were unable to stipulate the issue. I regard the issue to be:

Did the City violate the collective bargaining agreement when it failed to promote Janice Johnson-Martin to the position of Payroll Technician? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE IV

Management Rights

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to the following:

1. To direct all operations of City government;
2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge, or take other disciplinary action against employees for just cause.

...

5. To introduce new or improved methods or facilities.

...

8. To determine the methods, means and personnel by which such operations are to be conducted.

...

ARTICLE XII

Seniority

...

B. Recognition of Principle: The Employer recognizes the principle of seniority and the Union recognizes the need for maintaining an efficient work force. In all matters involving increase or decrease of forces, layoffs, or promotions, the length of continuous service with the Employer shall be given primary consideration. Skill, ability and efficiency shall be taken into consideration only where they substantially outweigh considerations of length of service, or where the most senior employee is unable to do the work. To prove qualified, the employee must demonstrate ability to do the job within thirty (30) calendar days. An employee shall not receive seniority benefits unless he/she becomes a regular full-time employee.

C. Notification: In the event the senior employee is not chosen, the Personnel Director shall give an explanation in writing to such senior employee and the Union stating the reason for his/her not being chosen.

...

ARTICLE XIII

Job Postings

A. Posting Procedure: Any job vacancy which occurs due to retirement, quit, death, new position or for whatever reason in the bargaining unit shall be posted.

The posting shall set forth the job title, duties and qualifications desired, rate of pay, work location or assignment and shift. Sufficient space shall be provided for employees to sign (apply) for said job posting.

All job openings within the province of the bargaining unit shall be posted for five (5) working days in overlapping consecutive weeks. The successful bidder or the Union shall be notified within five (5) work days after the close of the posting.

The City agrees to move the successful bidder to his/her new position as quickly as possible but in no event later than thirty (30) calendar days after notification of his/her selection.

The job posting for any classification shall remain in effect for ninety (90) days following the award of the posted job and shall govern, without any reposting, any job openings occurring within said ninety (90) day period in that job classification.

B. In accordance with Article XII, Seniority, total bargaining unit seniority shall prevail in all job postings except for shift changes which will be based upon classification seniority. Shift changes shall not be subject to Sections C and/or D below.

C. Probationary Period: Employees working on a job obtained through job posting shall serve a thirty (30) calendar day probationary period and shall be guaranteed the right to return to his/her previous job should his/her ability to handle the new work prove unsatisfactory within this probationary period. This provision shall also apply to employees from the Police Department Unit who post for and are awarded a job in this unit.

D. Return to Previous Job: If within thirty (30) calendar days the employee is dissatisfied with the posted job and wishes to return to his/her previous job, the Employer shall have the right to request the employee to remain on the job until such a time as the job is again posted and filled. At no time shall this time exceed thirty (30) calendar days. In order for a Union employee to change jobs or classifications while still in a probationary status, he/she must return to his/her previous job classification. This provision shall also apply to employees from the Police Department Unit who post for and are awarded a job in this unit.

...

ARTICLE XIV

Testing

The City reserves the right to establish reasonable testing procedures to be used to determine the ability of the employee to do the job on any promotion.

...

ARTICLE XXXIV

Mutual Cooperation

The Union pledges that it will cooperate with the City in a concerted effort for more production consistent with the highest quality of workmanship.

...

POSITIONS OF THE PARTIES

It is the position of the Union that Janice Johnson-Martin is the senior qualified applicant for the position. The Union extensively reviewed Ms. Johnson-Martin's testimony and notes that she gave substantial testimony and detailed examples of how she handled various facets of the posted job. The Union notes that she performed many of the tasks listed in the Payroll Technician announcement and further notes that the two-year Associate degree in Accounting is preferred and not required. The Union contends that at various points in her career, Ms. Johnson-Martin has been required to work independently. It also notes that the City trained her, and numerous others, under promotional circumstances.

The Union contends that management representatives, specifically William Dyess, determined that Ms. Johnson-Martin is qualified. The Union points to testimony by Mr. Dyess that he regarded her as qualified, and that he considered her to have more than five years of payroll experience. The Union further points to Dyess' testimony that all job applicants awarded new positions require some training.

The Union contends that the City violated the posting procedure when it failed to award the job to Ms. Johnson-Martin. The Union points to Article XII, Section C requiring the City to notify the senior applicant in writing if he or she is not awarded a position and to explain the reason for the rejection. That provision was simply never satisfied. The Union further points to Article IV, Testing, which permits the City to establish qualifications via reasonable testing. No tests were administered.

The Union concludes that Ms. Johnson-Martin is an articulate, well-qualified and respected employe. The Union argues that at no time did the City advance any other applicant for the position, let alone one whose skill, ability and efficiency substantially outweigh Ms. Johnson-Martin's seniority. It is the Union's view that she is entitled to the position. The Union asks that the undersigned award her the position of Payroll Technician and make her whole to October 18, 1996 for lost wages or benefits.

The Employer points to the reorganization of the finance department, the elimination of the Payroll Supervisor position, and the elevation of the Payroll Clerk's position to Payroll Technician. The enhanced position includes a pay increase as well as a minimum qualification requirement which includes a two-year Associate degree in Accounting or five years of mid-level payroll experience. The Employer points out that the newly-created position will be required to work with minimal direct supervision. The increased compensation is a by-product of the increased job responsibility.

It was determined by the Finance Director that none of the posting candidates possessed the required experience and education to assume the position of Payroll Technician. The Employer points to Maller's testimony that it is not possible to train Ms. Johnson-Martin due to the lack of formal education and experience. The Employer contends that Maller is the most qualified person to make a determination as to what is needed to do the job, and in essence contends that I should defer to Maller's judgement.

DISCUSSION

Articles XII and XIII regulate the promotional process applicable to bargaining unit positions. Under the provisions of Article XII, the senior employe is entitled to primary consideration for procedural opportunity. Skill, ability and efficiency are contractual considerations applicable when they substantially outweigh seniority. Those criteria are not applicable in this dispute, there is no junior candidate being considered. I believe the skill ability and efficiency criteria to apply when measuring a high-skilled junior employe versus a lesser-skilled senior employe. That is simply not the fact in this dispute. What is at issue in this proceeding is whether a senior employe is "unable to do the work."

The Union says she is capable of performing the work. It was the testimony of the Grievant that her work experience encompassed most, if not all, of the essential duties of the position. Ms. Johnson-Martin testified that over the course of her several years with the Employer, she has actually performed a great number of the tasks which constitute the posted position. My impression of Ms. Johnson-Martin is that she works hard and displays a willingness to learn. Ms. Johnson-Martin's testimony, while obviously self-serving, was supported by the record. Her performance evaluations ran from better than average to outstanding. The testimony of Mr. Dyess and Ms. Nelson supported her claim in its entirety.

It is the City's contention that Ms. Johnson-Martin cannot do the job. Mr. Maller indicated that he was searching for someone whose educational and experience background were more formal and systemic. Maller wanted someone who better understood the big picture and who could come on board running. In Mr. Maller's mind, Ms. Johnson-Martin was not that person. According to Maller, the Grievant's two great deficiencies were her lack of a two-year degree in Accounting and the relevance of her work experience.

The City argues that I should defer to Mr. Maller's conclusion. I concede that Mr. Maller is obviously the most qualified individual to make such an assessment. However, I am not willing to defer to his judgement for a number of reasons. What Mr. Maller sought is an employee with a skills and education package not readily found in the bargaining unit. It may be that the combination of education and skills sought by Mr. Maller does not exist in the bargaining unit. There is no degree required for the position currently occupied by Ms. Johnson-Martin. Ms. Johnson-Martin has experience. However, Maller indicates that her experience is of the wrong kind for this job. However, her experience performing the various tasks that compose the great majority of the Payroll Technician position are precisely the experiences that her career with the City has exposed her to. Her experience tracks the historic career progression for City employees moving upward. Ms. Johnson-Martin has actually performed a variety of the tasks constituting the Payroll Technician job. It is not clear to me how a City employee would gain the kind of experience sought by Maller.

Internal posting failed to produce the desired skills/experience mix within the bargaining unit. Maller proposed that the City recruit outside the bargaining unit. However, the collective bargaining agreement has a strong expressed preference for inside senior promotional applicants. Article XII, Paragraph "B" and Article XIII, Paragraph "B", establish a strong contractual preference for seniority-based promotion. Article XII, "C" obligates the Employer to inform the senior employee who is not chosen for a posted assignment of that fact and to set forth the reasons for her not being chosen. The record indicates that provision has not been complied with.

The fundamental question underlying this dispute is the question as to whether or not Ms. Johnson-Martin is capable of performing the Payroll Technician job. Maller insists that she is not. The Grievant believes that with training she is capable. The record establishes that this is an applicant who is arguably qualified. She has the experience contemplated by the collective bargaining agreement, notwithstanding the fact that is not what departmental management sought. The degree is indicated as preferred, not required. This Award does not address whether or not the Employer can impose a degree requirement that operates to exclude otherwise qualified internal applicants. The fact is, this job posting did not require a degree.

The record overwhelmingly supports a finding that historically individuals promoted have had meaningful training and an opportunity to learn facets of the job while on the job. The record also supports a finding that the ongoing evolution of the Department will inevitably involve Department-wide training. This is not a situation where an employee lacking the fundamental job-required skills has applied for promotion.

This contract has a mechanism for resolving disputes and/or questions as to whether an arguably qualified applicant is able to perform the job. Article XII (B) is directly on point: "To prove qualified, the employee must demonstrate ability to do the job within thirty (30) calendar days. . ." Bona fide disputes as to job related qualifications are contractually submitted to on-

the-job resolution. I believe Ms. Johnson-Martin is entitled to that opportunity. I believe the Employer's refusal to grant her that opportunity violates Article XII (B). As noted, that opportunity is a product of the contractual preference for seniority-based promotion.

Article XIV provides an additional mechanism where the Employer is concerned about the inefficiencies of on-the-job trials. Article XIV permits ability testing under promotional circumstances. To the extent this Employer demands a knowledge base as a precondition to placing someone in the Payroll Technician job, Article XIV provides a vehicle for assessment.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to offer Ms. Johnson-Martin the position of Payroll Technician within thirty (30) calendar days of receipt of this Award. Should she prove successful, the Employer is directed to make her whole for lost wages running from the date of the filing of the grievance.

Dated at Madison, Wisconsin, this 27th day of March, 1998.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

ENDNOTES

1/ Mr. DeBonis did not testify in this proceeding.