

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**LITTLE CHUTE VILLAGE EMPLOYEES, LOCAL 130-C,
AFSCME, AFL-CIO**

and

VILLAGE OF LITTLE CHUTE

Case 37
No. 55764
MA-10086

Appearances:

Mr. Bob Baxter, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney James R. Macy**, appearing on behalf of the Village.

ARBITRATION AWARD

Little Chute Village Employees, Local 130-C, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the Village of Little Chute, hereinafter referred to as the Village, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Village, that the Wisconsin Employment Relations Commission designate a member of its staff to act as the sole Arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Little Chute, Wisconsin, on February 3, 1998. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on April 24, 1998.

BACKGROUND

The Working Foreman (Grade V) in the Village's Street Department went on a leave of absence in July, 1997, due to illness. The Village assigned Martin Jansen, a Grade III Equipment Operator to temporarily fill the Working Foreman position. Jansen is the second

most senior employe in the Department and on July 11, 1997, the Union filed a grievance asserting the Village violated the parties' collective bargaining agreement but putting Jansen, a less senior man than Glen Lamers, in the temporary Working Foreman position without posting the position (Ex. 8). Jansen performed as temporary Working Foreman until August 14, 1997, when the grievance was resolved on the basis that the temporary Working Foreman position would be posted. The temporary Working Foreman position was posted on August 18, 1997, and stated as follows:

GRADE V WORKING FOREMAN

As of August 18, 1997, there is a Grade V Working Foreman's position open in the Department of Public Works, Street and Sanitation Division. If you are interested in applying for this position, please sign below by August 29, 1997. If the current Grade V returns to work, the selected individual will return to his former position.

This assignment could be temporary, and as such, is non-precedent setting in terms of collective bargaining agreement.

1. _____

2. _____

3. _____

4. _____

(Ex.6)

Four employes signed the posting including Glen Lamers and Martin Jansen. A memo dated September 9, 1997, was sent by the Director of Public Works to the applicants which stated as follows:

This memo is intended to set forth the selection guidelines that will be used by the Village of Little Chute in regards to the current posting for the Working Foreman position. The position will be considered based upon the following four criteria:

- (1) Education/training;
- (2) Experience:
- (3) An oral interview; and
- (4) A job related psychological profile.

Posting applicants will be required to fill out a job related application for the position which will set forth certain questions regarding the criteria listed. Some of the responses indicated in the application will be utilized within the oral interview.

The experience criteria will consider such aspects as leadership abilities, planning abilities, decision making abilities, and prior work experience.

Finally, top candidates will be required to take a job related psychological profile exam as it relates to this leadership position.

It is the intent of this process to hire the most qualified applicant within the language of the collective bargaining agreement.

If there are any questions in regard to this hiring procedure, please let me know.

(Ex. 7)

On September 15, 1997, the applicants were sent a job-related questionnaire which was to be returned by September 19, 1997 (Ex. 10). On September 17, 1997, the Union filed the instant grievance alleging that the Village improperly posted the position. The grievance stated as follows:

Management neglected to include a brief description of the job, did not list qualifications necessary for the job, and did not include the pay rate for the job in question and, only left four lines for applicants to sign the posting. (Ex. 2)

The grievance was denied on September 22, 1997, and appealed to the next step the same day (Exs. 3 and 4). The Village administrator denied the grievance on October 7, 1997 (Ex. 5). On October 31, 1997, the Director of Public Works sent the following memo to each of the applicants:

This letter is in regards to the current posting matter regarding the working foreman position. Upon further consideration by the Village, the Village is exercising its right to withdraw the posting procedure at this time and is electing not to fill the working foreman position. As you know, the current employee for that position is still employed by the Village.

It is anticipated that a retirement may occur in January, 1998. In that regard, the Village anticipates that it will post a vacancy at that time for the working foreman position. We sincerely appreciate your patience with this matter. We encourage all interested employees to apply when the future vacancy exists.

(Ex. 9)

The Working Foreman position was left vacant from August 18, 1997, until it was filled by a different posting on January 15, 1998. When there was a need for a Working Foreman, it was assigned to Lamers, and if he was not available, then to Jansen (Tr. 31). The second posting which resulted in the position being permanently filled on January 15, 1998, is the subject of a separate grievance.

The instant grievance was appealed to arbitration on November 10, 1997.

ISSUES

The parties were unable to agree on a statement of the issues. The Union frames the issues as follows:

1. Did the Employer violate the labor agreement and/or past practice by the posting for the Grade V Working Foreman position dated August 18, 1997?

If so, what is the appropriate remedy:

2. Did the Employer violate the labor agreement by selecting a less senior employee to fill the Grade V Working Foreman position?

If so, what is the appropriate remedy?

The Village frames the issue as follows:

Did the Village violate Article 7 of the collective bargaining agreement by the manner that it posted the position of Grade V Working Foreman position dated August 18, 1997?

If so, what is the appropriate remedy?

The undersigned adopts the issue as stated by the Village.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 Except as otherwise specifically provided herein, the management of the Village of Little Chute and the direction of the work force, including but not limited to the right to hire, promote, discipline, demote or discharge for just cause, to decide job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, and to modify said rules to determine schedules of work, to subcontract work except no employee shall be laid off in the department where subcontracting occurs, together with the right to determine the methods, processes, and manner of performing work, are vested exclusively in the Employer.

. . .

ARTICLE 7 – JOB POSTING

7.01 A vacancy shall be defined as a job opening not previously existing or a job opening created by the termination of employment, promotion or transfer of existing personnel.

7.02 All vacancies shall be posted on the bulletin boards in each department for ten (10) work days. Such postings shall contain a brief description of the job, qualifications, rate of pay, and adequate space for interested employees to sign. Qualifications shall be consistent with the requirements of the job classification. A copy of each job posting shall be submitted to the union president.

7.03 The Employer shall attempt to fill the vacant position within ten (10) calendar days following completion of the posting period from those employees who signed the posting. In making a selection, the Village shall consider:

- 1) Seniority;
- 2) Ability to perform the work;
- 3) Qualifications, including, but not limited to training, work record and experience.

When factors (2) and (3) are relatively equal, length of continuous service shall prevail. In each instance, the factors of ability to perform the work and qualifications including training, experience, and work record, shall take precedence over length of continuous service. In the event that a more senior employee is not selected to fill the position, the Village shall notify the employee and Union in writing of the reasons. Nothing contained herein shall either prevent the Village from eliminating a position or posting a vacancy consistent with the operating needs of the Village.

7.04 Promotion and Job Bidding: Seniority of each employee shall be on a department basis. Ability and seniority will be determining factors in giving such promotions for job transfers within the department. In the event that no employee from within the department bids on an opening, bargaining unit seniority will prevail amongst those employees who bid for the opening.

The Village may temporarily fill a position until it is determined that there are bidders for the job, or whether such bidders are substantially qualified for the job. Nothing contained in this provision shall prevent the Village from offering a job vacancy to a new employee when no current qualified employee bids for the position. The Village may, in the event that no employees are substantially qualified, offer the job to any employee it deems qualified or hire a new employee.

. . .

ARTICLE 8 – PAY POLICIES

. . .

8.02 Employees who are assigned by their supervisor to perform work in a higher classification following an accumulative eight (8) hours for training, shall receive the rate of pay for that higher classification for all hours worked in

that capacity, provided the assignment is more than one (1) hour. There shall be no wage rate reduction due to temporary assignment to a lower paid classification.

Such temporary assignments, whether inside or outside of the department, shall be offered to employees on the basis of department seniority among those employees who are qualified to perform the assignment. If no employee within the department who is qualified to perform the assignment accepts such assignment, the least senior employee who is so qualified shall be assigned.

. . .

UNION'S POSITION

The Union contends that the Village is arguing that it had no need to post the Working Foreman position. It claims that this issue is not before the Arbitrator because the settlement of Grievance #1-97 was that the Village would post the position. The Union asserts that the Village was required to comply with the posting provisions of the parties' collective bargaining agreement set forth in Article 7, Section 2 including a brief description of the job, qualifications, rate of pay and adequate space for interested employees to sign. It points out that the posting did not contain a reference to a description of the job, qualifications or rate of pay. It observes that Article 7, Section 3 requires an attempt to fill the position within ten (10) calendar days after the completion of the posting. The Union argues that the Village did not comply with this provision. The Union submits that the plain language of the contract must be given effect. It alleges that the undisputed testimony established that the grievant, Glen Lamers, was qualified to perform the job and is the most senior employee in the bargaining unit. It claims that the record shows that Lamers' skill and ability is relatively equal to all signers of the posting so he should have been awarded the position with back pay for the time the position was filled. It points out that Martin Jansen testified that the grievant is competent in performing the Working Foreman duties and Jansen had no incentive to give this testimony. The Union points out that Lamers was placed in the Working Foreman position whenever it was necessary.

The Union argues that the selection process is tainted and the Village created additional requirements so it would not have to select the grievant. It notes that the September 9th memo and the September 15th questionnaire were given to applicants well after the 10-day period expired. It contends that the grievance should be sustained.

The Union asserts that past practice supports its position as jobs have been awarded as specified in the labor agreement and there have never been job questionnaires or psychological profile tests used before this case. The Union believes that the fact these have been used in the

Police Department does not give the Village the right to use them in this unit. It concludes that past practice supports its position and the grievance should be sustained. It argues that Lamers should be awarded the position from September 17, 1997 through October 31, 1997, and be made whole for all lost wages and benefits.

VILLAGE'S POSITION

The Village contends that the grievance should be denied because it represents that which was previously grieved and resolved. It asserts that the Union tries to incorporate a past grievance which was resolved. It insists that the applicants understood the assignment and the rate of pay is set forth in the parties' agreement, yet the instant grievance seeks the same remedy as the initial grievance. It argues that the prior grievance dealt with a temporary assignment and not a vacancy as defined in Section 7.01. It maintains that the temporary assignment does not meet the definition of a vacancy and it relies on Section 7.04 which allows it to fill a position temporarily until it determines that there are bidders for the job who are qualified. The Village admits that it agreed to post the temporary position but the Union never questioned the procedures it used, and besides, the specific posting requirements for a vacancy do not apply. The Village points out that the prior grievance was settled on the basis of it being posted and no back pay would be forthcoming. It asserts that the Union is now arguing for the remedy of back pay in this grievance. It states that the Union's position is unclear. The Village argues that the instant grievance is not subject to arbitration as all the issues have been resolved making the grievance moot.

The Village takes the position that in resolving the previous grievance, the Union was well aware of the job description and duties and the wage rate for the Working Foreman is in the contract. It states that to assert a violation based on a lack of the job description and wage rate ignores reality as this was not a vacancy but a temporary assignment. The Village observes that it had no obligation to post a temporary assignment. The Village claims the grievance is moot because it withdrew the posting. It notes that after the first grievance was resolved, Jansen did not perform the duties but the position's duties were performed by supervisors and if they were not present, then it was assigned to the most senior employee. It maintains that once it became aware that the incumbent would most likely retire in January, it withdrew the temporary posting preferring to post for the vacancy. It contends that as the posting was withdrawn there was nothing to grieve and the grievance is moot and must be dismissed.

The Village contends that the management rights clause is clear and unambiguous and reserves to it the right to determine the appropriate qualifications for the Working Foreman. It submits that the method it uses to determine whether an applicant is qualified for a position will not be overturned unless it is arbitrary and capricious. It submits that it is entitled to give reasonable and appropriate written, oral, performance and other tests relevant to job

performance to determine the ability of competing applicants. It also maintains that it can use tests. It insists that it has the authority to determine qualifications and has not acted arbitrarily or capriciously and the grievance is without merit and should be denied.

The Village insists that the tools it utilizes are only used to evaluate qualifications and does not change the qualifications as urged by the Union. It points out that under the contract, seniority is not considered until qualifications have been determined to be relatively equal, then it becomes the decisive factor. It submits that the tools of testing and psychological profiles have been used by the Village for many years with positions which involve some supervisory duties. The Village claims that the contract requires it to assess the qualifications of applicants and it has the inherent authority to use the methods to determine qualifications, as long as they are reasonable, fair and nondiscriminatory. It submits that the grievance ignores the contract and should be dismissed.

The Village contends that the Union has not satisfied its burden of proof that the Village's actions were unreasonable. It claims the Union has failed to prove any violation of Article 7 and seeks denial of the grievance. The Village notes that it made appropriate assignments of Working Foreman duties to the grievant during the period in question and observes that jobs are not granted solely on the basis of seniority, which is demonstrated by the settlement agreement to post the position. The Village submits that the unrefuted facts show that after resolution of the first grievance, all temporary Working Foreman assignments were first given to the grievant. The Village requests that the grievance be denied.

UNION'S REPLY

The Union contends that the Village's arguments concerning an identical grievance which was dropped should not be before the Arbitrator. The Union asserts that Grievance #97-1 was considered settled when the Village agreed to post the position. The Union asserts the instant grievance involves the additional requirements announced on September 9 and 15, 1997. The Union argues that the Village mischaracterizes Jansen's testimony with respect to his not objecting to being assigned the Working Foreman duties. It states the record establishes that Jansen did not want to be accused of insubordination had he objected, and it was at Jansen's urging that the instant grievance was filed. The Union disputes the Village's assertion that the Village and Union had several discussions when only two meetings occurred, one to attempt to resolve Grievance #1-97 and the other to attempt to resolve Grievance #2-97. It asserts that #1-97 was filed because the Village did not post the position and #2-97 because once it was posted, the Village did not follow the provisions of the contract.

The Union asserts that the Village admitted it violated the contract. It claims that the Village was required to follow all the provisions of the contract when it posted the position and it could not add additional requirements after the posting of the position. It alleges that the

Village did not act in good faith because the additional requirements were added well after the end of the posting period rather than at the time of posting and were used in an attempt to disqualify the grievant.

The Union states it is pleased that the Village finally followed seniority in assigning the grievant to work as Working Foreman after withdrawing the posting but the settlement of #1-97 was to post and fill the position. It claims the Village distorts the facts and ignores the testimony. It maintains the record is clear that the grievant is the most senior employee, he is qualified, he signed the posting and should have been the Grade V Working Foreman from September 17, 1997 through October 31, 1997. It believes the Village was arbitrary and capricious in the assignment of Jansen in this position from September 17, 1997 until October 31, 1997. The Union argues that the Village's arguments on testing and how positions are awarded in other departments are not supportive or relevant. It submits that the Village grossly misstates the Union's position on posting a position that is vacant for a short time. The Union contends that in settlement of Grievance #1-97, the Village agreed to post the position and follow the language of the contract which it did not but came up with other criteria to exclude the grievant from filling the position. It asks that the grievance be sustained and the grievant made whole.

VILLAGE'S REPLY

The Village contends that the Union takes liberty with the facts in an attempt to revisit the past, settled grievance. It points out that the Union asks for back pay asserting that Jansen was in the position of Working Foreman on September 17, 1997 through October, 1997, yet the grievance only involves the form of the posting and besides, Jansen was not awarded the position for the Temporary Foreman duties, so the Union's position is not supported by the record. The Village claims that the Union raised the issue of not filling the temporary position within ten days of the posting for the first time in its brief and the grievance never raised this issue nor did the Union at any time at the hearing. The Village repeats its arguments that the posting was pursuant to a settlement and the job description and pay rate were well known.

With respect to the Union's arguments on the use of a psychological profile and a questionnaire, the Village maintains that Article 7 grants it the right to consider qualifications and the tools it employed were designed to provide an objective decision. It concludes that the Union misstates the record, makes new arguments and attempts to expand the grievance and places form over substance.

The Village argues that the Union is attempting to litigate a subsequent grievance by arguing that Lamers is the most qualified applicant. It observes that the posting for the temporary position was withdrawn based on the incumbent Working Foreman's consideration of retirement. Upon his retirement, the Village in fact posted the permanent vacancy and it asserts that the Union is inappropriately attempting to litigate a dispute that arose over the

filling of the permanent vacancy. The Village insists that this proceeding should be limited to the four corners of the grievance filed in this matter. It argues that no temporary assignment was made and there was no violation of the contract with respect to the posting of the temporary position and it concludes that the grievance is without merit and should be denied.

DISCUSSION

The instant grievance alleged that the Village violated the collective bargaining agreement in that the posting for the temporary Working Foreman position did not comply with the terms of the collective bargaining agreement. The Village argues that it did not have to post the position because it was temporary but did so only because it agreed to do so in a grievance settlement of Grievance #1-97. The exact terms of the grievance settlement were not reduced to writing but both parties agree that the temporary position would be posted. It follows that absent some other arrangement agreed in the settlement agreement, the posting had to be in accordance with the terms of the collective bargaining agreement. The Village asserts that everyone knew the duties of the Working Foreman position, the qualifications for it and the wage rate is set forth in the contract. Even if this were all true, the plain language of Section 7.02 must be followed. Assuming that the Village violated the parties' collective bargaining agreement by not complying with the posting requirements, the appropriate remedy would be to repost the position in compliance with the contract. The evidence established that the posting was for a temporary vacancy which no longer exists. A remedy requiring there be a new posting in accordance with the collective bargaining agreement would be meaningless because the temporary position related to the posting no longer exists. In other words, the issue is moot because posting would not be applicable to a non-existent position.

The Union has requested back pay for the time from September 17, 1997 through October 31, 1997. There is no evidence to support this. The Union in its brief at page 3 and its reply brief at page 8 stated that Jansen filled the position during this period and cites the transcript, page 7, but that is only the Union's opening statement. At page 8 of the Union's brief, it states that Jansen was in the position until it was posted in August, 1997. This conforms with Jansen's testimony (Tr. 14, 29). Therefore, the evidence fails to show that a less senior employee than the grievant, Lamers, performed the Working Foreman job during the period of September 17 and October 31, 1997. The collective bargaining agreement provides for a modified seniority clause, i.e., the most senior employee is not automatically entitled to the job. Section 7.03 of the agreement provides that ability to perform the work and qualifications shall take precedence over length of continuous service. Thus, even the most senior but minimally qualified employee need not be selected. Additionally, the evidence fails to establish that Lamers would have been selected based on the factors set forth in Section 7.03 had the posting been implemented. Thus, the remedy of back pay for Lamers has not been proved, and as noted above, any posting now would be moot as the temporary position is not in existence.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The grievance is moot and is therefore denied.

Dated at Madison, Wisconsin, this 16th day of July, 1998.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator