

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WISCONSIN COUNCIL 40, LOCAL 2676, AFSCME, AFL-CIO
and
CITY OF NEW BERLIN

Case 92
No. 55824
MA-10101

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 944, Waukesha, Wisconsin 53187-0944, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Roger E. Walsh**, 111 East Kilbourn, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the City.

ARBITRATION AWARD

Wisconsin Council 40, Local 2676, AFSCME, AFL-CIO, hereafter Union, and City of New Berlin, hereafter City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the District concurred, in the appointment of a Wisconsin Employment Relations Commission Staff Arbitrator to hear and decide the instant dispute. The undersigned was so appointed. The hearing was conducted at New Berlin, Wisconsin, on February 17, 1998. The hearing was transcribed and the record was closed on May 4, 1998, upon receipt of post-hearing written arguments.

ISSUES

Parties have stipulated to the following statement of the issues:

1. Did the City violate the labor agreement when it assigned Engineering Technician VI duties to the Grievant and then refused to compensate the Grievant at the appropriate rate between the time period of June 16 through July 25, 1997?

If so, what is the appropriate remedy?

2. Did the City violate the labor agreement when it denied the Grievant a promotion and hired an employe from outside the bargaining unit to fill a posted Engineering Technician VI vacancy?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II – MANAGEMENT RIGHTS

2.01 – Rights Except as hereinafter provided, the management of the work and the direction of the working forces, including the right to hire, promote and lay off employees, to discipline or discharge employees for just cause (except as provided in Sec. 5.01), to terminate employment because of lack of work or because a service is being discontinued, to transfer and realign work to different employees (subject to the right of the Union to grieve situations where an employee’s work load or work content has been increased or made difficult, for a determination of whether the prevailing compensation requires modification), to delegate the work to others (so long as such delegation does not result in an employee being laid off or suffering a reduction of hours of work), to adopt different methods of doing the work and install new machines and devices, are vested in the Employer, provided, however, that these rights shall be exercised with due regard for the rights of the employees, and provided further that these rights shall not be used for the purpose of discrimination against any employee, or for the purpose of invalidating any contract provisions.

. . .

ARTICLE VI – PROMOTIONS, TRANSFERS AND NEW POSITIONS

6.01 – Vacancies In the event the City elects to fill a vacancy under this section, it shall be posted. A vacancy, for the purpose of this section, is any job that has been created or vacated by an employee who has retired, deceased, terminated employment or transferred to another job within the City either within or outside of the bargaining unit.

6.02 – Posting Job vacancies shall be posted for at least five (5) workdays. Until the vacancy is filled under the posting procedure, the Employer may assign other employees or employ temporary help to provide the necessary services.

6.03 - Posted Information The job posting shall set forth the job title, work location, schedule of hours, rate of pay, and a brief description of the job requirements and the qualifications desired, the person to whom application is to be made and the deadline for applications.

6.04 - Selection Job vacancies shall be filled on the basis of ability and qualifications, providing, however, if two (2) or more applicants are relatively equal in ability and qualifications (if both have sufficient ability and qualifications), selection between such applicants shall be on the basis of City-wide seniority.

. . .

6.06 Disputes The selection of an employee to fill a job vacancy may be challenged by the Union through the Grievance Procedure. However, during the pendency of any such grievance action, the City may fill the vacancy on a temporary basis.

6.07 Rate for New or Changed Positions When a new position is created or the duties or responsibilities of an existing position are changed significantly, the Employer shall prepare a job description and establish the appropriate wage or salary. If the Union disagrees with the wage or salary rate so established, it may make a grievance as to the rate and such grievance shall be handled in accordance with Article IV herein.

BACKGROUND

Bob Beilfuss worked for the City as an Engineering Technician VI from April of 1993 until June 16, 1997. From June 16 through July 25, 1997, Engineering Technician V Richard Stainbrook, hereafter Grievant, was assigned and performed work normally performed by Beilfuss.

After receiving Beilfuss' resignation in early June of 1997, the City modified the position description of the Engineering Technician VI. On June 5, 1997, the City posted an Engineering Technician VI "Position Vacancy" which incorporated the modified position description.

The Grievant bid for the Engineering Technician VI vacancy, but was not selected for the vacancy. Subsequently, the Grievant grieved the following: that he had assumed Engineering Technician VI duties without compensation; that there was a job description change without notice to employe and bargaining unit; and that he was not considered to fill the position of the Engineering Technician IV. As a remedy for the grievance, the Grievant stated that he would accept the Engineering Technician VI position and backpay at the higher

rate of pay for time spent assuming the duties of the Engineering Technician VI and a change in the job classification back to the original description. The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Between June 16 and July 25, 1997, the Grievant was assigned to perform Engineering Technician VI duties and, thus, worked outside of his classification. Sec. 2.01 of the labor agreement indicates that the City may transfer or realign work, subject to the Union's right to grieve situations where an employe's workload or work content has been increased or made more difficult. Sec. 2.01, unlike other Sections of the labor contract, makes no distinction between temporary and permanent changes in job duties. The City's evidence of past grievance activity does not establish any binding precedent with respect to the receipt of out-of-classification pay.

The Grievant bid for the vacant Engineering Technician VI position. The City reviewed the Grievant's personnel file to determine whether or not he was qualified and interviewed the Grievant. The City's policy is to interview those who meet minimum requirements. The City had an obligation to hire the Grievant based upon his bargaining unit status, rather than hiring an employe from outside of the bargaining unit.

While the City argues that the Grievant was not qualified because he lacks registration as a land surveyor, City Engineer Jeff Chase testified that this registration is not a significant change. Not all of the employes who occupied the Engineering Technician VI position had such registration. As the City's Human Resources Director testified at hearing, the City did not research the requirements for obtaining registration as a land surveyor prior to modifying the position description. The City acted arbitrarily when it excluded the Grievant on the basis that he lacked registration as a land surveyor.

The City did not inform any local Union officers or stewards of any changes in the position description or posting in question. As Union officials become aware of significant changes to a job description and/or postings, requests are made of the City to negotiate the impact of those changes. The City has not acted in good faith and has given the appearance that there was an effort to deny the Grievant a promotional opportunity.

Arbitrators have consistently ruled that in every labor agreement there exists an implied covenant of good faith and fair dealing. Thus, a party may not exercise its contractual rights in an arbitrary, capricious or discriminatory manner. The City has breached the implied covenant of good faith and fair dealing, as well as the language of the labor agreement.

The Grievant should be made whole for the difference between Engineering Technician V pay and Engineering Technician VI pay as a result of his performance of Engineering Technician VI work during the period from June 16 to July 25, 1997. The Grievant should be promoted to the Engineering Technician VI classification immediately and be made whole for the difference between Engineering Technician V pay and Engineering Technician VI pay retroactive to the date that the position was filled.

City

At best, the Grievant may have spent eight hours on June 27, 1997, performing work that could be classified as Engineering Technician VI work. The rest of the work he performed between June 16 and July 25, 1997, was work that was within the job duties of the Engineering Technician V, as listed in the job description for that position. Nonetheless, the City has no contractual obligation to pay out of classification for these eight hours.

Prior to the negotiation of the current collective bargaining agreement, employees requested out-of-classification pay and such requests were denied. The Union proposed an out-of-classification provision during negotiations for the current collective bargaining agreement, but subsequently withdrew that proposal.

Union Representative Froiland testified that the out-of-classification proposal was withdrawn because he advised the Union's bargaining committee that out-of-classification payments were covered by Sec. 2.01. Sec. 2.01, however, refers to a situation where the duties of the position are changed on a permanent basis to such an extent that the prevailing compensation within Appendix A should be modified. It does not refer to a situation in which an employee may be asked to temporarily perform the duties of a higher paying classification. The contract does not provide for out-of-classification pay and, thus, the Grievant's request for such pay is without merit.

The City has a right to unilaterally establish minimum qualifications for a job. The City's reasons for modifying the minimum qualifications of the Engineering Technician VI position were reasonable and clearly job-related. The City did not intend to mislead the Grievant regarding the minimum requirements of the Engineering Technician VI vacancy.

Sec. 6.04 indicates that the job is to be filled on the basis of ability and qualifications. The Grievant was not qualified. The City's willingness to accommodate the Grievant's desire for an interview and hear him out on the subject of his eligibility for the position cannot be twisted into a waiver of the City's absolute right to refuse to hire unqualified individuals. The City acted properly in not selecting the Grievant for the position.

The City acted responsibly, reasonably and in unquestionable good faith when it refused the Grievant's unjustified demand for out-of-classification pay and when it set and adhered to qualifications for the Engineering Technician VI position. The grievance is without merit.

DISCUSSION

Out of Classification Pay

During the period of June 16 through July 25, 1997, the Grievant performed work of the Engineering Technician VI. Specifically, the Grievant performed work that the Engineering Technician VI performed in his capacity as crew chief.

At the time that the Grievant performed this crew chief work, the Engineering Technician VI had resigned his employment and the City had not yet hired a replacement. Thus, the Grievant acted as crew chief in the absence of the Engineering Technician VI.

The Grievant is an Engineering Technician V. The Engineering Technician V position description sets forth a variety of "Essential Functions." Since at least 1989, one of these "Essential Functions" is "Acts as crew chief in the absence of Engineering Technician VI."

The Grievant's prevailing compensation, as negotiated by the parties in their 1996-98 collective bargaining agreement, compensates the Grievant for performing duties which were part of the Engineering Technician V classification at the time that the parties negotiated this agreement. Acting as crew chief in the absence of the Engineering Technician VI is such a duty.

In summary, the Grievant did not work out of classification during the period of June 16 through July 25, 1997. The work performed by the Grievant during the period of June 16 through July 25, 1997 was appropriately compensated at the Grievant's Engineering Technician V wage rate.

Denial of Promotion

Bob Beilfuss was the City's Engineering Technician VI from April of 1993 until June 16, 1997. At the time that Beilfuss obtained this position, the Engineering Technician VI position description had the following "Position Requirements":

Requires six years of progressive experience in municipal engineering work (every twenty scientific or mathematical course credits taken in an accredited college or university may be substituted for a year of experience); Surveying crew leader for at least one year; Proficient use of Total Station for surveying; Municipal drafting; Good communication skills both verbal and written; Computer drafting skills; and a Valid Wisconsin driver's license. Registration as a land surveyor is desirable along with the following knowledge, skills and abilities:

- Experience with engineering work stations including Genasys and AutoCAD.

- Associates Degree or Bachelor's Degree from an accredited institute.

In early June of 1997, following receipt of Beilfuss' resignation, the City modified the "Position Requirements" of the Engineering Technician VI position to the following:

Position Requirements: Requires five years of progressive experience in municipal engineering or surveying work and an Associate Degree in Civil Engineering Technology, surveying or other closely related field. Two years of experience as surveying crew leader, good communication skills both verbal and written; extensive computer and CAD skills; a valid Wisconsin driver's license; and registration as a land surveyor in the State of Wisconsin.

Arbitrators generally recognize that, absent a contractual restriction, an employer has a management right to change position requirements. The parties' collective bargaining agreement does not contain such a restriction. The undersigned is persuaded, therefore, that the City has a management right to change the "Position Requirements" of the Engineering Technician VI classification.

As the Union argues, arbitrators generally require that an employer exercise its management rights in a manner that is not arbitrary, capricious or discriminatory. Sec. 2.01 of the labor contract requires the City to exercise its management rights "with due regard for the rights of the employees, and provided further that these rights shall not be used for the purpose of discrimination against any employee, or for the purpose of invalidating any contract provisions."

The managers of the Engineering Department, and not the City's Human Resources Director, sought the change in the Engineering Technician VI position requirements. It is reasonable for a Human Resources Director to defer to the judgment of department management on the issue of position requirements. Contrary to the argument of the Union, the fact that the City's Human Resources Director did not research the requirements for obtaining registration as a land surveyor prior to the modification of the position description does not warrant the conclusion that the City has acted arbitrarily.

City Engineer Jeffrey Chase, a manager in the Engineering Department who participated in the decision to modify the Engineering Technician VI position description, recalled that he wanted to mandate registration as a land surveyor in the State of Wisconsin because the City performed work which required this certification; the City preferred not to use outside consultants if work could be performed in-house; and, by meeting the requirements to be registered as a land surveyor in the State of Wisconsin, an individual demonstrated that the individual was experienced and proficient in survey work.

Survey work is a major function of the Engineering Technician VI. While it is true that not all of the employees who previously occupied the position of Engineering Technician VI were registered land surveyors, Beilfuss was a Registered Land Surveyor in the

State of Wisconsin at the time that he obtained the position of Engineering Technician VI and used this registration to perform valuable work for the City which could not have been performed by an Engineering Technician VI who did not have such registration.

Chase stated that, due to the seasonal nature of surveying work, one year of experience as a survey crew chief could result in as little as six months of experience, which experience would be insufficient to provide the type of experience necessary to perform the City's work. Chase's claim that one year of experience as a survey crew chief is insufficient is not contradicted by any record evidence.

According to Chase, the previous education/experience requirement was not desirable because education could be exchanged for experience to such a point that an applicant who qualified under the previous education/experience requirement could have too little practical experience to perform the requisite duties. Chase's conclusion that the new education/experience requirement provides a more appropriate balance between experience and education is not contradicted by any record evidence.

As the Union argues, Chase gave his opinion that the modified Engineering Technician VI job description is not significantly different than the one that preceded it and that he did not believe that the registered land surveyor requirement is a significant change. In later testimony, Chase agreed that the change in the registered land surveyor requirement would have an impact on who would be qualified for the position.

It is curious that Chase does not consider the modifications in the position description to be significant. However, Chase's opinion about the significance of the changes in the position description does not alter the fact that, his testimony as a whole, demonstrates that the changes in the position requirements were made for legitimate business purposes and that these changes were reasonably related to the work of the Engineering Technician VI.

Sec. 6.07 addresses changes in existing position descriptions. Neither this provision, nor any other contract provision relied upon by the Union, expressly requires the City to notify the Union of a change in a position description. The Union received constructive notice of the change in the position description when the "Position Vacancy" was posted on June 5, 1997. This constructive notice was given within days of the City's modification of the position description. Additionally, a Union Steward was copied on a letter dated August 4, 1997, in which Acting City Engineer John Graber notified the Grievant that "The qualifications for the position of Engineering Tech VI were changed when there was a vacancy in the position."

The Union's argument that the City engaged in bad faith conduct by not informing Union officials of the change in the Engineering Technician VI position description is not supported by the evidence. Nor does the evidence demonstrate that the City deprived the Union of the opportunity to request the City to bargain the impact of such changes.

In summary, the record does not demonstrate that the City exercised its management right to modify the Engineering Technician VI position description without due regard for the rights of employees, or for the purpose of discriminating against any employee, or for the purpose of invalidating any contract provision. Nor does the record demonstrate that the City's conduct in modifying the "Position Requirements" of the Engineering Technician VI position was otherwise arbitrary, capricious, or discriminatory. Rather, the record demonstrates that the City had legitimate business reasons for modifying the "Position Requirements" of the Engineering Technician VI position and that the modified "Position Requirements" were reasonably related to the work of the Engineering Technician VI. The City did not violate the parties' collective bargaining agreement when it modified the Engineering Technician VI position description in June of 1997.

As required by Sec. 6.02 of the parties' labor contract, an Engineering Technician VI "Position Vacancy" was posted. Consistent with the City's posting procedure, the City's Human Resources Department posted one copy of the "Position Vacancy" on the first floor employee bulletin board and distributed copies of the "Position Vacancy" to each of the City Departments for posting on the departmental bulletin board.

As the Union argues, the City did not send a copy of the posting to the Local Union President, or any other Union official. However, neither the contract language, nor the evidence of past practice, demonstrates that the City had a duty to send copies of the posting to any Union official.

The Engineering Technician VI "Position Vacancy" was posted on June 5, 1997. One copy of this "Position Vacancy" was posted in the Engineering Department. The posted Engineering Technician VI "Position Vacancy" contained the following "Position Requirements":

Position Requirements: Requires five years of progressive experience in municipal engineering or surveying work and an Associate Degree in Civil Engineering Technology, surveying or other closely related field. Two years of experience as surveying crew leader, good communication skills both verbal and written; extensive computer and CAD skills; a valid Wisconsin driver's license; and registration as a land surveyor in the State of Wisconsin.

The Human Resource Director's E-mail of June 5, 1997, announcing that the position of Engineering Technician VI had been posted on the notice board, included an inaccurate "Position Vacancy." The inaccurate "Position Vacancy" inserted the words "Position Requirements" in front of the paragraph that enumerated the duties and responsibilities of the position and failed to list the actual position requirements.

Relying on the E-mail of June 5, 1997, the Grievant bid for the Engineering Technician VI position without knowing that there had been a change in the "Position Requirements." While it is unfortunate that the copy of the "Position Vacancy" that was E-mailed on June 5, 1997 was

inaccurate, it is the posted “Position Vacancy” that is controlling. Inasmuch as the posted “Position Vacancy” contained the modified “Position Requirements,” the City appropriately relied upon the modified “Position Requirements” when it determined applicant qualifications.

As a general rule, the City does not interview candidates who do not meet the minimum requirements. The City made an exception to this general rule when it interviewed the Grievant. By making such an exception, the City did not acknowledge that the Grievant was minimally qualified for the position. Nor did the City otherwise waive its right to determine whether or not the Grievant met the qualifications of the posted Engineering Technician VI “Position Vacancy.”

On July 16, 1997, the Grievant was advised that the City had hired Nate Stanislaski to fill the Engineering Technician VI vacancy. During the processing of this grievance, the Grievant was advised by the Director of Human Resources that the Grievant had not met the following minimum qualifications of the position:

- Five years of progressive experience in municipal engineering or surveying work
- Two years experience as surveying crew leader
- Registration as a land surveyor in the State of Wisconsin

The collective bargaining agreement contains the following:

6.04 – Selection Job vacancies shall be filled on the basis of ability and qualifications, providing, however, if two (2) or more applicants are relatively equal in ability and qualifications (if both have sufficient ability and qualifications), selection between such applicants shall be on the basis of City-wide seniority.

Given the contractual requirement to fill job vacancies on the basis of ability and qualifications, the City has the right to reject a bargaining unit applicant who is not qualified for the job vacancy.

The Grievant did not have five years progressive experience in municipal engineering or surveying work. The Grievant did not have two years experience as surveying crew leader. The Grievant did not have registration as a land surveyor in the State of Wisconsin. Thus, the Grievant does not meet the “Position Requirements” of the Engineering Technician VI vacancy.

The Grievant was not qualified for the Engineering Technician VI vacancy because the Grievant did not meet the “Position Requirements” of that vacancy. Inasmuch as the Grievant was not qualified for the Engineering Technician VI vacancy, the City did not violate the labor agreement when it denied the Grievant a promotion to Engineering Technician VI and hired an employe from outside the bargaining unit to fill the posted Engineering Technician VI vacancy. The Union’s claim that the City acted in bad faith and/or was arbitrary, capricious and discriminatory when it denied the Grievant a promotion to Engineering Technician VI is without merit.

Based upon the above and foregoing, and the record as a whole, the undersigned issued the following

AWARD

1. The City did not violate the labor agreement when it assigned Engineering Technician VI duties to the Grievant between the time period of June 16 through July 25, 1997, and compensated the Grievant at the Engineering Technician V rate.

2. The City did not violate the labor agreement when it denied the Grievant a promotion and hired an employe from outside the bargaining unit to fill the posted Engineering Technician VI vacancy.

3. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 25th day of September, 1998.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator