

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**JACKSON COUNTY HIGHWAY EMPLOYEES LOCAL 2717-C,
WCCME, AFSCME, AFL-CIO**

and

JACKSON COUNTY

Case 106
No. 52340
MA-8923

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of the Union.

Mr. James Michael DeGracie, Corporation Counsel/Personnel Director, Jackson County, 307 Main Street, Black River Falls, Wisconsin 54615, appearing on behalf of the County.

ARBITRATION AWARD

Jackson County and Jackson County Highway Department Employees Local 2717-C, WCCME, AFSCME, AFL-CIO are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on March 10, 1995, requested the Commission to appoint either a Commissioner or a member of its staff to serve as Arbitrator. The Commission appointed Karen J. Mawhinney as Arbitrator on March 23, 1995. The case was subsequently transferred to Thomas L. Yaeger on October 3, 1995. Hearing in this matter was held on April 9 and 10, 1996, in Black River Falls, Wisconsin. The hearing was transcribed and the parties filed post hearing briefs which were received by the Arbitrator on July 16, 1998 from the County and on January 15, 1999 from the Union. The record was closed on January 15, 1999.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The Union

Did the County violate the collective bargaining agreement by removing the Grievant, George Lewis, from the Timekeeper/Stock Clerk position and returning him to his previous Patrolman position? If so, what is the appropriate remedy?

The County

Was the Grievant qualified for the position of Timekeeper/Stock Clerk? If not, was it a proper exercise of management rights to remove the Grievant from the Timekeeper/Stock Clerk position during the trial period, when management determined that the Grievant was not qualified to perform the duties of the position?

The parties being unable to stipulate to an issue, the Arbitrator frames the issue as follows:

Did the County violate Article 7, Job Posting, of the collective bargaining agreement when it removed Grievant from the Timekeeper/Shop Clerk position and returned him to his previous Patrolman position? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 - RECOGNITION

SECTION 1. The Employer hereby recognizes the Union as the exclusive bargaining agent for the purpose of conferring and negotiating on questions of wages, hours, conditions of employment and the adjustment of employee complaints and employee grievances for all regular full-time and regular part-time employees of the Jackson County Highway Department, excluding supervisory, managerial, clerical and confidential employees.

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ARTICLE 2 - MANAGEMENT RIGHTS

SECTION 1. The County possesses the sole right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the provisions of this Contract. These rights, which are normally exercised by the Employer, include, but are not limited to, the following:

- A. To direct all operations of County government.
- B. To hire, promote, assign and retain employees in positions with the County and to suspend, demote, discipline or discharge for just cause.
- C. To relieve employees of their duties because of lack of work or for other legitimate reasons.
- D. To maintain efficiency of County government operations entrusted to it.
- E. To introduce new or improved methods or facilities.
- F. To change existing methods or facilities.
- G. To contract out for goods and services, except that such actions shall not result in the lay-off of employees in the bargaining unit.
- H. To determine the methods, means and personnel by which such operations are to (sic) conducted.
- I. To formulate all reasonable rules and regulations for all operations and management of the department.
- J. To take necessary action to carry out the functions of the County in situations of emergency.
- K. To take necessary action to comply with the State and Federal laws.

The Union and the employees agree that they will not attempt to abridge these management rights and the County agrees that it will not use these management rights to interfere with the rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the County of Jackson to consult or negotiate concerning the above areas of discretion and policies.

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ARTICLE 4 - GRIEVANCE PROCEDURE

SECTION 1. A grievance is defined as any difference or dispute regarding the interpretation, application or enforcement of the terms of this agreement. The grievance procedure shall not be used to change existing wage schedules, hours of work, conditions and fringe benefits. For purposes of this Article, "days" shall be defined as work days excluding Saturdays, Sundays and holidays.

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SECTION 4. Steps in Procedure

. . .

Step 3. . . . The decision of the arbitrator shall be limited to the subject matter of the grievance. The award of the arbitrator shall not modify, add to or delete from the express terms of the contract.

. . .

ARTICLE 7 - JOB POSTING

SECTION 1. When it becomes necessary to fill vacancies or new positions within the bargaining unit, the Employer will post such vacancies or new positions for five (5) working days, during which time interested employees may apply by signing the posting. Job postings shall state the job to be filled, qualifications for the job and the rate of pay. Posted positions shall be awarded as promptly as possible following the posting period to a qualified applicant. The qualified applicant with the most seniority shall be selected to fill the vacancy or new position. This Section does not prohibit the Employer from advertising vacancies during the job posting period.

SECTION 2. Successful applicants shall be allowed up to twenty (20) working days to satisfactorily perform the work on an awarded position, however, the Employer may at his discretion extend the period by up to an additional thirty (30) working days. Employees not able to satisfactorily perform the work of an awarded position within the period granted shall be returned by the Employer to the position formerly held. If the successful applicant is not satisfied with the new position, he/she may return to the position formerly held within twenty (20) working days.

STATEMENT OF THE CASE

This grievance arbitration involves the Jackson County Highway Department and Jackson County Highway Employees Local 2717-C, representing the employees set forth in Article 1, Recognition. (Jt. 1) The Union alleges a contractual violation by the County for the failure of the County to give the Grievant a fair and reasonable opportunity to qualify for the position of Timekeeper/Stock Clerk in the County Highway Department. The Grievant, George Lewis, commenced work for the County Highway Department on July 13, 1971. The Grievant progressed through various positions and ultimately became a Patrolman under the Classification Schedule of the collective bargaining agreement between the parties. At all times pertinent to this grievance the County had a position classified as Timekeeper/Stock

Clerk. Duties of this position include checking, ordering, receiving inventory and recording all parts, materials, fuel, oils, answering and relaying telephone radio messages, preparing requests for machinery classifications for the Wisconsin Department of Transportation and maintaining records and making reports on preventative maintenance, accidents and repair.

Only one employe, Albert Skar, occupied this position. On December 30, 1992, Michael L. Hemp, Highway Department Commissioner, posted a notice asking whether any employe within the Highway Department might be interested in working in the shop office to learn the "parts/time clerk" operation in order to have a backup to Skar. (Jt. 3) George R. Lewis, the Grievant, signed the notice and received the opportunity to learn the position as backup. (Jt. 3) The Grievant worked in the shop with Skar from February 4, 1993 through September of 1994 and spent, if calculated as full time, approximately 7.5 months in the shop office with Skar. (Er. 20)

At a meeting on June 6, 1994, the Jackson County Highway Committee expressed their concern that employe Skar was contemplating retirement and no one within the Department was qualified to do his job. (Jt. 4) Skar, on July 18, 1994, gave Hemp, the Highway Commissioner, his contemplated date of retirement as January 14, 1995, with his actual last day of work as November 18, 1994. (Jt. 5) In September of 1994 the position of Timekeeper/Stock Clerk in the Highway Department was posted with an application deadline of September 26, 1994. (Jt. 9) Pursuant to the collective bargaining agreement the County also ran a newspaper ad for the same position on September 11, 1994. (Jt. 7) The Grievant was the only member of the collective bargaining unit in the Highway Department that posted for the position. The job posting required two years of formal education in inventory/parts distribution and control and two years on-the-job experience or the equivalent combination of four years of education or experience. (Jt. 9) Commissioner Hemp asked the Grievant to provide documentation of his training and education and his Army and National Guard experience that Grievant included on his application for the Timekeeper/Stock Clerk position. (Jt. 10) On September 26, 1994, the Grievant responded to the Highway Commissioner's request and forwarded documents related to his educational credits and training to the County Corporation Counsel, Michael DeGracie and indicated that his U.S. Army records would be forwarded as soon as he received them. (Jt. 18)

Grievant was awarded the job by letter from Commissioner Hemp on October 4, 1994. (Jt. 22) Grievant was informed by Commissioner Hemp that he would have, pursuant to Article 7, Section 2 of the labor agreement, 20 working days to demonstrate that he could satisfactorily perform the work. (Jt. 22) On October 4, 1994, Grievant asked Commissioner Hemp that he be given an additional 30 working days to demonstrate his ability for the Stock Clerk position, noting that employes who had recently bid for three unrelated positions within the Highway Department had received an additional 30-day period. (Jt. 23) Pursuant to the job posting article of the labor agreement the County at its discretion can give an employe, in a job posting situation, an additional 30-day qualifying period in addition to the 20 days the employe originally receives when awarded the job. (Jt. 1, Article 7, Section 2) Commissioner

Hemp responded on October 5, 1994 to Grievant's request: "A decision whether or not there is a need to extend the period by up to an additional 30 working days is premature at this time as the initial period has not even begun. Management will extend the period if, in their opinion, it is necessary for further evaluation." (Jt. 24)

The regular Shop Clerk, Skar, was assigned by Commissioner Hemp to a different building (the Courthouse) on a special project during the trial period of the Grievant as part of the test to see if Grievant could do the job. Skar was available by telephone during Grievant's trial period. Skar and Avis Hoff, account clerk in the Highway Department, were required by the Highway Commissioner to keep a record of contacts with the Grievant as was Patrol Superintendent Garbiel who was Grievant's immediate supervisor. The County documented various errors of the Grievant during his trial period. (Er. 26-31) On November 3, 1994, Commissioner Hemp returned Grievant to his position as Patrolman stating:

In your application you indicated you had the training, experience, skill and ability to competently and efficiently perform the duties of the Timekeeper/Stock Clerk position with minimal supervision. However, a review of the records and the work you have performed in the position since promoting you to the position on October 4, 1994 indicate that you have not demonstrated that you can satisfactorily perform the work in the position. (Jt. 14)

Lewis grieved his being returned to his position as a Patrolman after working 17½ days in the Shop Clerk position. Grievant alleged that he was not given a trainer, i.e. Skar and did not receive any supervisory evaluation, assessment or explanation for being terminated from the Stock Clerk position. The grievance was filed with the Highway Commissioner on or about November 15, 1994. (Jt. 32) On November 30, 1994, Commissioner Hemp denied the grievance stating that no trainer was necessary for Grievant since he had indicated in his application for the position that he had trained for the Timekeeper/Stock Clerk position under Skar since March 3, 1992. Hemp further stated that after 19 working days the Grievant had not demonstrated to management that he could satisfactorily perform the work of the position. Finally, Hemp stated that the 30-day extension, provided for at the discretion of management in a job-posting situation, was not needed to make a decision on Grievant's performance. (Jt. 33)

The parties processed the grievance through the contractual grievance procedure and were unable to resolve the grievance. No issue was raised as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on April 9 and 10, 1996, in the City of Black River Falls.

POSITIONS OF THE PARTIES

Union's Position

The Union's main argument is that Grievant was not treated fairly and was not given an opportunity to succeed at the position of Timekeeper/Stock Clerk. It is the position of the Union that the County never intended to hire the Grievant because it advertised prior to even posting the notice for the Shop Clerk position and there were employees in the Highway Department, other than the Grievant, who could have qualified for the position. The Union points to the fact that in three previous job postings employees had received a 50-day trial period and Grievant was refused this trial period when he requested it. Further, during the trial period, the man Grievant was to replace, Skar, was removed from the office and, although available by phone, this is not the same as having Skar present in the office and available to respond to questions and oversee and train the Grievant. Further, the Grievant was treated differently because he had to produce documentation of his prior training and experience which had never been requested of any previous applicants for a position in the Highway Department.

The Union argues that the Grievant's alleged poor record while he was in the 20-day trial period is over-blown and that an employee within a trial period is likely to make mistakes. The Union submits that the County did not take into account that during the two-year period that Grievant was working part of the time as a back up to Skar he had received an evaluation showing improvement in learning the Timekeeper/Shop Clerk position. (Jt. 21) In concluding its argument, the Union points out that the employee who was hired off the street to take the position after Grievant was returned to his Patrol position received more help from the County during that employee's trial period than was received by the Grievant.

The Union reiterates its belief that the County never intended to permanently place a bargaining unit employee in the Timekeeper/Stock Clerk position and did everything it could to make it difficult for the Grievant during his trial period. The Union takes the position that rather than the Grievant failing to demonstrate that he could not satisfactorily perform the work of the position, the County failed in its responsibilities to the Grievant during the trial period. The Union requests that the Arbitrator sustain the grievance and order the County to award the position of Timekeeper/Stock Clerk to the Grievant with a "make whole" remedy.

County's Position

The County's position is that based on arbitral precedent it alone determines ability as long as it has been fair and non-discriminatory. The County vigorously argues that it was the Grievant himself that stated that he had the training and experience to do this position based not only on his experience in the Army but on his experience of 2½ years working as a backup to Skar in the Shop. (Jt. 18) The County postulates that it is obvious, as evidenced during the trial period, that Grievant over-stated and/or misrepresented his qualifications for the position.

The County points out that the Grievant testified that he would need at least four months to qualify for the position so that Grievant could not, by his own admission, have qualified within a 50 working day trial period. The County's position is that the trial period called for in the collective bargaining agreement is not a training period; on-the-job training with someone of the Grievant's background would not be appropriate as it would be for someone hired off the street. The County submits that Grievant stated that he essentially had 2½ years' training under Skar in the shop. The County believed that taking Skar out of the office, but making Skar available on a daily basis, would be a true test of whether Grievant could independently do the job.

The County denies that there was any disparate treatment of the Grievant from the County and none was proved by the Union. The County states that it properly advertised and posted the position. Further, Hemp, the Highway Commissioner, could not have wanted to hire a specific individual from outside the Department as there were almost 100 applications for the position and the employee selected was approved by the County Highway Committee. As to other employees being qualified, the Union itself points out that Hemp had not been in the Highway Commissioner position long and could not have known all the employees. Further, only Grievant bid for the job so it would have been impossible for Hemp to know who else might have been qualified or interested within the Department to apply for the position.

Lastly, the County takes the position that it gave the Grievant the opportunity to qualify. The County argues that there is sufficient documentation to show that Grievant made far too many errors to have any reasonable success to qualify for the position. The County summarizes by stating that it followed the collective bargaining agreement and during the trial period, management of the County determined that the Grievant was not satisfactorily performing the responsibilities and that the treatment of Grievant was fair. Therefore, the County requests that the Arbitrator deny the grievance.

DISCUSSION

The issue before me is whether the County violated the collective bargaining agreement when it removed Lewis from the Timekeeper/Stock Clerk position. Article 7, Job Posting, Section 2 sets forth the standard for removal as being "Employees not able to satisfactorily perform the work of any awarded position within the period granted shall be returned by the Employer to the position formerly held." Thus, the question for the undersigned is whether Lewis was able to satisfactorily perform the Timekeeper/Stock Clerk job duties during the trial. If the Grievant established that he did, then the County violated Article 7, Job Posting, Section 2, by returning him to his Patrolman position.

As discussed above, Grievant was awarded the opportunity to qualify for the shop position based on his experience, background and training. (Jt. 18) That application for the position was in response to a job description that spelled out significant requirements for

training and experience for the duties required of the position. (Jt. 9) Crucial to this matter and my decision is the fact that Grievant stated in his application that “. . . Trained for Timekeeper/Stock Clerk under Albert Skar since March 3, 1992.” (Jt. 18, pg.4) Therefore, Grievant was giving notice that he had been training in the shop for this position for 2½ years prior to bidding for the posted position in September of 1994, and being awarded the position on October 4, 1994. As creditably testified to by Highway Commissioner Hemp, Lewis’ prior training in the position was the main reason that Hemp fashioned the trial period as he did for the Grievant. Hemp assigned Skar, the retiring Clerk whom Grievant was to replace, to the Courthouse, a different location than the Highway Department shop, to work on a special project. Hemp testified that he believed that unlike an employee new to the Department and shop, Grievant, based on his training and experience, did not need to be trained but rather tested to see if he could satisfactorily perform the job duties. 1/ Lewis received 37½ months of training in the position from Skar over the 2½ year period immediately preceding the posting.

1/ *REYNOLDS METAL COMPANY, 66 LA 1276, 1280 (VOLZ, 1976):*

The purpose of a trial period is to determine whether an employee who possesses the basic qualifications can satisfactorily do a job which she does not regularly perform. It is assumed that she will not have to be trained in all aspects of the job; for a trial period is not a training period, but simply an opportunity to demonstrate ability to do the job. A trial period, in effect, is a lengthened familiarization or orientation period in which the employee is acquainted with the nature and techniques of the job. It presupposes that the employee will be given instruction and assistance and that she will not simply be turned loose to “sink or swim.” But, it also assumes that she brings with her to the trial period by virtue of prior experience or education considerable knowledge, background, and skill for performing the duties of the new position. She still needs instruction in the peculiar requirements, procedures, equipment, and techniques of the job; but an intensive on-the-job training program, such as would be appropriate for a novice, is not contemplated.

Therefore, Hemp directed Skar to respond to any questions from Grievant and Skar usually saw Grievant at the start and end of the work day. In fact, Grievant did ask Skar questions about the job to which Skar responded. Hemp asked Skar to keep track of those questions and any mistakes made by Grievant. Hemp made the same request of Gabriel, Grievant’s immediate supervisor, and Hoff, the Department account clerk. The information he received from Skar and Hoff were relied upon by Hemp in making his decision whether Lewis had satisfactorily performed the duties of the position during the trial. The undersigned is persuaded that this procedure Hemp adopted for evaluating Lewis’ performance was reasonable and necessary to his making an informed decision.

Patrol Superintendent Gabriel testified some of the errors made by Skar were so basic and elemental that a reasonable person could not conclude Lewis was satisfactorily performing. Gabriel also testified that he just did not think that Grievant would work out for the position. Skar had reported inaccuracies related to over and under charging for materials. Hemp ultimately decided, based upon the information he had, that Grievant had not and could not satisfactorily perform in the position. (Jt. 14) There is no record evidence to suggest that Hemp's conclusion was unreasonable, or arbitrary and capricious in the face of the facts concerning Lewis' performance during the trial period. The Union is correct in noting that it would not be unusual for someone to make mistakes during a trial period for a new position. However, Lewis' mistakes were elemental and of the type one would not anticipate after training in the position off and on over 2½ years. Further, it was undisputed that accuracy was a substantial requirement of the position, and an area where Lewis' performance was unsatisfactory.

The qualifying or trial period for the job was twenty working days. (Jt. 1, Article 7) The parties are in disagreement whether the Grievant worked seventeen or nineteen days in the job before he was sent back to his patrol position by a letter from Hemp informing Grievant that he was not qualified for the shop clerk position. (Jt. 14) The grievance in this matter then followed.

The Union argued that an ad was run in a local newspaper for the job prior to it being posted internally. Joint Exhibit 9 which was introduced as the job posting is undated. However, the best evidence of when the job was posted is the Pending Position Vacancy Timekeeper/Stock Clerk announcement signed by Hemp on September 7, 1994, found in Exhibit 18. At least one ad was placed in a local newspaper on September 11, 1994. (Jt. 7) This places the running of the ad during the posting period as allowed by the labor agreement. (Jt. 1, Article 7) Even if the internal posting was after the ad, I do not believe, as argued by the Union, that this is indicative that Hemp wanted to hire from the outside and had someone in mind. Hemp testified that because the vacancy was occurring near the winter season which is a hectic time in the Department, filling the vacancy as quickly as possible was important. If no one in the Department was qualified, going outside would be necessary and so getting started, in case there were no qualified internal candidates, was important. The record discloses that 100 applicants from the outside applied for the position. The record also establishes that the County Highway Committee was directly and substantially involved in the screening and selection of the applicants to be interviewed. It was not Hemp's decision alone. Meanwhile, Grievant was awarded the position and given the qualifying period. I do not believe the evidence establishes that Hemp did not intend on letting Grievant succeed because he had already picked someone that he wanted from the outside. I also note that the first selected applicant from the outside was turned down based on a background check by the County Corporation Counsel.

The Union also noted that three employes who filled vacancies immediately before the Grievant filled the shop clerk vacancy received 50-day qualifying periods, but Grievant asked for an additional thirty days and was turned down. (Jt. 23) Hemp testified that he felt the

Grievant's request for an additional thirty days on his twenty-day trial period on the same day as he was awarded the job was premature. (Jt. 24) Further, Hemp stated that time was of the essence because Skar was retiring with a contemplated last day of work of November 18, 1994. (Jt. 5) I find that the three other positions are different jobs than the subject job and there is nothing in the record to indicate that the employees awarded those positions had ever performed in the jobs as had Grievant in the shop. As the labor agreement leaves it to the County's discretion to award an additional thirty days on the qualifying period, and due to the different nature of the jobs, I do not find under the circumstances present in this case that Hemp's refusal to grant the Grievant's request for an extension before the trial started to be evidence of unfair or discriminatory treatment.

The Union asserted that the County did not believe anyone in the Highway Department was qualified for the clerk position based on the minutes of the Highway Committee meeting where the perceived lack of qualified employees was discussed. (Jt. 4) I do not regard this conversation in a Highway Department meeting months before the job was posted as being anything more than conversation. The Union states that Hemp, who had been with the Department only a short time, could not have known the employees well enough to know whether there were employees within the Department who might qualify as clerk. On the other hand, when the Grievant did not receive the clerk job permanently, the Union argued that Hemp should have known there were three other employees in the Department who had the background necessary for qualifying for the position. Hemp stated that he was unaware of the qualifications of other employees and that he went to the outside when Grievant failed because no other employee had signed the clerk job posting. Based on the record I do not find the Highway Committee's discussion or the failure to seek other employees within the Department for the job as evidence of an intent to ensure Grievant did not succeed in the position.

The Union also argued that Grievant was treated differently than other employees as no one else had ever been required to provide a resume or document their background. The posting language of Article 7, Section 1 requires the posted vacancy be granted to the most senior "qualified" applicant. Requiring evidence of their prior training and experience in order to determine their qualifications is reasonable, prudent and necessary in order to determine which applicants are, in fact, qualified. Insisting that Grievant do so in this case, for this position, whether it was required or necessary in prior postings for other positions, was contractually permissible. Furthermore, there is no record evidence to suggest a binding practice existed to nullify this contractual right.

Last the Union argued that Farnsworth, the off-the-street candidate, received more training than did the Grievant. The record is less than complete as to the circumstances of the training of Farnsworth. Employee Lind testified that he spent one week training Farnsworth. Farnsworth was subject to a year probation period as a new employee under the labor agreement. Farnsworth was new to the Department; Grievant had been in the Department 24 years. Grievant had also been training with Skar over a period of 2½ years. Even if over that

period Grievant had been in the office with Skar for the equivalent of only 7½ months this is certainly longer than the training of Farnsworth, at least according to the record. Thus, I do not find the evidence of the training of Farnsworth establishes that the County treated Grievant in a discriminatory manner.

Based upon the foregoing and the record as a whole, I enter the following

AWARD

The County did not violate Article 7, Job Posting, of the collective bargaining agreement when it removed Grievant from the Timekeeper/Shop Clerk position and returned him to his previous Patrolman position. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 17th day of March, 1999.

Thomas L. Yaeger /s/

Thomas L. Yaeger, Arbitrator