

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE VILLAGE OF ASHWAUBENON

and

**ASHWAUBENON PUBLIC SAFETY
OFFICERS' ASSOCIATION**

Case 40
No. 57211
MA-10551

(Diane Lawler Grievance)

Appearances:

Mr. Aaron Halstead, Shneidman, Meyers, Dowling, Blumenfield, Ehlke, Hawks & Domer, S.C., Attorneys at Law, 217 South Hamilton Street, Suite 400, Madison, Wisconsin 53701-2155, on behalf of the Association.

Mr. James R. Korom, vonBriesen, Purtell & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, on behalf of the Village.

ARBITRATION AWARD

According to the terms of the 1996-1998 collective bargaining agreement between the Village of Ashwaubenon, Wisconsin (Village) and the Ashwaubenon Public Safety Officers' Association (Union or Association), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding whether the appointment of Officer Diane Lawler to an Investigator position was appropriate under the labor agreement and/or the Job Specialty Criteria Agreement of January, 1998. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was scheduled and held on April 14, 1999, at Green Bay, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed that they would file

their briefs for exchange by the Arbitrator postmarked May 28, 1999 and that they would waive reply briefs. The Arbitrator received the parties briefs on June 1, 1999, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to an issue or issues for determination in this case. However, they agreed to allow the undersigned to frame the issue based upon the relevant evidence and argument in this case as well as the parties' suggested issues. The Association's suggested issue is as follows:

Did the Village's appointment of Diane Lawler to the Investigator position violate the collective bargaining agreement and/or the Job Specialty Criteria of January, 1998? If so, what is the appropriate remedy?

The Village suggested the following issues for determination:

Is the grievance timely? Did the Village's appointment of Diane Lawler to the Investigator position violate the collective bargaining agreement? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, and having considered the parties' suggested issues, I find that the District's first issue -- Is the grievance timely -- must be determined first. Should I find the grievance timely, I find that the Union's substantive issue (quoted above) reasonably states the dispute between the parties and it shall then be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE XXXV

AMENDMENT PROVISION

This Agreement is subject to amendment, alteration or addition only by subsequent written agreement between and executed by the Village and the Association where mutually agreeable. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future endorsement of all its terms and conditions.

ARTICLE XXXVI

GRIEVANCE PROCEDURE

Purpose: The purpose of this procedure is to provide an orderly method of resolving differences.

Definition: A grievance is defined as any complaint by an employee involving interpretation, application or alleged violation of a specific provision of this Agreement, or where a policy or practice relating to wages, hours or conditions of employment is considered improper or unfair, or where there has been a deviation from or the misinterpretation of or misapplication of a policy or practice relating to wages, hours or conditions of employment.

Procedure: Step 1. All complaints shall be submitted in writing to the Director, with a copy going to the Village President, within ten (10) days after the occurrence giving rise to the grievance. Action shall be taken by the Director within ten (10) days of submission.

Step 2. If the complaint is not satisfactorily resolved at Step 1 above, the employee shall then submit the complaint in writing to the Village President, with a copy to the Chairman of the Finance & Personnel Committee, within ten (10) days of the decision of the Director. Action shall be taken by the Village President within ten (10) days.

Step 3. If the complaint is not satisfactorily resolved at Step 2, the employee shall submit the complaint to the Finance & Personnel Committee within ten (10) days of the decision at Step 2. The committee will make a recommendation for response to the Village Board within ten (10) days of the submission at Step 3, and the Board shall issue a written decision within ten (10) days of receipt of the committee's recommendations.

Step 4. If the complaint is not satisfactorily resolved at Step 3, either party may request arbitration within ten (10) days after receipt of the decision at Step 3. Said party shall file a request to arbitrate with the Wisconsin Employment Relations Commission (WERC). The WERC shall appoint an arbitrator from its staff to hear the differences of the parties and make an ultimate and binding decision regarding the interpretation or application of a specific provision of the Agreement. The party so petitioning shall send a copy of the request to arbitrate to the other party at the time said request is sent to the WERC.

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**RELEVANT PORTIONS OF THE JOB
SPECIALTY CRITERIA AGREEMENT**

ARTICLE XXXV: AMENDMENT PROVISION

This Agreement is subject to amendment, alteration or addition only by subsequent written agreement between and executed by the Village and the Association where mutually agreeable. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future endorsement of all its terms and conditions.

...

It is the agreement of the Ashwaubenon Department of Public Safety's Officers Association and the Director of the Department that the attached guidelines and criteria required to fill the Department's Job Specialties will be followed during the assignment of officers to fill these specialties.

It shall also be understood, whereas all specialties require the officers to meet minimum standards (evaluation) for one year prior to accepting a specialty. And that during the time between the last evaluation and the next evaluation (no more than 7 months) an officer has received discipline (not pending) which will result in that officer not meeting standards in any area on the evaluation, that officer may not apply for the specialty position without first going through and passing the appeals process.

...

EXEMPTION

Whenever an opening exists in a specialty area, and no officer meeting the minimum requirements to apply for the position is interested in the position, an officer who has met the evaluation standards for one year, however does not meet other minimum requirements, may fill the position upon approval from the Director.

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APPEALS PROCESS

Whenever an officer who has not met the evaluation standards for one year wishes to apply for a specialty position, he/she needs to make a request for appeal in writing to the Director.

The appeals process will consist of a panel of two supervisors and two association members. These positions will be assigned for a period of one year with options for additional renewals.

The panel will also have at least one alternate in cases of conflict of interest or unavailability at the time needed for disposition of the matter. Upon a request for appeal the panel will convene and gather information from both the officer concerned and his/her supervisor regarding the matter.

The panel will then provide a decision regarding the officers request. A vote of at least 3 panel members in favor of the appeal is necessary for the appeal to pass.

Since an officers (sic) personnel file is confidential, the officer must enclose in his/her request for appeal, a statement allowing only the panel, access to documents/paperwork concerning the matter.

JOB SPECIALTY/1997

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Liaison Officer/6th through 12th:

Note: Outside interview

Meet standards for one year; off probation; five years with the department; psychological exam

...

Investigator:

Meet standards for one year; off probation; five years with the department; outside testing/evaluation. 1/

1/ This document was signed by Association President Magestro and Department Director Konopacki on January 30, 1998.

BACKGROUND

The Department of Public Safety (DPS) employs approximately 30 bargaining unit employees (represented by the Union) to perform law enforcement, firefighting, and paramedic/EMT functions. The DPS also employs Investigators and DARE and School Liaison Officers. To fill various openings in the DPS (including Investigator positions), eligibility lists are routinely created, based on the results of testing, interviews and other criteria including years of experience with the DPS. Before 1998, there was a practice that the minimum number of years of experience necessary to receive an Investigator position was three years.

Eligibility lists which were established ranked candidates based on the criteria used. These lists were then used to fill vacant positions which arose over time during the validity of the list, with the highest-ranked candidate on the list who agreed to take the opening. In 1991, 1995 and twice in 1996, the Village considered the viability of an eligibility list used by the DPS. In December, 1991, the Board set a one-year period for retention of the-then-current eligibility list following the promotion of Officer Matson to sergeant. Again, in July, 1995, the Board approved the retention of the same eligibility list for an additional 18 months. In June and September, 1996, the Village Board approved the continued retention and use of the same eligibility list which was then over four years old.

On October 22, 1997, the DPS notified its PSO's that the DPS would be filling an Investigator position vacated by then-Investigator Magestro who had posted for patrol. The notice, received by all PSO's, also included a three-page memo detailing the selection process (which would result in a new eligibility list being created) and also stated as follows:

. . .

. . .All officers of the department with three (3) years Law Enforcement experience (any agency) and off probation are eligible to apply. This position will start on January 1, 1998.

Any officer who is eligible for this position should apply by submitting a letter of intent to the Director. A letter regarding your qualifications for this position should be attached to your letter of intent. Please see the attached memo regarding the selection process for Investigator.

...

Officers Broza and Lawler were the top two names on this eligibility list. Broza received the first open Investigator position in January, 1998.

Effective September 1, 1998, Lawler was promoted to Investigator. A memo to this effect was distributed and posted for all personnel to read on August 14, 1998. Union President Magestro saw the notice within a day or two of its posting. It was not until September 16, 1998 at a Union meeting that Magestro was told by unit members in attendance that Officer Lawler lacked the five years' experience necessary to become an Investigator under the language of the JSC Agreement. On September 17, Magestro spoke to Chief Konopacki and asked the Chief how Lawler could have been promoted to Investigator when she lacked the necessary job experience required by the JSC Agreement. The Chief indicated that he thought that all that was necessary was that Lawler have three years' experience. 2/

2/ Since 1990, all postings for Investigator positions have stated that a requirement of three years' experience is necessary for the successful applicant. Specifically, openings in 1992, 1993 and 1997 stated a three year experience requirement.

On September 18, 1998, Union President Magestro sent a letter to the Chief which read, in relevant part, as follows:

...

The purpose of this letter is to confirm the Association's stance regarding the appointment of Officer Lawler to the position of Investigator. Per our discussion on September 17, 1998, the "Job Specialties" criteria specifies that an officer have five years experience with the department prior to their assignment to the position of investigator. We have copies of the original documents signed by both you as (the Director), and by myself (as Association President) dated January 30, 1998.

We understand that it is your contention that Officer Lawler tested for this posting prior to the signing of this document, and that she was eligible under the three years of service requirement. Again, Officer Lawler was appointed to her current position in September of 1998, eight months after the Job Specialties criteria was signed and put into force.

Based on the logic you have used to keep Lawler in her position, all interested officers should have been allowed to post for that position, and simply have to put in their time until they meet the requirements. This would include anyone not having achieved the required years of service, but also anyone with a pending negative performance evaluation.

The remaining officers on the list meet the requirements specified in the "Job Specialties" criteria. The Association seeks to have the investigative branch position filled with one of those Officers.

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The Chief responded to the September 18 letter, the grievance herein, on September 23, 1998 denying the grievance as "not filed in a timely manner." 3/ The grievance proceeded through

3/ The Union made an offer of proof which included several documents which the Union argued would show that the Village has in the past been very lax regarding the timeliness of the filing of grievances. Although I allowed the Union to make a full offer of proof regarding this issue, I find that this evidence is inadmissible hearsay in this case, and I have not considered it herein.

the grievance procedure being denied by the Village Board on January 15, 1999 by letter which read, in relevant part, as follows:

...

The Village Board has authorized me to indicate to you that the Village Board denied the grievance dated September 18, 1998, which was forwarded to John Konopacki and hence forwarded to the Village Board for review. The Board feels that the Job Specialties Criteria Agreement put into force as of January 30, 1998 addressed any eligibility list to be created from that date forward.

Since Officer Lawler posted for an eligibility list that existed prior to that date, the Village Board approves and re-enforces the appointment of Officer Lawler to the position of Investigator.

...

The Union and the Village have, on several occasions, entered into side agreements which have altered the terms of the labor contracts between them under certain circumstances and for limited periods of time. In 1993, 1994 and 1995 the parties entered into side agreements affecting hours of work ("California Plan"), vacation and personal day scheduling. These changes to the labor agreement were each embodied in written agreements between the Village and the Union and executed by officers of both entities. In each case, the Village Board ratified the agreements and the executed agreements specifically stated that these agreements were intended to amend the labor contract.

The JSC Agreement evolved over many years. The Chief was not involved in any of the discussions which led to this agreement and stated he failed to read the JSC before he signed it on January 30, 1998, then believing it contained a 3-year (not 5-year) experience criteria for Investigators. During discussions which resulted in the JSC Agreement, no discussions were held regarding whether grievances could arise under the agreement; no discussion occurred regarding the viability of existing eligibility lists; and no discussion occurred concerning the meaning of the word "guidelines" or whether the document would apply retroactively as well as in the future.

POSITIONS OF THE PARTIES

Union

The Union argued that its complaint regarding the promotion of Officer Lawler to Investigator is a "grievance" within the meaning of Article XXXVI. In any event, the Union urged that arbitrators construe grievances in favor of arbitrability wherever possible. In addition, the Union contended that the grievance was not untimely because Officer Magestro filed it as soon as he became aware of the facts giving rise to the grievance. The Union noted that the Employer failed to show that Magestro was at all negligent in filing the grievance and therefore the grievance should be found procedurally arbitrable.

In regard to substantive arbitrability, the Union argued that the Director had authority to enter into the JSC Agreement in his position as Director or, at the very least, that he had the apparent authority to do so. In this regard, the Union noted that the Director held himself out as the head of the department with authority to speak on behalf of the Village and that the Union relied on the Director's actions in this regard to its detriment, thus meeting all conditions of the doctrine of apparent authority. Contrary to the Village's assertions, the

Union asserted that by its letter of January 15, 1999, the Village evidenced its agreement or apparent ratification of the JSC Agreement. Whether the Director read the JSC Agreement before he signed it was not relevant in the Union's view, as the document would nonetheless be enforceable. In this regard, the Union noted that courts have generally held that where an agent has every opportunity to read and consider a document but fails to do so, the document will be enforceable despite the fact that that agent failed to act reasonably in checking and reading the document before executing it. In any event, the collective bargaining agreement does not say that a Village policy or practice must be ratified in order to be enforceable under Article XXXVI. Thus, the Union asserted that the Arbitrator should find the grievance arbitrable and proceed to the merits.

The Union argued that the Village violated the JSC Agreement. The Union noted that nothing in the Agreement limits the applicability of that Agreement to eligibility lists created after January 30, 1998. As the Village filled the Investigator slot with Diane Lawler after it entered into the JSC Agreement, the Village should have followed the JSC and placed an officer in the Investigator position who had at least five years' experience with the Department. Furthermore, the Union urged that the JSC is a "policy" within the meaning of the definition of a grievance contained in Article XXXVI; that the JSC Agreement relates to wages and hours and conditions of employment; and that the Village has either deviated from it or misinterpreted or misapplied the JSC Agreement, thus requiring that arbitration of the substantive issues herein be resolved in a ruling for the Union.

The Union therefore sought that an officer be placed in the Investigator slot currently held by Lawler who was the person highest on the eligibility list which existed on August 14, 1998 and who also had five years of experience as of that date, and that that person be made whole from September 1, 1998 forward.

Village

The Village argued that the grievance was untimely filed and should be dismissed on that basis. The Village noted that the Union was seven days late in filing the grievance after the promotion took effect and 25 days late after the August 14, 1998 memo announcing Lawler's appointment to the position. As the contract requires that grievances be filed within ten days after the occurrence giving rise to the grievance, the Arbitrator should dismiss this grievance as untimely. In addition, the Village noted that it argued on timeliness at the first and second steps of the grievance procedure and that the Employer's later response (January 15, 1999) cannot constitute a waiver of its timeliness objection.

The Village argued that the grievance is not substantively arbitrable on various grounds. In this regard, the Village noted that the JSC Agreement was an extra-contractual agreement which related to a non-mandatory subject of bargaining. As the Union cited no contractual provision that has been violated, and as the JSC Agreement is extra-contractual, the grievance regarding the JSC should not be arbitrable.

In addition, the Village urged that the record failed to show that the Village properly executed the Agreement and made it a formal amendment of the contract as past practice would have required it to do if the JSC Agreement were to be considered enforceable under the collective bargaining agreement. Also, the Village urged that because the JSC Agreement is not related to wages, hours or conditions of employment but relates to minimum qualifications (a permissive subject of bargaining), it is not arbitrable under the parties' labor agreement. Furthermore, the Village urged that Article XXXVI limits arbitrable grievances to those relating to the interpretation or application of a specific provision of the contract in Step 4 which refers to the type of Award an arbitrator may issue. As Step 4 specifically limits the arbitrator to issuance of an Award regarding the interpretation or application of a specific provision of the contract and the contract specifically prohibits the arbitrator from altering the contract's terms, the Arbitrator may not reach the merits herein.

In any event, the Village urged that there was no "meeting of the minds" on the specific point in the JSC Agreement that required officers to have five years of experience to be considered for an Investigator position, as the Director believed the Agreement contained a three-year experience requirement when he signed it. In addition, the Village noted that, by its own terms, the JSC Agreement was intended only to provide "guidelines". Whether the Union's actions in gaining the Director's signature on the document were intentionally misleading or the result of some kind of mistake, the Village noted that the parties would never again make an extra-contractual agreement if a grievance such as the instant one, were sustained. Finally, the Village observed that the Director would not have appointed Lawler to the Investigator position had he actually known that a five-year experience requirement was contained in the JSC Agreement, thus requiring a conclusion that the Director's testimony was credible.

In any event, the Village argued that the contract has not been violated in this case, and that the grievance should be dismissed. In this regard, the Village noted that the JSC Agreement, by its own language, only applies to future promotions; that in arbitration, arbitrators generally construe language in order to avoid a forfeiture; and that Lawler never waived her rights under the contract and past practice after having been placed on the eligibility list. As Lawler was on the list and qualified before the criteria agreement was signed, she should not be penalized under these circumstances. As the JSC Agreement constituted mere guidelines which were not mandatory, and not expressly retroactive, the Village urged that the grievance should be denied and dismissed in its entirety.

DISCUSSION

The initial question to be determined herein is whether the instant grievance was timely filed under Article XXXVI. Step 1 of Article XXXVI indicates that all complaints must be submitted in writing to the Director within ten days after the occurrence giving rise to the grievance. In the instant case, the occurrence giving rise to the grievance was the appointment of Officer Lawler on September 1, 1998. The question then arises, when could the Union have reasonably discovered Lawler's lack of 5 years' experience, making it clear that a grievance regarding Lawler's appointment might be necessary.

Although the Village submitted evidence to show that all employees were notified that Lawler would be promoted by its memo dated August 14, 1998, the Village failed to submit any specific evidence stating that Magestro (or the Union) was aware of Lawler's seniority date prior to September 16, 1998. Indeed, the record showed that the first moment at which Magestro became aware of Lawler's seniority date (and that Lawler did not have five years' experience as of September 1st) was at the Union meeting on September 16th, and not before. Although the Village implied that all officers were aware of each other's seniority dates by reason of their badge numbers, the Village failed to place any specific evidence supporting this claim into the record in this case. Furthermore, there was no evidence to show that seniority dates for PSO employees were posted in the Department or that employees were otherwise made aware of the seniority dates of their fellow officers. It should also be noted that after Lawler's actual level of experience was brought to his attention on September 16th, Magestro promptly filed the instant grievance. Therefore, and in the absence of any evidence showing that Magestro was negligent or otherwise knew that Lawler lacked 5 years' experience prior to September 16th, I find that the Union filed the grievance herein within ten days of Magestro's reasonably discovering Lawler lacked five years' experience, and that, therefore, it was timely filed.

A contrary conclusion is not required by the explanatory language contained in Step 4 of the labor agreement as argued by the Village. In this regard, I note that the definition of a grievance contained in Article XXXVI specifically states that a grievance is "any complaint...involving interpretation, application or alleged violation of a specific provision of this Agreement, or, where a policy or practice relating to wages, hours or conditions of employment is considered improper or unfair, or where there has been a deviation from, or the misinterpretation of, or misapplication of a policy or practice relating to wages, hours or conditions of employment." Thus, the language contained in the labor contract defining a grievance is quite broad, and specific. As such, this definitional language would control this case. The more limiting language contained in Step 4, merely addresses the WERC's appointment of an arbitrator from its staff to make a final and binding decision "regarding the

interpretation or application of a specific provision of this Agreement.” 4/ In my view the more specific language of the Definition section of Article XXXVI controls over the parenthetical or explanatory language contained in Step 4.

4/ The fact that decisions regarding a policy or practice are not mentioned among those which would be final and binding, does not mean that such cases could not be brought under Article XXXVI. However, there could be a question regarding whether an arbitrator's decision regarding a policy or practice would, in fact, be final and binding.

In any event, it could be argued that the Union's grievance seeks an interpretation or application of Article XXXV relating to Amendment of Provisions. In this regard, I note that the Union has argued that the JSC Agreement has amended the collective bargaining agreement. The instant grievance falls squarely within the definition of a grievance contained in Article XXXVI, either as involving the interpretation or application of Article XXXV, or regarding whether a valid policy or practice relating to wages, hours or conditions of employment has been deviated from or misapplied by the Village.

The Village has argued that the JSC Agreement does not relate to wages, hours or conditions of employment. I disagree. In this regard, I note that the JSC Agreement has an effect on the wages and hours of employees as well as their other conditions of employment should they be selected under the criteria for an Investigator or other position. Whether the JSC Agreement is permissive, is an entirely different matter, not properly before me. As the JSC Agreement has not been made a part of the collective bargaining agreement or in any way incorporated therein, I need not address this issue. In all of the circumstances of this case, I find that the grievance is properly before me both procedurally and substantively.

I now turn to the merits of this case. In my view, the Village is correct in its assertion that the Village and the Union never entered into a formal amendment of the collective bargaining agreement by their execution of the JSC Agreement on January 30, 1998. The parties' failure to state therein that the JSC Agreement was intended to amend the parties' labor agreement and that the Village failed to ratify the JSC as the Village had always done in the past with other formal contract amendments, supports this conclusion. I note that the language of the JSC Agreement indicates that it should be applied prospectively. In this regard, it is clear that the JSC speaks prospectively -- of the "minimum requirements to apply" for a position and that the DPS "may fill the position upon approval from the Director of exception to the minimum standards." Furthermore, the appeals process of the JSC

Agreement, is also intended to be applied in the future only. It is significant that the JSC Agreement does not state that a new eligibility list will be created or in any way address the use of existing eligibility lists. It is clear that the Department has used its eligibility lists for extended periods of time, without any complaints thereon being lodged by the Union, and that employees have been selected from those lists. The record in this case also demonstrated that the parties never discussed whether the JSC Agreement would have retroactive effect, whether existing eligibility lists would remain viable in the wake of the JSC Agreement, or whether grievances could arise under the JSC Agreement.

In all of these circumstances, I find that the JSC Agreement was intended by the parties to be prospective only and, absent specific language to the contrary, that the JSC Agreement does not apply to the Investigator opening which Officer Lawler was granted based upon the October 22, 1997 eligibility list which specifically stated a three-year experience requirement for Investigator. Having reached this conclusion, I find that it is unnecessary for me to address the parties' arguments regarding apparent authority and a "meeting of the minds" between the Director of the DPS and the Union on the issue of the five-year experience requirement. Based upon the above analysis and my consideration of all of the relevant evidence and argument in this case, I issue the following

AWARD

The grievance was timely filed. The Village's appointment of Diane Lawler to the Investigator position did not violate the collective bargaining agreement and/or the Job Specialty Criteria of January, 1998. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 2nd day of August, 1999.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

SAG/gjc
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