

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**DOOR COUNTY COURTHOUSE EMPLOYEES,
LOCAL 1658, AFSCME, AFL-CIO**

and

DOOR COUNTY

Case 115
No. 57864
MA-10762

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Grant P. Thomas, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Door County Courthouse Employees, Local 1658, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Door County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties waived the arbitration panel provided for in the agreement and the Union made a request, with the concurrence of the County, 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 Sturgeon Bay, Wisconsin, on October 19, 1999. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on January 6, 2000.

BACKGROUND

On January 26, 1999, the County posted a vacant Clerk Typist I, part-time position in the Real Property Listing Office. (Ex. 2) The job description for the posted position provided under "KNOWLEDGE, SKILLS, ABILITIES, AND EXPERIENCE REQUIRED," the following:

2. Ability to read, comprehend and follow simple to moderately complex legal descriptions on a map. (Ex. 3)

The grievant, a Clerk Typist I in the County's Planning Department, submitted a job posting form for the position. (Ex. 4) The grievant listed her education information and stated the following:

My duties at the Planning Dept. have provided me with some background in property maps through copying, filing and typing letters pertaining to various maps and surveys and "other property" issues.

The grievant also listed her clerical skills, employment experience and personal references. The County denied the grievant this position by letter dated February 5, 1999, indicating that she was not qualified for the position and stated the following:

Specifically, the information you provided did not indicate that you had the ability to read, comprehend and follow simple to moderately complex legal descriptions on a map. (Ex. 5)

The grievant was the only bargaining unit employe to apply for the position and after her rejection, the County filled the position by an outside hire. The grievant grieved her non-selection which was processed through the grievance procedure to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the Employer violate the collective bargaining agreement by not awarding the vacant Clerk Typist I position in the Real Property Listing Office to Jean Kezo?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 6 – SENIORITY

. . .

D. **Job Posting:** Definition of a vacancy shall include job openings created either by an employee leaving the position or a newly created position.

Notice of vacancies shall be posted within five (5) working days after the vacancy occurs in each department for a minimum of three (3) working days. The notice of posting shall include the following minimum information: wage rate, hours of work, department, position title, job description, and qualifications. Any employee desiring to fill any such posted vacancy shall make application in writing at the Human Resources Office. After the conclusion of the posting period, the application shall be opened at the Human Resources Office in the presence of a representative of the Union and a representative of the Executive and Personnel Committee, or its designee, at a time to be mutually agreed upon.

Whenever any vacancy occurs, it shall be given to the senior qualified employee within seven (7) work days after the completion of the posting period.

. . .

F. **Trial Period:** An employee, upon being promoted or transferred to another classification, shall serve a trial period of ten (10) work days in the new classification. An employee who cannot do the work of the new classification, within the ten (10) work day trial period, shall be returned to his or her former position. The Employer may step the employee back to his or her former position at any time during the trial period provided that such action is not arbitrary, capricious, or unreasonable. The employee may return to his or her former position if he or she so elects during the initial ten (10) work days of the trial period upon written notice to his or her Department Head.

As provided herein, the employee shall be entitled to the pay rate for the position he or she is promoted or transferred to, effective the date the employee performs the functions of the new position, unless the employee is stepped back or returns to his or her former position. The ten (10) work day trial period may be waived by mutual written agreement between the parties. Continued service beyond the ten (10) work day trial period shall be deemed evidence of satisfactory completion of the trial period.

UNION'S POSITION

The Union contends that the grievant was qualified for the vacant position. It refers to her testimony that in the Planning Department she has been filing surveys for the Real Property Listing Department and other filing by legal description and tax parcel number and finds zoning on parcels using the plat book, plat maps and zoning maps using section, town and range as well as using quarter section and quarter-quarter section descriptions. It points out that no one asked her if she can follow legal descriptions on a map, no one interviewed her, she was not given a test and although she inquired where she could learn legal description reading, NWTC provided no such course.

It insists that the grievant believed her application was sufficient information for the County, no one asked for a resume or further information and she was not told she had been rejected because of not filing additional information. The Union refers to the testimony of David Sautebin, a Zoning Administrator for the County for over 20 years, who uses legal descriptions in his work and files surveys by Tax Parcel Number. It observes that Sautebin orients others on how to use legal descriptions which takes one to two days of 20 minutes to an hour and the employe knows what they are doing in two or three days relating to maps and finding parcels of land. According to the Union, Sautebin stated that if an employe knows section, town and range, the learning time is shorter for other legal descriptions. Sautebin, the Union submits, is familiar with the grievant's duties and she uses Tax Parcel Numbers including section, town and range and that her filing is the most up to date, accurate and timely in his 25 years with the County. The Union notes that Sautebin orientated employes on "metes and bounds" legal descriptions and it is not difficult to learn this in a couple of days and legal descriptions are usually learned on the job.

The Union argues that the successful applicant's application and resume gave no indication she had the ability to read, comprehend and follow simple to moderately complex legal descriptions on a map. It submits that she was given a test and an interview. It points out that while this applicant is no longer in the position, she held it for four months and found most of the information she needed on the computer.

The Union observes that the Personnel Director testified that the process for hiring from the outside is different from the inside. It refers to the Department Head, Holly Hansen, who believed, based on the grievant's application, that she was not qualified but admitted that previous employes learned to use legal descriptions in other departments.

The Union argues that the grievant was not given the same opportunity to demonstrate her qualifications as an outside applicant. It observes that the County gives a current employe one chance to qualify through application, whereas an outside applicant is allowed to test, interview and serve a trial period. It contends that the grievant should have been given a trial period because she is in the same class as the vacancy and routinely worked with legal

descriptions. It alleges that the County was arbitrary and capricious in denying the grievant the position. It insists that the grievant should be given the position plus back pay for the difference between her sixteen (16) hours per week and the thirty-two (32) hours per week for the vacancy. It argues that the County avoided hiring an internal applicant because it would take a qualified person from one department and require orienting him/her for another. It asserts that as a result, the County hired an unqualified applicant who did not work out. It concludes that the grievant should be offered the job and made whole.

COUNTY'S POSITION

The County contends that where the collective bargaining agreement is clear and unambiguous, the intent of the parties is to be found in the language of the contract and it asserts that Article 6, paragraph D. is not susceptible to more than one reasonable interpretation. It notes that a vacancy must be awarded to the senior qualified employee, but seniority is not the sole basis for selection and being qualified is equally important. It points out that the terms "senior" and "qualified" are not defined and must be given their common and ordinarily understood meaning and it cites dictionary definitions to establish their meaning.

The County alleges that the job description lists the necessary requirements and qualifications for the position. It observes that the grievant submitted a Job Posting Form but elected not to include any supplemental attachments. It insists that it was the grievant's duty to establish that she was the "senior qualified employee." It submits the County's determination as to whether she was the "senior qualified employee" was based solely on the Job Posting Form and the County, exercising sound and reasonable decision making, concluded the grievant did not possess the qualifications nor met the requirements for the position. The County asserts that the Arbitrator should only consider the Job Posting Form as that is what the grievant submitted and that is what the County considered, and so extraneous evidence should not be used. It believes that the evidence with respect to the outside hiring process is outside the collective bargaining agreement and job posting under the contract is what the parties bargained for, nothing more or less, so the outside hiring process is not pertinent or relevant to any issue in this case and should be ignored.

The County relies on a prior decision between the parties, DOOR COUNTY, CASE 103, NO. 54678, MA-9753 (JONES, 10/97), which involved similar facts and the Arbitrator concluded that the standards to be used in determining qualifications are left to the County and its decision will not be overturned unless it is unreasonable, arbitrary or capricious and the grievant's qualifications are determined from the same information considered by the County. The County maintains that this decision is on point and supports the position advanced by the County.

The County contends that the grievant was required to mitigate damages and failed to apply for the position through the outside hiring process, failed to post for a subsequent vacancy in this same position and failed to apply through the outside hiring process a second time, thus she failed to mitigate the claimed damages and is not entitled to any recovery. It concludes that the grievant did not meet the burden of proving her case and it asks that the grievance be denied.

UNION'S REPLY

The Union contends that the testimony about outside hiring is relevant. It argues that the County does not want to be held responsible for its lack of credibility in determining what qualifications are required. It claims that if outside applicants are considered under lesser qualifications, then that lesser standard applies to bargaining unit employees, otherwise the job posting procedure means nothing. It submits the end result is that the County prevents movement of employees and allows a department head or some politician to hire friends and political supporters.

The Union asks what is the standard presented here. It cites Elkouri & Elkouri, How Arbitration Works (5th Ed., 1997) for the proposition that the union can challenge the employer's initial determination of qualifications. It insists the County has been discriminatory in employing the outside applicant who clearly did not have the experience and skill the employer wanted, so it discriminated on the basis of union status. It insists that the grievant's use of legal descriptions should have been considered a subject for orientation, so the County was unreasonable. It states that the County was arbitrary and capricious in setting a standard, not providing the grievant with a test and hiring someone that did not meet the standard set for the grievant. The Union distinguishes the prior arbitration between the parties as it involved peculiar facts not present here. It maintains that the grievant should be judged by the standards set for the outside applicant but if the standards set for Union applicants is applied, the grievant was qualified and should be awarded the position. It requests a finding for the Union.

COUNTY'S REPLY

The County contends that the Union attempts to draw parallels between the "job posting" and the "outside hiring" process but no such parallels exist. It maintains that the "job posting" process was the subject of negotiations and is set out in the four corners of the contract, whereas the "outside hiring" process is not addressed within the agreement. It points out that probationary employees do not enjoy the same status or benefits as Union members awarded a position through the "job posting" system. It seeks to exclude consideration of any evidence related to the "outside hiring" process.

The County disputes certain allegations of fact in the Union's brief in chief. The County states that filing documents by tax parcel number does not prepare one to interpret and/or understand "metes and bounds" descriptions as the former involves rote memorization and the latter requires comprehension of legal descriptions of real property. It asserts that the Union makes general claims of wrongdoing by the County, but fails to offer any factual or legal basis for its claims and the Union's mere assertions and conclusions may be disregarded. It asks that the grievance be denied.

DISCUSSION

Article 6, Section D of the parties' collective bargaining agreement provides, in pertinent part, as follows:

Whenever any vacancy occurs, it shall be given to the senior qualified employee . . .

In the instant case, the grievant was the only employe who signed the posting so she was the most senior. The issue in this case is whether or not she was qualified to fill the vacancy. The County insists she was not qualified and the Union insists that she is. In a prior arbitration between the parties, DOOR COUNTY, CASE 103, NO. 54678, MA-9753 (JONES, 10/97), the arbitrator interpreted this same language set out above. The Union argued that the facts in that case differ from the present; however, even if the facts are different, the interpretation of the language and the principles relied on by Arbitrator Jones are equally applicable to the instant case. The word "qualified" is not defined in the parties' agreement and Arbitrator Jones found that in the absence of a contractual definition, the standards to be used in determining qualifications have been left to the County. Also, the determination concerning an applicant's qualifications will stand unless there is proof that the decision was unreasonable under the facts, arbitrary or capricious. Arbitrator Jones also determined that qualifications determined by the County from a review of the Job Posting Form would be considered by the Arbitrator, but not additional information not given until after the position was filled. These conclusions as to the meaning of the contract language will be applied to the instant case.

The Union has argued that the County applied a different standard as to qualifications for inside applicants than for outside hires. The language set out above requires the County to give the job to the senior qualified employe. Thus, a minimally qualified employe must be given the job over a well-qualified junior employe or an exceptionally qualified outside applicant. Additionally, the contract provides a ten (10) day trial period for the minimally

qualified employe. No trial period is required for an unqualified applicant. Thus, the senior qualified employe must quickly demonstrate that he/she can perform the job for which he/she meets the minimum qualifications. The senior qualified employe does not lose his/her job if they fail to perform in the posted position.

On the other hand, an outside employe has no seniority so selection is based on qualifications only, he/she serves a six-month probation and can be terminated without recourse to the grievance procedure. The contract provides no procedures for an outside hire so an applicant cannot challenge the County's selection process or the person selected. A new employe has no track record so the County must make determinations based on information provided and how the applicant might perform in the future rather than on qualifications on the Job Posting Form, and if determined to be "qualified," performance within ten (10) days. The two selection processes are not comparable and comparison of one to the other is like comparing apples to oranges. Also, the record failed to establish that the job description requirements were different for inside and outside applicants.

The sole issue presented here is whether the grievant demonstrated that she was qualified for the vacancy based on her Job Posting Form. The job description required the applicant to have the "[A]bility to read, comprehend and follow simple to moderately complex legal descriptions on a map." (Ex. 3) The grievant, besides listing her education information, clerical skills, employment experience and references, stated that "My duties at the Planning Dept. have provided me with some background in property maps through copying, filing and typing letters pertaining to various maps and surveys and other property issues." (Ex. 4) The County concluded from this information that the grievant was not qualified to read, comprehend and follow simple to moderately complex legal descriptions on a map. This decision has not been shown to be unreasonable, arbitrary or capricious. Merely copying, filing and typing letters related to a subject does not mean the person knows the subject. A person could copy, file and type letters related to medical issues but that would not demonstrate that they could perform as a Nursing Assistant, LPN or RN. A person could copy, file and type letters related to football or personnel matters but that would not indicate that they could coach football or handle personnel functions. The evidence presented here failed to demonstrate that the grievant had the ability to read, comprehend and follow simple legal descriptions on a map. The County's conclusion that the grievant was not qualified for the position because she did not meet this requirement set forth in the job description cannot be found to be unreasonable, arbitrary or capricious and the County's failure to award her the vacant position did not violate the contract.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes the following

AWARD

The County did not violate the parties' collective bargaining agreement by not awarding the vacant Clerk Typist I position in the Real Property Listing Office to the grievant, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 28th day of January, 2000.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator