

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL UNION 1241, WISCONSIN COUNCIL 40,  
AFSCME, AFL-CIO**

and

**CHIPPEWA FALLS AREA SCHOOL DISTRICT**

Case 125  
No. 58592  
MA-11005

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Appearances:

**Mr. Steve Day**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney James M. Ward**, appearing on behalf of the District.

**ARBITRATION AWARD**

Local 1241, Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Chippewa Falls Area School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the parties' agreement. The undersigned was so designated. Hearing was held on May 16, 2000 in Chippewa Falls, Wisconsin. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on July 7, 2000. The parties reserved the right to file reply briefs but neither did and the record was closed on July 17, 2000.

**BACKGROUND**

In the summer of 1997, the District created the position of Staff Training Assistant which was a half-time school year position starting August 25, 1997. (Ex-3) Michelle Alix was hired to fill the position. The anticipated tasks were to assist with purchasing for the

technology portion of the referendum and assist in teacher training lab (handout production, configuring lab, etc.) (Ex-3) Alix had no NT Administration experience. Alix reported to Jim Hadlock, the Director of Educational Technology. Over time the position increased in hours as well as NT experience which Alix learned from the Systems Engineer and seminars. (Ex-12) In 1998-1999, the position expanded to five hours a day and in 1999-2000 went to full-time. The number of users of the NT Administration operating system went from 40 in 1997 to 5,000 in 2000. The position's title was changed to Software Support and Technology Secretary. In 1998, the Union sought to accrete this position into the bargaining unit. (Ex-10) The District would not agree on a voluntary recognition and noted that the position demanded a high level of computer knowledge and technological trouble shooting skills. (Ex-22)

On July 15, 1999, the Union filed a petition to clarify the bargaining unit to include the position held by Alix. (Ex-21) The District unsuccessfully sought to exempt the position from the contractual posting requirement. On November 10, 1999 the parties reached an agreement on the unit clarification petition with the Software Support and Technology Secretary being accreted in the summer or fall of 2000 and the position posted two weeks before the end of the 1999/00 school year. (Ex-4) In November or December, 1999 Alix informed the District that she was leaving for another job. The District asked the Union to move the posting up and the position was posted on December 9, 1999. The posting was as follows:

• NOTICE OF VACANCY •

<b>POSTING DATE:</b>	December 9, 1999
<b>POSTING DEADLINE:</b>	December 15, 1999
<b>CLASSIFICATION:</b>	<b>SOFTWARE SUPPORT AND TECHNOLOGY SECRETARY</b>
<b>LOCATION:</b>	Korger-Chestnut 12 month position (7:30 a.m.-4:00 p.m.)
<b>LENGTH OF CONTRACT:</b>	Beginning immediately.
<b>SALARY:</b>	As per Master Contract (Clerk Secretary III rate)
<b>FORMER EMPLOYEE:</b>	Michelle Alix <b>(VACANCY #40)</b>
<b>QUALIFICATIONS:</b>	Experience with NT Administration. Experience in HTML and desktop publishing.

Sufficient experience with Microsoft Office and FileMaker Pro to offer software support.

Experience learning software from vendor supplied documentation.

Experience and ability maintaining complex clerical records, preparing reports, and scheduling.

Knowledge of English grammar, business English and spelling.

Knowledge and competence in the use of modern office equipment  
Including MacIntosh and IBM PC compatible computers, FAX,  
Copiers.

Two years experience in a clerical position.

By the last date of posting, a letter of intent to transfer into this position must be received by Larry D. Annett at the Administration Building. (Ex-6)

Five bargaining unit employees posted for the position with the grievant being the most senior. (Exs-5, 6, 7) All five were disqualified on December 16, 1999 because they lacked experience in NT Administration and HTML. (Ex-8) A grievance was filed on December 21, 1999 which was denied at the various steps and appealed to the instant arbitration. The District hired a Manpower employee but he was not able to perform the job. (Exs-10, 19) Alix contacted the District and she was rehired to fill the position.

### **ISSUES**

The parties stipulated to the following:

Did the District violate the collective bargaining agreement when it refused to award the vacant Software Support and Technology Secretary position to the grievant, Shelly Beranek?

If so, what is the appropriate remedy?

### **PERTINENT CONTRACTUAL PROVISIONS**

#### **ARTICLE V – SENIORITY**

. . .

**Section 4 Posting.** When it becomes necessary to fill a vacancy or a new position in the school system, the Board of Education shall bulletin such new

position or vacancy for a period of seven (7) days at each school. Such posting shall state the job to be filled, the hours, location, and pay for the same. The qualified applicant within the system with the longest period of service shall be assigned to the new position or vacancy.

. . .

Bargaining unit employees wherein a vacancy exists, shall be considered first in preference to all other employees.

. . .

**Section 5 Probationary Periods.** Employees being promoted, assigned, or bumped into a new position shall be granted thirty (30) work days to prove their qualifications, after the employee physically occupies the position. Applicants who qualify shall receive the applicable rate of pay of the new position retroactive to the date of change.

. . .

**Section 8 Union Positions.** When new positions created by the Board become Union positions, whether by voluntary accretion or otherwise, such positions shall be posted.

### **Union's Position**

The Union contends its main argument is that this case is not about the qualifications of the grievant but rather the District's continuous attempts to keep one particular outside hire (Alix) in the position, so the District had to disqualify the grievant.

It asserts the District wanted Alix in the position. It observes that Alix was hired into the position in 1997 when it was non-union and once it became union, the District would have to post it and Alix might not remain in the position, so the District attempted to keep it out of the unit and later sought to exclude it from the posting requirement. It notes that ultimately the position was included in the unit but posting was delayed until the end of the school year. It speculates that Alix figured her days of work with the District were numbered and sought another job. It points out that the District sought to post the position immediately and the Union agreed. It surmises the District wanted to post it quickly, disqualify all posters, then award it to Alix to keep her from leaving. It claims this strategy did not work immediately as Alix took another job but was soon hired back in the position.

The Union argues that the District form-fit the minimum qualifications for Alix so no other Union applicants could qualify. It claims the timing of changes made in the job description leave no doubt about the District's intentions as the July, 1999 description did not list NT Administration or HTML experience but after the unit clarification petition was filed, the new job description contained those qualifications. It submits that when the position was posted in December 1999, NT Administration experience and HTML experience were listed as minimum qualifications and no bargaining unit employee has that experience which was the sole basis to disqualify those who posted for the position.

The Union points out that every clerical position in the bargaining unit has had a typing requirement except Noon Hour Aides who perform no clerical work, yet the posting for the Software Support and Technology Secretary has no typing requirement whatsoever and in July, 1999, the job description listed 60 wpm and in August, 1999, 45 wpm, which is what Alix could type and finally no requirement. The Union maintains this is no coincidence as Alix was awarded the job without taking a typing test.

It submits that the grievant has been a Clerk Secretary III for fourteen years and her proficiency in computer applications and software is vast and she met the July, 1999 minimum job qualifications and as to the posting, the only qualifications she did not meet is NT Administration experience and HTML experience.

The Union refers to Article V, Section 5 of the contract which allows a thirty day trial period and the District could have put the grievant in the position and allay any doubts about her ability to quickly learn NT and HTML.

It states that the grievant was disqualified solely on one qualification, NT Administration and this limited type of assessment is frowned upon by Arbitrators.

In conclusion, the Union alleges that the District has not proven that the grievant is not competent for the position, it has only proven the great lengths it will go to retain a favored outside hire. It asks that the grievance be sustained, the grievant awarded the position and made whole.

### **District's Position**

The District contends that it has the right to establish minimum qualifications for the Software Support and Technology Secretary position provided the qualifications are reasonably related to the job. It observes that no provision of the labor agreement can be construed as waiving the District's inherent right to establish qualifications for positions. It cites arbitral support for the position that the decision as to whether or not an employee is qualified will not be upset unless it is found to be unreasonable, arbitrary or capricious, discriminatory or made in bad faith. It states that job-relatedness is the standard by which the reasonableness of any management decision to disqualify an internal applicant is to be judged.

The District claims that NT Administration experience, which is the first qualification listed in the job posting and the job description, is reasonably related to the work performed by the position. It maintains that the reason the position increased from a half-time to a full-time position over the course of two years has been the exponential growth in that operating systems users from 40 to over 5,000. It refers to Alix's testimony that half of her time is spent on NT Administration and the rest at the help desk, trouble shooting, solving user problems and maintenance of the District's website. It submits that the evidence supports the primacy of NT Administration experience among the listed qualifications and is clearly job-related in every sense of the term.

The District points out that the grievant has no NT Administration experience so she was justifiably disqualified from consideration for the position. The District asserts that Article V, Section 4 is a "sufficient ability" clause, i.e. the most senior gets the job provided he or she meets the minimum qualifications. The grievant lacked the minimum qualifications according to the District which checked with the grievant's supervisor and invited the grievant to come forward with any experience she may have neglected to mention initially. The District notes that the grievant acknowledged she had no NT Administration experience. The District points out that Alix acquired her experience from on-the-job training and had the luxury of learning at her own pace as the system grew. It alleges that any successor must have the required NT Administration experience. It cites the example of Mr. Hale who was a temporary employee who had some experience in NT Administration and shadowed Alix for two weeks but could not perform the next two weeks and the grievant with no experience would probably fare no better.

The District insists that the grievant is not entitled to a 30-day probationary period under Article V, Section 5 of the contract. It argues that the language does not give an employee a 30-day grace period to become qualified but the period is to prove their qualifications. It contends this means that the grievant must show that she possesses the minimum qualifications and thereafter perform satisfactorily, substantiating the qualifications so proffered. It cites arbitral authority distinguishing between a trial and a training period as a trial period is not a training period and it is assumed the employee will not have to be trained in all aspects of the job and it is assumed that the employer need not give training but simply familiarization with the job. It insists that the grievant is manifestly unqualified to fill the job and is not entitled to the 30-day probationary period.

The District claims that the Union has failed to demonstrate that the District acted in bad faith in rigging the job posting and job description as a means of assuring that Alix would be retained in the position. It observes that the Union cites the District's historical resistance to including the position in the bargaining unit and the District's "tampering" with the job description once inclusion of the position in the unit appeared imminent, particularly the inclusion of the requirement of NT Administration experience and the exclusion of a typing requirement. It also notes the Union's reference to the District's failed attempt to exempt the position from the posting requirement so Alix would be retained. The District asserts that the

change in the July, 1999 and August, 1999 job descriptions was drafted by Mr. Hadlock before he knew a unit clarification petition was filed. As to the typing requirement, the District submits that the job over time went from clerical to technology-oriented and typing was downgraded to reflect the obsolescence of that requirement.

The District contends that the Union's argument loses all persuasive force because the posting was accelerated due to the need to immediately fill the position when Alix announced her leaving for another job. The District alleges that at that time a new person from inside or outside would take Alix's old job. It notes that the new person would be in the unit and with Alix leaving, why would the District bother to insist on NT Administration experience if it was not in fact necessary to perform the old job. It asserts that the Union presented no evidence to indicate that NT Administration experience is not a bona fide qualification for the position. Also, it points out that Mr. Hadlock's estimate of a 3-6 month learning curve to be proficient was not contradicted by the Union's evidence. It observes that the Union's argument is relegated to the mere proposition that the job description/job posting process smells fishy. The District insists that proposition will not suffice to overcome the District's prima facie case as to the reasonableness of the qualifying criterion of NT Administration experience under the job-relatedness standard. It submits that the grievant was not qualified for the position and the Union failed to prove that the District abused its discretion. It concludes that the grievance is without merit and must be dismissed.

### **DISCUSSION**

It is undisputed that the District could establish a new position. With technology changing so quickly, it is necessary to create positions to perform the functions that new technology requires. It is clear from the record that the District created the position in 1997 (Ex-3) and the position has been increased in time and functions performed. (Ex-5)

Article V, Section 4 provides that when a new position or vacancy is filled, the qualified applicant within the system with the longest period of service shall be assigned to the position. The grievant had the most seniority and the issue in this case is whether or not she was qualified for the position.

The Union has contended that the District "form fit" the qualifications for the position so that only Alix would qualify. Generally, the employer can establish the requirements or qualifications for a position provided they are reasonably related to the duties of the position. Alix testified without contradiction that 50 percent of her duties involve NT Administration. As early as November, 1998, the District informed the Union that the position demands a high level of computer knowledge and technical trouble-shooting skills such that it might be classified differently than other clerical positions. (Ex-22) The Union's claim that the District's setting of qualifications to form fit a specific employee is based on nothing more concrete than implication. The undersigned would have to engage in unsupported speculation

as to the District's motives in setting qualifications. The Union has failed to provide sufficient evidence that the District's requirements to qualify for the position were not reasonably related to the duties. Besides, once Alix announced she was leaving and in fact left, the District's alleged form fitting the position would make no sense.

The District has the authority to determine whether an employee is qualified for a position as long as the decision regarding qualifications is not arbitrary, capricious, discriminatory or unreasonable. *BARBERS POINT FEDERAL CREDIT UNION*, 84 LA 956 (BROWN, 1984). In this case, the grievant admitted she had no NT or HTML experience. Her supervisor indicated that as far as he knew she had no experience using NT Administration software. (Ex-18) It is concluded that the evidence failed to establish that the District's determination that the grievant was not minimally qualified was arbitrary, capricious, discriminatory or unreasonable.

The Union refers to Article V, Section 5 which provides thirty (30) work days to prove an employee's qualifications. As pointed out in the District's brief, a trial period is not a training period. Article V, Section 5 assumes the applicant is already qualified and the trial period allows a qualified applicant the opportunity to demonstrate she can successfully perform the job. An applicant who is not qualified is not entitled to a trial period. *REYNOLDS METAL CO.*, 66 LA 1276 (VOLZ, 1976). Inasmuch as the grievant was not qualified for the position, the contract does not require the District to provide her with a trial period to establish her qualifications.

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

### **AWARD**

The District did not violate the collective bargaining agreement when it refused to award the vacant Software Support and Technology Secretary position to the grievant, Shelly Beranek, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin this 17th day of August, 2000.

Lionel L. Crowley /s/

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Lionel L. Crowley, Arbitrator

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