

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 796, AFL-CIO

and

CITY OF OSHKOSH

Case 317
No. 58952
MA-11125

Appearances:

Mr. Rick Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Davis & Kuelthau, S.C., by **Mr. William G. Bracken** and **Mr. Tony J. Renning**, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "City", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Oshkosh, Wisconsin, on September 25, 2000. The hearing was transcribed and the parties thereafter filed briefs and reply briefs that were received by December 6, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the City violate Article XVII of the contract when it did not select grievant Gregory Postl for the Equipment Operator II position and, if so, what is the appropriate remedy?

DISCUSSION

Grievant Postl works as a bus operator in the City's Transit Department. He in 1999 and 2000 bid for posted Equipment Operator II positions in the City's Department of Public Works, only to be turned down because he did not have two years prior experience in the construction business as required under the job postings. The February 2, 2000, posting and accompanying job description (Joint Exhibits 5 and 8) – which are the subject of his grievance -- stated:

NATURE OF WORK

This is skilled work in the operation of light and medium duty automotive maintenance and construction equipment. Work involves responsibility for the safe and efficient operation of equipment with moderately complex operating requirements which require manipulative skill to operate.

Operation of assigned equipment is normally a full-time or predominate task although other work is performed. Assignments are usually received in the form of orders to accomplish a specific task, pick-up and deliver material or personnel, or drive according to an established route. Work is performed independently, but under the supervision of a foreman or assigned crew leader, and is reviewed through observation by a Supervisor during progress and upon completion considering results attained.

EXAMPLES OF WORK

Operates Single Axle and Tandem Axle trucks – (with and without snow plowing attachments), Combination units, and Tanker units hauling excavation/construction materials, snow, and branches and leaf/grass debris. May operate Vac-All trucks, Jet-Vac trucks, Sewer Steaming equipment, Water Pumps, Power Rodders, small and medium Hydraulic Excavators, Street Sweepers, Flushers, light and medium duty End Loaders, Asphalt Pavers, Melter Applicators, light and heavy Rollers, Road Oilers, Air Compressors, Concrete Breakers, Mixers, Routers, Chain Saws, Concrete Saws, Compactors, Power Concrete Screeds, Mud-Jacking equipment, Leaf Pickers, Brush Chippers, Tractors, Mowers, and similar equipment. Makes minor adjustments and repairs to equipment including checking and changing tires, checking fluid levels, fuel and oil, and other safety equipment, and reports discrepancies to supervisory personnel.

Assists in snow plowing and removal, street sanding operations, builds and repairs manholes and catch basins, lays sewer pipe, assists with street construction and repairs including forming and grading, pouring and finishing concrete, asphalt work, and other miscellaneous street work as it is assigned.

REQUIRED KNOWLEDGE, ABILITIES, AND SKILLS

Through knowledge of automotive equipment operation including possession of a valid Class "A" Commercial Driver's License with Air Brake, Tanker, and Combination Unit endorsements.

Ability to make minor repairs and adjustments to assigned equipment.

Ability to perform assigned tasks in an efficient and timely manner with minimum supervision, and with sufficient skill to recognize potential problems or difficult situations that require further supervisory instruction or consent.

Familiarity of road construction supplies used to repair and maintain asphalt and concrete streets, roads, sidewalks, curbing, and sewer manholes and inlets.

Thorough awareness of material(s) safety data and the use and handling compliance requirement specifications.

Ability to work in adverse or hazardous weather conditions.

OTHER SIGNIFICANT WORK SITE ABILITIES REQUIRED

- 1 - Ability to do ladder work 12 feet height;
- 2- Minimum grip required to operate standard repair and fabrication tools and machines;
- 3- Vehicles;
 - a) As many as six steps
 - b) Open and close doors; push, pull and manipulate large items like heavy duty equipment tires and parts;
 - c) Stick shift
 - d) Lift fifty (50) pounds;
 - e) Up to 32-inch steering wheel/up to 50-inches height

- 4- Overhead work.
- 5- Work in crouching or supine positions.

REQUIRED EDUCATION AND EXPERIENCE

High School Diploma or Equivalent

Two years construction in the construction field operating motorized construction or maintenance equipment.

Valid Commercial Driver's License with Air Brake, Tanker, and Combination Unit endorsements.

That February 2, 2000, posting was awarded to outside applicant Dan McCollian.

Parks maintenance worker Keith Vierola formerly worked as an Equipment Operator I and Construction Crewman in the Street Department. He testified that two employees who transferred from the Transit Department to the Street Department after 1993 did not have two years' construction experience and that the 30-day probationary period in the past had been extended up to six months. On cross-examination, he said that the Equipment Operator I position has been unfilled for about the last ten years and that the Laborer position has also been unfilled for some time.

Grievant Postl, a bus operator for three years, testified about his past experiences which included driving a truck; being in the military and serving in Project Desert Storm; and operating a forklift. He said that he wants to transfer to the Street Department because it involves a 41 cent an hour raise and driving a truck; that he has the applicable driving licenses required for the Equipment Operator II position; that he in the past "helped some people out laying cement", "doing a couple of garage floors", and laying out a driveway; that he has taken safety training as a bus driver; and that he can work from a 12-foot ladder; that he can open and close doors; that he can use a stick shift; that he can lift over 50 pounds; that he can perform overhead work; and that he can do crouching work. He is now taking an engineering correspondence course.

On cross-examination, Postl testified that there is no reference to construction work in his initial job application for employment with the City (Joint Exhibit 7); that he does not have any experience laying asphalt; that he does have the mechanical ability to fix a truck; and that he has had no experience in building or fixing manholes, in grading and setting cement work, in erecting forms for a sidewalk curve, in working on curbs or gutters, or in laying sewer pipe. Referring to "Examples of Work" on the job posting, he also said that he has never operated a

Vac-All truck, a backhoe, sewer steaming equipment, water pump, power rodders, hydraulic excavators, street sweepers, flushers, light and medium-duty end loaders, asphalt pavers, melter applicators, light and heavy rollers, road oilers, concrete breakers, mixers, routers, concrete saw, compactors, power concrete screeds, mud-jacking equipment, leaf pickers, or brush chippers.

Personnel Assistant/Safety Officer Evonne Molinski testified that Postl's application for the Equipment Operator II position did not refer to any construction experience. She also said that the job notice (Exhibit 8), was posted in City facilities and that the Equipment Operator II job description (Exhibit 5), was attached to it; that the construction requirement for that position was added in 1993 because the "Street Department was having more and more difficulty trying to get their jobs done with employees when they have to take time to train them"; and that the City does not have an official training program. She added that the contract on page 16 refers to a 30-working day "trial period" which enables the City to "look at their work record and seniority, and if those match, then we can give them the 30-day trial period to prove that they can do the job." She also said that the 30-day period does not enable an employee to become qualified and explained that two employees from the Sanitation Department - Jerry Sitter and Michelle Briquet - were awarded Equipment Operator II positions even though they did not have two years construction experience because that was the settlement of their grievances. Those settlements also provided that certain grandfathered Sanitation Department employees could post for the Equipment Operator II position for a five-year period even though they may lack two years of construction experience.

Molinski said that Postl was the only internal candidate for the February 2, 2000, posting (which he grieved), and that he was turned down because he lacked the required construction experience, which was why he was not even interviewed for that position. Postl subsequently bid for the same position when it was reposted in April and June, 2000 (Joint Exhibits 12 and 14), and he again was turned down because of his lack of prior construction experience. On cross-examination, Molinski said that Equipment Operator II's "Rarely" work with masonry or cement block and that she did not recall what kind of prior construction experience successful applicants McCollian, Brian Klug, and Eric Schroeder had.

Superintendent of Streets and Sanitation William Rasmussen testified, "We don't have anybody in . . ." the Laborer and Equipment Operator I positions and that the requirement for two years construction experience was added to the job description in 1993 "Because we needed to bring over people that were trained and were able to do the job when they got on board."

He also said that "during the construction season" employees perform concrete or asphalt work "probably 80 percent of the time"; that "You have to have some training for

that”; that “the 30-day period is set up so that we can assess the individual, assuming they have the knowledge and know-how to do the job”; that employees must possess the requisite qualifications before being awarded the job; and that the 30-day period is a two-way street because employees can return to their prior positions during that time if they want to and because the City can similarly return employees to their former positions if it decides to do so. He also said that Postl’s past experience on construction projects was insignificant.

He added that McCollian - who was awarded the disputed February 2, 2000 posting - had two years prior construction experience because he had worked with Miller Masonry which does concrete blocks and cement work and because he had operated forklifts, Bobcats, and done some tractor loader work. He stated that Schroeder - who was awarded a subsequent posting - had prior construction experience because he had operated a ready-mix truck with Murphy Concrete; because he had about 15 years experience in forming and pouring finished concrete; and because he had worked about 13 years on heavy equipment. Rasmussen said that Klug, who also was awarded a latter posting, was qualified because he previously had worked at Michael’s Pipeline where he operated different equipment such as a trencher tractor, loaders and Bobcats. He added that applicants need prior construction experience because “if we are going to spend our time training we don’t have – then we’re not going to get our work done. . .” and because “we’ve got a short window that we have to get all of our concrete patching and our blacktop in . . .”

On cross-examination, he said that the blacktop and concrete crews are headed by working foremen who “lead the other people”; that none of the three recent hires - McCollian, Klug and Schroeder - can operate all of the equipment listed in the Equipment Operator II’s job description; and that none of them had prior experience working on all that equipment before they were hired.

Robert S. Horton, the Assistant Superintendent of Streets and Sanitation, testified about the grievance settlements involving Sitter and Briquet (Joint Exhibits 3 and 4), which enabled them and certain other grandfathered Sanitation Department employees to bid for the Equipment Operator II positions even though they did not have two years’ prior construction experience. He explained that Sanitation Department employees have had preferential treatment when it comes to transferring to “a sister department” and that the settlements provided for a six-month probationary period because employees needed that extra time to prove themselves over the winter when there is little construction work. He also said that Sitter did not meet the criteria and that he was moved back into the Sanitation Department from where he came.

On cross-examination, he said that the issue of Transit Department employees moving into the Streets Department never was discussed when the Sitter and Briquet grievances were settled.

Vierola was recalled as a witness and said that the City did not like the former process which allowed Sanitation Department employees to transfer to the Streets Department and that is why the six-month probationary period was established for them in the settlement of the Sitter and Briquetet grievances.

POSITIONS OF THE PARTIES

The Union contends that the City violated Article XVII of the contract when it refused to award the Equipment Operator II position to Postl and when it therefore refused to allow Postl to serve a 30-day trial period. It argues that he “is well qualified for the Equipment Operator II position” because his “military and other life experiences should be considered equivalent to two years of experience in the construction field”; that “construction work is not the primary duty of most Equipment Operator II’s”; and that the Briquetet and Sitter settlements “do not apply to this matter.” The Union also claims that the minimum qualifications for the Equipment Operator II position “do not reasonably relate to job duties”; that the two-year construction experience requirement “should emphasize the operation of equipment” and that Postl has had experience in operating equipment; and that the City has “allowed employees with far fewer qualifications than Mr. Postl to post into E.O. II positions.” As a remedy, the Union asks that Postl be awarded the position and that he be made whole for any loss of monies he has suffered because of his not receiving the position.

The City contends that it did not violate the contract because it has the right to establish minimum qualifications for a job and to determine whether a job applicant possesses the “requisite qualifications”; because Postl does not possess the minimum qualifications for the Equipment Operator II position; because minimum qualifications “cannot be demonstrated by a training or trial period”; and because no past practice requires the City to award the Equipment Operator II position “to the grievant despite his lack of qualifications.” The City also maintains that the requirement for two years’ construction experience cannot be replaced by “equivalent experience” and that “construction work is a primary duty of the Equipment Operator II position.”

DISCUSSION

The City is correct in pointing out that it has the right to establish minimum job qualifications pursuant to Article I of the contract, entitled “Management Rights”, which gives it the right “to manage its own affairs” and that it also has the right to determine whether a job applicant has met those qualifications.

The Union asserts that the City nevertheless was required to grant Postl a 30-day trial period pursuant to Article XVII of the contract, entitled “New Jobs-Vacancies”, which provides:

. . .

A vacancy shall be defined as a job opening not previously existing in the Table of Organization or a job opening created by termination, promotion or transfer of existing personnel when the job continues to exist in the Table of Organization. A steward shall be present during interviews with employees seeking promotions.

All non-supervisory vacancies shall be posted on the bulletin board of the Public Works and Parks Department and such notice shall be posted five (5) working days before the vacancy is filled. Employees wanting such posted jobs shall sign the posted notice. The employee shall be selected on the basis of seniority, work record and qualifications. In the event an official training program has been conducted for a given position successful completion of the course will be the qualifying factor for promotion. Said employee shall demonstrate his ability to perform the job posted within thirty (30) working days and if deemed qualified by the employer shall be permanently assigned the job.

Should such employee not qualify or should he desire to return to his former job, he shall be reassigned to his former job without loss of seniority.

That 30-day period, however, only kicks in after an employee has met the requisite job qualifications. Personnel Assistant Molinski and Superintendent Rasmussen both testified to that effect and there is nothing in the record showing that unqualified employees are still entitled to a trial period.

The Union also claims that the City's requirement for two years' construction experience is unreasonable because it does not "reasonably relate to actual job duties" and that construction work is not an Equipment Operator II's primary duty. I disagree. For while it is true that some parts of the Equipment Operator II's duties are fairly routine and that there can be considerable driving, Rasmussen testified without contradiction that Equipment Operator II's during construction season spend about 80 percent of their time on concrete and asphalt work. In addition, Rasmussen testified without contradiction that the City does not have the luxury of training new employees given the City's tight construction schedule. That is why, he said, job applicants need some prior construction experience. The City therefore is right on the mark when it states that the deletion of the Laborer and Equipment Operator I positions now makes it impossible for the City to "progressively train individuals who transfer into the Public Works Department. . ." and why it "needs employees who can perform the job from the first day of employment." Given all this, I conclude that the City's job requirements were reasonable.

Moreover, Postl was unqualified even if his “life experiences” are considered since there is very little in those experiences showing that Postl has a working knowledge of construction and the various tasks that Street Department employees must perform without prior training. And, while the Union correctly points out that McCollum, Schroeder and Klug do not know how to operate all of the City’s equipment and that their prior experience did not cover all aspects of construction work, all three nevertheless had some prior construction experience with Miller Masonry, Murphy Concrete, and Michael’s Pipeline which gave them far more construction experience than Postl. That is why they could fit in immediately and why Postl could not.

Indeed, Postl’s own grievance (Joint Exhibit 2), states that he “meets most of the qualifications. . .”, thereby acknowledging that he does not possess all of the required qualifications. Postl also acknowledged that he has never operated many of the equipment pieces listed on the job description, – i.e. a Vac-All truck, a backhoe, sewer steaming equipment, water pumps, power rodders, hydraulic excavators, street sweepers, flushers, end loaders, asphalt pavers, meter applicators, rollers, road oilers, concrete breakers, mixers, routers, concrete saws, compactors, power concrete screeds, mud-jacking equipment, leaf pickers or brush chippers. In addition, Postl’s Application for Employment with the City does not list any prior construction experience (Joint Exhibit 7).

It is true, as the Union correctly points out, that the City hired Sanitation Department employees Sitter and Briquet as Equipment Operator II’s even though they had no prior construction experience. Those slots, however, were filled pursuant to settlement agreements that expressly stated: “The provisions of this agreement shall not be precedential and shall not be used in any other form including grievance arbitration. . .” (Joint Exhibits 4 and 5). Given that *caveat* and the fact that parties settle grievances for all kinds of reasons, no weight can be given to the Sitter and Briquet situations.

In light of the above, it is my

AWARD

1. That the City did not violate Article XVII of the contract when it failed to award the Equipment Operator II position to grievant Gregory Postl.
2. That the grievance is hereby denied.

Dated at Madison, Wisconsin this 1st day of March, 2001.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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