

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FOND DU LAC

and

**CITY OF FOND DU LAC EMPLOYEES
LOCAL 1366, AFSCME, AFL-CIO**

Case 165
No. 59153
MA-11197

Appearances:

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Mr. William G. Bracken, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City.

Mr. Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. 2236, Fond du Lac, Wisconsin 54936-2236, appearing on behalf of the Union.

ARBITRATION AWARD

The City of Fond du Lac, hereinafter referred to as the City, and City of Fond du Lac Employees, Local 1366, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request to Initiate Grievance Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the denial of a posting. Hearing on the matter was held in Fond du Lac, Wisconsin on January 10, 2001. Post hearing arguments and reply briefs were received by the Arbitrator by April 2, 2001. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon the framing of the issue and agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

“Did the City violate the collective bargaining agreement when it failed to select Sue Kaiser or Tamara Schanke for the vacant Accounts Payable position?”

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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**ARTICLE XXII
PROMOTION AND SENIORITY**

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Section 5 – Promotions, Transfers, Voluntary Demotions

- A. All vacancies for positions represented by the Union that occur as a result of retirement, resignation, new positions or for whatever reason, except entry level positions, shall be posted on bulletin boards in all divisions for at least five (5) working days before the vacancy is filled. The posting shall state the job requirements, qualifications required and pay rate for the position.
- B. Any employee not serving an initial probationary period will be eligible to sign the job posting and be given consideration for the position.
- C. In filling vacant positions, the City shall consider the employee’s past job performance, length of service, previous training and experience. The most senior employee who meets the qualifications of the position or who through past experience has shown that he can meet those qualifications within the ninety (90) day probationary period or one hundred and eighty (180) day probationary period in the case of Public Safety Communication Operators, shall be selected for the position opening.

In filling the vacant position, any permanent employee within the division in which the vacancy occurs or any permanent employee who has been bumped from the division in accordance with the provisions of Section 6 of this Article within the two (2) years prior to the date of the initial posting of the vacancy who signs the posting will be given first consideration for the job. If no permanent employee within the division or no permanent employee who has been bumped from the division as defined immediately above signs or qualifies for the position, permanent

employees outside of the division shall be considered for the position. In considering the seniority of signers, seniority shall date from the date of initial employment in a permanent bargaining unit position. If no permanent employee signs or qualifies, seasonal employees who have signed will be given consideration based upon seniority. Seasonal employees within the division will be given first consideration then seasonal employees outside of the division. Seasonal employees of six (6) months duration or more in the Parks Division shall have full posting rights year round.

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ARTICLE XXVII MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, (no employee shall be laid off due to subcontract provisions) together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

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BACKGROUND

The City had employed Linda Baxter has a Clerk Typist II (Accounts Payable) from 1994 until 1999 when she posted to another position. The City, in the general course of business, reviewed the position and determined to make changes in it. It eliminated some functions and made the position part time. The City determined to place greater emphasis on accounting principles and lesser emphasis on data entry skills. The City also determined to change the qualifications and when it posted the position posted the following:

“Required Training and Experience

Associate Degree in Accounting and/or two years experience of recent accounts payable work experience in an automated setting. Ability to work independently if necessary. Proficiency in Excel and Word is required.”

Three employees signed the posting and followed through on the testing and interview for the position, Linda Schiessel, Tamara Scharnke and Sue Kaiser. The City offered the position to Schiessel who turned it down. The City reviewed work history and experience on file with the City, their test scores, and determined they did not meet the minimum qualifications. Scharnke does not have an Associate Degree in Accounting, does not have two years recent experience in accounts payable and received a test score of 51.7. Kaiser does not have an Associate Degree in Accounting, does not have two years recent experience in accounts payable and received a test score of 56.64. Schiessel had at least two years experience in the Comptroller's office, performed some of Baxter's functions after Baxter vacated the Accounts Payable position and had a test score of 77.8. The City had determined 75 was passing.

The City determined that Scharnke and Kaiser were not qualified and advertised for and hired an outside candidate. On March 22, 2000 the instant grievance was filed and processed to arbitration in accord with the party's collective bargaining agreement.

Union's Position

The Union argues that the language of the agreement serves a dual purpose. It allows a trail period for the employee, and, it allows the City to evaluate the employee's performance for the job in question. The Union points out Schanke is a ten-year employee with a good job record. Schanke has a two-year Administrative Assistant/Secretary Associate degree and has taken a course in Career Accounting. She had performed duties that included work in data entry, word processing, and payroll functions and worked with Excel on both payroll and overtime. Kaiser is an eight-year employee with a good job record. Kaiser has a two-year Supervisory/Management Associate Degree with a course in Managerial Budget and Finance and a two-year Secretarial Science – Medical Associate Degree. She had performed duties that included work in data entry and word processing.

The Union acknowledges that the Accounts Payable position had evolved due to new technology. However, the Union argues these changes were minor and do not warrant the major change in the "Required Training and Experience." The Union points out that to go from a requirement of a high school diploma to a two year Associate Degree should be supported by significant changes in the job. The Union points out the City provided no evidence or testimony concerning any significant changes in the actual make of the job.

The Union points out that when Baxter was awarded the position in 1994 she did not meet the minimum qualifications for the position and had qualifications less than the stringent new qualifications. The Union points out Baxter had no computer background when she started as the accounts payable clerk. The Union also points out that the changes made by the City in Baxter's view were subtractions of job duties.

The Union also points out that the City has not requested a higher pay rate be accorded the changed degree of skill and background. The Union asserts it had requested an increase in the past for the position and did not view the current changes as warranting a review to determine if such a request should be renewed.

The Union points out that Schiessel was offered the position even though she did not possess the two-year degree nor did she have the two years experience. The Union asserts the language of the agreement allows for the awarding of a position if the employee has sufficient ability and seniority.

The Union also argues the written portion of the test given by the City stresses book learning more than ability to perform the functions of a job. The Union also argues that when the City made the passing of the test final it substituted the method for proving ability. The Union also points out that the City gave no evidence on how it determined to weight the test, particularly putting book learning ahead and more important. The Union concludes the City did not know how to weight the different components of the test. The Union also points out that if an employee got a minimum on all four of the components the employee would still receive a score below passing.

The Union asserts the agreement mandates selecting the most senior employee who has the ability to perform the job. The Union concludes the testing was flawed and prevented the employees from using a basic benefit, advancing with increased seniority. The Union argues you advance based upon the ability to do the job within a specific period of time. The Union avers the two grievants have demonstrated thought their work and through their outside educational experiences the basic qualifications and should be afforded the opportunity to perform the job of Clerk Typist II (Accounts Payable).

The Union would have the undersigned sustain the grievance.

City's Position

The City contends the clear and unambiguous language of Article XXII, Subsection C, of the agreement specifies the selection process in the instant matter and governs the City's selection of an individual to fill the Accounts Payable Clerk position. The City asserts the hybrid nature of this provision requires consideration of not only seniority but also qualifications. The City asserts this provision clearly reflects the parties' intent to recognize qualifications as a factor in filling vacancies. The City argues that in determining whether to award the position to the grievants it considered past job performance, length of service, previous training and experience. The District points out the grievant's did not possess the minimum qualifications.

The City also contends arbitral authority recognizes the City's right to establish the minimum qualifications for a position as well as the right to determine whether the grievants met the requisite qualifications for the position. The City argues the system it used was properly established, enjoyed the participation of the Union, attempted to measure relevant factors in a reasonable manner and is objective and free of arbitrary, capricious or discriminatory elements. The City also argues it can use any reasonable manner to determine whether an individual has the qualifications to perform the position and points out there is nothing in the agreement which prohibits it from giving a test.

The City contends that after considering a variety of factors and using a variety of methods to evaluate the grievants' qualifications it determined the grievants did not possess the requisite qualifications. The City contends the requirements for the position were reasonably related to the duties of the position. These require the incumbent in the position to perform general accounting work using generally accepted accounting principles, policies and procedures. The City points out the grievants testimony and records demonstrate they do not have the requisite minimum qualifications for the Accounts Payable position. The City argues that notwithstanding the grievant's lack of qualifications the City determined to test the grievants to provide them with a fair and objective opportunity to demonstrate their abilities. The City points out they failed to obtain the minimum composite score. The City concludes that based upon the information submitted by the grievants and their composite test scores it was clearly indicated that the grievants were not qualified for the position.

The City also argues that the minimum qualifications for the Accounts Payable position cannot be demonstrated by a trial period. The City asserts either the grievants had the requisite training or experience or they did not. The City points out the trial period is not training period for minimum qualifications. The City also asserts it is not required to give the grievants a trial period so they can demonstrate their qualifications. The City contends the grievants must first demonstrate they have the qualifications or establish they can obtain the qualifications in ninety (90) days. The City contends that herein the grievants could not have satisfied the minimum qualifications within ninety (90) days.

The City would have the undersigned deny the grievance.

Union's Reply Brief

The Union asserts the instant language is not a hybrid seniority provision, but, the language is one of sufficient ability. Sufficient ability being that if the employee meets the minimum qualifications for the job preference is given to the most senior bidder.

The Union acknowledges that the City has the right to establish minimum qualifications for a position. However, the Union asserts such a right is not unfettered. The Union contends the City offered no evidence to demonstrate a need for the new qualifications.

The Union also argues that for the City to give a test the test must be appropriate and it must be validated. The Union also argues that while the City has the right to consider a number of factors and may use a variety of methods in evaluating the grievants qualifications the City should examine factors such as talking to the grievants supervisors and looking at City evaluations.

The Union again argues the qualifications are not reasonable and the City treated them as sacred. The Union points out that Schiessel did not meet the minimum qualifications and she has the same background as the grievants. The Union also argues that there is a practice of the City being very liberal in awarding jobs to candidates on the basis of their backgrounds.

The Union also argues the City presented no evidence that the written test accurately measured the capability of the grievants abilities to learn how to do the job or the grievants ability to do the job. The Union acknowledges that a trial period is not a training period but avers that if Schiessel met the minimum qualifications so did the grievants.

City's Reply Brief

The City argues that the record demonstrates the grievants do not meet the minimum requirements for the position. To be entitled to the Accounts Payable position the grievants must first demonstrate they have the minimal qualifications. The City contends it has demonstrated the grievants are not competent for the job. In order for the grievants to have a trial period they must first demonstrate they are qualified. Either they have the necessary experience or they do not. The City points out Schanke has no experience relating to accounting. The City argues her one class in accounting does not equate to an Associate Degree in Accounting. At most she had limited knowledge of accounting and therefore she is not qualified. The City acknowledges Kaiser has two (2) associate degrees, one course in accounting and some background in accounting. The City argues Kaiser does not meet the minimum qualifications.

The City points out the Accounts Payable position changed from being primarily data entry to an accounting position. The City argues the Union ignores this fact and thus argues the position has not changed. The City contends the change in the type of work being performed is the reason for the change in the job's requirements. The City argues the changes required a working knowledge of accounting and therefore a change in minimum requirements was necessary. The City also points out that the position's duties and responsibilities have changed since the previous incumbent took the job in 1994.

The City also asserts there is no binding past practice that would require the City to provide a trial/training period to demonstrate that they are qualified for a particular position. Here the City point out the grievants could not achieve the two (2) years experience or the Associate Degree in Accounting in the ninety (90) day trial period. The City also points out that this is not a situation such as the one Kaiser faced when she took a Laborer position and did not

possess a Certified Drivers License (CDL). During her trial period she could test for and achieve a CDL. Herein, she could not in ninety (90) days get two (2) years experience or an Associate Degree in Accounting.

The City also points out Schiessel, contrary to the Union's claim, had two years experience in the Comptroller's office and the City concluded this met the experience requirement. The City also points out that when the incumbent vacated the Accounts Payable position, Schiessel assumed many of her responsibilities. The City asserts that Schiessel's background and experience was different than that of the grievants. The City also asserts the test it gave were fair and reasonable. The City points out Senior Accountant Kawleski took the examination prior to it being given to employees to establish a benchmark. The test was administered fair and without discrimination. The City asserts any individual who possessed the minimum qualifications would pass the test. The City also asserts the tests were properly evaluated. The City concludes the test was appropriate and valid. The City also points out it placed less emphasis on the data entry portions of the test because the position was performing less data entry work.

DISCUSSION

The Union has argued that the City was unreasonable when it established the minimum qualifications for the Accounts Payable position. Article XXVII of the agreement clearly gives the City the right to establish minimum qualifications for a position. Herein the City had determined that when it was replacing the incumbent the City wanted someone with experience and/or training. Such a determination is not unreasonable. While the Union may believe the position is underpaid, the place to resolve that type of dispute is the bargaining table. Herein, even if the job had not evolved the City could determine that it did not want to train someone to attain accounting knowledge and experience, but wanted someone to enter the position already possessing knowledge and/or skill in accounting principles. The fact that the position has changed from primarily data entry to requiring more analytical functions demonstrates the duties of the position have changed over time and may continue to change. In effect the City has determined to change the position from basically one where no accounting experience was necessary to one where the position now requires accounting experience. The undersigned concludes such a determination is not unreasonable and that the City did not violate the collective bargaining agreement when it established the qualifications for the Accounts Payable position.

The record clearly demonstrates the grievants do not meet the minimum qualifications for the position. Neither had the requisite training and/or experience. Thus, having found the City had the right to establish minimum qualifications, and, given the fact neither grievant meets those minimum qualifications, the grievance must be denied.

Article XXII, Section 5, Subsection C provides where an employee can demonstrate they could meet the requirements in ninety (90) days they would have the opportunity to be selected for the position. There is nothing in the record that would demonstrate either grievant could achieve two years experience or achieve the Associate Degree in Accounting during the trial period. Herein both parties have acknowledged that the trial period is not a process used to train an employee in the minimum qualifications for the job. Both grievants have acknowledged they have a limited background and experience in Accounting principles. Having found the City can require a two-year experience and/or training in Accounting principle for the position, the undersigned also finds the City is not required to offer a trial period to employees who do not meet the minimum qualifications for a position and who cannot, during the trial period obtain the minimum qualifications for a position.

As noted above, the City has the right under the collective bargaining agreement to determine what the minimum requirements of a position are. Having done so, the City has the right to determine whether applicants have the sufficient ability to meet the minimum requirements. Herein the employees do not have the ability to meet the minimum requirements. However, the City went another step and tested the applicants. The undersigned notes that even though the test was for “book knowledge” such knowledge is a reasonable requirement for an Accounts Payable position given the types of duties the position is to perform. While each question separately could be dealt with in an on-the-job training program, in total the questions assessed the takers knowledge of accounting. Further, Kawleski validated the test when she established the benchmarks for the test. (One method of validating a test is to have a supervisor of the position or someone who is knowledgeable in the field review the test.) The test results basically demonstrate the grievants do not possess the knowledge of accounting principles the City established was necessary as a minimum qualification for the position. A fact also demonstrated by the grievant’s own admissions that they do not have the Associate Degree in Accounting nor two years accounting experience. In effect the test validated the City’s assessment of the grievant’s background and experience.

Therefore, based upon the above and foregoing and the arguments, evidence and testimony presented the undersigned concludes the City did not violate the collective bargaining agreement when it failed to select Kaiser or Schanke for the vacant Accounts Payable position. The grievance is therefore denied.

AWARD

“The City did not violate the collective bargaining agreement when it fail to select Sue Kaiser or Tamara Schanke for the vacant Accounts Payable position.”

Dated at Madison, Wisconsin this 29th day of June, 2001.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Examiner

