

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, LOCAL NO. 41**

and

DOUGLAS COUNTY

Case 244
No. 60266
MA-11566

(Grievance of Paulette Alseth)

Appearances:

Mr. Gerald W. Gravesen, Bargaining Consultant, Wisconsin Professional Police Association/LEER Division, 16708 South Lee Road, Danbury, Wisconsin 54830, appearing on behalf of the Wisconsin Professional Police Association/LEER Division.

Mr. Frederick P. Felker, Douglas County Corporation Counsel, Douglas County Courthouse, 1313 Belknap Street, Superior, Wisconsin 54880, appearing on behalf of Douglas County.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Superior, Wisconsin, on April 9, 2002, at which time the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was not transcribed and both parties filed briefs and reply briefs that were received by June 17, 2002.

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

ISSUE

The parties have agreed to the following issue:

Did the County violate the contract when it refused to promote grievant Paulette Alseth to the rank of Jail Sergeant and, if so, what is the appropriate remedy?

BACKGROUND

This case centers on the County's refusal in June, 2001 to promote Jailer Alseth to the position of Jail Sergeant after she and others had bid for two posted Jail Sergeant positions. Alseth has a seniority date of August 8, 1994. Marilyn Kizlik - who began her employment as a temporary employee in 1990 and who did not become a member of the bargaining unit until on or about January 6, 2001 - was awarded one of those two posted Jail Sergeant positions over Alseth. Kizlik, unlike Alseth, has a certification in law enforcement. The second successful applicant was Julie Ruikka who had more seniority than grievant Alseth, and whose promotion is not in issue. The final rankings for the interview process (Joint Exhibit 6) were as follows:

1. Kizlik 92
2. Alseth 90
3. Ruikka 86
4. Tim Magnuson 83

Patrol Sergeant Gerald Moe testified that the County in the past has always selected the most senior applicant if his/her abilities were relatively equal to everyone else's. Patrol Sergeant Paul Johnson testified to that same effect and said that if the County did not originally pick the most senior applicant, it eventually did so after a grievance had been filed. Jailer Matthew DeRosia testified that Alseth has a good work ethic; that she does what she is supposed to do; and that she is as good as the other shift commanders when she serves as temporary shift commander. Jailer Michael Hendrickson also said that Alseth is a "fine" employee; that she has a good work ethic; and that she works as well as the other Sergeants. Deputy Jailer Tyler Edwards also praised Alseth's work and said that she "is pleasant" on the shifts they have shared together and that she works as well as the other Sergeants.

Union Vice-President Russ Milroy testified that Alseth works well; that "She has good and bad days"; and that she works as well as other shift commanders when she serves as acting Shift Commander. Milroy did not bid for the two Sergeant positions because he only had one year of seniority at the time and he said that Kizlic could not previously serve as an acting Shift Commander because she was a part-time employee. Jailer Rob Hakala testified that he has worked well with Alseth during the four months of his employment and that she performs as well as the regular Shift Commanders when she serves as acting Shift Commander.

Jail Officer Alseth, who is responsible for fingerprinting and providing assistance to inmates who have chemical dependencies, has a seniority date of August 8, 1994. She

graduated *magna cum laude* from the University of Wisconsin-Superior, with a Bachelor of Sciences degree after having concentrated in criminal justice. She testified that she was never formally disciplined at any time during her employment. She testified that when Jail Administrator Arthur Pulford became Captain in January, 2000, he told her, "Oh, you're the difficult, challenging one" and that he suggested she call a mutual friend "to find out why you are the way you are." Alseth did not reply to Pulford's remarks. She also said that Pulford informed her that she had not been selected for the Sergeant's position and that he hoped she could work with others.

On cross-examination, Alseth testified that she had a problem with Sergeant Weber before Pulford arrived on the scene and that Pulford never told her that she would be promoted if she performed her job better.

Human Resources Manager Candace J. Fitzgerald testified that Kizlik commenced her County employment in 1990 as a temporary employee and that she then served as an on-call jailer up until 2001; that Kizlik became eligible under the Wisconsin Retirement System in 1992 after she worked a certain number of hours; that Kizlik became eligible to join the bargaining unit on January 6, 2001; and that Kizlik was ineligible to be in the unit before then because she was an on-call, part-time employee. She said that as of June, 2001, Alseth had a total of 11,882.25 hours as a County employee and that Kizlik had a total of 17,426.75 hours (County Exhibit 1). She also said that the question of seniority versus point of service never arose before now and that she never before has had to make a decision as to which would prevail.

Fitzgerald in a January 13, 1999, letter to Sheriff Richard Pukema (Union Exhibit 9) stated that Kizlik was not in the bargaining unit because of her on-call status; that it was "unfortunate" Kizlik had failed the civil service test to be placed on the hiring list; and that "that technicality prohibits her from performing bargaining unit work on a regular part-time basis."

On cross-examination, Fitzgerald testified that Kizlik had previously failed a test to become a full-time employee; that she passed the test only after the County had lowered the grade needed for passing; and that she was ineligible to be in the bargaining unit until she passed the test.

Sheriff Pukema testified that he selected Kizlik over Alseth because Kizlik was a "good team builder"; because Kizlik supports the department's goals; because she works well with others; and because she is able to deal with greater responsibility. He added that Kizlik was more qualified because she worked better with outside agencies such as the District Attorney's office and the City of Superior Police Department; because he received several outside complaints about Alseth; because Kizlik has never complained about anything; and because he and Pulford have confronted Alseth on several occasions.

He said that Pulford recommended Kizlik over Alseth for the posted Jail Sergeant position; that he told Pulford to tell Alseth if she wanted to be promoted, she needed to “show positive movement”; that Pulford subsequently told him that Alseth had her own issues and that she prevented him from giving her that message; that Pulford tried to speak to her again, but to no avail; and that he was unaware that Pulford earlier had told Alseth she was a troublemaker. He also said that Pulford, pursuant to his directive, made notations of Alseth’s lapses of judgment (Company Exhibit 4), and that those lapses included not leaving a female jailer on duty; not being cooperative in providing a doctor’s note and returning to work; providing a confusing note regarding her claimed disability; and trying to pressure an employee into filing a grievance.

Pukema also testified that Kizlik became a full-time member of the bargaining unit on July 1, 2001 after she finished her probationary period; that Alseth never received any disciplinary warnings; that Alseth received an oral warning in June, 2000 (County Exhibit 5); that said letter does not refer to any oral discipline; that he does not know if Alseth did anything wrong in her encounter with Sergeant Kerkoff; and that Alseth exercised poor judgment in writing a report regarding an inmate who attacked her.

Recalled as a witness, Alseth testified that Sergeant Kerkoff wanted to restrain a 13-year old which she termed “ridiculous”, and that another deputy “froze” when she was being attacked by an inmate, which is why she wrote her report the way she did.

POSITIONS OF THE PARTIES

The Association contends that the County violated Article 19 of the contract when it failed to award the Jail Sergeant’s position to Alseth because the contract language, past practice, bargaining history, and past grievance settlements all establish that seniority must be followed when, as here, employee qualifications are relatively even. The Association also asserts the County erred in using its promotion criteria and that Kizlik was ineligible to apply for the Jail Sergeant’s position because she was not a full-time bargaining unit member when she bid for that position. As a remedy, the Association asks that Alseth be awarded the Jail Sergeant’s position and that she be made whole for all of the backpay and benefits she has lost by not being awarded that position.

The County asserts that the grievance must be denied because Kizlik was eligible to be promoted to the rank of Jail Sergeant; because Alseth “is not the employee ‘oldest in point of service’ as required under the contract; and because Kizlik’s qualifications in any event are relatively greater than Alseth’s. The County also claims that Alseth was rightfully passed over because of her inability to work with others.

DISCUSSION

This case partly turns upon the application of Article 19 of the contract which states in pertinent part:

PROMOTIONS. Section 1. In making promotions and in filling job vacancies or new positions preference shall be given those employees oldest in point of service, provided, however, that the qualifications and physical fitness of the employees being considered for the job are relatively equal. (Emphasis added).

Section 2. All job vacancies or new positions shall be posted on the bulletin board ten (10) days prior to filling said vacancy or new position so that each interested employee may have an opportunity to apply. Such notice shall state the prerequisites for the position to be filled and said prerequisites shall be consistent with the requirements of the job. Employees shall apply for the vacancy or new position in writing, and only those applicants who meet the prerequisites will be considered.

Section 3. The successful applicant shall have a ninety (90) day trial period in which to demonstrate his/her ability to perform the job. If during said period the employer considered the employee unqualified, the employee shall be returned to his/her former position without loss of seniority rights.

Section 4. The Employer may make immediate temporary assignments to fill any vacancy or new position while the job posting procedures are being carried out.

Section 5. It shall be the policy of the Employer to promote to the supervisor position, insofar as possible, from the ranks of the employees. Such positions shall be posted as stated herein. However, all applications shall be submitted in writing and each applicant shall be interviewed by the Law Enforcement Committee and by the Police Committee to determine his/her qualifications for postings to be filled if deemed necessary by the Employer. Seniority will be considered but may not necessarily be the deciding factor in filling supervisory positions. (Emphasis added).

. . .

Section 7. The provisions of this Article are, however, subject to the rights of the employees as set forth in other Articles contained in this Agreement.

The key question here is whether the term “oldest in point of service” in Section 1 refers to an employee’s initial hiring date which for Kizlik would be 1990 when she started employment as a temporary employee or whether it, instead, refers to the date that someone begins to earn seniority within the bargaining unit which for Alseth is August 8, 1994, and which for Kizlik would be January 6, 2001. The County points out that the term “oldest in point of service” differs from the word “seniority” and that if the parties wanted straight bargaining unit seniority to prevail under this proviso, they would have used the word “seniority” rather than the term “oldest in point of service”.

The term “oldest in point of service” certainly can be interpreted in the manner urged by the County. However, there is no bargaining history or any other parol evidence showing that the parties ever agreed to the distinction being made by the County. Hence, it is not at all clear that the parties ever agreed to the County’s interpretation.

To the contrary, Article 19, Section 7, cautions that: “The provisions of this Article are, however, subject to the rights of the employees as set forth in other Articles contained in this Agreement.”

It therefore is necessary to also consider Article 16, Section 1, which states: “The seniority of all employees covered by the terms of this Agreement shall begin with the starting date of employment. . .”, as well as Section 2 therein which adds that “Regular full-time employees shall be deemed to have greater seniority than regular part-time employees” and which also mandates that there be two separate seniority lists, one for regular full-time and one for regular part-time employees.

Here, Kizlik’s status as an on-call employee prevented her from being even a regular part-time employee, as Human Resources Manager Fitzgerald in a January 13, 1999, letter to Sheriff Pukema acknowledged that her on-call status “prohibits her from performing bargaining unit work on a regular, part-time basis.” (Union Exhibit 9). That being so, it follows that Alseth as a full-time employee has far greater seniority than Kizlik who did not even qualify to be on the regular part-time seniority list which, in any event, must be subordinated to the regular full-time seniority list. Article 19’s reference to “oldest in point of service” thus must mean the “point of service” or seniority of the regular full-time employees who are bidding for a posted position, as it is that “point of service” and seniority that are protected elsewhere in Article 16, Section 2, and which thereby controls under Article 19, Section 7, which dictates that the “provisions of this Article are, however, subject to the rights of the employees set forth in other Articles contained in this Agreement.”

As the more senior bidder, Alseth therefore was entitled to the posted Jail Sergeant position if her qualifications and physical fitness were relatively equal to Kizlik’s.

Here, the County made its qualifying test easier to pass so that Kizlik could finally pass it after she had failed to pass it earlier and the County thereafter awarded that position to her even though Alseth graduated *magna cum laude* from a four-year college and even though Alseth has a BS degree after having concentrated in criminal justice. Moreover, since Alseth's test points (90) were only two points lower than Kizlik's (92), it is clear that their paper qualifications are relatively equal. See DOUGLAS COUNTY AND DOUGLAS COUNTY DEPUTY SHERIFF'S ASSOCIATION, WPPA, WERC File No. A/P M-96-106 (Joint Exhibit 12), where Arbitrator James L. Stern ruled that a three-point difference in testing was insignificant.

The County nevertheless argues that Alseth repeatedly has demonstrated an inability to work with others and that, as a result, her qualifications are not as equal as Kizlik's. There are several problems with this claim.

For starters, five of Alseth's co-workers, DeRosia, Hendrickson, Edwards, Milroy, Hakala – all testified that Alseth does work well with others when serving as Acting Shift Commander. Their testimony, which I fully credit, directly counters the County's claim.

Secondly, there is no proof that Alseth was ever disciplined over her many years of employment, thereby attesting to her ability to adhere to management's directives and work rules. Sheriff Pukema testified that he once gave Alseth an oral warning in June, 2000 (County Exhibit 3) and discussed other supposed shortcomings in her work. However, his June 12, 2000, written statement does not refer to oral discipline and there is no evidence that Alseth was ever disciplined over any of her supposed other shortcomings. I thus find that Alseth was never disciplined in June, 2000, and that Alseth's testimony to the effect that she was never formally disciplined must be credited.

Thirdly, not much reliance can be placed on certain allegations involving Alseth's alleged work deficiencies since they are hearsay in nature and since no one from the County had first-hand knowledge over what transpired in those incidents. More specifically, I am referring to the documents contained in County Exhibits 4, 6, 7, 8 and 9, which were prepared by various individuals who did not testify.

In addition, while the County criticizes much of Alseth's past performance, some of that criticism may stem from the personality clash that developed between Alseth and Jail Administrator Pulford, who did not testify because of an illness, and that was caused by Pulford when he told her in January, 2000, "Oh, you're the difficult, challenging one", and when he then suggested that she call a mutual friend "to find out why you are the way you are." Pulford thus had a negative opinion of Alseth from the get-go even though there was not one iota of objective evidence to support his opinion at that time and even though rudimentary fairness dictated that he not form an opinion of her until he personally observed her work. That being so, all of Pulford's negative comments regarding Alseth's work performance must

be disregarded, along with his recommendation to Pukema that Kizlik should be selected over Alseth.

The remaining allegations mainly center on Alseth's supposed difficulties in dealing with others outside the Sheriff's Department and various other problems dealing with her supposed confrontational attitude within the Sheriff's Department, including Pukema's complaint that she is not a good "team" player. Without going into each such allegation, it suffices to state that Alseth has provided reasonable explanations as to why she acted the way she did in those situations. Moreover, her testimony indicates that some individuals within the Sheriff's Department have a problem in dealing with such a strong-minded and strong-willed individual like Alseth. But since that is their problem and not hers, that cannot be used as a basis for denying her the Jail Sergeant's position. I therefore conclude that Alseth's "qualifications and physical fitness" are at least "relatively equal" to Kizlik's and that, as a result, Alseth is entitled under Article 16, Section 2, and Article 19, Section 1, to that position.

The County therefore shall immediately award the Jail Sergeant position to Alseth and it shall make her whole by paying to her the difference between what she earned and what she would have earned had she been awarded that position in June, 2001. Furthermore, and pursuant to the parties' agreement, I shall retain my jurisdiction to resolve any remedial disputes.

In light of the above, it is my

AWARD

1. That the County violated Article 16, Section 2, and Article 19, Section 1, of the contract when it refused to promote grievant Paulette Alseth to the rank of Jail Sergeant.

2. That to rectify its contract breach, the County shall immediately award grievant Paulette Alseth the position of Jail Sergeant and it shall make her whole by paying to her the difference between what she earned and what she would have earned had she been awarded that position in June, 2001.

3. That to resolve any remedial questions that may arise over application of this Award, I shall retain my jurisdiction for at least sixty (60) days and I will extend it past that time if it becomes necessary to do so.

Dated at Madison, Wisconsin, this 25th day of June, 2002.

Amedeo Greco /s/

Amedeo Greco, Arbitrator