

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION
LOCAL 95, AFL-CIO**

and

PORTAGE COUNTY

Case 167
No. 61246
MA-11862

(Cheryl Helms Grievance)

Appearances:

Shneidman, Hawks & Ehlke, S.C., by **Attorney Bruce F. Ehlke**, 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, on behalf of the Union.

Attorney J. Blair Ward, Portage County Assistant Corporation Counsel, 1516 Church Street, Stevens Point, Wisconsin 54481, on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, the Office and Professional Employees Union, Local 95, AFL-CIO (herein the Union) and Portage County (herein the County) were parties to a collective bargaining agreement covering the period January 1, 2001, to December 31, 2003, and providing for binding arbitration of certain disputes between the parties. On May 23, 2002, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the grievance of Cheryl Helms (herein the Grievant) concerning the denial by the County of her request to exercise bumping rights under the contract and requested the submission of a panel of WERC staff from which to select to arbitrate the issue. The parties subsequently designated the undersigned to hear the dispute and a hearing was conducted on October 24, 2002. The proceedings were transcribed and the transcript was filed on November 14, 2002. The County and Union filed their initial briefs on January 2, 2003, and January 6, 2003, respectively. The Union filed a reply brief on January 14, 2003 and the County filed a reply brief on January 21, 2003, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

Did the County violate Article 8, Section 3 of the collective bargaining agreement when, after eliminating the position of Cheryl Helms, it denied her request to be placed in the Sanitarian position?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Did Portage County violate Article 8, Section 3 of the collective bargaining agreement by not allowing Cheryl Helms to bump into the Sanitarian position?

If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

Did the County violate Article 8, Section 3 of the collective bargaining agreement when it laid off Cheryl Helms and did not permit her to move into the Sanitarian position?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 8 – SENIORITY RIGHTS AND LAYOFFS

Section 3 – Layoff: In laying off Employees because of reduction of forces, when possible, the County shall meet with the Union prior to notifying the Employee(s) who are to be laid off. The Employee with the least amount of seniority within the affected classification(s) shall be laid off first, provided that those remaining within the affected classification(s) are capable and qualified to perform the available work. “Classification” for the purpose of this provision means the job titles contained in Appendix “A”.

An employee affected by a layoff shall have the option of being laid off with no loss of unemployment compensation or moving to the least senior position in the same pay grade within the affected department if capable and qualified to perform the duties of that position. In the event the laid off employee does not qualify for any position within his/her same pay grade with the affected department, the employee may move to a position in a pay grade that is equal or lower in pay rate if capable and qualified to perform the duties of that position. In all cases, the laid off employee must take the lowest senior employee's position in the pay grade first, if capable and qualified, before being considered for the next least senior employee's position in that pay grade, etc. If a full time employee has a portion of their hours cut, they may bump into the least senior position (as explained above) causing that employee to have reduced hours.

BACKGROUND

The Grievant was hired by the Portage County Department of Health and Family Services in May, 1994, as a limited term employee in the Environmental Health unit in the position of Sanitarian. In this capacity, she assisted flood victims, tested wells for water quality and inspected taverns to determine compliance with County and State health and food regulations. The position was subsequently retitled Environmental Health Evaluator, but the duties remained the same. The Grievant is not a registered Sanitarian, but has obtained the necessary prerequisites for certification, subject only to passing an exam. In 1998, the Grievant took a position in the Department as a Lab Technician, but also continued to serve as backup Sanitarian. After that point, the regular Sanitarian duties were performed by two other Sanitarians and the Environmental Health Supervisor, Charles Michael Carder. In her role as backup, approximately 5% of the Grievant's time was spent performing Sanitarian duties, primarily collecting water samples and answering telephone inquiries.

Subsequent to the Grievant becoming a Lab Technician, the Department expanded its programs and increased the duties of the Sanitarian position. Specifically, the County took over retail food monitoring from the Department of Agriculture and air quality monitoring from the Department of Natural Resources. In addition, in February, 2001, the State, by Administrative Rule, adopted a new food code comprised of regulations for restaurants and retail food establishments, which the Department was tasked to administer, most of which duties fell to the Sanitarians. In anticipation of the significant changes encompassed in the new food code and the Department's expanded role in enforcing it, from April, 1999, through October, 2001, Carder and the two Sanitarians attended 13 days of training on various topics related to the new code. The Grievant was not offered the opportunity to attend the training and, although interested, did not ask to go.

During the summer of 2001, the Department revised the descriptions for the various positions, including those of the Grievant and the Sanitarians, and adopted the new descriptions on September 7, 2001. Of particular relevance to the Sanitarian position was the addition of a

requirement of one year's experience working with the new food code as a prerequisite for holding the position. On September 19, 2001, the Grievant was informed in writing by Department Director Judy Bablitch that her position of Lab Technician was being eliminated and that she would be laid off after December 31. On October 16, 2001, the Grievant sent Bablitch a letter notifying her of her intention to bump Sanitarian Keith Baine, a less senior employee, and assume his duties, pursuant to the provisions of Article 8, Section 3 of the collective bargaining agreement. She attached thereto a copy of her qualifications for the position as set out in the position description.

On November 9, 2001, a meeting was held between the Grievant, Carder, Health Officer Julie Hladky and bargaining unit Chairperson Jeff Jester to discuss the Grievant's intention to bump into a Sanitarian position. At the meeting, the Grievant's qualifications were discussed and she was questioned on various aspects of the food code to ascertain her familiarity with it. On November 27, 2001, Hladky and Carder informed the Grievant in writing that in their opinion she was not qualified for the Sanitarian position. Specifically, she did not have the requisite one year's experience working with the food code, nor did she have certification in an Environmental Health related field and was not registered to obtain such. According to Hladky and Carder, such certification would need to be as a certified pool inspector, lead inspector, lead risk assessor, well location inspector, asbestos inspector, asbestos risk assessor, food service manager or registered sanitarian.

Sometime after the November 9 interview, but prior to receiving the written denial, the Grievant enrolled in a course at North Central Technical College to obtain certification as a professional food manager and obtained this certification on December 17, 2001. She also obtained a copy of the new food code, as well as videotapes of the workshops attended by Carder and the Sanitarians, in order to increase her knowledge in this area. On December 6, 2001, the Grievant filed a grievance over the County's refusal to allow her to exercise her bumping rights, wherein she indicated that she had an adequate understanding of the food code and pointed out that at the time the incumbent Sanitarian also did not have the requisite one year of working with the code inasmuch as it had only been effective for 10 months. The grievance did not mention the Environmental Health certification requirement, the fact that the Grievant was currently enrolled in the professional food manager course or her study efforts to become proficient in administering the food code. The grievance was denied by Carder on December 12. At the close of business on December 31, 2001, the Grievant was laid off. On or about January 2, 2002, the Grievant had a Step 2 grievance meeting with Bablitch and Hladky, at which time she provided them with her professional food manager certificate and further discussed with them her qualifications for the Sanitarian position. The meeting was adjourned without resolution and the parties met again late in January, whereupon Bablitch informed the Grievant that her grievance was denied. The grievance was subsequently also denied by the County Personnel Committee, whereupon the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

The Union argues that the Grievant was capable and qualified to perform the duties of a Sanitarian and that, therefore, the County breached the collective bargaining agreement by not letting her bump into the position. It was only necessary that she be qualified, not the most qualified, for the position. She had been a Sanitarian in the past, continued as a backup after becoming a Lab Technician and performed her duties satisfactorily throughout. She was qualified to be a registered Sanitarian, although she had not obtained the certification and satisfactorily answered questions about the food code in her November 9 interview. The County asserts that she was not qualified because she did not have a year working with the food code nor an Environmental Health certification, which is a sham and a falsehood.

The argument that the Grievant did not have an Environmental Health certification was false. On December 17, 2001, she received a certificate as a professional food manager, which Carder conceded met the criteria in the Sanitarian job description. She should have received credit for this when the County was considering her request.

The requirement of one-year working with the food code is a sham because at the time it was instituted the code had only been in place for 7 months so that no one, including the incumbents, could claim to have worked with the code for a year. After the grievance was filed, the County changed its tack and claimed that the training the Sanitarians received prior to adoption of the code qualified for the year's experience. The Grievant, too, obtained this training on her own, but the County refused to credit it as equivalent because there was no way to know whether it was the same or whether the Grievant had achieved the same competency. Nevertheless, Carder admitted that he was unable to say for sure whether the Grievant's training was sufficient or not. By failing to consider the Grievant's qualifications and refusing to let her bump into a Sanitarian position, the County violated the collective bargaining agreement and should be required to award the Grievant the position.

The County

The County asserts that it did not violate the collective bargaining agreement. At the time the Grievant filed her bumping request, she was not capable and qualified to perform the duties of the Sanitarian position. The job required a certification in Environmental Health and one-year working with the food code and the Grievant met neither criteria. Further, she had not worked as a Sanitarian for several years and the record reveals that her work as a backup was insufficient to qualify her for a full-time position, as she was never called upon to perform all the responsibilities of a Sanitarian.

The Grievant did eventually receive certification as a professional food manager, which involved studying the food code and which qualified her under the Environmental Health requirement, but not until well after she applied to bump. Further, she did not have the

training with respect to the food code that the other Sanitarians had and, so, was not sufficiently practiced in it to have been considered to have one year's experience, regardless of her certification. Because she failed to meet these two prerequisites for the Sanitarian position, the Grievant was not eligible to bump into the position when she filed her request in October, 2001. Therefore, the County did not violate the collective bargaining agreement by denying her request. The grievance should be denied.

The Union in Reply

The Grievant was capable and qualified to perform as a Sanitarian at all times material to the case. The County's requirement of one-year working with the food code is specious, because it has nothing to do with the Grievant's capabilities. No other County requires its Sanitarians to meet this criterion, yet all must deal with the code, so clearly this requirement, while perhaps reasonable, is not necessary. In fact, at the time the Grievant filed her notice, none of the Portage County Sanitarians met this requirement. The County concedes that it considered the additional training received by the Sanitarians to compensate for the lack of a year's experience working with the code, thus the requirement, by the County's admission is unnecessary.

By Carder's admission, the Grievant also met the Environmental Health certification requirement by completing the professional food manager course. Thus, she was qualified in this regard before she was laid off. Further, her role in obtaining State certifications in the Health Department lab should have qualified her under this requirement. Therefore, there is no merit to this argument.

The County further asserts that the Grievant did not meet the qualifications "in time." This underscores the fact that the County wanted to lay off the Grievant, rather than the Sanitarians and timed the event in such a way that no matter what she did the Grievant would not have qualified for the position. The County's arguments that she did not have sufficient experience and training as a Sanitarian do not hold water. She was minimally qualified and senior to the least senior Sanitarian, so she should have been allowed to bump into the position.

The County in Reply

The County argues that the Grievant's duties as a backup Sanitarian do not support her claim because, in reality, her responsibilities were very limited. This is reflected in the fact that she was not offered the food code training because her supervisor did not think it was necessary given her limited work in this area.

The one-year requirement working with the code is a reasonable requirement. The other Sanitarians received credit for the training they received in using the code to meet the requirement. The Grievant did not have this training. She obtained the food manager

certification and studied tapes of the seminars only after she had applied to bump and these do not compare to the quality or quantity of training received by the Sanitarians. Further, she did not seek to attend the trainings attended by the Sanitarians, although she was aware of them and claimed to have been interested.

Approximately 50% of a Sanitarian's duties involve working with the food code, which is an extensive document. It cannot be mastered in a short period of time. The Union makes an issue of the fact that Carder testified that he did not know the extent of the Grievant's training on the food code. The fact is that she did not inform him of any such training. Nonetheless, this all occurred after the fact. At the time she applied to bump into a Sanitarian position, the Grievant had neither the training nor the Environmental Health certification, either of which was sufficient grounds to deny her request. The grievance should be denied.

DISCUSSION

The principal question raised in this case is whether the Grievant, according to the terms of the contract language, was "capable and qualified" to perform the duties of Sanitarian at such a time and under such circumstances that the refusal by the County to allow her to bump into the position constitutes a violation of the collective bargaining agreement. At the outset, it is necessary to observe that the conjunctive use of the terms "capable and qualified" in the contract language indicates that two separate criteria need to be satisfied in order to bump into another position. As used in this fashion, the words "capable" and "qualified" must be construed to mean different things and, thus, the Grievant must have been both capable of performing the duties of a Sanitarian and qualified to hold the position in order to successfully assert her bumping rights under Article 8, Section 3. Assuming that at some point the Grievant was capable and qualified, other salient issues then arise, such as at what point was she capable and qualified and did the County have knowledge of the fact at a time such that it was under an obligation to permit her to bump. I will address these various questions in turn.

To begin with, it is necessary to distinguish between the terms capable and qualified. The relevant definition of "capable," contained in Webster's New Collegiate Dictionary, is "having attributes (as physical or mental power) required for performance or accomplishment." This is a subjective standard which connotes personal, demonstrable ability to perform the tasks necessary to fulfill the duties of the position. In other words, in this case is the Grievant able to adequately perform the tasks of a Sanitarian. "Qualified," according to the same source, means "having complied with the specific requirements or precedent conditions (as for an office or employment)." This is an objective standard which focuses on whether the Grievant has obtained the requisite training and experience to hold the position. The language of the contract requires that the Grievant have successfully met both standards in order to bump into the Sanitarian position.

I am satisfied on this record that the Grievant was capable to perform the duties of a Sanitarian, or at least that there is insufficient evidence to conclude that she was not. The Grievant had originally been hired by the County as a Sanitarian and had held the position for

several years, even after becoming a Lab Technician. Eventually, the Sanitarian duties were passed to other employees, but she continued to act as a backup Sanitarian for the remainder of her period of employment. There is no evidence that she was ever found to be inadequate in her performance of Sanitarian duties. She did testify that occasionally she would receive inquiries in her backup position that she was unable to answer and that she would refer these questions to the other Sanitarians, but the record does not indicate how frequently this occurred, or whether the other Sanitarians occasionally had the same problem. In my view, when the Grievant applied to bump into the Sanitarian position she represented to the County that she was capable and qualified to do the job. At that point, it became incumbent upon the County to determine if this was so, because only if it was not could it prevent her from making the move. Significantly, no testing was conducted at the November 9 interview to determine her general capabilities as a Sanitarian. She was asked specific questions to ascertain her knowledge of the new food code and answered all but one correctly. The County had the ability to define the capabilities necessary to do a Sanitarian's job and controlled the process by which the Grievant's capabilities were determined. By the criteria it established, the Grievant appears to have met this requirement.

Whether the Grievant was qualified for the position appears to be another matter. The job description for a Sanitarian specifies that an acceptable candidate must have some form of Environmental Health certification and must have at least one-year of experience working with the new food code. It is clear that, at least as of October 16, when she filed her request, and November 9, when she had her interview, the Grievant did not meet these criteria. The job description does not specifically identify what constitutes an Environmental Health certification and in her application, the Grievant listed several certifications in various testing procedures in satisfaction of this requirement. In their November 27 memorandum denying the Grievant's request, Hladky and Carder pointed out that the listed certifications were of the laboratory she worked in and were not personal to her and that working in a lab that is certified to perform certain tests is not the same as holding a personal certification. They also listed a number of different certifications which would qualify, and there is no dispute that she did not have such certification prior to November 9.

Likewise, the Grievant did not have the requisite one-year of experience working with the new food code. The Union points out, however, and with some merit, that this requirement is somewhat suspicious, given that, since the code was only adopted in February, 2001, the incumbent could not have a year's experience with the code, either, raising a question of disparate treatment if that criterion was the basis for refusing her request to bump. The County concedes the point, but argues that the incumbent was given credit for the extensive additional training he received on the code. The Grievant did not receive the training and, therefore, was not entitled to the same consideration. The grievance itself suggests that there was some wrongdoing on the County's part in not offering the Grievant the opportunity to receive the same training concurrent with the incumbent. Nevertheless, there is no evidence that the Grievant asked for the training at the time and Carder testified that he did not feel it necessary, given that she was only the backup for the position. In my view, the record does not support a conclusion that the Grievant was deliberately denied the training wrongfully, but, in any event, as of November 9 she clearly did not have the same qualifications as the

incumbent. The County exercised discretion in imputing more experience to the incumbent based on his additional training, but I do not find that exercise of discretion to have been unreasonable. Furthermore, during the preceding months the incumbent was working with the food code on a daily basis, whereas the Grievant, by her own admission, was working with it only sporadically. I find, therefore, that as of October 16, when she filed her request to bump, the Grievant was not qualified for the position of Sanitarian and, further, that she was also not qualified as of November 9, when she was interviewed by Hladky and Carder. Thereafter, the water becomes murkier.

After her interview, but before her layoff, the Grievant obtained professional food manager certification and arranged on her own to obtain and review the videotapes and written materials from the food code trainings she had missed, ostensibly eliminating any objection to her qualifications. The County argues, however, that her independent study on the food code was not an adequate substitute for the training the Sanitarians received and, further, that her efforts were not timely. I will address these arguments in turn.

As to whether her additional study was an adequate substitute for the training the Sanitarians received, the best that can be said on this record is that it is unknown. Carder was unwilling to credit her individual study efforts because he didn't know what materials she had reviewed or the extent of her review. When asked to assume she had completely reviewed all the material, he still maintained that studying the seminar tapes and food code itself would not necessarily show competence. Ultimately, however, he conceded that he had not tested the Grievant on her knowledge of the code subsequent to her study and so was unaware of whether it was adequate or not. Under these circumstances, Carder's assumption was unfounded because he did not have a rational basis for comparison nor any objective data to confirm his impression. As will be seen, however, and as indicated below, I consider the question moot.

The County's assertion that the Grievant's additional training and certification were untimely is, in my view, incorrect, but also misperceives the real issue, which is not timing, but notice. As I have indicated, the Grievant did not have the necessary qualifications for the position by the time she had her interview. Assuming her food code training was adequate, however, she did have them before she was laid off. For some reason, however, she chose not to disclose this information before her layoff. Despite going to the effort to achieve the food professional certification and to obtain the materials on the food code and study them, the Grievant testified that she did not inform her superiors of her efforts until January, 2002. Even the grievance, which was filed on December 7, makes no reference to her attempts to obtain the remaining qualification, but merely asserts that the decision was arbitrary and motivated by bias. Indeed, her requested remedy, in part, seeks to obtain the additional training given the other Sanitarians and a grace period within which to gain practical experience, as if acknowledging that her training to that point had been inadequate. I find this oversight to be of critical importance.

In order to successfully bump into the Sanitarian position, the Grievant needed to be capable and qualified for the position, which she was not at the time she submitted her request. She correctly perceived, however, that she could still succeed if she subsequently obtained the

necessary credentials. Unfortunately, she withheld this information from her employers until after her layoff, which has two consequences. First, it deprived the County of the information necessary to alter its original decision prior to her layoff. Second, by disclosing her additional efforts after the layoff, it changed the status of her request from a request to bump to a request for recall. In order for the County to have violated the bumping provision, it had to have had knowledge that she was entitled to the position and have refused her request. At no time prior to her layoff was the County apprised of her added credentials. Its knowledge was no greater on December 31 than it had been on November 9, when her qualifications were found to be inadequate. Had she informed her superiors of her additional training and resubmitted her request prior to December 31, the County would then have had to reconsider its position in light of the new information. As it was, however, the County had only the information provided on the Grievant's resume and gleaned from her November 9 interview, which I have already indicated was insufficient to qualify her for the position. Inasmuch as the additional information was in the Grievant's control and she did not disclose it, I cannot find a violation by the County in not permitting her to bump into a Sanitarian position prior to December 31.

The first the County knew of the Grievant's food professional certification or additional food code studies was in the Step 2 meeting with Julie Hladky and Judy Bablitch in early January, 2002. At that point, she provided them with a copy of her certificate and disclosed the work she had done to become conversant with the food code. By then, however, she was already laid off and her window of opportunity for bumping had closed. At that point, the County was no longer under any contractual obligation to consider her added qualifications and reconsider her request to bump. Indeed, had it done so it could have faced an additional grievance from the bumped Sanitarian. Nor was she entitled to a recall at that point. The recall provision, contained in Article 8, Section 4, only establishes an employee's right to be called back to work in the event of a vacancy. So far as the record indicates, there was no vacancy for which the Grievant was qualified subsequent to her layoff. Thus, the County was not obligated to call her back.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

AWARD

The County did not violate Article 8, Section 3 of the collective bargaining agreement when it laid off Cheryl Helms and did not permit her to move into the Sanitarian position. The grievance is, therefore, denied.

Dated in Fond du Lac, Wisconsin, this 16th day of May, 2003.

John R. Emery /s/

John R. Emery, Arbitrator

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