

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**DODGE COUNTY PROFESSIONAL EMPLOYEES,
LOCAL 1323-A, AFSCME, AFL-CIO**
and
COUNTY OF DODGE, WISCONSIN

Case 218
No. 62157
MA-12181

Appearances:

Mr. Lee W. Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 727, Thiensville, Wisconsin 53092-0727, appearing on behalf of the Dodge County Professional Employees, Local 1323-A, AFSCME, AFL-CIO, which is referred to below as the Union.

Ms. Nancy L. Pirkey, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the County of Dodge, Wisconsin, which is referred to below as the County, or as the Employer.

ARBITRATION AWARD

The County and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Jeremy Klug, who is referred to below as the Grievant. Hearing on the matter was conducted on May 29, 2003, in Juneau, Wisconsin. Brenda J. Young filed a transcript of the hearing on June 12, 2003, and the parties filed briefs and reply briefs by August 8, 2003.

ISSUES

The parties did not stipulate the issues for decision. The Union states the issues thus:

Did Dodge County wrongfully deny Jeremy Klug the opportunity to bump employee Dan Carpiaux in December 2002?

If so, what is the remedy?

The County states the issues thus:

Was Jeremy Klug qualified to bump into the position of GIS Specialist to avoid layoff?

If so, what is the appropriate remedy?

I adopt the Union's statement of the issues.

RELEVANT CONTRACT PROVISIONS

ARTICLE III MANAGEMENT RIGHTS

Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of work and all other matters pertaining to the management and operation of the County, including the hiring, promoting, transferring, demoting . . . of any Employee. This shall include the right . . . to pass upon the efficiency and capabilities of the Employees . . . Further to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this Section shall not be used for the purpose of undermining the union or discriminating against any of its members.

. . .

ARTICLE VII PROBATIONARY PERIOD

7.1 All newly hired Employees shall serve a six (6) month probationary period. During said probationary period, they shall not attain any seniority rights and shall be subject to dismissal without prior notice or cause or recourse to the grievance procedure. . . .

- 7.4 Employees who are promoted may also be required to serve a ninety (90) day probationary period in the position to which they are promoted. Employees serving a promotional probationary period shall not be subject to discharge without recourse to the grievance procedure. During such probationary period, either the Employer or the Employee may request that the Employee be returned to his former position. . . .

**ARTICLE XV
SENIORITY RIGHTS**

- 15.1 It shall be the policy of the Employer to recognize seniority. . . .
- 15.6 Seniority shall apply in promotions, transfers, layoffs, recall from layoff and vacation selection as hereinafter provided.
- 15.7 **Job Posting.** Whenever a vacancy occurs or it is known that a new job will be created, the following procedure shall apply:

. . .

- 15.72 Selection of applicants to fill job vacancies shall be determined by the Employee's skill, ability and seniority. Where all factors are relatively equal, the Employee with the greatest seniority shall be entitled to preference.
- 15.73 When objections are made by the Employer regarding the qualifications of an Employee to fill a position, such objections shall be presented to the Union Committee for consideration. If there is any difference of opinion regarding the qualifications of an Employee, the union may take the matter up for adjustment under the grievance procedure contained in Article XVI of this Agreement.

. . .

- 15.8 **Layoff and Recall.** In the event the Employer reduces its work force, the following procedure shall apply:
- 15.81 Temporary, seasonal, then regular part-time Employees shall be laid off before regular fulltime Employees are laid off.

- 15.82. The Employee with the least seniority shall be laid off first, providing that the remaining Employees are qualified to carry on the Employer's usual operation.
- 15.83 In re-employing, Employees with the greatest length of service shall be called back first, provided that they are qualified to perform the work required.
- 15.84 Employees laid off under this Section shall retain all seniority rights for a period of one (1) year, provided that they respond to any request to return to work made during that time, by registered receipt mail.
- 15.85 The County will notify the Union as soon as the upcoming layoff is known.

BACKGROUND

The grievance, filed by the Grievant on December 19, 2002 (references to dates are to 2002, unless otherwise noted), asserts the Grievant was "denied the right to bump a lower senior employee who holds a position that I am qualified to perform the work duties." The grievance form states, in response to the "(The contention--what did management do wrong?) (Article or Section of contract which was violated if any)" entry: ". . . This is a violation of the labor agreement and practice of the County."

The "lower senior employee" was Daniel Carpiaux, who, at the time of the layoff, served as a GIS/CAD Specialist II. The Grievant served, at the time of the layoff, in the Survey & Description Department as a Land Surveyor II. There is no dispute that the Grievant was senior to Carpiaux.

The GIS/CAD Specialist position occupied by Carpiaux was shared between the Planning & Development and the Land Information Departments. The "**KNOWLEDGE, SKILLS, AND ABILITIES**" section of the Land Information Department portion of the position, which is denoted GIS Specialist I, reads thus:

Knowledge and understanding of current GIS-, cartographic-, and survey-related concepts and techniques (e.g., GPS, coordinate systems, map projections).

Knowledge and understanding of relational database concepts and development techniques.

Knowledge and understanding of database derived information and data analysis.

Knowledge and understanding of with ESRI's ArcGIS 8.x (ArcInfo and ArcView) and Extensions (Spatial Analyst and 3-D Analyst preferred).

Knowledge and understanding of digital orthophotography and aerial photo interpretation.

Knowledge and experience with digital data input and conversion methods including digitizing, document scanning, and coordinate geometry.

Knowledge and experience with . . . GIS, mapping, and database software applications.

Knowledge of document scanning concepts and techniques.

Knowledge of and working experience with personal computers and related peripherals such as printers, plotters, scanners, compact disk writers, etc.

Proficient in use of Microsoft Office Professional Suite (Word, Excel, Access, PowerPoint, Outlook).

Familiarity with programming languages and application software to support internet and web-based development and maintenance.

Familiarity with programming tools (i.e. Avenue, AML and Visual Basic) to develop basic customized menus and macros to automate and standardize procedures and generate requested GIS information.

Familiarity with GPS hardware, firmware and software (Trimble Pathfinder ProXR).

Familiarity with AutoCAD or other computer-aided mapping or GIS software, in addition to ESRI, helpful but not required.

Ability to design, develop, implement, summarize and present output from basic spatial analysis assignments.

Ability to set goals and objectives and meet project completion dates.

Ability to work cooperatively and communicate effectively (verbal and written) with a wide variety of contacts including staff in other County departments, officials on the municipal, state, federal level, and with other public and private sector clients.

Ability to conscientiously monitor accuracy and quality of GIS data.

Ability to work independently and manage/document multiple work assignments with minimal supervision.

Must meet requirements of Dodge County Driver Qualification Program.

Regular attendance and punctuality required.

The “**EDUCATION AND EXPERIENCE**” section of the job description states:

Bachelor's Degree in GIS, Information Technology, Geography or a related field with course work in GIS and Computer Science. Practical experience with and working knowledge of ESRI's ARC/INFO and/or ArcGIS 8.x, and ArcView required (Spatial Analyst Extension experience helpful). AutoCAD experience helpful.

The duties summarized in this job description constitute twenty-five percent of Carpiaux's position. Joyce Fiacco is the Director of the Land Information Department.

The "**KNOWLEDGE, SKILLS, AND ABILITIES**" section of the Planning & Development portion of the shared position, which is denoted GIS/CAD Specialist I, reads thus:

Knowledge of computer mapping concepts and computer hardware and software related to mapping and cartographic function.

Knowledge of drafting and cartographic equipment and basic materials of cartographic profession.

Knowledge and working experience with Microsoft and Office Professional software.

Knowledge of and working experience with personal computers and related peripherals such as printers, plotters, scanners, compact disk writers, etc.

Knowledge of local government organization and general cartographic principals.

Ability to plan, prepare, and implement drafting and mapping projects of substantial difficulty.

Ability to communicate and deal effectively with fellow employees, officials, and public.

Regular attendance and punctuality required.

The "**EDUCATION AND EXPERIENCE**" section of the job description states:

Four (4) year Bachelor's degree in geography, land use planning, GIS/LIS, or related field experience using GIS software (ArcView or AutoCAD).

The duties summarized in this job description constitute seventy-five percent of Carpiaux's position. David Carpenter is the Director of the Planning & Development Department.

The County went through a series of cuts for its 2003 budget. The cuts affected nineteen positions, nine of them occupied. Among the positions cut was that of Land Surveyor II. The Union and the County met on three to four occasions prior to the implementation of layoffs to discuss how to implement the layoff/bumping process. The meetings failed to produce an agreement. Prior to the layoffs, the Personnel Department prepared a document entitled "Layoff Guidelines For Supervisors." The document contains the following provisions:

Bumping

. . .

Professional

Employees will be allowed to bump someone with less seniority and they meet the minimal requirements of the job . . .

Supervisors

Employees will be notifying the supervisors of their intentions to bump. Supervisors will be responsible for making decisions whether someone meets the minimum qualifications of the position they are wishing to bump into.

Supervisors will also have the responsibility of determining whether an employee on layoff meets the qualifications for the position. This should be accomplished by personally interviewing that candidate, unless, it has been previously established that the employee does not meet the qualifications, (i.e. typing speed, certifications, etc.).

Sarah Eske is a Personnel Analyst for the Personnel Department, and saw to it that County supervisors received the guidelines. She also coordinated discussions between supervisors concerning the layoff/bumping process.

Rich Leaver was the Grievant's direct supervisor. Eske and Leaver began to discuss the Grievant's layoff through e-mails on December 7. By December 9, Leaver had informed the Grievant of the elimination of his position. The Grievant responded by requesting a meeting with Fiacco and Carpenter concerning a possible bump into Carpiaux's position. The meeting took place on December 12.

The December 12 meeting included the Grievant, James Wiersma, the Union's Treasurer, Joe Rains, the County's Personnel Director, Eske, Carpenter and Fiacco. Prior to the meeting, Fiacco was supplied the Grievant's position description for Land Surveyor II, the position description for GIS Specialist I, the Grievant's resume, and materials she requested from the Grievant concerning his experience with GIS. Carpenter came to the meeting with the Land Surveyor II and the GIS/CAD Specialist I job descriptions and the Grievant's resume. Each testified that they approached the meeting with some reservations concerning his qualifications, but had not reached any final conclusion.

The meeting participants reviewed, point-by-point, the portions of the job descriptions set forth above. The Grievant spoke candidly concerning his strengths and weaknesses, and took the position that he could perform the required duties. Both Fiacco and Carpenter had reservations concerning the Grievant's position. Each felt the Grievant lacked the knowledge and working experience with the ArcGIS software used by each department. Each confirmed their opinions in separate memos to the Personnel Department dated December 13. Each memo addresses the

Grievant's determination to bump Carpiaux from his position. Each memo states that if the Grievant could successfully perform a test on the software, then each supervisor would reevaluate the conclusion that he did not possess the minimum qualifications for the position occupied by Carpiaux.

Fiacco tried, without success, to find an outside source for a test. She then turned to an in-house test developed by herself and Stephanie Jansen, the County's Senior Cartographer from the Planning & Development Department. Jansen is a member of the bargaining unit. The test consisted of four parts. Each reflected the daily duties of a GIS Specialist. The test demanded the creation and editing of a database as well as the manipulation of data from, and creation of, computer generated maps. Rains met with Fiacco prior to the administration of the test to determine if it was job-related and could assess the minimum qualifications of the position. He met separately with Jansen to address the point with her. Jansen signed the following memo, dated December 17, to confirm the point. The memo states:

This afternoon I reviewed with you certain materials which comprised a test that could be used to determine a candidates qualifications for the GIS Specialist and GIS/CAD Specialist positions. The incumbent is utilized 75% as a GIS/CAD Specialist in the Planning Department and 25% as GIS Specialist in the Land Information Department.

Based on our discussion this afternoon, it is my understanding that you assisted in the development of the test questions and the work product that is to be produced as part of the test. You indicated that the development of this test began prior to the GIS/CAD Specialist and GIS Specialist position being filled, and that the test was designed to help determine whether a candidate meets the minimal qualifications for the positions. You stated to me that you believe the test is a fair assessment of a person's ability in that area.

By your signature below I am asking you to confirm that the above statements are an accurate reflection of our conversation in this matter, and that you have voluntarily offered this information.

The County offered the test the Grievant on December 18. The County gave the Grievant one-hour to review the sixteen manuals relevant to the software and provided him access to Carpiaux's computer for the hands-on portion of the test. Jansen served as proctor. After reviewing the manuals, the Grievant went to Fiacco's office to inform her that his taking the test would serve no productive purpose. He also noted to her that he understood that Carpiaux was going to resign, and asked if Fiacco would consider him for the job if he took an ArcGIS course to be offered through the University of Wisconsin-Madison. Fiacco informed him that the Personnel Department would have to address that point, and that she would contact them.

Carpiaux submitted a letter of resignation to the County on December 19. Eske issued the Grievant a letter of layoff dated December 19 that states:

...

This letter is to inform you that effective on December 20, 2002, your position will be eliminated from the 2003 budget. It has been determined that you do not meet the minimal qualifications of the position you wished to bump into. Effective at the end of the day on December 20, 2002 you are being placed on layoff.

We will be recalling people based on seniority to positions for which they are qualified. Equal consideration will be given to active employees who sign job postings and employees on layoff.

...

The County, on January 8, 2003, posted the position vacated by Carpiaux. It did not fill the position until May 5, 2003. The employee hired by the County did not have to take the hands-on test that the Grievant was scheduled to take on December 18.

The balance of the background is best set forth as an overview of witness testimony.

The Grievant

The County hired the Grievant on October 4, 1999. The Grievant is a graduate of the University of Wisconsin-LaCrosse, with a Bachelor of Science degree in Geography. In the Spring semester of 1998, the Grievant served as an intern for the Environmental Management Technical Center of the United States Geological Survey of the Department of Interior. During that internship he worked with ArcInfo 6.0 and ArcView 3.1 software. After graduation and prior to his hire with the County, he worked for a land surveying engineering firm in LaCrosse.

He noted that the December 12 meeting addressed the governing job descriptions in detail. His preparation for the December 18 test convinced him that the software had been modified to the point that he needed further preparation. He acknowledged that he could not have performed all of the duties of a GIS Specialist at the time he took the test. He offered, however, to take, at his own expense, a workshop offered over two days, with intensive hands-on training, through the University of Wisconsin-Madison. He estimated the course might cost one thousand dollars.

Each part of the inter-departmental position vacated by Carpiaux uses ArcGIS software. He testified that the position would use it “a great deal, 70 percent or so if not more” (Tr. at 40).

Rich Leaver

Leaver described the Grievant as “an exceptional employee” (Tr. at 43). His evaluations consistently reflected a strong work ethic and a facility to learn quickly. Neither Fiacco, Carpenter, nor anyone from the Personnel Department ever contacted him concerning the Grievant’s qualifications. He was not familiar with the requirements of Carpiaux’s position or with ESRI ArcGIS software.

Daniel Sommer

Sommer is a Cartographer for the Survey & Description Department. Sommer’s GIS background is strongest regarding AutoDesk Map, which is used in the Survey Department. AutoDesk Map is a separate software program to ESRI ArcGIS, but does use similar “right-click” context menus. Sommer has taken two ESRI ArcGIS certified classes to update his skills on that software. Those classes totaled five days of instruction and used ArcGIS 8.3. ArcGIS developed from ArcView and ArcInfo, combining their distinguishable file formats into a single file format.

He worked with the Grievant, respected his work ethic and ability to learn. In his view, “he would have little or no difficulty in learning the new software” (Tr. at 57), although it would be “rather difficult” (Tr. at 63) to move from AutoDesk Map to ArcGIS 8.x without training.

James Wiersma

Wiersma dealt with the Grievant throughout the layoff process. On December 19, during an exit interview, the Grievant reiterated his willingness to take courses to learn ESRI ArcGIS 8.x. Wiersma questioned the County on what other qualifications the Grievant lacked, and did not feel the County ever offered a satisfactory explanation. He asked Eske, via e-mail, whether the County’s denial of the bump rested on anything other than “this GIS software.” Eske spoke to Fiacco and Carpenter, who responded that the Grievant also “lacked the hands-on experience with this software.”

Sarah Eske

Eske’s role in the layoff process was that of a coordinator. Carpenter and Fiacco independently determined that the Grievant failed to meet the minimum qualifications for Carpiaux’s position. She noted that Carpiaux’s last day of work was January 3, 2003, and that she did not believe Carpiaux had offered his resignation at the time the Grievant sought to bump.

Michelle Vaillancourt-Pulver was also affected by the December layoff. She sought to bump into a social worker position. She lacked the necessary certification, but did have sufficient training to obtain a training certificate. The Union and the County entered a side agreement to permit her to bump, agreeing that she would have a certain period of time to obtain the necessary certification and that the agreement would not establish precedent. She did not think Vaillancourt-Pulver had to take any classes to obtain certification.

Joyce Fiacco

Fiacco thought the December 12 meeting was less formal than a job interview of an outside applicant. Her greatest reservations about the Grievant concerned his ability to manipulate current versions of ESRI ArcGIS software. At the time of the arbitration hearing, the County used ArcGIS 8.2. Versions of ArcGIS beyond version 8 (i.e., 8.x) embedded ArcView and ArcInfo within it. She did not think that any but the most recent schooling could supply the necessary training. She also had concerns with the Grievant's familiarity with programming languages and tools. Those concerns, however, reflect only two to three percent of the duties required of a GIS Specialist. She did not contact Leaver because she "didn't feel it was necessary" (Tr. at 122).

Her department uses the form of mapping software used in the Survey department on a "very minimal" (Tr. at 101) basis. She had no opinion on how much training the Grievant would require to become minimally proficient in ArcGIS 8.2 or higher. She learned ArcGIS on the job, and has attended seminars to update her skills.

The County used Jansen to proctor the test to make it more comfortable for the Grievant. The one-hour preparation time, in Fiacco's view, was sufficient for an employee proficient in ArcGIS, and would not have been provided for an outside applicant. Even though the Grievant declined to take the test, Fiacco did not view taking the test as proof in itself of his qualifications. Rather, she was willing to reevaluate her view of his qualifications if he did well on the test. She did not feel that permitting the Grievant to take a hands-on two-day course in ArcGIS would provide him the working experience necessary for the job. Neither Carpiaux nor the employee hired to replace him had to take the test.

During the unanticipated gap between Carpiaux's departure and the hire of another employee, Fiacco assumed some of the position's duties, and delayed work on a number of projects.

David Carpenter

Carpenter's department uses AutoCAD software more than Fiacco's, because it deals more frequently with land description data from the Survey department. His department is in the

process of phasing the software out of regular use. The GIS/CAD Specialist in his department uses ArcGIS software roughly ninety percent of the time.

Prior to the December 12, meeting, Carpenter reviewed the position descriptions with Jansen. Neither of them felt the Land Surveyor II had the software background or hands-on skills demanded of a GIS/CAD Specialist. The interview did not change his mind, although he was impressed at the Grievant's candor in assessing his own skills. He reached his conclusions regarding the Grievant's qualifications independently from Fiacco. He was open to the idea of testing the Grievant, but did not think that merely taking the test would sway his opinion.

The gap between Carpiaux's resignation and the filling of the vacancy came during a slow period preceding a major project, and thus the delay was not a significant problem.

Joe Rains

Rains played no role in the determination of the Grievant's qualifications, other than to facilitate the decision-making process of the department heads. Carpiaux's position was not vacant at the time the Grievant attempted to bump.

Doreen Ann Goetsch

Goetsch is a Senior Social Worker and the Union's Vice-President. She noted that Vaillancourt-Pulver lacked necessary certification to meet the minimum qualifications of the position she sought to bump into. She noted that Vaillancourt-Pulver, after obtaining the training certificate, had to take four additional classes sanctioned by the State of Wisconsin and then pass a test to be licensed as a Social Worker.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

The Grievant had the ability "to efficiently perform the work" of Carpiaux's position. An examination of the relevant job descriptions establishes this. Fiacco's testimony points to possible deficiencies in three of twenty-one separate areas of qualifications. Of those, only one poses a significant area of concern "and that is . . . the GIS 8.2." The Grievant was experienced in earlier versions of the software, but lacked experience "with the updated version." To limit consideration of his ability to this one criterion "is unduly restrictive."

The County's Layoff Guidelines demand minimal qualifications, but the County's

actions toward the Grievant “set the bar at a much higher level” and resulted in an “unreasonable and arbitrary” conclusion concerning his ability to bump. That the Grievant had prior experience with the software should have permitted him to bump, given his educational and his work background. His supervisor confirmed his work ethic and ability to learn on the job. Sommer’s testimony corroborates this. Fiacco acknowledged she had to update her computer skills and had to learn on the job. That the County had four months between Carpiaux’s resignation and the filling of his position should have created the time necessary to move the Grievant into the position without hardship to the County. The four month period “would have been a fair test to allow a trial or break in period on the job” without displacing any employee. The Grievant’s exceptional skills, work habits and learning capacity should have warranted at least the probationary period set out in Article VII.

Article XV establishes that the Grievant had the “prerequisite seniority to bump Dan Carpiaux” and that no more than a few days of Carpiaux’s employment would have been affected. The County’s denial was arbitrary and unreasonable. It is not consistent with the County’s treatment of Vaillancourt-Pulver. Beyond this, the test given the Grievant was not necessary, did not reflect past practice, and did not affect the County’s determination to deny the Grievant any bumping rights. The employee hired to replace Carpiaux “did not have to take the test” and the County made no effort to check the Grievant’s qualifications with his supervisor.

The Union concludes that the grievance should be sustained and the Grievant should be “immediately recalled to the position in question”, and should be “made whole for all losses.”

The County's Brief

After an extensive review of the record, the County contends that it “properly found that Grievant did not possess the minimum qualifications for the position.” The County’s right to set the minimum qualifications is undisputed and established by Article III. The job descriptions for the shared positions that the Grievant sought to bump into “specifically require knowledge of and working experience with 8.x version of ArcGIS software as a minimum qualification.” The supervisors for each part of the shared position were entitled to assess whether the Grievant minimally met this qualification.

Similarly, Article III entitles the supervisors to determine whether ArcGIS 8.x is the appropriate software for the County. Whether another form of software is more suitable has no bearing on whether the Grievant minimally met the demands of the position he sought to bump into. ArcGIS 8.x represents the software “which is used in 90% of the job duties of the GIS Specialist.” That the Grievant had experience in AutoCAD or in an earlier version of ArcInfo fails to establish “the working knowledge of, and practical experience with,” the software demanded by the position he sought.

Page 14
MA-12181

The determination of minimal qualifications aims at “present ability, not future capability.”

The GIS Specialist position demands “experience with programming languages, Internet application software, web-based development and maintenance, and programming tools.” The Grievant “simply did not have these skills.” The Grievant acknowledged “he had never worked with ArcGIS” and that his class experience with ArcInfo was at an introductory level in 1997. That the Grievant had familiarity with AutoCAD Map shows no more than a facility that was “helpful but not required” by the position. Sommer’s testimony falls far short of establishing that the Grievant could have assumed the duties of the GIS Specialist position when he sought to bump into it.

The County “afforded Grievant every opportunity to demonstrate minimal qualifications.” It afforded the Grievant the opportunity to review his qualifications with Fiacco and Carpenter, who “came to the meeting with an open mind.” They afforded him the opportunity to demonstrate his qualifications through a test, authored by County employees to accurately reflect the daily duties of the position. Even though the Grievant claimed the ability to perform the duties of a GIS/CAD Specialist, “he declined to take the test designed to mirror the typical work load of the GIS/CAD Specialist because he felt he could not pass it.” His review of the materials provided him by the County convinced him “he could not possibly perform adequately.”

Nor can any side agreements support the Union’s position. Vaillancourt-Pulver’s situation is “completely distinct from the Grievant’s.” She “had already received all the training, education, and experience she needed to qualify for a social working training certificate” and had done so at her own time and expense. Beyond this, the parties agreed to permit her to obtain a training certificate in a side letter “which specifically stated that it would neither set a precedent nor create or contribute to the creation of a past practice.”

The County concludes that “the grievance (should) be dismissed with prejudice.”

The Union’s Reply Brief

The Union contends that the County’s reliance on the frequency of use of ArcGIS 8.x software cannot obscure that the Grievant possesses the education and understanding that drives the benefit of the software. Beyond this, the County’s position ignores that the position description describing 75% of the position does not even mention ArcGIS software. The 25% portion of the position that does mention ArcGIS mentions it as one of twenty-one “separate categories.” Even if the software is considered important, the Grievant “could readily have picked up the skills in this software.” What arbitration precedent the County cites has no direct applicability to the grievance.

The Union does not cite the Vaillancourt-Pulver situation as precedent. Rather, the Union cites the example to demonstrate “that there were options that could have been used to live up to the contract language” at issue.

The County's Reply Brief

The County "does not contest that the Grievant was a good employee and was well-liked by his supervisor and co-workers." That is not, however, the issue. That he was a good Land Surveyor "does not automatically make him qualified to be a GIS Specialist." The Grievant, not the County, chose that position for bumping purposes. That the County did not interview his supervisor is irrelevant, since it did not doubt the quality of his performance in the prior position. That the Union feels he meets the demands of the bulk of the two governing job descriptions cannot obscure that he lacks experience in the software underlying 90% of the work time of a GIS Specialist. Nor does the contract require the County to supply the Grievant the training to address this deficit. The Union's position is self-contradictory, since "either the Grievant is minimally qualified to bump into the position or he is not." Whether or not the Grievant is a quick study or not has no bearing on the contractual issues.

That "Carpiaux quit after the Grievant was denied the opportunity to bump does not make the Grievant minimally qualified for the position." Whether or not the County could have moved the Grievant into Carpiaux's position without hardship has no bearing on the labor agreement. Carpiaux gave notice the same day the County denied the Grievant the right to bump. Thus, "the position was not vacant" when the Grievant "attempted to bump into" it. When and how the position became vacant cannot obscure that the interpretive issue is whether or not the Grievant was minimally qualified to fill it.

The County's request that the Grievant take a test was neither unreasonable nor improper. The evidence does not indicate that Fiacco or Carpenter had made up their minds concerning the Grievant's qualifications prior to seeking that he take the test. That other employees did not have to take the test falls short of establishing the Grievant's ability to assume the job. Vaillancourt-Pulver's situation has no bearing on the grievance on its facts or as a matter of contract interpretation.

DISCUSSION

I have adopted the Union's statement of the issues. The differences between the parties' statements are not significant. The County's focuses on its determination of minimal qualifications, and thus highlights the operation of Article III. The Union's broader statement, however, better reflects the breadth of the parties' arguments.

The Union accurately characterizes the case as one that does not pose a significant factual difference, and reflects a well-focused dispute on qualifications. The dispute must, however, be given a contractual focus. Section 15.1 generally governs the grievance by establishing a general Employer policy "to recognize seniority." This general policy is given specific applicability by Section 15.82, which demands that the employee "with the least seniority be laid off first."

There is no dispute the Grievant has more seniority than Carpiaux. Section 15.82, however, also demands that “the remaining Employees” must be “qualified to carry on the Employer’s usual operation.” Article III reserves the determination of qualifications to the County. The County’s internal guidelines, undisputed by the Union, demand that supervisors determine if an employee seeking to bump a less senior employee meet the minimum qualifications of the position the bumping employee seeks.

Thus, the contractual issue is whether the County’s determination that the Grievant failed to meet the minimum qualifications of Carpiaux’s position constitutes a violation of Section 15.82. The evidence, read in light of that section, favors the Employer’s view. The Union’s arguments are stronger as a matter of equity than as a matter of contract. As noted above, the dispute on qualifications is narrowly focused. The County’s concerns focus on less than a handful of the over thirty criteria stated in the combined position descriptions. As Wiersma’s e-mail highlights, the fundamental issue concerns the Grievant’s lack of knowledge and experience with ESRI ArcGIS 8.x.

As preface to an examination of this issue, it is appropriate to highlight what is not in dispute. There is no doubt that the Grievant was an exceptional employee, who demonstrated a strong work ethic and a facility to learn new tasks. There is some dispute on this point, but the evidence will not support a conclusion that the Grievant, at any point relevant here, sought anything other than to bump Carpiaux from his position. Carpiaux’s potential departure figured into the e-mail exchanges preceding the layoff, but it is evident from Fiacco’s and Carpenter’s December 13 memos and from Carpiaux’s December 19 letter of resignation that the County appropriately viewed the Grievant’s action as a request to bump an incumbent from a job. This conclusion means Section 15.7 plays no role in the grievance, for there was no “vacancy” or “new job” demanding a posting at the time the County assessed the Grievant’s qualifications. Nor can there be a significant contractual dispute that the County’s assessment was of the Grievant’s qualifications at the time of layoff. Section 15.82 establishes this by linking “the Employer’s usual operation” to the determination of “qualified.”

The strength of the Union’s arguments is that the Employer’s determination was unduly restrictive. On balance, however, the evidence will not support this position. The Grievant’s estimate was that ArcGIS software would occupy seventy percent of the position’s attention. AutoDesk Map was being phased out of the County’s system. Fiacco worked with the ArcGIS 8.x software, and knew its demands personally. Carpenter did not, but relied heavily on Jansen’s views to assess the Grievant’s qualifications. Jansen was a unit member with no apparent reason to view the Grievant’s qualifications less than objectively. Jansen’s role in developing the test administered to the Grievant effectively assured the test was job-related and tied to the daily duties of the position. The Grievant’s conclusion, after an hour of study, was that ArcGIS 8.x had fundamentally altered the earlier software versions he had experience with. His refusal to take the test and open acknowledgement that he lacked the current skill to take on the position

effectively closes the issue of contractual interpretation. The Employer's "usual operation" could not have been continued at his then-current level of skill.

As noted above, the Union's arguments have strength as a matter of equity. The Grievant was trainable, and willing to undertake training. As events worked out, a roughly four-month window opened that could have permitted training without evident hardship to the County. The Union and the County demonstrated flexibility and creativity regarding Vaillancourt-Pulver.

The strength of these contentions must be acknowledged, but does not afford a basis to overturn the conclusion stated above. As a general matter, flexibility and creativity are more hallmarks of the bargaining process than of contract interpretation. Contract interpretation involves compulsion, and that compulsion must rest on the parties' agreement rather than on an arbitrator's individual flexibility or creativity. There was no agreement concerning the Grievant analogous to that negotiated for Vaillancourt-Pulver. The agreement reached regarding her was not to create precedent. There is then, no interpretive room for the implication of an agreement covering the Grievant that parallels that covering Vaillancourt-Pulver.

The reference to "usual operation" in Section 15.82 is arguably broad enough to incorporate the possibility of training, and the time taken to fill Carpiaux's position did afford the opportunity for training. Here too, the potential of flexibility poses significant problems as a matter of contract interpretation. The time to fill Carpiaux's position is a function of hindsight, viewed from the perspective of the arbitration hearing. This does not, contractually or factually, afford an accurate reflection of the view demanded of the County at the time of the layoff. The Grievant did not have a convenient window of opportunity for training at the time of the requested bump. Rather, he sought to dislodge an incumbent employee. The focus on the Grievant's qualifications ignores that there is no dispute that Carpiaux was competent. The fortuity of Carpiaux's resignation cannot obscure that if the reference to "the Employer's usual operation" is expanded too broadly, then competent employees can be forcibly removed from their position by an employee not possessing the current skills to perform necessary duties. The flexibility sought on the current facts could have unintended results on future disputes.

Showing the flexibility sought by the Union has other contractual ramifications. Once Carpiaux resigned, there was a vacancy. That arguably brings the provisions of Section 15.7 into play. There may have been other unit employees with an interest in the position. The evidence will not support any conclusions on this, but it is of some significance to underscore that the assumption that the Grievant should have been placed in Carpiaux's position obscures the presence of contract language not at issue here and the potential interests of other employees. Similarly, bringing the provisions of Article VII into the grievance strains its terms, and poses potentially adverse implications. Section 7.1 applies to "newly hired Employees" and denies such employees seniority rights and recourse to the grievance procedure in the event of discipline. Section 7.4 applies to "promoted" employees. It is not apparent if the bump the

Grievant requested can be considered a promotion. If it can be, it is not apparent how he or the Employer “may request that the Employee be returned to his former position.” If language is stretched beyond its intended meaning, the results become unpredictable.

The Union’s concern with the Grievant’s loss of employment is understandable and well stated. That concern does not, however, translate into a sufficiently solid contractual basis to overturn the County’s determination.

AWARD

Dodge County did not wrongfully deny Jeremy Klug the opportunity to bump employee Dan Carpiaux in December 2002.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of October, 2003.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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