

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**WINNEBAGO COUNTY (SHERIFF'S DEPARTMENT)**  
and  
**WINNEBAGO COUNTY SHERIFF'S PROFESSIONAL  
POLICE ASSOCIATION, LOCAL 107, LAW, INC.**

Case 353  
No. 61600  
MA-11999

(Promotion Grievance)

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**Appearances:**

**Mr. John A. Bodnar**, Corporation Counsel, Winnebago County, 448 Algoma Boulevard., P.O. Box 2808, Oshkosh, WI 54903-2808, on behalf of Winnebago County.

**Mr. Thomas A. Bauer**, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, WI 54915, on behalf of Local 107.

**SUPPLEMENTAL AWARD**

On June 25, 2003, the Undersigned issued the Award in the captioned case sustaining the grievance and retaining jurisdiction over the remedy only, as follows:

**AWARD**

The County violated the collective bargaining agreement when it promoted Mark Habeck to the rank of Sergeant. Therefore, the County is ordered to remove Habeck from the Sergeant position and to create a new list of the top three scoring candidates who had the required length of service on the day of their examination to be eligible to test for a Sergeant's position. This new list must then be submitted to the Sheriff for his consideration. The Sheriff is ordered to select one of the top three scoring candidates and place him/her in the Sergeant of Patrol

position and if Peters is selected, the County shall place Peters in the position with full backpay and benefits from August 5, 2002, forward.  
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*8/ The County argued that if Peters were the chosen candidate he should receive the difference between Corporal pay and Sergeant's pay because Peters declined the Corporal promotion on February 23, 2001. The fact that Peters declined the Corporal promotion (which he had every right to do) is not relevant to this grievance and cannot form a basis for mitigation of any backpay that may be due him. I will retain jurisdiction of the remedy only in this case in order to assist the parties in implementing the Award.*

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On October 12, 2003, the Association requested that the Arbitrator reassert jurisdiction to clarify her Award regarding the remedy, explaining as follows:

. . .

The County has promoted Detective Greg Cianciolo to the rank of sergeant of patrol. This position was created as a result of the compliance of your award in the above-stated matter, wherein the County "demoted" Mark Habeck from the position of Corrections Sergeant, and then promoted Habeck to Corrections Lieutenant, a non-bargaining unit position. The Sheriff then opened the sergeant vacancy within the patrol division, and subsequently promoted Detective Cianciolo to the sergeant classification.

However, the Association contends that the County is still in violation of the arbitration award in that Cianciolo did not have "*the required length of service on the day of his examination to be eligible to test for a sergeant position.*" Cianciolo tested with Habeck, and was only eligible for the corporal examination.

. . .

By agreement of the parties, a hearing was held at Oshkosh, Wisconsin, on January 30, 2004, regarding the Sheriff's selection of Greg Cianciolo to fill the patrol sergeant position effective September, 2003. No stenographic transcript of the proceedings was made. The parties had a full opportunity to present evidence and argument at the hearing. The parties requested that the Arbitrator issue her Supplemental Award as soon as possible after her receipt of briefs. The parties submitted their briefs to the Arbitrator by February 10, 2004, wherein the record was closed.

**ISSUE**

Did the Employer violate the terms and conditions of the collective bargaining agreement when the Employer promoted Greg Cianciolo to the rank of Sergeant of Patrol on or about September, 2003? If so what is the appropriate remedy?

**BACKGROUND**

In the original Award herein, the Arbitrator interpreted Appendix B of the effective labor agreement as follows:

. . .

The first question that must be answered in this case is how best to interpret the applicable language of Appendix B. In my view, Appendix B unambiguously provides for a two-step process. First, officers must meet or exceed a length of service requirement before they are eligible to take an examination for promotion to a particular rank. Second, in order to actually be promoted, the candidate who has already met the length of service requirement for a particular rank, must meet or exceed the time-in-grade requirement listed. The minimum length of service requirements, 2 years in the Jail Division or 3.5 years in the Patrol Division, must be achieved before a candidate may write the "Corporal Exam" and 5 years of service is necessary in the Department before a candidate may write the "Sergeant Exam." The above length of service requirements must be met by each candidate on the day of the examination. Under the clear language of paragraph 2 of Appendix B, this first length of service requirement must be met before the next paragraph (paragraph 3) of Appendix B comes into play.

Paragraph 3 of Appendix B clearly states that "actual promotion shall be contingent upon the candidate's meeting or exceeding the . . . minimum time-in-grade for the respective ranks. . ." listed. The time-in-grade requirement for a Corporal promotion is 1 year experience in the Division of the vacancy; for a Sergeant promotion it is 1 year experience in the Division of the vacancy. In my view, it is clear that the length of service requirement must be met at the time the exam is taken, while the time-in-grade requirement must be met at the time the candidate is actually considered for a promotion to an open position.

. . .

The proper application of Appendix B herein to the Cianciolo promotion is at issue before the Arbitrator.

## FACTS

Following the issuance of the original Award herein, Sheriff Brooks requested that H.R. Specialist Cori Post issue him a list containing the top three scoring applicants from the tests given February 22 and June 14, 2001. Post issued a memo to the Sheriff dated July 8, 2003, on which she listed those she believed were eligible to be considered for the Patrol Sergeant opening, as follows:

...

Due to the Arbitration Case MA-11999, the following three (3) scores and associated names are forwarded to you for consideration for the Sergeant position opening in the Patrol Division:

1. Roger Peters
2. William Anthes
3. Randy Woldt and Greg Cianciolo (tied score)

These people meet the minimum length of service requirement (5 years in the department) and the minimum time-in-grade requirement (1 year in patrol). They are listed in order as they appear on the promotional list from the combined tests of February 22 and June 14, 2001.

...

Thereafter, Sheriff Brooks offered the Patrol Sergeant position to Randy Woldt who turned it down. The Sheriff then offered the position to Greg Cianciolo. Cianciolo took the promotion.

Sheriff Brooks stated herein that both Woldt and Cianciolo had five years' service with the Sheriff's Department at the time they each took their sergeant's exams (Cianciolo, as of June 14, 2001, and Woldt as of the February 22, 2001, exam). The Association asked the Arbitrator to assert her reserved jurisdiction over the remedy to determine whether Cianciolo was properly placed in the promotion as of September, 2003.

## POSITIONS OF THE PARTIES

### The Association

The Association argued that the June 14, 2001, make-up exam test date should not have been used to determine Cianciolo's eligibility for the Patrol Sergeant promotion because the contract requires the Sheriff to promote from the eligibility list created by the original exam conducted on February 22, 2001. The Association argued that the June 14<sup>th</sup> make-up exam

was not intended to and did not in fact create a new eligibility list. This conclusion was supported also by the fact that only two of those who took the June 14, 2001, make-up exam had five years' departmental service as of June 14<sup>th</sup>, as follows:

Habeck (hired 1-16-97), 4 years, 6 months;  
Vendola-Messer (hired 9-3-96), 5 years, 9 months;  
Cianciolo (hired 5-26-96), 6 years, 1 month.

Thus, the Association argued that without three eligible top scorers from the June 14<sup>th</sup> test, the Sheriff would have had to give another test (pursuant to Appendix B) which he did not do in this situation. Therefore, the Association requested rescission of the Cianciolo promotion, an order that the Sheriff make the sergeant selection from the eligibility list dated February 22, 2001, an order that the County cease and desist from similar activities in the future and to pay costs and fees of the Association in bringing the instant case.

### **The County**

Simply put, the County argued that Sheriff Brooks correctly offered the Patrol Sergeant position to Cianciolo as he had five years' service to the department as of June 14, 2001, the date he took the make-up exam (which had been requested as a means of settling a grievance by the Association). The County noted that the Sheriff gave the June 14, 2001, test at the Association's request and that the Sheriff was merely trying to be fair by agreeing to hold a make-up exam, as demonstrated by his letter of March 20, 2001, which read in relevant part as follows:

. . . I believe it is my responsibility to make sure that all members of the Winnebago County Sheriff's Office, not just one, receive equal and fair treatment. Therefore, it is my intention to allow anybody who was eligible to take the test in February, and did not sign up to take the test, the opportunity to take a makeup test that will be offered sometime in April of 2001.

. . .

As the contract does not refer to an original test date and there is no limit on the number of times the Sheriff can give a promotional test, the County argued that the language certainly allowed the Sheriff to do as he did in this case. In addition, the County argued that the relevant language of the labor agreement was clear and unambiguous and supported the Sheriff's actions herein.

The County urged that even if the Arbitrator were to rule in favor of the Association in this case, no money award should be granted herein due to the unusual situation/factual

circumstances and contractual language involved in this case. As no evidence was proffered to show that the Sheriff has been unfair in making his selections, the County urged that the case be dismissed without a remedy.

### DISCUSSION

The factual situation before me has never arisen between the parties and there is no contractual language which specifically addresses how to treat make-up tests. Furthermore, the parties offered no evidence of relevant past practice or bargaining history for my consideration. In these circumstances, I must look to the facts surrounding the parties' agreement to settle Habeck's testing grievance by holding a make-up exam for guidance on this point.

In this regard, I can find nothing in the record of this case to indicate that the parties ever discussed the value/affect the date of the make-up exam would have on the selection process. However, it is clear that the June 14, 2001, exam was given because the County and the Association agreed that there were Department employees who should have been notified of and offered an opportunity to take the combined corporal/sergeant exam because they had the minimum length of service in order to be eligible to sit for a corporal exam.

Therefore, but for errors by the County regarding who they invited to sit for the February 22, 2001, exam, Vendola-Messer, Cianciolo and Habeck, would have been invited to sit for the corporal exam on February 22, 2001, as all three had the necessary minimum length of service (2 years in Corrections or 3.5 years in Patrol) to be eligible to take the corporal exam as of the test date, February 22, 2001. Thus, eligibility to take the June 14<sup>th</sup> make-up dated back to the February 22, 2001, exam, making the June 14<sup>th</sup> date irrelevant. In this regard, I note that the June 14<sup>th</sup> make-up exam was only offered to Vendola-Messer, Cianciolo and Habeck, who the parties agreed had exam eligibility. In these circumstances, but for an admitted error, these three employees would have been given the opportunity to take the February 22, 2001, corporal exam and February 22, 2001, must be considered the test eligibility date. 1/

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*1/ Part of the problem here is that only one exam is given for corporal and sergeant openings. This has created confusion when the list of three top candidates have been made and given to the Sheriff for his selection.*

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This analysis is supported by the Sheriff's March 20, 2001, letter to the Association which refers to the later test (conducted on June 14<sup>th</sup>) as a "makeup" and states that all employees who were eligible to take the February 22, 2001, test should be tested.

The Association argued that the Sheriff should be required to select a sergeant from the February 22, 2001 eligibility list. This argument is contrary to the Association's prior agreement to settle the Habeck grievance by holding a make-up exam for those improperly denied the opportunity to take the February 22, 2001 exam. In addition, the June 25, 2003 Award in the underlying grievance recognized this prior agreement and the parties' implicit agreement to merge the February 22 and June 14, 2001 eligibility lists. Thus, the list to be used here must be one created by combining the February 22 and June 14, 2001 lists. I note that the Sheriff's March 20, 2001, letter shows that he had no intention of creating a new eligibility list by conducting the June 14<sup>th</sup> test, but rather that he intended to simply add eligible employees who had mistakenly been excluded from testing in February, 2001, to the original eligibility list created by the results of the February 22, 2001, test.

The County has conceded that Cianciolo did not have the necessary five years' length of service in the department as of February 22, 2001, to be considered for a sergeant's opening. However, the County has argued that the phrase "at the time of examination" should be read literally to mean the examination date of any candidate. Given the specific facts of this case regarding the parties' intent in settling Habeck's testing grievance and the silence of the labor agreement regarding make-up tests, I do not believe such a literal interpretation is appropriate.

Therefore, I find that the phrase "at the time of the examination" in this particular case must mean February 22, 2001, and the eligibility list to be used must be a combined list from the February 22 and June 14, 2001 exams. However, if there are not three individuals having passing scores on either the February 22, 2001, exam or the June 14, 2001, exam for the Sheriff to consider who also have the minimum five years of service to the department as of February 22, 2001, it appears that Appendix B would require a new test to be given, as follows:

In the event that the list of eligibles contains less than the names of three individuals having passing scores, a new test shall be conducted and a new list prepared.

In these circumstances, there might be no remedy in this case other than that the Sheriff conduct a new test and follow the language of Appendix B.

The County has reminded this Arbitrator that by his agreement to allow a make-up test, the Sheriff was trying to be fair to all, that he settled the Habeck testing grievance by giving all similarly situated employees the same chance to test and that no evidence has been submitted to show that the Sheriff had been unfair in his selection decisions in the past and that therefore, no monetary award should be made herein. Despite the very unusual circumstances of this case, a full monetary is not unreasonable as there is no evidence in this case to show that the Grievant, Roger Peters, should be disqualified from receiving a make-whole remedy if he is selected as Sergeant of Patrol pursuant to this Award.

Therefore, I issue the following

**SUPPLEMENTAL AWARD 2/**

The Employer violated the terms and conditions of the collective bargaining agreement when it promoted Greg Cianciolo to the rank of Sergeant of Patrol on or about September, 2003, because he lacked five years' length of service on February 22, 2001. Therefore, the County is ordered to remove Cianciolo from the Sergeant of Patrol position (if he is still the incumbent thereof) and to create a new list of the top three scoring candidates (from the combined February 22 and June 14, 2001 list) who had the required five years length of service on February 22, 2001, in order to be eligible to test for a sergeant position. This new list must be submitted to the Sheriff for his consideration if it contains the three names necessary under Appendix B. The Sheriff shall then select one of the top three scoring candidates from this list and place him/her in the Sergeant of Patrol position. If there are not three names on the list submitted to the Sheriff, the Sheriff shall conduct a new test and a new list shall be prepared, pursuant to Appendix B. If Grievant Peters is selected through this entire process for the Sergeant of Patrol position, the County shall place Peters in the position with full back pay and benefits from August 5, 2002, to date.

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*2/ For the reasons stated in the original Award herein, the Association's request for fees and costs is denied.*

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Dated at Oshkosh, Wisconsin, this 11<sup>th</sup> day of March, 2004.

Sharon A. Gallagher /s/  
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Sharon A. Gallagher, Arbitrator

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