

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 2470, AFSCME, AFL-CIO

and

CITY OF SPARTA

Case 52
No. 62127
MA-12169

(Guy Koehler Posting Grievance)

Appearances:

Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 2470, AFSCME, AFL-CIO.

Richard J. Heitman, City Attorney, on behalf of the City of Sparta.

ARBITRATION AWARD

Local 2470, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Sparta, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on June 11, 2003 in Sparta, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter. The briefing schedule was completed by November 10, 2003. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

1/ The parties waived the 30-day time limit for issuance of the Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

Did the City violate the collective bargaining agreement by failing to award the vacant Foreman position to the grievant? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

ARTICLE III **PERMANENT JOB POSTING AND BIDDING**

. . .

3.02 When a position covered by this agreement becomes vacant, such vacancy shall be posted in a conspicuous place listing the pay, duties and qualifications. This vacancy shall remain posted for a five (5) day period. Within five (5) days of expiration of the posting period, Employer will award the position to the most senior applicant qualified and able to accept the responsibility of the position. An employee who applies for a vacant position and is not awarded the position shall receive written notification.

3.03 The successful applicant shall be given a thirty (30) day trial period for the new position at the applicable rate of pay. If at the end of the trial, it is determined that the employee is not qualified to perform the work, or if he himself so chooses, he shall be returned to his old position and rate.

. . .

ARTICLE XIX **MANAGEMENT RIGHTS**

19.01 It is agreed that the management of the City and/or Water Utility and its business and the direction of its working forces are vested in the Employer, and an Employer shall retain all rights not expressly relinquished by this agreement, including but not limited to the following: to direct and supervise the work of its employees; to hire, promote, transfer, lay off employees, to demote, suspend, discipline or discharge employees for

just cause; to plan, direct and control operations; to determine the location where such work shall be performed; to determine to what extent any process, service, or activities of any nature whatsoever shall be added, modified, eliminated; to introduce new and improved methods or facilities, or to change existing service practices, methods and facilities; to schedule the hours of work and assignments of duty; to make and enforce reasonable rules; to take whatever action may be necessary to carry out the functions of the City in situations of normal physical emergency; to maintain efficiency of City government operations entrusted to it.

19.02 The Employer's exercise of the foregoing functions shall be limited only by the expressed provisions of this contract and Employer has all rights, which it has at law except those expressly limited by this agreement. In keeping with the intent of this agreement, the City and Utility will not subcontract work or farm out work that is normally done by the employees in the bargaining unit that will result in layoffs or loss of normal time worked by employees.

BACKGROUND

The Grievant, Guy Koehler, has been employed in the City's Street Department for 25 years and has held the positions of Laborer, Light Equipment Operator, and for the last 10 years, Heavy Equipment Operator. The Grievant testified that he has operated all of the equipment in the Department over the years, though now he operates the Loader for the most part. The Grievant has worked at the City's brush dump for the past 20 years. The last 15 years he has worked there by himself. At the time of hearing, the Grievant was working on the roads, mostly doing mowing.

On December 5, 2002, the Department posted a Working Foreman position. The position had been vacant for some years and it had been decided to fill it again. The posting set forth the following:

STREET DEPARTMENT WORKING FOREMAN POSITION

Posted 12/5/02, Effective 1/1/03

PAY

The starting pay for this position is established in the existing union contract (\$15.45/hour for employees with over 5 years seniority as of 1/1/03).

DUTIES

Assign duties for, dispatch and supervise employees performing department functions.

Deal with employees in a fair and respectful manner.

Help DPW plan for future department projects.

Calculate quantities and order materials as needed.

Provide information to DPW for budget planning.

Attend Public Works Boards, Finance/Personnel Committee meetings, Common Council meetings, and staff meetings only upon request by DPW.

Report any personnel problems or issues to DPW.

Ensure Department employees perform their duties in a safe, legal, and efficient manner.

Meet with DPW regularly to review project status, bills, and maintain open communication.

Deal with the public in a positive and respectful manner.

Read and respond to e-mail and other communication from City Hall.

Authorize department invoices.

Pick up department mail.

QUALIFICATIONS

Technically proficient in department work, possess appropriate CDL.

Ability to delegate work confidently and fairly.

Good interpersonal and communication skills.

Demonstrated positive attitude, ability to manage and supervise, fiscal responsibility, dependability, dedication and flexibility.

Adequate computer knowledge to read and respond to e-mail.

The Grievant and one other employee, A, signed for the position, the Grievant being the more senior of the two. The two employees were interviewed by the Department of Public Works Director, Jordan Skiff. A was awarded the position.

Skiff testified that he did not feel the Grievant was qualified because the job demands communication skills, interpersonal skills, respect for authority and dependability, and he had concerns about the Grievant in those areas. According to Skiff, he found the Grievant to be gruff and taciturn and feels he does not have a positive attitude. Skiff testified that the most important reasons he found the Grievant not qualified for the position was his lack of interpersonal skills and lack of respect for authority. The City also submitted incidents involving the Grievant that occurred in 1980, 1983, 1985 and 1999.

The Grievant testified that he has operated all of the equipment the Department has and has done most of the jobs in the Department. According to the Grievant, he gets along well with his co-employees, but agrees he needs some help with his interpersonal communication skills. In the interview with Skiff, he admitted he “has a temper” and that he needed some help with his interpersonal skills, but told Skiff he was willing to listen.

Koehler grieved the denial of the Working Foreman position. The grievance was processed through the parties’ contractual grievance procedure and, being unable to resolve their dispute, the parties proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

It is the Union’s position that Sec. 3.02 is a “minimum qualification” standard, and therefore, the issue is whether the Grievant is qualified for the Working Foreman position, not whether the other applicant is more qualified. As the Grievant was the most senior applicant, it is the City’s burden to prove the Grievant is not qualified.

The Grievant has worked for the City for 25 years, has held the positions of laborer, light equipment operator and heavy equipment operator, and has operated all of the equipment in the Street Department. Thus, he has the knowledge to perform the duties of Working Foreman.

While the City claimed the Grievant does not have the personal relationship and communication skills to perform the job, it could not cite any specific instances to support its allegations. In his two most recent evaluations, the Grievant received a "Very Good" rating in all categories, except "Effective In Verbal Communications" in which he received a "Satisfactory" rating. He was rated "Very Good" in "Overall Performance."

The Grievant testified that he believed he could perform all of the duties listed in the Working Foreman position description and that he met the qualifications listed as well.

Skiff expressed his concerns about the Grievant's ability to deal with co-workers, the public, and the Public Works Board. While the Grievant conceded that he has a temper, he testified he has never been violent. The record shows that Skiff asked employees to contact him if they had a problem with the Grievant being a foreman, but received no responses. Skiff conceded he had not received any complaints from the public regarding the Grievant's performance. As to dealing with the Board, the Grievant testified he believed he could work with them.

As to concerns about the Grievant's ability to refer an employee for discipline because of his strong union ties, the Foreman position is in the bargaining unit and is not supervisory. Thus, disciplinary action would not be taken by the Grievant, but only referred to his supervisor. The same would be true of any applicant for the position. Further, it would violate State law to deny the Grievant the position because of his ties to the Union.

While the City introduced evidence as to past situations to show prior discipline, those incidents did not result in discipline and occurred so long ago that they should be considered stale. Further, the Grievant testified he has never been disciplined.

The City also indicated concern about the Grievant's personal characteristics and attitude. The Union cites an example in Elkouri and Elkouri, *How Arbitration Works* (Fourth Edition), of an arbitrator holding that an employee's "surly and uncooperative" attitude could justify denying a promotion only if efforts had been made, unsuccessfully, to correct his attitude, and that his attitude seriously detracted from his ability to perform the job. At 646. Skiff conceded he had not taken any action to deal with the alleged attitude problem. Nor has the City shown that the Grievant has been involved in "injudicious conduct and conversation" so as to justify denying him the position.

The Union asserts that the Grievant has the knowledge to perform the Foreman position and with his 25 years of service, he should have at least been given the 30 day trial period in the position. The Union requests that the Grievant be awarded the Working Foreman position and made whole.

City

The City's argument is sufficiently succinct that it may be set forth as stated:

The City does not dispute that Mr. Koehler has more seniority than the individual who was awarded the working foreman position. However, the language, "qualified and able to accept the responsibility of the position" will be rendered meaningless if the people most able to make such a determination – the City staff – can be overruled by the employee.

Joint Exhibit 5 (a working foreman job description) was used by the City when the job was posted. Jordan Skiff, the Director of Public Works and the immediate supervisor of the working foreman, testified concerning Mr. Koehler's ability to fulfill the various aspects of the position. It was his firm and certain opinion that Mr. Koehler was deficient in many respects for the working foreman job.

The working foreman position is qualitatively different from any of the other positions in the Street Department; it is not sufficient to merely be able to operate machinery and perform manual labor. The foreman is required to effectively communicate with the other employees as well as the employer, plan and execute operations, occasionally speak on behalf of the City to City residents and taxpayers and assist the Public Works Director in planning, budgeting and supervision of employees. Mr. Koehler's abilities, while satisfactory in the position he presently holds, do not run in that direction.

The grievant's work history suggests that his demeanor is not suitable for a foreman position. Although the incidents written up in Employer Exhibit 2 are somewhat dated, Employer Exhibit 1 suggests that Mr. Koehler has not changed his stripes over the years. In fact, as Mr. Skiff testified, the grievant conceded that he has a temper. I would argue that a self-recognition of that kind of problem would indicate that he has trouble controlling it. The City would be not responsible to its constituents if it ignored what it knows about Mr. Koehler and his ability to handle the position of working foreman.

The City concludes that the grievance in this matter should be denied.

DISCUSSION

As the Union notes, Sec. 3.02 is not a "relative ability" clause; rather, it provides that the position is to be awarded to "the most senior applicant qualified and able to accept the

responsibility of the position.” Thus, the question is only whether the Grievant, as the most senior applicant, is presently qualified for the Working Foreman position, not whether he is more qualified than A. In this regard, while it is management’s determination to make, it must have a reasonable basis for its determination of the Grievant’s qualifications.

The Working Foreman reports directly to Skiff and is a quasi-supervisory position in that it involves assigning and supervising work and reporting personnel problems to the Director. The position’s required qualifications, which include “good interpersonal and communication skills” and “demonstrated positive attitude, ability to manage and supervise. . .”, appear to be directly related to the position’s duties. Thus, it is reasonable to require that the applicant possess those qualifications in adequate measure to be considered qualified for the position.

Skiff testified that the most important reasons he found the Grievant unqualified for the position were what he considered to be the Grievant’s lack of interpersonal and communication skills, although he also felt the Grievant lacked respect for authority and had a negative attitude. It appears that Skiff, who has been the Public Works Director since early 2000, based his conclusions on his contacts with the Grievant, a review of the Grievant’s personnel file and the Grievant’s interview. 2/

2/ While the Union argues that the City also questioned the Grievant’s willingness to report employees for discipline due to his Union ties, the Arbitrator’s notes show only that Skiff testified that he felt the Grievant would not be forthright in that regard because he would be more concerned with the employees than with management.

It appears from Skiff’s and the Grievant’s testimony that Skiff has had between 5-10 conversations with the Grievant prior to his interview. According to Skiff, the Grievant was “gruff” when he spoke to him. It appears the Grievant felt the same about Skiff.

As to the prior situations involving the Grievant, instances that occurred 20 or so years ago would ordinarily not have much relevance in determining an employee’s present qualifications. However, the three instances that occurred in the 1980’s all involved the Grievant’s unwillingness to accept criticism or direction from his supervisor without some sort of negative response on his part. While these write-ups do not amount to discipline, they indicate that they were shown to the Grievant and that he was told they would be placed in his personnel file. To this extent, it was made clear to the Grievant that his supervisor felt that he had a bad attitude toward supervision and was being sarcastic and insubordinate, and that this was not viewed in a positive light.

According to the Grievant, the incident that occurred in 1999 involved his using “colorful” language to vent about one of his supervisors and another employee thought the Grievant was talking about him. That appears to have been the case; however, this was similar behavior to that which occasioned the write-ups in the 1980’s, and occurred more recent in time. The ability to work closely with the supervisor is an obvious requirement of the Foreman position, and it appears that this has been a long-standing problem for the Grievant.

Most important is the Grievant’s interview with Skiff for the position. Both the Grievant and Skiff testified that the Grievant admitted in his interview that he “has a temper” and that he needs some help with his interpersonal and communication skills. The Grievant explained in his testimony that others get upset with him when he tells them how to do something and they do not do it right. He felt that they get mad at him because they think he is mad at them. This would indicate an inability on the Grievant’s part to deal with others without getting upset with them if things do not go his way, or at least an inability to express himself without appearing to be upset on such occasions. Given these admissions by the Grievant, it was not unreasonable for Skiff to conclude that the Grievant would have problems in directing other employees and overseeing their work, and dealing with them in a “fair and respectful manner” in doing so. Those would seem to be major components of a lead worker position such as this.

For the foregoing reasons, it is concluded that Skiff had a reasonable basis for his determination that the Grievant is not presently qualified for the Working Foreman position. Therefore, the City did not violate the parties’ Agreement by failing to award the Grievant that position.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 30th day of March, 2004.

David E. Shaw /s/

David E. Shaw, Arbitrator

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