

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**DOUGLAS COUNTY DEPUTY SHERIFF'S ASSOCIATION,
LOCAL 41, LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION,
WISCONSIN PROFESSIONAL POLICE ASSOCIATION**

and

DOUGLAS COUNTY

Case 256
No. 63040
MA-12482

Appearances:

Gary Gravesen, Bargaining Consultant WPPA/LEER, 16708 South Lee Road, Danbury, Wisconsin 54830, appearing on behalf of the Association.

Frederic P. Felker, Douglas County Corporation Counsel, 1313 Belknap Street, Room 206, Superior, Wisconsin 54880, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to a joint request of the parties to the Wisconsin Employment Relations Commission, Dennis P. McGilligan was asked to hear and decide a dispute as set forth below. Hearing was held in Superior, Wisconsin, on February 26, 2004. The hearing was not transcribed and both parties filed briefs that were received by April 5, 2004.

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

STIPULATED ISSUES

1. Did Douglas County violate the collective bargaining agreement when it promoted Deputy Larry E. Long to the position of Patrol Sergeant on September 7, 2003?
2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND

Facts Giving Rise to the Instant Dispute

On March 31, 2003, Douglas County ("County") posted an opening within the Sheriff's Department for the position of Patrol Sergeant. Said posting included the following language under "Minimum Qualifications": "In compliance with the Civil Service Ordinance, Section VI.F., promotion to the rank of Sergeants will be from the ranks of those deputies employed full time with a minimum of three (3) years experience on the first date of the posting for the vacancy." The posting added: "Testing procedures, approved by the Civil Service Commission, may be administered to determine the relative qualifications of the candidates." The posting also stated: "In addition, the County will follow Article 19, Section(s) 1-5 of the current bargaining agreement." The application deadline was April 10, 2003.

Ten deputies applied for this position with nine of them taking the written examination. A score of 70 percent was required to pass under the County Civil Service Ordinance ("Ordinance"). All of the applicants received a passing score on the written test. The person ultimately promoted, Larry E. Long ("Long"), received a score of 76.20. Grievant Robert Smith ("Smith") received a score of 77.30 and Grievant Christopher Hoyt ("Hoyt") received a score of 75.00.

The applicants were then asked to participate in a structured interview, the scoring of which would be weighted 45 percent of their total score. The structured interviews were held on August 5, 2003 in conference room 121 of the Sheriff's Department. Sergeant Richard Reichenberger of the Wisconsin State Patrol and Lieutenant Marcus Bruning of the St. Louis County Sheriff's Department were present and were the only two individuals responsible for scoring. Applicants were asked the same questions during the structured interview. Long received a score of 80.73. Smith received a score of 78.09 and Hoyt received a score of 78.97.

The three individuals with the highest composite scores were certified to Sheriff Tom Dalbec. These individuals were John Parenteau (composite score 88.66), Steve Olson

(composite score 86.33) and William Webber (composite score 82.17). The Sheriff was not told the numerical scores of each individual. He then offered the position of Patrol Sergeant to the most senior individual of the three, Steve Olson. Olson subsequently declined the position.

After Olson declined the position, the top three remaining individuals were then recertified to Sheriff Dalbec. The Sheriff offered the position of Patrol Sergeant to Long who was the senior individual of the three. He accepted. The composite scores of the two Grievants never made them eligible to be certified to the Sheriff for consideration under the Ordinance.

The final ranking of those candidates in dispute who met or exceeded the minimum standard for the Patrol Sergeant position, as determined by both the testing and interview process, was as follows: Long (composite score 78.24), Smith (composite score 77.65) and Hoyt (composite score 76.79).

The successful candidate, Long, has a bargaining unit seniority date of September 22, 1994. The two unsuccessful candidates have seniority dates of May 9, 1988 (Smith), and August 19, 1991 (Hoyt).

Bargaining History

Until the present 2003-2004 collective bargaining agreement, deputies and jailers were covered under the same agreement.

The parties have not tried to change during negotiations the contract language noted below.

Stipulations

1. The following language found in Article 19, Section 1, of the collective bargaining agreement has been contained in every agreement between the parties since calendar year 1975 to present day:

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

From the calendar year 2000-2001 agreement, references in these agreements do not contain any reference to the following promotional criteria; Ability, Attitude, Aptitude, Versatility, or Efficiency.

2. There are no outstanding issues of arbitrability or other procedural issues and the grievance is properly before the Arbitrator.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 5.

VESTED RIGHT OF MANAGEMENT. The right to employ, promote, to transfer, discipline and discharge employees and the management of the property and equipment of the Law Enforcement Department is reserved by and shall be vested exclusively in the Douglas County Board of Supervisors through its duly appointed Committees. The Department Head, through authority vested in him/her, by either the Douglas County Board or the State Statutes, shall have the right to determine how many men there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the Law Enforcement Department operation.

. . .

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

. . .

ARTICLE 17.

. . .

Section 6. Where qualifications and ability are equal, then seniority shall prevail.

. . .

ARTICLE 19.

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

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RELEVANT PROVISIONS OF COUNTY CIVIL SERVICE ORDINANCE

2.0 CIVIL SERVICE COMMISSION FOR SHERIFF'S DEPARTMENT

THE COUNTY BOARD OF SUPERVISORS OF THE COUNTY OF DOUGLAS DOES ORDAIN AS FOLLOWS:

SECTION I. DECLARATION OF POLICY

This ordinance is intended to provide that positions for Civil Service covered job classes as hereinafter provided shall be filled by appointment by the sheriff from a list of candidates who shall have received the highest ratings in the competitive examination. The candidates selected shall establish residency and domicile in Douglas County within thirty (30) days of permanent hiring and that residency and domicile in Douglas County continue during employment. Exceptions to the residency requirement will be made on a case by case basis per the County policy. That such competitive examination shall be conducted by the Civil Service Commission, hereinafter set forth, all in accordance with the Statutes of Wisconsin. The following are the covered job classes under the Civil Service Commission jurisdiction, Chief Deputy, Jail Administrator, Lieutenant, Sheriff Sergeant, Deputy Sheriff, Jail Sergeant, Jailer.

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SECTION VI. APPOINTMENT

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F. Promotion to the rank of Sergeant will be from the ranks of those deputies or jailers, according to the specific assignment of the position, employed full time with a minimum of three (3) years experience on the first date of the posting for the vacancy. The County and the Sheriff may add

additional job related qualifications for the position of Sergeants or Lieutenant. Candidates for promotion must submit a completed application form to the Human Resources Department. The vacancy will be filled by structured interviews conducted by a representative of the Human Resources Department and the Sheriff and/or his/her designee. The Sheriff in consultation with the Human Resources Department may use other testing procedures approved by the Civil Service Commission to determine the relative qualifications of the candidates. The Sheriff shall make the selection from not more than the highest three names certified.

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POSITIONS OF THE PARTIES

Association's Position

The Association argues that the County promoted a candidate with less qualifications and bargaining unit seniority than the Grievants in violation of the collective bargaining agreement, arbitral precedent, grievance settlements and past practice.

The Association maintains that, in cases of promotion, preference is given to the most senior applicant as long as the senior applicant meets or exceeds the minimum standard for the position at issue. In this case, the Association argues that the Grievants' qualifications and physical fitness were "relatively equal" to the successful candidate and the senior Grievant should have been awarded the position despite not being one of the three candidates certified to the Sheriff for appointment.

The Association rejects the County's position that its Ordinance has equal or greater weight as the collective bargaining agreement and that the contract language on selecting a successful candidate does not apply until three applicants are certified to the Sheriff. In support thereof, the Association relies on Wisconsin case law that provides when a collective bargaining agreement conflicts with a specific ordinance that applies to those with whom contract negotiations are made, the contractual agreement prevails.

The Association opines that the County's reliance on the "Arbitrator Burns Award" is flawed.

If either Grievant is sustained, the Association requests that the successful Grievant be made whole as it relates to lost wages, seniority as a patrol sergeant, and any other bargaining unit benefit retroactive to the appointment of Long.

County's Position

The County initially argues that the Association has not established a past practice that would compel the promotion of either Grievant to the position of Patrol Sergeant. To the contrary, if any practice has been established, it is the practice of applying the Ordinance to promotions. In this regard, the County maintains that it has uniformly followed the provisions of its Ordinance and has promoted individuals who were appropriately certified to the Sheriff under the Ordinance.

The County next argues that the management's rights provisions under the collective bargaining agreement allow it to determine the relative qualifications of the applicants. The County points out that the Union has not asserted that the County has failed to act in a proper manner when it tested the applicants. Instead, the County points out the Union contends that the testing process renders the Grievants relatively qualified to Long and that the County must depart from its long standing practice of certifying three candidates to the Sheriff and ignore the Ordinance. The County opines that it has properly exercised its management's rights to determine the relative qualifications of individual applicants and through use of the Ordinance's testing procedures determined that the Grievants were not relatively qualified.

Finally, the County argues that the collective bargaining agreement should and can be harmonized with the Ordinance to support its actions herein. In this regard, the County points out that it has simply utilized the Ordinance mandating that the top three applicants be certified to the Sheriff for selection. The County adds that this is the method it has always used to determine relative qualifications of individuals pursuant to the mandate of Article 19 that in making promotions, preference must be given to employees oldest in point of service, if qualifications are "relatively equal." The County concludes that the agreement and Ordinance can and, under these circumstances, must be harmonized to give effect to each.

The County requests that the grievance be denied and the matter dismissed.

DISCUSSION

At issue is whether the County violated the collective bargaining agreement when it promoted Deputy Larry E. Long to the position of Patrol Sergeant on September 7, 2003.

The Association argues that the County violated the agreement by its actions while the County takes the opposite position.

Management has the general right to control promotions, except as limited by the collective bargaining agreement. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6th Ed., 2003), p. 793. The parties have expressly recognized this principle in Article 5, VESTED

RIGHT OF MANAGEMENT, which provides that the County has the right to promote “subject to the rights of the employees as set forth in other Articles contained in this Agreement.”

Article 19, Section 1, provides that in making promotions “preference shall be given to those employees oldest in point of service, provided, however, that the qualifications and physical fitness of the employees being considered for the job are relatively equal.” Under this provision, the senior applicant is entitled to promotion if his/her physical fitness and qualifications are either superior to or relatively equal to the physical fitness and qualifications of the junior applicant. *DOUGLAS COUNTY (SHERIFF’S DEPARTMENT)*, Case 154, No. 402, MA-5014, p. 9 (Burns, 1/89). Consequently, the Arbitrator rejects the Association’s contention that promotional preference is given the most senior applicant as long as the senior applicant meets or exceeds the minimum standard for the disputed position.

The standard “relatively equal” has consistently been interpreted to mean that if the applicants in question are ranked within three or less points of each other their qualifications are “relatively equal.” Arbitrator Coleen Burns stated: “The undersigned does not consider a difference of less than 3 percentage points to warrant a finding that Jacobson’s qualifications are superior to those of the Grievant.” *Id.* On the issue of testing, Arbitrator James L. Stern stated:

Clearly, if one candidate has a score of 15 and the other a score of 75, their qualifications, as measured by this test, are not relatively equal. However, if one candidate scores 60 and the other scores 57, it appears that they are relatively equal even though one candidate’s score is slightly better than the other’s. *DOUGLAS COUNTY, WERC File No. A/P M-96-106, p. 9 (6/96).*

Moreover, Arbitrator Amedeo Greco in *DOUGLAS COUNTY*, Case 244, No. 60266, MA-11566 (6/02) at p. 7 stated that “since Alseth’s test points (90) were only two points lower than Kizlik’s (92), it is clear that their paper qualifications are relatively equal.”

In the instant case, 1.45% was the differential from the successful candidate to that of the candidate (Grievant) who placed third in the process utilized to fill the Patrol Sergeant position. There is no evidence that physical fitness played any role whatsoever in the County’s decision making process. Therefore, the test of bargaining unit seniority and qualification must be construed as the determinate factors in this case. It is clear that the paper qualifications of the two Grievants were relatively equal to those of the successful junior applicant. The record is void of any evidence depicting the education, training, experience, awards or commendations of the successful candidate that would lead to an opposite conclusion. As a result, the Association opines that in the case of relative equality in terms of qualifications, the seniority of the Grievants should prevail as to the selection of Patrol Sergeant.

Ordinarily, the Arbitrator would agree. However, the County argues that Article 19, Section 1, only applies once the applicants are certified to the Sheriff for consideration to fill the Patrol Sergeant position. For the reasons discussed below, the Arbitrator agrees.

The promotion history of the Sergeant's position within the Sheriff's Department dating back to 1997 indicates that the top three candidates have been certified to the Sheriff for selection pursuant to the Ordinance. (Employer Exhibit No. 2). The standard of "relative qualifications" has only "played a role in the top three candidates." (Testimony of Mary Lou Andresen, City of Superior Human Resources Director and consultant to the County). There has been a "long standing past practice of homogenizing the contract and the Civil Service Ordinance." *Id.* Kay Mattson, Human Resource Specialist for the County, confirmed the past practice of certifying the top three applicants to the Sheriff for promotion based on their test scores. Mattson testified that once a list is certified to the Sheriff the "relative ability" standard would come into play, and that preference would be given to the senior applicant "provided qualifications and physical fitness were relatively equal." Mattson stated that in putting together a promotional posting she looks at both the collective bargaining agreement and the Ordinance.

Association witnesses largely confirmed this practice. Retired Patrol Sergeant Paul Johnson testified that it was the policy of the County to promote the most senior individual who met minimum qualifications. Johnson added that the County has always had a Ordinance but he didn't know if there ever had been any individuals promoted to Sergeant who had not been on the list certified to the Sheriff under the Ordinance.

Grievant Robert J. Smith testified that he knew of no promotion in which the County had gone outside the scope of the applicants certified under the Ordinance.

Deputy James Radtke also testified that the County followed the Ordinance when making promotions.

County witness Sheriff Dalbec, a former President of the Association, testified that both the Ordinance and the collective bargaining agreement are given "equal weight" in making promotions and that the Sheriff selects someone off the top three applicants certified to the Sheriff based on seniority and the "relatively equal" standard.

An arbitrator's primary duty is to ascertain what the parties intended when they agreed to certain contract language. Arbitrator Richard Mittenhal explained why past practices must be considered alongside contract language when he wrote:

By relying on practice, the burden of the decision may be shifted from the arbitrator back to the parties. For to the extent to which the arbitrator adopts the interpretation given by the parties themselves as shown by their acts, he minimizes his own role in the construction process. The real significance of practice as an interpretive aid lies in the fact that the arbitrator is responsive to the values and standards of the parties. A decision based on past practice emphasizes not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and agreeable over the years. Because such a decision is bound to reflect the parties' concept of rightness, it is more likely to resolve the underlying dispute and more likely to be acceptable. A solution created from within is always preferable to one which is imposed from without. (footnote citation omitted) "*Past Practice and the Administration of Collective Bargaining Agreements*" from *Arbitration and Public Policy, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators*", (BNA, 1961), p. 38.

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He stated: "The practice, in short, amounts to an amendment of the agreement". Supra, p. 42.

He added that a past practice may be seen as a separate, enforceable condition of employment. Supra, p. 44. He wrote:

Thus, the union-management contract includes not just the written provisions stated therein but also the understandings and mutually acceptable practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force. By their silence, the parties have given assent to "existing modes of procedure." In this way, the practices may *by implication* become an integral part of the contract. Supra, p. 37.

The parties have not attempted to change the disputed contract language at any time material herein. As a result, this record evidence indicates that the Association has acquiesced to the past practice noted above.

Based on the above, the Arbitrator finds that the parties for years effectively amended their prior contracts by providing for application of the Ordinance to the promotional position

of Sergeant within the Sheriff's Department and the application of "relatively equal" standard only to the applicants certified to the Sheriff for consideration for the promotion. Consequently, the County did not violate the collective bargaining agreement, particularly Article 19, when it did not consider the two Grievants for the disputed Sergeant position.

The arbitration awards cited by the parties also support the past practice noted above.

The Association cites three arbitration awards involving these same parties in support of its position that a more senior applicant who scores within three or less points of the less senior successful applicant should be awarded the position. However, all three awards provide support for the County's position that it has always applied the Ordinance to promotions. In DOUGLAS COUNTY (SHERIFF'S DEPARTMENT), *supra*, it is clear that the disputed position was filled in accordance with the Ordinance. The grievant, Senior Jailer William Webber, was one of three individuals certified to Sheriff Johnson for the position of Jail Sergeant under the Ordinance. DOUGLAS COUNTY (SHERIFF'S DEPARTMENT), *supra*, p. 3. Webber had the lowest score among 3 candidates submitted to the Sheriff. *Id.* The County said that the junior successful applicant had "superior" qualifications to the senior applicant based on attitude and test scores. DOUGLAS COUNTY (SHERIFF'S DEPARTMENT), *supra*, pp. 5, 9. Arbitrator Burns disagreed stating that the grievant did not have an attitude problem and, as noted above, a difference of less than 3 percentage points does not support a finding that the junior applicant's qualifications were superior to those of the grievant. DOUGLAS COUNTY (SHERIFF'S DEPARTMENT), *supra*, p. 11. Arbitrator Burns concluded that Webber's qualifications were relatively equal to, if not superior to, those of the junior successful applicant and that the County violated the promotion article when it failed to promote the senior unsuccessful applicant to the disputed position.

The Stern award involved a dispute over promotion to the position of Jail Corporal. It makes no reference to the Ordinance. The current Ordinance also makes no reference to a Jail Corporal position. However, there were four applicants for two vacant Jail Corporal positions. DOUGLAS COUNTY, WERC File No. A/P M-96-106, *supra*, p. 2. If the Ordinance had been applicable to this particular fact situation, the numbers would have indicated that the grievant was eligible under its terms.

In addition, the Greco award involved a promotion to the position of Jail Sergeant with four applicants applying for two positions. The successful grievant was also certified to the Sheriff under the Ordinance. DOUGLAS COUNTY, Case 244, No. 60266, MA-11566, *supra*, pp. 2-3, 7.

Finally, contrary to the Association's assertion, the "Burns Award" of October, 1983, supports the Arbitrator's conclusions herein. DOUGLAS COUNTY (SHERIFF'S DEPARTMENT), Case CV, No. 30921, MA-2688. It is true, as pointed out by the Association, that the parties mutually agreed during bargaining that the criteria of ability, attitude, aptitude, versatility and

efficiency utilized in 1983 would be removed from the 2000-2001 calendar year prospectively so those criteria are not expressly applicable in the instant case. Arbitrator Burns considered those factors in arriving at her conclusion that because “the qualifications of Anderson and the grievant are not **relatively equal**, seniority is not controlling.” (Emphasis added). (DOUGLAS COUNTY (SHERIFF’S DEPARTMENT)), supra, p. 6. However, as pointed out by the parties’ stipulations, the “relatively equal” standard has been in effect since 1975 and was interpreted by Arbitrator Burns in arriving at her decision. Id. More importantly, the employees in question in the “Burns Award” were both “hired under the same grant of authority from the Civil Service Commission and the County Board.” (Emphasis added).

The Association argues that the County is asking the Arbitrator to ignore over twenty plus years of collective bargaining history, grievance settlements, and arbitrable precedent, and grant to them the ability to promote whomever they choose. To the contrary as noted above, it is the Association, not the County, who now seeks to alter the manner in which promotions are undertaken.

Nor does the County, as a result of this decision, have the right to promote whomever they choose. In the instant case, the Sheriff offered the position of Patrol Sergeant to the most senior individual on the certification list. If you are on the list certified to the Sheriff for promotion to Sergeant, and you are the senior applicant with qualifications and physical fitness relatively equal to or superior to the junior person, you are entitled to the promotion.

Having reached the above conclusions, it is unnecessary to address the Association’s arguments regarding its position that the Ordinance cannot nullify the work done as a result of collective bargaining. Here, the collective bargaining agreement can be harmonized with the Ordinance to give effect to both.

Based on all of the foregoing, and the entire record, it is my

AWARD

That the grievance filed in the instant matter is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 29th day of June, 2004.

Dennis P. McGilligan /s/

Dennis P. McGilligan, Arbitrator

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