

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY

and

AFSCME LOCAL 110, AFL-CIO

Case 370

No. 64847

MA-13029

(Ariane Wartke Grievance)

Appearances:

Michael J. Collard, Human Resources Director, Sheboygan County, 508 New York Avenue, Sheboygan, WI 53081, appearing on behalf of Sheboygan County.

Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, WI 53083, appearing on behalf of AFSCME Local 110, AFL-CIO.

ARBITRATION AWARD

Sheboygan County, hereinafter County or Employer, and AFSCME Local 110, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Susan J.M. Bauman was so appointed.

The County, by letter dated May 20, 2005, advised the Union that, in addition to confirming the waiver of Step 3 of the grievance procedure, the County preserved its right to argue the arbitrability of the grievance, under the condition that arbitrability be decided before the grievance would be heard on its merits by the Arbitrator. Pursuant to said understanding, the parties agreed to submit a written stipulation of facts and written argument, the last of which was received on September 12, 2005.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The County frames the issue in the following manner:

On April 6, 2005, was Ariane Wartke a probationary employee who might be terminated without recourse to the grievance procedure?

The Union did not submit a statement of the issue. Accordingly, the undersigned accepts the County's statement of the issue as the issue to be decided.

FACTS

The parties stipulated to the admission into the record of numerous documents and the following statement of facts:

1. In October 2002, Ariane Wartke ("Wartke") applied for a position as a correctional officer with the Sheboygan County Sheriff's Department. She passed the written examination and oral interview, and was placed on an eligibility list.
2. In March 2003 Wartke applied for a position as a booking clerk with the Sheboygan County Sheriff's Department. She was accepted for that position.
3. Wartke began work as a booking clerk on June 16, 2003.
4. Effective January 19, 2004, Wartke was laid off from her position as a booking clerk. The reason for the layoff was that she was bumped by Mark Belonger, who had been bumped from his position by Jason Knuth, whose position had been eliminated by the Sheboygan County Board.
5. Wartke collected unemployment compensation benefits from January 18, 2004 through April 3, 2004.
6. By letter dated March 26, 2004, Wartke was offered the position of correctional officer. This offer was based on her October 2002 application and her status on the eligibility list for that position. Union officials did not receive a copy of the offer letter at that time.

7. Wartke started work as a correctional officer on April 7, 2004.
8. Wartke received benefits immediately upon becoming a correctional officer. She used previously earned vacation, earned new vacation, and used and earned floating holidays.
9. Union dues were deducted from Wartke's first paycheck as a correctional officer in April 2004.
10. Wartke's last regularly scheduled shift as a correctional officer for the Sheboygan County Sheriff's Department was April 5, 2005.
11. Wartke's employment with Sheboygan County was terminated on April 6, 2005. Wartke's last day of work was April 6, 2005.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the Management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested in the Employer.

...

ARTICLE 7

FAIR SHARE AGREEMENT

The Employer shall deduct once each month from the earnings of each non-probationary employee in the collective bargaining unit an amount equal to the monthly dues certified by the Union as the monthly dues required of each Union member and pay said amount to the Treasurer of the Union on or before the end of the month in which said deduction was made.

Changes in the amount to be deducted shall be by written notification from the Union at least one (1) month before the effective date of any change.

The Employer shall provide the Union with a list of all employees from whom such deductions are made with each monthly remittance to the Union.

If an error is discovered with respect to any deductions under this provision, the employer shall correct said error by appropriate adjustment in the next paycheck of the employee or the next submission of funds to the Union.

ARTICLE 18

HOLIDAYS

All employees except as herein provided shall be granted eleven (11) paid holidays during calendar years 2003 and 2004. They are as follows:

. . .

a. Employees who have completed their probationary period may utilize Floating Holidays any time after the first of the year. The actual day of the holiday may be designated by the employee after notifying the department head five (5) days in advance (ten (10) days for employees of the Sheriffs Department) of such election and the department head shall respect the wishes of the employee as to the day off insofar as the needs of the County will permit.

. . .

d. Probationary employees shall be eligible for the herein described holiday pay except two (2) "Floating Holidays" as defined by contract as they occur while serving their probationary period, and the preceding paragraph (c) rules shall apply. It is further understood that if the probationary employee does not complete the required probationary period, the holiday pay that has been received shall be deducted from the employee's final paycheck.

. . .

ARTICLE 18

VACATIONS

. . .

4. Eligibility: Upon completion of six (6) months of continuous employment employees shall be granted six (6) days of vacation, with a remaining six (6) days after completion of twelve (12) months of continuous employment. If an employee does not complete one year of employment, any used vacation will be deducted from the final paycheck. . . .

ARTICLE 23

PROBATIONARY PERIOD

All newly hired employees without previous county experience in the job to which they are hired, shall serve a probationary period of six (6) months. All newly hired Correctional Officers shall serve a twelve (12) month probationary period. Probationary employees may be terminated without recourse to the grievance procedure, but the requirements for the termination reports shall be followed.

The following definitions shall apply:

a. A regular full-time or regular part-time employee is hereby defined as a person hired to fill a regular position.

b. A temporary employee is one hired for a specific period of time and who will be separated from the payroll at the end of such period.

c. A temporary employee who becomes a regular employee without a break in continuous service shall be deemed to have served their probationary period upon completion of six (6) months of service. His/her seniority shall date from the original time of hiring.

ARTICLE 25

SENIORITY

Sheboygan County shall, during the life of the herein contract, for the employees covered by the same, recognize seniority as herein provided.

. . .

B. Vacancy/Job Posting

1. Whenever an approved vacancy is to be filled within the bargaining unit, notice of said vacancy shall be posted for five (5) working days prior to the public posting for the information of all employees on appropriate bulletin boards where bargaining unit employees work.

The vacant position shall be awarded to the most senior qualified applicant in the department where the vacancy exists. . . . If no one within the department applies for the position, the position shall then be offered to the most senior qualified bargaining unit employee before filling the position with a non-bargaining unit employee. Any employee filling a position under this section shall serve a probationary period of six (6) months, unless waived or lessened by the department head.

If during the probationary period the employee's performance is inadequate or unsatisfactory, the employee may return to his/her former position.

The employee also has the option to return to his/her former position within the first ninety (90) days of the probationary period.

If this position has been filled by another employee, the employee shall bump the person in their former position.

Each bumped employee shall have the right to return to his/her former position. If no position exists, the employee hired last shall be on lay-off status.

C. Sheriffs Department

In determining shift preference, where the same classifications are involved, the shift preference shall be given to the employee with the longer period of seniority in that department in that classification.

Seniority shall be determined by the date of hiring. . . .

D. Layoff

For the purpose of layoff, the County recognizes seniority therefore, whenever the County determines it is necessary to decrease the work force and to layoff employees, such layoff shall, subject to the following procedures, be in inverse order of the employee "seniority". The order of layoff shall be as follows:

. . .

In determining the above priorities and carrying out layoffs, the following conditions shall apply:

a. Seniority: Seniority for layoff purposes shall date from the employee's most recent starting date of employment within the bargaining unit.

. . .

f. Recall from Layoff: An employee who has been laid off for less than a twenty-four (24) month period, shall be reinstated when a vacancy for which the employee is qualified occurs according to the inverse order of the layoff. Employees who have been demoted in lieu of layoff shall be reinstated to their former position when a vacancy occurs in such position.

A laid off employee, refusing a position of similar work and class from which he/she was laid off or who fails to respond to an offer of reinstatement via a certified letter within three (3) days of receipt of such letter, shall be removed from the seniority list, in addition, the County can contact the employee by phone.

An employee who has been laid off for twenty-four months or more shall be considered on permanent layoff status.

ARTICLE 26

GRIEVANCE PROCEDURE

The County shall not be required to process any grievance which is based upon an occurrence more than thirty (30) days prior to the date of it being offered as a complaint, or a complaint which is filed more than thirty (30) days after the Union knew, or should have known of the existence of grounds for such complaint, except that in discharge and suspension cases the time limit shall be five (5) working days, when an employee is suspended or discharge, the employee and the Union shall be notified in writing of such action and reason for same.

Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union shall be handled as follows:

. . .

POSITIONS OF THE PARTIES

It is the position of the Union that the grievance is arbitrable, as grievant Ariane Wartke was no longer a probationary employee when she was terminated on April 6, 2005. The Union construes the language of Article 23 as defining the probationary period for new hires, individuals who have never before been employed by Sheboygan County. Because the grievant had attained permanent status in her position as a booking clerk, she had completed the initial probationary period and was not subject to serve a probationary period when she assumed her position as correctional officer. It is the Union's contention that Ms. Wartke was not a new hire in April 2004; she was a laid off employee with recall rights and seniority.

In addition, the Union contends that the language of Article 25B regarding vacancies and job posting is controlling and that Wartke was subject to the trial period defined therein when she started in her new position as a correctional officer. The fact that Wartke was hired from an eligibility list does not negate the fact that she was already an employee of the County, on lay off, who was recalled to the position as a correctional officer. Wartke's prior work experience for the County was as a booking clerk in the Sheriff's Department, a position which gave her intimate knowledge of the working of the Sheboygan County jail.

The Union also points to the fact that the County did not treat Wartke as a probationary employee when she began her assignment as a correctional officer. Union dues were deducted from her pay from the start, contrary to the contract language that exempts probationary employees from paying Union dues. The County allowed Wartke to accrue and utilize vacation, in a manner that contravenes contractual provisions regarding probationary employees. Finally, Wartke was permitted to accrue and use floating holidays, also in contradiction to the contract provisions regarding probationary employees. Accordingly, the Union argues Wartke was not a probationary employee; the grievance is arbitrable; and the parties should proceed to arbitration on the question of whether Wartke's dismissal was for just cause.

It is the position of Sheboygan County that the termination of Ariane Wartke is not arbitrable because of the exception to the general grievance clause found in Article 23 which states, in pertinent part, "Probationary employees may be terminated without recourse to the grievance procedure." Wartke was a probationary employee at the time of her termination on April 6, 2005 inasmuch as she was hired as a correctional officer on April 7, 2004, less than one (1) year prior to her termination. Although Wartke had been employed by the County as a booking clerk prior to her hire as a correctional officer, this experience does not count towards the one year probationary period required of correctional officers. Article 23 of the collective bargaining agreement between the parties requires a full year of probation in the position of correctional officer, and any time worked by an individual in another position as a county employee does not count towards that one year period.

Wartke was hired from an eligibility list for correctional officers, not as a recall from being laid off as a booking clerk. Inasmuch as Wartke did not obtain her position as a correctional officer through the posting process, the provisions of Article 25 are not relevant or applicable to Wartke's circumstances. The fact that union dues were deducted from Wartke's pay immediately upon her hire as a correctional officer and the fact that she was granted floating holidays were mistaken acts on the part of a payroll clerk, and cannot be utilized to support a finding that Wartke was not a probationary employee throughout her employment as a correctional officer. The grievance is not arbitrable and should be denied.

DISCUSSION

There is no question that if Ariane Wartke was not a probationary employee on April 6, 2005, her termination from employment as a correctional officer at that time is subject to the proper cause standard, is grievable and is arbitrable. There is also no question that, in negotiating the 2003 - 2004 collective bargaining agreement, its predecessors and its successor, the parties did not contemplate the facts of this case: that a laid off county employee would be hired into a position as a result of her being placed on an eligibility list for a position prior to her initial employment with the County in a different position. Accordingly, it is necessary to analyze the contractual provisions in such a manner as to harmonize them, and determine whether Ms. Wartke was, or was not, a probationary employee on April 6, 2005.

Had Wartke been placed on the eligibility list for correctional officer in October 2002 and hired as a correctional officer commencing on April 7, 2004, without working as a booking clerk from June 16, 2003 to January 19, 2004, there is no question that she would have been a probationary employee on April 6, 2005 and subject to termination without recourse to the grievance procedure. However, Ms. Wartke was employed by Sheboygan County from June 16, 2003 to January 19, 2004 and successfully completed a six (6) month probationary period in that capacity. She was laid off from her position as a booking clerk, effective January 19, 2004. In accordance with Article 25 D f., Recall from Layoff, Wartke was subject to recall in April 2004:

An employee who has been laid off for less than a twenty-four (24) month period, shall be reinstated when a vacancy for which the employee is qualified occurs according to the inverse order of the layoff. Employees who have been demoted in lieu of layoff shall be reinstated to their former position when a vacancy occurs in such position.

The parties agree that Wartke was hired into the position of correctional officer in April 2004 because there was a vacancy in that position, and Wartke was qualified to perform the work of correctional officer, as evidenced by her being on the eligibility list that was created in October 2002.¹

If Wartke's return to work in April 2004 was a recall from layoff, the collective bargaining agreement between the parties does not provide, in Article 25 D, for any probationary or trial period even though the contract does not require that the employee be reinstated into a position in which he or she had achieved permanent status and, in fact, provides that an employee shall be reinstated "when a vacancy for which the employee is qualified occurs." The fact that Wartke was on the eligibility list for a position as a correctional officer is prima facie evidence that she was qualified for the position of correctional officer.

If Wartke's placement into the correctional officer position in April 2004 was the result of filling of an approved vacancy, the collective bargaining agreement, at Article 25 B, provides that "[a]ny employee filling a position under this section shall serve a probationary

¹ The stipulated facts fail to address the question of whether the vacant position of correctional officer was posted in accordance with the provisions of Article 25 B, Vacancy/Job Posting, and also do not directly address the question of whether Wartke should have been recalled pursuant to Article 25 D rather than being hired from the eligibility list created as a result of October 2002 testing. Contractual violations, if any, in the hiring process need not be addressed herein except insofar as the provisions of Article 25 B and D related to probationary periods to be served by individuals who are placed in positions as a result of a posted vacancy or recalled from lay off may apply.

period of six (6) months, unless waived or lessened by the department head.” The article further provides that should the employee’s performance during this probationary period prove to be inadequate or unsatisfactory, the employee may return to his/her former position which, in Wartke’s case would presumably be returning to lay off status. The contract also permits an employee the option to return to his/her former position within the first ninety (90) days of the probationary period.

Both sections of Article 25 provide protections to County employees based on their length of service to the County: those who are laid off are returned to employment in inverse order of layoff; those who seek another position within the bargaining unit have the ability to return to their prior position, without loss of seniority or other rights, should their performance in a new position prove to be unsatisfactory either to themselves or their department head.

By contrast, Article 23, Probationary Period, does not afford any protection to newly hired employees, persons who have no other rights, including seniority, under the collective bargaining agreement:

All newly hired employees without previous county experience in the job to which they are hired, shall serve a probationary period of six (6) months. All newly hired Correctional Officers shall serve a twelve (12) month probationary period. Probationary employees may be terminated without recourse to the grievance procedure, but the requirements for the termination reports shall be followed.

The County contends that “All newly hired Correctional Officers shall serve a twelve (12) month probationary period” means that any individual hired as a correctional officer, whether with or without prior County employment experience, must serve a twelve (12) month probationary period. Such a reading of Article 23 makes the language of Article 25B meaningless, a result that the parties could not have intended. Accordingly, the phrase “newly hired” must mean an individual who is not currently a County employee as well as an individual who does not have seniority or recall rights under the contract.² This means that Grievant Wartke is not subject to the twelve (12) month probationary period of Article 23. She was not “newly hired” and is thus not subject to the twelve (12) month probationary period.³

² The first phrase of this section, “All newly hired employees without previous county experience in the job to which they are hired...” only makes sense if it is interpreted to mean that the individual either has never worked for the County previously or that prior work experience for the County was in a different position and they no longer have any seniority/recall rights.

³ Because the question is not before me, I do not reach the question of whether Wartke is subject to the six (6) month probationary period of Article 25B or to no probationary period under Article 25D.

Accordingly Wartke was not a probationary employee at the time that she was terminated in April 2005 and her termination is arbitrable. The Union also contends that the deduction of Union dues from Wartke's paychecks, and her ability to utilize vacation and floating holidays during the first six (6) months of her employment as a correctional officer are proof that the County did not consider Wartke to be a probationary employee. Although these actions on the part of the County are inconsistent with the County's position that Wartke was a probationary employee, the undersigned is of the opinion that, as claimed by the County, these facts were more likely the result of error on the part of a payroll clerk than indicia of the County's treatment of Wartke as other than a probationary employee. Because I have found that, based on the contractual provisions cited above, Wartke was not a probationary employee at the time of her termination, I do not address the question of whether these errors on the part of the payroll clerk, errors which were not corrected by the County and not pointed out by the Union inasmuch as it had not been put on notice that the County, in hiring Wartke as a correctional officer, was requiring her to serve a probationary period⁴, independently support the finding that Wartke was not on probation at the time of her termination.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. Ariane Wartke was not a probationary employee on April 6, 2005.
2. Wartke may not be terminated without recourse to the grievance procedure.
3. The matter will be scheduled for a hearing on the merits at a time convenient to the parties and the undersigned.

Dated at Madison, Wisconsin, this 27th day of September, 2005.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

⁴ The parties have stipulated that the Union did not receive a copy of the letter offering Wartke the position of correctional officer and stating that she was to serve a twelve (12) month probationary period.