

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**AMALGAMATED TRANSIT UNION  
LOCAL DIVISION 1310**

and

**CITY OF EAU CLAIRE (TRANSIT)**

Case 265  
No. 64397  
MA-12886

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**Appearances:**

Davis, Birnbaum, Marcou, Seymour & Colgan, LLP, 300 Second Street North – Suite 300, P.O. Box 1297, LaCrosse, Wisconsin 54602-1297, by **James G. Birnbaum**, Attorney-at-Law, appearing on behalf of the Union.

**Stephen Bohrer**, Assistant City Attorney, City of Eau Claire, 203 S. Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin 54702-5148, appearing on behalf of the City.

**ARBITRATION AWARD**

City of Eau Claire, hereafter City or Employer, and Amalgamated Transit Union, Local Division 1310, hereafter Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Following a request by the Union and the concurrence of the City, to appoint a staff member as arbitrator to hear and decide the instant grievance, the Commission appointed Coleen A. Burns. Hearing was held in Eau Claire, Wisconsin on April 5, 2005. The hearing was not transcribed and the record was closed on June 21, 2005, following the submission of written briefs.

**ISSUES**

The parties were unable to stipulate to a statement of the issues. The Union frames the issues as follows:

1. Did the City violate Article 6, Section 2, when it failed to select the Grievant, the most senior employee, for a full-time Operator vacancy on November 15, 2004?
2. If so, what is the appropriate remedy?

The City frames the issues as follows:

Was the City within its contractual rights when it promoted Doug Beaver instead of Thomas Werlein for the position of full-time Operator?

### **RELEVANT CONTRACT PROVISIONS**

#### **Article 3 – Seniority**

Section 1. Seniority, as defined herein, shall be the length of continuous service within the Transit System.

. . .

#### **Article 5 – Management Rights**

Section 1. The Amalgamated agrees that the right to employ in accordance with the provisions of this agreement, promote, discipline and discharge employees, and the management of the property are reserved by and shall be vested in the City, and in connection therewith the City shall have the right to exercise discipline in the interest of good service and the proper conduct of its business; however, the City recognizes the right of its employees to bargain collectively on employer-employee matters that may arise from time to time.

. . .

#### **Article 6 – Working Conditions**

. . .

Section 2. Openings for any City employment positions will be posted in the Transit and C.E.S.A. staging area for five working days, except for CTSEA postings which will be posted for three working days. Qualifications being equal, seniority will prevail in the selection of applicants for jobs at Transit. A permanent full-time employee in the work division (Local 1310) shall have rights over all other full-time employees.

. . .

## **BACKGROUND**

With a seniority date of September 28, 2001, Thomas Werlein, hereafter Grievant, is employed by the City's transit system as a Part-time Bus Operator. On or about October 27, 2004, the City posted a position of Permanent Full-time Bus Operator. The Grievant, along with fellow employees Douglas Beaver and George Eavey, bid for this position. On or about November 9, 2004, Transit Manager Gwen Van Den Heuvel notified the Grievant of the following:

Per the contract with ATU Local 1310, Management has reviewed the qualifications of the employees who signed the posting for the position of Full-Time Bus Operator. We have determined that Doug Beaver is the most qualified candidate for the position. Mr. Beaver will be promoted to full-time beginning Monday, November 15, 2004.

Doug Beaver has a seniority date of October 2, 2001.

On or about November 16, 2004, a grievance was filed over the City's failure to promote the Grievant. The grievance was denied and, thereafter, submitted to arbitration.

## **POSITIONS OF THE PARTIES**

### **Union**

The collective bargaining agreement requires the City to select the most senior job applicant when qualifications are equal. The concept of absolute equality is a myth and, thus, to lend substance to a practical and fair interpretation of the concept of "equal," the concept of equality needs to be modified by a standard of reasonableness and substantiality. The City bears the burden to establish that the articulated reasons on qualifications are both reasonable and substantial. The City has not met this burden.

The components of a determination of qualifications includes an analysis of an employee's training, experience, licenses, pre-employment experience, operational experience as an incumbent, disciplinary record and evaluations. An analysis of each of these components reveals that the Grievant was not only as qualified, but indeed, was more qualified than Douglas Beaver. Given the differences in facts and issues, the Honeyman Award is not controlling.

One of the clearest indications as to whether or not an employer's asserted reasons are pretext is its actions and transparencies when questioned about the basis for its decision. At the time that the City made its decision, it did not articulate any reason for its decision. It was not until the Third Step of the grievance procedure that the City responded to the Union's repeated requests for reasons why the City concluded that Douglas Beaver was more qualified. At that time, the City indicated two reasons, i.e., Douglas Beaver was more qualified because

he accepted a temporary full-time job and that, as a result of these, he was more experienced with regard to routes and equipment operation. These reasons are not supported factually and do not constitute any legitimate basis to distinguish qualifications between the Grievant and Douglas Beaver.

One of the bench marks of whether or not an action by an employer is arbitrary or capricious is whether or not the employer articulated a viable standard and announced that standard in advance of any determination or application of the standard. Prior to the job posting for the permanent full-time position, the City utterly failed to articulate any criteria it would use in determining who was qualified for the position other than what was posted.

The testimony of the Grievant, which is more credible than that of Transit Manager Gwen Van Den Heuvel, establishes that, at the time of the posting of the temporary full-time position, the Transit Manager assured the Grievant that the full-time job would be bid and awarded on the basis of seniority. Had the Transit Manager been honest and indicated to the Grievant that, if someone accepts the bid on the temporary full-time job that they would be deemed to be more qualified; the Grievant would likely have bid on the temporary full-time position.

At the arbitration hearing, the City manufactured two additional reasons, *i.e.*, a comparison of disciplinary records and a safety issue. With the exception of a challenged discipline involving an abuse of sick leave, the Grievant has no prior disciplines. Douglas Beaver has two unchallenged disciplinary actions in his file, which are also related to time and attendance. A comparison of the number and nature of disciplinary actions establishes that the Grievant is more qualified than the Douglas Beaver.

The accidents that the City is attempting to cite as safety issues are referenced in the Grievant's evaluations, which evaluations reflected a satisfactory safety record. If these minor accidents formed a basis for determining that Douglas Beaver was substantially and reasonably more qualified than the Grievant, wouldn't you expect the City to have determined that the Grievant's safety record was unsatisfactory. With regard to safety, the Grievant and Douglas Beaver are the same.

Notwithstanding the City's argument to the contrary, the Grievant challenged management's determination that the ramp matter was chargeable. The City's attempt to augment its case by the unwarranted characterization of the Grievant's accidents as discipline provides additional evidence of pretext. The City's argument that Douglas Beaver was more qualified because he operated more hours than the Grievant is contrary to the record evidence, which establishes that the Grievant had more operating hours than Douglas Beaver.

The City failed to articulate an objective, credible standard in advance of the job posting. The City intentionally misled the Grievant to believe that his choice to not bid on the temporary full-time position would not impact on his future application for the permanent full-time position. The City has failed to articulate a standard that was uniformly applied to the Grievant and Douglas Beaver. The City's actions were arbitrary and capricious.

The grievance should be sustained. The Grievant should be placed in the permanent full-time position forthwith and otherwise made whole.

### City

The Honeyman Award is on point and sets the standard of arbitral review. Under the Honeyman Award, the Union has the burden to establish that the City's decision to promote Douglas Beaver over the Grievant was arbitrary, capricious or unreasonable.

At hearing, Transit Manager Van Den Heuvel testified that she ultimately decided that Douglas Beaver was more qualified than the Grievant and that this decision was based upon a determination of three criteria: 1) preventable accidents; 2) disciplinary history; and 3) experience in the full-time position.

Preventable accidents are those in which management determines the driver to be at fault. The Grievant had two preventable accidents and Douglas Beaver had none. The Safety Committee, which reviews incidents, concurred with management's conclusion that the Grievant's accidents were preventable. The Grievant did not dispute these findings.

It is self evident that there is a nexus between good driving and good quality work performance. To measure the qualifications of professional drivers upon the basis of their accident records is not arbitrary, capricious or unreasonable.

The Grievant had three occasions of receiving discipline, while Douglas Beaver had two. The Grievant's first discipline involved his interview in the ramp incident. The Grievant's second discipline involved his interview in the street light incident. The Grievant's third discipline occurred when he received a one-day unpaid suspension for falsifying sick leave. Douglas Beaver's disciplines involved an interview and an oral warning for being late for work.

The third incident is under separate consideration before this Arbitrator. The first and second incidents each resulted in a verbal reprimand. In each, management found the Grievant to be at fault; the Grievant did not appeal these findings; and management counseled the Grievant regarding his offenses. Douglas Beaver was also verbally reprimanded and counseled regarding his two incidences of tardiness.

Discipline is a concern traditionally considered by management in making decisions as to the level of qualifications of an employee. The City's use of discipline in determining driver qualifications was not arbitrary, capricious or unreasonable.

The Transit Manager and Supervisor Wagener testified that Douglas Beaver's 3 to 4 months experience as a Temporary Full-time Bus Operator was important in determining that he was more qualified because management saw that he successfully worked a 40-hour schedule at odd hours and in the less desirable routes which are generally left to the least

senior full-time driver. During this time, Douglas Beaver was observed doing “extra board,” i.e., unassigned work or fill-in for drivers who were out for sick leave, vacation and holidays. Douglas Beaver demonstrated a consistent willingness to work late afternoon and evening hours.

Supervisors Wagener and Van Den Heuvel testified that Douglas Beaver’s temporary experience as a full-time driver manifested qualities that could not otherwise be observed in the Grievant. It was not arbitrary, capricious or unreasonable to consider Douglas Beaver’s temporary experience as a full-time driver.

On or about September 22, 2003, two other Bus Operators posted for a Temporary Full-time Bus Operator position. The Grievant sought out the Transit Manager to discuss this matter. The Grievant claims that the Transit Manager promised the permanent job to the Grievant over Beaver if the position was ever posted due to the Grievant’s seniority and regardless of whether the Grievant opted not to post for the temporary full-time position. The Transit Manager denies that she ever made this promise or anything like it. The Grievant passed up an opportunity to bid for the temporary full-time position because of his children’s sports schedules.

The contract does not guarantee a job to the senior employee if he is minimally qualified. The contract requires an equality of qualifications before seniority controls. The City is entitled to take reasonable steps to measure those qualifications. Although some qualifications may have had different weights attached to them, the Union has failed to establish that management’s overall judgment was arbitrary, capricious or unreasonable. Management’s decision must stand.

### DISCUSSION

The Union’s statement of the issues more closely approximates that presented in the grievance, as filed and processed through the grievance procedure. Accordingly, the Union’s statement of the issues has been adopted by the undersigned.

The collective bargaining agreement does not require the Employer to include, in its analysis of qualifications, the factors of training, experience, licenses, pre-employment experience, operational experience as an incumbent, disciplinary record and evaluations, as argued by the Union. Nor does the collective bargaining agreement require the Employer to articulate an objective, credible standard for determining qualifications in advance of the job posting.

In a prior arbitration between the parties, Arbitrator Honeyman interpreted the language of Article 6, Section 2, that is relevant to this dispute, *i.e.*, “Qualifications being equal, seniority will prevail in the selection of applicants for jobs at Transit.” CITY OF EAU CLAIRE, MA-6055 (Honeyman, 8/90) Arbitrator Honeyman concluded that:

. . . and "qualifications being equal, seniority will prevail . . ." is language which gives management the right to make a decision as to which employe is more qualified, if any. That decision, in turn, is reviewable by an arbitrator under the widely accepted standard that if management decision is not arbitrary, capricious, or (in many arbitrators' view) unreasonable, it must stand. . .

Notwithstanding the Union's arguments to the contrary, this is the standard of review that is applicable to the City's decision to not select the Grievant to fill the permanent full-time position that is the subject of this grievance.

The decision to not select the Grievant was made by Transit Manager Gwen Van Den Heuvel, in consultation with her two Transit Supervisors. This decision was reviewed with Department of Public Works Director Brian Amundson and Human Resources Director Dale Peters. It is not evident that either of these two individuals had any significant input into Van Den Heuvel's decision.

Van Den Heuvel and one of these Transit Supervisors, Tom Wagener, testified at hearing. According to Van Den Heuvel, she did not select the Grievant because she decided that Beaver was more qualified for the position than the Grievant. Van Den Heuvel states that the decision regarding qualifications was based upon three factors, *i.e.*, that Beaver had worked as a Temporary Full-time Bus Operator and the Grievant had not; that Beaver had a better driving record than the Grievant; and that Beaver had a better disciplinary record than the Grievant.

As Wagener recalls the discussion with Van Den Heuvel, it was decided that Beaver was more qualified because he had worked as a Temporary Full-time Bus Driver; he had no preventable accidents although he worked the same amount of time as the Grievant; and that Beaver exhibited a willingness to work evening hours; which hours historically were the least desirable. Wagener also recalls that there was a comparison of disciplinary records.

It is undisputed that Beaver, unlike the Grievant, had worked as a Temporary Full-time Bus Driver for several months; beginning in October of 2003 and ending in January of 2004. Van Den Heuvel acknowledges that Part-time Bus Operators, such as the Grievant, operate the same equipment as Full-time Bus Operators. Wagener acknowledges that Part-time Bus Operators work all the routes.

According to Van Den Heuvel, Beaver demonstrated that he could perform full-time work very well; receiving no customer complaints and having no accidents. Van Den Heuvel stated that the full-time work provided Beaver with a different work experience than the Grievant's part-time work because Beaver drove forty hours per week, rather than the twenty hours or less that are driven by Part-time Bus Operators; Beaver drove longer shifts than normally required of Part-time Bus Operators; and, due to the fact that he was performing Extra Board work, which is the work of full-time employees, Beaver demonstrated that he had the ability to work late hours and then start early the next morning. According to Wagener,

Beaver's full-time experience was important because it demonstrated that Beaver was willing to work extra, during the less desirable evening hours.

The Grievant confirms that Beaver worked Extra Board while he was a Temporary Full-time Bus Operator. The Grievant further confirms that the duties of Extra Board include filling in for leaves and unplanned hours. The Grievant claims that Part-time Bus Operators and Full-time Bus Operators who perform Extra Board demonstrate the same flexibility. Van Den Heuvel disagrees.

It is undisputed that the Grievant had the opportunity to post for the Temporary Part-time Bus Operator that was filled by Beaver. It is also undisputed that, while the posting for this position was on the board, the Grievant approached Van Den Heuvel to discuss the posting. Portions of this discussion are in dispute.

The Grievant recalls that, when he saw the posting, he talked to Union President Don Imm to find out if the position would be reposted if it became permanent and then he went to Van Den Heuvel to be reassured that it would be posted if it became permanent. According to the Grievant, Van Den Heuvel then asked who had been hired first; Beaver or the Grievant, and the Grievant responded "me." The Grievant recalls that Van Den Heuvel then stated that it would be the Grievant's job based on seniority unless Frank posted because Frank had more seniority. The Grievant further recalls that he then told Van Den Heuvel that he did not want to miss his son's sports and, therefore, he would not sign for the temporary full-time position, but would have a decision to make if a permanent full-time position were to be posted.

Van Den Heuvel recalls that the Grievant came to see her while the posting for the Temporary Full-time Bus Operator was up; that the Grievant asked if the position was temporary and she responded yes; that the Grievant asked if the position might go permanent and she responded yes; that the Grievant asked if the position became permanent would it be posted and she responded yes; and that the Grievant asked if the position became permanent would he be allowed to sign and she said yes. Van Den Heuvel further recalls that the Grievant then discussed his son's sports and indicated that he was not sure about signing the temporary posting. Van Den Heuvel states that she did not promise the Grievant the full-time position; did not discuss seniority with the Grievant; and did not discuss who would get the permanent posting.

Given that the contract language does not award posted positions solely on the basis of seniority and the evidence that the most senior bidding employee has not always been awarded the posted position, it is implausible that Van Den Heuvel would respond to the Grievant's questioning of whether or not a permanent position would be posted, by offering any opinion on who might be awarded the position if it were posted; much less the opinion that it would be the Grievant's on the basis of seniority. Thus, the undersigned is persuaded that the Grievant is mistaken when he recalled that Van Den Heuvel asked who had been hired first; Beaver or the Grievant, and the Grievant responded "me" and when he recalled that Van Den Heuvel stated that it would be the Grievant's job based on seniority unless Frank posted because Frank had more seniority.



Crediting Van Den Heuvel's account of the discussion, the undersigned rejects the Union's argument that the Grievant was misled by Van Den Heuvel to believe that his choice to not bid on the Temporary Full-time Bus Operator position would not impact upon a future application for a Permanent Full-time Bus Operator position. Nor, given the nature of the discussion, does the undersigned accept the Union's argument that Van Den Heuvel had a duty to notify the Grievant that work in the Temporary Full-time Bus Operator position would be a factor in management's decision to fill any Permanent Full-time Bus Operator position.

The record provides no reasonable basis to discredit Van Den Heuvel's testimony that Beaver's work as a Temporary Full-time Bus Operator provided him with work experiences that differed from those of the Grievant's Part-time Bus Operator experience. Van Den Heuvel's consideration of Beaver's work as a Temporary Full-time Bus Operator, as well as her conclusion that Beaver's successful performance of Full-time Bus Operator work made Beaver better qualified to perform the work of a Full-time Bus Operator, are not arbitrary, capricious, or unreasonable.

With respect to driving records, Van Den Heuvel states that the Grievant, during the term of his employment with the City's transit system, had two accidents that were determined by management to be preventable and, thus, the fault of the Grievant, and that Beaver had none. This testimony is confirmed by other record evidence. According to Van Den Heuvel, Beaver's lack of preventable accidents showed that Beaver had better driving skills. The Grievant's testimony indicates that, at the time of the posting that is the subject of this grievance, he and Beaver had nearly the same number of operational hours. (Approximately 4,100 hours each) The posting which is the subject of this dispute lists "Special skills"; among which is a good driving record.

The Grievant disagreed with management's determinations that the two accidents were preventable. These determinations were reviewed by an advisory "safety committee", comprised of Union bargaining unit and management employees. The Grievant believes that one of these findings was not supported by Union bargaining unit employees. The record, however, does not provide any reasonable basis to discredit Van Den Heuvel's testimony that, in neither instance, did the "safety committee," disagree with management's findings. Neither Van Den Heuvel's consideration of the Grievant's and Beaver's driving records, nor her conclusion that the driving records showed that Beaver had better driving skills, is arbitrary, capricious, or unreasonable.

The "Complaint/Discipline Log" maintained by the Employer indicates that the Grievant received an "interview" for a preventable accident on 12/08/01 and 10/01/02, as well as a "written warning with one day suspension for an incident on 06/01/04. The "Complaint/Discipline Log" indicates that Beaver received an "interview" for being late on 12/01/01 and an "oral warning" for reporting late to his assignment on 01/10/02. Van Den Heuvel's testimony establishes that she considered all of these matters.

The Grievant disputes Van Den Heuvel's assertion that the "interviews" that followed the Grievant's preventable accidents were discipline. The "Discipline and Penalty Code" of the transit system lists preventable accidents, both major and minor, as discipline. (ER EX #1) Van Den Heuvel's testimony establishes that this Code has been in effect for over twenty years without any formal challenge by the Union.

The "written warning with one day suspension" was based upon management's determination that, on June 1, 2004, the Grievant had falsified sick leave. At the time that Van Den Heuvel selected Beaver for the full-time position, this "written warning with one day suspension" was the subject of a grievance. In another arbitration proceeding before this arbitrator, this discipline was overturned. In comparing the Grievant's disciplinary record with that of Beaver, Van Den Heuvel relied upon an unfounded discipline. Thus, Van Den Heuvel's decision that that Beaver had a better disciplinary record than the Grievant is arbitrary, capricious, and unreasonable.

The Union argues that, despite repeated requests by the Union during the processing of the grievance for the "specific reasons" why Beaver was more qualified than the Grievant, the Employer did not make any response prior to the Third Step meeting. The Union further argues that, at the Third Step meeting, the Employer articulated only two reasons, *i.e.*, that Beaver had taken the Temporary Full-time Bus Operator position and that, as a result, he was more experienced with regard to routes and equipment operation.

The Grievant and Transit Manager Gwen Van Den Heuvel testified regarding statements made at the Third Step meeting. The record does not establish the content of prior grievance discussions, if any.

The Grievant recalls that Amundson said that the reason for hiring Beaver was that he had taken the temporary full-time job and, therefore, he was more qualified on various types of equipment and various routes; but that Amundson did not state that this was the only reason. The Grievant further recalls that the Grievant denied that this was true and that the Grievant stated that he had worked on all routes and equipment. According to the Grievant, no one said anything about prior discipline.

Transit Manager Gwen Van Den Heuvel recalls that Amundson referred to Beaver's full-time work, but did not say the decision was limited to Beaver's full-time work. Van Den Heuvel recalls that Amundson stated that Beaver's full-time work provided Beaver with experience on a greater array of equipment and a variety of routes and that the Union disagreed, stating that part-time employees drive the same equipment and routes. Van Den Heuvel also recalls that Amundson said that the decision was based upon work records. Van Den Heuvel states that Amundson did not specifically refer to discipline or preventable accidents.

To be sure, Amundson's statements that Beaver's full-time work provided Beaver with experience on a greater array of equipment and a variety of routes are incorrect. The obvious error of this statement may have focused the Grievant's attention upon this statement.

During the processing of this grievance, the Union was entitled to be given a reasonable response to any request for reasons why the Grievant was not selected for the position. Given the record's lack of specificity regarding who said what to whom and when, the undersigned is unable to conclude that the Employer did not make a reasonable response.

At the Third Step, the City provided reasons, *i.e.*, work record and Beaver's full-time work. The three reasons cited by Van Den Heuvel, as the basis for her decision that Beaver was more qualified than the Grievant, fall within one of these two categories. Neither the evidence of Employer statements made at the Third Step of the grievance procedure, nor any other record evidence, reasonably warrant the conclusion that Van Den Heuvel's stated reasons for determining that Beaver is more qualified than the Grievant are pretext.

### Conclusion

Van Den Heuvel's determination that a comparison of disciplinary records showed that Beaver is more qualified than the Grievant for the position of Permanent Full-time Bus Operator is arbitrary, capricious and unreasonable. The record, however, does not establish that the comparison of disciplinary records was the most significant factor in Van Den Heuvel's determination of qualifications. Van Den Heuvel's reliance upon Beaver's work as a Temporary Full-time Bus Operator and Beaver's better driving record to conclude that Beaver is more qualified than the Grievant for the position of Permanent Full-time Bus Operator is not arbitrary, capricious and unreasonable and, thus, must stand. Under Article 6, Section 2, if qualifications are not equal, then the Grievant's seniority does not prevail.

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

### AWARD

1. The City did not violate Article 6, Section 2, when it failed to select the Grievant, the most senior employee, for a full-time Operator vacancy on November 15, 2004.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 21st day of October, 2005.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

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