

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 31, AFSCME, AFL-CIO

and

VILLAGE OF MENOMONEE FALLS

Case 77
No. 65406
MA-13216

Appearances:

John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Sean Scullen, Attorney at Law, Quarles & Brady, appearing on behalf of the Village.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2004-2006 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of Allen Wiedmeyer. A hearing was held on April 6, 2006, in Menomonee Falls, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on June 9, 2006.

ISSUE

The parties ask:

Did the Employer violate the collective bargaining agreement when it failed to award the vacant Parks Department Truck Driver position which closed on July 7, 2005 to the Grievant? If so, what is the appropriate remedy?

BACKGROUND

The Grievant is Allen Wiedmeyer, who has worked with the Village since January 27, 1997. Both he and another employee, Ken Weyer, posted for a position of truck driver in the Parks Department. Weyer, whose seniority date is April 14, 1997, got the position. The grievance is over the awarding of the position to a less senior employee.

Before coming to the Village, Wiedmeyer worked at the City of Wauwatosa in its Department of Public Works as a Laborer II. He repaired and maintained streets, catch basins, man holes, and did some asphaltting, snow plowing and salting, and small repairs in buildings, etc. He worked there a little under a year before coming to the Village. Before that, he worked eight years at the Salem waste water treatment plant. He operated and maintained the plant and also worked with the Highway Department in Salem, cutting grass, cutting down and pruning trees, clearing waterways, plowing, salting, repairing vehicles, and pumps, etc. He also did some small repair work on buildings there. He operated a tank truck and a vactor for sewer maintenance. He maintained everything at the plant, doing electrical work, plumbing, carpentry and masonry work. Wiedmeyer had a summer intern job at the Kewaskum Wastewater plant, doing mostly outside work, such as taking care of the lawn, waterways, ditch lines, small brush trimming, and planting flowers.

Wiedmeyer grew up on a family farm, called the Springside Dairy Farm near West Bend. He took care of animals, performed field work, repaired and maintained equipment, and repaired buildings. He planted crops such as corn, alfalfa and oats, checked for disease on plants, harvested the crops, cut down trees and performed other jobs associated with a farm. He has operated front end loaders, including larger ones with a backhoe on the end, as well as tractors, combines, choppers and other equipment. He has used chain saws and power pruners.

Wiedmeyer started his job with the Village after he applied for the truck driver's position in Parks. He was interviewed and hired for that position, but before he started, the position in Parks was filled by another employee transferred from the Public Works Department due to an injury or illness. Wiedmeyer was offered a position as truck driver for the Department of Public Works, which he accepted. His current position is construction maintenance for the Water Department.

In July of 2005, the Village posted the opening for the truck driver position in Parks. The posting stated that the examples of worked included:

1. Park maintenance, including restroom and pavilion cleaning, construction and facility repair, play structure inspection and repair and cutting grass.
2. Landscaping to include site restoration, seeding, stock planting, pesticide application and flower and shrub bed planting and maintenance.
3. Forestry activities to include tree planting, plant evaluation, disease and insect diagnosis, pruning, removals and stump grinding.

4. Operating light and heavy-duty trucks and other equipment in a safe and efficient manner.
5. Performing preventive maintenance on trucks and other equipment.
6. General street maintenance and construction.
7. Duties to include snow plowing, cleaning and repair of catch basins, maintaining signs and signals.
8. Specific duties may vary by department inter-cooperation.
9. Maintaining athletic fields and courts.

The posting noted that applicants must have a valid commercial driver's license.

Wiedmeyer believed he had the experience for the examples of work listed on the job posting. He had cleaned restrooms and buildings, been involved in construction, laid concrete, replaced roofs, and built structures. He has experience with plumbing. His experience with landscaping in the Water Department involved situations where a water main break would be in a boulevard or easement or on someone's front yard. The crew would backfill it, put topsoil on it and seed it. Wiedmeyer had not inspected play structures before, but put play structures up for his own children and fixed them. He had cut grass at Parks before and used one of the larger mowers there. He has planted a large garden in the past and planted crops on the family farm, using a corn planter or grain drill for oats and wheat. While he had not used pesticides at the Village, he used pesticides and herbicides on the farm. He has moved and replanted shrubs. He has looked at dead plants and trees and cut them down. He had not done any stump grinding before. He holds a commercial driver's license and owns a CDL testing company. At the Village, Wiedmeyer does basic maintenance on vehicles, but does more complex maintenance on his personal equipment and farm equipment. He has plowed, salted, maintained manholes, and cleaned catch basins. He has replaced bulbs in traffic signals and street lights. He had not taken care of athletic fields in the past but had observed the seasonal employees working on the fields. Wiedmeyer had worked at Parks when he was assigned light duty two or three times. He spent about 60 days total in Parks, primarily cutting grass, weed eating, pulling weeds in flower beds, and cleaning bathrooms and pavilions.

The job description for the position called for putting up and maintaining seasonal decorations, something that Wiedmeyer had not done in the past. The job description also stated that one must be available for weekend and evening work. Wiedmeyer said he is available for weekend and overtime work and had just worked the past weekend. Wiedmeyer does not have specialized certification or training in pesticide application, landscaping or forestry.

Tim Wick is the treasurer of Local 31, AFSCME and worked for the Village for 17 years. He believed that the laborer position in the Parks Department had always been awarded to the most senior applicant. However, that was not the case with a job in the Water Utility-Construction Maintenance, where Louis Ton was offered the job and was less senior than Joe Mosgaller. The position was never filled.

George Forst has been the Superintendent of Parks for the last year. Before that, he was the crew leader for two years, and a truck driver in Parks for 32 years. Before becoming Superintendent, Forst held several positions in the Union and was involved with bargaining the labor contracts from 1990 to the present contract. During negotiations, the Union sought to make seniority the ruling criteria for job postings but was not successful. Forst recalled that the crew leader position at Good Hope garage went to a less senior person, and the equipment maintenance crew leader went to a less senior person. Forst had applied for both positions and was not chosen even though he had more seniority. Neither he nor the Union filed a grievance over those positions.

Forst stated that the truck driver position is now far different than it was in 1996 when Wiedmeyer first applied for it. The staff has been reduced from 11 people to 8, and the size of the park system has been increased. State and federal restrictions have changed. Pesticide application is a big thing, forestry operations have changed, and OSHA regulations cause management to look at the people doing these operations. The American National Standards Institute (ANSI) has changed the standards for forestry.

Forst and the Director of Public Works conducted interviews of the applicants for the position and determined that Weyer was qualified and Wiedmeyer was not qualified. Forst noted that the Village's insurance carrier is concerned about the playground equipment, and inspection of it is a serious matter. Forst thought that Wiedmeyer's experience in planting corn and planting flowers in a Village flower bed were very different, and using pesticides at home is different than using them on public property. The re-seeding work at the Water Department is similar to that in the Parks Department, but the Parks Department gets involved with turf restorations and employees have to know plants. There are disease and insect problems that weren't around five years ago. The Gypsy Moth was not a problem when Wiedmeyer was hired but it is now. Setting up a ball diamond takes expertise. The summer staff does some of the work on the ball fields and tennis courts, but the full-time staff needs to know how to do it properly. Forst considered Wiedmeyer not qualified for the position because he has no training or experience in play structures, no pesticide application training or experience, no landscape experience with annuals or perennials, no forestry training, and no training on athletic fields and facilities.

Forst considered Weyer qualified because he had worked for a landscape company before coming to the Village. Weyer had a landscape pesticide applicator license in one category, turf and ornamental. After he was hired in Parks, he was trained and got certified in right-of-way application. Weyer was hired 77 days after Wiedmeyer and hired in the Parks Department. Forst felt that Weyer knew all the Parks' operations, including playground inspection, landscaping and forestry. Weyer has a pesticide license and vast experience on athletic fields and courts. Weyer held the truck driver position in Parks for three years. He gained some of his experience in athletic fields from his job at Parks.

None of the six truck drivers in Parks has a degree in forestry, arbor culture or horticulture. Forst considered two of them to have professional landscape experience. Some of the Parks employees got their knowledge of athletic fields and forestry by working for the Village, others brought some knowledge with them. There is some ongoing training in the Parks Department. Employees are trained on inspecting playground equipment. Forst reviews flower bed designs and approves them. The Department no longer puts up playground equipment but inspects it and repairs it. Employees are trained by the Village to do that job.

THE PARTIES' POSITIONS

The Union

The Union notes that the pertinent contract provisions are Sections 9.02, 9.03 and 9.04 of the collective bargaining agreement. It points out that Forst admitted that the language of Section 9.02 does not provide for the Employer to choose the most qualified applicant for these types of postings, but that it is required to select the senior qualified applicant. Forst agreed that the intent of the language only allows the Employer to argue that a person is head and shoulders above seniority considerations in the instance of crew leader positions. No such consideration is contemplated in the agreement for Parks Department truck driver positions.

Wick's testimony shows that in the last 10 years when he was an officer of the Union, positions like this one had always been awarded to the senior applicant. While the Village cited three occurrences where it did not award jobs to the senior applicant, one position posted in the water utility was not grieved because the job was never awarded to any applicant. A crew leader position was not grieved as the contract language contained in Section 9.02 draws a distinction between the type of position in dispute and that of a crew leader. And back in 1987, the Union did not grieve the non selection of Forst for a position of a small engine mechanic. Forst admitted that the decision not to grieve this matter was his and his alone. He did not offer any evidence that he was qualified for the position.

The Union asserts that the contract language supports sustaining its grievance. Wiedmeyer was qualified to be a Parks truck driver in 2005, just like he was in 1996. He has spent his entire career working for various municipalities, as well as the Village, honing his skills. He also spent years working on the family farm.

The Union contends that the record does not demonstrate that Weyer had any outstanding qualifications for the job in 1996. He and others in the Parks Department learned the job via on-the-job training. To attach more stringent requirements for Wiedmeyer as opposed to other Parks employees violated the intent of Section 9.02 as well as the long-established practice between the parties. The Village also violated Section 9.04 by not giving Wiedmeyer 60 days to demonstrate his acceptable progress towards qualification.

The Union asks that the grievance be sustained and the position in dispute be awarded to Wiedmeyer. There is no claim for back wages.

The Village

The Village contends that it had the right to select a less senior employee where the senior employee's qualifications did not meet the minimum qualifications determined by management. The contract clause, Section 9.02, is a modified seniority clause in the sense that seniority plays a role in filling vacancies, but that the qualifications of candidates are judged as well. Section 9.02 is most properly characterized as a sufficient ability variation of a modified seniority clause, which provides that the senior employee will be given preference only if he or she has sufficient knowledge, skill or ability to perform the job. The Village is the judge of qualifications, skills and abilities necessary for any position. In order to sustain a challenge, the employer's judgment must be shown to be unreasonable, capricious, arbitrary or discriminatory.

The Village's emphasis on experience or training in landscaping, forestry and park maintenance was reasonable criteria upon which to assess candidates. The Village was focused on the experience of all candidates with regard to landscaping, forestry, playground equipment inspection, athletic field maintenance and park maintenance. This criteria is directly related to what the truck driver position requires. Experience is a permissible criterion upon which to judge candidates. The Village reasonably determined that the Grievant did not have the minimum qualifications for the position. He did not demonstrate the degree of expertise, experience or training in all areas of the position description. He testified that inspection for plant disease and insect infestation involved simply looking at the plant to determine if the petals are falling off. Plant inspection requires more than a cursory glance to see if the petals are falling off. Likewise, the Grievant believed that playground equipment inspection was as simple as walking past to see if a bolt had fallen off or if something needed repair. However, playground equipment inspection is significantly more complicated and involves specific identification of hazards particular to children.

The Grievant's experience in Parks was limited by light duty restrictions, and when not so restricted, he performed the same work done by temporary and seasonal workers. It is not significant that he had been initially hired for a Parks Department truck driver position in 1996, because the position had changed significantly since 1997. Due to reductions in staff and an increase in workload, the Village requires employees to hit the ground running and has less time and resources to spend on training. Federal and state agencies regulate many functions of the Parks Department, like pesticide application and tree trimming. The Village did not find the Grievant's farming experience and limited landscaping experience at his home and in his current position to be comparable to the level of experience required for the job.

While the Union argued that the Grievant could have been trained in areas where he was deficient, a candidate's qualifications are assessed at the time of bidding – not prospectively based on how the candidate might perform with a little bit of training. The Village is not required to place an unqualified senior bidder in the job and then train him for some unknown period in order for him to eventually become qualified. It is irrelevant that other Parks Department employees may have received on-the-job training during the course of their employment. The issue is whether the Grievant, through prior experience or training, possessed the qualifications necessary to step into the truck driver position in July of 2005. It is not enough to allege that the Grievant would have been capable of performing the truck driver position – he must establish that he was qualified at the time of the bidding for the position.

Finally, the Village notes that in past bargaining, the Union has attempted to remove all consideration of qualifications from the language of 9.02 without success. An arbitrator may not grant to a party what it was not successful in obtaining through bargaining. The Village has every right to consider the Grievant's qualifications before looking to the issue of seniority. That is what happened – the Village reasonably determined that the Grievant did not possess the minimum qualifications for the position.

DISCUSSION

The contract language at issue is:

- 9.02 Employees interested in such jobs who meet the posted qualifications shall sign the posting and consideration shall be given these persons. Additionally, employees from the Building Maintenance Department who sign job postings for other Departments (Streets, Park, Water Utility, Sewer Utility) must, where applicable, also successfully pass the physical agility and driving tests and the drug screen required of all new hires into the Public Works Department prior to being selected to fill the opening (3/25/99). If more than one employee signs the posting, the employee with the greatest length of service, who through previous experience or training, qualifies for the job, shall be selected to fill the opening. However, for the Crew Leader classification, qualifications being relatively equal, senior employees shall be given preference. If no current employee who signs the posting is qualified, as determined by Management, consideration shall be given to outside applicants.

The parties are not in disagreement over the way to interpret the language noted above. The Village correctly calls it a sufficient ability clause. The parties also agree that for the crew leader position, a different standard is applied. In the sufficient ability clause at issue here, there are no comparisons between employees. If the senior employee can in fact do the job, the job goes to him, even if a junior employee has much more skill or ability.

One of the problems in this case is that if the relatively equal language applied, the Village could probably demonstrate that the less senior employee, Weyer, is head and shoulders above the more senior employee, Wiedmeyer, because of Weyer's background, and as well as his experience in the Parks Department. However, this is not a position of crew leader. All Wiedmeyer has to show is that he can do the job for the truck driver position.

A couple of things weigh against the Village in this case. First of all, the Village itself deemed Wiedmeyer qualified for the job when it first hired him for this very position in 1997. Although the Village argues that the job has changed significantly, the job is still a Parks Department position with the same basic skills needed of a Parks employee. Regulations may have increased, the methods to comply with them may have changed, the amount of work may have changed, the workload may have increased, but it is still a truck driver position in the Parks Department doing most of the same tasks they have always done.

While the Village may determine qualifications, its emphasis on certain qualifications appears to be arbitrary. For example, the Village lands on the elements of landscaping, forestry, and maintaining athletic fields and playground equipment as being very important. These are the areas where Wiedmeyer has some weaknesses, and the areas where Weyer stands out. Of course, once again, the comparisons between the employees are improper in this context. Weyer's strength in those areas comes both from his background and his prior experience in Parks. The Parks management knows his work. They want him back. But they have ignored all the requirements of the job. Without showing that most of the time spent in Parks would involve forestry, landscaping, maintaining athletic fields and playground equipment, the Village has arbitrarily skewed the requirements to favor the candidate it wanted. Wiedmeyer shows his strengths in many other areas, such as cleaning restrooms, construction and facility repairs, cutting grass, operating trucks, performing preventative maintenance on trucks and equipment, general street maintenance and construction, snow plowing, and cleaning and repairing catch basins, etc. Furthermore, Wiedmeyer is not unqualified to perform landscaping, pesticide application, forestry activities or athletic fields and playground equipment maintenance. Wiedmeyer shows much familiarity with trees, seeding, planting, pesticide application, flower and shrub bed planting and maintenance, tree planting, pruning, and plant evaluation. The Village wants to discount Wiedmeyer's experience at his family's farm, and it wants to discount all his prior experience with other municipalities, such as his work at Salem, as well as his work with the Village itself. But Wiedmeyer's prior experience has qualified him to work at the Parks job. Clearly, the Village had set its sights on the employee it wanted and disregarded the experience and training of Wiedmeyer in the process of trying to get Weyer back into the Parks Department.

The Village claims things have changed drastically. There was no Gypsy Moth disease when Wiedmeyer was first hired. Things always change. The Ash Borer is poised to invade the state and none of these employees have experience with it. Pesticides and herbicides change, their applications change. (And the Bald Eagle thanks us for stopping the use of DDT.) We learn as we go in many areas, with improvements constantly on the horizon.

Wiedmeyer is qualified for most of the work listed in the job description and job posting. Some of the work – such as playground inspection – is so specialized that hardly anyone has prior training or experience in it. However, one or two elements in a job posting with 20-30 tasks should not strike out an applicant.

It should be noted with some caution here that this grievance is not being sustained because the Grievant is the most senior applicant. It is being sustained because he is qualified to fill the position. Having been found qualified, his seniority then entitles him to the job. That is nothing more and nothing less than what the parties bargained for and got.

The grievance will be granted. As the position does not pay more than Wiedmeyer's current position, no make whole order is necessary.

AWARD

The grievance is sustained.

The Village is ordered to give the Grievant, Allen Wiedmeyer, the position of truck driver in the Parks Department as soon as feasible.

Dated at Elkhorn, Wisconsin this 21st day of July, 2006.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator