

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DUNN COUNTY

and

AFSCME LOCAL 727B

Case 118

No. 65511

MA-13240

Appearances:

Mr. Steven Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appeared on behalf of the Union.

Mr. Scott Cox, Weld, Riley, Prenz & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the County.

ARBITRATION AWARD

On January 20, 2006, Dunn County and Local 727B of the American Federation of State, County, and Municipal Employees, AFL-CIO submitted a request to the Wisconsin Employment Relations Commission, to have the Commission appoint William C. Houlihan, a member of its staff to hear and decide a grievance pending between the parties. A hearing was conducted on April 19, 2006, in Menomonie, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were submitted and exchanged by June 8, 2006.

This Award addresses whether or not the county is contractually permitted to utilize a Civil Service process to screen candidates for Deputy Sheriff positions.

BACKGROUND AND FACTS

Sec. 59.52 Wis. Stats., authorizes Counties to establish a Civil Service system, one of whose purposes is to provide a process for the selection of Law Enforcement Officers. The creation of such a system is discretionary with the County. Dunn County has such a system, has used it for years, and has modified it from time to time. In relevant part, the Civil Service

process sets minimum qualifications for the position of Deputy Sheriff and goes on to create an Application and Testing process used to screen candidates seeking employment as a Deputy Sheriff. An Eligibility List is created, and is good for two years. The applicable provisions of the Civil Service process are set forth below.

Dunn County and AFSCME, Local 727 are signatories to a Collective Bargaining Agreement, the relevant portions of which are set forth below. Key to this dispute is Article 5-Job Posting, which provides: "The most senior employee who meets the minimum qualifications as established in the job descriptions shall receive the position." It is the tension between certain aspects of the Civil Service system and this provision that frames this dispute.

The immediate facts giving rise to this grievance occurred when Keith Grimm, the grievant, signed a posting for a Deputy Sheriff position. Mr. Grimm is a Corrections Officer, and a member of the bargaining unit. Mr. Grimm was not on the Eligibility List. The posting went up September 12, 2005. On September 19, Mr. Grimm was advised that he was not qualified for the position. In follow-up correspondence, dated December 28, 2005 Sheriff Dennis Smith wrote Mr. Grimm the following:

Last week I found that you signed the job posting for the position of Deputy Sheriff. Today, I was notified that you were the only Dunn County Employee that signed that job posting.

I need to notify you that you are not able to post into the position of Deputy Sheriff at this time. Dunn County has a Civil Service Ordinance based on state law. That Civil Service Ordinance requires that you be on the current Certified Civil Service Eligibility List to post for a deputy sheriff opening. Since you were not on the current list, you are not eligible.

Ultimately, a non-bargaining unit employee got the job. A grievance was filed, and denied, leading to this proceeding.

There have been grievances filed over non selection in the past. A grievance was filed on April 1, 1991, contending that "A qualified union employee was denied a position through the job posting procedure." The grievance was informally resolved. The grievant was not awarded a Deputy position.

Two grievances, both filed in June, 1993, complain that "Management failed to appoint the most senior employee who meets the minimum qualifications, to a patrol deputy position, establishing qualifications not commensurate with the position and unreasonable work rules relating to the hiring process." Both grievances seek to "Award the position to the most senior employee with the minimum qualifications...." The grievances were resolved short of Arbitration with an Agreement that has since expired. That Agreement provided:

AGREEMENT BETWEEN DUNN COUNTY AND AFSCME LOCAL 727B

THE FOLLOWING TERMS ARE IN SETTLEMENT OF A GRIEVANCE(S) #93-J01 AND #J93-01 FILED IN THE MATTER OF A JOB POSTING FOR DEPUTY SHERIFF:

1. The County may hire the only applicant, Todd Kurtzhals, on the present civil service list to fill the current position.
2. Any current jail employee as of the date of this agreement shall be eligible to apply for said civil service eligibility list. For these employees, the November 21, 1990 job description for Deputy Sheriff shall be the requirement for the job of Deputy Sheriff. Only changes in state or federal law shall modify the job description.
3. In the last paragraph on the first page of said job description, the "combination of training and experience" shall be deemed as satisfied with 3 years of service in the position of jailer/matron and successful completion of existing civil service certification, except as modified by state or federal law.
4. The top 5 employees ranked by the existing civil service certification shall be placed on the civil service eligibility list. Other employees who pass and who rank lower than the top five successively shall move up to the top five list as the original top five employees are awarded Deputy Sheriff's positions, until the list of current employees is exhausted.
5. New employees of the Sheriff's Department, after the date of this agreement, may be required to have further reasonable qualifications to be awarded future Deputy Sheriff positions.
6. Employees on the top five eligibility list shall be awarded vacant Deputy Sheriff positions on the basis of Article 5, Job Posting, of the collective bargaining agreement.

Another grievance was filed in May, 1995. It makes the same essential claim as do the 1993 grievances. This grievance was resolved on a non-precedent setting basis.

Mr. Grimm has previously signed Deputy Sheriff postings, and has also attempted to secure placement on the Civil Service Eligibility list. In 1999 he satisfied the preliminary portions of the process and took the written exam. He was advised that he had passed the exam, and was to move on. He was subsequently advised that he would not get the posted job because a mistake had been made, and that he had actually failed the exam. It was his understanding the Sheriff's son was hired from the outside. As it turns out, there were two

vacancies and the Sheriff's son was hired for the second posting. Grimm did not sign that posting, because he believed his signature on the first posting was sufficient to express his interest in all existent openings. He did not grieve his non selection. He testified that he realized he should have grieved at the time, but was disgusted with the process and with his treatment.

John Kaanta, then Chief Deputy, met with Mr. Grimm sometime between 1999 and 2002 and counseled Grimm as to the detail and requirements of the Civil Service Exam and Process. He advised Grimm that he would have to successfully complete the process to qualify to be a Deputy Sheriff. Notwithstanding that conversation, Mr. Grimm did not participate in the creation of the 2002 or 2004 Civil Service Eligibility lists.

A number of Deputy positions have been posted, and filled, under the current Civil Service system, and the prevailing terms of the Collective Bargaining Agreement. In 1996, two positions were posted. No bargaining unit employees signed the posting. Two non-unit employees were hired. In February of 1999, another Deputy position was posted. Five bargaining unit employees signed the posting. All five were disqualified because they were not on the Civil Service list. A non-bargaining unit employee was hired. No grievance was filed. In November of 1999, another Deputy position was posted. There were no internal signers. This position was awarded to a non-bargaining unit employee (then Sheriff Zebro's son).

In March of 2000, a Deputy Sheriff position was posted. Mr. Grimm, the only internal signer, was disqualified because he was not on the list. No grievance was filed. In December of 2000, another Deputy position was posted. Mr. Grimm was again the only internal signer, and was again disqualified because he was not on the list. Another Deputy Sheriff position was posted in February, 2002. Three bargaining unit employees, including Kathy Christensen signed the posting. All were disqualified for not being on the list. A non-unit employee was hired. No grievance was filed.

In November, 2003, another Deputy position was posted. Two bargaining unit employees, including Ms. Christensen, signed the posting. Both were disqualified because they were not on the list. The position went to a non bargaining unit employee. No grievances were filed. In August of 2003, another Deputy position was posted. Ms. Christensen was the only bargaining unit employee to sign the posting. This time she was on the list, and she was awarded the job. She was ranked 7th of the 8 candidates on the Civil Service Eligibility List.

On September 12, 2005, the Deputy Sheriff vacancy that has led to this proceeding, was posted. Three bargaining unit employees, including the grievant, signed. It appears all three were disqualified for not being on the Eligibility list. Mr. Grimm has grieved.

ISSUE

The parties have stipulated the following:

Did the County violate the Collective Bargaining Agreement when it failed to award the Deputy Sheriff position to the grievant?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE DUNN COUNTY CIVIL SERVICE ORDINANCE

25.05 Application and Testing Process:

- A. Every two (2) years or more often as approved by the Committee, applications shall be solicited and received for the position of permanent Deputy Sheriff. Applications shall be made through the Administrative Coordinator's Office which shall certify whether an applicant meets the qualifications under 25.04.
- B. Each qualified applicant for permanent Deputy Sheriff shall be given a comprehensive written examination approved for use by the Committee. Seventy (70) percent shall be the minimum passing score.
- C. Qualified applicants passing the written examinations under B above shall each be given tests to determine their physical fitness, agility and endurance in a manner to be determined by the Committee. Such testing score shall be on a pass/fail basis.
- D. The applicants with the twenty (20) highest test scores and having passed B. and C. above shall be eligible for Rating Committee examination under 25.06.

25.06 Review and Rating by the Rating Committee:

- A. Each applicant for permanent Deputy Sheriff qualifying under 25.05 shall be given an oral interview by the Rating Committee. The purpose of the oral interview and rating evaluation shall be to evaluate personal characteristics including, but not limited to, the following:
 - 1. Appearance, manner and bearing.
 - 2. Ability to communicate.
 - 3. Personality.
 - 4. Alertness.
 - 5. Judgment.

- B. Each interviewed applicant shall be given a point score by the Rating Committee.

25.065 Ranking by Administrative Coordinator

- A. Following completion of all interviews, the Administrative Coordinator shall provide a numerical rating of zero (0) to one hundred (100) for each applicant to be calculated as follows:

Written Examination	40%
Oral Interview	30%
Previous Experience, Education and Training	30%
Total	100%

- B. The eight (8) highest rated applicants and ties shall be placed on an eligibility list by the Administrative Coordinator according to their rating with the highest rated applicant listed first (1st).
- C. Following listing by the Administrative Coordinator, the Administrative Coordinator shall inform each interviewed applicant of his or her written examinations score and final rating.

25.07 Pre-employment background investigation, physical examination and psychological testing:

- A. Prior to the appointment of any permanent Deputy Sheriff, a background investigation shall be conducted on the individual(s) the Sheriff is considering appointing. Any offer of employment shall be conditioned on the successful completion of a physical examination and psychological evaluation.
- B. The nature of such background investigation shall include, but not be limited to, a thorough check on the following:
 - 1. Accuracy of application or resumé;
 - 2. Mental and physical health;
 - 3. Previous employers and work record;
 - 4. All schools attended;
 - 5. Present and past neighbors and landlords;
 - 6. Character references;
 - 7. Credit records;
 - 8. Disposition; ethical character, honesty and

9. Local, state and federal police records;
 10. Driving history records;
 11. Military records;
 12. Any other source of information which previous contacts show to be important; and
 13. Any other source of information determined from time to time by the Sheriff, Committee or Administrative Coordinator or recommended by standards established by the Wisconsin Law Enforcement Standards Board.
- C. The physical examination required at subsection A. above shall be conducted by a Wisconsin licensed physician at the expense of the individual being considered, subject to the following requirements:
1. A complete individual medical history shall be submitted to the examining physician.
 2. The physician shall record his or her findings and shall note for consideration by the Sheriff any past or present physical defects, diseases, injuries, operations or conditions of an abnormal or unusual nature.
 3. The physician's written post-examination report to the Sheriff must conclude, in his or her opinion, whether the individual has the ability to physically perform the duties of a law enforcement officer.
- D. Prior to appointment under 25.08 the psychological testing required under subsection A. above shall be a professionally recognized written psychological examination in a form approved for use by the Committee. Results shall be provided to the sheriff for the purpose of assisting him or her in determining the mental health and suitability of candidates.
- E. Prior to the performance of any background investigation or physical examination under this section, the individual involved shall execute and file with the Sheriff a consent and release of information form authorizing same to be conducted. Failure to promptly file same shall make the individual ineligible from further consideration or appointment.
- F. The reports required in this section shall be considered confidential and copies of each shall be filed in the appropriate personnel file of every permanent Deputy appointed under this

25.08 Appointment of Permanent Deputies

- A. In the event of a Deputy Sheriff vacancy, the Sheriff shall appoint a replacement as soon as practicable from the top eight (8) individuals on the current eligibility listing provided under Section 25.06. For subsequent vacancies, the Sheriff shall appoint from the remaining names on the eligibility list.
- B. Any applicant unwilling or unable to accept appointment to a vacancy shall be removed from the eligibility list.
- C. The Sheriff shall notify the Committee and Administrative Coordinator of each appointment made.
- D. The official oath of each Deputy shall be filed with the Clerk of courts immediately upon appointment.
- E. Each Deputy Sheriff shall be deemed on probation during the first 2083 hours of employment after their appointment and may be discharged by the Sheriff at any time prior to termination of the probationary period.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 2 – GRIEVANCE PROCEDURE

Section 2. Arbitration

- d) Limitations on Arbitrator. The arbitrator shall have no right to amend, modify, nullify, ignore, or add provisions to this agreement. His/her authority shall be limited to the extent that he/she may only consider and decide the particular issue or issues presented to him/her by the Employer and/or the Union. Disputes or differences regarding negotiable issues are expressly not subject to arbitration.

...

ARTICLE 4 – SENIORITY

Section 1. Principle

The County recognizes the principle of seniority, and such principle shall

to which the principle of seniority is applicable, meet the necessary standard qualifications. Seniority shall be defined as an employee's length of continuous service with the County, dating from his/her last date of hire. Layoffs of less than one year shall not terminate seniority.

. . .

ARTICLE 5 – JOB POSTING

Section 1. Procedure

All new or vacated positions shall be posted on each main bulletin board in all departments for four (4) work days stating the job that is to be filled, qualifications, and the rate of pay. For the purpose of this section, work days are to be defined as Monday through Friday. Any position which has been posted, awarded, and then vacated, shall not be required to be reposted within 45 calendar days of the original removal date of the posting.

Employees who are on sick leave or vacation shall notify the County if they wish to be considered as applicants for all new or vacated positions.

Interested employees shall sign their names to this notice.

The appointment shall be made on the basis of seniority and qualifications. The most senior employee who meets the minimum qualifications as established in the job descriptions shall receive the position. The qualifications listed in the job description shall be relevant to the duties performed. The County shall have the right to administer various skill tests to determine whether or not employees meet the minimum qualifications set out in the job description. The tests shall be relevant to the duties performed and fairly administered. The job description shall include the minimum passing score. Applicants from within the bargaining unit shall have priority over applicants from other AFSCME Joint Council Bargaining Units.

Employees not qualified for a new position shall not be selected for the trial period in the new position. Upon request, employees shall be notified in writing for the reasons of disqualification.

Qualifications shall be commensurate with the position to be filled.

Outside non-employee applicants for bargaining unit positions shall be required to take any and all tests listed on the Union posting, regardless if any Union employees were tested. Such outside non-employee applicants shall also be

subject to the same minimum passing scores required of Union employees.

. . .

ARTICLE 7 – MISCELLANEOUS PROVISIONS

Section 1. Management Rights

It is understood and agreed that management possesses the sole right to operate and govern this agency and that except as otherwise specifically provided in this agreement, the County retains all the rights and functions of management that it has by law. . . .

. . .

POSITIONS OF THE PARTIES

The Union contends that the County Ordinance does not supersede the Labor Agreement. The sole reason Grimm was disqualified from posting for the Deputy Sheriffs position was that he was not on the list. The Union asserts that the Ordinance can be applied to bargaining unit members only to the extent it is compatible with the Collective Bargaining Agreement. It is the further view of the Union that the Civil Service Ordinance conflicts with the Contract.

Article 5, Sec.1 of the contract places clear restrictions on who the County may select to fill a posted position, and the criteria that can be used in the selection process. The Union contends that the testing process of the County is at odds with the specific skill testing standard of the contract. Additionally, the Union points out that under the Civil Service system, the Sheriff is permitted to select from the 8 certified candidates. Under the Collective Bargaining Agreement the Sheriff must select the senior qualified candidate.

Over the years, the Union contends that it has not acquiesced in the use of the Civil Service Ordinance. The Union claims that this defense was never raised prior to the hearing. Additionally, the Union notes that it has filed no fewer than 4 grievances over the application of the Ordinance. Those grievances were settled. At times the Ordinance has been applied compatibly with the contract. On yet other occasions, no grievant came forward. Taken together, it is the view of the Union that it has not conceded the use of the Ordinance.

Finally, once the grievant applied, the county failed to offer him a skill test, per the Collective Bargaining Agreement. Grimm testified that he met all of the requirements of the Position Description.

It is the view of the County that the Management Rights clause of the Contract allows the County to determine the qualifications for the Deputy Sheriff. Among those qualifications Dunn County requires applicants to be certified by the Civil Service Commission. The contract provides that the appointment go to the most senior employee who meets the minimum

by the Civil Service Commission. The County has satisfied the seniority provision of the Contract by giving first preference to bargaining unit members who meet the qualifications.

The County contends that the Contract must be harmonized with the Ordinance. It then asserts that it has harmonized the Civil Service Ordinance and the seniority and appointment provisions of the agreement by awarding positions to the most senior bargaining unit employee who meets all of the qualifications, including certification by the Civil Service Commission.

Finally, the County contends that the parties have established a past practice of using the Civil Service process to determine the qualifications of the candidates for Deputy. The Union is not free to disavow the practice.

DISCUSSION

Article 2, Sec. 2(d) restricts my analysis to the provisions of the Agreement and to the issues presented. Article 4, Seniority, defines seniority and generally provides that where applicable, it shall dominate...provided the employee "meets the necessary standard qualifications"

Article 5 makes specific what is treated generally in Article 4. Positions must be posted. Interested employees shall sign. The most senior employee who meets the minimum qualifications as established in the job descriptions shall receive the position. In determining qualifications, the employer has a right to administer various skill tests. There is no controversy relating to the first two requirements. Positions are posted. Employees interested in filling the vacancies do sign. It is the latter two provisions that are called into question. The critical question is whether or not the County is free to use the Civil Service process to determine qualifications. Put another way, is the Civil Service process a skill test, as that term is used in the contract? The follow-up question is whether or not the process concludes with the most senior bargaining unit applicant, who meets minimum qualifications, receiving the job?

I believe the county can use the Civil Service process to determine qualifications. The contract requires the successful applicant to meet certain minimum qualifications. The contract specifically allows the County to administer skill tests. The County is entitled to some latitude in selecting the tests to be administered. It is in the interests of all parties to have the County identify those who are, and those who are not, qualified and fit to enforce the Law. However, this latitude is not without limit. The contract requires that qualifications tested must be relevant to the duties performed. The purpose of the tests is to determine if those tested meet the minimum qualifications. The qualifications must be standard qualifications, and shall be commensurate with the position to be filled. In other words the terms of the contract must be honored. The Union is correct in its assertion that the Collective Bargaining Agreement prevails over conflicting provisions of the Ordinance.

The Civil Service exam is not itself a qualification. Rather, it is a process which seeks to measure the qualifications of those who would be Deputy Sheriffs.

The County has elected to use the Civil Service process to evaluate candidates. The origin of the process is Statutory. It is a commonly used procedure in the Law Enforcement community throughout the state. As such, it is a mainstream procedure. This is not a situation where the County has deviated far from the norm to select a novel testing device. Furthermore, the County has used this system for years. I believe a practice has developed. The Civil Service process has been universally used. It has been used repeatedly, and transparently. During the 1990's the Union challenged its application. There is no indication that any employee secured a position without successful completion of the process. To the extent that did occur, it would have been in a non-precedential context.

The 1993 grievance resolution sets forth the terms of resolution in the context of a viable, ongoing Civil Service process. The document affirms the applicability of the Civil Service list. What follows these early challenges are a number of instances where the Civil Service lists were created and re created. All Deputy positions were filled from such lists. A number of bargaining unit employees, including the grievant, were disqualified from consideration for failure to be on the list. This is the very question presented in this proceeding. Grimm was disqualified from consideration because he was not on the list.

The conclusion that the County can use the Civil Service process, is determinative of the issue framed by the parties. The County is free to use the Civil Service process to determine minimum qualifications. The grievant was not on the list. He did not participate in the Civil Service process, possibly due to his prior experience. He was counseled that he would have to go through the process to qualify for a job. He has been disqualified in the past for not being on the list. His decision here was knowing and deliberate. The County did not violate the collective bargaining agreement when it failed to award the Deputy Sheriff position to the grievant.

The Union attacks the Civil Service process on the grounds that it evaluates non job related factors, in violation of the contract. That contention is not addressed in this Award. Mr. Grimm was not skill tested. The Civil Service screening process is comprised of numerous tests, exams, and interviews. The elements, details, and application of the process was not litigated. Additionally, the Union claims that the flexibility of the Ordinance in allowing the Sheriff to select from among the 8 certified violates the contract. It was the testimony of County witnesses that the Department has interpreted its obligations under the contract such that it is required to select the senior employee who is minimally qualified. The selection of Christensen is offered as proof. I accept that testimony. It is that testimony that harmonizes one provision of the Contract with one provision of the Ordinance. Similarly, there is no evidence that, as applied, the rule of 8 has resulted in qualified bargaining unit employees being ranked lower than 8, and thus denied appointment.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 18th day of August, 2006.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

