

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 2470-A, AFSCME, AFL-CIO**

and

**MONROE COUNTY**

Case 191  
No. 66666  
MA-13598

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**Appearances:**

**Daniel Pfeifer**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Ken Kittleson**, Personnel Director, Monroe County, appearing on behalf of the County.

**ARBITRATION AWARD**

The Union and Employer named above are parties to a 2005-2006 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 Robyn Ryba. A hearing was held on June 26, 2007, in Sparta, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on August 6, 2007.

**ISSUE**

The issue is:

Did the County violate the collective bargaining agreement when it failed to award a lead worker position to the Grievant? If so, what is the appropriate remedy?

## **BACKGROUND**

Since 1998, the parties have a Memorandum of Agreement about lead worker positions, which states:

Monroe County and Monroe County Department of Human Services Professional Employees, Local 2470-A, Wisconsin Council 40, AFSCME, AFL-CIO, hereby agree to the following regarding the establishment of three Lead Worker positions; two in the Children and Family Services Unit and one in the Long-Term Support Unit.

- 1) The positions will be posted and filled in accordance with Article 17 of the Collective Bargaining Agreement.
- 2) The positions shall be allowed a qualifying period in accordance with Section 4 of Article 17.
- 3) The positions shall receive an additional \$.75 per hour above their regular pay for serving in the capacity as Lead Workers.
- 4) This agreement is non-precedent setting and without prejudice and shall not be used as a "status quo" condition in any arbitration.
- 5) This agreement shall remain in effect until a successor agreement is reached, and may be extended through mutual agreement of both parties.

Article 17, Section 1 of the collective bargaining agreement states:

All position openings shall be posted at the Union bulletin board for five (5) working days on a sheet of paper stating the job title, the job qualifications, job duties (consistent with actual duties performed), rate of pay, and the date the job is to be filled. Interested employees shall sign their names to this notice. Seniority and qualifications shall be considered in the selection of the applicant for the position opening; however if the qualifications are substantially equal, seniority shall prevail. . .

In August of 2006, the County posted a vacant position of the lead worker in the Children and Family Services Unit in the Human Services department. Three employees signed the posting. The position was awarded to Jennifer Arihood-Hanabarger, whose seniority date is August 29, 2001. The Grievant, Robyn Ryba, has a seniority date of April 1, 1992. There is no dispute that all applicants were qualified for the position.

Ryba has been a child protective service worker in the intake portion of the Children and Family Services Unit for 15 years. She works with child protection and investigates calls and information about abuse or neglect. She makes decisions about whether there is a need to remove a child from a home. She has worked with juvenile delinquents, mental health issues, and juveniles in need of protection. Both Ryba and Arihood-Hanabarger worked in the same unit and exchanged information on cases. Ryba is involved in training new employees and helped with the training of Arihood-Hanabarger.

Ryba has worked on some difficult cases. A recent case involved a family of another culture where there was a medical concern and some national research dealt with this subject. She felt the agency looked to her to handle medical cases or sexual cases where videotaping needs to be done. She has also worked on the majority of shaken baby cases.

There are some disciplinary matters in Ryba's personnel file, mostly for tardiness. In 1998, she was given a verbal warning for tardiness. In 2001, she was given a disciplinary notice about not completing child abuse investigations documentation in a timely manner. In 2004, she received another verbal warning about tardiness. And in 2006, Ryba and Arihood-Hanabarger were both talked to about tardiness by a supervisor.

Ryba felt she was as qualified as the applicant that the County chose for the lead worker position, because they complete the same duties and she had done it for ten years more than Arihood-Hanabarger. She assisted social workers with training and helped them know the laws and protocol in the agency. She had previous leadership responsibilities before working for the County. She worked at Shop-Ko in Eau Claire and moved up the ladder to become a lead senior worker in service where she directed other employees. She worked at a Bible camp for two summers as the waterfront director where she supervised life guards and the water program for a pool, lake, etc. She was a youth director at a church, taught Sunday school and confirmation classes. She has had extra training while working as a social worker.

The Director of the Department of Human Services is Gene Phillips. When he came to the County six years ago, there were two lead workers in the Children and Family Unit. Phillips noted there was a conflict between the intake and ongoing portions, or sub units of the Unit, and the lead workers spent some time working out problems between the sub units. Phillips felt that it was too small of a program to have those kinds of problems, as there were only about a dozen employees. After both of those lead workers left, Phillips and supervisor Ronald Hamilton looked at ways to pull the two sub units closer together. They had an idea of what they were looking for when they drafted interview questions. They felt they had a new and unique position for a lead worker to cover the whole unit and hold the sub units together and get the support of everyone. The applicants met the basic qualifications of the job description. Phillips said that the lead worker was not a "super social worker" who could do social work better but someone who was acceptable to the entire unit and could pull people together.

Phillips and Hamilton interviewed the applicants and had a list of 17 questions. Those questions were:

1. What interested you about posting for the Lead Worker position?
2. What do you see as the most important function of the Lead Worker?
3. Please give examples of when you were in a leadership role in the past.  
How did you demonstrate your leadership skills while in that role?
4. What leadership style do you plan to utilize in the role of Lead Worker?

5. How would your co-workers describe you?
6. What unique strengths do you bring to the role of Lead Worker?
7. What is one thing you would like to do better as a Social Worker and why?
8. What is the purpose of the Children and Family Services Unit?
9. What is your concept of "team" within the Children and Family Services Unit?
10. What have you done to encourage the "team" concept in the past and what are some thoughts or ideas you have for promoting the "team" concept in the future?
11. What would you do to bridge the gaps that exist between Access and Ongoing? CPS and Juvenile Justice?
12. What motivational methods would you employ to facilitate co-workers' completion of job tasks, including paperwork?
13. How will you manage multiple tasks while remaining current with your own caseload responsibilities?
14. What is your learning style and how would you assist in training/mentoring a new employee?
15. How do you typically manage conflicts between yourself and others?
16. How would you support your supervisor even though you may disagree with a decision made by the supervisor?
17. Is there anything else you would like to tell us?

After the interviews, Phillips and Hamilton compared the results. They felt that the applicants were the same on the first three questions and rated Arihood-Hanabarger better on questions # 4, 5, 6, 10, 13, and 17. Since her name was coming out on top more than the Grievant's name, they felt she was a better candidate. Phillips noted that Arihood-Hanabarger's name came out ahead in the preponderance of questions.

Phillips and Hamilton also looked at the job description and found that Arihood-Hanabarger met one or two of the criteria better than Ryba. They thought there were possible problems between Ryba and another applicant and that Arihood-Hanabarger was the most acceptable person for pulling people together.

Phillips stated that this was a unique position and they chose the person they thought was the best one to pull the sub units together. Phillips and Hamilton made the decision based on their knowledge of the applicants, their past history, their personnel file, and the applicants' responses to the questions in the interview. They felt that Arihood-Hanabarger and Ryba had equal supervisory experience in the past.

Hamilton supervised all the applicants for the position. He had general knowledge of the individuals after working with them for five years. He noted that Ryba and Arihood-Hanabarger were similar on tardiness issues.

## DISCUSSION

Seniority clauses are generally broken down into three types – a relative ability clause, a sufficient ability clause, and a hybrid clause. As stated in ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6<sup>TH</sup> EDITION, PP. 873-876:

The first category contains those clauses that provide in essence that the senior employee shall be given preference if he or she possesses fitness and ability equal to that of junior employees. (Footnote citations omitted) This type of clause might be termed a “relative ability” clause, because here comparisons between qualifications of employees bidding for the job are necessary and proper, and seniority becomes a determining factor only if the qualifications of the bidders are equal.

The wording of these relative ability clauses varies. The contract may provide that seniority shall govern unless there is a marked difference in ability, or unless a junior employee has greater ability. Some clauses provide that seniority shall govern if ability (or other qualifying factors such as physical fitness, competence, etc.) is “relatively equal,” or “substantially equal,” or, simply, “equal.” “Relatively” equal ability does not mean “exactly” equal ability. Even the term “equal” does not mean exact equality, but only substantial equality.

. . .

The second basic type of modified seniority clause provides in general that the senior employee will be given preference if he or she possesses sufficient ability to perform the job. Minimum qualifications are enough under these sufficient ability clauses.

. . .

The third basic type of modified seniority provision, which may be called a “hybrid” clause, requires consideration and comparison in the first instance of both seniority and relative ability.

It is clear from the above explanation that the clause in this contract is the first type of clause, a relative ability clause. Despite the use of the words “equally qualified” in Article 17, the parties would have recognized that no two people are identical in qualifications, and the intent of the term “equally qualified” would have to be either substantially equal or relatively equal in qualifications. Otherwise, the sentence would have no meaning at all, and the Arbitrator should not delete the sentence or give it no effect just because no two candidates would ever be exactly equally qualified.

In analyzing such relative ability clauses, it is common for arbitrators to demand to see that the junior employee has significantly greater ability to perform the work than does the senior employee. Many arbitrators use a “head and shoulders” test – that the junior employee must be head and shoulders above the senior employee in order to be awarded the job. All in all, arbitrators generally agree that there must be a definite, distinct, substantial, and significant difference between the competing employees when a junior employee is selected for a job.

The County understands the standard very well. It just does not meet the standard. There is not enough in the record to show that there is a distinct or substantial or significant difference between the Grievant and the applicant who was awarded the lead worker position.

Both applicants had similar backgrounds and social work experience. I agree with the County that leadership capabilities are not developed through time alone. However, there is nothing on the record to show that the applicant who was awarded the vacant position had significantly better leadership qualities than the Grievant. While management was convinced that Arihood-Hanabarger would make a better lead worker and be the person that could pull the sub units of the Family Unit together better, the record does not reflect that her qualifications are substantially above the Grievant’s for leading people.

The managers relied somewhat heavily on the answers to the interviews given for the position. Subjectivity is usually a problem in these cases. For example, Phillips and Hamilton rated Arihood-Hanabarger higher than Ryba on the fourth question, which asked what leadership style they planed to utilize in the role of lead worker. Their concluding notes say that Arihood-Hanabarger’s answer was most comprehensive. However, their notes show that the two of them responded in almost the same way. Arihood-Hanabarger said she would be available, handle problems tactfully, be cooperative and not a dictator, and use peoples’ strengths. Ryba said she would be down to earth, conversational, and use teamwork rather than dictatorship. It is very difficult to discern much difference there. But there could have been differences in the way they said such things or the way they elaborated on their answers.

Both Ryba and Arihood-Hanabarger were rated as the same on an important question - #11 – about how to bridge the gaps between Access and Ongoing and CPS and Juvenile Justice. There was no difference between them on question #15 about how to manage conflicts between yourself and others. Those questions seem to go to the heart of what management was looking for in a lead worker. So in areas where management was looking for lead worker qualities that went specifically with the vacant position, there was no difference between the Grievant and the applicant that got the job. This factor favors the Union’s case.

There is something that the parties are not telling the Arbitrator. In an exhibit, it appears that there may be some problems between the Grievant and another person in the agency, a person who also posted for the vacant position. There may have been a preference for Arihood-Hanabarger because she may have been getting along with everyone a little bit

better than the Grievant. However, the County did not rely on this factor as much as it did other factors, such as the personnel files, social work experience, other work experience, supervisory experience, past leadership roles, disciplinary actions and commendations. In those factors, there is little difference between the two applicants, and neither one is substantially more qualified than the other. Therefore, the two applicants were substantially equal in qualifications, and as contemplated by Article 17, seniority then prevails.

Accordingly, the County violated Article 17 of the collective bargaining agreement by not awarding the lead worker position to the Grievant, and it will be ordered to make her whole.

### AWARD

The grievance is granted.

The County is ordered to make the Grievant, Robyn Ryba, whole by offering to her the position of lead worker for the Children and Family Services Unit in the Human Services Department, and by paying to her a sum of money for wages lost from the time she should have been awarded the position of lead worker to the date it puts her in the lead worker position. The Arbitrator will hold jurisdiction until November 30, 2007, for the sole purpose of resolving any disputes that should arise over the scope and the application of the remedy ordered.

Dated at Elkhorn, Wisconsin this 18<sup>th</sup> day of September, 2007.

Karen J. Mawhinney /s/

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Karen J. Mawhinney, Arbitrator