

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MARATHON COUNTY OFFICE AND TECHNICAL EMPLOYEES' UNION,
LOCAL 2492-E, AFSCME, AFL-CIO**

and

MARATHON COUNTY

Case 324
No. 66412
MA-13520

(Nicole Schlice Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 E. 9th Street, Merrill, Wisconsin 54452, on behalf of the Union.

Ruder Ware, L.L.S.C., by **Attorneys Dean R. Dietrich and Christopher M. Toner**, 550 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the County.

ARBITRATION AWARD

Marathon County Office and Technical Employees' Union, Local 2492-E, AFSCME, AFL-CIO (herein the Union) and Marathon County (herein the County) are parties to a collective bargaining agreement dated February 28, 2006 and covering the period from January 1, 2006 to December 31, 2008. On October 25, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the discharge of Brian Fendos (herein the Grievant). The undersigned was appointed to hear the dispute and a hearing was conducted on January 30, 2007. The proceedings were not transcribed. The parties filed initial briefs by February 26, 2007, and reply briefs by March 12, 2006, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issue. The Union would frame the issues as follows:

Did the County violate the collective bargaining agreement when it failed to award the Grievant the posted vacant Correctional Officer position?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Whether the County violated the labor agreement when it decided not to consider the Grievant for the position of corrections officer in the Sheriff's Department?

If so, what is the appropriate remedy?

The Arbitrator adopts the issues as framed by the County.

PERTINENT CONTRACT LANGUAGE

Article 2 – Management Rights

The County possesses the sole right to operate the departments of the county and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include, but are not limited to, the following:

- A. To direct all operations of the respective departments;
- B. To establish reasonable work rules;
- C. To hire, promote, transfer, assign and retain employees;
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause.

...

- I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the rights of the County to continue to exercise these management rights.

Article 7 – Job Posting

- A. **Posting:** When the employer deems it necessary to fill a vacancy created by retirement, quitting, new position, or for whatever reason, a notice shall be posted on all authorized bulletin boards for five (5) working days (to overlap two (2) consecutive weeks). The Union shall receive a copy of the posting.
- B. **Notice and Application:** The job requirements, and rate of pay shall be part of the posting. Employees may notify the Employee Resources Department in writing of their application within the five (5) posted days. The Union shall be furnished a copy of the posting and shall be notified in writing of the name of the applicant who received the position. Whenever a vacancy occurs that is not to be filled, the County where practical, will notify the President of the Local.
- C. **Qualifications:** To apply for a vacancy the employee must have the qualifications for the job and have State certifications/registration for the vacancy if required.
- D. **Filling Vacancy:** When management reasonably determines qualifications, skill and ability are equal, seniority shall govern the filling of vacancies. In the event there are no qualified employees within the bargaining unit, the County shall recall laid off employees to fill the vacancy. If there are no laid off employees. The County may advertise publicly to fill the vacancy.

BACKGROUND

Nicole Schlice, the Grievant herein, was employed by the Marathon County Sheriff's Department on May 30, 2001 as a Public Safety Telecommunicator and remained employed in that capacity until June 4, 2006. In May of 2006 the Sheriff and County Human Resources Director discovered that Schlice was romantically involved with a police officer who was married at the time to one of her fellow Telecommunicators. At the same time, they discovered that Schlice had been making excessive use of the County email system communicating with the officer. Both of these activities were violations of County and/or Sheriff's Department policies. As a result, on May 31, 2006, Sheriff Randall Hoenisch issued Schlice the following memorandum:

RE: DISCIPLINARY TERMINATION/JOB DEMOTION

With regret, I must inform you that I am terminating your employment as a Public Safety Telecommunicator with the Marathon County Sheriff's Department effective June 4, 2006, with the understanding that you will utilize

your available compensatory time to take off during the week of May 28 through June 3, 2006.

The decision is based on the following:

On Thursday, May 18, during the course of an internal investigation lead [sic] by Employee Resources Director Matel and myself, you indicated that you did knowingly and excessively violate the City/County Data Center Computer System Use Policy and the Sheriff's Department Policy 13127.07 regarding use of County e-mail.

Furthermore, you admitted having a romantic relationship with this individual who received excessive e-mails from you during work time. The fact that this individual is a police officer who is married to a fellow Public Safety Telecommunicator has further complicated this situation by creating discord, damaging morale, and causing harm to the work environment and the public's trust in Marathon County Government, and the Marathon County Sheriff's Department in particular. This behavior violates Sheriff's Department Policies 13125.01 (E) Unbecoming Conduct On and Off Duty, and 13127.01 Standards of Conduct in violation of Department Standards and Core Values. The enforcement guidelines under 13127.01 clearly indicate that termination will occur if conflicts significantly damage the work relationship with other members or public confidence and trust. Based on the severity of your behavior and its effect on Sheriff's Department operations, I can no longer employ you in the Sheriff's Department.

Employee Resources Director Matel is prepared to intervene to some extent regarding my decision to terminate your Sheriff's Department employment. He has informed me he is willing to work out an agreement with you and the union to modify my discipline by offering you a disciplinary demotion to a Clerical Assistant I position in the Clerk of Courts office. I have no objection to this action.

Randall Hoenisch, Sheriff

Subsequent to the issuance of Sheriff Hoenisch's memorandum, Schlice did not return to work in the Sheriff's Department. On June 6, 2006, Schlice and Local 2492-E entered into a Memorandum of Agreement with the County regarding her employment status. That memorandum stated, as follows:

IT IS HEREBY AGREED by and between Marathon County and the Office and Technical Employees Union, AFSCME, Local 2492-E (hereinafter "Union") that the following shall constitute the non-precedential Agreement between the parties with respect to the disciplinary demotion of Nicole Schlice to a Clerical Assistant I position in the Clerk of Courts Office:

1. The parties agree that Nicole Schlice accepted a disciplinary demotion to a Clerical Assistant I position in the Clerk of Courts Office effective June 5, 2005.
2. The Union and Schlice agree not to file any grievances or other claims on behalf of Nicole Schlice regarding her demotion from the Marathon County Sheriff's Department to a Clerical Assistant I position.
3. The County shall not contest any claim Schlice may make for unemployment benefits.
4. Schlice understands that any further violations of the City/County data Center Computer System Use Policy will result in termination of employment.
5. That this Agreement in entered into between the Office and Technical Employees Union, AFSCME, Local 2492-E for the purpose of clarifying Nicole Schlice's employment status and shall not be considered precedent between the parties either now or in the future.

Dated this 5th day of June, 2006 in Wausau, Wisconsin.

ON BEHALF OF
MARATHON COUNTY

Frank A. Matel

ON BEHALF OF
THE UNION

Kathleen Monien
President, Local 2492-E

Nicole Schlice
Employee

On July 12, 2006, the County posted a position within the Sheriff's Department for a Corrections Officer/Juvenile Detention Officer and Schlice applied for the job within the deadline set forth in the posting. On July 31, 2006, Schlice was sent the following letter from the Jail Administrator:

Ms. Schlice,

I am in receipt of your application for the Corrections/Juvenile Detention Officer position. It is my position that to accept your application and consider you for employment in the Corrections Division of the Sheriff's Department would not be appropriate.

On June 4, 2006 you reemployment with the Sheriff's Department was terminated. The reasons for this termination were outlined in detail in a letter to you dated May 31, 2006. To accept your application and consider you for employment would render the disciplinary action, your removal from the Sheriff's Department and subsequent disciplinary demotion moot.

For the reasons stated above, I reject your application.

Sincerely,

Robert J. Dickman, Jail Administrator

On August 7, 2006, the Union, on Schlice's behalf, filed a grievance with the County, seeking to have Schlice awarded the Correctional Officer/Juvenile Detention Officer position. The County denied the grievance and the matter proceeded through the contractual grievance process to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Union

The Union contends that the County erred in failing to award the Grievant the Correctional Officer position in that the record establishes that she was qualified under the criteria set forth in the posting and under Article 7(d) of the contract because of her five years of experience in the Sheriff's Department. The Union asserts that management's use of the "good reputation" requirement in the posting to disqualify her is unreasonably subjective and should be irrelevant.

Further, to use her relationship with a co-worker's husband to deny her the position is to subject her to double jeopardy, inasmuch as she was already disciplined for that conduct in being demoted from her former Telecommunicator position. The settlement agreement regarding her demotion does not preclude her from posting into another position and the County is not properly the enforcer of the morals of its employees.

The County

The County asserts that, under its management rights, it may establish its hiring criteria and that it was within its rights to require that the successful applicant for the Correctional Officer position have a good reputation and background that would withstand pre-appointment investigation. Article 7(D) permits management to set reasonable job qualifications. The Grievant was not qualified due to her immoral conduct, as made clear by the applicable County and Sheriff's Department policies.

The Union in Reply

The Union asserts that the Grievant is not a “new employee,” thereby subject to the County’s right to hire and determine the qualifications of new employees and that the County’s interpretation and application of its management rights has been unreasonable. The Union further asserts that the qualifications of the Grievant were established in the testimony of jail Administrator Robert Dickman and that the Grievant’s failure to testify in her own behalf should not be held against her. Further, there was no need for the Union to offer testimony regarding the Grievant’s character since it is a subjective standard and irrelevant to this case. Finally, the fact that the County conceded in Jt. Ex. #6 that the Grievant could post into a Correctional Officer position after 10 months had elapsed shows that there is no bar to her holding that position based on character.

The County in Reply

The County reasserts that it has the right under the contract to determine the qualifications and criteria for hiring employees. Further, the County is not required to bargain over what it considers appropriate job qualifications and the good character and reputation of applicants is a valid criterion, which the County is within its rights to consider. The standard is only whether the County’s actions were arbitrary, capricious, or unreasonable.

Here, the Grievant’s conduct rendered her unfit for the Correctional Officer position. She violated numerous County and departmental policies and her behavior created a legitimate concern for disruption and morale problems in the Sheriff’s Department were she allowed to return. The Grievant’s demotion was due both to her violation of County e-mail policies and her inappropriate relationship with a co-worker’s husband. To allow her to post back into the Department only two months after her acceptance of the demotion would make the discipline moot and violate the intent of the settlement agreement.

DISCUSSION

In this case, the Union contends that the Grievant, Nicole Schlice, as a bargaining unit member, was entitled to post for the position of Correctional Officer and, further, should have been awarded the position based on her qualifications. The County’s position is that Schlice was entitled to apply for the position, but that, based on her previous misconduct, she was not qualified for the position and, thus, her application was properly rejected. It is undisputed that the management rights clause of the contract, Article 2(I), reserves to the County the right “...to determine the competence and qualifications of employees.” What is at issue is whether in this case the County exercised that right reasonably. For the reasons set forth below, I find that it did.

The Sheriff’s Department has promulgated General Order 13125.00, which constitutes the requisite Standards of Conduct for members of its staff. The statement of policy in the general order states, as follows:

It shall be the policy of the Marathon County Sheriff's Department to ensure that all members of the Department maintain the highest levels of personal and professional conduct possible.

Further, Section 13125.01(E) states:

Unbecoming Conduct – Department members shall ensure that their behavior, either on or off duty does not tend to bring reproach or discredit to the Department. This would include, but is not limited to, conduct that would adversely affect the morale, order, discipline or efficiency of the Department or has a tendency to impair public respect for Department members or confidence in the Department.

Also, General Order 13127.07 prohibits “...(e)ngaging in behavior that has the effect of creating discord or lack of cooperation between members.” The Union does not challenge the reasonableness of these rules.

The posting that was created for the Correctional Officer position states the following with respect to the requisite qualifications:

Qualifications: High school graduation or equivalent preferred. Applicant must have *one* of the following:

- One year's work experience involving direct care and safety of inmates in a correctional setting, residents in a group/shelter home, or patients in a secured institutional facility;
- OR one year law enforcement experience;
- OR related associate's or bachelor's degree;
- OR equivalent combination of related education and experience.

Must possess a good reputation and background that will withstand pre-appointment investigation. Current Wisconsin Jail Officer or Juvenile Detention Officer certification is a plus.

Ability to speak, interpret, and write the Hmong language is not required but will be given credit in evaluating applications.

Necessary special qualifications: Possession of a valid driver's license and a good driving record. Ability to obtain Basic Jail and Juvenile Detention Certification. Complete and pass a written, job-related exam.

Given that law enforcement personnel are subject to great scrutiny from the general public and the County's legitimate interest in having employees of good character working in the Sheriff's Department, as expressed in the general orders quoted above, it is not unreasonable for the County to make good reputation and a positive background check prerequisites for employment. The inquiry is whether the County's interpretation and application of that requirement in this case were reasonable.

As set forth above, the record establishes that two months prior to her application for the Correctional Officer position, Schlice was terminated by the Sheriff from her position as a Telecommunicator for misconduct, including violations of the County e-mail policy and carrying on a romantic relationship with a co-worker's spouse. The record does not indicate that this termination was grieved, nevertheless the County ameliorated the discipline by entering into a last chance agreement with Schlice and the Union whereby she was demoted to the position on Clerical Assistant I in the Clerk of Courts' office, which removed her from proximity to the Sheriff's Department. Any future violation of the e-mail policy would be grounds for immediate termination. The July 31 letter from Jail Administrator Dickman rejecting Schlice's application makes it clear that the recent misconduct and discipline were the principal reasons for his decision not to consider her for the Correctional Officer position.

The Union asserts that Schlice met the objective qualifications for the job by virtue of her five years' experience as a Telecommunicator, as set forth in the job posting and the County does not dispute this. The Union asserts, therefore, that Schlice, as a bargaining unit member, should have been allowed to post into the position as the most senior applicant without reference to her recent discipline. In the Union's view, the good character requirement is overly broad and subjective. Further, to allow the County to deny her application on the basis of the discipline would, in effect, be a form of double jeopardy for the same offense.

I do not see this as being a double jeopardy situation. The initial discipline issued for the previous infractions was a termination. If that had not been reduced Schlice would have had no basis for bringing this grievance because she would no longer have had posting rights. Nevertheless, she was demoted and removed from the Sheriff's Department for her misconduct. It is clear from the Memorandum of Agreement that a condition of her continued employment by the County was that she would accept these conditions. As such, the fact that she was not considered for the Correctional Officer position is not a second form of discipline issued by the County, but, rather, a logical extension of the first. The issue, as I see it, therefore, is not whether the refusal to consider her application is a form of double jeopardy, but rather, how long should the demotion, which also presumes inability to seek promotion, be in effect? Although the Memorandum does not specify any length of time that the demotion would be in effect, one can infer a reasonable period of time in order for the demotion to have significance. As Dickman noted in the July 31 letter, to permit Schlice to post into the Correctional Officer position so soon after the demotion would have the effect of negating the discipline. If the County were to take the position that the disciplinary demotion was permanent, the Union's argument would be stronger, however this does not appear to be the case. Joint Exhibit 6 reveals that the County Employee Resources Committee determined that Schlice could reapply for a position in the Sheriff's Department (other than Telecommunicator) on June 1, 2007, in effect after the passage of one year. This does not on its face seem an unreasonable amount of time for the disciplinary demotion to be in force.

As to the overbreadth and subjectivity of the qualification requirements regarding reputation and character, one can certainly argue that it gives the County too much latitude for

exclusion, but the facts of this case render that concern moot. Where the Grievant has demonstrated a disregard for Department policies and has engaged in conduct that is detrimental to the collegiality and morale of the Department, it does not seem unreasonable to me that the County should be able to take that into account in considering whether to allow her to return to the Department. Of course, as with most conduct that results in discipline, its significance decreases over time where there is no recurrence. Thus, if after a year Schlice has a good work record in the Clerk of Courts' office her past discipline in the Sheriff's Department should not preclude her from applying there again.

For the reasons set forth above, and based on the record as a whole, I hereby enter the following

AWARD

The County did not violate the labor agreement when it decided not to consider the Grievant for the position of corrections officer in the Sheriff's Department. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 31st day of October, 2007.

John R. Emery /s/

John R. Emery, Arbitrator

