

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BUFFALO COUNTY

and

**BUFFALO COUNTY HIGHWAY EMPLOYEES, LOCAL 1625
AFSCME, AFL-CIO**

Case 80
No. 67024
MA-13715

(Jeff Fitzgerald Posting Grievance)

Appearances:

Daniel R. Pfeifer, Staff Representative, AFSCME, AFL-CIO, on behalf of the Buffalo County Highway Employees, Local 1625.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Mindy K. Dale**, on behalf of Buffalo County.

ARBITRATION AWARD

The Highway Employees of Buffalo County, Local 1625, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Buffalo County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, Steve Morrison, of the Commission's staff, was designated to arbitrate the dispute. A hearing was held before the undersigned on August 29, 2007, in Alma, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 28, 2007. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The issue to be decided by the Arbitrator was stipulated to by the parties as follows:

- 1) Did the County violate the collective bargaining agreement when it did not award the vacant Signman position to the Grievant?
- 2) If so, what is the proper remedy?

RELEVANT CONTRACTUAL PROVISION

ARTICLE IV - MANAGEMENT RIGHTS

SECTION 1 The Union recognizes the rights and responsibilities belonging solely to the County, prominent among, but by no means wholly inclusive are the rights to hire, promote, discharge, or discipline for just cause. The right to decide the work to be done, and the location of the work. (sic) The Union also recognizes that the County retains all rights, powers, or authority that it had prior to this Agreement except as modified by this Agreement.

. . .

ARTICLE XV - JOB POSTING

SECTION 1 All new or vacated positions shall be posted at each garage, shop, and/or shed for ten (10) days on a sheet of paper stating the job that is to be filled, on what date it is to be filled, and the rate of pay. Interested employees shall sign their names to this notice. Vacancies or new positions shall be awarded on the basis of experience, skill, ability, and seniority. If experience, skill, and ability of two or more employees are relatively equal, the employee with the greatest seniority shall be chosen. The employee or union (sic) can file a grievance on the Commissioner's choice.

SECTION 2 The successful applicant shall be allowed thirty (30) operating days to qualify for the position. Interim appointments may be made by the Commissioner until such time as the mutual agreement is reached by the parties.

BACKGROUND

Buffalo County and the Union, at all material times herein, were parties to a collective bargaining which covered wages, hours of work and conditions of employment relating to the Highway Department employees. The Grievant, Jeff Fitzgerald, was at all material times an employee of the County Highway Department and held the job classification of "Patrolman."

On or about April 4, 2007, the County posted the position of "Signman" due to the retirement of the person who had held that position for over thirty years. Two individuals posted for the position: the Grievant, Jeff Fitzgerald, and fellow employee Randy Brommer. On or about April 30, 2007, following personal interviews of each candidate by the Highway Commissioner, David Brevick, the position was awarded to Brommer. Fitzgerald filed a timely grievance based on the fact that he was more senior to Brommer and that his qualifications were relatively equal to Brommer's and thus should have been awarded the position. The grievance was denied at all contractual steps and timely submitted to the Commission.

THE PARTIES' POSITIONS

The Union

The selection process employed by the Commissioner was flawed because it lasted less than 15 minutes and centered on the duties involved in the new position. There was no consideration or discussion relating to the Grievant's experience, skill or ability to do the Signman job and the Commissioner was more familiar with Brommer's abilities because Brommer worked in the Alma shop, near the Commissioner's office, whereas the Grievant was assigned to the Mondovi shop. Because the Mondovi shop is located some 25 miles from Alma, the Commissioner had more of an opportunity to observe Brommer's work than he had to observe the Grievant's work. This gave Brommer an advantage over the Grievant and was unfair.

The County expressed its desire to make the paver operation an integral part of the Signman position and the Grievant had paver operation experience. The remaining primary pieces of equipment used by the Signman are small hand tools and the sign truck, both of which the Grievant had operated in the past. He had also operated some heavy equipment at some time in the past and has operated the end loader, rollers, a little cat and grader and he has worked on the Bridge Crew.

While there is no formal educational requirement for "signing", i.e. making signs and erecting them, the Grievant did attend a seminar on signing whereas Brommer did not. The Grievant's job evaluations had been acceptable in the past, he is physically able to do the Signman job and has no issues with tardiness or absenteeism.

The County spent a lot of time talking about the Diggers Hotline aspect of the Signman job and the fact that Brommer had more experience in this area than the Grievant. The Union says that the County is making "a bigger deal of this than it really is." According to the Union the Signman does nothing more than coordinates with Diggers Hotline and shows them where the construction is to take place. The Grievant can do that as well as Brommer can.

Article XV, Section 3 of the collective bargaining agreement provides that the successful candidate shall be given thirty operating days to qualify for the position. The Union says that this means that the Grievant should have been awarded the position and then given thirty days to qualify for it.

The Union requests that the position be awarded to the Grievant along with a “make whole” remedy.

The County

The collective bargaining agreement gives the County the right to weigh each applicant’s experience, skill and ability. Only when two or more applicants are “relatively equal” in terms of experience, skill and ability does the agreement require the County to consider seniority. The County Highway Commissioner had over twenty years of experience in hiring employees and in evaluating the relative skills and abilities of the employees who work under him. He had over twenty years of opportunity to observe and evaluate both of the applicants here and was able to do so over this period of time regardless of which shop each was assigned to. This long term experience cannot be discounted and arbitrators have long recognized this. CITING PACIFIC GAS & ELECTRIC, 23 LA 556, 558 (1954), the Board of Arbitration stated that:

Considerable weight should be given to bona fide conclusions of supervisors when supported by factual evidence. In the first place, a supervisor is responsible for the efficient performance of his unit and has a legitimate concern that employees be properly assigned to achieve this objective. In the second place, he has a deeper and more intimate acquaintance with the men under his charge than an arbitrator is able to acquire in a brief hearing.

The importance of upholding managerial decisions made in good faith has also been recognized by arbitrators:

Unless there is a showing that the evaluation was arbitrary or unreasonable, the assessment of skill made by a supervisor or administrator in a position to make such a determination should be given considerable weight and should not be reversed by the arbitrator. There is nothing in the record of the present case that would indicate that the Principal’s decision was prompted by any consideration other than the teacher’s demonstrated qualifications. CINCINNATI BOARD OF EDUCATION, 72 LA 524, 528 (1979)

While the Union attempted to show that the applicants here were “relatively equal” in experience, skill and ability, it failed to show that the Highway Commissioner had overlooked pertinent background information respecting either applicant and there was no evidence that the Commissioner’s decision was prompted by anything other than his assessment of the applicants’ qualifications.

Because of the rugged terrain, curves, hills and mountainous conditions in Buffalo County, the County places a high priority on its signage program. Over 6300 signs are maintained by the County and the Commissioner acted within his contractual authority in making his determination of the applicants’ experience, skill and ability. Regarding experience, Brommer had current

experience using and maintaining heavy equipment. At the time of his hire, he was a heavy equipment operator on a three man construction crew. The Grievant's job as a Patrolman only required him to operate heavy equipment "as assigned", whereas heavy equipment operation was a specific part of Brommer's job description. The Union failed to provide evidence that the Grievant had three to five years of heavy equipment operation experience as required by the Signman position description. The evidence does show that any heavy equipment experience the Grievant did have was acquired over 20 years ago and that he had not operated a paver for 15 years or a grader since 1984 or 1985. This lack of recent experience alone rendered him unqualified for the Signman position. Brommer had more experience with permanent sign requirements than the Grievant and he had demonstrated to the Highway Commissioner an aptitude for the technical aspects of the job including the interpretation of rules and regulations, signing and marking drawings, charts and traffic control plans and grade and alignment staking, whereas the Grievant had not demonstrated these skills. Brommer had assisted in inventory over numerous years and had demonstrated the ability to perform the inventory tasks required of the Signman. The Grievant, on the other hand, had inventory experience as a tavern owner in the past and from his part time job working in a hardware store. He had also assisted with some County inventory five or six years ago. Unlike Brommer, the Grievant did not have inventory experience currently specific to the Signman job.

With regard to the relative skills of the applicants, Brommer had demonstrated to the Commissioner the ability to work with different groups of people, including foremen, employees and representatives from the Department of Transportation and various Townships. This skill was very important to the Commissioner when making his decision. The Signman position requires leadership ability because it has a responsibility to "Direct the Department of Transportation" and "Coordinate with Diggers Hotline." Brommer had done both and had demonstrated his ability and skill in this area. The Grievant had never actively participated in the coordination of construction assignments involving DOT or Diggers Hotline although he felt he was capable of doing so and testified that he viewed these functions as more of an office function.

As for ability, the Commissioner selected a candidate who was ready and able to perform the Signman job over a candidate whose heavy equipment, inventory, sign and coordination abilities were either not current or yet to be determined. The Grievant was competent at performing his assigned duties in his current position but this does not mean that he would be competent to perform the Signman duties. Brommer, on the other hand, had demonstrated experience in the areas required of the Signman and he had the necessary background. The County sees SCOTT & FETZER Co., 56 LA 6, 10 as analgous to this case. In SCOTT, the arbitrator noted:

There is nothing in the Agreement which requires the Company to train a senior employee for a job or give him or her an opportunity to learn how to do it. The Agreement reserves unto the Company the right to select the most qualified employee at the time the opening is to be filled.

Buffalo County's job posting/interview selection process is inherently subjective and management is given the authority to assess the relative strengths of applicants in terms of their

ability, skill and experience. Subjectivity in hiring is expected and appropriate absent evidence of discriminatory, arbitrary, or capricious decision-making. Here, the Commissioner's assessment was based on over twenty years of employee observation and experience and should not be lightly dismissed. "Interpersonal skills" defy an objective form of measurement and these skills are important in a job such as the Signman position which requires working with crew members and outside agencies and departments. As such, this was a reasonable area in which to assess the relative strengths of the candidates and the Commissioner gave Brommer a higher rating in this area.

The Commissioner reached the conclusion, consistent with the authority granted to the County in the management rights section of the Agreement, that Brommer was qualified for the job and that the Grievant's experience, skill and abilities were not "relatively equal" to Brommer's. Consequently, seniority was not a tiebreaker.

Union's Reply

The Union elected not to file a reply brief.

County's Reply

The County notes that the dates which appear on the job descriptions (Exhibits 5-7) indicate not the date the description was first developed, but the date the particular exhibits were printed from the computer.

As for skill and ability, the County suggests the evidence shows that Brommer had more experience in total on the paver and that that experience was much more recent than the Grievant's. Further, the Highway Commissioner, although he did spend more time observing Brommer than he did the Grievant, nonetheless had worked with the Grievant for over twenty years and was well aware of his skills and abilities. In other respects, the County essentially reiterates the differences in the two candidate's skills, abilities and educational history.

The County says that the Commissioner was authorized to make the assessment of the candidate's strengths and he was entitled to give weight to their abilities and skills, including their communication and coordination skills as they relate to the Digger's Hotline component of the job of Signman. The Union simply fails to take this aspect of the job as seriously as it should.

It is the right of management to determine job duties, responsibilities and qualifications and to select the best candidate to fill positions, especially in light of the fact that Buffalo County has a limited number of staff. The Commissioner does not have an obligation to assign a position to an employee lacking in essential qualifications simply in order to promote that employee.

Finally, the purpose of ARTICLE XV - JOB POSTING which provides for a 30 day qualification period is not to determine who the successful candidate will be, but to address issues which may arise after the successful candidate has been chosen. If the candidate fails to meet the

challenges of the job once he or she has been placed in that position he or she retains the right to revert back to his or her prior position.

DISCUSSION

In order to decide the primary issue in this case it is necessary to consider the Union's two main allegations: first, that because the Grievant was senior to the individual (Brommer) who was given the Signman position, the granting of that position to Brommer should be reversed and given to the Grievant strictly on the basis of seniority and he should have thirty operating days to qualify, and, second, that the Grievant and Brommer were "relatively equal" in terms of experience, skill and ability.

The analysis relating to the seniority issue is essentially a question of contract interpretation. The relevant contractual provision is found at ARTICLE XV- JOB POSTING, Sections one and two and states the following in relevant part:

Section 1 All new or vacated positions shall be posted at each garage, shop, and/or shed for ten (10) days on a sheet of paper stating the job that is to be filled, on what date it is to be filled, and the rate of pay. Interested employees shall sign their names to this notice. Vacancies or new positions shall be awarded on the basis of experience, skill and ability, and seniority. If experience, skill, and ability of two or more employees are relatively equal, the employee with the greatest seniority shall be chosen. The employee or union can file a grievance on the Commissioner's choice.

Section 2 The successful applicant shall be allowed thirty (30) operating days to qualify for the position.

The above language leaves little room for misunderstanding. The clear meaning of Section one is that seniority comes into play only when two or more applicants are "relatively equal" in terms of experience, skill and ability. If they are not, seniority is not an issue; if they are, seniority acts as the tiebreaker.

Section two is equally clear and is a common contractual element. It means that the thirty operating day qualification period comes into play only *after* the candidate has been selected on the basis of experience, skill and ability. If a candidate is not selected because his or her experience, skill and ability fails to measure up to his/her fellow applicants' experience, skill and ability, then the thirty day qualification period does not apply to him or her because he or she was not the "successful applicant." In short, what Section two means is that in order to avail oneself of the right to qualify within thirty operating days, one must first become the "successful applicant" by demonstrating that his or her experience, skill and ability exceeded that of the other applicants. Further, it means that once an employee has qualified as the "successful applicant", he or she will retain his or her right to return to his or her prior job in the event, during that 30 day period, he or

she is found to be unable to perform the job duties. What Section two *does not* mean is that the most senior employee has thirty operating days to qualify regardless of experience, skill and ability. Because this is exactly what the Union has argued in this case, the Union's argument in this regard must be rejected.

The Union's better argument rests with the premise that the Grievant's experience, skill and ability to handle the requirements of the Signman job are "relatively equal" to those of Brommer. The undersigned is persuaded that the Union has failed to make its case in this regard.

First and foremost is the fact that the hiring process conducted by the Highway Commissioner necessarily employed a great deal of subjective consideration. He was in the unique position of having been able, more so than anyone else, including the Grievant, to make such a subjective determination as to the evaluation of the two applicants. The Commissioner had worked with both applicants for over twenty years and knew very well the strengths and weaknesses each possessed. He certainly knew what he needed in order to run an efficient organization. Absent contractual provisions otherwise, the undersigned gives considerable weight to managerial conclusions of a subjective nature. Here, the Highway Commissioner made the determination that the most efficient use of his assets, his employees, was to place Brommer in the position of Signman, and he made that decision after consideration of the relative experience, skill and ability of each man. His decision was not tainted by unreasonable or arbitrary conclusions nor is there any evidence of discrimination in this case.

The record clearly supports the Commissioner's decision in choosing Brommer over the Grievant. Brommer had the three to five years of heavy equipment experience required by the County for the Signman job and Brommer's heavy equipment experience was current. The record is unclear as to whether the Grievant had the requisite experience or not, but is clear that whatever experience he did have with operating heavy equipment was gained long ago and was not current. Brommer had more experience with the types of signs used by the Signman, whereas the Grievant's sign experience related to placing temporary signs at construction sites and to the occasional repair of permanent signage. Brommer's demonstrated aptitude for interpreting rules and regulations, signing and marking drawings, charts and traffic control plans and his experience in grade and alignment staking heavily weighed in the Commissioner's determination. The record reflects that the Grievant failed to have the same extent of these types of experience. In the inventory experience category, Brommer had many years of inventory experience specifically related to the Signman position and, more importantly, had demonstrated his ability to perform these inventory tasks. The Grievant had experience with inventory related to his ownership of a tavern in years past and had participated to an unspecified extent in some County inventory matters, but, here again, the evidence demonstrates that Brommer's experience seems to eclipse that of the Grievant.

The Commissioner placed great weight on the fact that Brommer had demonstrated his ability and skill as an effective communicator and that he had successfully worked with different groups and government agencies in the past. The Grievant had not demonstrated these skills to the extent that Brommer had.

As for ability, the Commissioner determined that Brommer was the applicant best suited to take over the position of Signman and to assume that position with the least amount of training time. While the Grievant expressed his firm conviction that he would be able to learn the duties of Signman in time, Brommer was, in the mind of the Commissioner, able to do so with much less break-in time.

The contractual standard for this job posting is that the successful candidate is the one who possesses the better experience, skill and ability. That standard is necessarily a subjective one, at least in part, and is determined by the Highway Commissioner. The Union seeks to change that standard to make it a completely objective one, i.e. the successful candidate is the one with the highest seniority. The contract does not provide for that.

In light of the above, it is my

AWARD

The County did not violate the collective bargaining agreement when it did not award the vacant Signman position to the Grievant.

The grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 12th day of December, 2007.

Steve Morrison /s/

Steve Morrison, Arbitrator

