BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**EAU CLAIRE COUNTY JOINT COUNCIL OF UNIONS,
AFSCME, AFL-CIO, LOCAL 2223**

and

EAU CLAIRE COUNTY, WISCONSIN

Case 226
No. 67187
MA-13794

Appearances:

Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appearing on behalf of Eau Claire County Joint Council of Unions, AFSCME, AFL-CIO, Local 2223, referred to below as the Union.

Keith R. Zehms, Corporation Counsel, Eau Claire County, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin 54703, appearing on behalf of Eau Claire County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Maureen Kolstad. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing was held on January 15, 2008, in Eau Claire, Wisconsin. The hearing was not transcribed. At the close of the hearing, the parties requested that I issue a decision, if possible, within thirty days and indicated their willingness to receive a written award without any recitation of fact. I noted that I would issue the decision within thirty days if possible, but could not address the grievance ahead of other pending matters. I also indicated that if I could not issue a decision within thirty days, I would advise them to determine if there was any agreeable way to expedite the process. The parties filed briefs by February 4, 2008. I e-mailed the parties on March 10 to advise them that I anticipated that I might not be able to review the record prior to April and sought their opinion if that was a problem. I received no response to the e-mail.

7273

ISSUES

The parties entered the following written statement as the "Stipulated Issue:"

Did the County violate the contract when it denied the Grievant Posting No. 07-025 for the Office Associate 5 position in the Human Services Department for failure to meet the required post-high school education qualification as outlined on Posting 07-025?

If so, the Grievant should be awarded Posting No. 07-025 with appropriate backpay. (Starting date of incumbent).

RELEVANT CONTRACT PROVISIONS

ARTICLE I
RECOGNITION AND MANAGEMENT RIGHTS

. . .

1.06 The Employer shall have the right to:

. . .

A. Carry out the statutory mandate and goals assigned to the Employer utilizing personnel methods, and means in the most appropriate and efficient manner possible.

B. Manage the employees; to hire, promote, transfer, assign or retain employees and, in that regard, to establish reasonable work rules. . . .

ARTICLE 2
GRIEVANCE PROCEDURE

. . .

2.02 Step D. ***Arbitration . . .***

3. The arbitrator shall have no authority to add to or subtract from or modify this agreement in any way. . . .

ARTICLE 4
SENIORITY

. . .

4.01. Seniority Defined. . . .

B. The Employer recognizes the principle of seniority and such principles shall predominate where applicable, provided that the employees involved in any decision to which the principle of seniority is applicable, meet any necessary qualifications. . . .

ARTICLE 5
JOB POSTING

. . .

5.02 . . .

A. The qualifications of employees are a matter of fact, and include physical ability, knowledge, skill and efficiency on the job . . .

B. The Employer shall determine whether an applicant is qualified for the position. However, such determination may be grieved by the Union. Employees not considered qualified shall be notified of the reasons in writing.

BACKGROUND

The parties entered the following stipulated facts:

The Office Associate 5 position in the Human Services Department, Clerical Bargaining Unit, Posting No. 07-025 was posted for the period 2/20 to 2/27, 2007. The Grievant, Maureen Kolstad signed the posting. The Human Resources Department's procedure for review of qualifications is to have the direct supervisor first review the personnel file, in this case the Organizational Services Supervisor, then review by the Human Services Analyst and if there is a question regarding qualifications a final review and determination by the Human Resources Director. This process was followed in this case. All three persons reviewing the Grievant's file concluded that Maureen Kolstad did not meet the 24 post-high school credit requirement.

The Human Resources Director then sent the memo dated May 4, 2007 to Maureen Kolstad indicating she could not be awarded the posting because her review did not reflect 24 post-high school credits in any combination in the

> areas of administrative assistant, secretarial sciences, public or business administration, or other directly-related courses.
>
> The Grievant meets all other required qualifications for the OA-5 position except for the post high school education qualification that is in dispute.
>
> This case is properly before the Arbitrator for decision. There are no issues of arbitrability.

The "**REQUIRED QUALIFICATIONS**" section of Posting 07-025 concerning "the post high school education qualification that is in dispute" is taken from the relevant Office Assistant 5 (OA-5) Position Description and reads thus:

> Two years post high school education (at least 48 credits) with 24 of those credits in any combination in the following areas: administrative assistant, secretarial sciences, public or business administration, or other directly-related courses.

The Grievant signed the posting, but the County awarded the position to another applicant who possessed an Administrative Assistant/Associate Degree from Chippewa Valley Technical College (CVTC). The Grievant graduated from Edgewood College, summa cum laude, with a B.S. degree in Education, majoring in Early Childhood, Exceptional Education Needs, with a minor in Psychology. She has worked for the County for roughly twenty years, and was an Office Associate 3 at the time she signed the posting.

Heather Baker is the County's Human Resources Director, and notified the Grievant in a letter dated May 4, 2007 that she did "not meet the minimum qualifications of the Office Associate 5 position in the Department of Human Services." She rested her conclusion on the Grievant's failure to meet the "24-credit" aspect of the posting's "Required Qualifications." Baker's conclusion followed a review of the file by a Human Resources Analyst and Sue Schleppenbach. Schleppenbach is the County's Organizational Services Supervisor, and serves as the direct supervisor for the posted OA-5 position. Each concluded that the Grievant failed to meet the 24-credit requirement. Baker's initial review led her to conclude the Grievant had only 17.7 of the required 24 credits.

The Grievant responded to Baker in a letter dated May 9, which asserted among other points that she had no fewer than 45.4 credits applicable to the 24-credit requirement. She included in that number 9.1 credits of real-estate related Continuing Education Unit (CEU) instruction from CVTC; 8.6 credits of CVTC provided CEU instruction on "IBM MS-DOS-PC and Intermediate Q & A"; 4 credits of CVTC coursework in Accounting I; and 30 credits of Edgewood provided coursework (Fundamentals of Tests & Measurements; Helping Relationship; Educational Diagnosis & Evaluation; Assessment of Young Exceptional Child; Organization/Administration of Early Childhood Programs; Psychology of Learning; and Student Teaching). The Union followed up on this letter by filing the grievance.

As part of the processing of the grievance, Baker again reviewed the documentation of the parties' positions. She consulted course catalogs of CVTC and the University of Wisconsin at Eau Claire and concluded that her initial calculation of the total was not in fact directly correlated to the posted requirements. Under this view, the Grievant possessed only 11 of the required 24 credits. Baker presented the grievance to the Personnel Committee in late June of 2007. Schleppenbach prepared a memo, dated June 27, for their consideration. In that memo, Schleppenbach noted that the Grievant lacked the necessary credits because her coursework did not fall within "the Administrative Assistant, Secretarial Science, Public or Business Administration or related area." Schleppenbach addressed the Grievant's possession of a four-year degree thus:

> One argument has been that if a person has a four-year degree, they should be able to do a position that only requires a two-year degree. Two-year degrees from CVTC are specific to the area of the degree. A person with an Early Childhood Education Degree would not be trained for a two year Ultrasound degree from CVTC. Each degree has its own unique classes that will help that person successfully find and retain employment in their chosen field.

She addressed the Grievant's work experience thus, "The work experience does not take the place of related coursework."

At hearing, the Grievant and Kathleen Goss testified for the Union. Goss has worked for the County for roughly thirty years. In March of 2001, she successfully posted into the OA-5 position. This posting reflected that the parties had agreed to reclassify an OA-3 position to OA-5. That position had the same educational requirements as the position offered through Posting 07-025. Goss interviewed for the position with the position's then-incumbent direct supervisor, Holly Hakes. Goss stated that they discussed the significance of Goss' four-year degree on the research required by the position as well as on the future of the department. Goss had a Bachelor's degree from UW-Eau Claire, with a major in Library Science and History. Goss could recall no discussion concerning the 24-credit requirement, but could recall Hake's excitement regarding her possession of the degree and its bearing on the position's development. Goss did not have courses directly related to Administrative Assistant or to Business Management sufficient to meet the 24-credit requirement applied to Kolstad.

Beth Hein and Baker testified for the County. Hein is CVTC's Business Program Manager. She oversees the daily operation of all of CVTC's business programs. Part of her duties demands her review of instructor qualifications to assure all are properly certified. The County sent her a copy of relevant job descriptions and the Grievant's educational transcripts to determine whether she believed the Grievant met the 24-credit requirement. Hein concluded that the Grievant met the 48-credit requirement, but not the 24-credit requirement noted in the "REQUIRED QUALIFICATIONS" of the OA-5 position covered by Posting 07-025. Without belaboring the factual basis of Hein's conclusion, it reflected that the Grievant had abundant courses to meet general requirements (800 series courses) underlying a number of business related programs, but lacked sufficient coursework in the core areas (100 series courses) that

are essential to each specific business degree. Hein did not find any CEU or continuing education type offerings relevant to this determination. Such offerings, even if CVTC provided, are not transferable to credit requirements of degree programs. A CEU equates one hour of instruction with one unit of CEU credit. One credit in a degree program represents sixteen hours of instruction. CEU courses are not graded. Hein noted she would review such experience only if an employer asked her to. She acknowledged that a student can test out of degree required coursework, provided that the student first registered for the course and was then able to prove the necessary proficiency to meet course requirements.

Baker noted she agreed with the Human Resource Analyst and Schleppenbach that the Grievant failed to meet the minimum qualifications for the OA-5 position. Baker was not employed by the County at the time Goss was awarded the OA-5 position. She reviewed the file concerning that vacancy and could find no documentation whether or not Goss met the 24-credit requirement. Goss does have a CVTC transcript, including a number of computer and business related courses.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

The Union argues that Section 1.06, B imposes a duty on the County to act reasonably regarding promotions. Here, the County determined that the Grievant's four year comprehensive degree in secondary education was insufficient to meet "the educational requirements of the position." This is directly contrary to its action regarding Goss, whose possession of the same degree led the County to award her the same position. This constitutes disparate treatment.

The County specifically challenges the Grievant's possession of "the twenty four credits in related fields." Section 5.01, D demands these credits exist "in any combination." The Union counts fifty-five credits that meet this standard, because they would "count toward admission at CVTC when all credits are taken into consideration." The County unpersuasively seeks to undercut its own job posting by discounting "all credits that were duplicated, i.e. multiple Math, Communication, and Psychology courses." This discriminates against the in-depth study "inherent in a four year degree." Whether more narrow courses of study would meet the requirement is debatable, but is not posed on this record, given the diversity of the Grievant's credits. The subjectivity of the County's analysis is manifested by Baker's initially granting the Grievant 17.7 credits toward the 24-credit requirement, then reducing the count "on further review".

County failure to count CEU credits manifests disparate treatment. The Grievant has "in excess of one hundred fifty (150) training hours" in coursework offered at CVTC in areas relevant here. She "has even trained interns from CVTC in Office Internship programs for

which the student earns credit." Even if such hours do not count as credits for admission to CVTC, incoming students are at least allowed the opportunity to "test out of classes, based upon proficiency testing". The applicant preferred over the Grievant was granted "'credits' for taking courses in Word, Excel, Powerpoint, etc." This states a double standard.

EAU CLAIRE COUNTY, MA-11470, DEC. 6344 (Greco, 2/02) does not constitute precedent for this grievance. The Union does not seek to compel proficiency testing under Posting 07-025. Rather, it challenges the reasonableness of the County's determination. The Arbitrator should "sustain the grievance and order the stipulated remedy."

The County's Brief

Under Section 1.06, the County's authority to determine qualifications is a fundamental right, "which cannot be usurped by arbitrable decision." Under Section 5.02, A "qualifications" are a matter of fact, and the County determined that the Grievant lacked 24 necessary credits of post-secondary training. Arbitral precedent, including decisions of this arbitrator (WAUSHARA COUNTY, MA-8887, DEC. 5162 (McLaughlin, 11/95) and including decisions with these parties (MA-11470), confirm this.

Article 2 confines an arbitrator to the agreement's language, thus precluding the substitution of an arbitrator's judgment for supervisory determination of fact. There is no dispute that standard review procedures were followed and thus no basis for overturning the determination of qualifications posed here.

The evidence demonstrates that the Grievant did not have the required 24 credits at the time she signed the posting. A credit represents "16 hours of coursework toward a post-high school degree." A CEU is not a credit, because no testing is involved. Even if they were so considered, there is no proof that "real estate classes are related to performing the OA-5 position." In-house training cannot constitute credit toward a degree. The County does not grant such credit and CVTC does not recognize it. The arbitrator has no authority to overturn these decisions.

That the Union counts a combination of Edgewood College classes and nine CEU's in real estate to meet the 24-credit requirement shows nothing beyond the generosity of its count. Baker and Hein viewed the 24-credit requirement to demand "only the core courses at CVTC for Administrative Assistant, Business Management or Accounting Associate degrees, their equivalents, or other directly related courses." Baker and Hein reviewed the Grievant's transcripts. Baker found 11 of the necessary 24 credits, while Hein found only 4. The more generous count by the Union reflects their willingness to double count "non-core general education" courses that apply toward the 48 credit requirement as "core courses" needed to meet the 24-credit requirement.

That the Union believes a four year degree can meet the required qualifications should not obscure that Baker and the direct supervisor do not share that view. Neither County

representative did anything to waive any posted requirement. The Union specifically agreed to the 24-credit requirement when the parties reclassified the OA-5 position in 2001. It should not be permitted to work a change in that agreement through grievance arbitration. Any such change must come through negotiation not through litigation. The County acted reasonably, and its authority should not be undercut. Rather, the answer is for "bargaining unit employees to obtain readily accessible education." The grievance must be denied.

DISCUSSION

The issue is stipulated, but requires a contractual focus. The County persuasively argues that contract provisions bearing on the determination of qualifications govern the dispute. Section 1.06, B generally authorizes the County to promote employees, but Subsections A and B of Section 5.02 specify the authority to determine qualifications. Section 4.01, B bears on the determination by making seniority relevant to the selection process. However, Section 4.01 is applicable only if the employee meets necessary qualifications, which points the interpretive issue back to County authority under Section 5.02. Since the parties have stipulated the Grievant is entitled to the job if she meets the 24-credit requirement, the interpretive issue focuses on Section 5.02.

The strength of the County's case is that its determination of qualifications demands deference, and that in this case, it determined that the Grievant's academic background was insufficient to meet the 24-credit requirement. Hein's and Baker's testimony establish that knowledgeable reviewers reasonably determined that the Grievant's academic background included sufficient courses to meet general degree requirements, but lacked the core courses indispensable to a business degree program. Thus, she met the 48-credit requirement, but not the 24-credit requirement.

The background stated above does not attempt to detail the specificity with which the various reviewers analyzed the Grievant's coursework. This reflects the parties' desire to be less burdened than is the custom with my statement of a record. It also prefaces the persuasiveness of the County's view that counting credits is a job for the County, nor for an arbitrator. The necessary outcome of this conclusion, however, is that the determination of qualifications under Section 5.02 becomes a rote application of whether an applicant meets credit requirements consistent with those prevailing at CVTC provided business degree programs. This view is not consistent with the governing contract provision viewed in light of the evidence.

The fundamental difficulty with the County's assertion is that the determination of qualifications under Section 5.02 presumes an individualized County assessment of an applicant. This is an act of discretion, which the Grievant never received.

Section 5.02, A makes an employee's qualifications "a matter of fact." The County urges that its determination of fact must be deferred to. Section 5.02 does not, however, leave "a matter of fact" undefined. Rather, it notes that "qualifications" includes "knowledge, skill,

and efficiency on the job." There is no evidence that the County considered any of these points regarding the Grievant. It does not appear that either applicant was an OA-5, and this means the "efficiency on the job" had to relate to performance in a position other than OA-5. In spite of this, Schleppenbach's June 27 memo rejected even the need to consider the point. Rather, it notes, without elaboration, "work experience does not take the place of related coursework." Nothing in that memo demonstrates that Schleppenbach ever considered the Grievant's individual qualifications. Rather, the memo refutes the policy basis underlying the Grievant's May 9 letter. Whether a four year liberal arts degree can substitute for specific study under a two year associate degree program can be debated as a policy issue. Whether a CEU or County provided training should substitute for college credit is a policy issue. Regarding the specific terms of Section 5.02, however, an employee's demonstration of knowledge, skill or efficiency cannot be wished away. The record shows no County evaluation of any knowledge, skill or efficiency demonstrated by the Grievant over her twenty years of employment.

This focuses the County's case on its determination that the Grievant lacked the minimum requirements of the position based on her failure to meet the 24-credit requirement. As noted above, there is no reason to doubt the reasonableness of Hein's or Baker's count regarding this requirement. This cannot obscure that each count is an act of discretion. Baker's change from 17.7 to 11 out of 24 reflects this. Hein's testimony also confirms this. Hein noted she would consider employee proficiency if she was directed to. That she was not directed to reflects another County exercise of discretion.

More significantly, the reasonableness of the rote counting of credits under CVTC standards governing its business degree programs is irreconcilable to Goss' placement in the same position. There is considerable uncertainty regarding that placement. It cannot be determined with certainty whether or not the County treated her Bachelor's degree, standing alone, as sufficient qualification to receive the position. Uncertainty on this point, however, undercuts the County's position and supports the Union's. Significantly, Goss recalled the interview in some detail. She could recall no discussion of the 24-credit requirement, adding that she could not have met it. Her interview covered, however, the link between her degree and the OA-5 position as well as her ability to perform the research required by the position and Hakes' views on how all of this impacted the development of the OA-5 position. It is evident that the interview reflected an individual interaction between Hakes and Goss, at which her educational background, skill and knowledge were all considered. Whether or not Hakes considered the 24-credit requirement, the evidence is clear that she considered Goss' individual qualifications consistent with the standards of Section 5.02. The difficulty with this for the County's case is that there is no evidence it ever considered any factor under Section 5.02 regarding the Grievant. Rather, it elevated the 24-credit requirement of the Position Description to the defining criterion of qualifications.

However persuasive this view might be if it stood alone, the evidence does not permit it to stand alone. Even ignoring the language of Section 5.02, this exercise of discretion is difficult to square with the posting. The posting grants wide discretion to the County,

permitting it to count the 24-credit requirement using "any combination in the following areas". The "following areas" reflect the "core courses" as viewed by Baker or Hein. The County's arguments, however, ignore the reference to "other directly-related courses." There would be no reason for that reference if it meant no more than the previously listed core courses. This does not invalidate either Baker's or Hein's views. It highlights, however, that an act of discretion is involved. The record is void of evidence that the Grievant had her educational background seriously evaluated when it was first determined that she lacked the minimum qualifications for the position. Rather, whatever discretion was exercised reflects a decision not to count any credits beyond those reflecting CVTC standards governing its business degree programs. Schleppenbach's June 27 memo reflects no more than the defense of a decision not to consider the Grievant.

It is arguable that Goss received the OA-5 position because she possessed a four year degree. Even if that stretches the evidence, it is evident that a County supervisor evaluated Goss' degree and other qualifications in light of the demands of the OA-5 position. That she benefited from that discretion is not binding on this case. However, this act of discretion is the indispensable precursor to the application of the standards of Section 5.02. To grant the deference the County seeks in this case grants Schleppenbach's June 27 memo contractual force. That memo, however, reads the criteria of Section 5.02 out of existence. This cannot be reconciled to the provisions of Section 2.02, Step D, 3.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The County's narrow view of what constitutes "other directly related courses" is not, in my view, unreasonable. If this case represented the first application of Section 5.02, that view would be more persuasive. However, it is not the first application of Section 5.02. More significantly, it cannot be reconciled to the contract or to the evidence regarding County placement of Goss in the same position. This is not to elevate the Goss situation to a binding practice. What is meaningful from Goss as a matter of contract interpretation is that any view of the evidence makes her interview an exercise of discretion consistent with Section 5.02. Schleppenbach's June 27 memo stands in marked contrast. It reads express contractual components of "qualifications" out of existence. Its persuasive force is debatable in light of the job posting standing alone. More to the point, the invalidation of contract criteria is neither within the authority of an individual supervisor nor of an arbitrator under Section 2.02.

The parties each point to MA-11470. The award is applicable in the sense that it points out that the individualized process pointed to under Section 5.02 may not be applicable to applicants who cannot meet "a *bona fide* education requirement", MA-11470 AT 5. However, this grievance does not question whether the 24-credit can be imposed as a minimum requirement of the posted position. Rather, it questions how the County applied the *bona fide* requirement to the Grievant. The applicants in the cited case had no claim to the position outside of the implication of "a work experience equivalency", MA-11470 AT 6. No such implication is necessary here and the issue is whether the posting's 24-credit requirement barred the Grievant from the individualized assessment process of Section 5.02.

Similar considerations apply to other precedent cited by the County urging deference to its application of the 24-credit requirement. That the 24-credit requirement can be applied to the Grievant is not the issue. Rather, it is the County's specific application of the requirement to her credits. The applicability of her course work to the requirements of the posting is a closer issue than the County acknowledges. The difficulty with the County's position is that the deference it seeks ultimately rests on the basis for its counting credits as it did. The bald assertion that the Grievant failed to meet the minimum qualifications of the position affords no evident rationale for the County's count. Ignoring whether the response the Grievant received prior to the filing of the grievance complied with the requirements of Section 5.02, B it masks a close policy decision as a determination of counting credits under fixed guidelines. In my view, the policy issue is close enough that the County could have reasonably concluded either that Kolstad's coursework did or did not meet the 24-credit requirement. The difficulty posed here is that the County asserts that no act of discretion complying with Section 5.02 was required. Rather, only a rote review of her personnel file to determine whether she met the degree requirements of CVTC provided business programs was necessary. To grant deference to this reads the exercise of discretion afforded Goss out of existence. However, that exercise of discretion is reconcilable to Section 5.02, while the act of discretion afforded Kolstad is not.

The conclusion stated above does not mean that the County must equate a CEU to a college credit. Hein's and Baker's views are defensible. Had those views been part of a transparent exercise of discretion, weighing the Grievant's skill, efficiency and knowledge against the absence of core course credits, the County's view would be persuasive. The difficulty with the County's view is that it puts this matter in an all or nothing posture that pits words from a posting against express contract language. The County's view of the 24-credit requirement under the posting is plausible. It is not, however, the sole plausible reading of those terms, as the Goss situation demonstrates. Its persuasive force is undercut by the fact that it was not applied consistently to Goss and to the Grievant. More to the point here, in the opposition of posting language against contract terms, the posting language must yield. In the absence of an individualized assessment of the Grievant under Section 5.02, it is unpersuasive to afford the County the deference it seeks.

Ultimately, deference to the County has a procedural and a substantive component. Granting the grievance does not mean the County cannot view the 24-credit rule narrowly. However, Section 5.02 requires some process to evaluate individual qualifications under its standards. The process here was limited to making a narrow reading of the 24-credit rule the sole criterion of minimum qualifications as applied to the Grievant. Without regard to the persuasiveness of that view on a clean slate, it is inconsistent with County action toward Goss. Under Section 5.02, process determines the qualified applicant. Here, it was the other way around. The narrow reading of the 24-credit requirement dictated the "non-consideration" of the Grievant. There is no reason to doubt this could have been done consistent with the demands of Section 5.02. However, it was not done here, and to sustain the result reached would allow posting language to overturn contract language.

The parties' stipulation establishes the remedy and is incorporated verbatim below.

AWARD

The County did violate the contract when it denied the Grievant Posting No. 07-025 for the Office Associate 5 position in the Human Services Department for failure to meet the required post-high school education qualification as outlined on Posting 07-025.

As the remedy appropriate to the County's violation of Section 5.02, the Grievant should be awarded Posting No. 07-025 with appropriate backpay. (Starting date of incumbent).

Dated at Madison, Wisconsin, this 24th day of March, 2008.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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