

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 2239

and

CITY OF RACINE

Case 760
No. 66157
MA-13442

Appearances:

Mr. Nicholas E. Kasmer and Mr. Jack Bernfeld, Staff Representatives, Wisconsin Council 40, AFSCME, 8450 82nd Street #308, Pleasant Prairie, Wisconsin 53158, on behalf of the Union.

Deputy City Attorney Scott R. Letteney, 730 Washington Avenue Rm. 201, Racine, Wisconsin 53403, on behalf of the City.

ARBITRATION AWARD

For many years, AFSCME Local 2239 (herein the Union) and the City of Racine (herein the City) have been parties to a collective bargaining relationship. At the time the grievance herein arose, the agreement covering the period from January 1, 2004 to December 31, 2005 had expired and the parties were in a contract hiatus. On August 16, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the Employer's refusal to award Patricia McMillan (herein the Grievant) the position of Consumer Lending Specialist on the grounds that she was not qualified for the position. The undersigned was appointed to hear the dispute and a hearing was conducted on August 22, 2007. The proceedings were transcribed and the transcript was filed on September 5, 2007. The parties filed initial briefs by November 5, 2007. On December 4, 2007, the parties informed the Arbitrator that they would not be filing reply briefs, whereupon the record was closed.

ISSUES

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

Did the City of Racine violate the collective bargaining agreement when it failed to give Patricia McMillan the position of Consumer Lending Specialist?

If so, what is the appropriate remedy?

The City would frame the issues, as follows:

Does the collective bargaining agreement require the City to award a position to the most senior union member applying for the position without regard to qualifications?

If so, what is the appropriate remedy?

The Arbitrator frames the issues, as follows:

Did the City's process for filling the position of Consumer Lending Specialist violate the collective bargaining agreement?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE IV

MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract and the past practices in the department covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to the following:

1. To direct all operations of City government.
2. To hire, promote, transfer, assign, and retain employees in positions with the City and to suspend, demote, discharge, or take other disciplinary action against employees for just cause.

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8. To determine the methods, means and personnel by which such operations are to be conducted.

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ARTICLE XII

SENIORITY

- A. Definition: The seniority of a regular employee is determined by the length of his/her service with the City, computed in years, months, and days from the first day of his/her last continuous employment. Temporary or regular seasonal employees shall not have seniority. However, if a temporary or seasonal employee becomes a regular employee, he/she shall have seniority equivalent to the length of his/her last continuous employment. Regular part-time employees accrue seniority on a pro-rata basis.
- B. Recognition of Principle: The Employer recognizes the principle of seniority and the Union recognizes the need for maintaining an efficient work force. In all matters involving increase or decrease of forces, layoffs, or promotions, the length of continuous service with the Employer shall be given primary consideration. Skill, ability, and efficiency shall be taken into consideration only where they substantially outweigh considerations of length of service, or where the most senior employee is unable to do the work. To prove qualified, the employee must demonstrate ability to do the job within thirty (30) calendar days. An employee shall not receive seniority benefits unless he/she becomes a regular full-time employee.
- C. Notification: In the event the senior employee is not chosen, the Human Resources Director shall give an explanation in writing to such senior employee and the Union stating the reason for his/her not being chosen.

ARTICLE XIII

JOB POSTINGS

- A. Posting Procedure: Any job vacancy which occurs due to retirement, quit, death, new position, or for whatever reason in the bargaining unit shall be posted.

The posting shall set forth the job title, duties, qualifications desired, rate of pay, work location or assignment, and shift. Sufficient space shall be provided for employees to sign (apply) for said job posting.

All job openings within the province of the bargaining unit shall be posted for five working days in overlapping consecutive weeks. The successful bidder or the Union shall be notified within five (5) workdays after the close of the posting.

The City agrees to move the successful bidder to his/her new position as quickly as possible, but in no event later than thirty (30) calendar days after the notification of his/her selection.

The job posting for any classification shall remain in effect for ninety (90) days following the award of the posted job and shall govern, without any reposting, any job openings occurring within said ninety (90) day period in that job classification.

- B. In accordance with Article XII, Seniority, total bargaining unit seniority shall prevail in all job postings except for shift changes which will be based upon classification seniority. Shift changes shall not be subject to Section C and/or D below. If there is no successful bidder for a position, consideration will be given to bargaining unit members in the other Local 2239 unit before outside applicants.
- C. Probationary Period: Employees working on a job obtained through job posting shall serve a thirty (30) calendar day probationary period and shall be guaranteed the right to return to his/her previous job should his/her ability to handle the new work prove unsatisfactory within this probationary period. This provision shall also apply to employees from the Police Department Unit who post for and are awarded a job in this unit.
- D. Return to Previous Job: If within thirty (30) calendar days the employee is dissatisfied with the posted job and wishes to return to his/her previous job, the Employer shall have the right to request the employee to remain on the job until such time as the job is again posted and filled. At no time shall this time exceed thirty (30) calendar days. In order for a Union employee to change jobs or classification while still in a probationary status, he/she must return to his/her previous job classification. This provision shall also apply to employees from the Police Department Unit who post for and are awarded a job in this unit.

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ARTICLE XIV

TESTING

The City reserves the right to establish reasonable testing procedures to be used to determine the ability of the employee to do the job on any promotion.

BACKGROUND

Local 2239 represents a bargaining unit consisting of “all regular full-time and regular part-time ‘clerical and related’ and ‘technical’ employees in the employ of the City of Racine, excluding managerial, supervisory, confidential, casual, professional, craft employees, law enforcement personnel with the power of arrest, firefighters, employees working within the Police Department, and employees of the Water and Wastewater Utility, with the sole exception of three engineering technicians transferred from the City Engineering Department on or about January 1, 1989. Under the 2004-2005 collective bargaining agreement, one of the positions within the bargaining unit was that of Housing Loan Processor, which was held by Mariann Adamski. Late in 2005, Ms. Adamski announced her retirement. Thereafter the City decided to modify the position and, on December 15, internally posted an opening for the new position of Consumer Lending Specialist, which was also a bargaining unit position. The posting stated, in pertinent part:

PROMOTIONAL OPPORTUNITIES ANNOUNCEMENT

Date: 12/15/05

Position: Consumer Lending Specialist (new position)

Department: Housing (Mon – Fri; 8 AM - 5 PM)

Salary: SU-13 (\$17.36 - \$20.88/hr.)

Essential Duties

Collects application information from applicants, credit agencies, title companies, the Housing Technician regarding project cost estimates, etc. Reviews application information for eligibility for loan, grant or other assistance based on programs policies and standards. Determines maximum loan amount. Recommends approval or denial of application. Prepares loan closing documents and performs loan closing. Processes recording of mortgages and promissory notes. Maintains loan records for monitoring purposes. Conducts periodic review of loan recipients for continued compliance with requirements for insurance, etc. Serves as team leader for housing staff, including coordination with Housing Technician in obtaining cost estimates for applications and contractor proposals for loan closings. Explains characteristics of various housing

programs to potential applicants and other interested parties (city officials, contractors, realtors, credit institutions, etc.). Makes public presentations about the programs as authorized by the Assistant Director. **(NOTE: COMPLETE JOB DESCRIPTION ON FILE IN THE HUMAN RESOURCES DEPARTMENT.)**

Minimum Qualifications:

Minimum education and experience: high school diploma and four years increasingly responsible experience or bachelor's degree and two years increasingly responsible experience. Comprehensive knowledge of retail credit evaluation methods and procedures. Comprehensive knowledge of residential mortgage lending methods and procedures. Comprehensive knowledge of loan closing methods and procedures. The ability to pass a test in these areas will be required. Knowledge of federal and state regulations regarding consumer lending and mortgage lending. Ability to calculate loan repayments and explain amortization schedules. Ability to communicate effectively both orally and in writing. Ability to use desktop computer equipment and software. **Ability to use and pass a test in Microsoft Office products (Word, Outlook, Excel) required.** Ability to use specialized loan and mortgage software required; familiarity with FIPCO (Wisconsin Mortgage Banker's software products) preferred. **Ability to pass a test involving evaluation of one or more loan applications and related documents for suitability for a home improvement loan. Ability to pass keyboard test for accuracy at a minimum of 30/wpm (net.)** Valid Wisconsin driver's license and dependable automobile transportation.

Physical Demands:

Standing, walking, stooping. Kneeling, crouching, climbing, balancing, bending, twisting; lofting carrying, pushing/pulling up to a maximum of 25 lbs. Fine n motor skills. Sitting for long periods of time.

Environmental Conditions:

Normal office environment. Requires tolerance of background noise, including noise from office equipment and odor from office machines.

Equipment Used:

Personal computer and keyboard, typewriter, fax machine, 10-key calculator, telephone, copy machine, portage meter and other office equipment presently in use.

Interested City employees are invited to submit their resume for consideration to the Human Resources Department, Room 2, City Hall, on or before 12/21/05. All candidates will be subject to testing for this position as required.

The job description for the position provided, in pertinent part:

POSITION DESCRIPTION FOR CONSUMER LENDING SPECIALIST
- HOUSING DEPARTMENT

TYPE OF WORK PERFORMED:

Under general supervision, is responsible for the daily loan servicing aspects of the City's housing programs. Involves customer contact, loan underwriting, and record keeping.

REPORTING RELATIONSHIPS:

Reports to the Assistant Director of City Development for general instruction and review.

ESSENTIAL DUTIES PERFORMED:

Collects application information from applicants, credit agencies, title companies, and the Housing Technician regarding project cost estimates, etc.

Reviews application information for eligibility for loan, grant, or other assistance based on program policies and standards. Determines maximum loan amount. Recommends approval or denial of applications.

Prepares loan closing documents and performs loan closings.

Processes recording of mortgages and promissory notes. Maintains loan records for monitoring purposes. Conducts periodic review of loan recipients for continued compliance with requirements for insurance, etc.

Serves as a team leader for housing staff, including coordination with Housing Technician in obtaining cost estimates for applications and contractor proposals for loan closings.

Explains characteristics of various housing programs to potential applicants and other interested parties (city officials, contractors, realtors, credit institutions, etc.) Makes public presentations about the programs as authorized by the Assistant Director.

Assists the Assistant Director in developing and implementing marketing strategies for the programs.

Assists the Assistant Director in developing and implementing rules and procedures to insure programs remain in compliance with Federal, State, and City requirements.

Prepares reports on the status of programs and aspects of programs as directed.

Recommends changes in policies, practices and procedures to improve programs.

Maintains a consistent and reliable attendance record.

ADDITIONAL RESPONSIBILITIES:

Perform related duties as assigned.

KNOWLEDGE, SKILLS, AND ABILITIES REQUIRED

Minimum education and experience; high school diploma and four (4) years increasingly responsible experience or bachelor's degree and two (2) years increasingly responsible experience.

Comprehensive knowledge of retail credit evaluation methods and procedures.

Comprehensive knowledge of residential mortgage lending methods and procedures.

Comprehensive knowledge of loan closing methods and procedures. The ability to pass a test in these areas will be required.

Knowledge of federal and state regulations regarding consumer lending and mortgage lending.

Ability to calculate loan repayments and explain amortization schedules.

Ability to communicate effectively both orally and in writing.

Ability to work effectively with individual customers and general public, particularly with low and moderate income persons and a racially and ethnically diverse clientele.

Ability to use desktop computer equipment and software. Ability to use and pass a test in Microsoft Office products (Word, Outlook, and Excel) required. Ability to use specialized loan and mortgage software required; familiarity with FIPCO (Wisconsin Mortgage Bankers' software) products preferred.

Ability to pass a keyboard test for accuracy at a minimum of 30 wpm (net).

Valid Wisconsin driver's license and dependable automobile transportation.

PHYSICAL DEMANDS:

Standing, walking, stooping, kneeling, crouching climbing, balancing, bending, twisting, lifting, carrying, pushing/pulling up to a maximum of 25 pounds. Fine motor skills. Sitting for long periods of time.

ENVIRONMENTAL CONDITIONS:

Normal office environment. Requires tolerance of background noise, including noise from office equipment, and odor from office machines.

EQUIPMENT USED:

Personal computer and keyboard, typewriter, fax machine ten key calculator, telephone, copy machine, postage meter and other office equipment presently in use.

Six bargaining unit employees applied for the position, the most senior of whom was Patricia McMillan, an eighteen year employee, who was currently working as a Clerk Typist II in the Department of Public Works, in which capacity she processed the accounts receivable for the department. Based on the resumés, the City determined that none of the internal applicants were qualified for the position. As a result, none were interviewed or tested for the position. Ms. McMillan was informed of the City's determination by Jerry Scott from the City Human Resources Department. The position was then advertised externally, resulting in a number of applicants. The City interviewed five of the candidates and tested two. Ultimately, the City hired Dora Garcia to fill the Consumer Lending Specialist position.

On January 17, 2006, the Union filed a grievance over the City's failure to hire the most senior qualified internal applicant for the position. The City 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 this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the City violated the contract when it failed to interview, test, and ultimately award the Consumer Lending Specialist position to Patricia McMillan. The contract requires that seniority be considered in awarding positions and that skill, ability and efficiency will only be considered when they substantially outweigh seniority or when the senior employee is unable to do the work. The Director of City Development admitted he did not consider seniority when filling the position, but relied on experience and training and education. This failure violated the contract. The City further failed to provide a written explanation for its refusal to consider Ms. McMillan, which also violated the contract.

At the hearing the City raised the issue of Ms. McMillan's lack of qualifications. Qualifications and ability only are relevant if they substantially outweigh seniority. Ms. McMillan was a nineteen year employee and had several, although not all, of the listed qualifications for the position, including experience working with credit reports, mortgages and all the computer-related qualifications. While Ms. Garcia is more qualified than Ms. McMillan, this is not a case of comparative qualifications. It is a case of the City's failure to properly consider and give weight to Ms. McMillan's years of service when considering her for the position. The City may contend that Ms. McMillan was unable to do the work, but it cannot establish that because she was never given the opportunity and an employee can only be disqualified if they show themselves to be unable to do the work. She was never interviewed, tested, or given an opportunity to demonstrate her ability, nor was she given a written explanation for her disqualification. These are all violations of the contract and the grievance should be sustained.

The Employer

The City argues that the contract does not require that the position be awarded to an employee based on seniority, regardless of qualifications. The contract has numerous provisions that demonstrate the interplay of seniority and qualifications in job selection. Article IV makes it clear that hiring, management of operations and direction of the work force are rights reserved to management. Thus, the City may determine what the minimum qualifications are for any particular position. Article XIII requires qualifications to be listed within a job posting and Article XIV gives the City the right to establish testing procedures to determine ability to perform duties assigned to particular positions. Article XVI, although dealing with lay offs and bumping, requires an employee bumping into a position to have the minimum qualifications required of an employee posting into the position. The parties' contract has essentially a sufficient ability standard, which requires a position to be awarded to the most senior employee with sufficient ability to do the work.

Determining the necessary qualifications was the City's prerogative. This case is similar to CITY OF FOND DU LAC, WERC CASE 165, NO. 59153, MA-11197 (Bielarczyk, 6/29/01). There two bargaining unit employees were denied a position as a Clerk Typist II and the position was eventually filled externally. The arbitrator held that the contract gave the City the right to determine qualifications and that disqualifying the applicants who did not meet the minimum qualifications was not a violation of the contract, regardless of their seniority. Here, Ms. McMillan did not meet the minimum qualifications for the Consumer Lending Specialist position. There is nothing in her resumé to suggest that she has many of the skills and abilities or required knowledge to fill the position and her testimony was to the effect that her only experience with mortgages was obtained in purchasing a home herself.

To hold that seniority is the only permissible consideration in job selection would lead to absurd results. There are many diverse job classifications within the bargaining unit, all requiring different training, skills and abilities. If seniority, alone, controlled job selection, any employee could freely move from one position to any other on that basis alone. A Security

Attendant could become a Data Entry Clerk, or a Clerk/Typist could become an Engineering Technician without any reference to ability to do the work. This cannot have been the parties' intention and even Ms. McMillan agreed that there are situations where minimum qualifications are required. The City, therefore, requests that the grievance be denied.

DISCUSSION

As the parties have framed their arguments, there is wide disparity between as to what they believe to be the central issue of the case. The Union asserts that, as between seniority and qualifications, seniority should be the determining factor in filling bargaining unit vacancies, unless the disparity in qualifications is significant. In its view, Patricia McMillan, an eighteen year employee and the most senior applicant, should have been awarded the position and been given a thirty-day period, provided for in the contract, to establish whether she was competent in the position. The City, on the other hand, sees this as a question of whether the contract requires it to fill bargaining unit vacancies on the basis of seniority alone, without reference to qualifications. Implicit in the City's argument is the assumption that Patricia McMillan was unqualified for the position and that, unless the contract requires filling positions based on seniority alone, there was no violation of the contract in not awarding her the position. In my view neither party is completely accurate in assessing what the contract requires, or whether there was a violation in this case.

The operative contract language is found in Article XII, Section A, which states, in pertinent part:

In all matters involving increase or decrease of forces, layoffs, or promotions, the length of continuous service with the Employer shall be given primary consideration. Skill, ability, and efficiency shall be taken into consideration only where they substantially outweigh considerations of length of service, or where the most senior employee is unable to do the work. To prove qualified, the employee must demonstrate ability to do the job within thirty (30) calendar days.

And in Article XIV, which provides:

The City reserves the right to establish reasonable testing procedures to be used to determine the ability of the employee to do the job on any promotion.

The parties agree that the contract language creates a "sufficient ability" provision, which requires that a vacant position must be awarded to the most senior applicant from within the bargaining unit who is capable of doing the work. Where they disagree is as to how such a provision is to be applied.

I agree that the management rights clause, which gives management the authority to manage the operations of the City, determine positions and personnel necessary to carry out the

functions of government and direct the workforce, does reserve to management the right to establish qualifications for positions in the bargaining unit. Therefore, it was the City's prerogative to determine the qualifications necessary for the Consumer Lending Specialist position. This is consistent with my ruling in SAUK COUNTY, WERC CASE 156, No. 64263, MA-12853 (Emery, 11/17/05) and with Arbitrator Bielarczyk's decision in CITY OF FOND DU LAC, WERC CASE 165, No. 59153, MA-11197 (Bielarczyk, 6/29/01), both cited by the City. Furthermore, management is accorded great deference in establishing qualifications and a successful challenge to the reasonableness of particular qualifications must overcome a significant burden.

I do not agree, however, that the City has unfettered discretion in determining whether an employee posting for a position meets the qualifications. The City, of course, may establish baseline credentials required for posting into a position, such as specific training, level of education, licensure, or amount of relevant experience necessary to be considered for the position, as long as those criteria are reasonably related to the work of the position. Employees not meeting reasonable minimum criteria may be disqualified on that basis. Beyond that, however, the contract appears to provide two separate methods for determining the qualifications of an employee applying for a position. The first, found in Article XII, Section A, is to provide an employee a thirty day trial period within which to establish his or her ability to do the work. The second, located in Article XIV, is to test applicants to determine sufficient ability to do the work. Here, again, there is a standard of reasonableness and relevance to the work of the position applied to the testing process. According to the contract, therefore, regardless of seniority, if an employee posting for a position does not have the established credentials for the position, cannot pass a test establishing sufficient knowledge and skill to perform the duties of the position, or is not able to establish his or her competence during a thirty day trial period, he or she may be disqualified.

Here, Ms. McMillan submitted her resumé in applying for the Consumer Lending Specialist position, as required by the job posting. Her resumé, and those of the other applicants, were reviewed by a panel of management personnel, including Brian O'Connell, who is the Director of City Development, and is the overall supervisor of the Consumer Lending Specialist. Mr. O'Connell testified that the experience and training set forth in the job description were key criteria in assessing the applicants. He further testified that the group reviewed the resúmes of all the internal applicants and decided to not interview any of them because they felt that none of the applicants met the minimum qualifications for the position. Needless to say, none of the applicants were given testing, nor provided a thirty day trial period. The question then becomes whether the City was justified in disqualifying Ms. McMillan based on the information contained in her resumé alone.

The "training and experience" called for in the position description are, "...high school diploma and four (4) years increasingly responsible experience or bachelor's degree and two (2) years increasingly responsible experience." Beyond that the applicant must be able to demonstrate comprehensive knowledge and/or competence with respect to a number of matters, including credit evaluation, mortgage and consumer lending policies and procedures,

applicable government regulations, use of computers and other office machines and applicable computer software. While one's resumé might indicate training or education in these areas, presumably competence or comprehensive knowledge would have to be established through a process of interviewing, testing, and/or on-the-job observation.

Ms. McMillan's resumé reveals that she has a degree in cosmetology and has also taken technical institute courses in Data Processing, Data Entry, Data Preparation, Typing, Record Keeping, Office Practice, Business Math, Bank Teller courses and Secretarial Science. Her resumé does not specifically state that she has a high school diploma, but the City does not contend otherwise and I assume that a high school diploma or equivalency degree would be required as a basis for her other education. Her resumé further reveals that she has worked for the City since 1987 and currently works as a Clerk Typist II for the Department of Public Works. Her work experience includes accounts payable, requisitions, purchase orders, balancing accounts and handling of contracts, as well as knowledge and experience with computers, various software applications and a wide variety of office and business machines.

If the required baseline training and experience is a high school diploma and at least four years of increasingly responsible experience, it would appear to me that she has it. If on the other hand, it is the competency and comprehensive knowledge in mortgage, consumer lending and credit matters set forth in the job description, I cannot say, based on her resumé, that she either does or does not have it. Indeed, while information on a resumé could lead an employer to assume the existence of such knowledge and ability, I do not know how, short of an interview and some form of testing or observation, the lack of such knowledge and ability could be determined. In short, therefore, the review panel took a short cut with respect to disqualifying Ms. McMillan by making assumptions about her knowledge and skills based on what was not on her resumé, rather than what was, and thereupon disqualified her. What is more, this was not a matter of determining basic credentials, such as education, experience and licensing, because I have determined that Ms. McMillan met those criteria, at least minimally. Rather, these were assumptions about what she knew or could do. This is the more problematic because nothing in the job posting states that, beyond establishing baseline credentials, the resumé would be used to determine whether an applicant was competent to hold the position. The City was justified in using the resúmes to determine if applicants had the baseline credentials of a high school diploma or college degree accompanied by the requisite years of increasingly responsible experience. Beyond that, however, it was required to determine the existence of the required knowledge and skills for the position through testing and/or a thirty day trial period, as specified in the contract, especially since the job posting clearly states that the ability to pass tests in using Microsoft Office products, evaluation of loan applications and related documents, and keyboard competency are among the qualifications for the position.¹ By not offering Ms. McMillan an interview and the opportunity to demonstrate her competence through either testing or a trial period, therefore, the City violated the contract.

¹ The record reflects that, in fact, the successful external applicant was given testing by the City as part of her evaluation and hiring process. There is no reason, therefore, that the same testing could not have been administered to Ms. McMillan or the other internal applicants who had the required baseline credentials for the position.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

AWARD

The City's process for filling the position of Consumer Lending Specialist violated the collective bargaining agreement. The City shall, therefore, offer Patricia McMillan an opportunity to be tested for competency in the knowledge and skills required for the position and the position shall be awarded to her if she is successful. If she declines the opportunity to be tested or is not successful, the same opportunity shall be afforded all the other internal applicants for the position who possess the minimum required credentials. The most senior applicant, if any, who successfully completes the testing shall be awarded the position. The incumbent may remain in the position pending the results of the testing. If none of the internal applicants either opts to take the testing, or is successful in doing so, the incumbent may remain in the position thereafter.

I will retain jurisdiction for a period of sixty (60) days in order to resolve any issues that may arise in the implementation of this award.

Dated at Fond du Lac, Wisconsin, this 28th day of March, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

