

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLARK COUNTY

and

**JOINT COUNCIL OF HIGHWAY EMPLOYEES, LOCAL NO. 546,
OF THE AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

Case 135
No. 68482
MA-14245

Appearances:

Houston Parrish, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin, appeared on behalf of the Union.¹

Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, by **Anders B. Helquist**, 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Joint Council of Highway Employees, Local No. 546, of the American Federation of State, County and Municipal Employees, AFL-CIO, herein collectively referred to as the "Union," and Clark County, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Neillsville, Wisconsin, on March 5 continuing on March 17, 2009. Each party filed a post-hearing brief, the last of which was received April 20, 2009.

ISSUES

The parties stipulated to the following statement of the issues:

1. Did the Employer violate the posting provision of the collective bargaining agreement by failing to promote one of the three grievants (Opelt, Garder or Pakiz) to the crew leader position in the Clark County Highway Department?

¹ Mark DeLorme, participated in the briefing.

2. If so, what is the appropriate remedy?²

RELEVANT AGREEMENT PROVISIONS

“ . . .

ARTICLE 1 – RECOGNITION

Section 1. The Employer hereby recognizes the Union as the exclusive bargaining agent for all County highway employees, except confidential, clerical and supervisory employees who are employed by the County Highway Department, for purposes of bargaining and negotiating in good faith on all matters pertaining to wages, hours and working conditions of employment.

. . .

Section 6. The Union recognizes the rights and responsibilities belonging solely to the County, prominent among which, but by no means wholly inclusive, are the rights to hire, promote, discharge or discipline for cause, the right to decide the work to be done and the location of the work. Such seniority shall not be in a manner inconsistent with any of the other provisions of this Agreement.

. . .

ARTICLE 4 – SENIORITY

Section 1. Seniority shall begin at the time of original employment and shall not be diminished by temporary layoffs due to lack of work or funds.

. . .

Section 4. Employees will lose seniority rights for the following reasons:

- a. Quit;
- b. Discharge for just cause;
- c. Absence from work for three (3) consecutive work days without notification to the Employer unless unable to do so for physical or other legitimate reasons;
- d. Failure to notify Employer of availability for work within three (3) days, or failure to report to work within ten (10) working days after having been recalled from layoff;

² The parties stipulated that I might reserve jurisdiction over issues arising from the remedy if either party requested that I do so in writing, copy to opposing party, within sixty (60) days of the date of the award.

- e. Failure to report to work at the termination of a leave of absence;
- f. Acceptance of full-time employment elsewhere without permission of the Employer while on leave of absence for personal reasons;
- g. Retirement.

Section 5. In the event that an employee transfers from one of the County's AFSCME bargaining units to another of the County's bargaining units, the employee shall retain his/her seniority for vacation, leave and fringe benefit purposes only. Seniority for all other purposes, such as layoff and promotion, shall commence from the first day of employment in the position in the bargaining unit into which he/she has transferred.

ARTICLE 5 – JOB POSTING

Section 1. When a position covered by this Agreement becomes vacant or a new position is created, such vacancy shall immediately be posted in each shop. This notice of vacancy shall list the pay, duties and qualifications and shall remain posted for seven (7) working days. Employees interested shall apply by signing such posting within the seven (7) working day period. Within five (5) days of expiration of the posting period, the Employer will award the position to the most senior applicant qualified.

Section 2. The successful applicant shall be given a thirty (30) day trial and training period in the new position at the applicable rate of pay. If at the end of the trial and training period it is determined that the employee is not qualified to perform the work, he/she shall be returned to his/her old position and rate.

Section 3. The County may advertise to the outside concurrently with posting the position internally. If no internal applicant is qualified for the position, the County may fill the position from outside the bargaining unit.

. . . .”

FACTS

Clark County is a subdivision of the State of Wisconsin and operates a Highway Department among its many departments. The Highway Department is responsible to maintain County road and other roads under contract. This includes, but is not limited to, installing and maintaining road signals and signs, repairing roads and plowing roads in the winter, and maintaining its construction equipment. It has shops at various locations in Clark County. The Union is the collective bargaining representative of highway employees including people classified as Crew Leaders, but excluding the Foreman, supervisory and managerial

employees.³ There are about 20 employees in the bargaining unit represented by the Union. The County Highway Committee oversees the operation of the Highway Department. The chief administrative person reporting to the Highway Committee is Randy Anderson, Highway Commissioner. Don Walker is the Patrol Superintendent. He reports to Mr. Anderson. Until the facts in this case, he had two Foremen working reporting to him. One was Tim Hanson and the other was Dennis Buchholz. The facility at Loyal, Wisconsin had four employees. At one time, it had Crew Leader, but that position has been left unfilled for a long time with no intent to fill it. The issues in dispute involve the elimination of Mr. Buchholz's Foreman position and ultimately his subsequent movement into a Crew Leader position allegedly established just for him in the Loyal facility. Shortly before the events in this matter, a Truck Driver retired and the position remained unfilled thereafter. The other employees at the Loyal facility with their seniority dates and main duties behind their names are Rollin Opelt (1991, Mechanic/Welder), Larry Pakiz (1990, Center Line Painter), and Jay Gardner (1997, Paver Operator).

Mr. Buchholz started with the Employer in 1995 and became Foreman in 1999. He served in that position until October, 2008. Under the collective bargaining agreement he lost bargaining unit seniority for promotion purposes when he was promoted out of the bargaining unit. As Foreman, Mr. Buchholz had the responsibility to determine the work which was necessary for the Highway Department to do on a daily basis, the responsibility to assign the work to specific road crews, to direct all of the road crews, to effectively recommend the discipline of each subordinate employee and to evaluate the same. Except in snow emergencies, he did not perform unit work or operate equipment. The position of Foreman occupied by Mr. Buchholz had the following qualifications as stated in the applicable position description:

Training and Experience:

High school graduation, with four to five years of supervisory experience in equipment operation and supervision.

- Knowledge of basic computer operation or ability and willingness to be trained in personal computer operation.

In evaluating candidates for this position, the County may consider a combination of education, training and experience which provides the necessary knowledge, skills and abilities to perform the duties of the position.

[Emphasis supplied.]

³ Supervisory employees are excluded from bargaining units organized under the Municipal Employment Relations Act by Sec. 111.70(1)(i), Stats. See, Sec. 111.70(1)(o), Stats for the definition of a "supervisor" for purposes of MERA. Crew Leaders are not supervisors within the meaning of that statute and, therefore, are included in this bargaining unit.

In October, 2008, the Highway Committee determined to eliminate Mr. Buchholz's Foreman position for reasons of budget and economy. It did not wish to layoff Mr. Buchholz. It had planned to fill the position of Truck Driver then vacant in the Loyal Shop, and directed that Mr. Buchholz be so informed so he could maintain a job with the County. It also authorized the filling of the long vacant Loyal Crew Leader position when Mr. Buchholz was able to fill it. If that occurred the position of Truck Driver vacated by Mr. Buchholz would be eliminated. The evidence is not clear as to what specifically was said in connection with the position authorizations for Truck Driver and Crew Leader, but at least some of the discussions in that meeting implied that the other provisions were to "preserve" a job for Mr. Buchholz.

A few days later, Commissioner Anderson and County Personnel Director Katherine Long met with Mr. Buchholz to officially impart the fact that his position as Foreman had been eliminated. They encouraged him to apply for the Truck Driver position. They told him that the Crew Leader position at Loyal would be opened.⁴ They discussed seniority and other matters and confirmed that he would be able to apply for the Crew Leader position at the time they opened it. They told him that he would have to compete for the position and instructed how to do so.

No one on behalf of the Employer ever announced to other unit employees this sequence of events or the fact that the Crew Leader position would be posted in advance of the posting. No one on behalf of the Employer ever provided any directions to any other unit employee relating to competing for the Crew Leader position. Mr. Buchholz was selected for the Truck Driver position. Approximately two weeks later, on October 6, 2008, the Employer posted the position of Crew Leader in the Loyal Shop. Larry Pakiz, Rollin Opelt and Jay Gardner all properly signed the posting notifying the Employer of their desire to be appointed to the Crew Leader position. Dennis Buchholz also properly signed the posting. The posting provided the following job description which was substantively identical to the job description used to recruit past Crew Leaders.

CREW LEADER

GENERAL STATEMENT OF DUTIES: Supervises the Clark County road maintenance program.

DISTINGUISHING FEATURES OF THE CLASS: Under general supervision to assign and supervise the work of a crew performing highway maintenance of construction work; and to perform related work as required.

EXAMPLES OF WORK: (Illustrative only)

Supervises county and state maintenance and snow removal as needed;

⁴ Everyone in that meeting knew that the Crew Leader position had been long vacant with no intent to fill it. Thus, the proper inference is that they were informing Mr. Buchholz that they were opening the position for him.

Supevise patching, ditching and replacement of culverts in county;

Report county and state road conditions to Patrol Superintendent during adverse weather conditions;

Handle emergency calls and complaints concerning road conditions;

Assign work detail and equipment of subordinates;

Suggest plans for road maintenance activities such as road construction, resurfacing, drainage, grading, bridge repair, marking and signs;

Checks daily time cards and machinery cards for accuracy;

Does related work as required.

QUALIFICATIONS:

- Considerable knowledge of the methods, materials and equipment used in highway construction and maintenance work;
- Ability to plan, assign and supervise the work of others;
- Ability to operate and maintain various types of highway equipment;
- Ability to keep records and make reports;
- Ability to establish and maintain effective working and public relationships.

TRAINING AND EXPERIENCE: Graduation from high school. Four or more years of experience in highway maintenance and construction work, a part of which has involved supervisory responsibility.

The posting stated: "Please submit resumé to Commissioner no later than 4:00p.m., October 15, 2008. Dennis Buchholz did submit a resumé. Randy Opelt submitted a brief letter outlining his qualifications. Jay Gardner also submitted a letter of interest and resumé. His cover letter also provided: "I would welcome the opportunity to meet with you and explore how my experience could meet your needs" Mr. Pakiz did not submit anything beyond signing the posting. All did so in a timely fashion.

The Union recognized that it appeared that the Employer had pre-determined to give the Crew Leader position to Mr. Buchholz. It sent a letter to the Employer to put the Employer on

notice that it expected the Crew Leader position to be filled in accordance with Article 5, by seniority to the minimally qualified applicant.

Mr. Anderson's practice over the years in filling those positions in the bargaining unit from within was to rely on his personal knowledge of the unit applicant's work history in his or her work with the Employer. He has never examined the personnel records (applications) for all employees kept in his office under lock. He has never conducted interviews. This practice was common knowledge in the Highway Department.

On October 20, 2008, Mr. Anderson selected Mr. Buchholz to fill the Crew Leader position effective immediately. He had not conducted any interviews or sought any further information from any candidate. Each of the other applicants filed a grievance protesting their non-selection for the Crew Leader position. All three grievances were properly processed to arbitration and consolidated in this proceeding.

POSITIONS OF THE PARTIES

Union

The Employer violated Article 5, Sections 1 and 2 of the collective bargaining agreement when it failed to promote one of the three grievants to the lead person position in dispute. Under those provisions, the position in dispute must be awarded to the "the most senior applicant qualified." Each of the grievants was qualified. The sole argument which the Employer made was that each of the grievants lacked the required supervisory experience for the disputed crew leader position. The Employer's position in this matter is not believable. The Employer hired Mr. Buchholz to his former highway foreman position and required far less supervisory experience it is requiring for the disputed position. The Employer chose to re-create the long-vacant position of Lead Person after it eliminated the Foreman position and reduced the Foreman to a unit position. It did so only after verifying that Mr. Buchholz would be eligible to apply for the newly re-created job. Highway Commissioner Anderson is not believable in his claim that he did not slant the process to fill the Lead Person position so that Mr. Buchholz would receive the position. In this regard, Mr. Anderson's own testimony is that he set the "supervisory" aspect of the "qualifications" without regard to the actual duties of the Lead Person position, but, rather, in order to get "the most qualified individual." The Employer's position in this matter is not credible because it applied its selection process in a manner to deprive each of the grievants a fair opportunity to be considered. Previously, Lead Person positions and others have been filled based upon the Highway Commissioner's personal knowledge of the candidates without the requirement of extensive applications. It chose to ignore the Highway Commissioner's own files with the previous employment application of each of the grievants. Obviously, this severely limited its consideration of the past supervisory experience of each of the Grievants as shown in those available records. Nothing in the Collective Bargaining Agreement requires applicants to submit a resumé in order to have his or her previous experience considered. At the same time, it chose not to interview any of the grievants for the position. This is because it did not want to learn about their qualifications.

Each of the grievants has the requisite supervisory experience. Mr. Pakiz is the most senior applicant. From 1981-90, he was the Head Mechanic for Smith Feed Transport and from 1975-1977, he was a Truck Foreman for Plautz Bro's, Inc. At Plautz he was the foreman for a truck crew that paved gravel roads in Clark County. Additionally, it was the practice of Clark County to have the most senior person on a crew act as a Lead Person. This Mr. Pakiz had done.

Mr. Opelt was Head Mechanic for Opelt Bothers, a company also engaged in highway construction.

Mr. Gardner had been acting Lead Person many times. He also had been a squad leader in the Army.

The Union requests that the senior qualified applicant be ordered assigned to the position, Mr. Pakiz retroactive to October 20, 2008, and that he be made whole for all lost wages and benefits.

Employer

The Employer did not violate the collective bargaining agreement when it selected Mr. Buchholz as the successful applicant. The Employer has an established policy and procedure for filling vacancies. The Employer has the right to set the qualifications for a position and to determine who meets those qualifications. In this case, the Employer notified applicants that they were permitted to present a resumé with their application. The Employer had a right to rely solely upon the information provided by the applicants at the time of application and the personal knowledge of Highway Commissioner Anderson. This was an established process and there was no change of the process in this application process. The applicants were all aware of this process and chose not to submit resúmes. There have been exceptions in the past, but they are distinguishable from the current situation.

The Employer also followed the agreement in evaluating the applicants. The position requires the "[a]bility to plan, assign and supervise the work of others." It requires four or more years of experience, "part of which has involved supervisory responsibility." The grievants did not provide any information that showed they had this experience and their work history did not include supervisory experience. By contrast Dennis Buchholz had many years' experience as the Foreman of this department.

Mr. Pakiz is not qualified because he does not have the requisite supervisory experience. He is a Center Line Painter which involves operating the center line painting machine or doing other physical work. None of the duties of that position involve supervisory responsibilities. From 1990 to 2005, he worked as a Truck Driver which does not involve supervisory responsibilities. Mr. Pakiz's allegations that he took over for County crews when the Foreman left or that he was a foreman for a private employer cannot be considered. The time to submit this information was before, not after the hiring process. Mr. Anderson had no

obligation to seek out this information by looking in personnel files and he did not ordinarily interview employees. Mr. Pakiz had submitted resumés in the past and knew these procedures.

Mr. Opelt is not minimally qualified. He does not have the requisite supervisory experience. He was a Mechanic/Welder. None of his duties involve supervision. Mr. Opelt did not make Mr. Anderson aware in the selection process of any prior supervisory experience. Similarly, Mr. Gardner is not minimally qualified. He is a Paver Operator and none of his duties involve supervision. None of his previous positions with the County involved supervision. Mr. Anderson was not aware of any of his work in prior employment involving highway construction and maintenance.

There was no conspiracy. The meeting between Ms. Long, Mr. Anderson and Mr. Buchholz was not a prelude to a sham process, but simply to inform Mr. Buchholz of the decision of the Highway Committee to cut his Foreman position and to fill the Crew Leader position. [The Truck Driver position was already designated as one which could be filled.] The decision not to fill the Truck Driver position when Mr. Buchholz left it was solely for economy. The evidence with respect to the Employer's hiring process for Crew Leader demonstrates that the procedures were the same.

Article 5, Section 2 does not give any of the applicants an opportunity for a training period. The term "successful applicant" therein has historically meant that the applicant must be qualified at the time he or she is promoted. The Employer asks that the grievance be dismissed.

DISCUSSION

Article 5, Section 1 provides that when filling a unit position, the Employer will award the position to ". . . the most senior applicant qualified." This provision is one of the common types of selection provision used in labor relations and is recognized to require that an employer award a position to the most senior applicant who meets the minimum qualifications for the position.⁵ Under this provision, the senior employee is presumed qualified unless the employer produces evidence to establish that he or she does not meet a minimum qualification.⁶ A goal of provisions of this type is to encourage retention of employees by emphasizing promotion from within a bargaining unit. When parties negotiate provisions of this nature, they do so because they recognize that as to bargaining unit positions, employees tend to develop the necessary qualifications by service in the bargaining unit.

It is undisputed herein that the Employer has the authority to set minimum qualifications for a unit position in advance of the posting, provided they are job-related and its actions are taken in good faith. The parties have not specified detailed provisions for the

⁵ See, Miles Ruben, Ed., Elkouri & Elkouri, *How Arbitration Works*, (BNA, 6th Ed.), Ch. 14, Section 7 page 875.

⁶ See, for example, *PACIFIC GAS & ELECTRIC*, 23 LA 556, 557 (Ross, 1954)

administration of the selection process, but generally Article 5 assumes that the Employer will apply its established recruitment and promotion procedures. The Employer has authority to set and change procedures for the submission of qualifications and administration of the selection process in good faith, provided the procedures are otherwise consistent with the collective bargaining agreement. A purpose of the posting provision is to insure that all unit employees are given a reasonable opportunity to compete for selection for unit positions.⁷

The parties are in disagreement as to whether the Employer had the right to request that employees submit a resumé or other document outlining their qualifications for the disputed provision. The posting in question stated in relevant part:

Please submit resumé to Commissioner no later than 4:00 p.m., October 15, 2008.

As noted, in the absence of specifications in the agreement, the Employer is entitled to establish reasonable procedures. The Employer has requested resúmes in the same way in past postings.⁸ It appears this type of request has been the Employer's past uniform procedure and the Union has never grieved it. I conclude that the Employer did not violate the agreement by requesting resúmes, but, as discussed below, I conclude it did violate the agreement in the way it administered that request as to this posting.

In determining whether the Employer administered the selection process in good faith, it is necessary to examine the material disputed testimony (Mr. Pakiz and Mr. Anderson). Mr. Pakiz testified in detail as to the duties of a Foreman and those of a Crew Leader without any contradiction by Employer witnesses. The rest of his testimony is as follows. He explained that before he came to the County he had worked for two relevant private employers. At one he worked on a road construction crew which constructed the gravel roads for the townships in Clark County. He had worked his way up to Foreman for that company and worked in that position for two years. In that position he supervised a road crew in constructing roads for two years. He then went to another private employer and worked as a mechanic. In that job he worked his way up to Shop Foreman and supervised a maintenance shop with an ever-growing number of mechanics. He started with the County in 1990 and is the most senior person applying for the disputed position. He worked most of his career with the Employer as a Heavy Truck Driver. He worked with Crew Leaders when the Employer employed them and acted in accordance with the practice well-known in the Highway Department as "senior-person-in-charge" for most of those years when there were no Crew Leaders or the Crew Leader was absent. Since 2003 he has been the Center Line Painter, but is still stationed in the Loyal Shop and acts as senior-person-in-charge. The information about his prior positions was listed on his original job application which was on file in Mr. Anderson's office. He admitted that he did not submit a resumé or other summary of his experience and qualifications with his application for Crew Leader.

⁷ See, for example, MACK TRUCKS, INC., 55 LA 813 (1970)

⁸ However, if an employee has failed to submit a resumé, Commissioner Anderson has considered in past situations still given the applicant consideration based upon his personal knowledge of the applicant's qualifications.

Mr. Anderson testified in this proceeding. He testified as follows. He was hired as the Highway Commissioner 19 years ago and has been in that position ever since. He used the same process he always had used to fill the position which is as follows. Employees sign a posting for a position and submit a resumé. He used his knowledge of the position to be filled, the resumé or other information submitted by the employee to fill the position. He did not conduct interviews or do any other research other than the information provided. He did not consider experience in jobs other than those for the County not submitted with the application for this position. On cross he reluctantly admitted that he had used his personal knowledge of employees' work history with the Employer in making selections for past positions. As noted, it is undisputed that Mr. Pakiz did not submit a resumé or other summary of his experience prior to working with the Employer. Mr. Anderson was not aware of Mr. Pakiz's supervisory experience prior to coming to work for the Employer and not aware of any qualifying experience with the Employer. He also disputed whether the prior road crew experience was qualifying experience because it was with gravel roads and not paved roads and because the rules governing road construction and techniques used in road construction have changed.

Mr. Anderson's testimony was evasive and self-serving in many respects and is not credible. Many aspects of his testimony are discussed infra. Some main points are apparent from the testimony. First, the Employer's selection of the supervisory qualification for this position was not made in good faith. It administered this qualification based upon the supervisory ability and experience necessary for the Foreman position but was in excess of that necessary to be a successful Crew Leader. The position description in relevant part requires: "Four or more years of experience in highway maintenance and construction work, a part of which has involved supervisory responsibility."⁹ Mr. Anderson defined the aspects of the "supervisory experience" qualification he chose to apply in this situation. He effectively stated that "supervisory experience" includes the leadership ability necessary to be a Crew Leader.¹⁰ Further he indicated that the position required knowledge of modern road construction and maintenance procedures. This would include knowledge of the safety and other modern regulatory requirements applying to roads. He set this standard at the level to be a Foreman (which precluded all applicants other than Mr. Buchholz) rather than at the level required to be minimally necessary for a newly appointed Crew Leader. Second, the Employer has considered in selecting past Crew Leaders experience gained by senior employees acting in a manner similar to senior-person-in-charge as qualifying experience. Indeed, Mr. Anderson had promoted Mr. Buchholz to the Foreman position, a position requiring much greater supervisory ability, without any supervisory experience. Third, it is entirely unbelievable that in a small highway department such as this, Mr. Anderson would not know about Mr. Pakiz's supervisory experience and leadership abilities. Mr. Anderson's job requires that he be intimately familiar with each employee's abilities. In the normal course of assuming his duties when he was hired he would have read the personnel files of the people then employed. He would have participated in the interview or final decision on the hiring of everyone thereafter during the course of which it is unlikely he would not learn about every successful applicant's

⁹ By contrast, the position description for Foreman requires: ". . . four to five years of supervisory experience in equipment operation and supervision. . . "

¹⁰ Although he really evaluated the minimum as the leadership ability necessary to be Foreman.

background. Thus, it is entirely unbelievable he would not have known about Mr. Pakiz's supervisory experience. More importantly Mr. Pakiz easily demonstrated a very good understanding of the role of Crew Leaders and higher level supervisors in his testimony. I observed his interactions with fellow employees throughout the hearing and it was obvious that he played a leadership role among employees. Finally, even though the senior-person-in-charge practice is informal, it is entirely unbelievable that it was not known to Mr. Anderson or that he did not rely upon it as necessary. Thus, even if Mr. Anderson did not immediately recall Mr. Pakiz's experience in prior employment, Mr. Anderson was aware that Mr. Pakiz had demonstrated adequate leadership ability in his employment with the Employer.

I also note that the Employer chose to fill the long-vacant Crew Leader position for Mr. Buchholz. The evidence indicates that when the Employer wanted to reduce its costs it chose to eliminate Mr. Buchholz's Foreman position rather than make cost saving adjustments to it. It determined at that time to fill a Truck Driver position in the Loyal Shop to "preserve" a job for Mr. Buchholz and made a decision to fill a long-vacant Crew Leader position in the Loyal Shop when Mr. Buchholz qualified to seek the job.¹¹ The creation of jobs for individuals rather than creating them based on the Employer's needs for work tends to be inconsistent with the nature of the Employer's normal recruitment and promotion process which is assumed in Article 5. In this case, the Employer determined only to fill the Crew Leader position after it determined that Mr. Buchholz could compete for it. It also coached him as to how to compete for the position while it did not provide the same information to the other applicants. At a minimum, the Employer's actions must be examined carefully when created under these suspicious circumstances.

The selection process was not conducted in good faith. Although Mr. Anderson took the position in his testimony that he was evaluating the "minimum qualifications" required by Article 5, he inadvertently admitted later in his testimony that he selected Mr. Buchholz because he thought he was the "best man for the job." This violated the last sentence of Article 5, Section 1. Mr. Anderson did not consider Mr. Pakiz's supervisory experience in positions prior to coming to work for the County. As noted above, I am satisfied that Mr. Anderson would have known by working with Mr. Pakiz that he had sufficient leadership skills to be a Crew Leader. I am satisfied that the minimum requirement to be selected as a Crew Leader is leadership skill and a good knowledge of the Employer's procedures. Mr. Anderson in bad faith emphasized supervisory knowledge in order to avoid the applicants other than Mr. Buchholz. When questioned at length as to whether Mr. Pakiz's experience as a foreman on a road crew in prior employment was adequate to have qualified him, Mr. Anderson essentially acknowledged that the experience would successfully demonstrate the leadership skill necessary to be a Crew Leader, but alleged that it was insufficient because he would not then have had the knowledge of procedures and regulatory requirements now required in the construction of roads. First, I find it entirely incredible that Mr. Pakiz hasn't

¹¹ The evidence indicates that upon Mr. Buchholz's promotion to Crew Leader, the Truck Driver position was not filled. This is strong evidence that the positions were created for Mr. Buchholz. By contrast, the Truck Driver position had recently been vacated and the undisputed evidence is that the Employer had a need to fill that or similar unit position in the Loyal Shop at the time Mr. Buchholz received that position.

gained the necessary knowledge of changed procedures by working on road construction in his current job. Similarly, he has gained much of the knowledge of procedures required by regulations by being senior-person-in-charge and by watching Foreman and Crew Leaders in the past. The Employer promoted Mr. Buchholz to Foreman without that knowledge or experience in the past. Article 1, Section 2 requires successful applicants with a thirty day training period. The last sentence of Section 2 provides that the applicant's qualifications are to be assessed at the end of the training period.¹² The believable evidence indicates that Mr. Pakiz had sufficient supervisory knowledge required to initially perform the Crew Leader job and any other information which he did not immediately have could be easily be gained in thirty days. The Employer violated Section 2 in the way it applied the supervisory knowledge aspect of the Crew Leader position. Accordingly, the Employer violated Article 5 by applying its decisional standards in bad faith to exclude qualified senior applicants.

The parties disagreed as to the appropriate remedy for the violations of Article 5 found above. The Employer seeks to have the position reposted. The Union seeks to have Mr. Pakiz placed in the Crew Leader position and made whole for all losses. Either remedy is appropriate for this type of violation, but the determination to place Mr. Pakiz in the position must be made only when with positive assurance the arbitrator can conclude that but for the Employer's violations of Article 5, Mr. Pakiz would have been selected. I conclude the Union has met this more stringent standard. First, Mr. Pakiz is entitled to have all of his experience considered because he was not given an adequate opportunity to make a reasoned decision to submit a resumé. Employees other than Mr. Buchholz were not given an adequate notice of changes in the Employer's procedures to make a reasoned choice as to whether to submit a resumé. Only Mr. Buchholz was coached as to how to compete for this position. The job posting was essentially the same as prior postings for Crew Leader. As in the past it requested resúmes. In the past resúmes were not required and the failure to submit one was not considered as a reason to not select an applicant. Applicants were not told of this change. Applicants were not told that Mr. Anderson would not use his personal knowledge of their leadership skill to assess whether they had the necessary leadership skill for Crew Leader. This change is so fundamental to the process that the failure to provide adequate notice violates Article 5. Additionally, the Employer did not tell applicants that it was establishing qualifications beyond those which were necessary to perform the Crew Leader work; i.e. supervisory skills and knowledge necessary to be a Foreman rather than a Crew Leader. The failure to inform applicants of this change impaired their ability to make a reasoned decision as to whether to submit a resumé. It also violated Article 5. Based upon the stipulations of the parties and the tenor of Mr. Anderson's testimony, Mr. Pakiz has all of the requirements for the Crew Leader position including the supervisory leadership skill. I am satisfied based on the evidence that he either has the supervisory knowledge necessary to perform at the Crew Leader level or can easily gain the supervisory knowledge necessary to perform the Crew Leader position within thirty days in the position. Accordingly, I conclude that the Employer violated Article 5 when it did not select Mr. Pakiz as the Crew Leader and that the appropriate

¹² It is not necessary for this decision to make a detailed distinction between those qualifications which must be possessed before entering the training period.

remedy is to order the Employer place him in that position. I order that he be made whole for all lost wages and benefits that he would have earned as if he had been selected for the position. In accordance with the parties' stipulation at hearing, I retain jurisdiction over any dispute arising from the specification of the remedy as noted below.

AWARD

The Employer violated Article 5 when it did not select Mr. Pakiz for the disputed Crew Leader position for which he was the senior qualified bidder. The Employer shall immediately place him in that position and make him whole for all lost wages and benefits. I reserve jurisdiction over the specification of this remedy if either party requests that I exercise that jurisdiction in writing, copy to opposing party, within sixty (60) days of the date of this award.

Dated at Madison, Wisconsin, this 23rd day of June, 2009.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator