

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between  
**IOWA COUNTY HIGHWAY EMPLOYEES' UNION,  
LOCAL 1266, AFSCME, AFL-CIO**  
and  
**IOWA COUNTY (HIGHWAY DEPARTMENT)**

Case 135  
No. 67932  
MA-14055

---

**Appearances:**

**Mr. Michael J. Wilson**, Representative-at-Large, AFSCME Council 40, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717, appearing on behalf of the Union.

**Mr. Kirk Strang**, Attorney, Davis & Kuelthau, S.C., Ten East Doty Street, Suite 600, Madison, Wisconsin 53703, appearing on behalf of the County.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter referred to as the Union and the County, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to the Union's request that the Commission appoint a Commission staff member as Arbitrator to hear and decide a posting grievance, the Wisconsin Employment Relations Commission appointed the undersigned as Arbitrator. Pursuant to the agreement of the parties, the grievance hearing was held on November 17, 2008 in Dodgeville, Wisconsin. Following the hearing, the parties filed written argument; the last of which was received on April 10, 2009.

**ISSUE**

The parties were unable to stipulate to a statement of the issues. At hearing, the Union framed the issues as follows:

Did the County violate the terms of the collective bargaining agreement when it failed to award the Road Construction Lead Person position to the Grievant and/or failed to award a trial period in the position to the Grievant?

If so, what is the appropriate remedy?

At hearing, the County framed the issues as follows:

Whether or not the original grievance was resolved or otherwise waived through agreements reached in the grievance procedure?

Did the County violate the collective bargaining agreement in determining that Jim Kosharek should be awarded the Road Construction Lead Person position?

### **PERTINENT CONTRACT PROVISIONS**

#### **ARTICLE 3- MANAGEMENT RIGHTS**

3.01 The County possesses the sole right to operate the County and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

- A) To direct all operations of the County;
- B) To establish reasonable work rules and schedules of work;
- C) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- D) To layoff employees;
- E) To maintain efficiency of County operations;
- F) To take whatever action is necessary to comply with Federal law;
- G) To introduce new or improved methods or facilities;
- H) To change existing methods or facilities;
- I) To determine the kinds and amounts of services to be performed as pertains to County operations; and the number and kind of classifications to perform such services;
- J) To contract out for goods and services subject to the following conditions: The County agrees that no work will be transferred out of the bargaining unit while any unit employees are on layoff, nor shall any unit employees be laid off as a result of a decision to transfer work out of the bargaining unit, provided the decision

to transfer work out of the bargaining unit is a mandatory subject of bargaining.

- K) To determine the methods, means and personnel by which County operations are to be conducted;
- L) To take whatever action is necessary to carry out the functions of the County in situations of emergency.

3.02 The above rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union, and provided further, that the above rights shall be used fairly and reasonably.

...

#### **ARTICLE 5 - GRIEVANCE PROCEDURE**

5.01 Definition: A grievance shall mean any dispute concerning the interpretation or application of a provision of this Contract and shall be handled in the following manner:

5.02 STEP 1: The Union Committee and/or Union Representative shall present the grievance in writing to the Highway Commissioner no later than seven (7) working days after the grievance occurred or the employee or the Union knew or should have known of such occurrence. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later. The Commissioner shall within seven (7) working days, in writing, inform the employee and the representative of his/her decision.

5.03 STEP 2: If a satisfactory settlement is not reached as outlined in Step 1, the Union Committee and/or Union Representative may within seven (7) working days of the receipt of the Commissioner's decision, present the grievance to the Iowa County Transportation Committee. Such a meeting shall be held within seven (7) working days of receipt of a written request by the other party unless a later date is set by mutual agreement. The Committee shall within ten (10) working days of the meeting, in writing, inform the Union and employee of its decision.

5.04 STEP 3: If a satisfactory settlement is not reached as outlined in Step 2, either party to this Agreement may request within ten (10) working days of the Union's receipt of the Committee's decision that the dispute be submitted to arbitration.

Arbitration Procedure: The parties shall attempt to select a mutually agreeable arbitrator to hear the case. In the event the parties are unable to agree on the selection of the arbitrator, either party may request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. The Arbitrator shall make a decision on the grievance, which shall be final and binding on both parties. Only questions concerning the application or interpretation of this Agreement are subject to arbitration. Expenses for the arbitrator shall be borne equally by the Employer and the Union. The arbitration board shall have no power to modify, add to or delete from the express provisions of this Agreement.

. . .

## **ARTICLE 6- SENIORITY**

6.01 Policy and Definition: It shall be the policy of the Employer to recognize seniority in filling vacancies, making promotions and in laying off or rehiring, provided however, that the application of seniority shall not materially affect the efficient operation of the Iowa County Highway Department. Seniority shall be defined as length of service in the bargaining unit, dating from the employee's most recent date of hire, and shall not be lost or broken except as provided in Section 6.10, below.

6.02 Seniority Roster: A seniority roster shall be posted on all shop bulletin boards and brought up to date the last working day in December of each year by the Employer.

6.03 Probation: All newly hired employees shall serve a ninety (90) day probationary period. Upon mutual agreement between the Union and the County the probationary period may be extended for an additional period of not more than ninety (90) days. During such probationary period, they shall not attain any seniority rights and shall be subject to dismissal for any reason without recourse to the grievance procedure. Upon completion of the ninety (90) day probationary period, the employee shall be granted seniority rights from the date of original hire, and his/her hourly rate shall advance to the rate shown in Appendix A for his/her classification.

6.04 Job Postings: Whenever a vacancy occurs within the bargaining unit, either as a result of a termination, promotion, transfer or the creation of a new position which the County intends to fill, it shall be posted on all shop bulletin boards for a period of five (5) working days. The County shall notify the Union in writing within fifteen (15) working days of the vacancy, whether it intends to fill a position and when it will be posted. Each employee interested in

applying for the job shall endorse his/her name upon such notice in the space provided.

6.05 Selection: The regular employee with the greatest seniority who can qualify for the job, shall be given the job. If no regular employee bidding can qualify for the job, it shall be given to the currently employed seasonal employee with the greatest seniority who can qualify.

6.06 Temporary Filling: The Employer shall have the right to temporarily fill a job that is posted. However, such temporary filling of a job shall continue only for a reasonable time after the end of the five (5) days posting or the settlement of a grievance if one should arise. The County shall fill the position within ten (10) working days of the expiration of the posting, if a qualified applicant is available, and at the same time, notify in writing, the Union and those employees who bid for the position, whether they have been awarded the position or not, and the reasons for same. Nothing in this Section is intended to prevent the County from advertising and filling a position with a qualified outside applicant, if no qualified employee from within the Unit bids for the position.

6.07 Qualifications: The initial determination as to an employee's qualifications shall be made by the Employer. However, if there is any difference of opinion as to the qualifications of an employee, the Union Committee, and/or Union representative may take the matter up for adjustment under Article 5, Grievance Procedure.

6.08 Trial Period: An employee who successfully bids for a position shall serve a thirty (30) calendar day trial period in the new position. If, at the end of the trial period, the employee cannot perform adequately in the new position, or if the employee chooses to return to his/her former position, the County shall return the employee to his/her former position and rate of pay. Those employees who have moved to new positions due to the original promotion shall also be returned to their former positions and rates of pay.

...

### **BACKGROUND**

The Union and the County are parties to a collective bargaining agreement. This collective bargaining agreement covers certain employees of the County's Highway Department, including Caleb Buroker, hereafter referred to as the Grievant.

In December of 2007, the County posted the following:

NOTICE TO EMPLOYEES

Any employee wishing to apply for the position of:

**ROAD CONSTRUCTION LEAD PERSON - \$17.47**

Must be knowledgeable about construction equipment, grading roads, installing culverts properly, and concrete repairs, i.e. extending box culverts, concrete patches, minor bridge repairs, etc. Must be responsible for time and materials to get job charged out properly. Must be able (along with Patrol Superintendent and Commissioner) to work with landowners to get temporary easements for construction purposes and for minor realignment of curves, etc. May be asked to perform any other duties relating to highway maintenance. Applicant must also have a valid CDL with Classes A, B, C, D and N endorsement. (Employee will be allowed 30 calendar days from job being awarded to obtain.)

Please sign your name in the space below within 5 days of this notice.

The Grievant was the only employee to sign this posting within the five day period established by this notice. A second employee, John Kosharek, signed the posting after the five day period established by this notice had elapsed. Kosharek had less seniority than the Grievant. The Grievant did not receive the position.

On or about December 12, 2007, the Union grieved the County's decision to not award this position to the Grievant. This grievance states, *inter alia*: "Senior man applied for foreman of Grade Crew and was qualified and was denied." This grievance contended that management had violated Sec. 6.04, 6.05 and all other provisions that apply.

By letter dated December 17, 2007, Highway Commissioner Leo Klosterman advised the Union that he was available to meet on December 20, 2007 for Step One of this grievance. Jeri Grabbert, the County's Office Administrator, took notes during this meeting and relied upon these notes to prepare written minutes that include the following:

**Iowa County Highway Department Grievance Hearing  
December 20, 2007  
3:30 P.M.**

**Present: Leo Klosterman, Highway Commissioner; Jeri Grabbert, Office Administrator; Keith Buckingham, John Gardner, J.C. Olson, Caleb Buroker, Neil Wenger, and Doug Judd.**

Grievance #09-07

The Union felt that a senior man applied for foreman of grade crew and was qualified and was denied. The Union cited Articles 6.04, 6.05, and all other that apply, as being violated and would like the position awarded to the senior man.

Leo Klosterman read 6.04 and 6.05 (attached) and stated that he had provided Caleb Buroker with a letter stating that he had seniority but did not qualify for the position. Neil Wenger asked what was non-qualifying. Leo passed out the job description (attached) and said that Caleb was told he did not qualify, but asked Caleb if he had anything to offer to show he did have qualifications. Leo stated that Caleb did not offer anything.

J.C. Olson questioned the late signing by Jim (?) after the 5-day posting period. Leo responded that he interprets the contract to only say that a posting must be up "for a period of five (5) working days." The posting was up for 5 working days. He did not post it longer and he filled the position with a qualified person. J.C. Olson felt that employees should sign the posting while it was up. Leo stated that they have taken them down and filled positions with people from the inside before, i.e., Chuck Dahl in September 2002 (date questionable - years ago = 2002 +/-).

J.C. Olson asked Leo if he had ever asked Jim (?) to go for this position. Leo said no. Jim had called Leo at home on a Sunday and asked Leo if he wanted Jim to take the job. Leo told Jim that he must sign the posting and to see Mark James, who still had the posting sheet. Keith Buckingham said the bidding was done by Jim after the 5-day bidding period and that was not "kosher" with how they interpreted the contract. He felt the job should not have been awarded to anyone inside that did not sign the posting during the 5-day posting period and that it should be reposted.

Neil Wenger reiterated that the posting was signed by the recipient of the position (Jim ?) after the 5-day posting period. J.C. Olson felt that the position should be reposted or hire from the private sector and provide a letter to the Union that there were no qualified applicants on the original posting.

Leo said he will agree to the Union's interpretation that posted positions should be signed only during the 5-day posting period.

J.C. Olson asked Caleb if he felt he was qualified for position — as Leo had requested originally. Caleb gave his thoughts on his qualifications. He said he has been able to perform every job he has been assigned since he's been here. He said he wants the opportunity to try other things and he won't be a burden to the crew. He said he has had leadership roles and meets deadlines.

Leo stated that in his decision, he is thinking of the taxpayers and the Iowa County Highway Department — that it is his job to think of what's best for them.

Neil Winger reiterated the interpretation that signing posted positions can only be during the 5-day posting period. All agreed.

Leo will decide if he will repost the position or if he will hire from the outside. Leo will decide in the morning and notify the Union.

...

By letter dated January 4, 2008, the Highway Commissioner advised various Union representatives of the following:

After discussing the issues with you, I have decided to repost the Road Construction Lead person Position with a copy of the job description with qualifications needed for the Position. Jim Kosharek will return to the County Helper position as of Monday, January 7, 2008.

The Grievant and Kosharek signed a January 7, 2008 posting for Road Construction Lead Person position. This second posting was the same as the December, 2007 posting; except that the second posting, unlike the first posting, had an attached job description. The Grievant was not awarded the Road Construction Lead Person position.

By letter dated January 8, 2008, Union Representative John Gardner advised the Highway Commissioner that the Union was proceeding to Step Two grievance #09-07. The Step Two meeting was held and, in a letter dated February 8, 2008, the Highway Commissioner advised AFSCME Staff Representative Jennifer McCulley of the following:

The Iowa County Transportation Committee is denying Grievance #9-07, related to job posting of the Grade Crew Lead and filed by Neil Wenger. The Transportation Committee believes the grievance has no merit based upon management rights contained in the union contract on determining individuals meeting the job qualifications.

Subsequently, the Union advised the County of its intent to process Grievance #9-07 to arbitration and this grievance was submitted to arbitration.

### **POSITIONS OF THE PARTIES**



## Union

Contrary to the assertion of the County, the Union did not agree to a second posting. This lack of agreement is indicated by the fact that the grievance was appealed to arbitration and there was no agreement, verbally or in writing, to waive the grievance appeal or provide for a second posting. The testimony of Employer witnesses that there was such an agreement is self-serving or misleading. By the time of hearing, the Highway Commissioner's words of January 4, 2008, *i.e.*, "I decided to repost," had been transformed into an agreement with the Union to repost.

Only one bidder signed the December 2007 posting, *i.e.*, the Grievant. The Grievant's "qualifications" were not disputed until the February 8, 2008 written denial of the grievance. The County has violated Sec. 6.07 of the parties' collective bargaining agreement by not making an "initial determination as to the employee's qualifications."

The County's belated review of qualifications is prejudicial to the Grievant because the second posting produced another applicant. The Highway Commissioner knew that the second posting would produce a second applicant because he had talked to this applicant prior to the second posting.

The Commissioner did not fairly evaluate the Grievant's qualifications because he did not interview the Grievant or make any reasonable effort to discover the Grievant's qualifications for the position. The Grievant could operate heavy equipment and had leadership skills leading a group of mechanics. The Grievant was minimally qualified for the position and, thus, should have been awarded the position.

The County violated Sec. 6.08 of the parties' collective bargaining agreement when it failed to give the Grievant a thirty (30) day trial period. MANITOWOC COUNTY CASE 363 NO. 59144 MA -11195 (Morrison, 12/01).

The County returned Jim Kosharak to his former position of County Helper; thereby acknowledging that he was not eligible for the Road Construction Lead Person under the initial posting. Previously, Employee Dahl had been promoted by the Highway Commissioner. This employee was generally recognized to be unqualified for the position at the time that he started the position; but was provided with a trial period to demonstrate his qualifications to "adequately perform in the new position."

Under well accepted standards of contract interpretation, exact terms are given greater weight than general language. Therefore, Sec. 6.04, 6.05, 6.07 and 6.08 should be given greater weight than the general language of Sec. 6.01.

The County engaged in a charade so that it could promote the employee that it wanted. The record does not support a contention that the Grievant cannot qualify within 30 days on the job; nor has the County demonstrated how the Grievant's performance would "materially

effect the efficient operation of the Highway Department. The Highway Commissioner's testimony regarding employee Dahl's performance evidences a rather low standard; which could be improved upon by the Grievant.

The grievance should be sustained. The Arbitrator should order all appropriate remedy.

### County

The provisions of Article 3 and Article 6 of the parties' collective bargaining agreement provide relatively straightforward rules for filling vacancies. First, the County has a right to determine the qualifications required for County positions. Based upon this right, the County has formulated job descriptions for Highway Department positions that expressly identify essential duties and responsibilities; additional duties and responsibilities; minimum training and work experience required to perform job functions; and knowledge, skills and abilities to perform the job.

The Road Construction Lead Person is the most highly compensated position in the bargaining unit. The position description states that certain minimum training and work experience is required for the position; *i.e.*, experience operating heavy equipment for the position and previous road construction and supervision experience. (Although this latter requirement appears somewhat unclearly, as it is under the heading of "Required," but also is accompanied in the text by the word "preferred.")

The Grievant is a mechanic. The Grievant does not have experience as a heavy equipment operator. Nor does he have previous road construction or supervision experience. The Union's suggestion that testing heavy equipment following repair or moving it to another location qualifies as heavy equipment operating experience is not a serious contention.

Neither the MANITOWOC case cited by the Union, nor Sec. 6.08 is applicable to the facts of this case. The contractual provisions do not relieve the Grievant of the obligation to qualify for the job.

Contrary to the argument of the Union, the County determined that the Grievant was not qualified for the position properly and in good faith. The question presented is whether the County's conclusion was correct, not whether that conclusion was reached in the first instance. The Union's claim that reposting the position was prejudicial to the Grievant is both untrue and irrelevant.

The County concedes that the evidence established that the Union did not waive its right to process the grievance to arbitration; an issue that was initially raised by the County prior to the presentation of all the evidence. The Union did not clearly waive the grievance as originally thought, because it did advance the grievance.

The County reposted the grievance in good faith; based upon statements of a Grievant representative. Both parties ratified that process and continued processing of the grievance without objection after the second posting occurred. There is no basis for imposing forfeiture on either party.

The Union's claim that employee Dahl had no related experience and was generally recognized to be unqualified at the time he began is both untrue and irrelevant. Employee Dahl had directly relevant experience that the Grievant did not have. Additionally, employee Dahl predates the County's decision on current qualifications for the position.

The Grievant has many skills required for the job, but he does not have the minimum training and work experience that is required by the County. Inasmuch as the Grievant does not have the minimum mandatory qualifications for the position, the County's decision not to award the Road Construction Lead Person position to the Grievant did not violate the collective bargaining agreement. Accordingly, the grievance should be dismissed.

## DISCUSSION

### Issues

The parties were not able to agree upon a statement of the issues. At hearing, the Union framed the issues as follows:

Did the County violate the terms of the collective bargaining agreement when it failed to award the Road Construction Lead Person position to the Grievant and/or failed to award a trial period in the position to the Grievant?

If so, what is the appropriate remedy?

At hearing, the County raised two issues; the first of which is stated as follows:

Whether or not the original grievance was resolved or otherwise waived through agreements reached in the grievance procedure?

In post-hearing written argument, the County stated that it was withdrawing the waiver issue. Given this statement, as well as the lack of County argument in support of a claim that this grievance was resolved, the undersigned has concluded that she need not address the County issue set forth above.

The County's second issue is stated as follows:

Did the County violate the collective bargaining agreement in determining that Jim Kosharek should be awarded the Road Construction Lead Person position?

Upon consideration of the grievance, as filed and processed through the grievance procedure, the undersigned is persuaded that the Union's statement of the issue is the most appropriate.

### Merits

One of the issues raised by the Union in processing this grievance was the right of employees to sign a posting after the five day posting period elapsed. The minutes of the December 20, 2007 meeting indicate that the Highway Commissioner agreed with the Union's interpretation that posted positions should only be signed during the five-day posting period. Given this agreement, there is no longer an issue with respect to the right of employees to sign a posting after the five day posting period has elapsed.

The Union is asserting that the County violated Article 6 of the parties' collective bargaining agreement by not awarding the Road Construction Lead Person position/or a trial period to the Grievant on the basis of the December 7, 2007 posting. If the Union's assertion is correct, this Award will have implications for the subsequent January 2008 posting.

Neither the evidence regarding employee Dahl's previous selection for and tenure in the Road Construction Lead Person position, nor any other evidence, is sufficient to establish any binding practice that exists outside of the contractual language or that provides assistance in interpreting the language of the parties' collective bargaining agreement. Nor is there any evidence of bargaining history regarding the meaning or application of the language of the parties' collective bargaining agreement. This record provides no reasonable basis to conclude that the parties intended the Grievant to be given any rights to the Road Construction Lead Person position other than those reflected in the plain language of the collective bargaining agreement that has been negotiated by the parties.

The posting procedure agreed upon by the parties is contained in Article 6, Seniority. As set forth in the plain language of Article 3, Management Rights, the specific language of Article 6 takes precedence over the general management rights language contained in Article 3.

Sec. 6.01 includes the following language: "It shall be the policy of the Employer to recognize seniority in filling vacancies, making promotions and in laying off or rehiring, provided however, that the application of seniority shall not materially affect the efficient operation of the Iowa County Highway Department." This language, standing alone, indicates that the parties did not intend postings to be filled solely upon the basis of seniority and without regard to any other conditions.

Under the plain language of Sec. 6.05, the Grievant, as the "regular employee with the greatest seniority," "shall be given the job" if he is an employee who "can qualify for the job." Sec. 6.07 states that the "initial determination as to an employee's qualifications shall be made by the Employer."

As set forth in the plain language of Sec. 6.07, the Employer's "initial determination" may be appealed to grievance arbitration. Sec. 6.07 does not express a standard for arbitral review. It is appropriate, therefore, to apply the standard applicable to the exercise of management rights that is set forth in Article 3, *i.e.*, that management rights should be used "fairly and reasonably."

As stated in Sec. 6.08, "an employee who successfully bids for a position shall serve a thirty (30) calendar day trial period in the new position." Construing this language in a manner that is consistent with the plain language of Sec. 6.05 and 6.07; the undersigned is persuaded that the Grievant's seniority, *per se*, is not sufficient to provide the Grievant with the thirty-day trial period. Rather, the Grievant is only entitled to the trial period if he has "successfully bid" under Sec. 6.05.

Having posted a vacancy in the position of Road Construction Lead Person in December 2007, the County was obligated, under Sec. 6.05, to award this position to the Grievant, as the regular employee with the greatest seniority, if the Grievant was an employee who "can qualify for the job." According to the Highway Commissioner, his knowledge of the Grievant's work history caused him to conclude that the Grievant was not qualified for the December 2007 posting.

Under the applicable contract language, the Highway Commissioner's decision to not award the Road Construction Lead Person position to the Grievant must be based upon a fair and reasonable determination that the Grievant is not an employee who "can qualify for the job" of Road Construction Lead Person. The December 2007 posting was not accompanied by any request to confirm employee qualifications. Thus, to make a fair and reasonable determination that the Grievant is not an employee who "can qualify for the job" of Road Construction Lead Person, the Highway Commissioner is contractually obligated to provide the Grievant with a meaningful opportunity to show that the Grievant is an employee who "can qualify for the job" prior to reaching the conclusion that the Road Construction Lead Person position would not be awarded to the Grievant.

The Grievant recalls that, after the December 2007 posting came down, the Highway Commissioner told the Grievant that the Grievant was not qualified. The Grievant believes that he asked the Highway Commissioner why he was not qualified and that the Highway Commissioner did not want to talk to him then. According to the Grievant, the Highway Commissioner did not explain why the Grievant was not qualified.

The Highway Commissioner recalls that, prior to the filing of the grievance; he told the Grievant that the Grievant was not qualified for the position. The Highway Commissioner believes that he told the Grievant why he was not qualified. The Highway Commissioner does not state that, prior to concluding that the Grievant would not be awarded the position, the Highway Commissioner provided the Grievant with any opportunity to show that the Grievant was an employee who "can qualify for the job" of Road Construction Lead Person.

It is evident that, after the December 2007 posting came down, the Grievant and the Highway Commissioner had a discussion. Neither the evidence of this discussion, nor any other record evidence, establishes that the Highway Commissioner provided the Grievant with a meaningful opportunity to show that the Grievant “can qualify for the job” prior to reaching the conclusion that the Road Construction Lead Person position would not be awarded to the Grievant.

At the time of the December 2007 posting, there were three employees in the highway maintenance crew, including the Road Construction Lead Person. At the grievance hearing, the Highway Commissioner conceded that the Grievant has the ability to perform some of the duties and responsibilities of the Road Construction Lead Person position. According to the Highway Commissioner, the Grievant is not qualified for the position of Road Construction Lead Person because he lacked requisite experience as a heavy equipment operator and supervisor.

The Highway Commissioner states that the Grievant does not have experience operating heavy equipment to perform the work of the highway maintenance crew. According to the Highway Commissioner, this experience is a necessary qualification because the Road Construction Lead Person must be able to perform the work of the highway maintenance crew when a crew member is absent, as well as be able to train the crew and supervise the work of the crew. The Highway Commissioner states that, due to the downsizing of the highway maintenance crew, the Road Construction Lead Person performs the work of the highway maintenance crew more frequently than in the past.

The December 2007 posting includes the following: “Must be knowledgeable about construction equipment, grading roads, installing culverts properly, and concrete repairs, i.e. extending box culverts, concrete patches, minor bridge repairs, etc.” The Road Construction Lead Person position description lists, as a “Minimum Training and Work Experience Required to Perform Job Functions,” “Experience operating heavy equipment.” Additionally, among the “Essential Duties and Responsibilities” of this position are:

- Directs and supervises the department’s heavy equipment operations which includes but is not limited to scraper, dozer, bucketloader, and motor patrol (blade).
- Direct supervision of the road construction to improve and maintain productivity and efficiency.
- Assigns and routes personnel and equipment including road grading operations and winter maintenance crews; dispatch personnel in absence of the Highway Commissioner or Superintendent(s) as delegated.
- Reviews overall project scope and tasks with the Superintendent(s), Highway Commissioner, equipment operators, etc.

- Reviews grading, lays out roads, sets grade stakes, and reviews culvert installation blueprints.
- Reviews material invoices and documents the amount of material, fuel and labor used.
- Directs ditch cleaning and drainpipe installations.
- Operates equipment as needed.
- Maintains work standards

As the County argues, it has the management right to establish job qualifications. The Road Construction Lead Person position description, as well as the testimony at hearing, establishes that, with respect to the Road Construction Lead Person position posted in December 2007 and January 2008, the County has established, as a minimum job qualification, relevant experience operating heavy equipment. This relevant experience is necessary to perform the work of the highway maintenance crew in the absence of crew members and to supervise the work of the highway maintenance crew. This supervision of work would include training and instruction on how to operate heavy equipment to perform grading work in accordance with County requirements.

The testimony of the Grievant establishes that, at the time of the December 2007 posting, as well as at the time of the January 2008 posting, the Grievant, in his position as a County Mechanic, had operated heavy equipment used by the highway maintenance crew as necessary to repair this equipment and to ensure that the repair was correct. The Grievant acknowledges that at the time of the December 2007 posting, as well as at the time of the January 2008 posting, he had not operated this heavy equipment, or any other heavy equipment, at a job site. According to the Grievant, at the time of the two postings, his work experience with the County was as a Mechanic and that, prior to his employment with the County, he worked as a Mechanic at a milk hauling firm.

### **Conclusion**

In summary, the plain language of Article 6 is not clear and unambiguous. However, the plain language of Article 6, taken as a whole, is susceptible to a reasonable interpretation.

This reasonable interpretation, applied to the facts of this case, leads to the conclusion that the County violated the terms of the collective bargaining when it did not provide the Grievant with a meaningful opportunity to show that he “can qualify for the job” prior to making the decision to not award the position of Road Construction Lead Person to the Grievant. Inasmuch as it is not evident that the County has consistently engaged in such violations, it is not appropriate to remedy this violation by issuing a cease and desist order.

At the grievance hearing, the Grievant was provided with a meaningful opportunity to show that he “can qualify for the job” of Road Construction Lead Person, as posted in December 2007 and 2008. The Grievant was unable to do so because, at the time of these postings, he lacked the requisite relevant experience operating heavy equipment.

Under Sec. 6.05, the Grievant is entitled to be given the position of Road Construction Lead Person if he is an employee who “can qualify for the job” of Road Construction Lead Person. At the time of the December 2007 and January 2008 postings, the Grievant was not an employee who “can qualify for the job” because he lacked the requisite relevant experience operating heavy equipment. Accordingly, the undersigned rejects the Union argument that the Grievant has an Article 6 right to be awarded the position of Road Construction Lead Person.

Relying upon MANITOWOC COUNTY, *supra*, the Union argues that the County violated Sec. 6.08 when it failed to give the Grievant a thirty (30) day trial period to demonstrate that the Grievance “could perform adequately” the duties of Road Construction Lead Person. In MANITOWOC COUNTY, the Arbitrator awarded a thirty day trial period to the senior applicant; but this award resulted from the application of a posting provision that was a strict seniority clause. Given the differences in relevant contract language, the MANITOWOC COUNTY case is immaterial to the resolution of this dispute.

As set forth in Sec. 6.08, a precondition to receiving the thirty day trial period is that the employee “successfully bids.” In the present case, the Grievant has not “successfully bid” because he is not an employee “who can qualify for the job.” Based upon the facts of this case, the Grievant is not contractually entitled to the thirty day trial period set forth in Sec. 6.08.

For the reasons discussed above the County has violated the parties’ collective bargaining agreement. For the reasons also discussed above, the only appropriate remedy for the County’s violation of the parties’ collective bargaining agreement is to recognize the existence of this violation.

Based upon the foregoing and the record as a whole, the undersigned enters the following

### **AWARD**

1. The County violated the terms of the collective bargaining agreement when it did not provide the Grievant with a meaningful opportunity to show that he “can qualify for the job” of Road Construction Lead Person position posted in December 2007 prior to making the decision to not award this position to the Grievant.



2. The County did not violate the terms of the collective bargaining agreement when it failed to award the Road Construction Lead Person position to the Grievant and/or failed to award a trial period in the position to the Grievant.

Dated at Madison, Wisconsin this 5th day of August, 2009.

Coleen A. Burns /s/

---

Coleen A. Burns, Arbitrator

CAB/gjc  
7455