

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF SHEBOYGAN

and

LOCAL 1564, AFSCME

Case 145
No. 69170
MA-14510

Appearances:

Tom Rice, Director of Human Resources and Labor Relations, for the City.

Sam Gieryn, Staff Representative, AFSCME Council 40, for the Union.

ARBITRATION AWARD

The City of Sheboygan and Local 1564 selected me to serve as arbitrator for a bumping grievance. Hearing was held in Sheboygan, Wisconsin on November 17, 2009. There is no stenographic or other transcript of the proceedings. The parties filed post-hearing written argument-the last of which was received January 15, 2010.

ISSUE

The parties agreed that I should decide the following issue:

Did the Employer violate Article V of the contract by not allowing the grievant to displace a less senior employee and, if so, what remedy is appropriate?

DISCUSSION

Article V, Section 4 of the parties' contract gives an employee facing layoff the right to bump any less senior employee in the same or lower pay range if:

1. The affected employee is capable of performing the job of the employee with less seniority with familiarization only and not retraining. The employer shall determine the capability of the affected employee and such determination shall not be subject to the grievance procedure unless it is found to be arbitrary and capricious.

As reflected by the contract language, the City's determination can only be overturned if found to be arbitrary and capricious. Thus, I only have the authority to determine if the City's determination was a reasonable one. Applying that contractual standard, I conclude that the City could reasonably determine that the grievant was not capable of performing the job of Police Property Officer "with familiarization only". Therefore, the grievance is dismissed.

I begin with a consideration of the term "with familiarization only" in terms of the time period contemplated. The City's 8/5/09 memo denying the grievance suggests that "with familiarization only" should be equated with the ability to satisfactorily perform the job within one month. The Union does not specifically take issue with such a time frame. Article V, Section 4 (c) establishes a thirty day trial period for those who have bumped into a job. Thus, as a general matter, I find one month to be a reasonable time period to apply to the "with familiarization only" standard in the context of this dispute.

The Union contends the City's decision was arbitrary because it was "driven not by a reasonable assessment of the Grievant's capabilities, but instead by a willful desire to keep the incumbent in the position." In support of this argument, the Union: (1) compares the grievant's qualifications with those of the incumbent Police Property Officer when she was hired; (2) asserts that the grievant's current qualifications exceed those of the incumbent at the time she was hired; and (3) alleges that the City therefore treated the grievant in a "disparate" and thus arbitrary way by not allowing him to bump the incumbent.

I do not find the Union's analysis to be persuasive. The contract does not measure the reasonableness of the City's judgment by comparing the qualifications an incumbent possessed at the time of hire with the current qualifications of the employee who wishes to bump the incumbent. The contractual test is "capable of performing the job . . . with familiarization only" Put another way, the contract does not ask whether the grievant can step in and perform the job at the same level as a new hire but instead asks whether the grievant can perform the job at a satisfactory level "with familiarization only". Thus, the contractual standard for bumping an incumbent is higher than the performance standard applied to a new hire. Therefore, while I agree with the Union that the contract does not allow the City to measure the grievant's capability of performing the job against the apparently excellent performance of the incumbent Police Property Officer, the contractual measuring standard is whether the grievant was capable of stepping in and satisfactorily performing the Property Officer duties "with familiarization only."-not whether the grievant's qualifications would allow him to be hired off the street as a Police Property Officer.

While I have rejected the Union's analytical framework, it is nonetheless clear that the Union is correct when it argues that the grievant's job experience and performance are quite relevant to any reasonable judgment as to his capability to perform a different job "with familiarization only". The Union is also correct when it asserts that many of grievant's qualifications do match the qualifications for the Police Property Officer listed in the job description. However, the evidence presented as to the actual nature of the Police Property Officer's duties makes it clear that it is a complex job requiring an exceptional measure of

precision and substantial knowledge of process and procedures if it is to be satisfactorily performed. The grievant lacks any knowledge of the relevant process and procedures and the position from which he was laid off did not require an exceptional level of precision. While the grievant may well have been able to perform this job with “re-training”, the complexity of the job satisfies me that the City could reasonably conclude that the grievant would not be able to satisfactorily perform the job with one month of “familiarization only.” Therefore, I conclude the City did not violate Article V when it denied the grievant’s request to bump the incumbent Police Property Officer.

Dated at Madison, Wisconsin, this 1st day of February, 2010.

Peter G. Davis /s/

Peter G. Davis, Arbitrator