

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SHEBOYGAN COUNTY HIGHWAY DEPARTMENT EMPLOYEES,
LOCAL 1749, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

and

SHEBOYGAN COUNTY

Case 414
No. 69079
MA-14469

(Bridge Crew Foreman Grievance)

Appearances:

Mr. Sam Gieryn, Staff Representative, 187 Maple Drive, Plymouth, Wisconsin appearing on behalf of Sheboygan County Highway Department Facilities Employees, Local 1749, Wisconsin Council 40, AFSCME, AFL-CIO.

Mr. Michael Collard, Human Resources Director, Sheboygan County, 508 New York Avenue, Sheboygan, Wisconsin, appearing on behalf of Sheboygan County.

ARBITRATION AWARD

Sheboygan County Highway Department, Local 1749, Wisconsin Council 40, AFSCME, AFL-CIO hereinafter "Union" and Sheboygan County, hereinafter "County," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot was assigned the case. Hearing was held before the undersigned on February 11, 2010 in Sheboygan, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received by April 12, 2010 at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

Did the Employer violate Article 27 of the collective bargaining agreement when it awarded the Bridge Crew Foreman position to a junior employee in lieu of David Black? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due to him/her for such period of time involved in the matter.

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ARTICLE 27

SENIORITY

It shall be the policy of the department to recognize seniority.

- (a) **Lay-Offs:** If a reduction of employee personnel is necessary the last person hired shall be the first person laid off and the last person laid off shall be the first person recalled.
- (b) **Job Posting:** Whenever any vacancy occurs due to a retirement, quit, new position, or for whatever reason, the job vacancy shall be posted within twenty-one (21) days following the position becoming vacant. The vacancy shall be posted on all bulletin boards for a minimum of five (5) work days. The job requirements, qualifications, and experience shall be a part of the posting and sufficient space provided for interested parties to sign

said posting. If no regular employee makes application for this job by signing the posting, it shall be given to the probationary employee applying (signing) who has the most seniority, subject to the right of the Employer to determine whether the employee applying for said position has the proper qualifications and experience to perform the job. If an employee signs up for a posted regular position and receives said position, he shall be ineligible to sign any subsequent posting for a period of two (2) years, and if an employee signs for a special winter position and receives said position, he shall be ineligible to sign any subsequent special winter position posting for a period of two (2) years. If a position remains vacant and the department's needs require it to be filled, an employee with a County Maintenance classification can be assigned/appointed to said position but will not be subject to the posting freeze. Non-established employees (probationary) who are assigned or appointed to a position will not be subject to the two (2) year freeze. Employees will not be allowed to post out of their initially hired position for a period of two (2) years. Any posting freeze provided for in this article may be waived by mutual consent of the Highway Commissioner and the Union.

A copy of the Job Posting with an indication of the successful applicant shall be sent to the President and the Secretary of the Local.

- (c) Reposting of Jobs: Jobs which the County has been unable to fill from the above posting procedure, or from outside the bargaining unit will be reposted according to the posting requirements after a six (6) month period as needed.
- (d) Trial Period: An employee moving to a different classification will have ten (10) working days trial period in said position. An employee shall go back to the former position if so directed by the employer or voluntarily goes back on own initiative. Continuance in or beyond ten (10) working days shall be deemed as satisfactorily completing the trial period.
- (e) Qualifications Dispute: If there is any difference of opinion as to the qualifications of an employee the Highway Committee and/or Highway Commissioner may take the matter up for adjustment through the Grievance Procedure.

- (f) Accumulation: The seniority rights of an employee shall continue to accumulate during periods of layoff and for other legitimate reasons.
- (g) Notice of Recall: The Notice of Recall for any who has been laid off shall be mailed to the last known address of the employee on the books of the County. Such Notice shall be deemed effective upon date of receipt of registered mail.

Employees on layoff are responsible for notifying the County of any changes in their mailing address. Notice of change of address should be given to the Highway Department Office.

If employee fails to report within three (3) days after having been recalled from layoff, he/she shall be considered terminated.

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BACKGROUND AND FACTS

The Grievant, David Black, is a twenty year employee of the County Highway Department having been hired on June 19, 1990. The Grievant has worked as a Center Liner, Grader Operator, and for the last ten years as the Backhoe Operator. Prior to his employment with the County, he worked for five years in private sector construction. The Grievant never served as a member of the Bridge Crew nor did he ever fill in for someone assigned to Bridge Crew. At all times relevant herein, Gary Mentink was a County Highway Department Patrol Superintendent and Greg Schnell was the County Highway Commissioner.

The County posted the position of Bridge Crew Foreman on April 14, 2009. The posting read as follows:

REQUIREMENTS

This position under the supervision of the patrol superintendents requires the ability to work with, supervise, and instruct other members of the bridge crew in the construction and maintenance of bridges, culverts and other related drainage structures. The applicant shall assume responsibility of all workers that are under his/her control.

The position requires the applicant to have knowledge of: fabrication of concrete forms, reinforcing steel and related materials in accordance with plans and detailed specifications; forming, pouring, finishing and curing of the different type of concrete; operation of air hammers, sand blasting equipment and other bridge maintenance equipment; bearing and expansion joint mechanisms. The

applicant must have the ability to interpret the State of Wisconsin Standard Specifications for Road and Bridge Construction, to complete and maintain comprehensive records and reports and have an understanding of safe work practices. The successful applicant should have any combination of training and experience equivalent to two years experience in the construction and maintenance of bridges, culverts and other related drainage structures. The position requires that the individual perform duties as part of the bridge inspection team with the ultimate responsibility of becoming the bridge inspection team leader. A commercial driver's license is required.

This description has been prepared to assist in properly evaluating various classes of responsibilities, skills, working conditions, etc., present in the classification. It is intended to indicate the kinds of tasks and characteristic levels of work difficulty that will be required of positions that will be given this title. It is not intended as a complete list of specific duties and responsibilities. Nor is it intended to limit or in any way modify the right of any supervisor to assign, direct and control the work of employees under this supervision. The use of a particular expression or illustration describing duties shall not be held to exclude other duties not mentioned that are of a similar kind and level of difficulty. If there are any questions regarding this job posting, please contact the Highway Commissioner.

In accordance with the 2007-2008 Employees' Labor Contract Article 27 Seniority (d) the employee awarded the position will be on a trial period for ten (10) working days and also (b) employees having completed the trial period will be ineligible to sign or be awarded any other position for two years without the joint consent of the Highway Commissioner and Union Officials.

APPLICATIONS

Applications for the above position will be considered on the basis of qualifications, ability and seniority. Appointment for the position will be made by the Highway Commissioner. This notice will be posted from April 14, 2009 through April 20, 2009.

Three employees signed the posting – the Grievant, Jim Foshag, and a third bargaining unit member. County Highway Commissioner Greg Schnell interviewed the three internal applicants and the position was awarded to Foshag.

The Union filed a grievance on May 11, 2009 asserting that the “Employer awarded least senior person to position of bridge crew foreman” in violation of Article 27. The requested remedy was to award position to most senior employee which the Union posited was the “established practice of Highway Department” and for the Union to be made whole.

Schnell responded to the grievance in a letter dated May 12, 2009:

Dear Mr. Ziegelbauer:

On Monday, May 12, 2009 I was presented with the above mentioned grievance from Local 1749.

In response to the above mentioned grievance Article 3, Management Rights Reserved, states:

“Unless otherwise herein provided, the management of work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer.”

Article 27, section (b) relating to job postings, qualifications and experience is referenced two separate times. After interviewing the three candidates two of the candidates had no bridge experience with the County or with a previous employer. The candidate who was awarded the position is a certified bridge inspector, has been a bridge crew member for the past 4+ years and has acted as bridge crew foreman.

Article 27, section (e) Qualifications Dispute, “If there is any difference of opinion as to the qualifications of an employee the Highway Committee and/or Highway Commissioner may take the matter up for adjustment through the Grievance Procedure.” If the union’s belief is all jobs are awarded solely on seniority then why would it be necessary to have an article that addresses qualification disputes?

Also, on the bottom of the job posting it clearly states “Applications for the above position will be considered on the basis of qualifications, ability and seniority. Appointment for the position will be made by the Highway Commissioner.” Qualification and ability are key elements in the decision process when dealing with a position with the responsibility of bridge crew foreman.

Based on the above information I must respectfully deny the grievance.

/s/
Greg Schnell
Highway Commissioner

Additional facts, as relevant, are contained in the DISCUSSION section below.

DISCUSSION

The issue in this case is at what point in the posting process does the County consider an employee's seniority, if ever?

The parties' collective bargaining agreement contains a broad management rights clause that includes the right to set qualifications for positions and to make promotional decisions. The Union does not dispute the County's right to set qualifications.

The County's promotional rights are limited by the language of Article 27 – Seniority. Article 27 begins by stating in sub-section (a) that the parties will “recognize seniority.” It continues in sub-section (b) to address job posting and differentiates between regular employees and probationary employees. Of specific relevance is the third sentence which states, “[t] job requirements, qualifications, and experience shall be a part of the posting and sufficient space provided for interested parties to sign posting.” This is the only sentence that addresses qualifications for regular employees and notably absent is any reference to seniority.

The fourth sentence of Article 27 reads, “[i]f no regular employee makes application for this job by signing the posting, it shall be given to the probationary employee applying (signing) who has the most seniority, subject to the right of the Employer to determine whether the employee signing for said position has the proper qualifications and experience to perform the job.” Thus, the parties definitively stated that probationary employees will be evaluated for proper qualifications and experience and that the most senior employee deemed minimally qualified will be awarded the position. This is a sufficient ability clause. This type of clause forbids the County from selecting even a vastly better applicant if the senior bidder meets the minimum qualifications. Not only does this sentence evidence agreement by the parties as to how they intended to balance their competing interests, but also shows that they are capable of drafting harmonizing language.

None of the remaining sub-sections - (c) addressing reposting, (d) addressing the trial period, (f) addressing how seniority is accumulated, and (g) addressing recall -, include any reference to seniority. Of significance is sub-section (e) which was created to address qualification disputes. The section directs that disputes regarding an employee's qualifications will be addressed via the grievance procedure. Interestingly, the party initiating the grievance is the Highway Committee or the Highway Commissioner. Application of this language is

difficult to imagine. It neither indicates when it is exactly that the County is supposed to grieve a qualification dispute nor is it clear what the remedy would be since there is no language affirmatively requiring the County to take any action, much less award a position to the most senior employee. It is possible to read together sub-sections (a), (b) and (e) and conclude that regular employees are to be awarded positions based on seniority and if the County does not find the most senior applicant to be qualified, then it – the County – would file a grievance, but that is not the only interpretation of these sub-sections. This conclusion would adopt the Union’s strict seniority assertion, but also reads meaning into the second sentence of (b). Regardless, the existence of (e) establishes that the parties envisioned a scenario where there was disagreement as to qualifications and if qualifications were not to be considered, there would be no reason to have fashioned a resolution process.

The language of Article 27 is vague and the parties’ intent cannot be ascertained with any degree of confidence. There is no question as to the priority of criteria to be considered for the probationary employees. The language supports an inference that regular employees are subject to a “job requirements, qualifications, and experience” evaluation, but if and when seniority is to be considered is unclear. Given the ambiguity, it is necessary to look to the labor agreement as a whole and extrinsic evidence including bargaining history and past practice to determine the parties’ intended meaning.

Looking to the remainder of the labor agreement, the only article other than Article 27 which lists seniority is Article 21 – Vacation. That provision reads, “[w]henver the County feels too many employees have requested the same vacation period, the most senior employee shall have preference for said time period.” The parties were therefore fully capable of stating when and how seniority was intended to apply for purposes of vacation selection and their failure to similarly state seniority preference for postings is conspicuous.

I now move to the Union’s claim of past practice. The Union argues that the County must follow strict seniority as evidenced by past practice. The County denies the existence of a binding past practice. A binding past practice constitutes an implied term of the contract and will only be recognized as such if there is proof that it is 1) unequivocal, 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period time. Elkouri and Elkouri, *How Arbitration Works*, 6th ed. p. 608 (2008). An employer’s nonuse of a right does not mean that it has been lost. *Id.*

The evidence in support of the Union’s position includes one letter from 1994, five letters from 1997, eight letters from 2001, one letter from 2005 and one letter from 2007 which specifically state that the successful candidate was awarded the position “based on seniority.” There are also three letters from 2006, three letters from 2007, and one letter from 2007 which award the posted position to a named individual and there is no reference to seniority. It seems unlikely that these are the only vacancies that were posted between 1994 and 2008 and the record is almost certainly incomplete as to what criteria the County used to award posted positions. I also note that the County revised its letter and removed the “based

on seniority” reference intermittently from some letters, raising questions about the basis of the selection in some cases.

Ultimately, the Union is asking that I conclude that the contract has been amended to include a strict seniority clause for purposes of postings for regular employees as a result of a binding past practice. Strict seniority clauses are few and far between in modern collective bargaining agreements. Bornstein, Gosline, Greenbaum, *Labor and Employment Arbitration*, p. 27-11 (Mathew Bender & Co., 2000). I neither find that there is a binding past practice nor am I willing to simply assume the existence of such a valuable benefit to the Union when there is insufficient language to support a conclusion that the parties’ intended a strict seniority posting procedure.

The Union offered testimony regarding a posting which it points to as evidence of the County’s knowledge that seniority is the controlling factor when determine the successful posting applicant. The posting was for a grading crew foreman position that was ultimately awarded to Dale Schraut. Schraut was the third highest seniority applicant that signed for the position. Testimony was offered by the Union that the County brought the two higher seniority applicants into the office and persuaded them to decline the position. Neither of those two applicants testified and Mentink did not recall meeting with either of the applicants. This was not the only position that went through a series of declinations before an applicant was awarded a position. I do not find this instance sufficient evidence to support application of strict seniority to regular employee posting.

The Union next asserts that the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is applicable and supports its position. The maxim provides that where certain items are specifically delineated and others are not, the parties intended only the stated exclusions and that additional exclusions should not be read into the language. The Union applies this maxim to the third sentence of sub-section (b) concluding that since the parties did not specifically state that the County would consider qualifications and experience before seniority for regular employees, the parties did not intend for that evaluation to occur. The problem with this argument is that in (b) although they did not include specific language like they did with the probationary employees, the parties did refer to qualifications for regular employees and did not indicate that seniority would be considered. Application of the Union’s principle is therefore a two edged sword – if each listing is assumed to be exhaustive, and job qualifications and experience were included for regular employees, but seniority was excluded, it is equally reasonable to conclude that the parties meant to have these decisions driven by work history alone.

This case presents language that can only be interpreted based on inference and extrinsic evidence. Sub-section (b) definitely includes “requirements, job qualifications and experience” as part of the posting procedure for regular employee, but does not reference seniority. Sub-section (b) and Article 21 – Vacation - provide language that specifies how seniority shall be considered, therefore the exclusion of any reference to seniority in sub-section (b) for regular employees must be acknowledged as intentional by the parties. Past

practice indicates that the parties have awarded postings based on seniority, but have also deviated when the County concluded an applicant was not qualified. I am ultimately persuaded that the parties intended there to be a qualification and experience component to postings for regular employees. Accepting this and the County's preliminary determination that the Grievant did not meet the qualification and experience requirement, I therefore move to the issue of whether the Grievant was qualified for the Bridge Crew Foreman position.

The County's decision will be upheld so long as there is specific and understandable evidence to show the Grievant did not meet the qualifications and that the determination by the County was free of caprice, arbitrariness or bad faith. Recognizing that when the consequence of a qualification evaluation is a job, Arbitrator Sidney L. Cahn explained in *AMERICAN CYANAMID*, 52 LA 247 (Cahn, 1969):

The determination of qualifications must be based on objective criteria, as determination must ultimately depend upon factual considerations for even though the Company's actions may not be arbitrary, capricious, discriminatory or made in bad faith it still may be an erroneous one. To treat it as a factual determination rather than one based upon subjective criteria would permit evaluation which should be subjected to the scrutiny envisioned by the grievance procedure.

The job posting states the applicant is required to "have knowledge of: fabrication of concrete forms, reinforcing steel and related materials in accordance with plans and detailed specifications; forming, pouring, finishing and curing of the different type of concrete; operation of air hammers, sand blasting equipment and other bridge maintenance equipment; bearing and expansion joint mechanisms ... must have the ability to interpret the State of Wisconsin Standard Specifications for Road and Bridge Construction, to complete and maintain comprehensive records and reports and have an understanding of safe work practices ... [and] should have any combination of training and experience equivalent to two years experience in the construction and maintenance of bridges, culverts and other related drainage structures." The qualifications as listed in the position description for the Foreman – Bridge Crew position are:

- High school diploma or equivalent
- Combination of training and experience equivalent to two years experience in the construction and maintenance of bridges, culverts and other related drainage structures.
- Good physical condition, with ability to lift items weighing 100 pounds with occasional lifting and/or carrying of objects weighing 50 pounds. Ability to climb for maintenance activities.

- Valid Commercial Drivers license, Class A, B, C, D – ability to obtain endorsements H and N.
- Understands and effectively carries out oral and written instructions.

Experience is an important factor in determining ability and the job description and job posting both indicate that “[t]he successful applicant should have any combination of training and experience equivalent to two years experience in the construction and maintenance of bridges, culverts and other related drainage structures.” The parties’ labor agreement does not designate which – qualifications or experience – is to be given greater weight.

The Grievant testified that since he had been operating the backhoe, half of his time was spent digging with the bridge crew in order to lay piping. This directly contradicts Robert Ziegelbauer, the Bridge Crew Foreman from approximately May 2007 to May 2009 who testified that the total time the Grievant worked with the bridge crew when he was Foreman was a “few days, week maybe.” The Grievant testified that he “used to” be able to lift 100 pounds and when asked during cross examination about that response, he indicated that “sure” he could lift 100 pounds and that he “didn’t know” why he answered otherwise on direct examination. The Grievant testified he worked with his brother who has a business that fabricates concrete forms, assisted in constructing a bridge and was unfamiliar with bridge maintenance equipment. He testified he did not have any experience in bearing and expansion materials, in reading bridge plan and specifications, and was unfamiliar with Wisconsin bridge standards.

This is not a case where the senior employee has some experience and the junior employee has just a little less experience. Rather, the Grievant had no direct experience in bridge work and he admitted so when he was interviewed by the Highway Commissioner. Moreover, the Grievant questioned Schnell as to why he (the Grievant) would need to attend Bridge Inspector school since he only had a short time of County employment before he retired and that he knew that Ziegelbauer, the prior Bridge Crew Foreman, never went to school. The Grievant testified that he told Schnell that “he probably would not go to school” and further, that he “probably would not be interested in the position if [he] had to go to school.” The Grievant explained that he desired the Bridge Crew Foreman position because it was less physically demanding than his current position and it paid more money. While these are justifiable reasons to seek a position, the Grievant basically told Schnell that he was looking for an easier job and had no interest in receiving training in order to better perform the position.

The Union argues that the two previous Bridge Crew Foremen did not meet the qualifications as listed in the job description and/or posting and therefore it was inappropriate for the County to subject the Grievant to a qualifications evaluation. Assuming the Union is correct in its evaluation of Ziegelbauer and James Greunke, that does not negate the County’s right to require a candidate meet minimum job qualifications.

The Union argues that Article 27 does not impose a qualification requirement on regular employees. I disagree. Absent clear contract language to the contrary, it is axiomatic that an employee should be able to do the work. Moreover, the contract itself, reasonably read, recognizes that an applicant must be qualified. The third sentence lists the criteria that will be included on the job posting. There would be no reason to list the job qualifications and experience necessary to perform a posted position if the County did not have some ability to evaluate a regular employee's qualifications and experience as listed on the posting.

This conclusion is supported by sub-section (g) when read in concert with sub-section (b). It has to be presumed that the collective bargaining agreement is drafted for regular employees and not for probationary employees. Therefore, given that a probationary employee may only be considered for a job posting if no regular employee has signed, the language of (g) makes it clear that regular employees are subject to a qualification determination. This is so because the parties drafted language that creates an appeal mechanism to the County qualification determinations. Had it not been the parties' intention for the County to evaluate employees and make a determination as to whether an employee was qualified, there would be no appeal mechanism.

In conclusion, seniority rights are only given by contract. "Recognizing seniority" does not translate into a strict seniority clause. It promises that seniority will be a factor, but does not give it controlling weight. There is no binding past practice that amends the labor agreement and adopts strict seniority. The County's qualifications and experience requirement were reasonably related to the position and the Grievant was found to not meet the requirement. That determination is supported by the record and there is no evidence to suggest that the County's decision was unreasonable, arbitrary or capricious. Thus, I do not find a contract violation.

AWARD

1. The Employer did not violate Article 27 of the collective bargaining agreement when it awarded the Bridge Crew Foreman position to a junior employee in lieu of David Black.
2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 20th day of July, 2010.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

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