

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PIERCE COUNTY

and

**PIERCE COUNTY HIGHWAY DEPARTMENT EMPLOYEES,
LOCAL 556, AFSCME, AFL-CIO**

Case 147
No. 70177
MA-14891

Appearances:

Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin, appeared on behalf of the Union.

Bradley Lawrence, Corporation Counsel, Pierce County Courthouse, Ellsworth, Wisconsin, appeared on behalf of the Employer.

CONFIRMATION OF ARBITRATION AWARD

Pierce County Highway Department Employees, Local 556, AFSCME, AFL-CIO, herein referred to as the "Union," and Pierce 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 Ellsworth, Wisconsin, on December 14, 2010. At the conclusion of the hearing, the parties each made oral argument and the arbitrator gave a bench decision and ordered that the grievance be denied. The following confirms that bench decision.¹

ISSUES

The parties agreed to the statement of the issues as follows:

¹ The parties agreed that my recordings of the hearings are for my own notes, would not be available to either party and would be erased after the award is rendered.

1. Did the Employer violate Article 5 of the collective bargaining agreement when it awarded the grading foreman position to the least senior employee without consideration of seniority?
2. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

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ARTICLE 5 – JOB POSTING

Section 1. All new or vacated positions shall be posted at the Ellsworth shop for five (5) work days, on a sheet of paper stating the job to be filled, on what date it is to be filled, the rate of pay, and this notice shall be posted immediately upon a vacancy. The County shall notify any employee who is on vacation or on sick leave during the five (5) day posting period, of all new or vacated posted positions by registered mail.

Seniority and qualifications shall be considered in the selection of the applicant for the new or vacated position. In determining qualifications when filling a position in Classifications I and II, the County shall:

- a. Conduct an interview; and
- b. Consider the applicant's past experience, prior training, skill and personnel record with the County.

Within five (5) days following the expiration of the posting period, or at such other time as the parties may mutually agree, County and Union representatives shall meet jointly and attempt to mutually agree on the nominee for the position, and if a mutual agreement is not reached at this point, a grievance may be filed by the Union. The successful applicant shall be allowed three (3) calendar months to qualify for the position. If the Employer determines that an employee is not qualified, within said period, the Employee shall be returned to his/her former position. Employees may return to their former position on their own volition in the first calendar month of their qualifying period. Interim appointments may be made by the Commissioner until such time as a mutual agreement is reached by both parties. Maintenance employees shall not sign a posting for a seasonal position, and no one shall sign more than one (1) job posting within a twenty-four (24) month period, once he/she is placed in a position through the job posting procedure. If only one person signs the posting and that person has not fulfilled the two-year waiting period, then the two (2) year waiting period may be waived upon mutual consent. If more than one

person signs the posting, then the two (2) year waiting period shall be observed, regardless of seniority. If all persons posting for the position have fulfilled the waiting period or are unaffected by it, then seniority shall prevail.

Section 2. Any employee failing, for any reason, to qualify for any job or new position may return to the job he/she formerly held. If said employee feels dissatisfied, he/she may appeal said decision through the grievance procedure.

Section 3. Seasonal jobs (sand blaster, center liner and boiler operator) shall not be posted unless the position is operational for three hundred (300) hours or more.

Section 4. Promotion to a higher job classification shall be within the discretion of the Highway Committee, Highway Commissioner, and the Union, taking into consideration qualifications and seniority. The Highway Committee and the Highway Commissioner shall determine qualifications.

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FACTS²

On March 10, 2010, the Employer posted an opening for the position of Outside Foreman. The position is one of a crew leader who spends approximately 55% of his or her time supervising, inspecting, laying out and participating in the construction of roads. Five employees duly applied for the position with the following approximate seniority (year of first employment); Don Hines (1986), Rick Kormman (1990), Michael Shields (1988) Evan Sieben (2003), and Brady Scharpen (2007).

Chad Johnson is a licensed engineer and the Highway Commissioner. His immediate subordinate is Highway Department Construction Foreman Jim Harris. He conducted the interviews in question with Harris. Johnson established interview questions which were all job-related well in advance of the interviews. They included, but were not limited to, questions designed to elicit an applicant's experience in heavy construction, ability to read highway construction plans, ability to articulate construction procedures, and ability to maintain safety. The qualifications for this position stated on the job description include; reading and understanding construction plans and two years' experience in the field of design, estimating, and road construction or a combination of education and experience that provides the equivalent. Although Johnson established questions, he did not establish a list of expected answers or benchmarks for evaluating answers.

² Additional facts are stated in the discussion.

Johnson and Harris jointly interviewed all five candidates. Johnson met the following Monday with Union leaders and essentially let it be known that he intended to select Scharpen. Union leaders have never disputed that Scharpen is qualified for the job, but objected because he was the least senior person. They asked Johnson to issue a scoring of the answers to the questions asked at the interview. He did this. Scharpen was ranked highest under that scoring. Scharpen was selected for the position and the Union grieved the matter. The same was properly processed to arbitration.

DISCUSSION

It is undisputed that the agreement requires the Employer to consider seniority in making these selections. Nonetheless, no employee can be selected for a position if he or she does not possess the minimum qualifications for the job. The sole issues are whether the Employer set the "minimum qualifications" which are in dispute at a level intentionally so high to result in the selection of the junior employee, take other steps to improperly assist Scharpen, or improperly disqualify any of the senior applicants. I concluded that the Employer did not and, therefore, denied the grievance. Had the Employer done otherwise, the result in this matter might well be different.

The Employer disqualified all of the senior employees because they did not meet its minimum qualifications. It disqualified Hines because he could not provide appropriate leadership with respect to safety. Hines missed a question in the interview in which he was required to answer that he would call for utility location before excavating. He has a history of safety issues reflected in his personnel record. The agreement specifically authorizes the Employer to use personnel records in evaluating employees. Finally, he is on a last-chance disciplinary agreement for a safety issue. The evidence strongly supports the judgment that he is not likely to be able to provide leadership to fellow employees with respect to safety.

It disqualified the other three senior employees on the basis that they were unable to read highway construction plans. The job description requires that ability. The plans used to evaluate all of the applicants were of the type currently used on more sophisticated jobs. The Employer had an immediate need for an employee who could read plans at that level of sophistication. It would take about 40 hours of basic training to be able to read plans. However, it is unlikely that an employee would be proficient at using plans in his or her daily responsibility. This was a reasonable requirement. It is unlikely that the Employer could train one of the senior employees to effectively read plans in the time necessary to meet its reasonable needs.

There was no evidence offered to support the allegation that the successful candidate was given any advance help in preparing for the interview process. There was no evidence of any effort to give him an advantage that he already did not have.

The preponderance of the evidence indicates that the senior employees were disqualified because they did not meet the reasonably set minimum qualifications for this position.

AWARD

That the grievance is hereby denied.

Dated at Madison, Wisconsin, this 17th day of December, 2010.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

SHM/gjc
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