

BEFORE THE ARBITRATOR

In the matter of an Arbitration Between

MARINETTE COUNTY

and

**MARINETTE COUNTY PROFESSIONAL EMPLOYEES UNION,
LOCAL 1752-A, AFSCME, AFL-CIO**

Case 202
No. 69913
MA-14802

Appearances:

Mr. Randall W. Etten, Staff Representative, AFSCME, 3347 Mardon Lane, Green Bay, Wisconsin 54313, appeared on behalf of the Union.

Ms. Gale Mattison, Corporation Counsel, Marinette County Courthouse, 1926 Hall Avenue, Marinette, Wisconsin 54143, appeared on behalf of the County.

ARBITRATION AWARD

On June 6, 2010 the Marinette County Professional Employees Union, Local 1752-A, AFSCME, AFL-CIO and Marinette County filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on January 6, 2011 in Marinette, Wisconsin. No formal record was taken. Post-hearing briefs were submitted and exchanged by March 4, 2011.

The parties stipulated to the following issue:

Did the County violate article 4.02 of the collective bargaining agreement when it determined the Grievant did not meet the minimum qualifications for the In-Home Social Worker position and did not award her the position?

If so, what is the appropriate remedy?

The parties further stipulated "At issue is the qualification 'Requires one-year supervised experience and/or training with SED children in the Mental Health and/or family based social work services field.'"

SED is an acronym for severely emotionally disturbed.

BACKGROUND AND FACTS

Marinette County posted a vacant position of In-Home Social Worker late in calendar 2010. The Job analysis for the position provided the following;

This position provides a full range of case management and intensive in-home services including screening evaluation, on-going case management, therapist aide to therapist in-home family psychotherapy, development of wrap-around teams, consultation and interagency coordination services to a targeted group of severely emotional disordered children.

The posting included sections on Essential Job Functions, Required Abilities, Qualifications, Environmental Conditions of the Workplace, Physical Demands and Additional Duties. Each of the sections set out certain expectations or conditions of the job. Critical to this proceeding, one of the qualifications set forth on the posting was:

Requires one-year supervised experience and/or training with SED children in the Mental Health and/or family based social work services field.

The grievant, Kelly Badker, applied for the position on December 2, 2009. She was not selected. Joann Liska, a supervisor no longer employed by the County, determined that the grievant lacked "...one-year supervised experience and/or training with SED children in the Mental Health and/or family based social work services field." Liska issued a memo seeking a substitution of skills and abilities, which provided: "The position requires one-year of supervised experience and/or training with SED children in the Mental Health and/or family based social work services field. The applicant has six months. The substitution requested is to utilize the experience/training indicated on the attached sheets for the remaining six months."

In essence, the supervisor was suggesting a substitution of other experience for that found on the posting. The suggestion was subsequently rejected. It was the testimony of the grievant and other witnesses that the substitution was a suggestion of the supervisor and not the grievant or the Union. Both the grievant and Union believed that the grievant qualified for the position without any substitution of experience.

An interview was subsequently conducted in January involving Badker, Sheri Millard, who is a case manager and also a Union Steward, and Robin Elsner, the Director of Health and Human Services. At the time neither Badker nor Millard were aware of the request to substitute experience. It was Badker's testimony that Elsner indicated that he felt she was qualified and would do a good job. She indicated that Elsner indicated that he could work with her qualifications. Millard testified to much the same, and further indicated that Elsner made reference to a combination of qualifications. Elsner testified that he was looking for a years experience with SED children. He felt the experience could come from mental health or

family or a combination of the two. Elsner testified that he advised Badker and Millard that he would consider the grievants qualifications, and was willing to work with her. He testified that he believed that Liska had already reviewed the grievant's qualifications, and that was the context in which he spoke.

Following the meeting, Badker was asked for more information relating to her work history. It was Elsner's testimony that when he subsequently reviewed Badker's qualifications no combination of training and experience got her to 1 year of SED experience. Badker was denied the position because she lacked the 1 year SED experience.

On January 29, 2010 the Union filed a grievance which contends that the grievant should have been given the position based upon her existing experience.

The grievant has worked for the County as a Social Worker since January of 2000. The Union's post-hearing brief summarizes the record and describes her duties as follows:

In this capacity, she works primarily with elderly and physically disabled consumers. Her duties include completing initial assessments of the needs of consumers when they enter into the social service system. In this process she works directly with the consumer, immediate family and care providers to develop and establish an ongoing service plan. This requires the coordination of services that are to be directly provided to the consumer, as well as the short and long term planning for the consumer to remain living in the community. In doing this, direct contact is made with family, including spouses, children, parents and grandchildren. These individuals act as the core providers in keeping the consumer surrounded by the services to ensure that they continue to live in the least restrictive environment.

These plans are designed to assist the consumer in areas such as socialization, medication management, scheduling of medical appointments and transportation, among other duties. Services are also coordinated to assist the care providers, including guardians, as well as the previously established core of support persons in the consumer's life.

In Ms. Badker's over eleven years of experience she has worked with dozens of consumers, including providing direct services to children under the age of eighteen (18) on two occasions.

Before joining the County, the grievant had served two internships as a student at UW-Green Bay. She participated in a Junior Field practicum in a Medical and Psychiatric center for a total of 84 hours and in a Senior Field practicum at a Family Independence Agency for a total of 480 hours. Both were credited as SED related, and the grievant was given credit for 584 hours which the County treated as 6 months experience.

The grievant provided evidence of other training and experience, none of which was credited as SED related. One of the grievant's work experiences was as a substitute teacher for a K-12 school district for a period of one school year. She was given no credit for SED experience since children with emotional disturbance issues were mainstreamed with other children in the classroom.

The grievant brings a good deal of experience to the application process. She does not bring a year of SED background.

Dan Powel, a Psychiatric Nurse, testified that in 2003, he was awarded a position under circumstances where he did not have the required minimum number of hours background. He was selected by Elsner, who was the Community Support Program Manager, at the time. Powel testified that the hiring system has not really changed in the interim. He further acknowledged that there have been a number of directors of Health and Human Services in the interim.

**RELEVANT PROVISIONS OF THE
COLLECTIVE BARGAINING AGREEMENT**

3.01 Management Rights

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

. . .

- B. To manage and direct the work force, to make assignments of jobs; to determine the size and composition of the work force, to determine the work to be performed by Employees, and to determine the competence and qualifications of Employees.

. . .

4.01 Filling a New Job or Vacancy Definition

- A. Definition. A vacancy shall be defined as:
 - 1. A newly created job
 - 2. A job opening created by termination or transfer of existing personnel.

. . .

4.02 Employee Selection

In selecting Employees for vacant positions, the most qualified applicant shall be selected. If qualifications are relatively equal, the most senior bargaining unit applicant shall be promoted. The applicant pool may contain applicants who are County Employees and applicants who are not County Employees. Qualified County Employees will be considered before candidates who are not County Employees. The Employer's determination of selection criteria and its application of the criteria shall not be arbitrary or capricious.

POSITIONS OF THE PARTIES

It is the position of the Union that the grievant qualifies for the posted position. The Union's view is based in part on how it reads the disqualifying sentence. In its argument at hearing and in its post-hearing brief, the Union places emphasis on the term "or". It notes that the sentence can be read to say the following:

Requires one year supervised experience OR training with SED children in the mental health OR family based social work services field.

Read in this light the sentence is alleged to permit any single or combination of experiences to satisfy the requirement. And so an individual who possessed one year of supervised experience would qualify for the position. The Union takes issue with the County construction of the paragraph. It is this dispute over the construction of the qualifications provision that has led to this proceeding.

The Union notes County testimony about tightening up the application process, and disputes whether that has happened. The Union points to testimony which indicates that previous employees, who failed to meet minimum hiring standards, have been hired. To the extent the County uses posted qualifications as a tool to disqualify applicants who they don't want to move, it is the view of the Union that the County has acted in an arbitrary and capricious manner.

The Union points to an initial meeting with Director Eisner where Union witnesses recalled Eisner indicating that any combination of experience could be used to qualify Badker, that Eisner was open to Badker moving into the position and that he could work with her qualifications. Following the meeting, Badker was asked to provide additional documentation, which she did. The Union finds it difficult to understand how Badker's qualifications for the position could have eroded following the meeting.

The Union reviewed the grievant's qualifications and noted that her two college internships totaled 564 hours. The grievant works an 1820 hour schedule. It is the view of the Union that under the formula the grievant should have been credited with 4 months of qualifying service. The fact that she was given 6 months is alleged to be arbitrary.

Ms. Badker worked for the same entity which provided her internship following her graduation from college. Her work was not credited for purposes of qualifying for the posted position. The Union questions how the internship can count and the subsequent work as a professional can not.

It is the view of the Union that work performed in family based services should count toward the minimum qualification for the posted job. The Union argues that training in this field is broad based and prepares the individual for work in the general Social Work field. Over the years a Social Worker develops the necessary skills to work effectively. It is the view of the Union that it is irrelevant what the age of the consumer is. The skills developed as a Social Worker are the key to working with varying populations. The difference in working with adult mental health issues and with SED is the community's providers of service. A veteran Social Worker can learn to work with the different systems. The Union points out that the grievant worked in a school system for a year and had experience working with SED children during that time.

It is the view of the County that the job requires one year of experience or training working with SED children. It is the view of the County that the grievant lacks such experience, and when questioned as to whether she had such experience the grievant testified that she did not know.

Ms. Badker was interviewed prior to a full check of her qualifications. The County contends that a manager, no longer employed by the County, requested that Badker be given credit for substituted experience. It is the view of the County that Elsnor believed that the grievant's credentials had been checked by a manager prior to the meeting, and it is in that context in which he spoke.

It is the view of the County that there is no practice of hiring individuals who do not meet the minimum hiring qualifications. One incident, in 2003, was referenced. There have been a number of Directors since then, and the system has been refined. One incident does not create a binding practice.

It is the view of the County that in order to qualify for the position, an applicant had to have one years experience working with SED children. That experience could come from either mental health or family based social work. The County contends that whatever disagreement the parties may have had construing the words of the posting, the grievant was advised during the hiring process that the desired experience was in working with SED children.

The County contends that it did not act in an arbitrary or capricious manner.

DISCUSSION

Under Article 4.02 the employer has the authority to establish selection criteria, subject to an arbitrary and capricious standard. In this proceeding, the County determined to establish 1 year experience with SED children as a selection criteria. The Union claim in this proceeding is that the County posting does not do so, but rather, allows for other training or experience to satisfy the selection criteria. The County disagrees. If the Union is correct, the posting would result in any Social Worker with 1 years supervised training or a Social Worker with 1 year in a family based social work services field, but no experience working with SED children, qualifying.

There is little in the record to rely upon in determining how critical SED experience is to the posted position. The Job Description provides:

This position provides a full range of case management and intensive in-home services including evaluation, on-going case management, therapist aide to therapist in-home family psychotherapy, development of wrap-around teams, consultation and inter-agency coordination services to a targeted group of severely emotional disordered children.

There was testimony that a veteran Social Worker can learn the child service support system. On its face, it does not seem arbitrary to ask for SED experience for a job which targets the SED population. It may be that a veteran Social Worker could learn the system. That does not make the decision to require directly related experience arbitrary or capricious.

The two sides read the qualifications sentence, and come away with competing views as to its meaning. It may be that the sentence is sufficiently ambiguous to permit two interpretations. However, I do not think the County interpretation is strained or contrived. There is no indication in the record that the County interpretation has varied, or evolved once the candidate pool became known. The County made known its view of what it required for the position early in the interview process. The fact that the qualifications sentence is capable of more than one interpretation does not render the qualification arbitrary or capricious. Given the nature of the position being posted, the County construction of the sentence so as to require SED experience is both rational and practical.

Article 3.01 gives to the Employer the right to determine qualifications of employees. Here, the County determined that the grievant had some qualifying experience. Elsner testified that the grievant was given 564 hours credit because he understood that the two clinicals involved work with SED children. Other training and experience was rejected because it did not involve SED children. The record supports the underlying factual basis of the determination. There is no evidence to the contrary. The grievant had one year of substitute teaching, with classrooms that included emotionally disturbed children. There was no indication as to how many of those children the grievant saw, or how much of her time was invested in those children. The grievant testified, and it was her testimony that she was unsure

whether she had 1 year experience with SED children. There is little basis in the contract or the record to second guess the employers conclusion that the grievant lacked 1 year SED experience. The fact that the County rounded the 564 hours up to 6 months does not change that conclusion.

Article 4.02 subjects the County's application of the selection criteria to an arbitrary and capricious standard. The selection process had flaws. Following receipt of the grievant's application, Liska sought to substitute more general credentials for the specific SED requirement. The stated reason for the substitution was that the applicant did not have 1 year experience with SED. It appears that Liska was the source of the request for substitution. It appears that neither the grievant nor the Union was aware that Liska had initiated the request for substitution of experience. It also appears that Elsner believed that the grievant or Union either initiated or supported the request for substitution.

Elsner met with the grievant and Millard in January. The parties testified to different versions of the conversation that transpired. While the confusion arising from the substitution request explains some of the variation in the discussion, it does not fully explain the differences. What I do think is clear from the discussion is that the grievant was directed to bring back more supporting data relative to her experience. She was not offered the job. At a minimum, there had to be some understanding that Elsner was not satisfied that the grievant had the requisite credentials. I also believe the grievant and the Union understood, even if they did not agree, that the County was looking for SED experience.

Ultimately the County concluded that the grievant did not have the 1 year of SED experience. It is difficult to conclude that this was an arbitrary decision. As a practical matter the grievant did not have the minimum qualification. This dispute attempts to parlay Elsner's remarks into a conclusion that the grievant sufficiently met the qualifications. I do not believe that to be the case. I do not believe the experience requirement was waived. There is no indication that the position was filled with a less qualified person or that the qualification was waived for someone else.

The Union points to the waiver of qualifications that occurred in 2003, involving Elsner as support for its position. I do not agree that a single incident, which arose 7 years earlier, can stand for the proposition that the County is not free to establish and require job related qualifications.

In summary, I do not believe the application of the selection criteria was arbitrary or capricious.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 26th day of April, 2011.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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