

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**COLUMBIA COUNTY PROFESSIONAL EMPLOYEES UNION,
LOCAL 2698-A, AFSCME LOCAL 2698-C, AFL-CIO**

and

COLUMBIA COUNTY

Case 303
No. 69888
MA-14787

(Leland Potter bumping grievance)

Appearances:

Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO appearing on behalf of the Union.

Joseph Ruf, III, Corporation Counsel/Human Resources Director, Columbia County, appearing on behalf of the County.

ARBITRATION AWARD

Columbia County, hereinafter “Employer”, and Columbia County Professional Employees Union, Local 2698-A, AFSCME, AFL-CIO, hereinafter “Union”, 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 Portage, Wisconsin, on October 12, 2010. Each party filed a post-hearing brief, the last of which was received April 2, 2011, and the record was closed as of that date.

ISSUES

The parties agreed to the following statement of the issues:

1. Did the Employer violate Article 7 of the Collective Bargaining Agreement when it declined to allow Grievant Leland Potter to bump into the victim-witness coordinator position in December, 2009?
2. If so, what is the appropriate remedy?

FACTS

The Employer is a Wisconsin county. The Union represents non-supervisory professional employees of the Employer, including professional social workers employed in its Health and Human Services Department and the victim-witness coordinators employed in the District Attorney's Office. Grievant Leland Potter was hired by the Employer as a professional social worker in the Employer's Health and Human Services Department on March 3, 2008. He functioned as a child abuse investigator for its Child Protective Services Division throughout his tenure with the Employer. He was a member of the bargaining unit represented by the Union. The position he occupied required at least a bachelor's degree in social work and a certificate as a social worker. The position requires an essential skill, among others, of the "Ability to relate to people (sic) unprejudiced and understanding manner."

Mr. Potter graduated with a BA in psychology in 2004 and a Masters of Social Work in 2006. He has some prior experience in intake in juvenile court, and working with homeless people in the Porchlight, Inc. program and conducting juvenile victim-offender conferencing.

The Victim-Witness program was created as Ch, 949 and 950, Stats, to meet the requirements added to the Wisconsin Constitution, as Article 1, Section 9m in 1993. The Employer maintains two positions of victim-witness coordinator in the District Attorney's Office. The position of victim-witness coordinator requires a bachelor's degree or as little as a high school diploma and related experience working in a related field. It requires, among others qualifications:

- Experience dealing with people in crisis or victims of crime
- Ability to work cooperatively with others
- Knowledge of criminal and juvenile court systems

The Employer determined to reduce its complement of professional social workers. Mr. Potter was the least senior social work and he was notified by letter dated December 1, 2009 that he was slated for layoff effective on or about January 1, 2010. On December 7, 2009, Mr. Potter notified the Employer that he wished to exercise his right under the collective bargaining agreement to bump into one of the two positions of victim-witness coordinator in the District Attorney's Office. The position pays about \$3.00 per hour less than he was earning in his position. He is slightly more senior than both of the occupants of those two positions. The Employer declined to allow the bumping.

The Union timely filed the instant grievance. The grievance was properly processed to arbitration.

RELEVANT AGREEMENT PROVISIONS

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ARTICLE 7 – SENIORITY RIGHTS

7:1 Definition of Seniority: Seniority shall be defined as an employee's length of service in the bargaining unit, commencing with the most recent date of hire in a position within this bargaining unit. Employees accreted to this bargaining unit shall retain all previously accumulated seniority. Regular part-time employees shall attain seniority in relationship to time worked. For the purpose of computing seniority, 162.5 hours shall be considered one (1) month.

7:2 Seniority shall apply in promotions, filling vacancies, layoffs, recall from layoff, and vacation selection, for positions represented by the Union, except as otherwise stated herein.

7:3 The Employer agrees that as to transfers of caseload assignments, its supervisors will discuss staff and caseload assignment with employees prior to the filling of vacancies and will give consideration to the employees' desires.

7:4 Layoff and Recall: In the event that the Employer is required to reduce his/her workforce, the following procedure shall apply:

A) Temporary employees shall be laid off first, before regular employees are laid off.

B) The last employee hired shall be the first laid off;

1. In the event that the position eliminated is not held by the employee with the least seniority, the employee whose position is eliminated shall be permitted to displace any junior employee, provided that the displacing employee meets the qualifications of the position held by the junior employee.

2. Any employee displaced by operation of paragraph 1, above, shall be afforded the same rights as if his/her position had been eliminated.

C) In re-employing, employees with the greatest length of service shall be called back first to perform the work required.

D) Employees laid off under this Section shall retain all seniority rights for a period of one (1) year, provided that they respond to any request to return to work made during that time, said request to be made at their last known address.

E) The Employer will give reasonable written notice of its intent to lay off employees, but not less than thirty (30) working days' notice will be given. The employee shall notify the Human Resources Director within ten (10) working days of such notice of his/her intent to exercise his/her right under 7:4 B).

7:5 A seniority roster shall be posted and shall be brought up to date on July 1st of each year. The roster shall list the names of all employees in the bargaining unit, their classifications, and the number of months of credited seniority.

7:6 Seniority: Each employee shall earn, accumulate, or lose seniority as follows:

A) While on probation employees shall not acquire or accumulate seniority. Upon completion of probation, employees shall receive seniority credits retroactive to original date of employment.

B) Employees on military leave shall earn and accumulate seniority in accordance with state and federal statutes.

C) Employees on leave of absence without pay or on layoff shall earn and accumulate seniority up to but not exceeding the first forty (40) days of such leave or payoff.

D) Employees' seniority shall be terminated or lost when:

1. The employee quits or is discharged for just cause;

2. The employee fails to return to work upon expiration of a leave of absence; within ninety (90) days after a military tour of duty (as provided by law); or fails to respond to a recall from layoff.

7:7 Job Posting Procedure: Whenever there is a job opening within the unit which the Employer intends to permanently fill, either as the result of a termination, promotion, transfer or creation of a new position, the Employer shall post a notice on all designated bulletin boards. Such notice shall provide

the job title, job description, qualifications and rate of pay, and shall be posted five (5) days. The Employer may advertise vacancies during the posting period.

7.8 In filling vacancies or new positions that the Employer intends to permanently fill, the position will be given to the most senior employee, provided the employee's aptitude, ability and qualifications are relatively equal to any other internal applicant. In the event an internal application is selected for the position, he/she shall serve a ninety (90) day trial period in the new position. If at the end of such trial period the Employer determines that the employee does not qualify for the position or the employee wishes to return to his/her former position, the employee shall be returned to the former position. This subsection is subject to the grievance procedure.

7.9 Temporary Assignment: The Employer may fill a vacant position or new job in order to meet the needs of the Employer on a temporary basis, pending consummation of the procedures relating to a permanent filling of such position. If the Employer intends to permanently fill a vacant or new position, the Employer will do so within forty (40) days.

7.10 Employees who move to another position shall be placed on the same increment step as though they had remained in their formerly held position.

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ARTICLE 14 – MANAGEMENT RIGHTS

14:1 The County possesses the sole right to operate County government 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 engage and direct the workforce, to make assignments of jobs, to determine the size and composition of the workforce, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;
- D) To hire, promote, transfer, schedule, and assign employees to positions within the County;

E) To suspend, demote, discharge, and take other disciplinary action against employees for cause;

F) To relieve employees from their duties because of lack of work, lack of federal or state funding of their positions, or other reasons;

G) To maintain efficiency of departmental operations;

H) To take whatever action is necessary to comply with state or federal law;

I) To introduce new or terminate existing methods or facilities;

J) To change existing methods or facilities;

K) To determine the kinds and amounts of service to be performed as pertains to county government operations; and the number and kinds of classifications to perform such services; and the number of employees in each classification;

L) To contract out for goods and services; the Employer agrees to bargain the effects of the decision to subcontract if employees are laid off as a result thereof;

M) To utilize part-time seasonal or temporary employees, but not for the purpose of eliminating existing full-time positions or reducing existing full-time positions;

N) To determine the methods, means and personnel by which County operations are to be conducted;

O) To take whatever action is necessary to carry out the functions of the County in situations of emergency.

14:2 Nothing contained in the management rights clause shall be used for the purpose of divesting the Union or any rights under the Wisconsin Statutes.

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POSITIONS OF THE PARTIES

Union

The Employer violated Article 7 when it failed to permit the Grievant to bump into the position of victim-witness coordinator, displacing the admittedly junior employee. Article 7 provides that a senior employee who is displaced may bump a junior employee provided that the senior employee is qualified for the position. The Employer's claim that Mr. Potter is not qualified is entirely without merit. Mr. Potter has a MA degree in Social Work. The position requires less than a BA degree in Social Work. Paragraph 2 of the job description requires, "experience in dealing with people in crisis or victims of crime." This provision does not require a length of experience with victims. Mr. Potter spent nine months working with the Victim Offender Conferencing Program in 2004-05. He spent another twenty months at Porchlight Safe Haven working with homeless people with mental illness on 2004-06. He then worked as a Juvenile Court Counselor in Dane County working with troubled youth for another eight months in 2007 and 2008. Finally, he worked for almost ten additional months working in Columbia County investigating child abuse issues in 2009. In summary, he spent the last five years of his career working with victims and witnesses. It is impossible that he does not meet that qualification.

Paragraph 10 of the job description requires, "knowledge of criminal justice juvenile and courts system." It is similarly impossible that Mr. Potter has not had that experience. He also meets all of the other minor qualifications. The Union asks that the arbitrator sustain the grievance and make Mr. Potter whole for all lost wages and benefits which occurred as a result of the Employer's violation.

Employer

The Employer did not violate the agreement because while it concedes that Mr. Potter was "slightly" senior to one of the victim-witness coordinators, he lacks the knowledge, experience and interest in the position required to be qualified to perform that function. Accordingly, the Employer did not violate the agreement when it refused to let him bump into one of those two positions.

The victim witness program is unique among similar programs in other states in that the program's authorizing authority is found in Article I, Section 9m of the Wisconsin Constitution. The Legislature provided a detailed structure for the victim-witness program in Ch. 949 and Ch. 950, Stats. See, also, Wis. Admin. Rules, Chapters Jus 11 and 12. District Attorney Kohlwey testified at the hearing herein that she bears ultimate responsibility to insure that the rights of victims and witnesses are protected. She may be disciplined as an attorney for any failure in that regard. She delegates that function to the Victim Witness Coordinator. Accordingly, her judgment ought to be accorded great weight. Notwithstanding Mr. Potter's MA in Social Work and limited experience in that regard, DA Kohlwey credibly testified at hearing that she came to the conclusion that he "did not have a clue" as to what the victim-witness coordinators' responsibilities are.

By contrast to the District Attorney's demonstrated knowledge of the field, Mr. Potter's testimony indicates that he does not have sufficient knowledge of the position to perform its duties. While Mr. Potter has had experience in ChIPs cases,¹ he admitted at hearing that he had only glanced at the governing statutes and had only a vague idea as to what a victim-witness coordinator does. District Attorney Kohlwey's expert testimony demonstrates that Mr. Potter's assumption that his experience in ChIP's cases qualified him for this position is not correct.

Mr. Potter also assumed that the District Attorney would provide training so that he could perform this function. District Attorney Kohlwey stated that she did not have the time to train Mr. Potter and that he had to be fully qualified to perform the work immediately. While Mr. Potter might have met the requirement to be hired into that position, he did not meet the requirements to be qualified to perform the position without further training. Accordingly, he cannot be deemed qualified to bump into the position.

Section 978.05(8)(b), Stats, gives a district attorney the authority to hire his or her staff. While this authority is subject to some restrictions by the County and is subject to collective bargaining, the County lacks authority to limit the District Attorney's hiring decision as to this type of position.

District Attorney Kohlwey had had prior experience working with Mr. Potter while she was in private practice. She credibly testified that while Mr. Potter is intelligent and well-educated, he lacked the maturity, experience and confidence which are essential to the successful performance of this position.

Mr. Potter was not really interested in the victim-witness position. He is interested in continuing his career in the social work field. He did not apply for the victim-witness position when it became open. The Employer asks that the grievance be denied in its entirety.

Union Reply

The Employer has tried to use a number of external sources to expand the minimum qualifications for the disputed position. Mr. Potter clearly meets the minimum qualifications set forth in Section II and III of the job description and should not be expanded for the convenience of the Employer. D.A. Kohlwey's professional liability is not relevant to the case. D. A. Kohlwey could assign the less-demanding work to Mr. Potter until he develops more experience in the position. D.A. Kohlwey's alleged statutory authority is irrelevant. It was not raised in negotiations and does not override the agreement.

¹ This is an abbreviation for Child in Need of Protection. This is one of the concepts under which a juvenile court may assert jurisdiction over a child.

Employer Reply

The Union has the burden of proof in this case and it has failed to meet it. Mr. Potter's master's degree does not automatically qualify him for this position. The arbitrator should rely on the expert judgment of D.A. Kohlwey as to her judgment about Mr. Potter's minimum qualifications.

DISCUSSION

The determinative issue in this matter is whether Mr. Potter meets the minimum qualifications for the position in dispute. Section 7.4 requires that “. . . the displacing employee meets the qualifications of the position held by the junior employee.” Article 14 reserves to the Employer, among other things, the right to “. . . determine the competence and qualifications of employees.” A major focus of the parties' arguments is whether the qualification standard for bumping is the minimum necessary to be hired into the position or, from the Employer's view, a reasonable level of competency. The difference between hiring and bumping situations is that an employee may be minimally qualified to learn to perform a position when hired while an employee who bumps must be able to adequately perform the position with minimum familiarization. A second focus was whether the determination of minimum qualifications must be based solely upon the wording of the job description. I conclude that it must be based upon the job description but that the job description has to be interpreted in the light of the duties performed and not just the stated wording.

Mr. Potter lacks the minimum skill level to perform the victim-witness function because he lacks the minimum level of maturity and inter-personal skills necessary to effectively develop the trust of victims of crime and witnesses in sensitive cases, particularly the skill to act with the appropriate level of empathy toward this class of clientele. I note that this is no criticism of Mr. Potter, who has done well in other positions.

District Attorney Kohlwey testified in this matter. She has held the elective position of District Attorney for twelve years and she supervises the victim-witness coordinators. She has an independent duty as an elected official to insure that the victim-witness services are properly provided. D.A. Kohlwey testified as to the essence of the victim-witness coordinator's job. The victim-witness coordinator must quickly understand the needs of the victim, guide the victim through the criminal justice proceeding, including, but not limited to, helping the victim make judgments as to when to appear in court, how to make his or her position known to the court, making sure the assigned prosecutor adequately advocates for the victim. The victim-witness coordinator helps the victim to understand the practicalities of the restitution process and to make an effective request for restitution. In some cases, the victim-witness coordinator must be in a position to provide the support to empower a victim to communicate with the prosecutor and investigators. The victim-witness coordinator does not provide counseling or other on-going services but assists the victim in obtaining and transitioning to those services.²

² References herein to the transcript are denominated “tr. p. -.” Tr. pp. 65-69

D.A. Kohlwey elucidated her view at a number of points in her testimony. For instance, at tr. pp. 66-7 she testified as follows:

It's not just head knowledge. It is knowing what people need in a circumstance. It's the difference between head knowledge and experience. It's the difference between just knowing something and having the maturity to know when a victim is ready to hear it. And that's something that our victim witness unit does very well.

She reinforced this view at other points in her testimony about successful victim-witness coordinators.³ I am satisfied that an essential difference between this position and that of the more highly skilled social work position is that the victim-witness coordinator through life experience is able to effectively empathize with victims and witnesses and using that skill and knowledge to quickly understand the needs of the victim or witness and to develop and maintain an on-going relationship of trust and respect. The victim-witness coordinator then uses his or her knowledge of the criminal justice system, the people involved and the other services available to provide leadership to that victim and witness in those processes. By contrast, a social worker must understand the emotions and needs of the people he or she works with, but must remain more professionally detached.

D.A. Kohlwey's testimony indicates that she has worked with Mr. Potter in the past and that she believes he lacks the life-experience and empathetic skills necessary to be minimally qualified for this position.⁴ She supported this with her understanding of two specific incidents which, if true, would support that conclusion. It is not necessary to repeat them here because they did not reflect that Mr. Potter was deficient in his duties as a social worker, but that he failed to reflect the foregoing essential skills.⁵

I have reviewed Mr. Potter's testimony with this in mind. As a person just beginning his career, it does not appear very likely that he does have the kind of life experience which one would expect for the disputed position. He was not able to articulate the difference between the positions discussed above. His testimony as a whole indicates that he did not recognize the difference. More importantly, the nature of his testimony suggests a less than adequately empathetic position with the clientele of the disputed position.⁶ Accordingly, the preponderance of the evidence supports D.A. Kohlwey's conclusion that Mr. Potter lacks the basic qualifications for this position. Again, this is no reflection at all upon his qualifications and skill as a social worker. Accordingly, since Mr. Potter lacks the minimum qualifications

³ Tr. pp. 76, 77

⁴ See, for example, tr. 76-77, 80 ll. 17-20 and 88-9.

⁴ Tr. pp. 87-89

⁵ Tr. pp. 88-91, 107-109

⁶ See, for example, tr. pp. 57-8

for this position, the Employer did not violate the collective bargaining agreement when it denied Mr. Potter the opportunity to bump into the disputed position. The grievance is, therefore, denied.

AWARD

The Employer did not violate the collective bargaining agreement when it denied Mr. Potter the opportunity to bump into the disputed victim-witness coordinator position. The grievance is denied.

Dated at Madison, Wisconsin, this 1st day of July, 2011.

Stanley H. Michelstetter /s/

Stanley H. Michelstetter II, Arbitrator