STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of Interest Arbitration	
Between	
BROWN COUNTY	Voluntary Impasse Procedure
And	(Testing)
BROWN COUNTY MENTAL HEALTH CENTER EMPLOYEES UNION LOCAL 1901, AFSCME	

APPEARANCES: Kenneth J. Bukowski, Corporation Counsel
On Behalf of the County

James W. Miller, Staff Representative
On Behalf of the Union

I. BACKGROUND:

The parties in the course of negotiating a 1984-85 labor agreement reached an impasse. The Union filed a petition for mediation-arbitration on January 9, 1984 (case CCXVII No. 32774 MED/ARB-2640). On March 6, 1984, the parties met with an investigator from the Wisconsin Employment Relations Commission. On June 8, 1984, the parties submitted their final offers to the investigator, who in turn advised the Commission that the parties remained at impasse. Subsequently, the Commission ordered the parties to select a Mediator/Arbitrator. The undersigned was selected.

The Mediator/Arbitrator met with the parties on September 14, 1984, in an attempt to mediate a voluntary resolution to the dispute. All the outstanding issues were resolved except on the issue of testing. However, the parties agreed to establish a joint committee to study the matter. If a resolution couldn't be reached by July 15, 1985, it was agreed this issue would be submitted to an Arbitrator under a voluntary impasse procedure. It was also agreed that the undersigned would serve as that Arbitrator. The understanding was as follows:

> The parties agree to a joint study committee equally comprised of Management and Labor representatives to meet and arrive at a standardized formula for testing, which will include the establishment of passing scores for bargaining unit positions and the appropriate ratio of seniority and testing scores, to be applied in the selection of employees for vacancies of promotions.
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> In the event no agreement is reached on a standardized formula for testing by July 1, 1985, the parties have agreed to submit final offers on that issue to arbitrator Gil Vernon by July 15, 1985. After that date, a hearing will be arranged at which the parties can present the evidence and/or argument on the outstanding issue.
>
> The parties further grant authority to the arbitrator to select one offer or the other, and said decision shall constitute and become a part of the parties' 1984-85 selective bargaining agreement.

The Commission was notified of the Agreement and Case CCXVII No. 32774 MED/ARB-2640 was closed November 15, 1984.

On October 24, 1985, the Employer advised the Arbitrator that the joint committee could not arrive at a testing formula and submitted its final offer on December 17, 1985. The Union asked that the matter be set for hearing. A hearing was scheduled and held on February 5, 1985. Post hearing briefs were exchanged April 4, 1986.

II. ISSUE:

The basic issue relates to the weight to be given to test scores versus seniority in the granting of promotions. The Union's final offer proposes the following:

> Passing test score of 70.
> Person with most seniority passing test gets the position.

Thus, seniority prevails among those employees who get a minimum score of 70 on a test.

The Employer proposes the following:

> "seniority (months) $\times \frac{.28}{2} +$ employee test score = Mean Employee Rating (MER)
>
> Formula to remain the same except for the factor which will be increased to .28.
>
> .28 equals 100 divided by thirty (30) years of service in months. 100 would be the total number of points on any exam given.
>
> Rationale for 30 years:
>
> Use of 30 years service to determine factor originates from Wisconsin Retirement Fund regulations where an employee may retire with full benefits at age 62 if s/he has worked for 30 years for an employer or employers covered under the fund.
>
> Minimum passing score for all exams shall be seventy-five (75) points."

Thus, this formula gives weight to both seniority and test scores. There are a possible 100 points on the exam and there are a possible 100 points for seniority. A thirty-year employee would receive 100 points for seniority (.28 x 360 = 100). An employee's amalgamated aggregate score accounting for seniority and test scores would be divided by 2 to put it on a 100-point basis. It is also noteworthy that the same basic formula was used in the past by the employer, however, the factor for seniority was .17 instead of .28. While the county's proposal utilized .28 based on 30 years service, they formerly calculated the factor based on 49 years service.

III. POSITION OF THE PARTIES:

A. The Union

The Union believes their proposal is consistent with Article 23 of the present Agreement which states, "It shall be the policy of the employer to recognize seniority." Citing Roberts' dictionary of industrial relations, they believe the principle of seniority can be defined as follows:

> "The seniority principle rests on the assumption that the individuals with the greatest length of service within the company should be given preference in employment. Length of service frequently determines his or her position when layoffs and rehires take place and is an important factor in promotions and transfers."

Thus, they submit their proposal is also consistent with the principle of seniority whereas the Employer's does not.

With respect to the Employer's proposal, they question its validity on a number of grounds. First, it is based on what they describe as the "magical figure" of 30 years. They note that Employer witness Webb testified that the 30 years of service was based on the Wisconsin Retirement Program which allowed for full retirement with 30 years of service and being 62 years of age. However, they suggest there is no full retirement with 30 years of service at age 62 so that this figure and this calculation and this assumption are totally false.

Secondly, while the Employer's formula purports to give equal weight to seniority and test scores, they note that under cross examination by the Union, Employer witness Webb testified that he in fact worked up this formula and admitted that for the first seven years of employment, seniority would not be the determining factor as to who gets a position under job posting. Under further cross examination, Mr. Webb testified that it was indeed possible for the first seven years, that an employee with not a great deal of seniority and high test scores could receive a higher final rating than an employee who passed a test with the minimal score and had more seniority. This indicates to the Union that in the first seven years of employment, the Employer is looking for the most qualified regardless of seniority. Thus, it is only after the first seven years of employment that it would then seem that everyone is on an equal basis or an equal footing with seniority and test scores being the determining factor but the seniority weighing more heavily after seven years than it does during the first seven years. Not only is this inconsistent with Article 23 but they suggest that there was no reasonable explanation given by Webb or the Employer why this should take place.

The Union also direct the Arbitrator's attention to Arbitrator Robert J. Mueller's decision Brown County (Sheriff Department) v. Brown County Sheriff-Traffic Department Labor Association, CLIII No. 29531 MIA-667 Decision NO. 20167-A. In that case, the Employer proposed to base promotions on several criteria and weight them as follows:

Promotional Criteria	1982
Written Examination	20%
Oral Interview	15%
Performance Evaluation	40%
Seniority	25%
TOTAL	100%

The Union then highlights the following comments of the Arbitrator:

> "While the Arbitrator can understand a promotional procedure that would insure as closely as humanly possible an objective manner of ranking numerous applicants for a position so that the County could place into such position the most qualified, it appears that their final proposal in this case, while attempting to attain such a goal, serves to reduce the criteria of seniority to a point where its consideration is insignificant and clearly where its consideration is imprecise and indefinite."

Drawing an analogy, they believe the Employer's proposal would render seniority insignificant, imprecise and indefinite since it is clear from the testimony of Employer Witness Webb that it is possible for an employee to get a high test score, have less seniority and still be awarded a position over an employee with more seniority and only a minimal passing score.

Lastly, the Union directs attention to the Courthouse Contract, the Highway Contract and that of the Social Services Department. They note there is no reference to testing in any of the contracts and no reference to this formula or any other formula to be used for the testing procedure. Moreover, the Employer offered no comparables nor any evidence to show that the jobs being tested were of such a nature that required employees of high degrees of skill or professional jobs and did not and could not show any need or situation that would require two different levels of seniority for the first seven years of employment.

B. The County

The County, like the Union but for different reasons, believes their proposal is most consistent with Article 23. Article 23 requires that the Employer recognize seniority in the promotion process. They submit over the years the County has complied with this contractual language by giving weight to both seniority and the employee's ability to do the job.

In this regard, they make reference to two grievance arbitration awards in favor of the County which they contend involve the precise issue which is before the instant Arbitrator. In case Number MA-1858, Arbitrator Doug Knudson found that the formula used by the County was appropriate and did in fact recognize seniority. Arbitrator Knudson held that the County did not violate the collective bargaining agreement by employing the formula which is identical to the formula contained in the final offer in the case before the Arbitrator. The only difference is the change in the factor used in the formula, from .17 to .28, thus giving even more weight to seniority in the County's final offer. The second decision is decision MA-2890, dated January 30, 1984. Again, the County used the same formula as is contained in the County's final offer in the case at bar and the Arbitrator ruled that use of that formula was appropriate.

The County also responds to the Union's reliance on Arbitrator Mueller's award. They note that he ruled in favor of the Union since the County reduced the criteria of seniority to a point where its consideration was insignificant and clearly where its consideration was imprecise and indefinite. In the Mental Health Center situation it is the Employer's position that seniority has not been relegated to insigifnicance, and in fact it has as much weight as an employee's ability to do the job. Moreover, the minimum passing grade of 75 is related to state exams which require testing and as a result licenses and permits are issued. On the other hand, the Union presented no evidence whatsoever to substantiate its passing grade of 70% as presented in its final offer.

IV. DISCUSSION:

The problem facing these parties isn't particularly unique. The proper relationship between seniority and qualifications in promotions is an issue over which labor and management, in general, have battled for years. Normally, a union's strong preference is for language which provides promotions strictly on the basis of seniority. On the other hand, management often jealously guards its right to make promotions based on qualifications and would prefer to award positions to the most qualified employee without regard to seniority. Often there are compromises which can be ranked along a continuum with strict seniority and strict qualification at the extremes.

One such compromise is employer biased and requires that management simply give consideration to seniority without necessarily defining how much. This is the present situation

between the parties. The two previous grievance arbitration awards between the parties established this. Moreover, one award specifically found that the employer's utilization of the basic formula at dispute (although at that time it used .17) did not violate the contract as it did in fact recognize and give weight to seniority. Accordingly, this comprises the status quo.

Given that the Union is proposing to alter the status quo, the burden--in line with well established arbitral thinking--is on them to put forth compelling reasons to alter that status quo. Additionally, the burden increases as the degree and extent of change increases.

In this case, the Union's proposal departs from the status quo significantly. Although the agreement to establish the joint committee effectively directed the Union to present a formula which addresses the ratio between scores and seniority, they present a proposal which gives no weight to qualifications (test scores) except to state a minimum score. It goes without saying that even under a strict seniority clause an employee must be minimally qualified. Thus, it is clear that the Union's proposal effectively gives strict weight to seniority if minimum qualifications are satisfied.

In support of their proposal, the Union essentially attacks the reasonableness of the Employer's proposal and directs attention to three internal comparables. It is the opinion of the Arbitrator that this is not enough to support their burden in the face of the Employer proposal.

While internal comparables are important and deserve weight, it would be very helpful if some consensus of comparable external employers could be cited. This important factor is absent in this record.

Regarding the reasonableness and fairness of the Employer's proposal, this case is wholly distinguished from the Mueller award since the formula here is not as imprecise in how seniority is weighted against qualifications. Here qualifications are quantified by the test. In the Mueller case, there were significant quality factors to be accounted for and there was no explanation as to how they would be quantified. This certainly is a significant distinction. Moreover, seniority here is given more weight than it was there.

Additionally, it can't be said that the Employer's proposal, on its face, is arbitrary. This much was established in the grievance arbitration decision issued by Arbitrator Knudson. At the point in time of the Knudson award, seniority was less important than it is under the instant Employer proposal. Thus, while novel in its approach, the Employer's proposal goes farther than they had in the past in giving seniority weight in their promotion decisions. This weights in their favor.

Additionally, it weights in their favor that the Employer's approach is a more moderate accommodation of the competing interests between seniority and qualifications. While the Arbitrator would prefer compromise language more traditional than the Employer's proposal, i.e. some language which deferred to seniority where qualifications were relatively equal, there is nothing unreasonable with the Employer's offer. The Employer's offer gives seniority greater and more demonstratable weight than the present formula and as a result is more moderate than the Association's offer.

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1. Under this standard, seniority could be ignored only when differences in qualifications were significant and demonstratable.

On the other hand, there is nothing unreasonable with the ultimate objective of the Union's offer. However, such fundamental issues are preferrably dealt with at the bargaining table. They should be granted in arbitration absent compelling reasons. In this there is no such compulsion in the external comparables nor is the Employe's offer, relatively speaking, so unreasonable to compel the acceptance of the Union's offer.

AWARD

The 1984-85 contract shall contain the Employer's offer on testing.

Gil Vernon, Arbitrator

Dated this 30th day of June, 1986, at Eau Claire, Wisconsin.

On the other hand, there is nothing unreasonable with the ultimate objective of the Union's offer. However, such fundamental issues are preferrably dealt with at the bargaining table. They should not be granted in arbitration, absent compelling reasons. In this case, there is no such compulsion in the external comparables nor is the Employer's offer, relatively speaking, so unreasonable as to compel acceptance of the Union's offer.

AWARD

The 1984-85 contract shall contain the Employer's offer on testing.

_____
Gil Vernon, Arbitrator

Dated this _____ day of June, 1986, at Eau Claire, Wisconsin.

July 2, 1986

Mr. Ken Bukowski
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Green Bay, WI 54301

Mr. James W. Miller
Representative, Bay District
Wis. Council 40, AFSCME, AFL-CIO
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RE: Brown County Medical Center
Med/Arb 2640 (Testing)

Dear Parties:

My office received a call today concerning obvious typographical errors in the last paragraph of the Award.

My apologies for the confusion. Thank you for bringing this error to my attention.

Enclosed is a corrected copy of the last page of the Award.

Sincerely,

Gil Vernon

cc: Wisconsin Employment Relations Commission

Enclosure

On the other hand, there is nothing unreasonable with the ultimate objective of the Union's offer. However, such fundamental issues are preferrably dealt with at the bargaining table. They should not be granted in arbitration, absent compelling reasons. In this case, there is no such compulsion in the external comparables nor is the Employer's offer, relatively speaking, so unreasonable as to compel acceptance of the Union's offer.

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