

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
LINCOLN COUNTY HIGHWAY EMPLOYEES,	:
LOCAL 332, AMERICAN FEDERATION OF	: Case 114
STATE, COUNTY AND MUNICIPAL	: No. 46170
EMPLOYEES, AFL-CIO	: MA-6899
	:
and	:
	:
LINCOLN COUNTY, by its PERSONNEL	:
and ADMINISTRATION COMMITTEE	:
	:

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 1981, Wausau, Wisconsin 54402-1981, appearing on behalf of Lincoln County Highway Employees, Local 332, American Federation of State County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Charles A. Rude, Personnel Coordinator, Lincoln County, Lincoln County Courthouse, 1110 East Main Street, Merrill, Wisconsin 54452, appearing on behalf of Lincoln County, by its Personnel and Administration Committee, referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on June 10, 1991. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on November 4, 1991, in Merrill, Wisconsin. The parties waived those contract provisions providing for an Arbitration Board. The hearing was not transcribed, and the parties filed briefs by December 10, 1991.

ISSUES

The parties stipulated the following issues for decision:

Did the County violate the collective bargaining agreement by implementing the Leadman position and rate without awarding the position to the most senior qualified bidder?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

. . . .

ARTICLE II
RECOGNITION

The Employer recognizes the Union as collective bargaining representative for all employees of the Lincoln County Highway Department except the Highway Commissioner, Assistant Highway Commissioner, Patrol

Superintendent, confidential clerical personnel and supervisory personnel on all matters pertaining to wages, hours and all other conditions of employment.

. . .

ARTICLE VIII
JOB POSTING

A. Job posting: Whenever a vacancy occurs or a new job is created, except for common labor, it shall be posted on all shop bulletin boards for a period of five (5) working days. The determination as to whether or not a vacancy exists shall be made by the Highway Commissioner. Any employee desiring to apply for such job or vacancy must submit a written application to the Highway Commissioner. The employee with the greatest seniority making application, who can qualify, will be given the job. The Highway Commissioner shall have the right to temporarily fill the job that is posted. However, such temporary filling of job shall continue only for a reasonable time after the end of five (5) days posting, or the settlement of a grievance if one should arise.

B. Trial Period: The employee who receives the position shall serve a ninety (90) calendar day probationary period . . .

C. Employer Objection: When objections are made by the Employer regarding the qualifications of an employee to fill the position, such objections shall be submitted to the Union Committee for consideration, if requested.

. . .

ARTICLE X
ARBITRATION PROCEDURE

. . .

D. Decision of the Arbitration Board: . . . The arbitration board shall only have the power to interpret the express terms of the contract as they may apply to the particular grievance. The Board shall not have the power to amend, add to, revise, modify or delete any language expressed in said terms.

BACKGROUND

Michael Hemp is the County's Highway Commissioner. He testified that the structure of the Highway Department has been under review, and that as a result of this review, the County created a Leadman position in early June of 1991. Two employees were to fill this position: one at the Merrill shop and one at the Tomahawk shop. The Position Description for the Leadman position reads thus:

GENERAL DESCRIPTION

Under supervision and direction from the Highway Superintendent, Patrol Superintendents and/or the Highway Commissioner, will perform work with, and direct, employees or crews assigned to highway construction, maintenance or repair work.

GENERAL DUTIES OF THE POSITION

1. Directs, and participates, in the work of highway employees assigned to a variety of tasks, including but not limited to:
 - a. Maintenance work on County roads.
 - b. Reconstruction work on County roads.
 - c. Snow plowing, salting and sanding, and shoveling bridges.
 - d. Erection or replacement of signs and other markers.
 - e. Installation and removal of snowfence.
 - f. Cutting brush and trees.
 - g. Shouldering.
 - h. Equipment maintenance and repair.
2. Checks work assigned to insure that it has been properly completed, or is in process, on a timely basis. Reports any problems or discrepancies to his immediate supervisor.
3. Operates equipment such as trucks, graders, bulldozers and front end loaders, or performs manual labor, as necessary.

TRAINING AND EXPERIENCE

1. High school graduate, or GED equivalent, with substantial knowledge and experience in highway maintenance and construction procedures.
2. Skill and ability to operate a variety of

highway equipment.

3. Knowledge of "on-the-job" safety hazards and safe working procedures.
4. Ability to direct work of others and to work from both oral and written instructions.

On June 10, 1991, the Union filed a grievance which challenged "the posting a new union job position (Leadman)." The grievance listed the following as the basis for the violation: "Management failed to bargain with Union on this matter." The grievance listed the following as the requested remedy:

Bargain with the Union and if both sides agree to a Leadman, back pay shall be given to the temporary Leadman of all the hours he worked including overtime.

The parties ultimately met to discuss the matter, but were unable to reach any agreement, and decided to move the matter into then upcoming contract negotiations.

As noted above, the County posted the position in the Merrill and Tomahawk shops. Each opening was filled. The Union has not challenged the determination reached regarding the Merrill shop, but has challenged the County's selection of Carl Taves as the Leadman for the Tomahawk shop.

Six employes signed the posting at the Tomahawk shop. Taves did not. Taves was asked to submit an application after the posting process was completed. Of those six employes, four have greater seniority than Taves.

Four witnesses testified regarding the selection process. A brief summary of their testimony will complete the evidentiary background.

John Swarmer

Swarmer is one of the job applicants with greater seniority than Taves. Swarmer testified he presently works out of the Hot Mix Plant in Tomahawk, and has worked there for ten years. He has been employed by the County for roughly twenty-one years. He testified that he has a high school degree, and has operated a wide variety of equipment for the Highway Department. He also noted that he had at least some experience in each of the areas noted at Section 1 of the "General Duties of the Position" portion of the Leadman job description. His sole supervisory experience came when he worked for a carnival from 1966-

1969. He acknowledged he has experienced a number of on-the-job injuries, one of which was quite serious. He has not, however, been disciplined for any safety violation.

Matt Venne

Venne is a Patrolman, who has worked for the County for about five and one-half years. He is also one of the job applicants with greater seniority than Taves. He noted he has a high school degree, but acknowledged he does not have much experience in construction work. He noted he has experience in seven of the eight areas noted at Section 1 of the "General Duties of the Position" portion of the Leadman job description. He has no experience in "Reconstruction work on County roads". Prior to working for the County, he supervised a supermarket in Tomahawk which employed roughly twenty employees.

Michael Hemp

Hemp testified that the Highway Committee wanted the best applicant available for the Leadman position. He felt this was the main criterion for the job, which could potentially lead to further promotion. He acknowledged that the most senior employe who met the qualifications was not offered the position. The County selected Taves because he had considerable construction-type experience and had prior experience supervising employes.

Byron Lange

Lange is the County's Patrol Superintendent. He noted that the evaluation of the applicants for the Leadman position was based on the applications submitted. No personal interviews were given. Taves was selected, according to Lange, because of his prior experience, including surveying work, and because he had proven supervisory skills. He felt Taves had qualifications beyond those listed on the Leadman position description, and was selected as the best applicant available.

THE UNION'S POSITION

The Union argues initially that Article VIII clearly and unambiguously requires that the County award a new position to the most senior qualified bidder, and that at least two of the bidders for the Leadman position were more senior than the employe selected by the County. Article VIII is, according to the Union, a "sufficient ability" type of provision. The Union contends that arbitral authority places the "burden on the employer to show that the by-passed senior employe is not competent."

The evidence establishes, the Union contends, that Swarmer and Venne are more senior than Taves, and that each is fully qualified. Noting that Taves did not testify, and that Swarmer's and Venne's testimony stands un rebutted, the Union concludes that "the employer has clearly not met its burden." Even if a dispute on qualifications existed, the Union argues that any such dispute should have been addressed under Article VIII, Section C.

The Union argues that the County's assertion that the Leadman position is a "new classification", not a "new job" effectively reads Article VIII out of existence. Beyond this, the Union argues that the County's posting of the position is itself evidence that the Leadman position is a "new job" within the meaning of Article VIII.

The Union's final major line of argument is that Article VIII, Section A, requires an applicant to submit a written application to the Highway Commissioner. Because the evidence establishes that Taves did not, while two

of the other posters did, it follows, the Union asserts, that the County has violated Article VIII.

The Union concludes by requesting that "the Arbitrator . . . sustain the grievance, require the County to award the position to the most senior qualified bidder and make him whole for any and all los(s)es incurred".

THE COUNTY'S POSITION

The County asserts that the grievance has evolved from one which challenged that "management had failed to bargain with the union on the matter" into one which challenged "the selection of the Leadman at Tomahawk."

Acknowledging that three of the bidding employes "had greater seniority than the employee to whom it was awarded", the County argues that Article VIII makes seniority the determining factor only among employes "who can qualify". The County argues that testimony from the Highway Commissioner and the Patrol Superintendent establish that "none of (the more senior applicants) met all the criteria contained in the general duties of the position description." More specifically, the County contends:

While all the employees who testified were able to list experience in general duties 1 and 3, none of them testified to experience in leading and directing a crew of highway workers assigned to a task or project.

The County concludes that: "(t)he Agreement does not require that the senior employee must always be awarded a position . . . (e)mployees who post for a position must be qualified to perform it."

It follows, the County contends, that the grievance must be denied.

DISCUSSION

The stipulated issue reflects the change in focus in the grievance from the time it was filed to the time it was litigated. The grievance initially sought to bar the implementation of the Leadman position issue until a wage rate had been agreed upon. The stipulated issue draws on this, implying a possible contractual violation regarding "implementing the Leadman position".

There is no issue posed regarding the County's authority to implement the Leadman position. There is no evidence the County failed to bargain in good faith regarding the position, and there has been no demonstration of any contractual or legal 1/ bar to the implementation of the position. That the Union has not challenged the validity of the selection of a Leadman for the Merrill shop underscores this point.

The issue thus focuses on the selection process for the filling of the Leadman position at the Tomahawk shop. The filling of new positions and vacancies is covered by Article VIII. Threshold to the application of Article VIII is a determination that the "new job" or "vacancy" is a position covered by the unit description of Article II. There is no dispute on this point. The

1/ No legal bar can be presumed. Even if the parties' contract does not address the point, the County could, if it fulfilled its duty to bargain, implement the change during the term of the agreement. See Area Vocational, Technical and Adult Education District One, Eau Claire, Dec. No. 23944-C (WERC, 11/87).

Leadman position is a bargaining unit position.

Article VIII, Section A, is, then, the provision which governs this issue. Article VIII, Section C, offers no guidance here. Whether that section calls on the County or the Union to request submission of a qualifications dispute "to the Union Committee for consideration" need not be resolved to address whether the filling of the position complies with the requirements of Article VIII, Section A.

Article VIII, Section A, states four elements to its operation: (1) A "new job" must be created or the Highway Commissioner must determine the existence of a "vacancy"; (2) the vacancy or new job, except for common labor, must be posted for five work days; (3) an employee "desiring to apply for (the) job or vacancy must submit a written application to the Highway Commissioner"; and (4) the position must be given to "the employee with the greatest seniority making application, who can qualify".

The parties' dispute focuses on the fourth element to the operation of Article VIII, Section A. Whether characterized as a new job or as a vacancy, the first element to the operation of Article VIII, Section A, has been proven.

The Leadman position is covered by the "JOB DESCRIPTION" set forth above, and the parties do not dispute that it is a unit position. Thus, the Leadman position constitutes a new job. That the death of an employee recognized as a Crew Foreman prompted the review of the Highway Department's organizational structure which ultimately led to the creation of the Leadman position means only that the position could be considered a vacancy. It is, in any event, apparent the Highway Commissioner approved the filling of the vacancy, since two employees have been selected to be a Leadman. Whether more properly characterized as a new job or as a vacancy, it is apparent that the Leadman position is covered by Article VIII, Section A.

There is no dispute the position was posted, and thus the second element to the operation of Article VIII, Section A, has been established.

The Union has asserted that Taves never properly applied for the position. It is not clear how Taves submitted a written application to the Highway Commissioner. The record is not sufficiently clear on this point to permit a reliable conclusion that the County failed to comply with the third element to the operation of Article VIII, Section A.

The dispute thus focuses on the fourth element, and specifically on whether the applicants other than Taves demonstrated they "can qualify" for the position.

The testimony establishes the County did not apply the appropriate contractual standard during the selection process. The reference to "can qualify" requires that the County establish the qualifications necessary to the position, and then determine if any applying unit member can meet those qualifications. There has been no demonstration that the qualifications for the Leadman position are any other than those noted in its Job Description. It is apparent, however, that the County did not measure the applicants against that standard. Rather, the County sought applicants through the posting procedure and then, apparently, through an informal solicitation. The County then determined not which of the applications met the qualifications of the Job Description, but which of the applications appeared to be the best. Hemp noted Taves was the most qualified applicant in the Committee's estimation. The other applicants were rejected not as unqualified, but as less qualified than Taves. Lange acknowledged that Taves' superiority to the remaining candidates was rooted in factors not traceable to the Job Description. Thus, the fourth element to the operation of Article VIII, Section A, has not been satisfied.

That the County sought the applicant it viewed as the best is an understandable policy position. However, the parties established the governing policy for filling new positions and vacancies by agreeing to the terms of Article VIII, Section A. That negotiated policy decision can not be tampered with in arbitration, since Article X, Section D, confers on an Arbitrator no more authority than to apply the written terms of the agreement. Article VIII, Section A, requires that the employe "with the greatest seniority . . . who can qualify . . . will be given the job." That was not the standard applied by the County in this case.

The remedy awarded below requires some discussion. The Union has argued any of the testifying witnesses can be considered qualified for the position. Not all of the applicants testified, however, and the testimony regarding the qualifications of each witness is sketchy at best. Beyond this, the contract requires the County, not an arbitrator, to assess the qualifications of the applicants. The conclusion stated above establishes not that the County refused to assess the qualifications of the applicants, but that the County failed to apply the appropriate standard.

Thus, the AWARD entered below establishes the standard by which applicants for the position of Leadman at the Tomahawk shop are to be evaluated. The AWARD requires the position to be reposted, to assure that any interested employe's qualifications will be assessed under the contractual standard. That standard requires the County to assess the applicants first on whether or not the applicant can qualify for the position. To make this assessment, the County must judge each applicant against the established requirements of the job, not weigh the qualifications of each applicant against the other applicants. Then the County must award the position to the most senior of the applicants determined to meet the established requirements of the job.

The Union's request for a make whole remedy is persuasive, yet speculative at the present time. Assuming an applicant other than Taves is selected, the parties' agreement requires a ninety day trial period. The make whole remedy the Union seeks would be triggered only if an applicant other than Taves is selected and only after that applicant successfully completes the probation period. Any such applicant would, as the Union asserts, be entitled to be made whole for the period of time for which Taves held the position.

AWARD

The County violated Article VIII, Section A, of the collective bargaining agreement by implementing the Leadman position and rate without awarding the position to the most senior qualified bidder.

To remedy its breach of Article VIII, Section A, the County shall repost the Leadman position for the Tomahawk shop, and shall judge the qualifications of each applicant by first assessing the qualifications of that applicant against the established requirements of the Leadman position. The County shall make an assessment for each applicant of whether or not that applicant can qualify for the position of Leadman. The County shall not assess the qualifications of each applicant against the qualifications of the remaining applicants. Once the County has determined which of the applicants can qualify for the Leadman position, the County shall award the position to the employe with the greatest seniority of the qualifying applicants.

If the Leadman position is awarded to an employe, other than Carl Taves, who successfully completes the probation period for the position, then that employe shall be made whole for the wages and benefits he would have earned,

but for the County's selection of Taves.

Dated at Madison, Wisconsin, this 29th day of January, 1992.

By _____
Richard B. McLaughlin, Arbitrator