

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 2717, AFSCME, AFL-CIO

and

JACKSON COUNTY

Case 99  
No. 49676  
MA-8024

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,  
appearing on behalf of the Union.

Mr. James Michael DeGracie, Corporation Counsel/Personnel Director, Jackson County,  
appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear the grievance of Carolyn Scott. A hearing was held in Black River Falls, Wisconsin, on October 21, 1993, during which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 26, 1995.

ISSUE:

The Union frames the issue as follows:

Did the County violate the collective bargaining agreement by not awarding the vacated Legal Secretary position to the Grievant? If so, what is the appropriate remedy?

The County frames the issue as this:

Subject to Wisconsin Stats., Sec. 978.13(2)(e), the County cannot require a District Attorney to hire a person in a clerical or support staff position without the District Attorney's approval. In the alternative, the position of Victim Witness Coordinator/Legal Secretary was awarded to the person with superior qualifications, in conformance with the collective bargaining agreement, Article 3, Section 1 and Article 8, Section 1.

The Arbitrator will deal with all the issues raised by the parties in the Discussion section of this Award.

BACKGROUND:

On February 8, 1993, the County posted a position for Legal Secretary, Grade 5 pay range. The job description is called Legal Secretary/Victim Witness Assistance Specialist, District Attorney's Office, and is generally called the Victim Witness Coordinator by the parties. The following is the job description:

GENERAL STATEMENT OF DUTIES

The Legal Secretary and Victim/Witness Specialist performs a variety of complex clerical duties including the preparation of various legal forms relating to court cases handled by the District Attorney and Assistant District Attorney and informs all persons involved of the status and disposition of criminal and juvenile cases.

Also assists with administrative duties in the office and keeps a monthly record of all contacts either written, personal or by phone made to all victims, witnesses and offices. The Legal Secretary and Victim/Witness Specialist records all office expenditures both for the District Attorney's Office and the Victim/Witness Assistance Program. The work requires the exercise of good judgement in the application of office procedures and regulations. The Legal Secretary provides general supervision and assistance to other clerical staff. Over all supervision is provided by the District Attorney.

EXAMPLES OF WORK: (Illustrative Only)

Legal Secretary

Types complaints drafted by the District Attorney or Assistant District Attorney and obtains the proper signature.

Prepares summons or various warrants with the complaint and obtains proper signatures.

Drafts criminal complaints and other various legal documents.

Schedules court hearings.

Submits summons and complaints to proper County or State for personal service.

Types legal documents for juvenile and CHIPS cases.

Schedules juvenile and CHIPS hearings and sends the notice of the

hearing to the required persons.  
Types briefs in appellate cases.

Collects and pays out payments received for bad checks and restitution.

Determines all restitution by contacting victims, etc.

Prepares all restitution orders for the State.

Prepares a large variety of legal documents as directed.

Prepares monthly expenditure vouchers.

Keeps an itemized monthly statement of office expenditures for the District Attorney's budget.

Prepares the annual budget for the District Attorney.

Composes correspondence to other District Attorney's offices, Sheriff's Department, Clerk of Courts, attorneys and defendant's regarding court action.

Assists the public with the handling of bad checks.

#### Victim/Witness Specialist

Contact citizen witnesses to inform them of the status of the case in which they are involved; determine whether they will have any problems appearing in court and seek resolution of any problems presented, in order to insure witness' appearance in court.

Contact witnesses to place them on-call or notify them of as case adjournment in order to reduce number of unnecessary appearances.

Interpret to witnesses the importance of their role; reassure and persuade reluctant witnesses to insure their continued involvement.

Orient victims to the benefits available from the Victim Compensation Program; assist victims with application procedures.

Act as witness advocate and liaison with various court and police agencies in such areas as: Assist citizens in getting property recovered by the police returned to them; assist victims in getting restitution owing them; assist witnesses in apply for witness fees.

Orient witnesses to their rights, to criminal justice procedures, and to community and governmental resources available to them; make referrals to appropriate community agencies as needed.

Answer citizen inquiries.

Maintain communication with prosecutors regarding case status and witness problems.

Make travel and hotel arrangements for out-of-town witnesses.

Investigate whereabouts of witnesses when the Sheriff's Department

or Post Office has not been able to locate for service of a subpoena.

## QUALIFICATIONS:

- Knowledge of terminology and format of a variety of legal documents.
- Knowledge of office practices and procedures, legal terminology and office equipment.
- Ability to plan, organize, and schedule priorities effectively.
- Typing skills.
- Ability to work with other people.
- Ability to work without direct supervision.
- Ability to maintain confidentiality.
- Familiar with available community resources.
- Familiar with the criminal justice system and its procedures.

## TRAINING AND EXPERIENCE

High school diploma or equivalent. Vocational training as a legal secretary or paralegal and 1 to 2 years of law office experience, preferably in the criminal field, or any combination of training and experience which provides the required knowledge, skills and abilities.

Four bargaining unit members applied for the job -- Carolyn Scott, Terri Goettl, Theresa Franks, and Gloria Everson. Scott is the most senior of the four, with Everson next, then Franks, then Goettl. Goettl was awarded the job.

Scott and Franks both grieved the awarding of the position to Goettl. At the time of the hearing, Franks was no longer a grievant because she got the job when Goettl left it after trying it for only one week. Scott remains the sole grievant.

Scott began working for the County in May of 1986 as a secretary in the Sheriff's Department, a Grade 1 pay range which later went to a Grade 2 range. In 1991, she became the Administrative Assistant in the Sheriff's Department. Before coming to the County, Scott worked as a personnel secretary for a factory, as a bookkeeper and secretary for an insurance company, as a secretary and receptionist in an attorney's office, and worked with her husband who had his own business.

Before being awarded the job in dispute, Goettl worked under Scott in the Sheriff's Department as a secretary. Scott was the only secretary until Goettl was hired and became full time in 1992.

Scott is familiar with the legal/criminal system and the types of documents used within it. She has prepared complaints when working for a private attorney. She is familiar with all the reports generated by officers which are reviewed by the Sheriff or Chief Deputy and then filed with the proper legal agency. There is no contention that her technical or secretarial or clerical

skills are inadequate.

Scott has also dealt with victims when they are hostile, angry, upset and crying as part of her duties in the Sheriff's Department. Her immediate supervisor, Garth Rolbiecki, stated that Scott deals with victims very well on a regular basis.

The District Attorney since January 4, 1993, is James B. Sherman. Sherman is an employee of the State, not the County. The County is expected to provide the District Attorney's office with clerical support. When Sherman took office, Hazel Miles was the Victim Witness Coordinator. Miles had created the position of Victim Witness Coordinator and was leaving in the early part of 1993.

Sherman, Miles, and an assistant District Attorney all interviewed the four candidates that signed the job posting. Sherman's biggest concern was that he find someone with the right personality, someone who "could take the ball and run with it" in the Victim Witness Coordinator role and in doing juvenile work. All three who participated in the interviews agreed on Goettl as the right candidate for the job. Sherman testified that she had energy, a "certain amount of savvy," and an "effervescent" personality. According to Sherman, Scott had difficulty smiling, and exhibited only one "forced" smile in the interview. She did not have the personality he was looking for. Sherman also based his assessment of Scott on his limited experience with her. For example, he stated that when he had seen her in the hall, he rarely got a "hi" from her. He stated that she looks like "an unhappy person." Rolbiecki called Goettl and Scott equally "effervescent" in dealing with the public in the Sheriff's Department.

When Goettl decided after a week on the job that she wanted to go back to the Sheriff's Department, Sherman picked Theresa Franks as his second choice. Franks was a secretary in the zoning department. Franks had been highly recommended when she worked at a law firm that belongs to Sherman's father and brother. Sherman felt Franks also had the right personality for the job.

Part of the job involves dealing with victims of sexual assault, rape, and other violent crimes. Victims are in a delicate state and may suffer more trauma in retelling their experiences. Part of the job of the Victim Witness Coordinator is to tell victims what to expect, to apprise them of the status of their cases, and to keep in contact. Sherman believes this job needs a warm, friendly person to make the victim feel at ease.

Sherman stated that if Franks had not taken the job, he would not have hired either Scott or Everson, but would have hired someone outside of the bargaining unit. He was aware of the trial period in the collective bargaining agreement, but he wanted to hire someone while Miles was still there to train her successor. By the time Franks took the job, Miles was already gone.

Sherman also testified that all four applicants could have done the job, but how well each could have done the job was different.

## THE PARTIES' POSITIONS:

### The Union:

The Union submits that a District Attorney's authority to hire and supervise a Victim Witness Coordinator is subject to the Wisconsin Municipal Employment Relations Act, and the District Attorney's authority to hire such an individual may be limited by provisions in the collective bargaining agreement between the County and the Union. The authority of the District Attorney to hire a Victim Witness Coordinator is rooted in the general statutory authority of Section 978.05(8)(b), Wis. Stats. This authority is correspondingly limited by the authority of counties to regulate hiring, employment and supervision of county employees, according to the Court of Appeals decision in Crawford County v. WERC, 177 Wis.2d 66 (1993).

The Union argues that the District Attorney cannot circumvent the Court of Appeals decision in Crawford County by relying on another statutory provision, such as Sec. 978.13, Wis. Stats. Section 978.13 is a funding statute and does not provide a District Attorney a separate grant of authority to hire employees for his or her staff beyond the general authority provided in Section 978.05.

The Union cites from an Attorney General's advisory opinion addressed to the Corporation Counsel for Juneau County, from 1991, where the Attorney General noted that the last sentence of Sec. 978.05(8)(b) -- "nothing in this paragraph limits the authority of counties to regulate the hiring, employment and supervision of county employees" -- was inserted as an amendment by the Joint Finance Committee, and indicated a conscious intent on the part of the Legislature not to further diminish county hiring responsibilities for county employees in the District Attorney's office. The opinion further states that District Attorneys exercise pervasive powers concerning the hiring process for state employees and counties exercise pervasive powers concerning the hiring process for county employees.

Further, the Union notes that the county's authority to regulate the process by which a Victim Witness Coordinator is chosen is further supported by Sec. 59.15(2)(c), Wis. Stats., which states that the county board may establish regulations of employment for anyone paid from the county treasury, and that this section prevails in the event of a conflict with another statute.

Turning to the merits of the grievance, the Union notes that Sherman testified that the qualifications of Scott and Goettl were relatively equal but that he selected Goettl to fill the position because she had a better personality. Sherman testified that personality was very important in the position of Victim Witness Coordinator, and that he had to hire a person he could work with. He stated that Goettl had an "effervescent" personality, and that Scott did not. He had not worked with Scott but stated that she did not smile, rarely said "hi" and was not friendly when he saw her in the hall.

The Union believes that Scott's supervisor, Rolbiecki, contradicted all of Sherman's testimony regarding Scott's personality. Rolbiecki testified that Scott was good with the public, a good employee, that she was outgoing and that her personality was equally as good as Goettl's.

The Union contends that this case is a clear illustration of why employees form a union and negotiate a collective bargaining agreement -- to be judged on seniority and qualifications rather than on personality. The District Attorney admitted that the qualifications of Scott and Goettl were relatively equal and that Goettl was selected because of personality. However, the labor contract states that when qualifications of two or more bargaining unit members are relatively equal, seniority is the determining factor. The Union would argue that Scott's qualifications are in fact superior to those of Goettl, but the Union has met its burden of proof by the fact that the District Attorney found the two to be relatively equally qualified and Scott has four more years seniority than Goettl.

The Union asks that Scott be awarded the position of Victim Witness Coordinator/Legal Secretary with a make whole remedy.

The County:

The County asserts that the District Attorney has the authority to make hiring decisions, pursuant to Sec. 978.13(2)(e), Wis. Stats. The County acknowledges that the court in Crawford County interpreted the District Attorney's hiring power in the context of Sec. 978.05(8)(b), which refers to the authority of counties to regulate the hiring, employment and supervision of employees. The facts of Crawford County and the instant case differ.

In this case, there is no proposal that the position of Victim Witness Coordinator be taken out of the bargaining unit. The newly elected District Attorney, Sherman, followed the bargaining agreement and posted the position. The District Attorney followed the rules as set forth in Sec. 978.05(8)(b). However, Sec. 978.13(2)(e) guides the support staff's employment in the District Attorney's office. Counties have the financial responsibility to create adequate support staff for the District Attorney's office, and the District Attorney has the approval and supervisory power over the support staff.

The County points out that both Goettl and Franks were offered the position with the approval of the District Attorney, who would not have approved of Scott for the position. Sherman would have advertised the position instead of offering it to Scott.

The County argues that Secs. 978.05(8)(b) and 978.13(2)(e) are reconciled by requiring the District Attorney to follow the hiring regulations, including requirements of collective

bargaining agreements. However, the legislature provides the authority to the District Attorney to have staff under him or her subject to his or her approval, and Sherman complied with the legislative requirements in this case.

As to the merits, the County submits that the District Attorney may rely on personality as a necessary work requirement for the Victim Witness Coordinator. Arbitrators have permitted management to consider other factors in determining an employee's qualifications. Certain jobs require that employees be able to deal with a special class of customers. The County does not argue that such subjective factors would apply in every case, but it passionately argues that these factors must be taken into consideration in this case. Personality and the ability to sensitively interact with victims of crimes are qualifications of the job. The job description provides ample evidence of this.

Sec. 950.01, Wis. Stats., provides in part ". . . that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity. . ." The statute encourages counties to provide services to victims and witnesses of crime. The legislature intended that victims and witnesses are to be provided with additional consideration and different treatment.

Thus, the County states, the duties of the Victim Witness Coordinator are to be performed by someone who is sensitive to the hardships faced by victims and witnesses of crime, and it takes a special personality to treat these people with the dignity, respect, and courtesy. Sherman testified that Goettl and Franks had the type of personality and interpersonal skills necessary for the job, but he did not believe, from the interview and personal knowledge, that Scott had the type of personality required for the job.

The County states that while personality is a subjective qualification, it is a critical qualification for this position at issue. Victims and witnesses of crime are entitled to be served by a person who has the appropriate personality. The District Attorney acted upon the information he had before him and did not believe that Scott had the type of personality needed for the position. The District Attorney offered the position to a person with superior qualifications for the position, consistent with the requirements of the collective bargaining agreement.

#### DISCUSSION:

Because the County has raised an arbitrability question based on the District Attorney's statutory powers, a review of the applicable statutes being asserted in this case is in order first. Sec. 978.05, Wis. Stats., is entitled "Duties of the district attorney." Sec. 978.05(8)(a) and (b) read:

- (a) Establish such offices throughout the prosecutorial unit as are

necessary to carry out the duties of the office of district attorney.

(b) Hire, employ and supervise his or her staff and make appropriate assignments of the staff throughout the prosecutorial unit. The district attorney may request the assistance of district attorneys, deputy district attorneys or assistant district attorneys from other prosecutorial units or assistant attorneys general who

then may appear and assist in the investigation and prosecution of criminal matters in like manner as assistants in the prosecutorial unit and with the same authority as the district attorney in the unit in which the action is brought. Nothing in this paragraph limits the authority of counties to regulate the hiring, employment and supervision of county employees.

Sec. 978.13 is entitled: "Operational expenses of district attorney offices." Section 978.13(2)(e) states that:

(2) Except as provided in sub. (1), each county in a district attorney's prosecutorial unit has financial responsibility for the operation of the district attorney's office, including, but not limited to, all of the following: . . .

(e) Adequate investigators and clerical and all other support staff subject to the approval and supervision of the district attorney.

A review of Chapter 950, quoted by the County, is not necessary, because it deals with the rights of victims and witnesses of crime. Nothing in that statute applies to the employment of people dealing with victims and witnesses of crimes.

Crawford County, cited by both parties, resolves this issue. The Court in Crawford County clearly stated that there is no special statute empowering the District Attorney to appoint an administrative law clerk, and the District Attorney's general authority to hire and supervise staff is expressly restricted by the phrase giving the counties the authority to regulate the hiring, employment, and supervision of county employees.

The County attempts to distinguish this case on a factual basis, that there is no proposal to take the position of Victim Witness Coordinator out of the bargaining unit here as was true in Crawford County. The different facts do not dictate a different result. The important point to note here is that Crawford County says that the District Attorney's authority to hire is expressly limited. It was limited here by the collective bargaining agreement between the County and the Union

which represents the bargaining unit that includes the position at issue here. The County and the Union have agreed to a modified seniority clause on job postings, which limits the District Attorney's discretion on hiring for a bargaining unit position.

The County argues that Sec. 978.13(2)(e) gives the District Attorney the right to approve of staff, but this part of the statute goes to the County's financial responsibility for that staff. I find nothing to bar this grievance from consideration. The grievance is arbitrable.

Turning to the merits, a review of the relevant contract language is in order:

ARTICLE 8 - JOB POSTING

SECTION 1. When it becomes necessary to fill vacancies or new positions within the bargaining unit, the Employer will post such vacancies or new positions for five (5) working days, during which time interested employees may apply by signing the posting. Job postings shall state the job to be filled, qualifications for the job and the rate of pay. Posted positions shall be awarded as promptly as possible following a posting to be qualified applicant. Seniority and qualifications will be considered. When the qualifications of two or more bargaining unit employees are relatively equal, seniority shall be the determining factor. Regular employee applicants within the bargaining unit shall be considered first in filling vacancies for new positions.

Vacancies in the position of Deputy Clerk of Court, Deputy Register of Deeds, Deputy Treasurer and Deputy County Clerk shall be posted according to the above provisions, but may be filled at the discretion of the elected officials in the department without adherence to the selection procedures contained above or the recall procedures in Article 7, Section 6.

...

SECTION 3. Successful applicants shall be allowed up to twenty (20) working days to satisfactorily perform the work of an awarded position; however, the Employer may, at its sole discretion, extend the period by up to an additional thirty (30) working days. Employees not able to satisfactorily perform the work of an awarded position within the period granted shall be returned by the Employer to the position formerly held. If the successful applicant is not satisfied with the new position, he/she may return to the position formerly held within twenty (20) working days.

...

The language quoted above is a modified seniority clause,<sup>1/</sup> as opposed to a strict seniority provision which would require that the employer give preference to the employee with the most seniority without regard to ability or other considerations. Modified seniority clauses may further be divided into two basic categories -- relative ability clauses and sufficient ability clauses. The sufficient ability clause gives preference to senior employees if they possess sufficient ability to do the job, or have minimum qualifications.

The seniority clause here is clearly a relative ability clause. The term "relative ability" has been extensively analyzed by arbitrators, such as the following from Arbitrator Luskin in Interlake Steel Corp., 46 LA 23 at 26 (1965):

The term "relatively equal" when applied to the factor of "ability to perform the work" has been interpreted, defined, and applied on numerous occasions by many arbitrators. In many instances the term "relatively equal" has been defined to mean that the Company must establish the fact that one employee has substantially or significantly greater ability to perform the work than does a senior employee before the junior employee can be promoted to the vacancy. In some instances arbitrators have pointed out that the term "relatively equal" does not mean "equal," and that where minor variations exist with respect to comparative ability, a minor distinction between two competing employees would not be sufficient to warrant the Company in disregarding the basic concept of seniority as set forth in Article XVI, Section I by promoting a less senior employee to a vacancy. Although the term "relatively equal" has been given many definitions, including the application of the concept of a requirement that the junior employee must be "head and shoulders" above the senior employee before he can be awarded the job, all of the various definitions boil down to the fact that there must be a definite, distinct, substantial, and significant difference between two competing employees with respect to "ability to

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1/ The second paragraph of Section 1 notes that vacancies in four areas -- deputies of certain elected officials -- may be filled at the discretion of those elected officials without regard to the modified seniority portion of Section 1. There is no similar exemption for the District Attorney's Legal Secretary/Victim Witness Assistance Specialist, or any other position of the bargaining unit which is supervised directly by the District Attorney.

perform the work" in favor of the junior employee before the Company can award a vacant job to a junior employee where the senior employee does have the basic ability to perform the work.

Sherman stated that all four bargaining unit applicants could do the job. What separated them was personality. While the Union is correct in stating that personality is not a factor in most jobs, it is fairly obvious that an employee's personality and ability to work and deal with other people would be an important aspect of the Victim Witness Coordinator's job. This ability or criteria is sufficiently embedded within the job description and is a valid consideration, although it is not the only consideration or factor that is needed to obtain the job. For example, the job description states that the Victim Witness Coordinator duties are to contact witnesses, see if they will have problems appearing in court, reassure and persuade reluctant witnesses, assist citizens in getting property back, answer their questions and tell them their rights and orient them to the criminal justice procedures, among other things.

Promotions to jobs that require special working conditions may entitle an employer to some leeway and flexibility in choosing a person to meet the special conditions. See, for example, Great Western Sugar Co., 41 LA 528 (Arb. Seligson, July 1963). And as Arbitrator Block stated in Smart & Final Iris Co., 51 LA 896 (December 1968):

As a general rule, arbitrators prefer not to rest their opinions on subjective evidence. Such evidence is not as satisfactory, and certainly not as convincing, as would be objective evidence on the same points. On the other hand, it must be frankly conceded that some human traits do not readily lend themselves to objective measurement and an inflexible insistence upon objective evidence as the sole criterion might not always be justified.

The employer is entitled to some deference in determining personality qualifications. After all, the employees and employer work with each other, and an outside arbitrator has little opportunity to see these people except during a hearing when those who are testifying are usually somewhat restrained. Moreover, arbitrators do not want to impose their own judgment over those of supervisors familiar with an employee's personality. Therefore, management may be allowed some flexibility in this area where personality is deemed essential to the job and where management has the fair and ample opportunity to judge this trait.

However, arbitrators will step in where the supervisor making the decision is not familiar with those abilities, or the supervisor who is familiar with the employee's abilities is not asked. See, for example, Lear Siegler, Inc., Anchorlok Division, 75 LA 1001 (Arb. Nathanson, October 1980). And in Marshalltown Area Community Hospital, 76 LA 978 (May 1981), Arbitrator Smith noted that the record failed to demonstrate that a supervisor objectively tried to identify the knowledge, skills, and abilities possessed by each applicant in order to compare each individual

against the qualifications of the vacant positions.

Sherman had little contact with the Grievant, or any of the applicants, and judged the Grievant's personality to be cool and reserved based on the job interview and his limited contacts with her in the hallways of the courthouse or sheriff's department. He testified that she only smiled once during the job interview and that her smile seemed forced. Job interviews can be

especially stressful situations for many people, and it may be difficult to know how an applicant's personality would play out on the job compared to a job interview. The other contacts that Sherman had with the Grievant were too limited for him to make any significant evaluation.

Sherman testified that he talked with other people about Scott, but he did not state who those people were. Chief Deputy Rolbiecki, who is Scott's direct supervisor, testified that Scott is very "outgoing, very helpful," and that Scott and Goettl were "equally effervescent in dealing with the public." There is no evidence that Sherman ever discussed the applicants with Rolbiecki. The fact that Sherman did not ask the supervisor most familiar with the abilities of the applicants shows that he acted in an arbitrary and capricious manner. Similarly, in Rainier Port Cold Storage, Inc., 79 LA 441 (June 1982), Arbitrator Armstrong said that an employer acted in an arbitrary and capricious manner when -- in determining qualifications for layoff purposes -- it did not consult with a foreman who was the best qualified person to give a supervisory opinion as to the ability and competence of the grievant. Rolbiecki was the best qualified person to give a supervisory opinion, but was not consulted. Sherman did not observe Scott's work in the Sheriff's Department or see her deal with people.

After Goettl left the position, Sherman still did not award it to Scott but again chose a less senior employee, Franks. He stated that Franks had the "right" personality but did not define what that was or how he was able to judge that personality. He did note that Franks got high recommendations from the law firm where she worked. This law firm is owned by Sherman's father and brother.

Again, the record does not show that Sherman sought out the opinion of a supervisor most knowledgeable about applicants Franks or Scott at the time he chose the second person. Again, the process by which he chose an applicant appears arbitrary and capricious. A scent of nepotism or favoritism creeps into the process in the case of Franks, something not recognized in the language of Article 8. It is not at all clear why Franks was chosen over Scott, and the record does not clearly show that Franks' personality was distinctly superior to Scott's.

All in all, the record fails to show that the two junior employees who received the job were "head and shoulders" above the Grievant, or that there were substantial or significant differences between the junior employees and the Grievant which would justify awarding the position to such junior employees. Even giving some leeway to management as to the requirement of

"personality," and giving the management the measure to be the best judge of personality, the record fails to show that the District Attorney used any reasonable basis upon which to judge the personalities of the applicants. He did not know them, did not supervise them, and did not ask their supervisors about their capabilities of working with the public. The resulting determination that Franks and Goettl have "warm" or "effervescent" personalities and that Scott has a "cool" or "reserved" personality lacks a rational basis. Accordingly, the determination of qualifications was arbitrary and capricious.

Scott can perform the job, as could the other applicants, according to Sherman. A review of her record shows that she was being recommended for a reclassification, her prior work performance was not criticized, and there is nothing negative in her past record to detract from her ability to perform the Victim Witness Coordinator position. Moreover, the contract calls for a trial period of 20 working days, which the Employer may extend to another 30 working days at its sole discretion. This gives the District Attorney ample opportunity to observe Scott and document any defects in her personality or ability that would disqualify her from continuing to do the job.

Therefore, the Arbitrator finds that the collective bargaining agreement was violated, specifically Article 8, Section 1, where the record does not show that the job applicants were not relatively equal. Instead, the record tends to show that the applicants were relatively equal, and that being so, the senior employee should have been awarded the position first. The Arbitrator is going to hold jurisdiction open for a period of time as stated below to give the parties the first opportunity to resolve any monetary remedy.

#### AWARD

The grievance is sustained.

The grievance is arbitrable. The County violated Article 8, Section 1, of the collective bargaining agreement by not awarding the vacated Legal Secretary/Victim Witness Assistance Specialist (known as Victim Witness Coordinator) position to Carolyn Scott.

The County is ordered to give the position to Carolyn Scott as soon as feasible upon receipt of this Award.

The Arbitrator will retain jurisdiction in this case for the purposes of determining the appropriate monetary remedy, should the parties be unable to agree on the amount. The parties should notify the Arbitrator by June 5, 1995, if they have reached an agreement or not. If the parties are unable to reach a mutually satisfactory agreement by that date, the Arbitrator will give the parties an opportunity to be heard by letter or brief as to the final remedy, and

will then determine the remedy.

Dated at Elkhorn, Wisconsin this 5th day of April, 1995.

By Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator