

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 796, AFSCME, AFL-CIO

and

CITY OF OSHKOSH

Case 241  
No. 51724  
MA-8718

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.

Mr. Warren Kraft, City Attorney, City of Oshkosh, appearing on behalf of the Employer.

ARBITRATION AWARD

The Union and City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear the grievance of Arden Anderson. A hearing was held on February 7, 1995, in Oshkosh, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by March 14, 1995.

ISSUE:

The parties ask:

Did the City violate the collective bargaining agreement when it denied Arden Anderson a promotion to the Water Maintenance II position? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE XVII

NEW JOBS - VACANCIES

A vacancy shall be defined as a job opening not previously existing in the Table of Organization or a job opening created by the termination, promotion or transfer of existing personnel when the job continues to exist in the Table of Organization. A steward shall be present during interviews with employees seeking promotions.

All non-supervisory vacancies shall be posted on the bulletin board of the Public Works and Parks Department and such notice shall be

posted five (5) working days before the vacancy is filled. Employees wanting such posted jobs shall sign the posted notice. The employee shall be selected on the basis of seniority, work record and qualifications. In the event an official training program has been conducted for a given position successful completion of the course will be the qualifying factor for promotion. Said employee shall demonstrate his ability to perform the job posted within thirty (30) working days and if deemed qualified by the employer shall be permanently assigned the job.

Should such employee not qualify or should he desire to return to his former job, he shall be reassigned to his former job without loss of seniority.

### BACKGROUND:

This grievance is over the educational requirements of a position in the Water Department. The City denied the Grievant a position as a Water Maintenance II because he does not have a high school degree.

The Grievant is Arden Anderson, who is 56 years old and went to high school up through the 11th grade. He can read and write, and attended a vocational technical school where he took courses in woodworking, blue prints, and sheet metal. He has been working since he was 16 years old in construction type jobs. He was once a general foreman at Badger Concrete, where he supervised 125 people. Anderson has been employed by the City in the Water Distribution Department for the last 14 years. He worked in a Water Maintenance I position for ten years and then became a Meter Reader in January of 1990, when he signed a job posting for the position. The job description for Meter Reader stated that the required education and experience was "graduation from high school." When Anderson got the job, no one told him to go back and get his high school degree.

The City's job descriptions for Water Maintenance Man II used to state that the required education and experience was an eighth grade education and two years experience in the water distribution system construction and maintenance work. In fact, in the same year that Anderson got the Meter Reader position which then required a high school degree, a job posting for the Maintenance II position in October of 1990 stated that the required education was an eighth grade education. Anderson signed that posting also, but the job was awarded to Bob Burns who had more seniority.

The next posting for a Maintenance II position did not come up until February of 1994. Anderson did not sign the posting for it, only Bob Reichenberger and Todd Killilea signed it. Reichenberger, the more senior of the two, got the job. The job description for this posting stated that the required education and experience was a high school graduate, two years of experience in water distribution system construction and maintenance work, and a Class "B" CDL with air brake endorsement. Reichenberger has a high school education.

Another vacancy for a Maintenance II position occurred later in 1994, and the City posted for the position on July 13, 1994. Anderson signed this posting, as did Killilea again, and Dan O'Neil and one non-union applicant. This posting included the job description that, like the last one, included the requirement of a high school education. Anderson has more seniority than Killilea or O'Neil. Anderson was hired on January 25, 1981. Killilea was hired on January 15, 1990. O'Neil was hired in the fall of 1993.

The job was awarded to Killilea. The Superintendent for the Water Distribution system, James Wolf, was not the decision maker in the process. Wolf was in a meeting where the City Personnel Director, Norbert Svatos, asked him who had the most seniority. Wolf believes that the City then did background checks and ruled out Anderson for the job on the basis of the lack of a high school education.

In fact, the City's consistent response to Anderson's grievance is that he did not get the job because he did not have a high school education. Wolf stated so in a letter dated September 8, 1994. The Director of Public Works, Gerald Konrad, stated so in a memo dated September 21, 1994. And the City Manager, William Frueh, stated so in a letter dated September 26, 1994. Frueh's letter notes that Anderson did not have a "high school diploma or equivalent."

The letter from Frueh indicates that an "equivalent" would be acceptable. Killilea has a GED instead of a high school diploma.

The parties agree that the City hires people without any experience or formal education in the water distribution work and trains them on the job. People usually start out at the Maintenance I position and learn the job and skills required to post into higher positions.

The main difference between the duties of a Maintenance I and II position is that the person in a II position works with contractors, inspects new mains, services and hydrants, makes flow tests, uses spec books, measures mains and maps them, and can supervise others on the job or the department in the absence of other supervisors. The job has not changed from the time that the City required an eighth grade education to the present when the City requires a high school education.

This is the first time in this department that the most senior employee applying for a position did not get the job.

Anderson testified that his immediate supervisor, Wolf, told him that he was too old for the job as Maintenance II, and that the meter readers will eventually become meter service people. Wolf said that Anderson's age was not a factor, that it never came up, but that Wolf had a conversation with Anderson about his age in another setting. Wolf did not want Anderson to leave his meter reader position, and asked him to stay because his experience as a meter reader would help him when the department went to a new system and the meter readers became meter service

people.

There are no high school courses that teach people the specialized knowledge needed in the water distribution system.

#### THE PARTIES' POSITIONS:

The Union believes that Anderson should be awarded the position of Maintenance II for a number of reasons. The most senior employee always got the job that he signed for in the past, and barring some obvious deficiency, that practice should be followed. While the City denied Anderson the job for a lack of a high school education or its equivalent, the Union urges that his 14 years on the job -- 10 of them in a position as Maintenance I -- more than compensates for the one year that he lacks of high school.

The Union points out that the meter reader job required a high school education, and Anderson got that job. Thus, the City has waived this requirement in the past, and the Union had no way of knowing in advance that the City would not waive it until this case. Had Anderson been the more senior person signing for the next Maintenance II position, he would have received it, because that posting still required an eighth grade education. The job of Maintenance II has not changed, the requirements became different.

The Union agrees that the Employer may set the requirements, and the job market as it relates to new employees shows that the new employees will likely have high school degrees. However, where the City changed the rules of the game for existing employees, it penalizes them by creating a barrier to promotion.

The Union notes that other arbitrators have said that the lack of a formal high school education should not constitute a bar to consideration for a job or that employers should not create exclusionary barriers which prevent employees from competing for vacancies. The lack of credentials such as a high school diploma is not evidence of the lack of ability to perform a job.

The Union asks that the grievance be sustained and the Grievant be made whole for all losses.

The City argues that Anderson could not do all the tasks expected of a Water Maintenance II person, and therefore, the Union failed in its burden to show that the employee was the most senior qualified. The bargaining agreement states that the employee shall be selected on the basis of seniority, work record and qualifications. While the City does not dispute the past practice that the most senior person gets the promotion, the employee must meet the other two requirements. Wolf testified that Anderson could not do all the tasks expected of a Water Maintenance II person.

The City's stated reason for denying the promotion was the employee's lack of high school

diploma or equivalent. The City does not quarrel with the Union's citation to cases that note that denial of a job based solely on education requirements is impermissible. However, those cases also found the aggrieved employee otherwise qualified for the position. In this case, the Union failed to show that the Grievant was qualified for Maintenance II.

Although the educational requirement was waived when Anderson got the promotion to meter reader, this one waiver is insufficient to create a past practice, the City asserts. It also believes that the Union failed to grieve the 1994 posting that led to another promotion. While the Union contends that the most senior of those signing the posting received the job, it does not account for any self-selection by the employee who may have concluded that he was not qualified because of the educational requirement.

The City further points out that the trial period applies only if the arbitrator finds that the failure to promote violated the contract. The City believes no such violation occurred. While the City asserts that there is no remedy, it offers a comment on the only possible remedy, that Anderson be promoted to the Water Maintenance II position and Killilea be returned to his former position effective on the date of the award, and any back pay to be computed on the basis of Killilea's effective date of promotion, August 8, 1994.

In the Union's reply brief, it contests the City's statement that Anderson could not do all the tasks of a Maintenance II person. Anderson testified that he actually had performed all the duties in the job description with the exception of testing meters, and the other Maintenance II employees had not tested meters before or after holding that position. Moreover, Wolf stated that experience to perform the Maintenance II position would come from on-the-job training.

The Union points out that the sole reason given for denying Anderson the position was his lack of a high school diploma. That was the reason given by Wolf, by Konrad, and by Frueh. Wolf stated the same thing at the hearing. There is no reason that a high school education is needed for the job and there are no high school courses which help people prepare for these jobs.

The Union asserts that Anderson's 14 years in the department has to be worth something, as well as his 11 years of schools. The City's position would be valid if Anderson lacked some basic educational requirement for the job, such as the ability to read or write or hold a necessary license or certification. The Union further agrees that the City could hire only high school graduates, but contends that the failure to promote for the lack of the same is discriminatory without some nexus between that educational requirement and the position. There is no such nexus, and the City is creating an exclusionary barrier to prevent every non-high school graduate from ever being promoted.

The Union responds to the City's waiver argument by noting that such educational requirement has never prevented the senior applicant from being awarded a vacancy. The Union does not view Anderson's promotion to Meter Reader as a waiver by the City of the educational standard, but merely as a reasonable application of that standard to existing employees.

#### DISCUSSION:

According to Article XVII, the City must consider three things in filling vacancies -- seniority, work record and qualifications. The City used the high school education as a requirement in the job posting. An educational requirement may be considered as part of the qualifications aspect for consideration in filling the vacancy. However, the City seemed to rely

on just one thing -- that high school education. It did not take into account Anderson's seniority or work record or other qualifications for the job, such as his total 14 years in the water department, including 10 years as Water Maintenance I, or his experience on jobs, tasks, and equipment that are relevant to the Maintenance II position.

Until the arbitration hearing in this matter, the City did not challenge Anderson's qualifications or ability for the Water Maintenance II position, other than his lack of a high school education. At the hearing, Wolf testified that he did not believe that Anderson could make certain decisions and work well with developers. But Wolf did not make the decision on the Maintenance II position, and he testified that Svatos asked him who had the most seniority, but after the City did the background checks, he was not the deciding factor on anything.

The City's consistent denial of the position to Anderson was based on his lack of a high school education or its equivalent as required by the job description. That's what Wolf stated in his September 8th letter, that's what Director of Public Works Konrad stated on September 21st, and that's what City Manager Frueh stated on September 26th. It is late in the day for the City to now say that even if Anderson had the proper education, he lacks other qualifications.

The City agrees that one may have the equivalent of a high school education, but does not state what could constitute the "equivalent." Obviously, a graduate equivalency diploma or GED like Killilea holds is satisfactory to the City. The City did not take into consideration Anderson's three years of high school plus vocational technical school training, where he took courses in sheet metal, wood working, and blue printing -- skills that may be more important on his present job than general high school courses. The City could have considered the fact that Anderson had completed three-fourths of a high school education and taken vocational technical training to be the "equivalent" of a high school education. Or it could have considered that Anderson's prior education and his 14 years on the job would suffice for the "equivalent" and meet the requirements for the job description. Or that 40 years working in construction type jobs may be sufficient. But the City considered none of this.

The City does not claim that there is any relationship between high school course work and work in the water department. The ability to read and write would be a necessity, but Anderson has such abilities. Everyone that testified at the hearing said there was nothing in high school that gave them any training for the job, and that one had to learn these jobs by working in the water department.

The City's job descriptions formerly called for an eighth grade education. When the City updated them to require a high school education, the positions in the water department had not changed.

Additionally, the City promoted Anderson to the Meter Reader position, and that job description required a high school education, just as the Maintenance II position does. If the City did not deem that particular element to be necessary for the Meter Reader position, why does it

deem it necessary for the Maintenance II position? The City has no explanation. This alone shows an arbitrary determination in disqualifying Anderson for the Maintenance II position on the basis of a lack of a high school education. The City may not pick and choose which time it will stand by its educational requirements on a job description and which time it will waive them without showing that there is a connection between the educational requirement and the position at issue.

Anderson's formal education should not be a bar to being promoted within the water department to a Maintenance II position. He has a sufficient amount of high school and vocational technical education and years of job experience to qualify for the job, and he should not be barred from consideration based on a technicality that has no relationship to the position in question.

Moreover, the labor contract requires the City to consider an applicant's seniority, work record and qualifications. Anderson was the senior person to post for the position, but the City discounted this factor because he lacked a high school education. There is nothing on the record that indicates that the City ever considered his work record or qualifications other than formal education. Anderson has as many qualifications as the other applicants, having performed most of the tasks in the water department over many years.

Accordingly, the City violated the collective bargaining agreement and the grievance will be upheld.

#### AWARD

The grievance is sustained.

The City is ordered to give the Grievant Arden Anderson the position of Maintenance II, in accordance with any training period in the collective bargaining agreement, and to make him whole by paying to him the difference in wages from the date it awarded the position to Todd Killilea.

The Arbitrator will retain jurisdiction over this matter until June 30, 1995, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 8th day of May, 1995.

By           Karen J. Mawhinney /s/



Karen J. Mawhinney, Arbitrator