

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL NO. 139

and

GREEN LAKE COUNTY

Case 65
No. 50898
MA-8423

Appearances:

Mr. Warren Kaston, Legal Counsel, International Union of Operating Engineers, Local No. 139, appearing on behalf of the Union.

Mr. John B. Selsing, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

On April 28, 1994, the International Union of Operating Engineers, Local No. 139, hereinafter Union, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as arbitrator in a dispute between it and Green Lake County, hereinafter County. Hearing in the matter was held on August 11, 1994, and September 28, 1994, at which time the parties were afforded an opportunity to present documentary evidence and testimony relative to the dispute. Subsequent to the conclusion of the hearing, the parties filed post-hearing briefs, the last of which was received on January 19, 1995.

ISSUE:

1. Is the grievance filed by the Union on March 18, 1994, procedurally defective, and therefore not appropriately at the arbitration step?
2. Did the County violate Article 18, Promotions and Transfers, when it denied Joseph Kallas' bid of February 24, 1994, to be promoted to the Adult Services Worker/Social Worker I position vacancy posted on February 15, 1994? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE 2 - MANAGEMENT RIGHTS

The Employer and Green Lake County retain and reserve the sole right to manage its affairs in accordance with all applicable laws, resolutions, ordinances and regulations. Included in this responsibility, but not limited thereto, is the right to determine the number and classification of Employees; the services to be performed by them; the right to manage and direct the work force; the right to establish qualifications for hire and to test and judge such qualifications; the right to hire, promote and retain Employees; the right (sic) transfer and assign Employees; the right to demote, suspend, discharge for cause, or take other disciplinary action subject to the terms of this Agreement and the grievance procedure; the right to release Employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, means and personnel by which such operations are conducted, including the right to contract out provided that the exercise of this right shall not result in layoff of permanent personnel; and to take whatever actions are necessary and reasonable to carry out the duties and responsibilities of the Employer. In addition to the foregoing, the Employer and Green Lake County reserve the right to make reasonable rules and regulations relating to personnel policies and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. The Employer shall give reasonable notice of new rules and regulations or changes therein as promulgated by it to the Employees and the Union. Any disagreement over the meaning or application of such rules and regulations may be the subject of a grievance; however, the Employer reserves total discretion with respect to the function or mission of the County, its budget, organization, and the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement.

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ARTICLE 5 - GRIEVANCE PROCEDURE

Grievances within the meaning of the grievance procedure shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and items concerning wages, hours and conditions of employment, and about alleged violations of this Agreement. All such grievance (sic) shall proceed as follows:

Section 1. **Step 1:** Grievances shall be initially presented to the immediate supervisor by the Union representative and/or by the Union Committee if made by the Union, and the grievance shall be presented within ten (10) days from the date

of the occurrence giving rise to the grievance. Grievances shall be presented in writing, stating the nature of the grievance and the date when the incident giving rise to same occurred.

Section 2. **Step 2:** If a satisfactory settlement is not reached during the process outlined in Section 1 within ten (10) days after receiving the written answer from the appropriate supervisor, the grievance shall be presented in writing to the appropriate governing committee. A meeting shall be held within fifteen (15) days, or upon mutual agreement of both parties at the next regularly scheduled meeting of that governing committee.

Section 3. **Step 3:** If a satisfactory settlement is not reached during the process outlined in Section 2 within ten (10) days after the written answer from the appropriate governing committee, the grievance shall be presented in writing to the Personnel Committee, as it represents the Green Lake County Board of Supervisors. A meeting shall be held within fifteen (15) days, or upon mutual agreement of both parties, at the next regularly scheduled meeting of the Personnel Committee.

Section 4. **Step 4:** If a grievance is not satisfactorily resolved in Step 3 of the grievance procedure, either party may submit said grievance to arbitration by giving notice in writing to the other party within ten (10) days after a decision is reached in Step 3. Within five (5) days of such notice, the Employer or Union may contact the Wisconsin Employment Relations Commission for the appointment of an arbitrator from its staff. The decision by such arbitrator shall be binding on both parties except for a judicial review of same.

Section 5. If a discharged employee claims injustice in her/his discharge, the request for a meeting on a grievance shall be made within fifteen (15) days from the date of such discharge. Such requests shall be made by letter, with the postmark on the envelope to be considered as the time of request. Such grievances shall be handled under the procedures outlined in Sections 1, 2, 3 and 4 above.

Section 6. The time limits as set forth herein shall not include Saturday, Sunday or holidays, and may be extended by mutual agreement of both parties.

Section 7. Arbitration expenses shall be shared equally between the County and the Union except that special expenses, such as attorney's fees, witness fees, transcript fees, and similar expenses shall be borne solely by the side requesting these services.

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ARTICLE 18 - PROMOTIONS AND TRANSFERS

Section 1. When the County deems it necessary to fill a vacancy or a new position, notice of such vacancy shall be posted for seven (7) working days. All Employees shall be eligible for all promotional exams given by a department. Promotions shall go to the most qualified applicant, and seniority shall be a consideration. Any Employee on layoff shall be notified within three (3) working days of the posted position and given preferential consideration for recall for any new or existing vacant positions within the bargaining unit.

Section 2. Employees who are promoted or otherwise assigned to a new position shall serve a thirty (30) day probationary period in the new classification. Should the Employee be determined to be unqualified to perform the work, the Employee will be returned to her/his former position without loss of seniority or benefits.

Section 3. Employees who are promoted or otherwise assigned to a higher position shall have their seniority date for step increase advancement only determined by the date of such promotion or assignment. All other aspects of seniority shall be determined by the provisions of Article 6.

Section 4. If an Employee is transferred to a lower classification due to a reduction in work force, the Employee shall receive the rate of pay for the previous classification for the first sixty (60) days, and thereafter at the rate for the new classification.

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BACKGROUND:

In February, 1994, Joseph Kallas, the grievant, was employed by the County as a Production Supervisor in the Fox River Industries Unit. On February 15, 1994, the County posted the vacancy of "Adult Services Worker/Social Worker I, Green Lake County Human Services Department. Joseph Kallas, on February 24, 1994, signed the posting indicating he was interested in bidding for the position. Attached to the posting was a copy of the job description for the position.

PURPOSE OF POSITION: To assess and provide case management services to adults who are elderly, physically disabled, developmentally disabled or chronically

mentally ill that come to the attention of the department that may require guardianship and/or protective placement.

FUNDAMENTAL JOB DUTIES AND RESPONSIBILITIES:

A. Essential Functions:

About 35% of this position's time is spent participating in Chapter 55 and 880 Court proceedings. This includes assisting petitioner and the corporation counsel in the preparation of petitions including interviewing adults, collateral contacts and locating prospective guardians as needed. This also includes referring and arranging services that will enable the individual to remain in his/her own home if possible and if not, to arrange for services to be provided in other settings.

Approximately 20% of this position's time is spent providing case management services to clients in the community who are at risk of protective placements or who have been protectively placed. This includes follow-along/discharge planning to ensure that the individual is in the least restrictive setting possible with necessary services.

Another 20% of the time is spent doing elder abuse and neglect investigations/assessments. This is usually done in conjunction with the Aging Unit Manager. This includes verifying if elder abuse or neglect has occurred and assessing as to what services are available to reduce the risk of any future abuse or neglect. This includes participating in the Adult Services meetings for consultative purposes as well as coordinating existing service providers in the development of a comprehensive treatment plan if indicated by the assessment.

The remaining 20% of time is spent providing community education and consultation to the community, guardians, family members, and other agencies within the county as to what protective services does for the community and in particular to the adults who are referred for elder abuse. This individual would also license and recruit Adult Family Care Homes. Additionally, this involves participating in peer counseling training, public speaking, and as a back-up to the Community Options Program Coordinator.

Also other administrative functions are performed within this category such as unit staff meetings and individual supervision, training, etc.

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QUALIFICATIONS NEEDED (EDUCATION SKILLS): A Bachelor's Degree in Social Work, or a closely related professional field is required with considerable experience working with the elderly. Experience working with developmentally disabled, physically disabled and/or chronically mentally ill is preferred. Must be certified/certifiable as a Social Worker in Wisconsin. Basic everyday living skills, the ability to understand, follow and provide directions; reading, writing (reports) is necessary. Additionally it is important to have comprehensive knowledge of the needs of individuals who are elderly, chronically mentally ill, developmentally disabled, and/or physically disabled; ability to relate to and communicate effectively with staff, community professionals, agencies and the general public. Must have a valid Wisconsin Driver's License and access to an insured vehicle.

This position description has been prepared to assist in defining job responsibilities, physical demands, working conditions, and needed skills. It is not intended as a complete list of job duties, responsibilities and/or essential functions. This description is not intended to limit or modify the rights of any supervisor to assign, direct, and control the work of employees under supervision. The county retains and reserves any and all rights to change, modify, amend, add to or delete, from any section of this document as it deems, in its' judgement, to be proper.

Thereafter, on March 4, 1994, Dissing, Deputy Director of Green Lake County Hugman Services Department, advised Kallas:

Based upon the essential functions and qualifications (as outlined in the job description) required for the above position and the information supplied by you, we have determined that you do not meet the minimum qualifications and are therefore unable to assume this position.

After receiving the notice of denial of his bid, on March 11, 1994, Kallas grieved. Then, on March 18, 1994, Dissing sent Kallas the following response to his grievance:

Pursuant to the labor agreement between Green Lake County and International Union of Operating Engineers, Local 139, Article 5, Section 2, I am responding to your grievance dated March 11, 1994.

To summarize your grievance, you are alleging that Article 18 of the contract was violated. Article 18 states that "promotion shall go to the most qualified applicant, and seniority shall be a consideration." You are further alleging in your judgement that you meet the qualifications of this position.

I would, however, refer you to Article 2 of your contract entitled management rights. This clearly states that the employer has "the right to establish qualifications for hire and to test and judge such qualifications; the right to hire, promote and retain employees; the right to transfer and assign employees...". (sic) It is management's contention that this right is not only for new hires but for those posting into positions that might become vacant. This right was exercised when you signed to post into the Adult Services position. You signed the posting on February 24, 1994 and were interviewed on March 4, 1994. Again, I would emphasize that it is management's right to determine if an applicant meets the qualifications of the position prior to assigning or appointing them to the position. This is true whether a person is hired outright for a position or attempts to post for a vacant position.

You furthermore state in your grievance that you were unaware of what the minimum qualifications were for this position. I would refer you to the job description which was attached to the posting which clearly details the essential functions and qualifications needed to perform the duties within this position. The minimum qualifications needed are a Bachelor's degree in Social Work or a closely related professional field with considerable experience working with the elderly. You have a Bachelor's degree in Political Science which is not considered a closely related professional field. Furthermore, by your own admission, you have no formal social work education, training or experience. You have little or no knowledge of Wisconsin Chapter 55 and 880 court proceedings. Furthermore, you stated you have no court experience in this field. You have not done any elder abuse or neglect investigations or assessments. Nor have you done any social work case management. All of these are essential functions of this position.

Based on the above information, the interview held on March 4, 1994, the job description, and the contract language found between the union and the County, it is management's determination that:

1. Management has the right to determine whether an applicant or a potential posting individual has the qualifications necessary to be assigned or be appointed the position that is vacant.
2. That management has made a determination that you do not meet the qualifications of this particular position and are therefore ineligible to assume this position.

This is management's response and position pursuant to Step 2 of the grievance process. If you wish to proceed further with your grievance, have your union representative contact me.

Also, on March 18, Union Representative Van De Hei filed a grievance contesting the County's determination that Kallas did not meet the minimum qualifications for the posted Adult Services Worker/Social Worker I position. The Union filed the grievance because it believed, pursuant to the collective bargaining agreement, employees could not file grievances and only the Union could grieve. Van De Hei's grievance and Dissing's response to Kallas' grievance crossed in the mail. No written response to Van De Hei's grievance was ever prepared by the County. However, on March 21, Representative Van De Hei spoke with County Clerk Bostelmann. Bostelmann inquired of Van De Hei whether his letter was a Step 1 grievance or a response to the letter Dissing had sent to Kallas. Van De Hei stated that his was a Step 1 of the grievance because he had not seen the Dissing letter. Van De Hei never spoke with Bostelmann again about his grievance, and the matter was never agendaed for the Personnel Committee, but was taken directly to arbitration.

DISCUSSION:

The first issue to be resolved is whether the grievance is appropriately at the arbitration step. The County contends that the Union did not appeal the grievance to Step 2 and therefore, the grievance should be barred from the Arbitrator's consideration.

The facts surrounding the procedural aspects of the grievance in this case clearly show that, at least in this bargaining unit, grievances have been handled in a very informal fashion. First, neither the Union nor the County has a formal grievance form for use in filing grievances in this bargaining unit. Secondly, the testimony established that historically when the Union had a grievance, the Union representative would make oral contact with a County representative, and not put the grievance in writing as required by Step 1. Those grievances, apparently, were usually resolved without proceeding to arbitration. In this instance, the grievance was filed by the affected employe, Kallas, initially on March 11. At that time, the Employer did not indicate that the grievance had to be filed by a Union representative or a Union committee as stated in Section 1 of

Article 5, but rather the Deputy Director, Dissing, responded in writing to Kallas' grievance.

Union Representative Van De Hei also filed a written grievance on March 18. When excluding the intervening Saturdays and Sundays between the March 4 Dissing denial of Kallas' bid for the Adult Services Worker/Social Worker I position and the March 18 Van De Hei grievance, it becomes clear that the Van De Hei grievance was timely filed. Thereafter, no written response was provided by the County to the Union. Obviously, there was some confusion, as evidenced by the Clerk's conversation with Van De Hei, as to whether Van De Hei's was a first step grievance or in fact a response to Dissing's response to Kallas' grievance. However, Van De Hei told Bostelmann that his was a first step grievance. However, the grievance was never agendaed for the County Personnel Committee and was immediately moved to arbitration.

In light of the evidence of the informality in which grievances have been historically handled in this bargaining unit, as well as the confusion surrounding Kallas' grievance, Dissing's response thereto, and Van De Hei's grievance which was the official grievance, the undersigned does not believe it would be appropriate in this case to conclude that the grievance is procedurally defective and that the undersigned does not have jurisdiction to resolve the merits of the grievance alleging the County's wrongful denial of Kallas' bid for the Adult Services Worker/Social Worker I position. Consequently, the undersigned will proceed to resolve the merits of that grievance. 1/

Kallas was the only County employe to bid on the Adult Services Worker/Social Worker I position vacancy. The language of Article 18, Section 1 provides "Promotions shall go to the most qualified applicant, and seniority shall be a consideration." Obviously, because Kallas was the only bidder for the position, if it was established that he was qualified, he should have automatically received the promotion pursuant to Article 18.

However, the County determined that Kallas did not meet the minimum qualifications for the position. Both Dissing and Sleezer, Unit Manager, concluded that Kallas did not meet the minimum qualifications because he did not possess a Bachelor's Degree in social work or a closely related professional field, was not certified or certifiable as a social worker in Wisconsin, and did not have sufficient relevant experience.

1/ Clearly, if either party to this contract wishes to prospectively enforce the requirements of the grievance procedure, it should give timely notice to the other party of its intent to do so. Also, the undersigned believes it would be in both parties' interest to meet and discuss the need for formal grievance forms, as well as the specifics of how the contract grievance procedure was intended to operate. Once those meetings occur and both parties reach an understanding of their rights and responsibilities, instances like occurred in this case can be avoided in future cases.

Kallas' degree was in Political Science, and he did not have extensive experience working with the elderly in assessing their needs and developing treatment plans. That was the type of experience which Dissing testified the County was looking for. But, Kallas' experience as the Production Supervisor in his current position, and previous experience as a nursing home orderly did not provide the type of experience which the County testified was necessary for an individual filling this position. Dissing testified that the interview with Kallas established that he had good articulation, but had not had any social work experience, educational training, or familiarity with the laws and paperwork associated with the assessment of elderly individuals. Dissing also

testified that it was the County's position that there was not a hard and fast rule on educational background and what were closely related fields to social work. He testified that prior experience also received great weight in determining whether an individual was qualified for a particular vacancy.

The individual ultimately hired to fill the vacancy from the outside, Hinton, did not have a degree in social work either. However, Dissing testified that she had extensive relevant experience in another County, and was certifiable as a Social Worker I and was in the process of applying for that certification at the time the County hired her to fill the vacancy. To the contrary, Kallas was not a certified Social Worker, and Dissing believed he was not certifiable under the State rules on the basis of his prior work experience.

The Union argued that the County was deviating from a prior practice of not insisting upon a social work degree or a degree in a closely related field. However, the testimony of County witnesses established that subsequent to the creation of the Human Services Department in or about 1991, as social work positions have become vacant, the position descriptions were redone and the requirement for social work experience and degree in social work or related fields has been inserted. While it is true, as the Union established, that prior to that time employees were hired without such educational background and/or experience, that policy or practice became irrelevant with the creation of the Human Services Department and the County's determination to upgrade the required minimum qualifications as positions became vacant. Article 2 - Management Rights clearly states the County's "right to establish qualifications for hire and to test and judge such qualifications." There has been no showing in this case that the County acted arbitrarily in establishing such qualifications or that the qualifications established for the Adult Service Worker/Social Worker I position were unreasonable. Consequently, having established those minimum qualifications, the County had the right to insist that any applicant, either internal or external, meet the minimum qualifications. In this case, the undersigned is satisfied that the grievant did not meet those minimum qualifications and that the County's denial of his bid was therefore appropriate, and not in violation of Article 18.

Article 18 also provides in Section 2 that employees promoted shall serve a thirty day probationary period. The Union has argued that the grievant was entitled to the thirty day probationary period in order to show that he was qualified for the position. The undersigned would agree that Kallas should have been given the thirty day probationary period had he met the minimum qualifications for the position. However, the minimum qualifications for the position is the threshold which must be met before the individual is entitled to the thirty day qualification. Obviously, it would make no sense to allow employees to fill a position for thirty days in an attempt to demonstrate they can perform the duties and responsibilities of the job if they do not meet the minimum qualifications thereof. For example, if a license for a particular position is required, i.e., a CDL, and an individual bidder did not possess such a license, it would make no sense to allow that employee to have thirty days within which to establish that he could perform the duties and responsibilities of the position. Thus, it is reasonable for the Employer to establish

reasonable, minimal threshold qualifications as a prerequisite to an employe being selected to fill a vacancy and afforded a thirty day probationary period within which to demonstrate his ability to perform the duties and responsibilities of the position. In this case, Kallas did not meet those threshold minimum qualifications, and therefore, was not entitled to serve a thirty day probationary period within which to demonstrate his capability to perform the job.

AWARD

1. The subject grievance is not procedurally defective and is appropriately at the arbitration step.

2. The County did not violate Article 18 - Promotions and Transfers when it denied Joseph Kallas' bid of February 24, 1994, to be promoted to the Adult Services Worker/Social Worker I position posted on February 15, 1994. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 5th day of June, 1995.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator