

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DRIVERS, WAREHOUSE, AND DAIRY
EMPLOYEES UNION, LOCAL NO. 75

and

OCONTO COUNTY

Case 129
No. 52596
MA-9037

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, by Mr. John J. Brennan, for the Union.

Godfrey & Kahn, S.C., 333 Main Street, Suite 600, Green Bay, Wisconsin 54307, by Mr. Dennis W. Rader, for the County.

ARBITRATION AWARD

Drivers, Warehouse, and Dairy Employees Union, Local No. 75 (the Union), and Oconto County (the County), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on June 1, 1995, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Oconto, Wisconsin on July 12, 1995. A transcript was taken and received on July 21, 1995. The parties filed briefs, and reply briefs, the last of which was received September 11, 1995.

ISSUE

At hearing, the parties stipulated to the following statement of the issue:

Did the County violate the contract when it did not grant the floater relief deputy position to the grievant, Bret Schaal?

If so, what is the appropriate remedy?

BACKGROUND

The Union represents a unit of jailers and radio operators in the Oconto County Sheriff's Department. In March, 1995, the County sought to fill a vacancy in the position of floater relief

deputy in a separate unit of deputies and others with the power of arrest, commonly referred to as the "deputy unit." Grievant Bret Schaal, who had been a jailer for almost two years, applied for the position. After a preliminary screening, the County administered a state-provided written test to those applicants who demonstrated at least minimum qualifications and subsequently interviewed them. Ultimately, the County appointed Keven Thomson to the position. Officer Schaal grieved the County's decision, asserting that his qualifications were relatively equal to those of Thomson, and under the contract language he should have been granted the position. The grievance remained unresolved throughout the grievance procedure and is the subject of this award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE I

RECOGNITION

The County agrees to recognize Drivers, Warehouse and Dairy Employees Union, Local No. 75 as the bargaining agent for all full-time and regular part-time personnel of the Sheriff's Department employed by the County, excluding the Sheriff and the Director of Police Services, all supervisory, managerial, confidential and other employees with the power of arrest, in the matter of wages, hours and working conditions. Prior to any negotiations the County shall be furnished with a list of the bargaining agents for the unit.

All part-time employees hired after January 1, 1989 shall receive benefits on a quarterly pro rata basis.

ARTICLE V

SALARY AND OVERTIME

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New employees whose probationary employment is in effect when base salaries (18 months) are increased shall be adjusted to the corresponding salary level. New employees shall be hired at ten percent (10%) below the base salary of the classification. After six (6) months probationary period, the employee's salary shall be adjusted to five percent (5%) below base salary of his classification. After eighteen (18) months, an employee shall be adjusted to the base salary of his classification.

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ARTICLE XXV

PROMOTION AND LAYOFF PROCEDURES

1. All promotions of employees shall be in an orderly manner as provided herein. All permanent vacancies on any new and/or permanent job openings or other positions shall be posted upon the determination to fill such vacancy or opening. Vacancies shall be posted on all bulletin boards for five (5) working days, giving a summary of the duties, qualifications and rate of pay. Any employee interested in such promotion may sign the posting. The Employer shall select from the signatories an employee to fill the new or vacated job based on the employee's qualifications. The unit employees shall be considered in one group for purposes of promotion. When the Employer determines that two (2) or more employees are relatively equal in qualifications, the more senior employee shall be selected. If within thirty (30) working days, he/she fails to qualify or if after thirty (30) working days he/she wishes to return, he/she shall be returned to his/her former job and the next applicant shall be placed in the job until a qualified person is found.

If no qualified persons apply for the job, then the Employer may consider applicants from outside the unit. The job shall be filled based on the applicant's qualifications, but if a unit member applies for the job and his or her qualifications are relatively equal to a non-unit applicant, the unit member shall receive the job. When seniority is not recognized in job preferences, the case shall be subject to the grievance procedure.

Unit employees applying for Deputy or Investigator positions in the Deputy Unit shall receive the job if his or her qualifications are relatively equal to non-unit applicants.

The County reserves the right to test all applicants for the deputy or investigator positions.

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POSITIONS OF THE PARTIES

The Union

In arguing that Grievant's qualifications were superior to Thomson's, the Union points to Grievant's experience in the County jail and as a reserve deputy and as a police officer in the Village of Lena, maintaining that this background gave him working knowledge of the jail and law enforcement procedures. Additionally, the Union emphasizes the value of Grievant's training, his police science degree and Grievant's specialized certifications. It asserts his training is more relevant to the duties of the deputy than Thomson's degree in natural resources.

The Union discounts the importance of Thomson's higher score on the written test, and notes that the County itself indicated that the written test was not the deciding factor because it named Grievant as the second choice even over other applicants with higher written scores. The Union asserts the County should have the burden of showing that the two applicants were not relatively equally qualified.

Addressing Thomson's status as an employe who had worked in a unit position for three days, the Union argues that as a probationary employe, Thomson should be treated as a non-unit employe for purposes of interpreting the disputed contract language. Furthermore, the Union contends that the contract requires an analysis of whether the applicants were "relatively equal" even if Thomson were considered a non-probationary member of the unit. In that case, Grievant should be found to be relatively equal to Thomson and his seniority should entitle him to the disputed position.

The County

The County offers two arguments. On the one hand it asserts the successful applicant, Keven Thomson, was a member of the unit at the time he was appointed and therefore the contract language referring to making determinations between unit and non-unit applicants does not apply. In the alternative, if that language is found to apply, Thomson is clearly the better candidate and the County did not violate the contract by granting the position to him. The County had the right to administer a test to all applicants and it did so in a fair fashion. The County's determination of qualifications can only be overturned if it made that determination arbitrarily. There is no past practice requiring the County to appoint a jail officer to the deputy position.

In its reply brief, the County asserts that seniority rights only come into play when the position being considered is in the bargaining unit. It reasserts its position that both grievant and Thomson were members of the bargaining unit, thereby making the third paragraph of Subsection 1 irrelevant. Arguing in the alternative, it maintains that the County has the rights to determine qualification and that testing and a consideration of education and experience are proper.

ADDITIONAL FACTS AND DISCUSSION

A critical fact in this case is that the position sought by Grievant, that of floater relief deputy was not in the bargaining unit of radio operators and jailers which is represented by the Union. Both the Union and the County recognize this fact and agree that the first two paragraphs of ARTICLE XXV - PROMOTION AND LAYOFF PROCEDURES are not applicable to this dispute since they govern the granting of promotions to positions within the unit.

The collective bargaining agreement does, in the third paragraph of Subsection 1, address this circumstance of a bargaining unit member applying for a deputy or investigator position in the deputy unit. That paragraph gives preference to a member of this Union's bargaining unit when another candidate or candidates are from outside this unit and possesses qualifications relatively equal to those of the employe in this unit.

It is clear, then, that the question of whether Thomson, the successful applicant, was a bargaining unit member is crucial to the determination of whether the County was obligated to follow the last paragraph of the subsection when awarding the disputed position. Thomson had worked in the jailer position for three days. The County argues that this made him a bargaining unit member, whereas the Union argues that he was a probationary employe and not entitled to be considered a bargaining unit member.

As the Union states, probationary employes are not described in a separate subsection of the contract, but ARTICLE V - SALARY AND OVERTIME refers to a salary rate paid for the six month probationary period. The undersigned notes that ARTICLE XXIII - DUES DEDUCTION, FAIR SHARE refers to "new employes," and provides that they pay fair share or due deductions beginning with the first paycheck after 60 days of employment. The parties do not note any other references to new or probationary employees in the contract.

The term "probationary employe" is widely used to denote a newly-hired employe who has no recourse to the grievance and arbitration procedure to challenge termination during the probationary period. This meaning is so widely accepted that arbitrators have even refused to find arbitrability in a probationary employe discharge dispute even when the term is not defined in the contract. 1/ There are also contracts which expressly restrict certain other rights from probationers. But that convention regarding probationary employes and discharge does not by itself justify a ruling that a newly hired employe is not member of the bargaining unit. Such a ruling is not possible in a case such as this one where there is no evidence either in the contract language or in the parties' past practice to support it. The contract which this arbitrator is charged to interpret provides a recognition clause that encompasses Thomson and the record does not demonstrate that the parties intended to exclude him from bargaining unit membership.

1/ See, for example, Cranston Print Works, 91 LA 955 (Robinson, 1988).

Since Thomson, as well as Grievant, is a bargaining unit member, rather than a "non-unit applicant," the first sentence of the last paragraph on ARTICLE XXV, Subsection 1, does not govern this dispute; that is, a finding that Grievant's qualifications are relatively equal to Thomson's would not automatically entitle him to the position. In this circumstance, the County is free to choose among applicants without a contractual limitation, and the question of whether Grievant and Thomson are relatively equally qualified is irrelevant.

The undersigned is not persuaded by Union's argument that even if both applicants are bargaining unit employees, the County is required to award the position to Grievant if he and Thomson are relatively equally qualified. By expressly providing for situations involving non-unit applicants, the contract indicates an intention to exclude other situations from the requirements of the "relatively equal" standard.

To summarize, under the facts presented here, the County had no contractual obligation to grant the position to Grievant if he should be relatively equally qualified as another applicant, and since there is no allegation that the choice was made in bad faith, or arbitrarily or capriciously, the undersigned concludes that the contract was not violated.

AWARD

1. The County did not violate the contract when it did not grant the floater relief deputy position to the grievant, Bret Schaal.
2. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin, this 21st day of December, 1995.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator