

IN RE ARBITRATION BETWEEN:

AFSCME COUNCIL 65

and

MILLE LACS COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 08-PA-0964

JEFFREY W. JACOBS

ARBITRATOR

September 29, 2008

IN RE ARBITRATION BETWEEN:

AFSCME Council 65

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 08-PA-0964
Terri Fetters Case Aide Position grievance

Mille Lacs County.

APPEARANCES:

FOR THE UNION:

Jo Musel Parr, Business Agent for the Union
Terri Fetters, Grievant
Charlene Burklund, Lead Financial Worker
Stefanie Dillan, Union Steward

FOR THE COUNTY:

Pam Galanter, Attorney for the County
Leo Vos, Family Services Director
Richard Schmidt, Supervisor of Adult Services

PRELIMINARY STATEMENT

The hearing in the above matter was held on July 31, 2008 at 10:00 a.m. at the Mille Lacs County Courthouse in Milaca, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated August 22, 2008. The parties did submit supplemental Reply Briefs the last of which was received on September 14, 2008 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2008 through December 31, 2010. Article XXIII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Whether the County violated the collective bargaining agreement at Article XIX, Section A and/or Article XXI, Section G when it selected an applicant other than the grievant for the case aide position? The County also argued that the matter was not substantively arbitrable.

UNION'S POSITION:

The Union's position was that the County violated the contract at Articles XIX and XXI when it hired a junior applicant for the position of Case Aide. In support of this position the Union made the following contentions:

1. The Union asserted that the County violated Articles XIX and XXI when it selected a junior applicant for the Case Aide position in December 2007 over the grievant. The Union asserted that the grievant was not only more senior but was actually more qualified than the successful applicant and should have been hired into the open job. At the very least the grievant was equal to the other applicant insofar as her qualifications and under the language at issue here; seniority should have been the deciding factor.

2. The Union asserted that there is no difference under the contract between a promotional opportunity and a lateral transfer and that even though the Case Aide position would have been a lateral transfer for the grievant seniority should still have come into play.

3. The Union pointed to the provisions of Article XIX, which provides in relevant part as follows:

The Employer and the Union agree that job class vacancies or a newly created job class should be filled based on the concept of promotion from within, by seniority, provided that applicants are on an eligible register for appointment, be willing to accept the job class or the newly created job class, and are qualified to perform the duties in the opinion of the Family Services Director. Principles of seniority will prevail when all other qualifications are equal as determined by the Family Services Director.

4. The Union also points to the provisions of Article XXI, section G which provides in relevant part as follows:

When any position in the agency becomes vacant or when any new position is created within the agency, such position shall be posted on employee bulletin boards. It shall be the prerogative of qualified employees to make application for posted positions. It shall also be mandatory that such qualified employee be given priority consideration for said position before it is considered to be filled from outside the agency, subject to Article XIX. If two or more employees equally qualified as determined by the Family Services Director apply for the same position, determination of the appointment shall be made according to seniority.

5. Based upon these provisions, the Union argued that the grievant should have been selected. Her Merit Pay scores were the highest of all the other applicants. Further, the grievant was the most senior employee to apply and seniority should have been used to determine her selection.

6. The Union further asserted that in the past, the interview process used here was not used and the most senior employee was simply selected. In fact in 2002 a senior applicant was selected over this grievant when they had both applied for the same job. The Union asserted that this is the process that should have been used here.

7. The Union claimed that the County acted arbitrarily and capriciously when it selected a junior applicant who was not as qualified for the job as the grievant was. The Union claimed that the grievant was very experienced and clearly understood the Case Aide job and was at least equal to the successful applicant or even better. The Union pointed to the notes and rankings used by the interviewers and noted that one of the interviewers rated the two applicants equally. Mr. Vos acknowledged that the grievant was an outstanding employee with excellent evaluations going back years. One of the areas in which she consistently ranks the highest is her ability to work well with others. Yet here, the question that worked against her dealt with how she might deal with an error made by a co-worker. There was simply no basis to suggest that she somehow “blew” this question.

8. The Union pointed out that initially, the County was not even going to grant the grievant an interview. When they finally did, it was clear that they had already determined she would not get the job and that even though her scores were the highest, her evaluations were consistently excellent and her seniority was the greatest of all the applicants.

9. The essence of the Union’s claim is that seniority should be the deciding factor in selection for a job opening, whether the position is promotional or a lateral. Here the grievant was not only the most senior applicant but in fact a better qualified candidate than the person selected.

Accordingly the Union seeks an award sustaining the grievance and ordering the grievant to be placed into the Case Aide position involved in this matter.

COUNTY'S POSITION

The County's position was that there was no contract violation here at all since the clear contract language grants to the employer the discretion to determine if qualifications between competing candidates are equal. In support of this position the County made the following contentions:

1. The County pointed to the very same provisions of the labor agreement and asserted most strenuously that the matter is not even arbitrable. The County asserted that the language clearly reserves to the Family Services Director the discretion to determine the qualifications of each applicant and the right to determine whether they are equal or not.

2. The County pointed to the specific language of Article XIX and asserted that the entire sentence must be read in order to understand fully the relative rights of the parties here. Seniority is to be used “provided ... [the applicant is] qualified to perform the duties *in the opinion of the Family Services Director.*” (Emphasis added) The County argued that this language clearly reserves to the Director, here Mr. Vos, the right to determine the qualifications. There is no limitation on this whatsoever. There is neither a list of factors to be used to determine qualifications nor any requirement to use any particular test nor is any limitation on whether to use an interview process.

3. The County also pointed to the provisions of Article XXI and again pointed to the last sentence of Section G that provides in part as follows: “If two or more employees equally qualified *as determined by the Family Services Director* apply for the same position, determination of the appointment shall be made according to seniority.” (Emphasis added). Once again, the County pointed to this language and asserted that this is almost directly on point with the scenario presented here. There were two applicants and it is for the Family Services Director to determine qualifications. There are no limitations on that right nor a list of factors to be used. It is left entirely to the discretion of the Family Services Director to determine qualifications and to determine whether they are equal or not.

4. The County also argued that even if one looks at the qualifications of the two applicants involved in this matter it becomes clear that the grievant was not in fact equal to the successful applicant. While her Merit Score was higher, the County asserted that the Merit System test is not a true measure of the qualifications of the applicant. The Director testified that this is similar to passing a driver's test. It qualifies the person to drive but is not a true measure of the quality or competency of the person once in that position.

5. Moreover, the County argued, the grievant did not possess knowledge of SSIS software; critical software that is used almost daily in the Case Aide position. Even though the successful candidate did not possess knowledge of MMIS she did have knowledge of SSIS software, which is a far more important piece of knowledge to have.

6. Further, the grievant did not answer at least one important question very well at all. The Director determined that her answer to question #11 did not demonstrate the right way to handle a situation wherein a co-worker makes a mistake.

7. The County acknowledged that the grievant is an excellent employee with a good work ethic and a good attitude. Her performance in her current position is quite good but argues that this is not the issue. The issue is whether the Director determined that another person would be a better fit for the Case Aide position. Since the contract clearly gives him that unfettered right and since he determined that the grievant's qualifications were not in fact equal to the successful candidate, the grievant's performance in her current position is simply immaterial to this discussion.

8. The County also pointed out that there was nothing to suggest that the person hired was not well suited to the job or that she was anything other than better qualified for the job. In fact, the County's Adult Services Supervisor, Mr. Schmidt, indicated that the person hired into the Case Aide job is doing quite well and that he believes the County made the right choice to hire her. There is simply no reason now to pull her out of the position in favor of the grievant.

9. The essence of the County' argument is that the contract grants the right to the Director to determine equality of qualifications. Here he did just that and determined through the interview process that the grievant's qualifications were not equal to the other person's. There is simply no basis on which to grant the relief sought by the Union.

The County seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

There were no disputes about the operative facts of this matter. The grievant has been with the County since 1992. She was the senior applicant for a Case Aide position that came open in the fall of 2007. There is further no question that by all accounts she is an excellent employee. Her supervisor indicated that her attitude and work ethic are exemplary and that in her current position she does a very good job. Her evaluations, Union Exhibit 6, showed her performance to be at or in many cases well above expectations.

The evidence further showed that the grievant learned that the person in the Case Aide position would be retiring soon and inquired about it and expressed interest in the job if and when it became available. Several individuals including Mr. Schmidt, the Supervisor of Adult Services, encouraged her to apply. The Case Aide position did become open in the fall of 2007 and the grievant applied for it. The evidence further showed that she took the necessary tests for the position and scored the highest on the Minnesota Merit System Score. See Union Exhibit 9, Tab 12. As noted, the grievant is the most senior of the applicants for the job.

At first the County was not going to grant the grievant an interview. It was not clear why but eventually the grievant was interviewed along with at least one other applicant. Mr. Schmidt and Mr. Vos conducted the interview. They asked a series of scripted questions to each applicant in order to maintain consistency. There was no evidence that the interview process was either arbitrary or capricious nor was there any evidence to suggest that the questions were somehow skewed to favor one or the other applicant.

The evidence showed that the answers given by the applicants were similar to many of the questions but differed on several of them. The evidence showed that the Family Services Director, Mr. Vos, felt that the grievant's answers to one of the questions pertaining to how she would handle discovering an error made by a co-worker was not as good as the other applicant. The essence of this question was how she would handle the discovery of an error by a co-worker. Both indicated that they would investigate further to determine how the error was made and who made it. The grievant indicated that she would not be confrontive about it while the other applicant indicated that she would report her information so that her superiors would know who made the error. Mr. Vos testified credibly and persuasively that this divergence in answers created some doubt about the grievant's ability to manage the department. It should be noted that there is some requirement that the error be caught and the person held accountable for it so there was a very real distinction between these two answers on a salient point for the job.

The evidence also showed that the grievant did not possess any experience with SSIS software and that this type of software is the main type of software used in the Case Aide position. The other applicant did not know how to utilize MMIS software but the evidence further showed that this software was not as important or as prevalent as the SSIS software. There was not an extensive discussion of what these software programs do or how they differed but on this record those differences were not material. What was important was that the Family Services Director testified credibly that the software most used was the SSIS and that he determined that the other applicant's knowledge of the SSIS was more important than the grievant's knowledge of MMIS software.

The grievant was not hired into the position of the Case Aide and filed this grievance claiming that her seniority should have been the determinative factor. She further claimed that she should have been hired given her higher score and her prior performance.

The question involves the interpretation of the language of Article XIX and XXI as cited above. The County argued that the matter is not substantively arbitrable given the language of these two provisions. The County asserts that the language reserving to the Family Services Director the decision to decide whether the qualifications of the respective applicants are “equal” or not takes this out of the arbitrator’s jurisdiction and that the matter should simply be dismissed on that basis.

The grievance procedure, Article XXIII, defines a grievance as “a dispute or disagreement as to the interpretation or application of any term of this Agreement.” Clearly here there is such a dispute about the interpretation or application of the language of Article XIX and XXI. As such the matter is certainly arbitrable. The relative strength or weakness of a party’s argument or position does not take it out of the arbitrator’s jurisdiction. The matter can thus proceed to the merits.

On the merits, the County’s position is well founded. The contract language in this matter shows by its plain and unambiguous terms that the Family Services Director is to make the determination of the equality of the qualifications of the various applicants for an open position. Certainly too, the language makes no distinction between a promotional position versus a lateral transfer for any particular employee. Thus the fact that this was a lateral transfer for the grievant did not take it out of the purview of Article XIX and XXI.

A review of the language shows that job vacancies are to be filled “by seniority, provided that applicants are ... qualified to perform the duties *in the opinion of the Family Services Director.*” (Emphasis added). This language demonstrates clearly that the decision regarding whether the candidates are “qualified” to perform the job duties is left to the Family Services Director. Here though there was no evidence to suggest that the grievant was not qualified to perform the job. Mr. Vos did not indicate that she was unqualified to perform the job; only that the other applicant was better qualified to do so.

Resort must then be made to the language of Article XXI, which provides that “If two or more employees equally qualified as determined by the Family Services Director apply for the same position, determination of the appointment shall be made according to seniority.” This is the far more relevant provision and when read together with the previously cited provision, shows that the intent of the language is that the Family Services Director retains the discretion to determine the relative qualifications of the applicants. Here it is only where the Family Services Director determines that the employees are “equally qualified” that seniority becomes the deciding factor.

Without going into an extensive discussion of the various types of seniority clauses out there, there are essentially three basic types. A so-called straight seniority clause calls for the use of seniority alone to determine the promotion or transfer. That is not involved in this case.

There is also the type that calls for the use of seniority where it is shown that the candidates are “qualified” to perform the job. This would essentially require the use of seniority where the various candidates are shown to possess the minimum qualifications to perform the job. That is also not involved here. This becomes relevant in the discussion of the Merit pay test since simply passing that test and possessing minimum qualifications for the job is not under this clause enough to trigger the seniority requirement. The grievant certainly possessed minimum qualifications to perform the work but the question is whether the qualifications of the two applicants involved here were equal.

Elkouri describes various seniority clauses and discusses “relative ability” clauses in particular. This type of clause he describes as providing “in essence that the senior employee shall be given preference if he or she possesses fitness and ability equal to that of junior employees. This type of clause might be termed a ‘relative ability’ clause, because here comparisons between qualifications of employees bidding for the job are necessary and proper and seniority becomes a factor only if the qualifications of the bidders are equal.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed, @ 873-874.

Elkouri notes that the results will vary depending on the contract provision involved in an individual case. There are certainly times when ability and qualifications are equal based on the facts and evidence in a particular case and the senior person should have been awarded the opening. There are others where ability is not equal and a junior person can be properly awarded the position.

The type of clause involved here is clearly a “relative ability” clause that calls for the use of seniority only where the relative ability to do the job is equal or substantially equal and is on all fours with the provision here with one exception. This language calls for the Family Services Director to make the determination of the equality of the qualifications for the various candidates and reserves to the Family Service Director the decision of relative equality of the qualifications. Here Mr. Vos determined that the qualifications were not in fact equal and as such under the language seniority did not become the deciding factor. Elkouri further notes that “arbitrators have frequently held that, where fitness and ability factors are to be considered along with seniority under one of the modified seniority clauses, but is silent as to how and by whom the qualification determination is to be made, management is entitled to make the initial determination, subject to challenge by the union on the ground that management’s decision was unreasonable under the facts, or otherwise capricious, arbitrary or discriminatory.” Elkouri at page 877. Elkouri further notes that “interview results, while not always determinative, may have a bearing on fitness and ability if they are fair and related to the job performance. Therefore, an employer may, under a relative ability clause, properly select a junior employee with a few months experience over a senior employee with several years of experience on the basis of superior performance during an interview.” Elkouri at page 920.

Turning to the facts presented here, the evidence showed that the process used was reasonable and related to job performance. Each applicant was tested; each was interviewed and the interview questions were asked in a reasonable way. This, when coupled with the clear contractual clause allowing the Family Services Director to make the determination of relative ability, supports the County’s case in this matter.

Moreover, there was some merit to the County's argument that the Merit System test administered is not and should not be the sole deciding factor. Mr. Vos testified credibly that the test was analogous to a driving license exam. Doing better than another person on that test does not necessarily provide a true measure of a person's ability to drive or operate a motor vehicle. He testified that much the same could be said for the test administered here and the fact that the grievant scored higher on the Merit System Test did not provide a true measure of qualifications in the actual job, even though it did show she possessed the minimum qualifications for the job. If the language were different and provided for seniority to be used where the two candidates possessed the *minimum* qualifications to perform the job the result might well be different but obviously, it does not.

Here too, the evidence showed that the grievant did not possess the knowledge of SSIS software and that this software is very important in the Case Aide position. Mr. Vos again testified credibly that this software is more frequently used than other types of software and that knowledge of this is critical in the performance of the Case Aide job. This was shown to be less so with the MMIS software. No countervailing evidence on these points was provided.

There was no evidence of arbitrary or capricious action. Arbitrariness implies that the action was based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something. Capricious implies that the action was impulsive unpredictable or done by fiat. No such evidence was adduced on this record.

There was further no showing of any sort of personal or anti-Union animus toward the grievant. To the contrary, both County witnesses gave the grievant high praise in the performance of her current job but simply said that the other applicant was better qualified to perform the Case Aide job. Certainly too there was some merit to the County's argument that the ability to perform the grievant's current job does not automatically make her better qualified to perform as a Case Aide. Taking the evidence as a whole it was clear that the successful applicant was better qualified for the Case Aide position and that no contract violation occurred as the result of the facts presented here.

Moreover, based on the contract language presented here, the County's managers get to make that call based on this contract language. Seniority is the "final cut," to use the words of the Family Services Director, in the event he determines that the qualifications are equal. Here, based on the process used, he determined they were not. There was nothing to suggest otherwise. Finally, as noted above, the contract reserves to the Family Services Director the discretion to make this determination. There was nothing on this record to suggest that the arbitrator should second-guess that determination. Accordingly, the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: September 29, 2008

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Jeffrey W. Jacobs, arbitrator