

STATE OF MINNESOTA
BUREAU OF MEDIATION SERVICES

In Re the Arbitration between
AFSCME Council 65

Grievant,

and

BMS Case No.: 10-PA-0012

Itasca County

Respondent.

DECISION AND AWARD

BEFORE

Bernice L. Fields, Arbitrator

APPEARANCES:

For: Labor Union

Ms. Sarah Lewerenz, Attorney, AFSCME Council 65, 118
Central Avenue, Nashwauk, Minnesota 55769

For: Itasca County

Mr. Scott Lepak, Attorney, Barna, Guzy & Steffen, Ltd.
400 Northtown Financial Plaza, 200 Coon Rapids
Boulevard, Minneapolis, Minnesota 55433-5894

Place of Hearing

Grand Rapids, Minnesota

Date of Hearing

June 17, 2010

Date of Award

September 17, 2010

Relevant Contract Provisions

Article 2, Section C; Article 12, Section D

Contract Year

2007-2009

Type of Grievance

Contract Interpretation

I. INTRODUCTION

This matter came on for hearing pursuant to a collective bargaining agreement between the parties effective 2007-2009. A hearing occurred on June 17, 2010 in a conference room of the Grand Rapids, Minnesota City Hall. Attorney Sarah Lewerenz represented the AFSCME Council 65, hereinafter Union. Attorney Scott Lepak represented the County of Itasca, Minnesota, hereinafter Employer.

The hearing proceeded in an orderly manner. There was full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the Arbitrator. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter had been properly submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. The arbitrator officially closed the record upon receipt of briefs from the parties on August 20, 2010.

STIPULATED ISSUE

1. DID THE EMPLOYER VIOLATE THE COLLECTIVE BARGAINING AGREEMENT WHEN IT FAILED TO AWARD BYRDIE DICKLICH THE CHILD SUPPORT OFFICER JOB?
2. IF SO, WHAT IS THE APPROPRIATE REMEDY?

STIPULATED STATEMENT OF THE FACTS

The parties also stipulated a number of basic facts:

1. The Grievant is employed by Itasca County.
2. The County posted a position for Child Support Officer on April 16, 2009
3. The County has used the same position description for Child Support Officer since 2002.

4. The posting and the position description establishes a minimum qualification of education and experience that are at Joint Exhibit 7 and 8*

*Note the stipulated facts referenced Joint Exhibit 9. As presented in the hearing, the accurate reference is to Joint Exhibit 7 as the job description and Joint Exhibit 8 as the internal notice of position vacancy.

5. The Grievant applied for the Child Support Officer opening.

6. The County informed the Grievant that she did not meet the minimum qualifications for the position.

7. Based on this determination, the Grievant was not scheduled for the Agency Child Support Officer examination.

8. The Grievant did not complete a technical college “Child Support Officer” degree program and was not within six months of completion of the program.

9. The Grievant did not have two years experience as a collections officer, with direct responsibility for carrying out a part of child support collections.

10. The Grievant did not have four years of experience in collections work outside a County Human Services setting.

11. The Grievant did not have three years of college with emphasis in criminal justice, public administration, business administration, paralegal, social work, psychology, sociology or other related human services field.

12. The Grievant did have one year experience or education working with personal computers.

13. The County credited the Grievant with two (2) years experience for her work with Itasca County as an Enforcement Aide.

14. The County applied the Grievant’s two (2) years experience for her work with Itasca County in the Enforcement Aide to the requirement that the applicant “must have three years experience

in work directly related to child support collections in a County Human Services Agency (e.g., providing support services to the child support and collections unit as that of a support enforcement aide)”).

15. The County determined that the Grievant’s two (2) years experience was not sufficient to meet the three years experience of this child support collections criteria.

16. The County credited the Grievant with two (2) years and five (5) months experience for her work with Itasca County as an Eligibility Specialist.

17. The County applied the Grievant’s two (2) years and five (5) months experience for her work with Itasca County as an Eligibility Specialist to the requirement that the applicant must have “three years of experience as a Financial Specialist or the equivalent in a Human Services Agency”.

18. The County determined that the Grievant’s two (2) years and five (5) months experience was not sufficient to meet the three years experience of this Financial Specialist or equivalent criteria

RELEVANT CONTRACT PROVISIONS

ARTICLE 2. RESPONSIBILITIES OF THE PARTIES

Section A.

Each of the parties to this Agreement acknowledges that the rights and responsibilities of the other party and agrees to discharge its responsibilities under this Agreement.

Section B.

The Employer, including its managers, supervisors and representatives at all levels, is firmly bound to observe the conditions of this Agreement.

Section C.

The Union, including its officers, representatives and all its members, is firmly bound to observe the conditions of this Agreement.

ARTICLE 12.

Section D

Notice of all vacancies and newly-created positions shall be posted on the employees' bulletin board, and the employees shall be given five (5) days time in which to apply for the vacancy or new position. The senior qualified applicant shall be transferred to the job. The Employer shall determine whether or not an employee is qualified for a job. In the event that a senior employee is not given a vacant or newly created position, upon written request, he/she shall be given a written explanation as to why they did not get the job. This matter shall be subject to the grievance procedure if the Union disagrees with the Employer's decision

POSITION OF THE PARTIES

POSITION OF THE UNION

Grievant is qualified for the position of Child Support Officer, she should be given the opportunity to take the test for the position, if she passes the test she should be awarded the position and back pay from the date the less senior applicant started in the position.

A. The Collective Bargaining Agreement Provides That The Most Senior Qualified Employee Shall Get The Job.

Article XII, Section D of the collective bargaining agreement provides with respect to vacancies in pertinent part:

“The senior qualified applicant shall be transferred to the job.” (Union Exhibit Book at p. 12)

B. The Language in the Collective Bargaining Agreement Is A “Sufficient Ability” Clause. Elkouri and Elkouri, *How Arbitration Works*, 6th Edition, BNA, 2003, p. 875

explains that clauses which require employers to award the job to the most senior employee provided they are qualified to do the job are “sufficient ability” clauses. They write regarding such clauses:

“Under this type of provision, “it is necessary to determine only whether the employee with the greater seniority can in fact do the job.”” [(Quoting *Central Franklin Process Co.*, 19 LA 32, 34 (Marshall, 1952)]

Elkouri and Elkouri also points out that under sufficient ability clauses the employer can be required to bear the burden of proof:

“In cases involving sufficient ability clauses, arbitrators have placed the **burden on the employer to show that the bypassed senior employee is not competent to do the job**, and the fact that a junior employee is more competent than the senior employee is irrelevant.” (Id. at 880) (emphasis added)

C. Criteria Used In Determining Whether An Employee Possesses Sufficient Ability Must Be Job Related.

Reasonably, arbitrators when confronted with the task of determining whether an employer has met its burden of proof require that the criteria used to determine whether an employee is qualified are not arbitrary, are fair (Id. at 882) and are related to the job. Elkouri and Elkouri explain:

“...the factors must be consistent with the collective bargaining agreement and relate directly to job requirements and the employee’s ability to meet those requirements.” [Id. at 883, quoting *Public Serv. Co. of Colorado*, 77 LA 468, 474-75 (Justin, 1953)]

Arbitrators do examine whether experience criteria are reasonable and fair and really measures whether the employee can do the job:

“Work experience on the job in question or on a related job evidences an employee’s ability to perform the job; experience on the particular job is given greater weight than experience on a related job. (Id. at 890)

D. The Method Used By Itasca To Determine Ability In Hiring For The Position Of Child Support Officer Was Arbitrary And Does Not Meet The Employer’s Burden Of Proof.

An examination of the job and the posted requirements makes very clear they did not appropriately test Grievant’s ability to do the job. The Business Fiscal Division Manager, testified that the County’s objective in hiring for the Child Support Officer position was to hire someone “trainable” because employees did not come knowing how to do the job but had to be trained to do it. When asked if Grievant could do the job he replied: “She’s trainable.”

His testimony forecloses the question of whether Grievant is qualified for the CSO job. Any other conclusion but that she is qualified does not fit with Grievant's real qualifications and is, therefore, arbitrary. Given the Employer bears a burden to show the Grievant is not competent, the Business Manager's testimony shows they have failed.

The comparison of the job requirements and duties with Grievant's testimony also makes clear that she is more than qualified for the CSO job. As the Business Manager testified, CSO hires come to the CSO job without prior knowledge or experience. But, as Grievant's testimony makes clear, she is the exception to that rule. Her unrefuted testimony regarding the 31 job duties listed in the posting is that through her employment with Itasca County she does or has done 20 of the 31 job duties (and, two of the ten she hasn't done are exact duplicates of others she hasn't done). Knowing only the jobs she had held with Itasca County, the County should have been able to determine they had an exceptional applicant. (She's done two other of the duties working elsewhere.) Most applicants come to the Child Support Unit with no or little knowledge of the job duties. Further, the number of job duties she has done all or in part in comparison to the lack of knowledge on the part of the successful applicant M.J. show starkly how arbitrary the employer's determination of whether Grievant is qualified was.

The Employer also failed to follow its own protocols when it found Grievant unqualified for the job of Child Support Officer by not counting her legal secretary training towards her attaining three years in one of the two jobs (Eligibility Specialist or Child Support Enforcement Aide) for which three years would have caused her to be ranked as qualified. The County's job posting for the CSO job specifically allows the substitution of "education for experience" yet it failed to substitute Grievant's education as a Legal Secretary for some of the experience it required. (Union Exhibit Book at p. 112) This is certainly arbitrary and capricious.

And, the Employer also failed to follow its own protocols when it failed to credit Grievant with the seven years she spent in public administration as a substitute for the three years of college education with an emphasis in public administration the posting called for. The Employer had two totally top notch references detailing Grievant's work and abilities in this regard and in one of the e-mails sent in connection with her appeal she made clear she had spent seven years in public administration. (Union Exhibit Book at pp.123-124 and p. 136) If Itasca County had followed its own job posting, this alone would have meant Grievant had to be found qualified for the position of Child Support Officer. Again, therefore, the conclusion that she was not qualified is arbitrary and capricious.

Additionally, the County's job was to determine if Grievant was qualified for the job of Child Support Officer not to use arbitrary criteria to find otherwise. It was willing to find candidates with three years of experience as an Eligibility Specialist or its equivalent to be qualified. It was also willing to find candidates with three years of experience as a Child Support Enforcement Aide to be qualified. Presumably, the County was willing to find applicants with these experiences were qualified because three years experience in either of the jobs demonstrated the applicant was qualified because they were trainable and/or work in those jobs meant the applicant had some training in some of the work they would be doing. It only follows then, that almost four and a half years in the two jobs combined would do the same – render the applicant qualified because that experience meant they were trainable and/or the applicant had experience in, based on the combination of the jobs, a considerable number of the duties they would have to assume. This analysis clearly demonstrates not only was Grievant qualified but the County would have been way ahead to promote her to the CSO position.

Arbitrator James Cox in *Cook County and Illinois Nurses Association* (Union Exhibit Book at p. 230) dealt with seniority in the context of a relative ability clause. A relative ability clause is one where if the applicants' qualifications are substantially similar or the least senior applicants' qualifications are not demonstrably superior, the most senior applicant is entitled to the job. (Union Exhibit Book at p. 235) Obviously, the seniority clause in the AFSCME/ITASCA County contract more strongly favors the senior employee because it only requires the senior employee to have sufficient ability not equal ability. But, in spite of the difference in legal standards, the decision contains language helpful to understanding the rationale behind seniority clauses:

“...one must be mindful that a seniority clause is being construed which is **intended to grant certain preferences to the senior employee**. This comparison is at best inexact. Human beings are different and cannot be inspected and measured as finished products from the assembly line. **Doubt must be resolved in favor of the senior employee.**” [Union Exhibit Book at p. 235, quoting *Screw Conveyor Corp.*, 72 LA 434, 436-437 (1979)] (emphasis added)

Itasca County's failure to find Grievant qualified for the job of Child Support Officer demonstrates it did not live up to its contractual requirement to grant a preference to the senior employee.

E. Grievant Is Entitled To An Opportunity To Take The Test For Child Support Officer And Should Be Made Whole Including All Back Pay And Benefits She Lost If She Passes The Test.

Testimony at the hearing was that the applicants for the position of Child Support Officer were first screened to determine if they met the qualifications in the job posting. Itasca County did not but should have found Grievant qualified in this regard (see above). The next stage in the hiring process was for qualified applicants to take the Child Support Officer test. If they passed they were offered the position in order of seniority. Grievant was not afforded the opportunity to take the test. Two other Itasca County employees who were

more senior than Grievant took the test and passed. They were offered the job in the order of their seniority and both turned it down. If Grievant had been afforded the opportunity to take the test and passed it, she would have been the next to be offered the job. Because she did not get to take the test, an employee less senior employees was offered and accepted the test. That employee has occupied the job since and, therefore, earned substantially more per hour than Grievant.

In order to make her whole, Grievant should be afforded an opportunity to take the test and if she passes, she should be placed in the job and receive back pay equal to the amount of the difference between what she earned from when should would have started the job and the time she does.

Given the exemplary qualifications possessed by Grievant, the decision herein should find her qualified for the job. She should then be allowed to take the test and if she passed made whole with all back pay and benefits

EMPLOYER'S POSITION

The County did not violate the collective bargaining agreement when it determined that the Grievant did not meet the minimum requirements of the Child Support Officer job. As the party bringing the grievance, the Union has the burden of proof in this case to prove that the County violated the collective bargaining agreement. The present grievance involves a hiring dispute that has few, if any, disputed material facts. The dispute may be best described as whether insufficient experience in two qualification areas may be combined to meet the minimum qualifications for the position. Because the requirements are distinct and reference three years as the minimum experience needed, less than three years experience in each area is

insufficient. The insufficient experience in each area may not be “mixed and matched” in order to meet the minimum qualifications.

The minimum requirements of the Child Support Officer position included six alternative minimum requirements, including the following two requirements:

three years experience in work directly related to child support collections in a County Human Services Agency (e.g. providing support services to the child support and collections unit as that of a child support enforcement aide);

OR

three years experience as a Financial Specialist OR the equivalent in a Human Services Agency.

There is no factual dispute that the Grievant had two years of experience in one area (support enforcement aide) rather than the three years identified as the required minimum experience. There is also no factual dispute that the Grievant had two years five months experience in the second area (Financial Specialist) rather than the three years identified as the required minimum experience.

The Union’s argument that reference to the financial specialist or the equivalent in a Human Services Agency allows the Grievant to combine whatever experience she may have is not supported by any evidence. The County presented unrefuted testimony that the “or the equivalent” reference in the “three years experience as a Financial Specialist OR the equivalent in a Human Services Agency” factor is included simply to include positions that perform the same work as a Financial Specialist but utilize a different title. For example, Itasca County utilizes the position title of Eligibility Specialist and does not utilize the position title Financial Specialist. In addition, reference to “or equivalent” may not be so broadly defined that it would include another alternative factor.

The Union's argument that the County should have considered the Grievant's one year of education as a legal secretary ignores that her application did not indicate that she had any specifically identified months or years of education as a legal secretary. Nor does the one (1) year legal secretary education fit into the defined minimum requirements of the education emphasis listed. Rather the materials provided to the County (in this case her application) simply noted that she went to Mesabi Range Technical College where she took legal secretary and general business as subjects. The Union's argument in this area also ignores that the Grievant did not claim such education was relevant in her two appeal documents.

The Union's argument that the County should have credited the Grievant's "many years work in public administration" ignores that such a broad claim does not have any application to the specific requirements of the Child Support Officer position since work in the field was performing administrative secretary duties.

Finally, reference to minimum qualifications is not a guideline where the County can utilize a "close enough" standard. Adherence to posted requirements is necessary to avoid the County's actions from being determined to be arbitrary. Adding subjective considerations to standards may sound fine in a close case but will destroy the objectivity required in a fair hiring process.

Accordingly, the dispute is limited to whether the County violated the "selection" portion of the language in the collective bargaining agreement. The operative language is found in Article 12, Section D. As noted above, the key provisions are that:

The senior qualified applicant shall be transferred to the job. The Employer shall determine whether or not an employee is qualified for a job.

The Union has the burden to establish that the Employer violated this contractual provision.

A. Background of the Position and Posting.

In the present case the County utilized the written qualifications for the Child Support Officer position that have been in place for a number of years. Itasca County utilized the Minnesota Merit System until January of 1985. Joint Exhibit 14 at page 131. The Minnesota Merit System maintains its own job descriptions. In January of 1985, the County attained independent status from the Minnesota Merit System. Id. Accordingly, while the job descriptions at Itasca County may resemble or may be historically based on Minnesota Merit System positions, the County positions do not need to be identical to the Minnesota Merit Systems positions. For example, the Itasca County Child Support Officer job description is an outcome of a settlement agreement with the Child Support Officers in 2002. Id.

The written qualifications for the Child Support Officer job description are in the Class Specification Title (Job Description) for Child Support Officer. Joint Exhibit 7. County witnesses testified that the job description has not changed since 2002. The “minimum qualifications of education and experience” are listed at pages 108 and 109. They are as follows:

Minimum Qualifications of Education and Experience:

(A candidate may substitute experience for education and education for experience in order to meet the qualifications):

Completion of the technical college “Child Support Officer” degree program (must attach certification) or applicants must be within six months of completion of the program;

OR

Two years experience as a collections officer with direct responsibility for carrying out a part of a child support collections;

OR

Three years experience in work directly related to child support collections in a County Human Services Agency (e.g. providing support services to the child support and collections unit as that of a child support enforcement aide);

OR

Three years experience as a Financial Specialist or the equivalent in a Human Services Agency;

OR

Four years experience in collections work outside a County Human Services setting;

OR

Three years of college with emphasis in criminal justice, public administration, business administration, paralegal, social work, psychology, sociology or other related human services field;

AND

Must have one year experience or education working with personal computers; Must successfully complete the Agency Child Support Officer examination (passing grade 70 and above).

These same minimum qualifications of education and experience were included in the posting for the position. Joint Exhibit 8 at page 112.

B. Application of These Factors to the Grievant.

As noted in the posting and job description, there are six alternatives to meeting the minimum qualifications of the position (separated by a new line as well as “OR” as noted above) plus a requirement that the applicant have one year experience or education working with personal computers plus a requirement that the applicant successfully complete the Agency Child Support Officer examination. The parties stipulated that the Grievant did **not** meet the following alternatives:

completion of the technical college “Child Support Officer” degree program. Stipulated fact #8;

two years experience as a collections officer, with direct responsibility for carrying out a part of child support collections. Stipulated fact #9;

four years experience in collections work outside a County Human Services setting. Stipulated fact #10;

three years of college with emphasis in criminal justice, public administration, business administration, paralegal, social work, psychology, sociology or other related human services field. Stipulated fact #11:

The parties stipulated that the Grievant **did** have one year experience or education working with personal computers. Stipulated fact #12.

Based on these stipulations, the focus in this grievance narrows to whether the Grievant met the remaining minimum qualifications:

three years experience in work directly related to child support collections in a County Human Services Agency (e.g. providing support services to the child support and collections unit as that of a child support enforcement aide);
OR
three years experience as a Financial Specialist or the equivalent in a Human Services Agency.

In making the determination of whether the Grievant had the required experience in these areas, the County relied upon the materials submitted by the grievant in connection with this vacancy. The Grievant filled out a County application. Joint Exhibit 9. This application stated, in relevant part:

2. BE COMPLETE. Applicants are eligible only if it can be determined from their application that they meet minimum qualifications for the position. If the examination includes a rating of training and experience, your test score depends on the information you provide.

(Joint Exhibit 9, page 115 under the box that says **IMPORTANT**). While the Grievant indicated on the application that she attached a resume to this application, the unrefuted testimony of the Employer was that no resume was attached. In addition to the application, the Grievant submitted an undated letter of recommendation from [redacted] (page 123) and an August 10, 2000 letter from [redacted] (page 124).

Reference to the Grievant's application established that she had experience in three different areas (all with Itasca County):

Office Support Specialist from February of 2004 to January of 2005 as an Office Support Specialist;
Financial Worker from January 2005 to May 2007; and

Enforcement Aid Child Support from May 2007 through the time of her application (received April 21, 2009).
Joint Exhibit 9 at pages 115 and 116.

Given these statements, the County performed a straightforward application of the minimum standards. The Grievant received credit for two years experience from May 2007 through her application date as an Enforcement Aid Child Support. These two years of experience did not meet the three year minimum requirement of:

three years experience in work directly related to child support collections in a County Human Services Agency (e.g. providing support services to the child support and collections unit as that of a child support enforcement aide).

In addition, the Grievant received credit for two years and five months experience – from January 2005 to May 2007 as a Financial Worker. These two years and five months did not meet the three year minimum requirement of:

three years experience as a Financial Specialist OR the equivalent in a Human Services Agency.

Accordingly, the County determined that the Grievant did not meet the minimum requirements of the position. The County notified the Grievant of that determination. Joint Exhibit 10 at page 126.

The Grievant appealed and noted the factual basis of her appeal was consistent with the County's determination - that she had 2 years and 4 months experience as a Financial Worker and 2 years as a Child Support Enforcement Aide. Joint Exhibit 11 at page 128. Her argument was that her experience in these two areas should be combined. *Id.* The Grievant repeated this same appeal argument on a follow-up appeal. Joint Exhibit 13 at page 130.

The County appropriately rejected the Grievant's request that the two areas of experience be combined. There is no dispute that the factor of:

three years experience in work directly related to child support collections in a County Human Services Agency (e.g. providing support services to the child support and collections unit as that of a child support enforcement aide)

does not contain an "or" as a reference. Accordingly, that factor does not support any substitution of other experience.

The second factor under consideration does contain an "or":

three years experience as a Financial Specialist OR the equivalent in a Human Services Agency.

The unrefuted testimony of the County witnesses was consistent. Each of these three individuals testified that the word "OR" was placed in that factor to reflect the fact that not all Minnesota Human Services Agencies utilize the term "Financial Specialist." Each identified that Itasca County did not utilize the term Financial Specialist and that the "OR the equivalent" was necessary for the County to consider time spent in the County position of Eligibility Specialist. It is noteworthy that each of the three witnesses provided this same testimony despite the fact that none of these witnesses were present for the testimony of any of the other witnesses. Ms. [redacted] testified that she applied this same interpretation in the past. Ms. [redacted] testified that this factor was applied to qualify four applicants for Child Support Officer.

Aside from this rationale, it would be irrational to create separate alternatives that detail the same experience. Creating alternative factors (the candidate may qualify if they met any one of six areas plus have the requisite one year of computer experience and pass the test) presupposes that they are different areas. For example, creating alternative factors with one factor requiring one year of experience and the alternative factor requiring twelve months of

experience is irrational in that the same qualifications are necessary and it is really not an alternative qualification.

What is telling about the Grievant's April 30, 2009 appeal (page 128) and her May 8, 2009 appeal (page 130) is that the Grievant conveniently separated reference to the alternative factor of "three years of experience as a Financial Specialist OR the equivalent in a Human Services Agency" into separate factors. Rather than list it as a single factor, the Grievant separates the factors by adding two lines between this single factor. While demonstrating guile, this introduction of separation to suggest that there is a seventh factor simply allowing for "the equivalent in a Human Services Agency" supports the rational conclusion that keeping it with the factor as written does not support the Grievant or the Union's theory. Ms. [redacted] testified that in such a case a custodian could apply and meet the minimum qualifications provided that they worked in a Human Services Agency.

What is equally revealing is that this same factor exists in the Minnesota Merit System's Child Support Officer job description. This job description exists at the Minnesota Merit System's Online Application Center. This can be found at:

<http://agency.governmentjobs.com/mnmeritsystem/default.cfm>

Simply clicking on the vacancy for Child Support Officer reveals that the third alternative minimum qualification is "three years of experience as a Financial Worker or the equivalent in a public human services agency." The requirement is the same as the factor at issue in Itasca County. This is not a separate factor.

C. The County cannot and should not have considered the Grievant's experience to be "close enough" or any other information not listed on the submitted materials

There is no dispute that the Grievant had reached 29 months of the 36 months experience in her Financial Worker position required for qualification. Unfortunately for the Grievant, the County is not able to utilize a subjective “close enough” standard and may not utilize the personal knowledge that an individual performing the hiring analysis may have of the applicant or applicants to supplement the information provided. Hiring practices are subject to significant regulation and oversight. Utilization of subjective hiring processes creates potential liability for employers under the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Minnesota Human Rights Act. The reason is that subjective application such as personal knowledge that is not in the submitted materials or a “close enough” standard allows discriminatory intent to be an unstated factor in the hiring process. The better, and more rational, approach is to utilize a hiring practice with defined parameters on what can be considered along with objective measures and cut offs.¹

Such an objective measure is also required in the present case because it is a position that is governed by the Veterans Preference Act. This law is at Minn. Stat. Sec. 197.455. This law requires that positions must be separated into distinct elements that can be numerically scored on a 100 point system. The applicable portion of the law provides:

Subd. 4. Nondisabled veteran's credit.

There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.

Subd. 5. Disabled veteran's credit.

There shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of ten points provided that the

¹ In the present case, the County testimony from Ms. [redacted] was that a transcript is requested as additional information outside of the application materials in the limited instance in which the application claims that the individual graduated and the County. In contrast, the County does not require a resume and accordingly would not make a follow up request for a resume. The volume of information presented to the County and the number of candidates that the County receives is also of such a volume that the County cannot “babysit” each candidate to follow up with a request for missing information.

veteran obtained a passing rating on the examination without the addition of the credit points. There shall be added to the competitive promotional examination rating of a disabled veteran, who so elects, a credit of five points provided that (1) the veteran obtained a passing rating on the examination without the addition of the credit points; and (2) the veteran is applying for a first promotion after securing public employment.

Minn. Stat. Sec. 197.455. This law has been interpreted to require that “political subdivisions of the state must adapt their hiring systems to a 100-point rating system to enable the allocation of veterans’ preference points.” Hall v. City of Champlin, 463 N.W.2d 502 (Minn. 1990). Such a system cannot exist with subjective determinations.

In addition, the creation of the Minnesota pay equity act, Minn. Stat. Sec. 471.991 et. seq. requires a county to establish job evaluation systems in order to determine the comparable work value of the work performed by each class of employees within that county. See Minn. Stat. Sec. 471.994. This statute requires that objective measures be put in place. As a matter of implementation, this includes use of minimum experience and education requirements so that positions and their pay can be objectively compared to assure equitable compensation relationships between male dominated and female dominated positions can be achieved. Creating a subjective “close enough” standard is contrary to such efforts to establish and maintain an objective measurable job classification system.

The Itasca County cut off and use of minimum qualifications is also similar to that used by the Minnesota Merit System. The regulations applicable to the Merit System note that:

9575.0420 DISQUALIFICATION OF APPLICANTS.

The supervisor may refuse to examine an applicant, or after examination, may disqualify the applicant or remove the applicant from a register, or may refuse to certify any eligible person on a register if the applicant:

A. is found to lack any of the preliminary requirements established for the examination for the class of positions; ...

Minn. R. 9575.0420. Similarly, there is an objective requirement in the Minnesota Merit System related to rating examinations:

9575.0480 RATING EXAMINATIONS.

Subpart 1. Determination of score. The supervisor shall determine a final score for each applicant's examination, computed in accordance with the weights for the several parts established by the supervisor as set forth in the announcement. Failure in any part of an examination shall disqualify the applicant in the entire examination. All applicants for the same position shall be accorded uniform and equal treatment in all phases of the examination procedure.

Subp. 2. Determination of passing point. The supervisor shall utilize appropriate scientific techniques and procedures in rating the results of examinations and in determining the final scores of the applicants. The supervisor shall establish reasonable passing points for all examinations, giving due regard to the number of vacancies that may reasonably be expected to occur during the life of the register.

While such an approach may have harsh results, such as where an individual misses an eligibility cut off by one day, it is a system that is free from potential abuse and favoritism that accompanies a more subjective approach that blurs lines. Fairness in a hiring process requires eliminating subjectivity to the extent possible. This is the approach utilized in Itasca County.

2. The Appropriate Remedy In The Present Case Is Dismissal of the Grievance.

Given that the Grievant did not meet the minimum qualifications of the position, the grievance is appropriately denied. In the event that the Grievant is determined to have met the minimum qualifications of the position, there is no dispute that the Grievant was eliminated at an early phase and was not permitted to take the test. In the event that the arbitrator determines that the grievance has merit, sustaining the grievance would need to include a limitation that any remedy is dependent upon the Grievant taking and passing the same test that was given to the other applicants that were allowed to test. This limitation would need to be met prior to the County displacing the incumbent awarded the position.

This case can be broken down very simply. The Union bears the burden to establish that the County violated the collective bargaining agreement. Because of their focus, arbitrators are particularly ill suited to review, balance and determine the relative qualifications of individuals. Accordingly, the review must be limited to the information that was presented to the County at the time of the selection process.

The information that the Grievant provided to the County in the application process was stipulated to by the parties and presented at the hearing. Based on this information, the only substantive issue for the arbitrator is:

Can an applicant with 2 years and 5 months experience as a Financial Worker and 2 years experience as an Enforcement Aide Child Support meet the separate three (3) year minimum requirements of the written job description and posting in each of those areas?

Reference to the job description and posting shows that the answer is no.

Accordingly, the grievance must be denied.

ANALYSIS AND FINDINGS

THE UNION HAS FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE EMPLOYER VIOLATED THE COLLECTIVE BARGAINING AGREEMENT WHEN IT DETERMINED THAT GRIEVANT WAS NOT QUALIFIED FOR THE POSITION AS CHILD SUPPORT OFFICER.

In the universe of conflicts there are only three categories. The first and most common category is the conflict of values. All the familial, interpersonal (co-worker/co-worker/supervisor), age, gender, race, national origin, harassment, threats, and workplace violence disputes fall into this category. The second category is instrumental conflicts: how should things work? These conflicts involve interpretation of the universe of organization procedures i.e., work rules, seniority, craft differences, etc. Usually work rules are well defined

in the collective bargaining agreement and employers' written policies, but ambiguities based on interpretation still arise that require good faith negotiation to resolve. The last and most difficult category of conflicts to resolve are disputes over the division of scarce resources, i.e., time, money, human resources, and space.

This is an instrumental conflict, how should an existing employee be qualified for another position within his/her division? In this case, Grievant, a long time administrative support employee in the Child Support Division, sought appointment as a Child Support Officer. The Employer judged her unqualified because she did not meet the minimum requirements. The Grievant wants her other previous experience, items outside the posted criteria, counted as equivalent to the posted requirements. "How things should work," instrumental conflicts, are best resolved at the negotiating table rather than in arbitration.

There are numerous rationales to deny this grievance. First among equals is the inherent right of the Employer to set conditions for employment in any manner it devises without any limitation except for those imposed by law or negotiated away in the Collective Bargaining Agreement (CBA). The Grievant makes a good faith argument that alternative and different criteria should be accepted for the posted position. That argument is not viable

A collective bargaining agreement is like a brick and mortar wall. The bricks are the rights negotiated from the Employer's inherent management rights. The mortar surrounding and connecting the bricks represent the Employer's common law right to operate the business in any chosen manner, limited only by Federal and State legislation and the rights negotiated to the Union. Consequently, it is impossible to enumerate all of the Employer's management rights. These residual or reserved rights can never all be stated specifically in any labor agreement.

Here, however, one of management's inherent rights is specifically stated and is the resolution of this case. Article 12, Section D states in applicable part:

...The Employer shall determine whether or not an employee is qualified for a job...

Therefore, absent the inclusion of any prohibited criteria, race, age, gender, national origin, and affectional preference, the Employer can devise and implement hiring criteria to suit its needs.

Having devised acceptable criteria, posted them in a job announcement, processed applications pursuant to the CBA, and selected its candidate from the pool of applicants it deemed qualified, the Employer is not obligated to consider alternative/additional criteria suggested by the Union. In this case, the Union steps impermissibly into the mortar of the Employer's management rights contrary to Article 2, Section C of the parties' CBA which states:

The Union, including its officers, representatives, and all its members is firmly bound to observe the conditions of this Agreement.

As to other and equal reasons for denying the grievance, the Employer's arguments, ably stated above, are adopted herein in their entirety.

AWARD

After study of the testimony and other evidence produced at the hearing and of the arguments of the parties in post hearing written briefs on that evidence in support of their respective positions, and on the basis of the above discussion, I make the following award:

1. The grievance is denied.

Respectfully,

Dated: 09/17/10

/s/
Bernice L. Fields, Arbitrator