

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
WALWORTH COUNTY :
and : Case 97
LOCAL 1925, AFSCME, AFL-CIO : No. 41568
: MA-5408
: :
- - - - -

Appearances:

Whyte & Hirschboeck, S.C., by Ms. Karen K. Duke, on behalf of the County.
Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME,
AFL-CIO, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein the County and Union, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on May 5, 1989 in Walworth, Wisconsin. The hearing was transcribed and both parties filed briefs which were received by July 11, 1989.

Based upon the entire record, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree upon the issue, I have framed it as follows:

Did the County violate the contract when it paid grievant Rodney Baerbock the pay range 3 rate of pay when he temporarily worked as the Marking and Sign Lead Worker and, if so, what is the appropriate remedy?

DISCUSSION

Alan Pontell is the only worker in the Marking and Sign Lead Worker position which is in pay range 5. In the negotiations leading up to the present contract, the parties agreed to red circle Pontell via language providing: "It is agreed that when this position is vacated it will be thereafter treated in pay range 3." The spread between pay ranges 5 and 3 is 85 cents an hour.

Grievant Baerbock, a Patrolman in pay range 1, filled in for Pontell on about 21 occasions and was paid the pay range 5 rate. Baerbock also filled in for Pontell on November 14 and 15, 1988 when the County paid him the pay range 3 hourly rate. Baerbock filed a grievance on November 21, 1988 claiming that he should have been paid the pay range 5 hourly rate.

In support thereof, the Union argues that the County in the past has paid the higher rate; that it agreed to the red circle language "with the understanding that it would become effective when the current incumbent permanently vacated his position..." and that there can be "no reduction in the rate paid to temporary replacements of the current incumbent;" and that its interpretation is supported by its other contract with the County for Lakeland Nursing Home which expressly includes language that calls for replacement employees to receive a rate of pay lower than the incumbent. As a remedy, the Union requests that Baerbock be paid the difference between the pay range 3 and 5 rates for the hours he worked in issue and that the County be ordered to henceforth pay the higher pay range 5 whenever anyone fills in for Pontell.

The County, in turn, contends that the red circle rate only applies to Pontell; that the contract language is unambiguous, thereby negating consideration of any alleged past practice; that no past practice in any event exists; and that the grievance should be denied.

The contract itself is not clear and unambiguous on this point, as it does not contain any reference whatsoever as to what is to happen when Pontell is not on the job and when someone else must fill in for him. The contract is silent because the parties in negotiations never addressed it, let alone agreed as to what should be done in such circumstances.

That being so, it is necessary to try to ascertain the dimensions of the bargain to which they did agree. As to that, it is clear that both parties ultimately agreed that Pontell's position should be downgraded from pay range 5 to pay range 3. Pontell, however, was not to suffer any wage reduction for however long he occupies his position. Thus, Robert Frazer, a member of the Union's bargaining team at the time, testified at the hearing that Union negotiators told the Company that "we said, well, we can't take money away from

Alan Pontell." Accordingly, the bargain reached shows that the pay rate 5 inures to him personally and not to the position itself. When he goes and vacates his position, the pay rate 5 pay range goes with him. Accordingly, Pontell's successor cannot be heard to complain when he is paid less than Pontell since the County's wage reclassification plan showed that said position must be downgraded, a fact ultimately agreed to by the Union.

Well if a successor is not going to receive Pontell's higher salary, it is difficult to see why, absent any clearly expressed contract language, a temporary substitute should receive it when Pontell misses work before he leaves for good. One's wages, after all, are pegged to the degree of difficulty of one's job. Here, the parties have agreed that the job is considerably less difficult than previously thought and that its lesser degree of difficulty warrants its downgrade to pay range 3 if Pontell is not on the scene. That being so, there simply is no reason why the County must pay temporary fill-ins anything other than the pay range 3 since to do anything else would only represent a windfall, one which is all the more unjustified when it is remembered that Baerbock, who is in pay range 1, was paid the higher pay range 3 when he filled in for Pontell. That is enough of a premium for this work and that is why his grievance must be denied.

In so finding, I am of course aware of the Union's claim that a past practice has arisen to the contrary because the County on about 21 occasions paid Baerbock the higher pay range 5 rate when he filled in for Pontell in the past. But about 15 of these times occurred before the parties agreed to red circle Pontell in the last round of negotiations. As to the 6 instances which arose thereafter over five pay periods, I credit the testimony of Highway Commissioner Benjamin H. Coopman who stated that he was personally unaware of those payments and that they were made in error by the bookkeeper who had not been told of the new red circle agreement and that he, Coopman, immediately ordered that Pontell's fill-ins be paid at the pay range 3 rate once he found out about the mistake. Given that, there is no basis for finding that a well developed past practice supports the Union's position.

By the same token, not much weight can be given to the fact that the parties have entered into a separate contract covering the Lakeland Nursing Home which expressly provides that fill-ins for a person who is red circled are not to receive the higher red circle rate. That agreement shows that the parties there specifically dealt with that issue in their negotiations and resolved it. Here, the record shows that this particular issue never came up. That being so, there is no reason to award the higher red circle rate when the Union in these negotiations did not expressly obtain it.

In light of the foregoing, it is my

AWARD

That the County did not violate the contract when it paid grievant Rodney Baerbock the pay range 3 rate of pay when he temporarily worked as the Marking and Sign Lead Worker; the grievance is therefore denied.

Dated at Madison, Wisconsin this 26th day of October, 1989.

By _____
Amedeo Greco, Arbitrator