BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SHEBOYGAN COUNTY SUPPORTIVE SERVICES LOCAL 110, AFSCME	Case 118 No. 42173 MA-5595
and	
SHEBOYGAN COUNTY	

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Street, Sheboygan, Wisconsin, on behalf of the Union.

Mr. John Bowen, Personnel Director, 615 North Sixth Street, Sheboygan, Wisconsin, on behalf of the County.

ARBITRATION AWARD

Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO, hereafter the Union, and Sheboygan County, hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance concerning the meaning and inter-pretation of the terms of the agreement. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Sheboygan, Wisconsin, on July 27, 1989. No stenographic transcript was prepared. Briefs were submitted by September 20, 1989; the Union filed a reply brief on October 12, 1989; the County declined to file a reply brief.

ISSUE

The Union frames the issue as follows:

> Did the employer violate Article 11, Section 2, Section 9. Temporary Employees? If so, what is the appropriate remedy?

The Employer frames the issue as follows:

> Whether the County violated the agreement in its effect, interpretation and application by subcontracting technical work in the Land Conservation Department with three individuals beginning with the years 1985, 1986 and 1987 respectively. Further if a dispute existed as to whether this subcontracted work was classified as "bargaining unit" work, should not the Union have questioned the existence of these positions prior to 1989?

The undersigned frames the issue as follows:

1. Is this grievance timely?

2. If so, did the County violate Article 11, Section II, A, paragraph 9, by utilizing certain non-bargaining unit employes to perform work pursuant to contracts between the County Land Conservation Department and the Wisconsin Departments of Natural Resources and Agriculture, Trade and Consumer Protection?

3. If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

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RECOGNITION

> The Employer recognizes the Union as the exclusive bargaining agent for all regular full-time and part-time personnel employed by Sheboygan County in the Court House and in auxiliary departments and buildings (but specifically excluding therefrom all elected public officials, supervisors, professional employees of the Welfare Department, all professional

employees of the Unified Board, all deputized employees of the Sheriff's Department, all nurses, all confidential employees, the Welfare Department Office Supervisor and the Welfare Department Income Maintenance Supervisor) with regard to negotiations with the Employer on questions of wages, hours and conditions of employment.

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MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

By way of further enumeration and not as a limitation because of such enumeration, the Employer shall have the explicit right to determine the specific hours of employment and the length of the work week and to make such changes in the various details of the employment in the various employees as it, from time to time, deems necessary for the effective and efficient operation of County business.

The right to contract for any work it possesses and to direct its employees to perform such work wherever located is specifically reserved to the Employer.

The Union agrees that it will, at all times, promote the proper operation of County government and will make diligent efforts to protect the public interest of Sheboygan County.

Sheboygan County may adopt reasonable rules and amend the same from time to time and the Union agrees to cooperate in the enforcement thereof.

. . .

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WAGES, PAY PLAN AND SHIFT DIFFERENTIAL

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II. PAY PLAN

A. REGULATIONS OF THE PAY PLAN

. . .

9. Temporary Employees: It is understood and agreed that temporary, seasonal, casual, part-time or extra help shall not be used to reduce, replace or displace regular full-time employment.

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VACATIONS

1. Employees Who Earn Vacation: All employees shall earn vacation, except temporary employees.

. . .

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PROBATIONARY PERIOD

All newly hired employees without previous county experience in the job to which they are hired, shall serve a probationary period of six (6) months. Probationary employees may be terminated without recourse to the grievance procedure, but the requirements for the termination reports shall be followed.

The following definitions shall apply:

a. A regular full-time or regular part-time employee is hereby defined as a person hired to fill a regular position.

b. A temporary employee is one hired for a specified period of time and who will be separated from the payroll at the end of such period.

c. A temporary employee who becomes a regular employee without a break in continuous service shall be deemed to have served their probationary period upon completion of six (6) months of service. His/her seniority shall date from the original time of hiring.

. . .

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GRIEVANCE PROCEDURE

The County shall not be required to process any grievance which is based upon an occurrence more than thirty (30) days prior to the date of it being offered as a complaint, or a complaint which is filed more than thirty (30) days after the Union knew, or should have known of the existence of grounds for such complaint, except that in discharge and suspension cases the time limit shall be five (5) working days. When an employee is suspended or discharged, the employee and the Union shall be notified in writing of such action and reason for same.

BACKGROUND

In recognition of the pressing need for wise stewardship of precious and dwindling natural resources, the County of Sheboygan has created a Land Conservation Department. This grievance concerns the employment status of certain individuals with whom the Department and County contracted for certain technical services, pursuant to grants from the Wisconsin Departments of Natural Resources and Agriculture, Trade and Consumer Protection.

The first such contract was entered into on July 26, 1985, between the County and Mr. Christopher Ertman, for services related to the Milwaukee River

Basin Watershed Program. That contract, which referred to Ertman as a "contractual employee", provided for an hourly wage of $10.00, plus 21 cents per mile for approved travel, with no fringe benefits or insurance. The contract provided that same "shall be completed by December 31, 1986". While this was the only contract which Ertman signed, he has remained under contract with the County at all times material to this grievance.

Similar arrangements, for similar technical services on related projects, were subsequently made with Kevin Miller (on October 24, 1986) and Andrew Wallender (on November 20, 1987). Miller was hired pursuant to a posting, dated September 20, 1986, which provided in part as follows:

> WATERSHED INVENTORY TECHNICIAN
>
> Sheboygan County Land Conservation Department
>
> This is a full time limited position involving the collection and analysis of watershed inventory data for the development of the Sheboygan River Priority Watershed Plan. Primary responsibilities will involve preparation of inventory maps, inventorying barnyards, manure spreading, streambank, and upland erosion. Performs related work as required. Position is under the direct supervision of the County Conservationist.
>
> . . .
>
> Salary
> Approximately $16,848 per year with fringe benefits. This position is contingent on the continuation of funds from the Wisconsin Fund Non-Point Source Water Quality Program of the Department of Natural Resources.

The deadline for applications for the above-cited position was September 20, 1986. On September 26, 1986, the Land Conservation Committee (LCC) adopted a motion "to authorize Pat Miles to select final candidates for Inventory Technician position and to hire one of those for that position". Miles was, and remains, the Sheboygan County Conservationist and Manager of the Land Conservation Department (LCD). On October 17, 1986, LCC Chairperson William O. Hand wrote to the County Personnel Committee as follows:

> The Sheboygan County Land Conservation Committee is recommending hiring a part-time individual (one day per week on a temporary basis) to work on various State funded programs. The LCC Committee will approve this position at the October LCC meeting on October 24, 1986. (See 10/24/86 LCC Meeting Minutes) This position will be of no cost to Sheboygan County.
>
> Also, the Land Conservation Committee approved the hiring of a Inventory Technician for the Sheboygan River Watershed Project at the September 26, 1986 LCC Meeting. This position also is 100% funded by the State and will be of no cost to Sheboygan County. If you have any questions, feel free to contact me.

At its meeting of October 24, 1986, the LCC approved Miles' selection of Kevin Miller as Sheboygan County LCD Watershed Inventory Technician.

On October 23, 1987, the LCC approved the hiring of a Technician for the Farmland Preservation Program. On November 20, 1987, Miles informed the LCC that Andy Wallender had been hired to fill the position to begin work December 14, 1987.

Notwithstanding the 1985 contract indicating a $10.00 hourly wage and no benefits, Ertman has received less money but some benefits, namely the same vacation, holiday and insurance benefits as bargaining unit employes. His starting wage was $8.10 per hour which remained constant until December 21, 1987, when LCC Chairperson Hand wrote Personnel Committee Chairperson James Gilligan as follows:

> The Sheboygan County Land Conservation Committee approved a wage increase of 7% for Watershed Inventory Technician Chris Ertman and Kevin Miller at their meeting of Friday, December 18, 1987. These positions are state funded and non-union. The 7% increase will take effect on January 1, 1988. If you have any questions, please feel free to contact me.

On August 17, 1988, the LCC adopted a motion to approve a second 7% wage increase for both Watershed Technicians (Ertman and Miller) and the Conservation Technician (Wallender). On November 29, 1988, LCC Chair Hand wrote Personnel Committee Chair Wesley Prange as follows:

> The Sheboygan County Land Conservation Committee approved a wage increase of 7% for the Watershed Technicians Christopher Ertman and Kevin Miller at their meeting of Friday, August 17, 1988. These Watershed Technician positions are state funded by the Department of Natural Resources and are non-union. The Committee also approved a 7% wage increase for Conservation Technician Andy Wallander. This position is state funded by the Department of Agriculture, Trade and Consumer Protection and is also non-union. The 7% wage increase will take effect January 1, 1989.
>
> Should you have any questions, please contact Pat Miles at the Land Conservation Department office.

At the time of this proceeding, Ertman was the only one of the three individuals still in service to the County, paid at the hourly wage of $9.27.

On February 23, 1989, Union steward Faith Wierman filed a grievance, on behalf of the Union, alleging that "Temporary employees working full- time, reducing, replacing or displacing regular full-time employees," and thus a violation of Article XI Pay Plan Sections 1. A & B and XI Sec. II. 9; Article XX Sick Leave; Article VII Fair Share, and any other violations that may apply. As remedy she sought that the County cease from above practices, make all temporary employees full time, make all affected employees whole and make the union whole.

On March 1, 1989, LCD Manager Pat Miles denied the grievance as follows:

> The recognition clause (Article I) of the Labor Agreement does not apply to the temporary employees in the Land Conservation Department Office. The positions were established and are funded by the State of Wisconsin.
>
> If there was a dispute the Union should have questioned the situation thirty (30) days after your knowledge in the years of 1985, 1986 and 1987 when personel (sic) were employed (Article XXV).

On March 16, 1989, the Personnel Committee affirmed the denial of this grievance on the grounds of untimeliness. As explained by Personnel Director John Bowen in a letter dated March 22, 1989:

> The job positions questioned in this grievance have been in existance (sic) since the years 1985, 1986 and 1987 respectively. If the Union sought their inclusion into the bargaining unit or felt that a violation of contract occurred, a grievance should have been filed. The relief requested can not be granted due to the untime-liness of submission. Grievance denied.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> The subject employes are regular full-time employes of the County's Land Conservation Department, and should be receiving the same benefits as other regular full-time County employes.
>
> The collective bargaining agreement defines temporary employes as those hired for a specific period of time. However, while these employes may have limits based on funding, they have no time limits. Further, official County regulations do not provide for vacation to temporary employes; these employes, however, have received vacation. For these reasons, these employes are not temporary employes.
>
> Nor are these employes independent contractors. It is the County Land Conservation Committee which approves the hiring, and the County department head who directs and assigns the work force.
>
> As temporary employes, these employes are definitely taking the place of full-time employes, in violation of Article 11, Section 2, 9., "Temporary Employes". They work eight hours per day, forty hours per week, just like other employes, and have been doing this for years. And the expectation is for this to continue until 1998.
>
> Past grievances won by the Union indicate that this is not the first time the County has sought to circumvent the contract in this manner.
>
> The County's contention that this grievance is untimely is without merit. The burden of proof is on the County to prove that the Union had knowledge of the status of these employes more than thirty days before the grievance was filed. It has not done so.
>
> These employes should be deemed full-time permanent employes and made whole for lost wages, with the Union being made whole for lost dues.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

> The Union's submission of this grievance for arbitration is capricious and unreasonable. Testimony clearly establishes the Union's disinterest or failure to verify whether the position duties were an incursion of the bargaining unit. Seniority rosters are provided every six months; the actions of the Land Conservation Committee were taken in open session and recorded in open minutes. Thus, this information was readily available to the Union, and its failure to question the existence of these positions in 1985, 1986 and 1987 makes this grievance clearly untimely.
>
> Further, as Chris Ertman testified, he functions as a Project Manager with a minimum of supervision. His functions are those of the management group, with no relationship to bargaining unit work. This is further supported by the fact that these employes received wages increases different from those granted to the bargaining unit, which information was available to the Union.
>
> The Union's argument about prior grievances and arbitrations is inappropriate, as they were decided at least ten years ago and dealt with different issues.
>
> The County in good faith subcontracted work to

three individuals to perform duties not covered by the collective bargaining agreement. These subcontracted employes were not temporary represented employes in the first place nor did they reduce or replace or displace any regular full-time employes. The content of these positions does not parallel existing bargaining unit jobs.

Because these positions are management positions having management responsibilities; because these positions were subcontracted due to their content and projected duration; because management has the right to subcontract any work it possesses; because the action taken did not adversely affect the bargaining unit by displacing union members or eliminating jobs or otherwise detract from job security; and because the grievance was filed in an untimely manner, this grievance should be denied.

In reply, the Union further posits as follows:

The Union cannot be held responsible for attending, and reviewing the minutes, of every Land Conservation Committee meeting to identify possible grievances. Moreover, the minutes themselves would not have raised any red flags about the violations to the contract being committed. The Employer has failed to prove that the Union knew of the existence of a grievance.

If the Employer is contending these employes are independent contractors, such contention is mistaken. The County hired them, paid for them with state funding on County checks, regulated their wages, put them in its insurance group, paid their Wisconsin Retirement Fund, and provided some benefits. They are not independent contractors.

The County also errs when it refers to what it calls the subcontracting clause. That is not what this is -- this is a contracting clause; and in its contract with the D.N.R., the County is using its watershed technicians.

Nor are they managerial because they allegedly function independently. They are hired as County employes, and directed by a County employe.

DISCUSSION

The threshold issue which I must address is timeliness. The collective bargaining agreement relieves the County of the duty to process any grievance which is "based upon an occurrence more than thirty (30) days prior to the date of it being offered" as a complaint, or a complaint "which is filed more than thirty (30) days after the union knew, or should have known of the existence of grounds for such a complaint . . .". The instant grievance was filed on February 23, 1989; thus, if the Union knew, or should have known, of the existence of the grounds for its complaint prior to January 23, 1989, this matter must be dismissed as being untimely filed.

The County bases its argument as to untimeliness on the fact that the underlying events of which the Union complains -- the employment status of certain persons under contract to the Land Conservation Department -- should have been readily known to the Union, had the Union exercised due diligence. Specifically, the County contends that, as the actions complained of were taken in open session of the Committee, and recorded in publically-available minutes, the Union was given an adequate opportunity to learn of the situation. Further, as the County did provide to the Union current seniority lists every six months, which lists did not include the incumbents of the positions in question, the County contends that the Union was made directly aware that the County did not count these positions as being within the bargaining unit.

It is true that, had the Union cross-referenced the Committee minutes with the seniority lists, and reviewed the correspondence between the Committee chair and the Chairperson of the County Personnel Committee, it could have learned much earlier than it did of the employment status of the positions in question. However, to assign to the Union the affirmative duty of constantly reviewing the minutes and correspondence of all County committees goes beyond, I believe, the concept of "knew or should have known" embodied in the contract. Further, since the Union was never made directly aware of the existence of these positions (which personnel worked in an office well-removed from the bulk of the bargaining unit workforce), it can be rightfully excused from challenging the omission of these positions from the seniority lists which it

did receive. Had the County informed the Union directly of the existence and nature of the positions in question, the Union's failure to grieve within thirty days of such notice would have made the County's contention more meritorious. However, no such notice was given. Moreover, it appears that the Union is challenging not the initial arrangement with these workers, but rather their use subsequent thereto. That is, as noted on the grievance form itself, the Union has claimed timeliness on the grounds that the County's continued use (or, from the Union's perspective, misuse) of these workers constitutes a continuing violation of the contract. Indeed, there is substantial arbitral authority that "continuing" violations of the contract do give rise to "continuing" grievances, which may be filed without violating specific time limits. Such time limits, however, are to be applied to limit the retroactive effect of any remedy. Accordingly, I find that the matter was filed in a timely manner.

I now turn to the merits of the matter, to consider whether the County violated Article 11, Section II, Section 9, by its arrangement with the personnel at issue. I conclude it did not.

The contract clause which the Union contends the County violated provides as follows:

> It is understood and agreed that temporary, seasonal, casual, part-time or extra help of any kind shall not be used to reduce, replace or displace regular full-time employment.

Both parties appear to be making arguments in the alternative as to the status of these personnel. The Union contends that, because these personnel were not hired for a specific period of time, they fail to fit the definition of temporary employes, as claimed by the County in its initial denial of this grievance. The Union also contends, however, that, if these employes <u>are</u> temporary, they are in violation of the contract because, by working eight-hour days and 40-hour weeks, these personnel are "definitely taking the place of full-time employees". The County counters by contending that these positions are managerial, or are independent contractors as provided for under the contract's contracting clause, and that, in any event, these personnel neither displaced union members, eliminated positions nor otherwise affected job security.

The record evidence -- especially the County payroll checks indicating County contributions to the Wisconsin Retirement Fund accounts of the individuals in question, and the indications of the County's ability to direct and control the work -- does not support a finding that these were independent contractors. Further, the ongoing relationship between the individuals and the County, and the County allowance for vacation (which is explicitly denied to temporary employes) leads to the conclusion that these personnel are something other than temporary employes.

What status, then, do these personnel have? They work regular, full-time hours; does that mean they are regular, full-time employes, as described in the recognition clause? Perhaps. While this is a question more typically answered pursuant to a petition for unit clarification, it would not be beyond my authority as arbitrator to make such a determination. However, given the state of the record made at hearing, I believe that such a determination would be beyond that called for or justified in this particular proceeding.

The only answer I can provide in this proceeding is that these individuals are what Article 11, Section II, Section 9, refers to as "extra help of any kind". Within that framework, the ultimate question is whether they are being "used to reduce, replace or displace regular full- time employment". There is nothing in the record to establish that they are.

The best case which can be made on the Union's behalf is that the contract's wage schedule does provide for a position entitled, "Soil Conservation Technician", which job we can intuitively presume has some similar skills and duties to the Watershed Inventory Technicians at issue. However, an intuition as to some similarity is far short of the record evidence required for an arbitration award. Further, there is nothing in the record to indicate that the duties currently being performed by the personnel at issue were ever performed by bargaining unit employes. Using extra help of this kind may well have obviated the need for additional bargaining unit employes; but it did not "reduce, replace or displace" regular full-time employment.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

<u>AWARD</u>

1. That this grievance was filed in a timely manner;

2. That this grievance is denied and dismissed.

Dated at Madison, Wisconsin this 6th day of November, 1989.

By _____
Stuart Levitan, Arbitrator