BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	: Case 90 : No. 42041 : MA-5541
MARINETTE COUNTY COURTHOUSE EMPLOYEES, LOCAL 1752, AFSCME, AFL-CIO	: Case 91 : No. 42042 : MA-5542
and	: Case 92
MARINETTE COUNTY (COURTHOUSE)	: No. 42043 : MA-5543

Appearances:
Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. James E. Murphy, Corporation Counsel, Marinette County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1987-1988 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve three grievances concerning the posting of positions. The undersigned was appointed and held a hearing on June 29, 1989, in Marinette, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript of the hearing was made, both parties filed briefs, and the record was closed on November 22, 1989.

ISSUE:

The Union states the issue to be decided as the following:

> Did the County violate the collective bargaining agreement when it posted the positions of Deputy Clerk of Courts (two openings), Deputy Forest Administrator II, and Deputy County Clerk II as Deputy I positions? If so, what is the remedy?

The County raises two issues:

1. Did the Union file timely grievances?

2. Did the County violate the work agreement by posting and awarding jobs as Deputy I's to fill positions which were formerly held by persons with the title of Deputy II?

The Arbitrator accepts the County's framing of the issues.

RELEVANT CONTRACT PROVISIONS

ARTICLE 4 - GRIEVANCE PROCEDURE

> Should differences arise between the Employer and employees or the Union, this procedure shall be followed:
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> Section 1. Any employee covered by this Agreement who has a grievance shall report h/er grievance to the steward or other representative of the Union within ten

(10) work days, who shall investigate the grievance thoroughly, and if the Union feels the grievance is warranted, the Union shall request a meeting with the department head within five (5) workdays. The department head shall give h/er answer to the Union in writing within three (3) work days of this meeting.

Section 2. In the event the grievance cannot be satisfactorily adjusted by the department head, the grievance will be submitted in writing to the designated committee of the County Board, which will act on the grievance within thirty (30) days. Following the meeting, the committee shall give its answer in writing to the Union within ten (10) days of this meeting.

Section 3. The Union shall have the right to have present the aggrieved employee or employees and any other Union representatives at all meetings for the purpose of resolving said grievance. Grievances shall be presented for adjustment without fear of penalty to the employee aggrieved. No employee shall be caused to suffer loss in pay on account of carrying out the provisions of this grievance procedure.

Section 4. If the matter still remains unsettled, then it should be submitted in writing to arbitration.

Section 5. The arbitration board shall consist of one (1) member selected by the Wisconsin Employment Relations Commission. The decision of the arbitration board shall be submitted to both parties hereto in writing and shall be final and binding upon both parties.

ARTICLE 5 - NEW JOBS, VACANCIES

Definition: A vacancy shall be defined as:

1. A job opening not previously existing in the table of organization;

2. A job opening created by termination, promotion or transfer of existing personnel, when the job continues to exist in the table of organization.

A new job or vacancy within the County shall be filled as follows:

1. Posted on the County bulletin board five (5) working days before the job operation begins. Said posting shall contain the job requirements, qualifications and starting rate of pay.

2. Copy furnished to the Union secretary;

3. Employees desiring posted jobs will sign the posted notice to make a written application to the department head concerned.

At the end of the bidding period, the vacancy or new job will be awarded on the basis of the following provisions:

1. The department head shall confirm with the Union secretary the posted names.

2. Bargaining unit employees from the department in which the vacancy exists shall have first opportunity to fill the position if qualified.

3. If no bargaining unit employee from the department applies or qualifies, it shall be open to any bargaining unit employee from any department if s/he is qualified.

4. If no bargaining unit employee bids on the posted job and is qualified, the County shall have the right to recruit personnel from outside the workforce.

5. The bargaining unit employee shall demonstrate h/er ability to perform the job posted within thirty (30) days and if deemed qualified by the Employer shall be permanently assigned the job. Should such employee not qualify or should s/he desire to return to h/er former job, s/he shall be reassigned to h/er former job without loss of seniority.

6. In the event it becomes necessary to discontinue or suspend a job for a period of time, a notice to that effect shall be posted immediately, and a copy furnished to the Union.

7. In contested cases, the County agrees to provide proposed designated Union representatives with sufficient information to show that the selected individual made a timely and proper application during the posting period.

8. Reclassification shall not be considered a vacancy and posting shall not be required.

. . .

ARTICLE 22 - EXISTING PRACTICES

All existing practices pertaining to working conditions not specifically mentioned herein shall continue in force as at present until they are adjusted by mutual agreement between the County and the Union. Nothing shall be construed as a practice unless it meets each of the following tests: It must be a) long continued; b) certain and uniform; c) consistently followed; d) generally known by the parties hereto; and e) must not be in opposition to the terms and conditions of this Agreement.

. . .

APPENDIX B
RULES FOR THE ADMINISTRATION OF THE
CLASSIFICATION AND COMPENSATION PLAN

The authorized pay ranges shall be interpreted and applied as follows:

1. a) Initial Employment: The hiring rate shall be the entrance rate payable to any employee on first appointment to a job. If recruitment difficulties exist or if a potential appointee possesses unusual qualifications directly related to the requirements of the position, the County may permit hiring at any step in the pay range provided all other employees in the same classification receive a like adjustment in salary.

b) Probationary: All newly hired employees shall serve a ninety (90) day probationary period during which time the County may discharge an employee with no right of appeal. Regardless of time since last pay increase, an employee upon successful completion of the six (6) month period shall have h/er pay increased to the permanent appointment rate. Employees hired at the permanent appointment rate shall have their pay increased to the job rate (maximum). Those employees who are hired at the job rate shall receive no pay increase following successful completion of the probationary period.

c) Change in Classification: Any change in a position classification as allocated herein shall be processed as follows: Such change shall be initiated by the Department Head; submitted to the appropriate committee for approval; submitted to the Personnel Committee for approval. The provisions governing promotions and demotions shall apply in determining the new pay level.

d) Promotion: Promotion is the movement of an employee from one class to another class having a greater job rate (maximum). When an employee is promoted to a position in a higher class, s/he shall serve a thirty (30) day trial period. During the thirty (30) day period the employee will be paid h/er present rate or the hiring rate, whichever is greater. If during this period the employee demonstrates ability to carry out the newly assigned duties and responsibilities upon completion of the thirty (30) days, h/er pay shall be increased to the job rate (maximum) for the higher class according to the number of months of employment. (Employees whose performance does not meet acceptable standards shall be restored to a position commensurate with h/er former status for which s/he is qualified.)

e) Transfer: Transfer is the movement of an employee from one class to another class having the same job rate (maximum). There shall be no immediate change in the pay rate of an employee who is transferred.

f) Demotion: Demotion is the movement of an employee from one class to another class, having a lower job rate (maximum). When an employee is demoted to a position in a lower class, h/er pay shall at least be reduced to the job rate (maximum) for the lower classification.

BACKGROUND:

Three grievances concerning four posted positions are combined in this case. In all four cases, the County posted a position of a Deputy I after a Deputy II left a job and created an opening.

On November 15, 1988, the County posted a position with the title of Deputy Clerk of Court I. This position was for a vacancy created when Linda Dumke, a Deputy II, was elected Clerk of Courts. Connie Whichell was among those signing for the posted position and filled the job.

On the same date, the County posted a second position for Deputy Clerk of Court I, for a position created by the retirement of Helen Arnost, a Deputy II. Bette Harbick filled that posted position.

On November 28, 1988, the County posted a position of Deputy County Clerk I. This position was a vacancy created by the retirement of Carol Trempe, a Deputy II. Kathy Brandt filled the position.

Brandt had been a Deputy Forest Administrator II, and when she went to the County Clerk's office, the County posted a position of Deputy Forest Admini-strator I on December 22, 1988. This position was filled by Sue Weidemeier.

The Union filed the first grievance over the two positions in the Clerk of the Courts office on December 13, 1988. The next day the Union filed a grievance over the County Clerk's position, and filed the last grievance for the position in the Forestry office on January 4, 1989. The County denied all the grievances which were ultimately processed to arbitration.

There is no difference in job duties between the positions of a Deputy I and II. There is no specific number of Deputy I's or II's in any given department. When a person is reclassified from a Deputy I to a II, the job assignment does not change. A Deputy II makes more money, and the person being reclassified upward is rewarded for length of service and efficiency. Changes in classification are made according to the procedure in Appendix B of the parties' contract, whereby the Personnel Committee ultimately approves of a reclassification. The Personnel Committee took no action with respect to the four positions at issue in this grievance.

THE PARTIES' POSITIONS:

The Union:

The Union states that the grievances have been filed in a timely manner, noting that Article 4 of the collective bargaining agreement calls for a posting to remain posted for five working days, and that the grievance procedure allows the Union up to 15 days after an infraction to file the grievance. The Union argues that since no evidence was introduced at the hearing to show that the grievance was not filed within the 15 day limit, the County's objection on timeliness is without merit.

Turning to the merits of the grievances, the Union argues that there is no valid past practice of filling jobs at the level of a Deputy I when a Deputy II leaves, pointing to Article 22 which states in part that a valid past practice must not be in opposition to the terms and conditions of the collective bargaining agreement. The Union looks to Appendix B, Section C, of the contract, which calls for the procedure to change a position classification through the Personnel Committee. There is no dispute that the County did not follow the requirements of Appendix B when it unilaterally posted the positions as I's when II's vacated those positions. The Union argues that the County can cite no provision of the contract that allows Appendix B to be ignored.

The Union claims that the County's argument that it need not follow Appendix B when filling a vacancy is a mystery. A position is classified and inserted into the contract at a wage rate in Appendix A, which is the contractual placement of a position in a classification. Therefore, the Union submits that if the County wishes to change a position's classification whether there is a vacancy or not, the County must follow the procedure in Appendix B to do so.

If the County were to prevail, the Union contends that the County could also unilaterally reduce the wages of any position, which is something the parties never intended. The Union claims that this is not idle speculation, because in the case of the Deputy Forest Administrator, Appendix A has no contractual title of Deputy Forest Administrator I or a wage rate for that position. Therefore, the Union submits that even if the County's past practice existed of placing positions as Deputy I's when II's left, this past practice would not apply to the Deputy Forest Administrator position since there is no Deputy I in the labor contract.

The Union further notes that there must be some objective basis for changing classifications, and the County has no such objective basis. No duties are changed or added when positions are changed from Deputy I's to II's, and thus the Union objects that a position is worth more one day and worth less the next day.

Finally, the Union submits that the contract contemplates positions, not people, although the County asserts that the basis for a change in classifications is that the position goes with a person. However, the Union contends that juggling position classifications on the basis of individuals has no contractual basis.

The County:

The County asserts that the grievances were not filed in a timely manner. The Union had 15 days after the infraction to file a grievance, and if there were an infraction, it had to be at the date the jobs were posted. The County argues that with the exception of the grievance concerning the Deputy Forest Administrator, the grievances were all filed outside the 15 day limit.

If the Union were asking that the jobs be reposted as Deputy II's, the County admits that the Arbitrator might consider the merits of the Deputy Forest Administrator grievance. However, the County believes that the remedy sought by the Union -- to allow the Grievants to remain in their jobs but as Deputy II's -- would violate Article 5, Section 1, of the labor contract, which calls for the posting to contain the starting rate of pay. Because the Grievants received the pay for which they posted, the County contends that the Union cannot now seek through arbitration a higher rate of pay without denying the rights of other Union members who might have bid for the job had they known the rate of pay was higher than that posted.

The County contends that it was not required to follow the procedure for reclassifications as seen in Appendix B before posting Deputy I positions, as the purpose of Section C in Appendix B is to reward an employee for efficiency and skill in a position during the term of the labor agreement. The history of reclassifications shows that at one time, an employee could not be reclassified unless the Union approved, but that requirement was dropped at the suggestion of the Union, thus giving the County unilateral authority to reclassify people.

With the exception of the Clerk of Courts, Helen Jean Arnost, the County submits that the record shows that employees become Deputy II's by reclassification and not by posting into such positions. All Deputy II's were first Deputy I's and then reclassified as Deputy II's, with the sole exception of Arnost, whose hiring was unusual. The County notes that the duties and respons-ibilities of the Deputy I's and Deputy II's are exactly the same. The County asks that the grievances be denied because the County was merely exercising its right to post and award jobs under Article 5 to perform the duties and respons-ibilities of a Deputy I.

The Union's Reply:

The Union argues that there is no merit the County's position that the grievances are untimely. The Union was not informed of the denial of two grievances -- for the Clerk of Courts and County Clerk -- until after the time called for by the labor contract. Therefore, both parties have ignored the time requirements.

The Union objects to the County's assertion that the remedy proposed would be contrary to the contract and that jobs should be reposted if the Union prevails.

The Union agrees that the purpose of Section C under Appendix B is to reward an employe for efficiency and skills, because it explains why there is no need for Union approval of reclassifications when employees move up in classifications. The only issue is whether the County must follow the procedure outlined in Appendix B to lower the classification from a Deputy II to a I when a vacancy occurs. The Union believes the County must follow that procedure.

DISCUSSION:

Timeliness of Grievances:

The County asserts that the grievances were filed in an untimely manner, because the Union had only 15 days after the infraction to file a grievance, and the time should have started to run from the date the jobs were first posted. However, under Article 5 of the contract, a new job or vacancy is to be posted for five working days. Under Article 4, Section 1 calls for "work days" to be considered for filing grievances. Under Article 14, employees are granted both Thanksgiving and the following day as holidays, a factor which

becomes relevant in counting days surrounding three out of four postings.

The record shows the following facts regarding the postings and the filing dates:

Position Filed	Posted Dates	Grievance
Deputy Clerk of Courts I	11/15/88 - 11/21/88	12/13/88
Deputy Clerk of Courts I	11/15/88 - 11/21/88	12/13/88
Deputy County Clerk I	11/28/88 - 12/02/88	12/14/88
Deputy Forest Adm. I	12/22/88 - 01/03/89	01/04/89

The County admits that the last grievance -- for the Forest Administrator, is timely, but claims that the filing for the Clerk of Courts is 29 days and the filing for County Clerk is 17 days, and both those time limits are beyond the 15 day limit. However, the County incorrectly counts both weekends and the holiday periods to reach the figures of 29 days in the Clerk of Courts cases, as a calendar for 1988 will show that Thanksgiving fell on November 24 that year. Neither the 24th or 25th of November would have been working days within Article 14 of the contract. The County is also counting weekends in the case of the County Clerk. Once weekends are taken out, the filing of the grievance over the posting of the County Clerks' position is timely whether one counts the days from the first day posted or the last day posted.

Therefore, the only issue is whether the two grievances for the two positions of Deputy Clerk of Courts are likewise filed in a timely manner. In general, the time for filing a grievance begins to run when the aggrieved party knew or should have known of the alleged infraction. If the County were correct that the time should run from the first day a position is posted, the Union would have been untimely, with the December 13th date falling 19 days or four days late from the posting date of November 15th, excluding weekends and the two holidays. However, the positions remained posted for five days, and one could consider the end of the postings as the date from which the time started to run.

The aggrieved employees or the Union may not necessarily have seen the postings from the first day they were posted, and it cannot be said that the grievants either knew or should have known of an alleged violation on the first day the positions were posted. It also follows that an arbitrator should not pick any particular day in between -- whether day two, three or four -- of the postings as an arbitrary date on which the grievants knew or should have known of the infraction. Therefore, the time should begin to run at the end of the postings, on November 21st, as the last date of the Employer's conduct when the Union had 15 days to grieve. Therefore, I find that the Union filed its grievances over the Deputy Clerk of Courts positions in 14 days and in a timely manner. The grievances are all arbitrable.

The Merits:

The Union is objecting to the fact that in all four cases, people who held classification of Deputy II's -- a higher classification in the pay scale -- left their positions, and the County posted and filled the positions as

Deputy I's. The Union claims that in order for the County to change the classifications of the positions, it must follow the procedure spelled out in Appendix B of the contract, which admittedly, the County did not follow.

Appendix B, Section C, calls for the method by which changes in classification are handled. Changes in classifications include both promotions and demotions and end with the approval of the personnel committee. Article 5 contains the contractual procedure for filling vacancies. Section 2 of Article 5 contains the contractual procedure for filling vacancies, and applies to the grievances at hand -- job openings created by the termination, promotion or transfer of existing personnel, and the job continues to exist in the table of organization. Also, in Article 5 (in the second paragraph numbered "1") calls for the posting to contain the job requirements, qualifications and starting rate of pay. Finally, paragraph 8 states the reclassification shall not be considered a vacancy and posting shall not be required.

All these provisions of the contract must be read in conjunction with each other, as well as Article 22 which states that existing practices must meet certain tests, including that they not be in opposition to the terms and conditions of the agreement. The parties' past practice has been to use the reclassification procedure of Appendix B to move employees upward during the term of their employment as a reward for greater efficiency or skills and a greater length of service. The Union believes that once these employees are reclassified upward, their positions become locked into the contract through the wage rate in Appendix A, and that when those employees leave those positions, the County must post their jobs at the position level they had obtained.

However, the Union's position is contrary to the plain language of Article 5, especially paragraph 1 (the second number "1"), which gives the County the right to post an open job with the job requirements, qualifications, and starting rate of pay. The County chose to post these jobs as Deputy I's, which it was entitled to do under Article 5. Further, paragraph 8 of Article 5 works against the Union's assertion that the County's conduct amounts to a reclassification, because paragraph 8 states that reclassification shall not be considered a vacancy and posting shall not be required. If the Union were correct in that the procedure in Appendix B had to be used for these jobs, there would be no purpose to some of the sections of Article 5, especially those sections giving bargaining unit members the first right to vacant jobs through the posting procedure. Surely that was not the parties' intent when they agreed to the language of Article 5. Paragraph 8 gave them a way to reclassify an existing employee into a higher classification without having to post for the higher classification. The Union cannot admit that the County has the right to post for open jobs but then demanded it has to use the reclassification procedure of Appendix B, when Article 5 spells out the procedure for posting job openings.

The County's position, simply stated, is that when a person who is classified as a Deputy II leaves that position, the person takes the classification of a II with them, and the County can then post the open job as a Deputy I. The Union's position is that the contract contemplates positions, not people, and that when a person who is classified as a Deputy II leaves that position, the position of a Deputy II is the vacant job for which the County should be posting. While Appendix B, Section C, refers to a change in "position" classification, paragraphs D, E and F, also talk about the movement of an "employee." Sections C, D, E and F refer to the change in classification for employees already on staff, while Article 5 refers to open jobs. These two parts of the contract are not in conflict with each other. Moreover, the practice of posting jobs as Deputy I's when II's leave is not in opposition to any terms of the contract. Therefore, Article 22(e) does not apply to the practice.

The Union is correct that there appears to be no objective basis for reclassifying employees, as the County may change a Deputy I to a II when it decides to and when it complies with Appendix B. However, this is the method both parties agreed to as a means to upgrade employes during the term of a labor agreement. While the Union argues that the County could unilaterally reduce the wages of any position if the County prevails in this case, the County would

still have to follow Section F of Appendix B for such a change in classification. Although the Union argues that the Deputy II positions became locked into the contract through the wage rate in Appendix A, it would not have the Deputy I positions similarly locked into the contract, as it has agreed that the County may upgrade Deputy I's during the life of the contract. The County's position in posting job openings is consistent with the language of Article 5, and does not conflict with Appendix B.

Moreover, the parties agree that the duties and responsibilities of a Deputy I and a II are the same, which supports the County's position that people are reclassified to II's to reward them for their length of service. These employees so reclassified then make the higher wage rate spelled out in Appendix A, but Appendix A does not have the effect of freezing the position. There is nothing that spells out how many classifications of Deputy I's or II's the County has in any given department. Therefore, when a person classified as a II leaves that job, and the County posts the vacancy, it may post at the rate of a I. It could in theory post for a II or not post the job at all, if it determined it would not fill the vacated job. The Union admits that the County has the right not to fill a vacancy at all. The Arbitrator concludes that the County also has the right to fill the vacancy at the level it determines to be appropriate, under the language of Article 5.

Accordingly, it is my decision that while these grievances were filed in a timely manner, they are all denied. There is no contract violation shown, and the Union's position that the postings of the jobs at issue were reclassifications which were not subjected to the procedures of Appendix B is without merit.

AWARD

The grievances are denied.

Dated at Madison, Wisconsin this 5th day of January, 1990.

By _____
Karen J. Mawhinney, Arbitrator