

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 CHIPPEWA COUNTY : Case 165  
 : No. 42899  
 and : MA-5838  
 :  
 CHIPPEWA COUNTY PROFESSIONAL :  
 POLICE ASSOCIATION :  
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Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Joel L. Aberg, on behalf of the County.  
Mr. Dennis A. Pedersen, Business Agent, on behalf of the Association.

ARBITRATION AWARD

The above-entitled parties, herein the County and the Association, 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 December 19, 1989 in Chippewa Falls, Wisconsin. Briefs were filed by January 16, 1990.

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

ISSUE:

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

Did the County violate Article 8 of the contract when it denied grievant Donald Anderson's request to revert back to his former Patrolman position and, if so, what is the appropriate remedy?

DISCUSSION:

Anderson, then a Patrolman, bid for a vacant Dispatcher position and was awarded said position via a December 5, 1988 letter from Sheriff Al Dachel. Anderson, a former Dispatcher before he became a Patrolman, accepted that job in a December 12, 1988 letter to Sheriff Dachel where he stated that he would start his new job on January 1, 1989. 1/

Sometime in late December, 1988, Anderson telephoned Dachel to express reservations about taking the lower paying Dispatcher position, saying that he "wanted to stay in my position as a Patrolman" because of the nearly \$3,000 cut in pay and benefits he would have to suffer. There is a testimonial conflict about what transpired in that conversation, with Anderson claiming that Dachel then ordered him to take the Dispatcher position. Anderson contends that he subsequently did so because he believed that he could automatically revert back to his former patrolman job after 90 days and that "I felt I had 90 days to give it a shot". Dachel, on the other hand, testified that "At no time did I order Ronnie to take the job", adding that "he could have grieved it and we would have lost".

Near the end of the 90 day probationary period, Anderson by letter dated March 21 informed Dachel that he wanted to transfer back to his former Patrolman's job, pointing out that "Since the road position is still open it would not involve displacing any other personnel." By letter dated March 31, Dachel denied the request because he believed there was nothing in the contract allowing Anderson to revert back to his old position. In the interim, and following an extensive examination and screening process, the County on March 13 hired Robert Cunningham to fill Anderson's former Patrolman's job. Anderson never bid for said position because he did not believe that the contract allowed him to post for another position. In addition, the County on April 16 hired Gordon Foiles to replace former Patrolman Stangl. Again, Anderson never bid for said position.

On April 24 Anderson filed the instant grievance, requesting that he be allowed to revert back to his former position "with all attendant rights and privileges as though he had not left said position".

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1/ Unless otherwise noted, all dates hereinafter refer to 1989.

In support thereof, the Association acknowledges that while no other employes in the past have actually reverted back to their old positions, they "were, indeed afforded the ability to determine" for themselves whether they wanted to and that, as a result, Anderson reasonably expected to "be treated the same way". The Union maintains that the Sheriff himself is responsible for the instant dispute by refusing to let Anderson withdraw his name for the Dispatcher position before he had even started working and that, furthermore, Anderson should have been given the Patrolman position which was vacant at the end of March (the one filled by Foiles on April 16).

The County, in turn, argues that there is no past practice giving employes the right to unilaterally decide for themselves whether to revert back to their former positions following the expiration of their 90 day probationary period and that the practice in fact, "is to send a transferred employee back to a prior position only if he/she does not meet acceptable standards", something which did not happen here. The County also argues that Anderson could have filed a grievance over his proposed transfer in December 1988 and that he in fact never told Dachel at that time that he was opposed to the transfer.

The pertinent contract language on this issue is Article 8, Section 7, which states:

Section 7: When an employee is appointed to a position through the posting procedure, a three month probationary period will be served. If the employee does not meet the acceptable standards during the probationary period, he shall be returned to a position commensurate with his former status for which he is qualified. If the new employee meets the acceptable standards, he shall be ineligible to apply for any other position for a period of one year from the date he signed the posting.

As the County correctly points out, this language on its face does not give employes the right to revert back on their own, as it addresses reverting back only within the context of when "the employee does not meet acceptable standards during the probationary period". However, it is also true that nothing in this language expressly prohibits the kind of reverting back sought by Anderson.

Furthermore, this language must be interpreted and tempered within the unique facts of this case. Thus, speaking about Anderson's reluctance to take the Dispatcher position, Dachel himself testified that Anderson "could have grieved it and we would have lost". This admission clearly shows that Anderson had the contractual right to withdraw his bid when he spoke to Dachel in late December, 1988, before he took the job. In addition, Anderson on March 21 informed Dachel that he wanted to revert back to his former Patrolman job. Dachel refused that request on March 31 even though there was a vacant Patrolman position which was not filled until April 16 which Anderson easily could have filled had he been given the chance to do so.

This case therefore boils down to whether this later job should have been given to Anderson when Dachel knew that Anderson wanted to revert back to that position and when an honest misunderstanding apparently arose between Dachel and Anderson in December, 1988 regarding the latter's obligation to take the Dispatcher position. 2/ Because Dachel himself may have contributed to that misunderstanding, and because it would be unfair to deprive Anderson of his admitted contractual right to have turned down the Dispatcher position because of that misunderstanding, Anderson's reasonable request to revert back to his former position should have been granted since the County would not have been prejudiced in any way had it done so. Accordingly, and given the fact that the County has never offered any explanation as to why it wanted to hire a new employe over Anderson, it follows that the County's refusal to allow Anderson to revert back was arbitrary and that, as a result, it violated Article 8 of the contract when it refused to award him the vacant Patrolman position at the end of his probationary period.

To remedy that, the County shall immediately offer to reinstate Anderson to his former Patrolman position and it shall make him whole by paying him the difference between what he has earned as a Dispatcher and what he could have earned as a Patrolman from April 1, 1989 to the present.

To resolve any questions which may arise over application of the Award, I shall retain my jurisdiction for at least thirty (30) days.

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2/ Given this misunderstanding and the fact that the County concedes that Anderson could have turned down the Dispatcher job before he took it, it is unnecessary to determine whether employes in the past were given the opportunity to return to their prior jobs if they chose to do so.

It therefore is my

AWARD

1. That the County violated Article 8 of the contract when it denied grievant Donald Anderson's request to revert back to his former Patrolman position; it therefore shall take the remedial action noted above.

2. That I shall retain jurisdiction over this matter for at least thirty (30) days.

Dated at Madison, Wisconsin this 13th day of March, 1990.

By \_\_\_\_\_  
Amedeo Greco, Arbitrator