BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
POLK COUNTY COURTHOUSE EMPLOYEES LOCAL 774-B, AFSCME, AFL-CIO	
and	Case 59 No. 42603 MA-5746
POLK COUNTY (COURTHOUSE)	

Appearances:
Mulcahy & Wherry, S.C., Attorneys at Law, 21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Ms. Kathryn J. Prenn, appearing on behalf of the County.
Mr. James A. Ellingson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Box 2, Brule, Wisconsin 54820, appearing on behalf of the Union and Ms. Margaret McCloskey, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on the Union brief.

ARBITRATION AWARD

Polk County (Courthouse), hereinafter referred to as the County or Employer, and Polk County Courthouse Employees, Local 774-B, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing in the matter was held on August 31, 1989, in Balsam Lake, Wisconsin. The record was closed on March 13, 1990, upon receipt of posthearing briefs.

ISSUE:

The Union frames the issue as follows:

> Did the County violate Section 13.03 of the contract when it assigned the personal care work of the Grievant to a personal care worker?

The County requests that the Arbitrator frame the issue.

The Arbitrator frames the issue as follows:

> Did the County violate Section 13.03 of the labor contract when it assigned the personal care work in the Grievant's geographic area to a Personal Care Worker?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II - MANAGEMENT RIGHTS

Section 2.01 The Union recognizes the lawful management rights repose in the County which include:

> A. To direct all operations of the County;
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> . . .
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> C. To hire employees to positions within the County;
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> . . .
>
> F. To maintain efficiency of County government operations;
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> . . .
>
> I. To determine the methods, means, kinds, and amounts of services to be performed as pertains to County government operations, and the number and kinds of classifications to perform such services and to contract out for goods and services where the work force is not affected or if the work force is affected, there must be a showing of substantial savings to the County;

J. To take whatever action is necessary to carry out the functions of the County in situations of emergency. Whatever or not the Employer has been reasonable in the exercise of these management rights, A through J, shall be subject to the provisions of Article IV.

Section 4.07 Arbitration:

. . .

6. Decision of the Arbitration Board: The decision of the arbitration board shall be limited to the subject matter of the grievance and shall not modify, add to, or delete from the express terms of this Agreement.

ARTICLE XIII - EMPLOYEE DEFINITION

. . .

Section 13.03 Limited Part-Time Employees: (Class III) An employee who is scheduled to work less than 1,020 annual hours in a permanent position. This employee is not entitled to any fringe benefits granted by this Agreement except participation in the Wisconsin Retirement Fund if they work a minimum of 600 annually scheduled hours. The Employer shall not employ limited part-time employees in positions that reasonably should require regular part-time or regular full-time employees.

BACKGROUND

Marilyn Iverson, hereinafter the Grievant, was employed by the County as a Home Health Aide for approximately ten years. The Grievant terminated her employment with the County on August 7, 1989.

In November 1987 the parties entered into a Letter of Understanding which provided as follows:

> The following "Letter of Understanding" is entered into without prejudice to clarify the bargaining unit as follows:
>
> [1] The position of Home Health Aide will hereby be included in the Polk County Courthouse Employees Local 774-B bargaining unit. As a result of this unit clarification agreement the Home Health Aides shall become a part thereof effective the 1st day of November 1987.
>
> [2] The Union and County hereby agree to meet for the purpose of bargaining the wages, hours and working conditions for Home Health Aides on a mutually agreeable date and time.
>
> This understanding is entered into pursuant to discussions of the parties involved, and is to become a part of the clarification of this unit, and is binding on the parties hereto.

At the time that the County was negotiating with the Union to establish wages, hours and conditions of employment of the Home Health Aides, the County advised the Union that the State was in the process of changing the home health care program and that one effect of the change was that work historically performed by the County's Home Health Aide would be reimbursed at two different rates. Specifically, services rendered to clients in the Skilled Home Care Program would be reimbursed at a higher rate than services rendered to clients in the Personal Care Program. The Union was given the following County proposals:

> 1. A new position will be created entitled Personal Care Worker. This position will be filled on an as needed basis contingent on patient load and geographical distribution of patients.
>
> 2. Wages will be set at $3.85 starting salary and $4.00 after 975 hours probation for new employees.
>
> 3. Fringe benefits will be paid on a prorated basis prospectively for one year for any Personal Care Worker or Home Health Aide after having achieved 975 hours in an anniversary year. Eligibility for

fringe benefits will be reevaluated on an annual basis.

4. A task rate of $3.85 inexperienced/$4.00 experienc-ed will be added to the Home Health Aide salary schedule. Home Health Aides will be paid the Personal Care task rate when assigned a personal care patient and the Home Health Aide rate of pay when assigned a skilled home health aide patient.

5. All hours worked by Home Health Aides, both for skilled home health aide patients and personal care patients, will accrue towards fringe benefits.

6. Management reserves the exclusive right to assign personal care patients and skilled home health aide patients to existing Home Health Aide staff or new Personal Care Worker staff based on factors (geography, mileage, experience, orientation) that contribute to the efficient and effective operation of the agency.

At the conclusion of the December 14, 1987, bargaining session, the parties reached an understanding regarding wage rates and fringe benefits for the Home Health Aide and Personal Care Worker positions. Among the understandings was that Home Health Aides would be paid at the Personal Care Worker wage rate when performing personal care work. The Union agreed to draft a Letter of Agreement regarding the same.

The parties continued to meet and negotiate on the Home Health Aides and on March 14, 1988 signed a "Summary of Tentative Agreements" regarding the inclusion of Home Health Aides. The negotiations which occurred between December 14, 1987 and March 14, 1988 did not involve any further discussions on the issue of personal care work or the use of Personal Care Workers. The "Summary of Tentative Agreements" did not refer to personal care work or Personal Care Workers. However, Sec. 5.07 of this "Summary" contained the following:

> Patient assignments for Home Health Aides will be made based on the level of care and the qualifications of personnel required, the efficiency and cost effectiveness of personnel and travel, the availability of personnel and seniority, in that order.

In the Spring and Summer of 1988, the parties met on several occasions to negotiate a collective bargaining agreement to succeed the parties' 1987 collective bargaining agreement. Neither party raised the subject of personal care work until after the State implemented the Personal Care Program on July 1, 1988. At that time, the County asked the Union's Representative about the letter of understanding which had been discussed in December. The Union's Representative conferred with his negotiations team and, thereafter, told the County that the Union would not agree to have the Home Health Aide paid at a lower rate for performing personal care work. The Union Representative also told the County that if the County thought that they could hire Personal Care Workers at the lower rate then the County should go ahead and hire them. Thereafter, the County began to advertise for and hire Personal Care Workers to perform personal care work. The County established a wage rate for the Personal Care Worker position which was lower than the wage rate for the Home Health Aide position which had been bargained by the parties.

Home Health Aides, who are assigned to work a specific geographic area, are given the first opportunity to perform the Personal Care work in their geographic area at the Personal Care Worker wage rate. The Grievant informed the County that she was not interested in performing Personal Care work at the lower wage rate. The Grievant was assigned to handle the Personal Care cases in her geographic area on a temporary basis during the time period in which the County sought to hire an individual to handle the Personal Care cases in the Grievant's geographic region. Since the assignment was involuntary, the County continued to pay the Grievant the higher Home Health Aide rate when she performed the Personal Care work. The temporary assignment continued until April 3, 1989, at which time the County hired a Personal Care Worker for the Grievant's geographic area of the County. From the time that the County hired this Personal Care Worker until the Grievant resigned, the Grievant did not request, nor was she involuntary assigned, any Personal Care work. The Grievant grieved the County's action in assigning the Personal Care work in the Grievant's geographic area of the County to a Personal Care Worker. The County denied the grievance and the grievance was subsequently advanced to arbitration.

POSITIONS OF THE PARTIES

Union

On or about April 3, 1989, the Grievant was informed that her personal

care work was going to be reassigned to LaNette Hanson, a Personal Care Worker. Prior to the reassignment of this work, it was offered to the Grievant at a reduction in pay. The Grievant, who was making $7.25 per hour, was offered $5.50 per hour for the same personal care work that she had previously performed for $7.25 per hour.

Section 13.03 of the collective bargaining agreement specifically restricts the Employer's right to use limited part-time employes in positions that reasonably should require regular part-time or regular full-time employes. The purpose of this provision is to insure that work goes to either full-time employes or regular part-time employes. Therefore, any exception to the requirement that the work be assigned to either full-time or part-time employes should be strictly construed. For example, a reasonable exception would be where it was impossible to schedule a full-time or part-time employe to perform such work or the full-time and part-time employes were not qualified to perform the work.

The evidence of bargaining history establishes that the County sought to bargain a lower wage rate for the Personal Care Workers and to bring them into the Union. The Union refused to accept a lower wage rate for personal care work and, indeed, refused to accept the Personal Care Workers into the Union. As the testimony of the Local President establishes, the Union relied upon Section 13.03 to protect the hours of the Home Health Aides who were in the Union.

The testimony of the County's Director of Nursing clearly establishes that if the work in dispute was required to have been assigned to a bargaining unit employe, then the bargaining unit employe who would have been assigned such work would be the Grievant. The Personal Health Care Worker position was never recognized by the Union as a separate classification of employee within the bargaining unit, the title was never added to the contract, and no agreement was reached between the Union and the County as to separate bargaining unit wages for the position. The Grievant has been denied hours of work because of the County's hiring of a Personal Care Worker to work those hours. Section 13.03 of the collective bargaining agreement clearly prohibits the County from hiring limited part-time employes in positions which would reduce the hours of regular part-time or regular full-time employes. By hiring LaNette Hanson, the County clearly reduced the hours of the Grievant in violation of Section 13.03 of the collective bargaining agreement.

The language of Section 13.03 does not support the County's assertion that the provision prevails to work which is assigned to the "same" positions. Acceptance of the County's position, would negate the "reasonable" standard set forth in Section 13.03. Clearly, it is reasonable to conclude that the Union, in negotiating the language of Section 13.03, was concerned with limited part-time employes usurping work that would normally be performed by regular bargaining unit employes.

Contrary to the argument of the Employer, the Union is not prohibiting management from exercising its rights. Rather, it is asking that management exercise these rights consistent with the requirements set forth in Section 13.03 of the collective bargaining agreement, which language prohibits the creation of new positions in order to usurp the work of current bargaining unit employes. The Union urges the Arbitrator to sustain the grievance and make the Grievant whole for any loss of wages or benefits she suffered through the improper actions of Polk County.

Employer

Effective July 1, 1988, the State created two segregated and distinct programs for the provision of home health services, i.e., the Home Health Care Program and the Personal Care Program. Consistent with the authority vested to it in Section 2.01 (I) of the collective bargaining agreement, the County created a job classification to fit each of the two programs. The County designated the position of Home Health Aide to perform the State prescribed list of duties for the Skilled Home Care Program and the County created the position of Personal Care Worker to perform the State prescribed list of duties for the Personal Care Program.

During a bargaining session on December 14, 1987, the parties discussed the Union's proposals relating to the Home Health Aide position and the County's proposals for the Personal Care Worker position. At the conclusion of the meeting, the parties reached a tentative agreement regarding the wage rate for each position. Although the Union Representative agreed to draft a Letter of Agreement regarding the same, he failed to do so. In subsequent bargaining sessions, the Union failed to raise the issue of the Personal Care Worker position. Prior to the conclusion of the August 3, 1988 bargaining session, Public Health Director Larson asked Union Representative Rettke about the status of the Letter of Agreement. According to the unrefuted testimony of the Public Health Director, Union Representative Rettke said "if you think you can hire them (Personal Care Workers) at $4.00 per hour, go ahead." With this green light from the Union, the County began to advertise for and hire Personal Care Workers in late August and early September. As the Public Health Director testified, she heard nothing further from the Union about the Personal Care

Worker position until April 5, 1989, when the Grievant filed her grievance.

Having been placed on notice that the County was going to create the Personal Care Worker position, having been provided the opportunity to take the issue all the way through the interest arbitration for the 1988-89 collective bargaining agreement, and having expressly told the County to "go ahead," the Union has expressly waived any right to grieve the fact that the position of Personal Care Worker has been created.

The Union seeks to have the Arbitrator delete from the collective bargaining agreement the County's expressed authority of Section 2.01 "to determine the methods, means, kinds and amounts of services to be performed . . . and the number and kinds of classifications to perform such services," or, in the alternative, the Union seeks to have the Arbitrator add a provision requiring the County to pay its Personal Care Workers the same as its Home Health Aides. Since the provisions of Section 4.07 (6) of the collective bargaining agreement expressly provides that the arbitrator "shall not modify, add to, or delete from the express terms of the Agreement," the remedy sought by the Union is clearly beyond the scope of the Arbitrator's authority.

As the record demonstrates, the County did offer the Grievant the Personal Care work in dispute, albeit at a lower rate. From the outset, the Grievant told the County that she did not want to do any Personal Care work. It is axiomatic that an employe is to "work now, grieve later." In this case, the employe refused to work. Accordingly, to award the Grievant the remedy sought by the Union would be contrary to basic arbitrable principles and would unjustly enrich the Grievant.

The Union fails to acknowledge that Article II of the collective bargaining agreement authorizes the County to determine the number and kinds of job classifications to perform services provided by the County. Pursuant to that authority, the County created the position of Personal Care Worker. Having created a new position in response to a new State program, the County understood and acknowledged that it had a duty to bargain with the Union regarding the wages, hours and conditions of employment for the new position. In its initial brief, the Union, for the first time, stated that it does not want the Personal Care Workers in the Union. This declaration is particularly surprising in light of the bargaining history between the parties regarding the position.

To adopt the Union's position, i.e., that Section 13.03 prohibits the creation of a new position, would be contrary to two basic arbitrable principles, i.e., (1) that the meaning of any provision must be determined in relation to the contract as a whole and (2) if alternative interpretations of a clause are possible, an interpretation which would nullify or render meaningless any part of the contract should be avoided. It is the unrefuted testimony of the Public Health Director that Section 13.03 prohibits the County from dividing a regular part-time or regular full-time position into several limited part-time positions. This is clearly a different situation than present in the instant case where there are two distinct positions, i.e., Home Health Aides and Personal Care Worker, which are responsible for providing two separate and distinct levels of care under two separate state programs. The County respectfully requests that the Arbitrator dismiss this grievance in its entirety.

DISCUSSION

At issue is whether the County violated Section 13.03 of the labor contract when it assigned personal care work in the Grievant's geographic area to a Personal Care Worker. As the Union argues, the plain language of Section 13.03 evidences an intent to preserve the bargaining unit work of bargaining unit employes. Specifically, the County is not permitted to "employ limited part-time employes in positions that reasonably should require regular part-time or regular full-time employes." Apparently, Public Health Director Larson believes that the Section 13.03 restrictions on the use of LTE employes to perform Home Health Aide work applies only to LTE employes who occupy the classification of Home Health Aide. However, as the Union argues, Larson's interpretation is more restrictive than the plain language of the provision would warrant. Regardless of whether the LTE employe is in the Home Health Aide classification, or some other classification, such as Personal Care Worker, the provisions of Section 13.03 prohibit the County from using the LTE employe to perform Home Health Aide bargaining unit work. The issue to be decided is whether the personal care work in dispute is Home Health Aide bargaining unit work.

As set forth in the Letter of Understanding by which the parties voluntarily agreed to accrete the Home Health Aide position into the collective bargaining unit, the parties expressly agreed that:

> The Union and County hereby agree to meet for the purpose of bargaining the wages, hours and working conditions for Home Health Aides on a mutually agreeable date and time.

It is evident, therefore, that inclusion in the Union's bargaining unit did not have the automatic effect of extending coverage of the Union's collective bargaining agreement. Rather, the wages, hours and working conditions of the Home Health Aide were to be established through subsequent bargaining between the parties.

When the parties met to bargain the wages, hours and working conditions for Home Health Aides, the Union was informed that as a result of changes in the State's reimbursement of home health care services, the County intended to transfer some duties previously performed by the Home Health Aide to the new classification of Personal Care Worker. In December of 1987, the Union and the County reached an oral understanding in which the parties, inter alia, agreed to a wage rate for the Personal Care worker classification, i.e. $4/hour, and further agreed that Home Health Aides would be paid at the Personal Care Worker rate when performing personal care work.

Between December, 1987 and March 14, 1988, the parties continued to negotiate the wages, hours and working conditions of Home Health Aides. These negotiations, however, did not contain any further discussions concerning personal care work. On March 14, 1988, the parties signed a "Summary of Tentative Agreements" on items to be included in the parties' 1988 contract. 1/ This "Summary of Tentative Agreements' is silent on the issue of personal care work.

To be sure, the Union Bargaining Representative who was to reduce the December, 1987 oral understandings to writing did not do so prior to March 14, 1988 when the parties signed the "Summary of Tentative Agreements." However, neither did the Union's Bargaining Representative repudiate the oral understanding of December, 1987 prior to the time the parties entered into the March 14, 1988 "Summary of Tentative Agreements." Thus, the evidence of bargaining history prior to March 14, 1988 supports the conclusion that, at the time the parties signed the March 14, 1988 "Summary of Tentative Agreements," the parties' understanding of personal care work was the understanding reached in December, 1987, i.e., that personal care work was no longer to be considered Home Health Aide work, but rather was Personal Care Worker work compensable at the Personal Care Worker rate of pay.

The State implemented the Personal Care Program on July 1, 1988. Thereafter, during negotiations on the parties' 1988 labor contract, the County asked the Union's Representative about the status of the Letter of Agreement which had been discussed in December. Following a caucus with his negotiations team, the Union Representative advised the County that the Union would not agree that Home Health Aides who performed personal care work would be paid at the lower Personal Care Worker wage rate. The Union Representative further advised the County that if the County could find individuals to work at the lower Personal Care Worker wage rate, then the County should go ahead and hire these individuals. As the County argues, the Union Representative's response does not contain an objection to using Personal Care Workers to perform personal care work, but rather, expressly recognizes that the County has the right to use Personal Care Workers to perform personal care work at a wage rate lower than that negotiated by the parties.

At all times during the bargaining on the Home Health Aides wages, hours and working conditions, the Union was aware that the County intended to transfer work from the Home Health Aide to the new classification of Personal Care Worker. There is no evidence that the Union advised the County that it objected to this transference or made any claim that personal care work was to be performed only by Home Health Aides. Rather, the evidence of bargaining history demonstrates that the Union expressly recognized the right of the County to assign personal care work to Personal Care Workers.

Given the record presented herein, the undersigned is persuaded that at the time the Home Health Aides became subject to the terms and conditions of the Union contract, including Section 13.03, the parties mutually understood that the County had the right to assign personal care work to the Personal Care Worker classification. Since it was mutually understood that the County had theright to assign personal care work to Personal Care Workers, such personal care work is not Home Health Aide bargaining unit work. Accordingly, the County's use of a Personal Care Worker to perform personal care work in the Grievant's geographic area did not violate the Grievant's Section 13.03 rights.

Based upon the above, and the record as a whole, the undersigned issues the following

AWARD

1. The County did not violate Section 13.03 of the labor contract when it assigned personal care work in the Grievant's geographic location to a Personal Care Worker.

2. The grievance is denied and dismissed.

1/ The terms and conditions of the 1988 labor contract had not been negotiated at this time.

Dated at Madison, Wisconsin this 23rd day of May, 1990.

By _____
Coleen A. Burns, Arbitrator

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