

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 TEAMSTERS LOCAL UNION NO. 662 :
 :
 and : Case 80
 : No. 43481
 : MA-5987
 PIERCE COUNTY :
 (SHERIFF'S DEPARTMENT) :
 :
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Appearances:

Ms. Christel Jorgensen, Business Agent, Teamsters Local 662, appearing on behalf of the Union.
 Mulcahy & Wherry, Attorneys at Law, by Mr. Richard Ricci, appearing on behalf

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and the County respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on April 3, 1990 in Ellsworth, Wisconsin. The parties filed briefs in the matter which were received by May 14, 1990. Based on the entire record, I issue the following award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the collective bargaining agreement when it failed to assign the investigator position temporarily vacated by Kenneth Witt by seniority? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-90 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 3

MANAGEMENT RIGHTS

Except as otherwise set forth in this Agreement, it shall be the exclusive function of the Employer to hire, direct and control the work force, take disciplinary action for just cause, assign work and schedule hours of the work force.

ARTICLE 4

PROBATIONARY PERIOD AND JOB POSTING

. . . .

Section 5. Permanent openings for jobs setting forth classification and rates of pay shall be advertised on the bulletin board for five (5) work days. Employees may apply for transfer or promotion by making a written request to their department head clearly identifying the job they want. Applicants indicating an interest in the job will be considered. In selecting the employee to fill the permanent vacancy, the County shall give consideration to the employee's seniority with the department where the vacancy occurs and the employee's past experience, prior training, skill and general personnel record with the County. If none of the job applicants qualify for the vacant job, or no one posts, the vacancy shall be filled by hiring the necessary skills and ability or transferring a present employee to the vacant positions. Priority consideration shall be given to permit an office employee to post into the Traffic or Deputy Departments.

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ARTICLE 6

SENIORITY

Section 1. Seniority rights for employees shall prevail under this Agreement and all Agreements Supplemental hereto unless it is specifically noted otherwise in any Article or Section. For determination of seniority rights the rule shall be that the oldest employee in respect to their employment with the Employer in the bargaining unit, is the senior employee and has seniority over anyone their junior who is hired later in the bargaining unit. This shall continue on down the seniority list with the above interpretation. Therefore, any place in this Agreement that seniority is mentioned, unless qualified, shall mean the oldest employee of the Employer in respect to length of employment with the Employer in the bargaining unit. Where no specific mention is made of seniority or any qualification, seniority shall prevail with the above ruling. It is also understood that should any employee leave the bargaining unit for any reason other than that which is granted in this Agreement, he shall lose all seniority accumulated to date. Seniority is a period of continuous employment of employees by the Employer in the bargaining unit commencing with the first hour and date of work and including time for vacations, Leave of Absence, temporary layoff due to lack of work, military service as prescribed by law, illness, accident or other mutual agreement. Should two or more employees be employed the same date and hour, then seniority shall be determined by arranging said employees or group of employees in alphabetical order on the seniority list starting with the last name and then the first name.

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ARTICLE 20

LEAVE OF ABSENCE

. . .

Section 6. The County may employ interim employees to replace a County employee who is on an extended Leave of Absence. These interim employees will not belong to the Union but shall pay Union dues. They will not receive fringe benefits nor shall they have any right of recourse through the Grievance Procedure for termination.

FACTS

There are three main position categories in the Sheriff's Department: investigator, patrol/deputy sheriff and dispatcher/jailer. In October, 1989, Sheriff James Hines became aware of an upcoming temporary investigator's vacancy due to the scheduled surgery of Investigator Kenneth Witt. Witt was scheduled to commence a worker's compensation leave in conjunction with his surgery on November 13, 1989. On November 1, 1989, Sheriff Hines issued a memo announcing that Witt's medical leave created a temporary investigator vacancy and that this vacancy would be filled by Dispatcher/Jailer Natalie Stockwell effective November 13, 1989. Investigator Witt commenced a worker's compensation leave on November 13, 1989, and the temporary vacancy created by his absence was filled by Dispatcher/Jailer Stockwell as per Sheriff Hines' November 1, 1989 memo.

Witt's temporary vacancy (which was given to Stockwell) was not filled by seniority. Hines testified he selected Stockwell to fill Witt's temporary vacancy because the dispatch area (where Stockwell worked) was fully staffed at the time; in contrast, the patrol area was understaffed at the time and Hines did not want to worsen that situation by filling Witt's investigator position with someone from the patrol area. Hines also noted that Stockwell was a signer of a 1988 job posting for an investigator's position.

Two employees senior to Stockwell, Steve Boleen and Doug Sjostrom, filed grievances contending they should have been awarded this temporary investigator vacancy. The grievance of the most senior employee, Patrol/Deputy Sheriff Boleen, was processed. During the processing of the grievance the parties agreed Boleen has the qualifications to perform the work of the investigator. Boleen filled a temporary investigator's position in mid-1988. He had signed for an investigator's position in 1986 but did not sign the 1988 investigator's posting (which Stockwell had signed) because it was assigned to welfare fraud and had only limited funding.

Stockwell filled Witt's investigator vacancy from November 13, 1989 to

January 8, 1990, at which point she assumed another position she had bid on and been awarded. After Stockwell vacated Witt's investigator position on January 8, 1990, it was not refilled. Hines testified the main reason he did not refill it after Stockwell left was because of lack of funds and a secondary reason was because of the instant grievance. Witt was still on sick leave at the time of the arbitration hearing.

POSITIONS OF THE PARTIES

It is the Union's position that the Employer violated the collective bargaining agreement when it failed to fill the temporary vacancy at issue here by seniority. The Union notes in this regard that Article 20, Section 6 gives the Sheriff the right to fill temporary vacancies due to extended leaves of absence (as happened here) with non-bargaining unit personnel. Here, though, the Sheriff chose not to do so (i.e. fill the temporary vacancy with a non-bargaining unit person) but instead decided to fill it with a bargaining unit member. As a result, it is the Union's view that the Sheriff should have followed Article 6, Section 1 here and filled the temporary vacancy by seniority. As a remedy for this alleged contractual breach, the Union requests the following: (1) that Boleen, the senior employe, be awarded the temporary investigator's position (if it is still vacant); (2) that he receive the monies paid to the less senior employe (Stockwell) between November 13, 1989 and January 8, 1990; and (3) that he be paid for all hours that the vacant temporary position would have been filled from that point (i.e. January 8, 1990) up to the present. According to the Union it would be unfair not to include the time after January 8, 1990 since the Sheriff's reason for not filling the position after that date was because the instant grievance had been filed. In addition, the Union believes that to not include that period (i.e. after January 8, 1990) would allow the Employer to play games with the due process provisions of the labor agreement.

It is the Employer's position that it did not violate the collective bargaining agreement when it did not fill the temporary investigator's vacancy by seniority. According to the Employer, by virtue of the absence of language limiting its right, it has the authority to fill temporary vacancies according to management prerogative. In support thereof, it notes that the job posting language in the contract directs the County to utilize seniority in filling permanent vacancies, but is conspicuously silent in regard to temporary vacancies. In the Employer's view, since the contract language does not address the filling of temporary vacancies this means that temporary vacancies are not a limitation covered under the agreement and the filling of those vacancies remains a management right. Thus, the Employer contends it is not required to fill temporary vacancies based on seniority. In filling the instant position, the Employer submits that Sheriff Hines reviewed the most recent investigator's posting (which did not contain the grievant's name) and chose Stockwell because her name was on the posting and she was not one of the much needed patrol officers. In making this decision, the Employer asserts that Hines was simply trying to keep all departments adequately staffed. The Employer also contends there is no clear past practice which would provide for seniority based filling of temporary vacancies. It acknowledges in this regard that the grievant filled a temporary investigator vacancy in mid-1988, but it notes that in another situation a junior employe (namely Dennis Sorenson) filled a temporary patrol vacancy in 1986 and 1987. The Employer therefore requests that the grievance be denied.

DISCUSSION

The instant dispute concerns the method used to fill Witt's temporary vacancy. The Union contends, contrary to the Employer, that this temporary vacancy should have been filled by seniority. If it is found that Witt's temporary vacancy should have been filled by seniority, then the Employer violated the contract because seniority was not used to fill the vacancy. On the other hand, if the temporary vacancy did not have to be filled by seniority, then no contractual violation occurred.

In resolving this question the undersigned first turns to a review of the applicable contract language. Article 4, Section 5 specifies the procedure to be utilized in filling permanent vacancies, namely that seniority shall be given consideration in making the selection. By its express terms though, this provision applies only to permanent vacancies. Inasmuch as the instant vacancy was not a permanent vacancy but rather a temporary one, it follows that this provision is not dispositive in resolving the instant dispute.

Next, attention is turned to Article 20, Section 6. That section gives the Sheriff the right to fill temporary vacancies caused by extended leaves of absence with non-bargaining unit personnel. There is no question that Witt's absence constituted such an extended leave of absence. That being the case, the Sheriff could have filled Witt's temporary vacancy with a non-bargaining unit person if he wanted, as he has done on previous occasions. However, for whatever reason, the Sheriff decided to not fill Witt's temporary vacancy with a non-bargaining unit person but instead chose to fill it with a bargaining unit member. Under these circumstances then, Article 20, Section 6 is found to be inapplicable here.

A review of the labor agreement indicates it does not explicitly address the manner in which temporary vacancies are filled. Given this contractual silence on the subject, the Employer contends it retains authority under the Management Rights clause (Article 3), specifically that portion allowing it to "assign work and schedule hours", to fill such temporary vacancies as it sees fit and is not required to fill them by seniority. Were it not for the strong seniority language of Article 6, Section 1, I would agree. That section sets forth the general principle that seniority prevails under the instant contract unless it is specifically noted otherwise. It goes on to provide: "Where no specific mention is made of seniority or any qualification, seniority shall prevail with the above ruling." Here, the labor agreement does not contain any express exception to this seniority principle for the filling of temporary vacancies (other than that already noted in Article 20, Section 6). That being so, it is the conclusion of the undersigned that Article 6, Section 1 (the seniority language) is more specific than is the management rights language in addressing how temporary vacancies are to be filled. Inasmuch as specific language governs over more general language, it follows that Article 6, Section 1 is determinative here and requires that certain temporary vacancies be filled by seniority.

In so finding, it is expressly noted that this award should not be construed as holding that the Employer has to follow seniority in filling every temporary vacancy. As previously noted, Article 20, Section 6 gives the Employer the right to hire off the street to fill temporary vacancies if it so desires. If this happens, seniority plays no role whatsoever in filling a temporary vacancy. However where, as here, the Sheriff decides to not hire off the street to fill a temporary vacancy but instead decides to fill a temporary vacancy with a bargaining unit employe, then the Employer is contractually obligated to fill it by seniority. 1/

Application of this rationale here means that Witt's temporary vacancy should have been filled by seniority. Inasmuch as this did not happen it follows that the temporary vacancy should have been awarded to Boleen, the senior grievant, rather than to Stockwell. In order to remedy this contractual breach the County shall pay the grievant the money he would have earned as an investigator between November 13, 1989 (when the position became available) and January 8, 1990 (when Stockwell, the junior employe, vacated it).

1/ In reaching this conclusion, no weight has been given to the Employer's previous practice in filling temporary vacancies because it is inconclusive. Specifically, each side points to a single instance which supports their position (i.e. the Union to a situation where a senior employe, who happened to be Boleen, was awarded a temporary vacancy and the Employer to another situation where such a temporary vacancy was awarded to a junior employe). Simply put, these two instances are insufficient to create a past practice which supplements the parties' labor agreement.

Attention is now turned to the question of whether the backpay should extend beyond January 8, 1990 to the present. The record indicates that after Stockwell vacated the temporary investigator's position on that date it was not refilled by the Employer. The Union contends that Witt's investigator position should have been refilled after January 8, 1990. I disagree. The general rule in this regard is that an employe's departure from a position (in this case, Stockwell leaving the temporary investigator's position) does not automatically create a vacancy. When an employe leaves a position management has the right to decide whether or not the employe's departure creates a vacancy. 2/ This prerogative is reserved to the Employer here by the Management Rights clause (Article 3). In the absence of a contract provision limiting these management rights in regard to filling vacancies, as, for example, a clear requirement to maintain a certain number of positions in each classification, it is management's right to determine whether a vacancy exist and if it shall be filled. 3/ Nowhere in this labor agreement is there any contractual provision which requires the Employer to fill each temporary vacancy or maintain a certain number of investigator positions. That being the case, the Employer was not contractually obligated to refill the temporary investigator's position after Stockwell left it on January 8, 1990. This outcome is not altered by the fact that the Employer's secondary reason for not filling the temporary vacancy was due to this pending grievance. This is because the Employer's stated primary reason for deciding not to refill the position (namely lack of funds) certainly qualifies as a permissible exercise of management discretion.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the Employer violated the collective bargaining agreement when it failed to assign the investigator position temporarily vacated by Kenneth Witt by seniority;

2. That in order to remedy this contractual breach, the County shall pay the grievant the money he would have earned as an investigator between November 13, 1989 (when the position became available) and January 8, 1990 (when Stockwell, the junior employe, vacated it and the Employer decided not to refill it).

Dated at Madison, Wisconsin 25th day of July, 1990.

By _____
Raleigh Jones, Arbitrator

2/ Elkouri & Elkouri, How Arbitration Works, 3rd Ed. page 478.

3/ Ibid.