

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 SHEBOYGAN COUNTY LAW ENFORCEMENT : Case 128
 EMPLOYEES, LOCAL 2481, : No. 44100
 AFSCME, AFL-CIO : MA-6171
 :
 and :
 :
 SHEBOYGAN COUNTY :
 :

Appearances:

Ms. Helen Isferding, Staff Representative, AFSCME, Council 40, appearing on behalf of the Union.
Mr. John Bowen, Personnel Director, Sheboygan County, appearing on behalf of the County.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and the County or Employer respectively, are parties 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 August 7, 1990 in Sheboygan, Wisconsin. Thereafter, the parties filed briefs and the Union filed a reply brief, whereupon the record was closed October 15, 1990. Based on the entire record, I issue the following award.

ISSUE

The parties were unable to agree upon the issue and requested the arbitrator frame it in his award. 1/ The arbitrator hereby frames the issue as follows:

Did the Employer violate the collective bargaining agreement when it posted the process server position for a limited term, namely three years? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-1991 collective bargaining agreement contains the following pertinent provisions:

1/ The Union states the issue as:

Did the Employer violate the contract and/or past practice when it posted the process service position as limited term? If so, what is the appropriate remedy?

While the Employer states the issue as:

Whether the County violated the agreement by posting for interest in the classification of Deputy, a sign up sheet for the job assignment of civil process server with the term of assignment being three (3) years? If the County so violated the agreement what should the remedy be?

ARTICLE 5

MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement, the Employer shall have the right to:

1. Carry out the statutory mandate and goals assigned to the County utilizing personnel, methods and means in the most appropriate and efficient manner possible. It is understood and agreed, however, that should new classifications, reclassification, reallocation or substantial changes in job duties occur, the parties agree to meet and negotiate wages, hours and working conditions for any such positions.
2. To hire, promote, transfer, demote, discipline, suspend or discharge for just cause its employees.
3. To determine the specific hours of employment, the length of the work week and make such changes in the various details of the employment it from time to time deems necessary for the effective and efficient operation of the Sheriff's Department. It is understood and agreed that shift rotation during the term of this Agreement shall remain the same as scheduled prior to the effective term of this Agreement.
4. To adopt reasonable rules and policies and amend the same from time to time.

ARTICLE 24

SENIORITY

- A. Sheboygan County, shall, during the life of the herein contract for the employees covered by the same, recognize seniority as herein provided.
 1. When it becomes necessary to reduce the work force the last person hired shall be the first person laid off and subsequent to any layoff the last person laid off shall be the first person offered reinstatement.
 2. In determining shift preference where the same classifications are involved the shift preference shall be given to the employee with the longer period of seniority in that classification.
 3. Seniority shall be accumulated on a month-to-month basis or major portions thereof for continuous months of service. Absence from work because of illness, layoff, suspension for less than thirty (30) days, or authorized leave shall not interrupt the accumulation of seniority.
 4. Seniority shall be determined by the date of hiring; In the event two (2) members of the Sheriff's Department were hired on the same dates, seniority shall be determined by the member's position or rank on the eligibility list, in effect on the date said two (2) members were hired.

ARTICLE 25

VACANCIES/PROMOTIONS

Whenever a vacancy exists for a non-entry level union position, notice of said vacancy shall be posted for ten (10) days on a bulletin board in the department for the information and signature of all interested eligible employees. The position shall be awarded to the most qualified employee. The promotional

procedures contained in Sec. 1-6-1 of the Sheriff's Department Policy and Procedures manual, as they exist at the time of posting, shall be used to determine qualifications. Section 1-6-1 of the Sheriff's Department Policy and Procedures shall not be changed unless mutually agreed upon by the Union and the employer.

FACTS

The Sheriff's Department has three divisions pertinent here: patrol services, support services and criminal investigation. Deputies work in all these divisions: those in patrol services are patrol officers, those in support services are bailiffs and those in criminal investigation are civil process servers. In addition, a deputy works in the special investigation unit as a drug enforcement investigator. All these positions are entry level positions with the department. Movement by deputies into these positions are lateral transfers across division lines, but there is no change in wages or official classification. (i.e. deputy).

The instant grievance involves a civil process server position. This job entails serving civil papers upon the public and transporting prisoners.

On December 18, 1989, the Employer posted an opening for the position of civil process server. This position became available due to the retirement of the incumbent, Ernst Spelshaus, who had held the position for 15 years. The posting in question provided that "This position will be for a limited period (3 years)." This was the first time the Employer had posted a civil process server position for a limited term; it had always been posted before as a permanent position.

Five deputies signed the posting indicating their interest in the position, one of whom was Gary Schneider. Deputy Inspector James Hoffman testified he recommended Schneider for the position because he thought Schneider was the best suited candidate for the job. Schneider, who happened to be the least senior signer, was ultimately selected to fill the position. Seniority was not utilized in making this selection. The Union subsequently filed the instant grievance which was processed to arbitration.

In 1988, the Employer posted the drug enforcement officer position for a limited term (approximately one year) and no grievance was filed concerning same. The record indicates that the reason this position was posted for a limited term was the safety consideration that the identity of the undercover drug enforcement officer eventually becomes known to the drug community.

POSITIONS OF THE PARTIES

The Union initially notes that it is not challenging the person who was awarded the process server position in question. Instead, its entire focus centers on the duration of that job. In its view, the Employer's posting of the process server position for a limited term (namely 3 years) rather than on a permanent basis violated the contract. It makes the following arguments in support thereof. First, it contends that posting a job for a limited term circumvents the seniority provision and ultimately would do the same for the promotional provision because the contract contains a "most qualified" standard whereby the Employer could promote only those they have selected to gain experience. Next, it submits that the Employer has a practice of posting job openings on a permanent basis - not for a limited term. According to the Union, this was the first time the Employer ever posted a job for a limited term other than the drug enforcement officer which it believes is distinguishable on its face due to the undercover nature of the work involved. Finally, the Union argues that the Employer did not show any need for a limited term for the process server position such as funding problems. It therefore contends the grievance should be sustained. As a remedy for this alleged contractual breach the Union seeks to have the process server position reposted without any mention of a limited term.

The Employer's position is that it did not violate the contract by posting the process server job assignment for a three year term. First, it notes that there is nothing in the contract that explicitly prohibits the Employer from posting for a limited, as opposed to a permanent, term. That being the case, it is the Employer's view that it retains the right under the management rights clause to post for a limited term. Next, it argues that neither of the contractual provisions cited by the Union in the grievance (namely Article 5 and 25) have any bearing here; Article 5 (the management rights clause) grants rather than restricts the Employer's rights and Article 25 (the promotion provision) applies only to non-entry level positions while the job involved here (namely process server) is an entry level position. Finally, the Employer submits that its primary purpose in making the process server position a limited term was to give the deputy selected an opportunity to expand his career objectives by exposing him in depth to this one area of law enforcement. The Employer believes that this, in turn, will provide it with a cross-trained individual ready for promotion. The County therefore asks that the grievance be denied.

DISCUSSION

It is initially noted that although the posting of the process server position is involved here, the selection of the individual chosen for that job is not in issue nor is the selection criteria used by the Employer in making that selection. Instead, the sole question herein is whether the Employer could post that job for a limited term, namely three years. The Union contends, contrary to the County, that the County could not post the position for a limited term. If it is found that the Employer could not post the process server job for a limited term then the Employer violated the contract because that is what happened here. On the other hand, if the Employer could post the process server job for a limited term then no contractual violation occurred.

In resolving this question the undersigned first turns to a review of the applicable contract language. Article 25 specifies the procedure to be utilized in filling vacancies, namely that the position will be posted and awarded to the "most qualified" employee. By its express terms though, this provision applies only to "non-entry level" positions. The civil process server position is not a "non-entry level" position; rather it is an entry-level position. This of course means that Article 25 is inapplicable here.

Next, attention is turned to Article 24 (the seniority clause) because the Union argues that the Employer's posting for a limited term circumvents this provision. Certainly a discussion of seniority rights would be in order if the undersigned were reviewing the selection of the employee chosen for the process server job. However, as noted above, the undersigned is not addressing that matter at the Union's request. That being so, it follows that in this case the seniority provision is not involved in resolving the question of whether the Employer can post a position for a limited term.

A review of the labor agreement indicates it does not explicitly address whether the Employer can post a vacancy for a limited term. Thus, the parties have not included language in their present agreement covering this situation. Given this contractual silence on the subject, the Employer contends it retains authority under the management rights clause (Article 5) to fill such vacancies for a limited term as it sees fit. I agree. The general rule in this regard is that management has the inherent right to determine whether a vacancy exists and whether and when it shall be filled.^{2/} Since management has the right to decide if a permanent vacancy exists, it must likewise have the right to decide if a vacancy exists for a limited term. In the absence then of any contractual prohibition against posting a position for a limited term, the Employer retains the right to do so. The undersigned therefore declines to imply a restriction against posting a position for a limited term because none presently exists. Finally, contrary to the Union's contention, the Employer does not have to justify the need for a limited term position (as opposed to a permanent position).

2/ Elkouri and Elkouri, How Arbitration Works, 3rd Ed., p.478.

The Union argues that the Employer is nevertheless precluded from posting for a limited term because a practice allegedly exists that the Employer post positions permanently. In support thereof, the Union cites the uncontested fact that the Employer never posted a process server position for a limited term prior to the instant case. 3/ However, just because the Employer has not posted for limited term in the past does not mean that a "practice" against it exists. As noted above, the Employer's posting of the process server position for a limited term was a legitimate management function. The County's failure to exercise that right until now does not mean it has somehow surrendered that right or is precluded from now exercising same. This is because mere non-use of a (management) right does not entail a loss of it. 4/

In summary then, it is held that since the Employer is not contractually precluded from posting positions for a limited term, it could post the position involved here (i.e. civil process server) for a three year term. In so finding, the undersigned wishes to emphasize the narrowness of this holding. Nothing herein should be construed as approving of the Employer's stated reason for posting the position for a limited term (i.e. to provide the Employer with a cross-trained individual ready for promotion). Instead, this case only stands for the proposition that inasmuch as the Employer is not presently precluded from posting positions for a limited term, it can do so. Finally, no opinion is expressed by the undersigned on what happens in three years when the term for this position expires.

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

AWARD

That the Employer did not violate the collective bargaining agreement when it posted the process server position for a limited term, namely three years. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 11th day of December, 1990.

By _____
Raleigh Jones, Arbitrator

3/ Although the record indicates that the Employer posted an undercover enforcement position for a one year term in 1988, that posting is distinguishable from the one involved here due to the unique nature of the undercover job. The parties agree that the limited term involved there was necessitated by safety considerations because the identity of the drug enforcement officer eventually becomes known to the drug community. Safety considerations were not involved though in the Employer's decision to post a process server position for a limited term.

4/ Standard Oil Company, 16LA 73, 74 (McCoy, 1951).