BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SHEBOYGAN COUNTY SUPPORTIVE SERVICES EMPLOYEES, LOCAL 110, AFSCME, AFL-CIO	Case 126 No. 44098 MA-6169
and	
SHEBOYGAN COUNTY	

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 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 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 August 21, 1990 in Sheboygan, Wisconsin. The parties filed briefs in the matter which were received by October 1, 1990. Based on the entire record, I issue the following award.

ISSUE

The parties could not agree upon the issue so they 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 selected Gloria Candella rather than Marlana Fiorentino for the vacant Child Support Coordinator position? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-91 collective bargaining agreement contains the following pertinent provisions:

1/ The Union states the issue as:

> Did the Employer violate the contract, Article 24 (Vacancy - Job Posting) when it promoted Gloria Candella rather than Marlana Fiorentino to the position of Child Support Coordinator? If so what is the appropriate remedy?

While the County states the issue as:

> Did the County violate the labor agreement, specifically Article 24, Paragraph B-1, when it awarded the position vacancy of Child Support Coordinator to the most senior qualified applicant in the department where the vacancy existed? If the County so violated the agreement what shall the remedy be?

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

. . .

ARTICLE 24

SENIORITY

. . .

B. Vacancy/Job Posting

1. Whenever an approved vacancy is to be filled within the bargaining unit, notice of said vacancy shall be posted for five (5) working days prior to the public posting for the information of all employees on appropriate bulletin boards where bargaining unit employees work.

   The vacant position shall be awarded to the most senior qualified applicant in the department where the vacancy exists. If no one within the department applies for the position, the position shall then be offered to the most senior qualified bargaining unit employee before filling the position with a non-bargaining unit employee. Any employee filling a position under this section shall serve a probationary period of six (6) months, unless waived or lessened by the department head.

BACKGROUND

For many years the County had four separate departments that dealt with human service needs, to wit: Social Services, Public Health, Aging and Community Services. Those departments dealt with a comprehensive range of human services such as public health, mental illness treatment, developmental disabilities, general relief, income maintenance, probation and parole, alcohol and drug abuse, youth and aging.

In 1983, the parties negotiated language addressing the filling of vacancies. This language, which is now found in Article 24, B, 1, has not been changed since that time. Union negotiator Carol Zoran testified without contradiction that when the parties inserted this language into their 1983/84 contract and used the word "department", they were referring to the four departments identified above (i.e. Social Services, Public Health, Aging and Community Services). Zoran testified that both sides wanted to ensure that the employes who would be given the first opportunity for open jobs would be those most familiar with the jobs and the work involved.

In January, 1989, the County merged the four above-named departments into a Human Services Department. When this happened, those departments became divisions within the new (Human Services) Department.

Prior to November, 1989, the child support enforcement function in the County was performed by the District Attorney's office. This changed when a new state law was passed which provided in part that the child support enforcement function could no longer be performed by the District Attorney's office. After this law was enacted the County Board transferred the child support enforcement function and employes from the District Attorney's office to the Human Services Department under the control of the Division of Social Services.

FACTS

In early 1990, the position of Child Support Coordinator became available due to the incumbent's transfer. The Employer decided to refill the position and posted it on March 2, 1990.

Two employes timely signed the posting: Gloria Candella and Marlana Fiorentino. At the time, neither worked in the Child Support unit. Candella

was an Account Clerk 2 who worked in the Division on Aging in the Human Services Department while Fiorentino was an Account Clerk 2 who worked in the County Clerk's office. Fiorentino has more seniority than Candella.

For reasons unexplained in the record, only Candella's application was initially reviewed. Candella was thereafter awarded the position on the grounds she was the only applicant in the Human Services Department who bid on the job.

After learning that Fiorentino had been mistakenly excluded from consideration for the position, the manager of the Division of Social Services, Ann Wondergem, reviewed Fiorentino's application. After doing so, Wondergem reaffirmed the County's original decision to award the position to Candella. Wondergem told Fiorentino that the reason she (Fiorentino) did not get the job was because she did not work in the Human Services Department (where the opening was), while Candella did. Fiorentino grieved this action which was ultimately processed to arbitration.

POSITIONS OF THE PARTIES

The Union contends that the Employer's definition of "department" as referring to the newly formed Human Services Department not only leads to an absurd result in terms of size (i.e. number of employes) but also is not supported by the parties' bargaining history. According to the Union, the word "department" in Article 24, B, 1 does not refer to the newly formed Human Services Department. Instead, in the Union's view, it refers to those former departments that are now known as divisions in the new Human Services Department: Social Services, Public Health, Aging and Community Services. Thus, the Union reads the term "department" more narrowly than does the Employer. In support thereof, it relies exclusively on the testimony of union negotiator Carol Zoran for the proposition that when the parties inserted the language in question into the 1983/84 contract and used the word "department", they were referring to the small circle of people who did similar work in the Social Services Department, the Public Health Department, the Aging Department and the Community Services Department. In the Union's view, the creation of the new umbrella Human Services Department should not change the contractual definition of "department" because the parties' intent (as shown by the bargaining history) establishes its meaning. The Union does not identify though which former department should have been used for the initial selection process. Instead, the Union simply notes that since neither of the employes competing for the Child Support Coordinator job then worked in the Child Support unit, the position should have been awarded to the "most senior qualified bargaining unit employee." The Union argues that did not happen here so the Employer violated the contract. In order to remedy this alleged contractual breach, the Union asks that the arbitrator sustain the grievance, place the grievant into the Child Support Coordinator position and make her whole.

The County believes the Union's reliance on bargaining history in this matter is misplaced. In its view, all that is necessary to resolve this dispute is a review of the existing contract language, specifically the language in Article 24, B, 1 referring to "the most senior qualified applicant in the department where the vacancy exists." (Emphasis added). Addressing that point, the Employer's position is that the word "department" refers, in the context of this case, to the Human Services Department -- not those former departments that are now divisions in the Human Services Department (i.e., Social Services, Public Health, Aging and Community Services). The Employer believes that in filling the position herein (i.e. Child Support Coordinator) it had to first look to the Human Services Department to see if there were any applicants before it looked outside that department. Since it so happened that there was an applicant for the position who worked in the Human Services Department (namely Candella who worked in the Division on Aging) it is the Employer's view that it did not have to look elsewhere or compare Candella's seniority to any other applicant. With regard to Fiorentino, the County specifically notes that she did not work in the Human Services Department whereas Candella did. Thus, the County contends it complied with the pertinent contract language by picking Candella for the job. The Employer therefore requests that the grievance be denied.

DISCUSSION

It is initially noted that although this is a job posting dispute between two competing candidates, the relative qualifications of the candidates are not the focus of attention. Rather, the crux of the matter centers on where those candidates were then working; Candella was in the Division on Aging in the Human Services Department and Fiorentino was in the County Clerk's office. This is critical because the pertinent contract language, Article 24, B, 1 provides that:

> The vacant position shall be awarded to the most senior qualified applicant in the department where the vacancy exists. If no one within the department applies for the position, the position shall then be offered to the most senior qualified bargaining unit employee before

> filling the position with a non-bargaining unit employee.
>
> (Emphasis added).

Said another way, department employes get first crack at filling vacancies and if none apply it is opened up to the entire bargaining unit. The vacancy in issue here was in the Child Support unit. Although this unit was formerly assigned to the District Attorney's office, a change in state law resulted in it now being assigned to the Social Services Division of the Human Services Department. Given the foregoing then, the threshold question here is what "department" should be used for this selection process.

This question obviously turns on what definition is applied to "department". The Employer contends that in the context of this case, the word "department" refers to the Human Services Department. The Union disputes this assertion and contends that "department" refers to those divisions in the newly created Human Services Department that were formerly departments. If it is found that the word "department" refers to the Human Services Department, as argued by the Employer, then the Employer used the correct department for the selection process because that is what happened here. However, if it is found that "department" does not refer here to the Human Services Department but rather to those divisions in the Human Services Department that were formerly known as departments, as argued by the Union, then the Employer did not use the correct department for the selection process.

In deciding this question the undersigned will focus first on the applicable contract language. If that language does not resolve the matter, attention will be given to evidence outside the so-called four corners of the agreement.

As noted above, Article 24, B, 1 provides that department employes get first crack in filling vacancies. The contract language does not define or identify what a "department" is though. Thus, the parties have not included language in their present agreement specifically defining or identifying a "department". Given this contractual silence on the matter, it follows that the existing language is simply unclear on this point.

Having so found, attention is turned first to the Employer's contention that the correct department for the selection process here was the Human Services Department. On its face, the Employer's assertion in this regard certainly appears reasonable since the Child Support unit, where the vacancy existed, is now part of the overall Human Services Department (albeit in the Social Services Division). However, contrary to the Employer's contention this finding does not end the matter. If the discussion were to simply end here the Union's entire theory of this case (i.e. bargaining history) would be totally

ignored. Obviously that cannot occur. Therefore, I will review the evidence external to the agreement cited by the Union (i.e. the parties' bargaining history) and weigh it against the above-noted finding.

Bargaining history can be a useful guide in interpreting ambiguous or silent contract language. In this case it is of critical importance. The language in question was negotiated into the contract in 1983 and has not been changed since that time. The record indicates that at the time that language was adopted there were four separate departments pertinent herein: Social Services, Public Health, Aging and Community Services. The uncontradicted testimony of union negotiator Zoran was that when the parties created the language now found in Article 24, B, 1 in 1983 the word "department" contained therein referred to those four named departments. She further testified without contradiction that both sides wanted to ensure that when there was a vacancy the employes given first crack at job openings were those small circle of employes who worked in that area and knew the jobs. The effect of this agreement was that job openings in the Social Service Department were opened first to employes in the Social Service Department, job openings in the Public Health Department were opened first to employes in the Public Health Department and so on. This meant that when Article 24, B, 1 was created/negotiated in 1983, the parties reached a mutual understanding how the word "department" would be interpreted, namely that it referred to the four aforementioned departments (i.e. Social Services, Public Health, Aging and Community Services). That being so, the bargaining history clearly supports the Union's proposed interpretation of "department".

Having so held, attention is now turned to the question of whether the meaning or application of the word "department" in Article 24, B, 1 changed when the Employer created the Human Services Department in 1989. I find it did not. The rationale for this finding is based on the premise that the mutually accepted meaning of a word cannot be changed by one parties' unilateral act. The unilateral act here, of course, was the Employer's creation of the Human Services Department in 1989. Had the parties so desired, they could have altered the then existing meaning of the word "department" at either that time or in their just completed negotiations to refer to the Human Services Department rather than the four aforementioned departments. They did not. Specifically, they did not change the meaning of "department" to henceforth apply to the newly created Human Services Department. That being the case, it is reasonable to conclude that the then accepted meaning of the word "department" did not change; it continued to refer to the four former departments (now known as divisions) and not the Human Services Department. This means that when the Employer changed its operating structure in 1989 by creating a Human Services Department, that change did not affect the meaning or application of the word "department" in Article 24, B, 1. This is because an accepted meaning to that word existed at the time which has never been mutually altered in negotiations. Accordingly, that accepted meaning controls here, not the meaning proposed by the Employer.

It follows from this conclusion that the Employer did not use the correct department for the selection process herein. Specifically, the Employer should not have looked, as it did, to the overall Human Services Department to select the "most senior qualified applicant." Instead, since the vacancy involved here was in the Child Support unit of the Social Services Division, the Employer was obligated to initially look to the Social Services Division, formerly known as the Social Services Department, for the "most senior qualified applicant." However, there were no applicants for the position from the Social Services Division so the next step in the procedure established in Article 24, B, 1 is for the position to be "offered to the most senior qualified bargaining unit employee." (Emphasis added).

Attention is now turned to the final question of whether that happened here. Two bargaining unit employes from outside the Social Services Division applied for the position: Candella from the Division on Aging in the Human Services Department and Fiorentino from the County Clerk's office. With regard to seniority, Fiorentino was the most senior candidate. With regard to qualifications, it is noted that the Employer has never contended Fiorentino was unqualified for the job of Child Support Coordinator. Although the Employer attempts to build a case that Candella was more experienced than Fiorentino and should be awarded the job on that basis, this argument misses the point because the contractual standard involved here is simply "qualified" -- not "more qualified" or "most qualified." Therefore, since there is nothing in the record to indicate Fiorentino is not qualified to perform the job in question, the presumption adopted by the undersigned is that she is. Accordingly then, it is held that Fiorentino was the "most senior qualified bargaining unit employee" who bid on the job. As a result, she should have been awarded the position. Inasmuch as this did not happen it follows that the Employer violated the labor agreement, specifically Article 24, B, 1. In order to remedy this contractual breach the Employer shall award Fiorentino the position of Child Support Coordinator and pay her the difference between what she would have earned in pay and benefits in that position and what she actually earned from April 11, 1990 (the date Candella assumed the position) to the date she assumes the position.

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 selected Gloria Candella rather than Marlana Fiorentino for the vacant Child Support Coordinator position.

2. That in order to remedy this contractual breach the Employer is directed to award Fiorentino the position of Child Support Coordinator and make her whole by taking the action noted above.

Dated at Madison, Wisconsin this 18th day of December, 1990.

By _____
Raleigh Jones, Arbitrator