BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LA CROSSE COUNTY CERTAIN EMPLOYEES, LOCAL 2484, AFSCME, AFL-CIO	Case 131 No. 47079 MA-7168
and	
LA CROSSE COUNTY	

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, P.O. Box 333, Sparta, Wisconsin 54656-0333, appeared on behalf of the Union.
Mr. Robert B. Taunt, Personnel Director, LaCrosse County, LaCrosse County Courthouse, 400 North Fourth Street, LaCrosse, Wisconsin 54601, appear

ARBITRATION AWARD

On February 26, 1992, La Crosse County Certain Employees, Local 2484, AFSCME, AFL-CIO and La Crosse County filed an arbitration request with the Wisconsin Employment Relations Commission wherein they requested that the Commission appoint William C. Houlihan, a member of its staff, to serve as an arbitrator to issue a final and binding award on a grievance. The Commission appointed Houlihan to hear and decide the matter on March 25, 1992. A hearing was conducted on Monday, April 6, 1992 in La Crosse, Wisconsin. The proceedings were not transcribed. At the conclusion of the evidentiary hearing, the parties made oral argument. All parties agreed that I would issue an expedited and abbreviated arbitration award.

This grievance involves the discharge of employe Teresa Sibley.

BACKGROUND AND FACTS

Teresa Sibley, the Grievant, was hired as a Clerk/Receptionist in the LaCrosse County Department of Human Services, Disability Services, on April 15, 1991. As a new employe she was scheduled to serve a probationary period of six months. Ms. Sibley worked as the receptionist in the Disability Services division of the department. According to Joan Campbell, Ms. Sibley's supervisor, there were concerns relative to Sibley's ability to learn and perform the job raised by a number of co-workers. Specifically, Campbell was concerned that Sibley was not learning nor following certain office procedures. On or about April 30, 1991, Campbell met with Sibley and advised her as to the concerns that had been raised and gave her assistance and ideas relative to how to overcome perceived deficiencies.

On or about July 19, 1991, Campbell gave Sibley her three-month performance review. The review has a number of categories in it, some of which Sibley satisfied, some of which she did not. The summary of the review indicates that Sibley's "overall performance needs improvement". In addition to the performance review Campbell provided Sibley with a narrative memorandum outlining both strengths and weaknesses. Specifically, there were six areas brought to Sibley's attention, in writing, in which Campbell pointed out shortcomings and indicated a need for improvement. During the performance review Campbell offered to meet with Sibley monthly in order to give her a progress review. Approximately one month later the two women met in an informal review. Sibley went to Campbell's office and had what she (Sibley) described as a good review. According to Sibley, Campbell indicated that she had "really turned things around", that she (Campbell) was "really proud of

you", and that she "knew you could do it". Campbell also characterized the 4-month informal evaluation as positive.

There was no 5-month informal evaluation. According to Sibley, Campbell asked, "How do you think you're doing?" Sibley answered, "It's going really well". Campbell replied, "I think so, too. I don't think you need a 5-month review." Campbell confirms that no meeting was held, and that she (Campbell) confirmed Sibley's opinion that things were going well.

A 6-month performance review was scheduled for Friday, October 4 and postponed to Monday, October 7, 1991. On October 7, Sibley and Campbell met for the performance review. The review strongly paralleled the review provided at 3 months. Many of the same deficiencies were indicated. The overall performance rating was "overall performance needs improvement". The review concludes with a recommendation that probation be extended. The review was accompanied by a memorandum outlining the concerns set forth in the review document. The memorandum contains the following two paragraphs:

. . .

> TESS, because I feel you are capable of performing at a much higher level, I am willing to extend your probationary period for thirty (30) days and reassign you to a receptionist position in another area. Perhaps, after time is spent in a less stressful situation and with an opportunity to learn more about the agency as a whole, you will eventually be sufficiently prepared to seek a receptionist position similar to those in Clinical Services.
>
> Please let me know, prior to October 15, if you accept my proposed reassignment and 30-day probation extension or if you wish to consider this your exit interview.

Sibley did not need a week to think about it. She immediately agreed to the 30-day probationary period extension and signed a written agreement to that effect. There was no Union representative present at this meeting. Campbell did not offer Union representation. Sibley did not request it.

Sibley's probationary period, scheduled to end on October 15, 1991 was extended to November 15, 1991.

On or about October 8, Sibley was transferred to the receptionist position in the central lobby. According to Sibley, this receptionist position is a "catch-all". It was her task to monitor the switchboard. She had a mixture of job duties in addition to switchboard responsibility. She balanced a number of patient checkbooks for Social Services aide Cindy Jensen. She had questions about that work and when she had questions she asked Jensen and got explanations. The only checkbooks she balanced were those given her by Jensen. Additionally, she performed certain cutting and pasting assignments for Biz Meier. According to Sibley, she was told to cut and paste certain billing statements into a book. Her assignment did not include any mathematical computations. According to Campbell and Larry Hagar, the department Director of Human Services the assignment from Meier was not just a cut and paste assignment, but rather included the balancing of the bank statements which were being cut and pasted into the log.

During this period of time, the La Crosse County Board eliminated a clerical position. The management of the Human Services Department identified the switchboard position being occupied by Sibley for elimination. Accordingly, on November 1, 1991, Campbell sent Sibley the following memorandum:

> As you may recall, we recently spoke about the decision to eliminate the position of clerk/receptionist which you currently hold. Based on that decision and your failure to pass your probationary period (including the extension), I regret to inform you that your last day of employment with Human Services will be November 15, 1991.
>
> Please do not hesitate to contact me if you have any questions.

Sibley requested and was given a written explanation of the basis for her termination by memorandum dated November 11, 1991. On November 15, 1991, Sibley ended her employment with La Crosse County.

On November 12, 1991, a grievance was filed by the Union on behalf of Ms. Sibley.

It was Campbell's testimony that she was not aware of the potential loss of the lobby/receptionist position at the time Sibley was transferred to that position. It is her further testimony that during the 3-week period from October 8 through the end of the month of October, she (Campbell) had no direct contact with Sibley. Rather, she relied upon others (i.e., co-workers) for information with respect to Sibley's performance. According to Campbell, the performance problems previously plaguing Sibley had continued. Additionally, it was her understanding that Sibley had made numerous mistakes balancing checkbooks and reconciling bank statements.

Sibley took issue with the substantive criticism of her work. Additionally, she indicates that she balanced checkbooks for Jensen, that she asked Jensen how she was doing, and that Jensen told her she was doing just fine. Sibley's testimony was corroborated by Mary Speltz, a co-worker who was present during one of those conversations and overheard Jensen telling Sibley that she was doing "just fine". Sibley also testified that her work for Biz Meier consisted solely of cutting and pasting statements into a log. It was her uncontradicted testimony that no reconciling of accounts was ever expected of her, and that no one brought the need to do so to her attention. Both Campbell and Hagar testified that it was their understanding that Meier had directed Sibley to balance the accounts. Neither of those supervisors were present when such direction was given. Meier was not called to testify.

Sibley first contacted her Union on or about October 30. It was the testimony of Sue Mikkelson, Union Steward, that the Union was not aware of the probation extension until contacted by Sibley on or about October 30.

The County introduced a number of probationary period extensions into the record. On May 7, 1991, Linda Taylor had her trial period for a new job extended by one month. On August 11, 1986, Taylor had her original probationary period extended by a period of time equal to that which she had taken as unpaid medical leave. In 1977, David Schoonover had his probationary period extended by three months. In 1991, Dale Wallentine had his probationary period extended by 30 days. In 1990, Paula Peterson had her probationary period extended by two months. Schoonover and Wallentine are in a different AFSCME local whose officers, but not stewards are the same as Local 2484. The Union was not a party to any of these extensions.

ISSUES

The parties stipulated to the following two issues:

1. Is this grievance arbitrable (i.e., was probation effectively extended)?

2. If the answer to question (1) is yes, was there just cause for the discharge? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I

RECOGNITION

1.01 This Agreement is entered into by and between La Crosse County, Wisconsin, hereinafter referred to as "the Employer" or "County", and Local 2484, WCCME, AFSCME, AFL-CIO, hereinafter referred to as "the Union."

The County hereby recognizes the Union as the exclusive bargaining representative of the collective bargaining unit involving certain employees of La Crosse County consisting of. . .for purposes of collective bargaining with the County on questions of wages, hours, and other conditions of employment, and in the adjustment of complaints and grievances of the employees.

. . .

ARTICLE V

GRIEVANCE PROCEDURE AND ARBITRATION

5.03.1 The Board of Arbitration shall consist of three (3) members:. . .a third (3rd) member, who shall be Chairperson of the Board of Arbitration, shall be selected from a panel of five (5) WERC staff arbitrators predetermined by the parties to this Agreement. 1/

. . .

ARTICLE VII

SENIORITY AND PROBATIONARY PERIOD

7.01 Seniority shall begin with the original date of employment following satisfactory completion of the six (6) months, or 975 regular hours, working probationary period. Thereafter, said employee shall have seniority as a regular employee unless notified otherwise prior to

1/ The parties waived the panel, leaving the undersigned as the sole arbitrator.

completion of said probationary period. Provided, however, that those positions regulated by State Statutes and Administrative Rules shall be subject to such provisions as they may restrict the passing of probation.

7.02 Employees failing to qualify within the probationary period shall be subject to dismissal without recourse to the grievance procedure. By mutual agreement, the working probationary period may be extended for a period not to exceed three (3) months.

7.03 Any regular full-time employee having once gained seniority status and whose employment is to be terminated for other than disciplinary action shall be given notice in writing fourteen (14) calendar days in advance of such action.

. . .

ARTICLE VIII

LAYOFFS

8.01 In the event of layoff due to lack of work, or economic cutbacks in any department, the department will accomplish the reduction of forces by: (1st) Layoff of temporary and provisional employees, (2nd) part-time employees, (3rd) those full-time employees in the department with the least amount of seniority, except those whose special knowledge and skill cannot be replaced by a more senior employee. Senior employees in a department may elect to displace a junior employee in another classification at the same or lower pay level in any department which comes under the purview of this Agreement, providing that said senior employee has the training and experience, or State certification, when required, to perform the work of the displaced employee.

. . .

POSITIONS OF THE PARTIES

The Union finds it more than coincidental that Sibley was transferred into a position scheduled for elimination. They find it curious that the Employer would retain this employe for one more month which just happens to coincide with the lifespan of the position in the lobby. It is the view of the Union that the Recognition Clause substantiates the existence of an agreement between the County and the Union. In the view of the Union, mutual agreements between employes and supervisors undermine the contract and are prohibited. Had the parties intended the mutual agreement provision of Article VII to apply to individual employes, they would have written the Article that way. In the view of the Union, if the Employer's construction of these words is validated, it places the Employer in a position to unilaterally alter the meaning and intent of the clause. The Union does not believe there exists an interpretive practice which respect to unilateral extension of probationary periods. There

are a very limited number of such instances pointed to by the Employer over a 20-year span. There was no Union acquiescence because there was no Union knowledge of these extensions. The Union only found out in this case because an employe contacted the Union. Once it found out, the Union acted.

From October 9 through and including October 30, Sibley, and her position, were not reviewed. Her only indication of her performance was her conversation with Cindy Jensen. That conversation was positive. Sibley did what Biz Meier directed her to do. She was never advised that her performance in that regard was at all flawed. If the purpose of her transfer was to afford her one last opportunity to improve her performance in a less stressful climate, the Union finds it particularly suspicious that that performance was never monitored during the three-week period between her re-assignment and the decision to terminate.

If the termination was the result of the elimination of a position, the contract has a layoff clause. In the view of the Union, there are less senior employes than Sibley who should have been identified for layoff, and not for termination.

It is the County's view that the central issue to this dispute is the meaning of Article 7.02's reference to "mutual agreement". The County points out that in Article 7.02 it has the right to dismiss probationary employes without recourse to the grievance procedure. In the County's view, the term "mutual agreement" is somewhat ambiguous. The County argues that there are two equally reasonable constructions of the use of that term. The first is an agreement between the Union and the County as entities. The second, equally plausible, is an agreement between the supervisor and an affected employe. The County urges a logical examination of this clause. When an employe is being reviewed, it is only that employe and his or her supervisor in the room. Those are the only two people who have to be there. The Union has no right to represent a probationary employe at that point in time. Given that only those two people are legally required to be in the room, it is entirely plausible, and in fact preferable, to construe the term as involving those two people; that is, the employe and her immediate supervisor. The County poses the question, what is the purpose of having the Union agree to the extension? If one buys the Union's theory, the Employer would be required to call the Union and ask the Union for its approval to extend the probationary period. If the Union says no, the employe would be fired. The Employer posits that the Union will be motivated to say yes. There is no more alternative for the Union in this matter than for the employe in question. That being the case, the Employer sees absolutely no value to imposing an artificial requirement to call the Union into the meeting. The supervisor and employe are entirely capable of making or not making this agreement. The Employer does not regard this choice as particularly coercive. The context in which this choice is made is that the individual will be terminated. The choice at least provides an alternative. This choice is better than none at all.

The Employer claims detrimental reliance upon its agreement with Sibley. Sibley was given an option. She agreed to an extension. The County, which had a unilateral right to terminate her at that point in time relied upon that agreement. Sibley then turned around and grieved. She took the pay, the work and the insurance for an additional month and was given another opportunity to improve her performance. She had the benefit of the extension. The Union had the benefit of the extension. The Employer was thereafter compromised. It is fundamentally unfair to now subject the Employer to a just cause standard given its reliance upon the agreement into which it entered.

The Employer urges this arbitrator to examine the other instances in which it unilaterally extended probation. Those instances, argues the

Employer, form an interpretive practice supporting the Employer's view that mutual agreement extends to the employe and his or her supervisor, and not the Union.

Should it be determined that the Employer is subject to a just cause review of its action, the County believes it had just cause. The supervisor, relying upon the complaints of co-workers and users, made a decision. The supervisor's decision was a response to legitimate complaints of those individuals. In the view of the Employer, Sibley did not learn her job; she just "didn't make it". The Employer argues for deference to the decisions of its supervisors and notes that Ms. Sibley doesn't know what it is that she doesn't know.

DISCUSSION

I believe this grievance to be grievable and arbitrable. I do not believe that the Employer effectively extended Sibley's probationary period. The Union is the exclusive collective bargaining representative of the employes in the bargaining unit. What that means is the Union possesses exclusive rights to bargain over wages, hours, terms and conditions of employment of the employes in the unit. The scope of bargaining clearly encompasses the probationary period and the standard against which to measure the discharge of both probationary and non-probationary employes. The parties have bargained those matters in this contract. The bargaining rights of the Union thus transcend and supercede the employe's individual right to bargain. Under the collective bargaining scenario, the employe has no right to bargain his or her individual conditions of employment. The Employer is proscribed from bargaining with an individual employe with respect to those matters properly bargainable with the Union. The exclusivity principle has been incorporated and contractualized within the Recognition Clause of the agreement. It thus forms the legal background against which to interpret the other provisions of the Agreement.

As the Employer argues, it is unclear to whom "mutual" refers. The Employer contends that there exists an interpretive practice construing the term to mean an agreement between the individual employe and his or her supervisor. I disagree. There are too few incidents brought forward to rise to the level of an ongoing practice. There are no more than three or four incidents having occurred in a multi-year period. Some of those incidents arose in a different bargaining unit. That may or may not be meaningful given the fact that the Union officers of the second unit were common to those of this unit. There was a meaningful factual distinction with respect to one of the incidents pointed to by the Employer. That is, one employe's probationary period was extended on a day-for-day basis as an offset to sick days taken. That appears to comply with the "work hours" language defining the length of the probationary period. Another incident pointed to by the Employer involved a trial period for a promotion. Different language of the collective bargaining agreement is involved. I do not find any notice to the Union. The Employer argues that the Union knew, or should have known of these extensions. There is no evidence the Union knew, and I find no basis upon which to hold the Union to constructive knowledge. The Employer could have put the Union on notice by copying it, but chose not to do so. The Employer cannot now claim constructive knowledge.

The Employer's construction of Article 7.02 would constitute a waiver by the Union of its right and its responsibility to bargain over the subject matter of termination. Such a waiver is disfavored, and to be effective must be clear and unambiguous. This clause is neither clear nor unambiguous. The Union's interpretation that mutual agreement be between the Union and the County is consistent with the law, with the contract and with convention. The

Union and the County are the bargaining partners in this relationship. Their efforts have led to this contract. It is the terms of this contract which are in dispute. Contractual mutuality can only be achieved through the acquiescence of the County and the Union.

Effective October 16, 1991, Tess Sibley was no longer a probationary employe. From that day forward, she was entitled to retain her job absent cause for her removal. The cause standard was not satisfied in this proceeding. There is little point going into excessive detail in this matter. The Employer believed at the time that Sibley was probationary, and made no concerted effort to satisfy the cause standard. However, given my decision with respect to the probationary period, the Employer was subject to the cause standard. From the period October 7 through the date of her termination there was no supervisory review of Sibley's performance. The supervisor, of necessity perhaps, relied upon the judgments and reports of other employes to analyze Sibley's work performance. Those individuals were not called to testify in the discharge proceeding. The information supplied by those individuals to Campbell and from Campbell to the proceeding can best be described as hearsay. There is no meaningful ability to cross-examine the claims, comments and accusations of those employes. While it may be that this method of information gathering and reporting is entirely satisfactory to satisfy whatever standard might exist for the termination of a probationary employe, it does not rise to the level sufficient to effectively terminate an employe subject to a cause standard. So far as Sibley knew, the feedback she received for her performance in the month of October following her reassignment was positive.

In reassigning Ms. Sibley, the Employer gave her a chance to improve her performance. She was sent to a new work site, was given new work, and was told that it could lead to her becoming a permanent employe. That was not followed up by any meaningful review. The feedback she received was inconsistent. In July she was told, in writing, that her performance was not favorable. In August, a verbal assessment indicated that her work performance had improved. A review scheduled for September was cancelled. This was apparently done because there was a feeling that such a review was no longer needed. In October, her performance was again identified as unsatisfactory, and she was advised that she would be terminated. However, the termination letter offers her hope and encouragement of future success. Her probationary period was therefore extended. The purpose of the extension was to give her another chance. It is hard to understand why, given that purpose, she was not given more structured review and why her performance was not monitored more than it was. Sibley's feedback from co-worker Jensen was evidently positive. Sibley claims that she performed the work assigned by Meier appropriately. There is no indication that either Meier or Jensen were critical of her work performance. It may well be that those two employes and others were critical of Sibley's work performance to Campbell, but the record is clear that those criticisms never found their way back to Sibley in a meaningful fashion.

The termination letter refers to two bases for termination. The first is the elimination of the position of clerk/receptionist. The Union is right when it claims that the layoff clause should be invoked for purposes of reduction in staff. To the extent that was the force motivating the Employer, the layoff clause was the appropriate provision of the Agreement.

The Employer claims a detrimental reliance defense. The Employer's claim in this regard is misplaced. The Employer was not free to individually contract with Sibley. It thus comes to this process without the clean hands necessary to raise a defense in equity. The Employer erred in relying upon its illicit contract with Sibley. It is not free to raise an equitable defense having constructed an improper agreement as the basis of that defense.

The Employer claims that the Union would have been subjected to the same pressures as the individual. In effect, the Employer's argument is, "What's the difference?" I don't believe this is the case. The Union is an institution. It exists as the collective voice of the Employer's employes and has broader goals than does any single individual. The fundamental underlying purpose of the collective bargaining process is to allow the employes of an Employer to join together and deal collectively with their Employer. That purpose has been totally undermined by the Employer's individual negotiations with an individual employe. It is precisely the disparity in bargaining power between the individual and the Employer that led to the enactment of collective bargaining statutes. Whatever the decision a Union might make, it is the province of the Union, and not the individual, to make such a decision.

AWARD

The grievance is sustained.

REMEDY

Ms. Sibley is to be reinstated and made whole for all lost wages and benefits which occurred during the time in which she was off work. The Employer is directed to pay lost wages, to reimburse any and all health costs that would have been covered by health insurance during the time period, and to pay and/or restore any other economic benefits that would have been paid. The Employer is entitled to offset its backpay by Unemployment Compensation benefits earned during the interim. However, should the Employer do so, it is to restore Ms. Sibley's Unemployment Compensation account to the extent that is necessary to guarantee her full Unemployment Compensation benefits in the future should she be subject to layoff. The Employer is further directed to expunge all reference to the discharge from her personnel file and to treat her seniority date as her original date of hire.

JURISDICTION

I will retain jurisdiction of this matter for sixty (60) days from today's date to resolve any dispute with respect to the reinstatement and/or backpay.

Dated at Madison, Wisconsin this 8th day of April, 1992.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

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