BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
VERNON COUNTY COURTHOUSE AND HUMAN SERVICES, LOCAL 2918, AFSCME, AFL-CIO	Case 86 No. 46133 MA-6888
and	
VERNON COUNTY	

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, on behalf of the Union.
Klos, Flynn & Papenfuss, by Mr. Jerome Klos, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein the Union and County, are privy to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on December 11, 1991, in Viroqua, Wisconsin. The hearing was not transcribed 1/ and the parties thereafter filed briefs which were received by April 27, 1992.

Based upon the entire record, I issue the following Award.

ISSUE

The parties have stipulated to the following issues:

1. Is the grievance arbitrable?

2. If so, did the County violate the contract when it placed grievant Debra J. Moran at the probationary rate of pay on January 8, 1990, and, if so, what is the appropriate remedy?

DISCUSSION

Grievant Moran, who is Union Secretary, began working as a part-time Clerk-Typist for the County in the Register of Deeds' office in 1988. On January 8, 1990, after she had completed her probationary period as a Clerk-Typist, she transferred to the Human Services Department - which is a separate department than the Register of Deeds' office - where she was classified as a Income Maintenance Assistant, which is a higher-paying job than a Clerk-Typist. At that time, she was placed at the probationary rate for that job even though

1/ There, the parties waived the tripartite arbitration panel provided for in the contract and the twenty-day time limit for issuing this Award.

she formerly was at Step I of her prior classification. She thus was paid about $5.57 an hour, with said figure appearing on her pay stubs. At the end of her six-month probationary period, her pay was raised to $5.79 an hour.

Moran did not immediately complain over that situation until a Union officer near the end of 1990 noticed on Moran's pay stub that she was being paid at the probationary rate rather than at Step I. Following unsuccessful efforts to resolve the matter informally dating back to January, 1991 when she spoke to Linda Nederdo, Moran on May 8, 1991, filed the instant written grievance charging that she should have been placed at Step I when she transferred into the Human Services Department. In the meanwhile, Moran on April 9, 1990, transferred to a Clerk II position in the Human Services Department.

The parties have stipulated that this marked the first time that an employee going to a different department had to start over at the probationary rate. On the other hand, employees transferring to other jobs within their own department did not have to start over at the probationary rate.

In support of the grievance, the Union primarily asserts that Moran's grievance is timely because she immediately acted as soon as she learned in the end of 1990 that she was not being paid the correct contractual rate; that the contractual time deadline for filing a grievance is inapplicable here because this is a continuing grievance, with the question of timeliness only going to remedy. It thus requests that Moran be awarded back pay for what she would have earned had she been paid at the correct rate.

The County, in turn, asserts that the grievance was not timely filed under Article 5.02 of the contract which requires grievances to be filed within fifteen (15) days and that, in any event, it is without merit because Moran's transfer into a separate department "was without seniority" because "she commenced the new job at the probationary start contract rate for the new job."

As to the timeliness issue, the contract in Article 5.02 provides that:

> 5.02 In the event of any disagreement concerning the meaning or application of any provisions of this Agreement, such disagreement shall be resolved in the manner hereinafter set forth; however, no matter not involving the interpretation or application of this Agreement shall be subject to these procedures. It is further provided that any grievance must be timely filed within fifteen (15) calendar days of occurrence in order to be deemed a valid grievance.

Here, Moran waited well past 15 calendar days after taking the Income Maintenance Assistant position before filing her grievance. While she testified that she was unaware of this problem until a Union representative told her about it near the end of 1990, an examination of her pay status should have revealed this fact much earlier. As a result, it would be unfair to make the County pay her for any back wages before she brought her complaint to management's attention, as the County did not know before then that this was a problem and that it could be held liable for back wages. Indeed, the Union itself recognizes this since it does not seek any back pay on Moran's behalf before May 8, 1991, the date she filed her written grievance.

That same consideration, however, does not apply once she complained about it. For, as correctly noted by the Union, "each day that Ms. Moran is inappropriately placed in the wage schedule constitutes a new violation of the collective bargaining agreement."

It is a well-recognized principle of arbitral law that such continuing

grievances are not time-barred by contractual deadlines, absent express contract language to that effect which is not present here. 2/ Accordingly, I find that Moran was not prevented from grieving over this continuing problem and that the timing of her grievance only goes to the question of remedy.

As to the substantive merits of her grievance, the County correctly points out that the contract provides for departmental seniority and that the County in contract negotiations wanted to keep seniority separate because many of the bargaining unit jobs are dissimilar. In addition, the County believes that employees transferring between departments need to be placed on probation to prove themselves over again and in order to prevent unqualified employees from moving into new jobs.

This latter concern, however, can be dealt with by the County itself because it retains the right to determine at the outset whether such employees are qualified. Once that is determined, it is difficult to see why a further probationary period is needed. Indeed, Jerome Klos, the County's attorney and chief negotiator, admitted on cross-examination, "That's true" -- i.e., that the Union's grievance does not affect who the County selects.

Furthermore, the only stated seniority exception in Article VI of the contract relates to separate departmental seniority "for the purposes of promotions and vacations selections", hence showing that the parties knew how to limit an employee's interdepartmental rights when they wanted to.

The fact that they did not also provide for new probationary rates for inter-departmental transfers shows that no such further limitation was ever agreed to by the parties in the negotiations leading up to the present contract. Rather, the contractual wage schedule contains a unified wage progression schedule which pegs step increases to the amount of time employes work for the County, without any requirement that all of that time must be worked in a particular department.

Furthermore, the Union correctly notes that adoption of the County's position would result in the highly anomalous situation of where, say, a Clerk I with 54 months of service in one department earning $1165.04 a month would begin at the $1006.01 start rate for a Clerk II position in another department; a Clerk II with 54 months of service in a department earning $1210.99 a month would begin at the $1058.90 start rate for a Clerk III in another department; and a Clerk III with 54 months of service in a department and earning $1275.33 a month would begin at the $1098.84 start rate in another department. Absent clear contractual language which is not here, there simply is no basis for assuming that otherwise qualified employees are to receive such wage <u>decreases</u> when they exercise their contractual posting rights.

2/ Elkouri and Elkouri, <u>How Arbitration Works</u>, BNA, 4th Ed. (1989), p. 197.

Moreover, adoption of the County's position would lead to the anomalous situation of where employes changing jobs within a department would not have to start over at a probationary rate, 3/ while employes moving to other departments would. Again, absent clear contract language, there is no reasonable basis for concluding that employes should be treated so differently.

As a result, the contractual job posting language in Article VIII must be read as providing that successful transfer applicants are not required to start over again at a probationary rate, as no such qualifying language provides for that in any part of the contract.

In light of the above, it is my

AWARD

1. That the grievance is arbitrable.

2. That the County violated the contract when it continued to pay grievant Debra J. Moran one step lower than she otherwise was entitled to had she been properly placed at Step 1 when she became an Income Maintenance Assistant.

3. That as a remedy, the County shall make her whole by paying to her the step and wages she lost from May 8, 1991, onward - including the time she has spent in subsequent positions - and by now placing her at the correct pay step which is commensurate to her total length of service.

4. That to resolve any questions over application of this Award, I shall maintain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin this 5th day of June, 1992.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

3/ The County stipulated at the hearing that employes transferring within their own departments do not have to start over again at the probationary rates.