BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| VERNON COUNTY (COURTHOUSE) | Case 87 No. 47248 MA-7210 |
| and | |
| VERNON COUNTY | |

Appearances:
Mr. Daniel Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Klos, Flynn & Papenfuss, Attorneys at Law, by Mr. Jerome Klos, on behalf of the

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. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was appointed by the Commission. Hearing was held on May 20, 1992 in Viroqua, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedule on July 10, 1992. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE

The parties at hearing could not agree upon a stipulated issue.

The Union proposed the following:

> Is the grievant, Shirley Soltau, receiving the appropriate rate of pay? If not what is the appropriate remedy?

While the County does not object to the Union's statement above, it poses the following as a preliminary threshold issue:

> Under contract provisions 2.01, Administration, and 21.02, Reclassified Employees, once the County has considered the grievance reclassification request and denied same, does the arbitrator have jurisdiction to modify the classification decision in a grievance procedure?

The undersigned will accept and address both parties' proposals as stated above in framing the issue.

PERTINENT CONTRACT PROVISIONS

ARTICLE II
ADMINISTRATION

> 2.01 Except as otherwise provided in this Agreement, the COUNTY retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline

employees for just cause; the right to decide the work to be done and allocation of work; to determine the services to be rendered, the materials and equipment to be used, the size of the work force, and the allocation and assignment of work and workers; to schedule when work shall be performed; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; and, to adopt and enforce reasonable rules and regulations.

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ARTICLE V
GRIEVANCE PROCEDURE AND ARBITRATION

5.01 Any employee being discharged shall be so notified in writing stating herein the reasons for such action. A copy shall be submitted to an officer of the UNION.

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.

5.03 Matters not involving the interpretation or application of the terms of this Agreement may be processed through Step 3 of this paragraph (5.03). The Union Business Representative may be present at any step in the grievance procedure.

Step 1. The employee and the UNION Steward shall attempt to settle the issue with the immediate Supervisor. If no satisfactory settlement is reached within five (5) working days, then:

Step 2. The matter shall be reduced in writing and presented to the Department Head. The Department Head shall meet with the aggrieved employee(s), the UNION's Chief Steward and President, or Chairperson within five (5) work days of receipt of the written grievance and attempt to resolve the dispute. If no satisfactory settlement is reached within ten (10) work days, then:

Step 3. The matter shall be referred to the County Personnel Committee which Committee shall meet and hear the presentation of the matter between the UNION and the COUNTY. Said Committee shall render its written decision within fifteen (15) calendar days from the date of the meeting. It is

further provided that decisions shall be by a majority vote of said Committee.

Step 4. If no satisfactory settlement is reached in Step 3, either party may, in writing, appeal the matter to a Board of Arbitration by giving notice to the other party within ten (10) work days of receipt of the written decision provided for in Step 3.

5.04 The Board of Arbitration shall consist of three (3) members; one (1) member to be chosen by the COUNTY and one (1) member to be chosen by the UNION, said members shall be chosen within five (5) days of the notice of appeal; the two (2), so selected, shall attempt to choose a third (3rd) member, who shall be chairman of the Board of Arbitration. If the two (2) members so selected cannot agree within ten (10) calendar days of their appointment of the third (3rd) member, then the parties jointly may request the American Arbitration Association to name the member and he shall be chairman of the Board of Arbitration. In the event the UNION and COUNTY are unable to agree on the third (3rd) party, then the third party shall be selected by the Wisconsin Employment Relations Commission, unless either party requests the appointment be made by the American Arbitration Association. The parties may mutually agree to waive the Board of Arbitration and proceed with the Chairman as the single arbitrator. Each party will bear its own expenses for their witnesses and representatives, and both parties shall equally bear the expenses of the third (3rd) party.

5.05 Grievances subject to this arbitration clause shall consist only of disputes concerning the meaning or application of provisions of this Agreement. The Board of Arbitration shall have no power to add to, or subtract from, or modify any of the terms of this Agreement. No questions affecting the allocation of classifications to a pay grade will be considered arbitrable.

5.06 The vote of a majority of this Board, or arbitrator, as the case may be, shall be final and binding upon the parties and they shall render a decision within twenty (20) calendar days from the date of the hearing, unless an extension is approved jointly by the COUNTY and UNION. Any time limits in this Article may be extended by agreement.

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ARTICLE XXI
DEPUTIES AND RECLASSIFICATIONS

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21.02 Reclassified Employees. Reclassifications will be considered once a year by the COUNTY, upon written application of the employee to their Department

Head, who shall refer said requests to the County Personnel Committee. Such requests must be submitted by no later than September 30th, and must contain therein the reasons for the requests.

21.03 Social Services Aide I and Economic Support Specialist I positions shall be eligible for reclassification to Social Services Aide II and Economic Support Specialist II upon meeting the certification requirements of the State Merit System of the Department of Human Resources.

FACTS

The grievant, Shirley Soltau, was employed in July of 1989 as an Income Maintenance Worker. On March 10, 1990, she was hired in a non-bargaining unit position of Finance Clerk/Bookkeeper at a Pay Grade 10 on the County's non-Union pay structure. The Social Service Department was combined with the County's Human Service Department and one of the positions placed in the new department by agreement of the parties was the grievant's position. The parties, however, could not agree on the appropriate rate of pay for said position and the matter was submitted to interest arbitration. The County proposed that she be classified as a Bookkeeper Class C, at a salary below that which she currently enjoyed, her rate of pay to be frozen until the Class C schedule caught up with her current salary. The Union insisted that she be classified at an elevated step of Clerk IV, three tiers higher. The interest arbitrator found for the Union resulting in grievant's being placed in a Clerk IV classification.

No issue was made by the Union of further reclassification of the position in the negotiations for the 1992-93 collective bargaining agreement. However, on July 10, 1991, pursuant to Article 21.02, the grievant requested that she be reclassified to a rate comparable to the Mental Health Case Manager. She requested to be heard by the Personnel Committee. It considered the reclassification request in two meetings, one in August and the other in September and denied said request after considering written documentation and the grievant's oral presentation. Soltau then filed a grievance on October 11, 1991. Both Soltau's supervisor and the Director of Human Services supported her reclassification request but indicated that they did not possess the authority to grant her request and referred said grievance to the Personnel Committee. The Personnel Committee took testimony from the grievant, reviewed the favorable recommendations, but nevertheless concluded that she was appropriately classified as a Clerk IV. It denied the grievance by letter dated December 20, 1991. Said denial is the subject of the instant dispute.

POSITIONS OF THE PARTIES

Union

According to the Union, what the County is claiming is that once it considers a reclassification request, the matter is closed regardless of the County's consideration. It maintains that this is clearly erroneous, pointing to the existence of Section 21.02 which expressly addresses reclassification requests. Since such a contractual provision exists, it stresses, the provision is subject to the grievance procedure, including the arbitrator's right to fashion a remedy. It submits that the arbitrator has the responsibility to insure that the County has not acted in an unreasonable, arbitrary or capricious manner. It also notes that another arbitrator has already exercised arbitral authority previously on two prior reclassification cases.

It disputes County contentions that the interest arbitration set the

appropriate wage rate for the grievant and takes the position that the instant reclassification request should be considered on a "de novo" basis premised upon the facts as they currently exist.

With respect to the merits, the Union cites the facts as they relate to Soltau's position prior to its inclusion in the bargaining unit. It points out that she was paid at the same rate as the Case Manager position which was also included in the bargaining unit at the same time.

It emphasizes that the testimony of both the grievant's supervisor and the Director of Human Services supports Soltau's comparability with the Case Manager rather than with a Clerk IV and that the Personnel Committee has limited knowledge of the day-to-day operations of the Human Services Department.

The Union argues that anti-union animus exists which has made Personnel Committee action arbitrary and capricious. It points to the fact that when Soltau's position was not included in the bargaining unit, she was entitled to a higher starting wage and twenty automatic yearly increases, but when the position was included the County sought to reduce her wages through interest-arbitration. It also raises as evidence that although there have been many reclassification requests submitted by members of the bargaining unit, the County has never granted a reclassification request to a member of the bargaining unit.

The Union also cites the testimony from the Personnel Coordinator that the Committee simply examined Soltau's job description and believed she was performing Clerk duties, thus denying the reclassification request. It maintains that the County's failure to make a comparison of Soltau's duties and wages as compared to other bargaining unit employes or employes similarly situated in comparable counties. Pointing to other non-Union employes with bookkeeping duties, it avers that Soltau is paid at a substantially lower rate of pay.

Accordingly, it submits that the County acted unreasonably, arbitrarily and capriciously in its consideration of Soltau's reclassification request and urges the arbitrator to sustain the grievance.

County

The County stresses that Section 21.02 does nothing more than provide a window in which a request for reclassification may be made outside of regular contract negotiations. Said provision, it avers, does not require reclassification upon request even if said request is recommended by a department head.

Section 2.01, according to the County, gives it discretionary authority to determine reclassifications without providing an arbitrator jurisdiction to review its determination. Should an arbitrator claim jurisdiction, such jurisdiction should be limited to whether the County afforded the grievant due process in considering her application regarding the classification.

With respect to the merits, the County argues that the matter has already been resolved by an interest arbitrator over its objection. It claims that this is the Union's third attempt to have an arbitrator create a classification under similar circumstances. Noting that the Union did not raise this issue in the most recent contract negotiations, the County maintains that no financial case manager position exists.

It is the County's position that the grievant's principal function is that of a bookkeeper and that she is properly classified as such. It strongly asserts that there is no record basis in the collective bargaining agreement

upon which the arbitrator could substitute her judgment for that of the County to arbitrarily create a new classification and promote the grievant to it.

DISCUSSION

The threshold issue to be determined is whether or not the arbitrator has jurisdiction to consider the grievant's reclassification request. The County argues that the undersigned possesses no authority in this regard whatsoever. Because Article XXI, Section 21.02 exists in the agreement and contains no qualifying phrases expressly excluding said section from being subject to the grievance procedure, it must be assumed that Section 21.02 is subject to review pursuant to Article V, the parties' grievance and arbitration procedure. This is especially true given Section 5.02 and 5.05 of the agreement which limits grievances which are subject to the arbitration clause to those disputes concerning the meaning or application of provisions of this agreement. Just as Arbitrator McGilligan in a previous reclassification case with the same parties involving the same language previously held, this language grants to the arbitrator the right to review the County's actions with respect to the reclassification request of the grievant. Accordingly, the County's arbitrability argument is rejected.

Turning to the merits, the next question to be addressed involves the standard which the arbitrator must apply in reviewing the County's determination. The applicable language states that reclassifications will be considered once a year by the County . . . (emphasis added). Many arbitrators would find that inherent in this "consideration" by the County is the obligation to act in good faith. Or, in other words, the County's actions in considering said reclassification requests must not be arbitrary, discriminatory or capricious. 1/

Assuming, arguendo, that this is the appropriate standard for review of the instant language, the undersigned declines to undertake a de novo review of the substantive merits of the reclassification request or to substitute her judgment for that of the County Personnel Committee. 2/ Rather, her inquiry is limited to whether the Personnel Committee's action violated a good faith standard as set forth above.

Black's Law Dictionary defines "arbitrary" as, among other things, without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to judgment; depending on the will alone; in. . . Without fair, solid, and substantial cause. . .not governed by any fixed rules or standard." These definitions and common arbitral usage imply that a decision may be arbitrary if it lacks procedural fairness or if there is no substance underlying it.

The Union maintains that the Personnel Commission acted in an arbitrary, capricious and discriminatory fashion. It points to Personnel Administrator Everhart's testimony that the Personnel Committee simply examined the grievant's job description, concluded that she was performing clerk duties and denied her reclassification request. Record evidence goes further than this to establish that the Committee did afford Soltau the opportunity to present documentation to support her request. It also granted her the opportunity to come before the Committee to argue her position of which she took advantage. Accordingly, it must be concluded that the Committee's action cannot be

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1/ The Union's assertion that this standard also encompasses "unreasonableness" is rejected if "unreasonable" is defined as a less stringent standard than "arbitrary", involving some type of balancing of interests, assertions or facts.

2/ While the Union makes a strong case that Soltau is underclassified on the facts, that is not before the Arbitrator in the instant case.

considered arbitrary because of any failure to grant procedural fairness.

The Union also claims, however, that the Committee action was arbitrary and discriminatory because it is motivated by anti-union animus. It points to Soltau's wage and future pay plan prior to her inclusion in the bargaining unit and the County's position regarding her wages since her inclusion in the unit. It stresses that the Personnel Committee has never granted a reclassification request from a member of the bargaining unit and that other non-bargaining unit bookkeepers employed by the County are paid at a considerably higher rate.

The Union's contention regarding the County's position on Soltau's previous rate as compared to her present wage rate along with its argument that other non-Union bookkeepers receive higher wages go to the merits of the decision which the undersigned has already determined will not be reviewed de novo. Moreover, this argument does not take into account the Union's own role in setting Soltau's existing rate within the context of the interest-arbitration procedure. The Union, which did not pursue a higher rate in that forum because of the need "to be cautious" in view of the totality of issues involved cannot now assert that the County's desire to implement a lesser rate, which in fact was not accepted by the arbitrator, stems from anti-Union animus.

The failure of the County's Personnel Committee to ever approve any requests by bargaining unit employes for reclassification is more troubling. Without, however, knowing how many requests were submitted over what period of time, and the reasons stated for rejection, the undersigned cannot conclude that this conduct, in and of itself, rises to the level of arbitrary, capricious, or discriminatory treatment.

Having concluded that the County's conduct did not violate a "good faith" standard to "consider" reclassification requests employed by many arbitrators, it is unnecessary to determine whether the standard employed by Arbitrator McGilligan in the previous arbitration 3/ involving the parties is an appropriate standard in the instant case.

Accordingly, it is my decision and

3/ In his decision, Arbitrator McGilligan refused to adopt a minimum standard of review regarding reclassification requests. Many arbitrators would, nevertheless, hold the County to a minimum "good faith" standard.

AWARD

1. The arbitrator does have jurisdiction to review and/or modify the classification decision.

2. The County did not violate the collective bargaining agreement by its refusal to reclassify the grievant Shirley Soltau in December of 1991.

3. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 16th day of September, 1992.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator

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