

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 MANITOWOC COUNTY COURTHOUSE AND : Case 259
 HUMAN SERVICES EMPLOYEES LOCAL 986-A, : No. 47201
 AFSCME, AFL-CIO : MA-7198
 :
 and :
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 MANITOWOC COUNTY (COURTHOUSE AND :
 HUMAN SERVICES) :
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Appearances:

Mr. Gerald D. Uglund, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
 Lindner & Marsack, S.C., Attorneys at Law, by Mr. Alan M. Levy, appearing on behalf of the County.

ARBITRATION AWARD

On March 23, 1992, the Manitowoc County Courthouse and Human Services Employees Local 986-A, AFSCME, AFL-CIO, hereinafter the Union, with the concurrence of Manitowoc County, hereinafter the County or Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as the impartial Arbitrator in a dispute involving the filling of a position entitled Computer Operator. A hearing in the matter was held on June 23, 1992, at which time the parties were afforded the opportunity to adduce testimony and introduce documentary evidence. A stenographic transcript of the proceedings was taken and the parties filed their posthearing briefs with the undersigned by August 11, 1992.

ISSUE:

At the hearing the parties were unable to stipulate to a statement of the issue. The Union believes the issue to be:

Did the Employer violate the collective bargaining agreement by failing to fill out a job content evaluation questionnaire as provided by Article 22 and negotiate with the Union regarding the Computer Operator position? If so, what is the appropriate remedy?

On the other hand, the County believes the issue to be:

Whether the County can determine how many employees it needs in any particular position?

After reviewing the evidence and arguments of the parties, the undersigned believes the issue to be:

Did the County violate Article 22 of the applicable collective bargaining agreement when on August 26, 1991, it posted for a Computer Operator position without previously notifying the Union of its intent to do so, completing a job content evaluation questionnaire for the position and negotiating with the Union over the rate of pay for said Computer Operator position? If so, what is the appropriate remedy?

BACKGROUND

Late in the summer of 1991, a part-time Systems Analyst/Programmer quit employment with the County. At that time, the County's Data Processing Manager determined that the demands of the department were such that it would be more efficient for the department to have a second Computer Operator rather than a Programmer. Consequently, on August 26, 1991, the County posted for another Computer Operator position. Attached to the posting was the job description of the Computer Operator position which was identical to the job description of the then current Computer Operator. On September 6, 1991, subsequent to the posting, the Union filed a grievance. The grievant stated:

Job was posted as a Computer Operator, yet the position was a Systems Analyst/Programmer. The Union wasn't notified of the change and the wage level is inappropriate. . .

and alleged this was a violation of Article 22 - Job Posting. The County denied the grievance and in its third step answer said:

It is the County's position that management has the right to determine the need for positions. Management in this case made the decision that it was in their best interest to hire an additional computer operator and not fill the System Analyst/Programmer position at this time...The qualifications and responsibilities of this position are identical to the existing computer operator position. . . .

The contract contains a job posting provision in Article 22:

ARTICLE 22 - JOB POSTING

Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in each department as well as the bulletin boards in the Courthouse (located in the office of the County Clerk and the Personnel Department) for five (5) working days. The notice of posting shall include the following minimum information: wage rate, hours of work, department, position title, job description, and qualifications. Any employee desiring to fill any such posted vacancy or new position shall make application in writing at the Personnel Department. After the conclusion of the posting period, the applications shall be opened at the Personnel Department in the presence of a representative of the Union and a representative of the County Personnel Committee, or its designee, at a time

to be mutually agreed upon.

Whenever any vacancy occurs, it shall be given to the employee with the greatest seniority within seven (7) work days after the completion of the posting period.

When objections are made by the Department Head regarding the qualifications of an employee to fill the position, such objections shall be presented to the employee and the Union in writing by the Department Head or the Department Head's designee.

If there is any difference of opinion as to the qualifications of an employee, the County Personnel Committee and the Union Committee shall take the matter up to adjustment through the grievance procedure.

When new positions are to be created the Employer shall notify the Union in writing prior to filling the position. The department head shall complete a job content evaluation questionnaire using the form agreed to by the Employer and the Union. The parties shall meet and negotiate the wage rate for the new position.

The Employer shall notify the Union in writing of any significant change in the job description, job duties, assignment, or qualifications of a position it may desire. If requested by the Union, the position shall be re-evaluated using the job content evaluation questionnaire form agreed to by the Employer and the Union. The parties shall meet and negotiate as may be required under the circumstances. Significant changes shall be defined as a change of one (1) pay grade or more.

Negotiations as herein provided shall be initiated by written request of the Union to the Personnel Committee.

The Union alleges that it is not raising any issue as to how many employees in a given classification the Employer may employ. Rather, it is contending that the Employer had a contractual obligation under Article 22 to notify the Union of new or changed positions, which in this case was a new Computer Operator position, submit a job content questionnaire to the Union for its use in rating and negotiation on the wage rate for the position. The Union contends there is no dispute that the duties and responsibilities of the posted Computer Operator classification are different from those of the vacated part-time Systems Analyst/Programmer position. In point of fact, the pay rates are significantly different in that the contractual rate of pay for a Computer Operator at the time was \$9.13 per hour whereas the hourly rate for the Systems Analyst/Programmer was \$11.58 per hour. While the Employer attempts to confuse the terms "position" and "job classification" the Union believes that these terms are not interchangeable and that in this instance the Employer did create a "new position," not a new job. The Union refers to the definition of those terms in Robert's Dictionary of Industrial Relations and states that the burden is on the Employer to establish that they can be used interchangeably. The Union states that "A new POSITION was created or that the existing POSITION was changed is obvious." However, whether the position was dissolved and a new one created or that the position was simply changed, is immaterial because the effect is not significantly different given that the Union expressed its desire to have the position evaluated. The Employer had a responsibility to fill out a job content evaluation questionnaire as well as meet and negotiate with the

Union concerning the Computer Operator position. This the Employer failed to do and therefore, violated Article 22. The Union seeks as a remedy that the County be ordered to notify the Union of the new position or position change, fill out a job content questionnaire for the position in question and meet with the Union and negotiate the wage rate for the new position.

The County, however, contends that it is the Union that is alleging a violation of contract, and therefore, bears the burden of proving by a preponderance of the evidence that such a violation occurred. The County believes no such violation occurred, and points first to the managements rights clause of the collective bargaining agreement wherein it has reserved for itself the right to manage the work and determine the direction of the workforce. Included within those rights is the right to determine staffing levels and decide whether to fill vacancies or enlarge or eliminate existing job classifications. The County states that Article 22 - Job Posting does not in any way limit these management rights.

In this specific case, the County determined that in December of 1991, its needs were not such as to require the filling of the vacated part-time Systems Analyst/Programmer position. Rather, the County's needs at the time required the skills of another Computer Operator and that formed the basis for its decision to post the vacancy as Computer Operator not Systems Analyst/Programmer. Doing so, did not in any way violate the collective bargaining agreement. The County contends that the Computer Operator position is not a new position, and therefore, the County had no contractual obligation under Article 22 to notify the Union in writing prior to filling the position, or complete a job evaluation questionnaire, and negotiate with the Union. The County believes the Union's case is premised on the other language of Article 22 which obligates the County to only notify the Union in writing of "any significant change in the job description, job duties, assignment, or qualifications of a position it may desire." However, in this case, there was no difference in terms of job duties or job content in the Computer Operator position that was posted from the other existing Computer Operator position. That fact is born out by the job posting which contained the position description of the existing Computer Operator. Furthermore, the Director of the Data Processing Department testified that there was no change in the duties of the additional Computer Operator position which was posted that would have required the County to conduct a job reevaluation or negotiate with the Union.

Consequently, because the Union has failed to establish that there was a difference in job duties or job content between the two Computer Operator positions, it has not sustained its burden of proof in this case, and thus there is no basis for concluding that the County violated Article 22. Therefore, the County requests that the grievance be denied.

DISCUSSION

The basic facts giving rise to this grievance are not in dispute. It was the Employer's decision to post the vacated part-time Systems Analyst/Programmer position as a Computer Operator position instead without first notifying the Union, completing a job content questionnaire and sitting down and negotiating a wage rate for the position with the Union that prompted the grievance. The Union believed that the Computer Operator posting was a posting for a new position and consequently triggered the aforementioned language of Article 22 necessitating completion of the job content questionnaire and negotiation with the Union over the appropriate wage level for the position. The Employer does not dispute that the position which was vacated was not the position which was posted. However, it believes that the Computer Operator position which was posted is not a "new" position whereas the Union believes otherwise.

Article 22 does not define the term "new." Webster's New Collegiate Dictionary however, defines the term as "never existing before; appearing, thought of, developed, made, produced, etc. for the first time." Clearly, the Computer Operator position was not a "new" position in this bargaining unit. A contractually negotiated wage rate was in existence, and there was a position description for such a position also in existence. Indeed, the Computer Operator position description for the other Computer Operator in the data processing area was the position description attached to the posting. The testimony of the head of computer operations for the County was that the duties and responsibilities of the posted position were identical with those of the then existing Computer Operator position, and that is why that position description was made a part of the posting. Thus, in the context of the County's computer operations, the position of Computer Operator was not a "new" position. It was, however, a different position than that of the part-time Systems Analyst/Programmer which had been vacated, thus creating the need for hiring another employe within the department.

Does this mean that the Computer Operator position as posted was a "new" position bringing it within the purview of Article 22 and requiring the Employer to fill out a job content questionnaire and bargain with the Union regarding the appropriate wage level for the position? The undersigned does not believe it does. The language of Article 22 being relied upon by the Union starts out by saying "When new positions are to be created the Employer shall notify the Union in writing." In the instant fact situation, the Employer was not creating a "new position." Rather, the Employer determined to post the vacancy created by the resignation of the previous part-time Systems Analyst/Programmer as a Computer Operator. The testimony established that the reason for the decision was based upon the work requirements of the department and a determination by management that a Systems Analyst/Programmer was no longer necessary, but rather another Computer Operator was needed. That decision, the Union acknowledges, was clearly the County's to make. Once the decision was made, the next step was to post for the position of Computer Operator.

Because the position of Computer Operator already existed and a position description and wage rate were in existence, the only step remaining was to obtain a copy of the position description, complete the posting and post the materials. There was no need to determine what the duties and responsibilities of the position would be, as would be the case were a new position being created, because the Computer Operator position was in existence and the County had determined that the duties of the additional Computer Operator were to be identical with those of the already existing Computer Operator position. Had the County determined to combine the duties of the Computer Operator position with that of the Systems Analyst/Programmer position into some hybrid of both positions, then the Union's theory of the case would be correct -- a "new" position not previously in existence would have been created by such action. Those are not the facts in this case, however, and therefore, the undersigned does not believe that Article 22 was violated by the County in this instance.

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

AWARD

The County did not violate Article 22 of the parties' collective bargaining agreement when it, without notifying the Union in writing, completing the job content questionnaire and negotiating with the Union with respect to the job rate, posted the position of Computer Operator. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 12th day of November, 1992.

By _____
Thomas L. Yaeger, Arbitrator