BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BROWN COUNTY EMPLOYEES LOCAL 1901 of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 470 No. 47499 MA-7288
and	
BROWN COUNTY, WISCONSIN	

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 936 Pilgrim Way #6, Green Bay, Wisconsin 54304, appearing on behalf of Brown County Employees Local 1901 of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Kenneth J. Bukowski, Brown County Corporation Counsel, 305 East Walnut, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of Brown County, Wisconsin, referred to below as the Employer, or as the County.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of "Local 1901". The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 5, 1992, in Green Bay, Wisconsin. The hearing was not transcribed, and the parties filed briefs by September 14, 1992.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Employer violate the collective bargaining agreement by filling, through the Temporary Posting process, vacancies in positions occupied by Anna Mae Vandermeuse and Darlene Van Egeren?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1. 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. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him/her for such period of time involved in the matter.

. . .

ARTICLE 2. RECOGNITION AND BARGAINING UNIT

The Employer recognizes the Union as the exclusive bargaining agent in a collective bargaining unit consisting of all regular fulltime and all regular part-time employees as certified by the Wisconsin Employment Relations Board on April 17, 1967, pursuant to an election conducted by the Board on April 6, 1967, and pursuant to subsequent W.E.R.C. rulings.

. . .

ARTICLE 3. PROBATIONARY PERIOD

. . .

A regular employee is hereby defined as a person hired to fill either a regular fulltime or regular part-time position. A temporary employee is one who is hired for a specified period of time or to perform on a specific project (not to exceed ninety (90) days), and who will be separated from the payroll at the end of such period or project. The Union shall be notified of all new employees and with the necessary information.

. . .

A seasonal employee is on the active payroll only during the summertime vacation period, and during holiday periods.

. . .

ARTICLE 23. SENIORITY

. . .

(b) JOB POSTING: Whenever any vacancy occurs due to a retirement, termination, new position or for whatever reason, the job vacancy shall be posted. The vacancy shall be posted on bulletin boards for a minimum of five (5) work days. Posted vacancies must be reposted not later than thirty (30) days after the least senior qualified regular employee who has signed the posting has been offered and declined the position. The job requirements and qualifications shall be part of the posting and sufficient space provided for interested parties to sign said posting. If no regular employee makes application for this job by signing the posting, it shall be given to the on-call employee applying (signing) who has the most seniority, subject to the right of the Employer to determine whether the employee applying for said position has the proper qualifications to perform the job. All new positions and salary rates shall be negotiated by the parties.

. . .

(e) Fill-in time (not overtime situations) to be given to part-time people first.

. . .

MEMORANDUM OF UNDERSTANDING

Effective December 12, 1988, Brown County recognizes Local 1901 as the exclusive bargaining agent in a collective bargaining unit consisting of on-call employees of positions as defined in "Article 2" of the labor contract with Local 1901.

1. DEFINITION:

An on-call employee shall be defined as a qualified individual employed for the purpose of relief coverage (sick, vacation, personal holiday leaves, etc.) of a regular fulltime or regular part-time position(s), or a temporary position(s) posting needed for special staffing requirements to meet facility needs.

. . .

5. TEMPORARY POSTINGS

A. Temporary postings shall be for a specified period of time or specific project not to exceed ninety (90) days. Such temporary postings shall be reposted at the end of the 90 day period unless extended by mutual agreement between Management and Union . . .

B. Temporary postings shall be awarded according to necessary qualifications and seniority in the following order:

1. Regular fulltime and part-time members of Local 1901
2. On-call employee
3. Individuals outside of the employment of the facility

. . .

BACKGROUND

The grievance, dated January 28, 1992, questions "Management awarding available hours to temporary employment agency personnel and not to regular and/or on-call MHC employees."

The circumstances underlying the grievance concern the absence of Anna Mae Vandermeuse and Darlene Van Egeren. Vandermeuse missed work due to an injury from October of 1991 through July 30, 1992. She was unable to work on even a part-time basis from December 5, 1991, through March 8, 1992. At the onset of her injury related absence, the Center thought Vandermeuse's absence would be short-term, and filled, as fill-in time under Article 23, Section (e), the two days per week she was unable to work. By December, however, it was apparent that Vandermeuse was unable to work, and the Center posted her position as a temporary posting. No unit members signed the posting, and the Center filled the position through an independent temporary employment agency.

The Center released the employe of the temporary agency prior to that employe's ninetieth day of work. The temporary position was again posted. This time one unit member signed the posting, but ultimately declined the position. As a result, the position was again filled from the independent temporary employment agency. The position was again posted in May of 1992. On that occasion, a unit member signed the posting, and accepted the temporary position. Vandermeuse returned to work on July 30, 1992. Sharon Butnik, the Center's Dietary Services Manager, offered to split the earlier postings into two temporary positions, and still failed to secure volunteers.

Similar scheduling problems led the Center to post a temporary position resulting from the long-term absence of Darlene Van Egeren. On December 10, 1991, the Center posted the position as a temporary posting. No unit members signed the posting, and the position was filled through an independent temporary employment agency. In January of 1992, the temporary employe became unavailable, and the Center posted the position again. This time, a unit member signed for, and accepted the temporary position.

It is undisputed that the Center posted both Van Egeren's and Vandermeuse's total hours of work as the temporary posting, and did not offer to break out the hours of either position to employes who were interested in

some, but not all, of Vandermeuse's or Van Egeren's hours. In December of 1991, the Center had openings equalling three full time equivalent (FTE) positions in a unit consisting of nineteen FTE positions. It is undisputed that regular part-time employes were available to assume at least some of the hours Vandermeuse was scheduled to work between December of 1991 and July of 1992, or at least some of the hours Van Egeren was scheduled to work in December of 1991 and early January of 1992. It is also undisputed that part-time employes may sign a number of postings to expand their hours of work.

Nancy Tomchek-May, the Center's Personnel Coordinator, testified that the Center has used temporary employment agencies since 1976. She stated that the Dietary Center had used employes from temporary employment services on no fewer than ten occasions between 1989 and 1992. She noted that Butnik was responsible for the initial scheduling of employes in the Dietary Center. If the schedule could not be filled, Butnik was responsible for seeking the approval of the Center's Administrator for the usage of temporary employes. Once this approval had been secured, Tomchek-May would post the temporary position. Butnik testified that the temporary positions at issue here were difficult to fill due to the weekend work involved, and the low staffing level at the time of the absences. She stated that posting anything other than a position would make it virtually impossible to schedule work.

Ray Schmitt, the Union President, stated that the Center could have offered, but chose not to offer the hours available to part-time or on-call employes who were willing to take at least some of them. In the event the position remained unfilled, Schmitt stated that the County was obligated to hire outside on-call help, not revert to an independent employment agency.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union contends that the grievance "concerns the issue of whether the Center violated the labor agreement by subcontracting for employee absences in the Dietary Services Department through the use of temporary employment agencies." The Union then contends that the "background and facts are fairly simple" posing a situation in which a temporary posting was not signed by an unit employe, prompting the Center to use a temporary employment agency. This situation is "not covered by the contract's specific job posting language of Article 23, SENIORITY, (but is) outlined in Section 5 of a Memorandum of Agreement . . . entitled 'On Call Employees,'" according to the Union.

The Union argues that Article 3 "defines the categories of employees working for the . . . Center", except for on-call employes "which were subject to the Memorandum of Understanding which recognized the union as the bargaining agent for this classification of employee as of December 12, 1988". The Memorandum, according to the Union, deals primarily with how an on-call employe becomes a regular employe. Beyond this, the Union notes that the Memorandum controls how temporary postings are filled. The Union disputes both the County's contention that the Memorandum replaced the definition of classes of employes stated in Article 3, and the County's contention that Subsection 3 of Section 5, B, refers to the employes of outside agencies.

The Union specifically contends that the County's assertions undercut the purpose of the Memorandum, which was to define how on-call employes could "become regular employees and members of the union, in particular through the accumulation of a special form of seniority." Beyond this, the Union argues that the County's assertions would cut off the contractual rights of outside agency employes, negating such an employe's right to County contributions to worker's compensation insurance and payroll taxes as well as the rights stated in the Memorandum itself. The Union concludes that the most persuasive view of the Memorandum is that Subsection 3 refers to "individuals not employed by the facility", not to individuals who are employes of another employer. The Union asserts that Subsection 3 requires the County to expand its pool of on-call employes, while the County's interpretation essentially seeks to circumvent this obligation. The Union concludes that the County can "hire three types of employees that are not regular fulltime or part-time employees": seasonal employes; temporary employes who work ninety days or less; and on-call employes. The Memorandum essentially establishes "a bridge between temporary and permanent employment" regarding on-call employes.

The Union's next major line of argument is that the County did not have the contractual right to require employes to sign for all of the hours posted for a temporary vacancy. The Union contends that a number of employes could have absorbed part of the hours posted in the temporary vacancy, and that the use of an outside contractor did not assure the County that all of the available hours would be assumed. Here too, the Union contends that the ultimate problem is that the County has too small a pool of on-call employes. The Union stress that if the County's view of the Memorandum prevails, the County will have no incentive to expand that pool.

The Union then contends that the County assertion of past practice must be rejected. More specifically, the Union asserts that it received no notice of the past use of outside agencies, that such past usage may have been for hours that regular employes were scheduled to work, and that "(t)he Union could not grieve a practice that it was not aware of."

Because Article 1 does not specifically authorize the County to contract out for labor, the Union concludes that Article 3, read together with the Memorandum, govern this dispute. Because the Union's view of those provisions is the more persuasive, the Union concludes that "(t)he affected part-time employees in the Dietary Department should be made whole for their los(s)es in wages and benefits and the Center should be ordered to cease using . . . temporary agencies."

THE EMPLOYER'S POSITION

The Employer contends that the facts can not be considered in dispute, and do not support a finding of any contractual violation. More specifically, the Employer contends that Schmitt's and Tomchek-May's testimony establish that the County has a history of using "an outside agency, such as a temporary employment company, to provide help during times of need."

The Employer asserts that it fully complied with its obligation under the collective bargaining agreement, including the Memorandum. More specifically, the Employer asserts it posted the positions in dispute at the end of the ninety day period specified in the Memorandum, and "was unsuccessful in obtaining any employees to sign for the posting." The Employer asserts that it could not fill the hours even by splitting the posting. It follows, the Employer concludes, that it fully discharged its obligations before resorting to the use of an outside employment agency. It necessarily follows, the Employer concludes, that the grievance should be dismissed "on its merits since no violation of the contract by the employer occurred."

DISCUSSION

The issue adopted for decision is broadly stated, to subsume a number of issues raised by the parties. It underscores that the fundamental difference between the parties is the interpretation of Section 5 of the "MEMORANDUM OF UNDERSTANDING" (the Memorandum) which governs "TEMPORARY POSTINGS". The Employer's use of a temporary employment agency is directly posed on these facts, and is subsumed in the broadly stated issue for decision. The issue does not directly reference the use of an outside agency because that issue turns on an interpretation of Section B, 3, of the Memorandum.

The issue stated above clarifies that this is not a traditional subcontracting dispute. Typically, such disputes pose the loss of work traditionally done by unit members. In this case, any loss of unit work is temporary, and based on the absence of unit members to perform the work. It is apparent the Employer regards individuals employed for more than ninety days to acquire employment rights. The reposting of temporary positions under Section 5, A, of the Memorandum assures that any loss of unit work is temporary at most, and even if temporarily lost to non-County employes, will ultimately be offered to unit members. Thus, the facts do not pose an issue questioning the rights, if any, of the Employer to subcontract work under Article 1. Rather, the fundamental issues to be addressed here are whether the Employer properly posted Vandermeuse's and Van Egeren's positions under Section 5, A, of the Memorandum, and properly referred the vacancy to an outside employment agency under Section 5, B, 3, when no unit members signed the posting.

The Union asserts that Article 23, Section (e), requires the County to parcel out vacancies on an hour-by-hour basis to part-time employes. The Employer has forcefully argued that this would make it impossible to schedule. While this point has considerable persuasive force, the ultimate issue is whether the contract compels the Employer to so parcel out hours. The Union's contention that Article 23, Section (e) is the source of this compulsion is unpersuasive. That section refers to non-overtime "(f)ill-in time". In this case the applicability of the section to Vandermeuse's initial absences is apparent and undisputed. The absences were short-term, and she was still able to work, appearing to have the ability to work all her scheduled hours after limited time off. Thus, her position was not vacant but she did require some short-term fill-in to complete her schedule. By December this was no longer the case. She was unable to work at all, and any replacement(s) would not fill-in gaps in her schedule, but would fully assume her position until she was capable of returning to work. Article 23, Section (b), requires that "any vacancy . . . shall be posted." It further refers to the vacancy as "the position" or "said position". Nowhere does Section (b) compel the employer to parcel positions into whatever size an interested applicant wants. Beyond this, there is a tension between Section (b) and Section (e) under the Union's interpretation. If the Employer can split positions into its component hours, then the Employer has, through Section (e), the ability to avoid the posting requirement. Vacant positions could be parceled out on an hour by hour basis

instead of being posted, as Section (b) clearly requires. Similar considerations apply to Van Egeren.

In sum, by December of 1991, the Employer properly viewed Vandermeuse's and Van Egeren's absences to create a vacancy in their positions. Thus, those positions were, under Article 23, Section (b), subject to the posting procedure. Because the vacancies were of an unknowable duration, and the incumbent employes apparently capable of returning, the vacancies were temporary in nature, thus falling under Section 5 of the Memorandum. The Employer's decision to post the vacancies as temporary positions was, then, appropriate.

The remaining issue is whether Section 5, B, 3, of the Memorandum permits the County to use an outside agency to supply an employe. It can not be said that Section 5, B, 3, will permit only the interpretation advanced by the Union or by the County. The provision cannot, then, be considered unambiguous. Typically, past practice and bargaining history are the most reliable guides to interpret ambiguous language, since they focus on the conduct of the bargaining parties whose agreement is the source and the goal of contract interpretation. In this case those guides are not available. There is evidence that the County has used outside agencies in the past, but there is insufficient evidence that the Union was aware of this usage to conclude a binding practice exists. Beyond this, while it is apparent that the Employer sought to preserve its usage of outside employment agencies during the negotiation of the Memorandum, the specific point was not directly addressed during those negotiations.

Thus, interpretation of Section 5, B, of the Memorandum must turn on the terms agreed to by the parties. Initially, it must be noted that the Employer's interpretation clearly falls within the scope of Section 5, B, 3. Employes of an independent temporary employment agency are clearly "(i)ndividuals outside of the employment of the facility." More significantly here, the Union's interpretation reads Section 5, B, 3, out of existence. Once an individual has been hired by the Employer for "relief coverage", that individual has become, under Section 1 of the Memorandum, an "on-call employee" of the County. Under the Union's interpretation, there can be no "(i)ndividuals outside of the employment of the facility", for any such individual, upon hire, is an "on-call employee", within the meaning of Section 5, B, 2. Under the Union's interpretation, the Employer could not use "(i)ndividuals outside of the employment of the facility", as Section 5, B, 3, authorizes. Under the Union's view, the Employer's sole recourse in times of staffing need is to expand the pool of on-call employes. This view effectively reads Section 5, B, 3, out of existence, and is, then, unpersuasive. The language of Section 5, B, 3, by its terms, refers to the practices the Employer used at the time the Memorandum was negotiated. While the practice, standing alone, can not bind the Union, the language does.

In sum, the Employer properly treated the absences at issue here as vacancies requiring a temporary posting under Section 5 of the Memorandum. After determining that no unit employes would sign the postings, the Employer properly concluded it could fill the vacancies "for a specified period of time or specific project not to exceed ninety (90) days" through an independent temporary employment agency.

AWARD

The Employer did not violate the collective bargaining agreement by filling, through the Temporary Posting process, vacancies in positions occupied by Anna Mae Vandermeuse and Darlene Van Egeren.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 1st day of December, 1992.

By _____
Richard B. McLaughlin, Arbitrator

RBM/sh
H3558H.24