BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
WALWORTH COUNTY COURTHOUSE EMPLOYEES, LOCAL 1925B, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO	:	Case 121 No. 47912 MA-7431
and	:	
COUNTY OF WALWORTH, WISCONSIN	:	

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of Walworth County Courthouse Employees, Local 1925B, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, referred to below as the Union.

Mr. Roger E. Walsh, Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appearing on behalf of County of Walworth, Wisconsin, referred to below as the County.

ARBITRATION AWARD

The Union and the County 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 "Policy Grievance" filed on June 17, 1992. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on November 19, 1992, in Elkhorn, Wisconsin. The hearing was transcribed, but the parties did not agree that the transcript would serve as the record of the hearing. The parties filed briefs and reply briefs by February 17, 1993.

ISSUES

The parties stipulated the following issues for decision:

> Did Walworth County violate the collective bargaining agreement when it hired new employe, Joanne Burns, at a rate of pay above the start rate of pay provided in Pay Range 10?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I - RECOGNITION

1.01 Recognition. The County hereby recognizes the Union as the exclusive bargaining representative for purposes of conferences and negotiations on all matters concerning wages, hours, and other conditions of employment for all Walworth County courthouse employees, but excluding elected officials, professional employees, social services employees represented by Local 1925, supervisors, court reporters, the deputy coroner, confidential employees in the Personnel Office, and all other employees of Walworth County as certified by the Wisconsin Employment Relations Commission on February 3, 1970.

. . .

ARTICLE II - MANAGEMENT RIGHTS

2.01 In General. The management of the Walworth County Courthouse and the direction of the employees in the bargaining unit, including, but not limited to the right to hire, the right to assign employes to jobs and equipment in accordance with the provisions of this Agreement, the right to assign overtime work, the right to schedule work, the right to relieve employees from duty because of lack of work or for other legitimate reasons, except as otherwise provided in this Agreement, shall be vested exclusively in the County.

. . .

2.03 Public Health and Safety. Nothing in this Agreement shall be construed to limit the discretion of the County with regard to matters affecting the public health, safety or general welfare.

2.04 Work Rules. The Union recognizes the right of the County to establish reasonable work rules.

. . .

ARTICLE VII - SENIORITY

. . .

7.02 Part-Time Employees. A regular part-time employee is defined as an employee hired to fill a regular part-time position as set forth in Article XXII and in the job classification plan attached to this Agreement and made a part thereof, marked Exhibit "A" and "B".

7.03 Probationary Employee.

(A) Probationary Period. New employees shall be on a probationary status for a period of six months, however, such period shall be extended by mutual agreement only, for an additional thirty calendar days for individual employees as the need arises. If still employed after such date, their seniority shall date from the first day of
hiring . . .

7.09 Continuation of Seniority - Fringe Benefits. For the purpose of fringe benefits only such as sick leave, vacations, holidays, retirement, etc., an employee's seniority shall continue if transferred from this bargaining unit to another County Department or facility.

. . .

ARTICLE IX - WAGES

9.01 Pay Rate Schedule. All employees . . . shall be paid in accordance with the "Job Classification and Rate Schedule"(s) attached to this Agreement as Exhibits "A," "B" and "C" and made a part hereof . . .

9.02 New Employees. New employees hired at the start rate shall receive a step increase upon completion of the probationary period. They shall advance through the rate range according to the schedule set forth in Exhibits "A" and "B" and "C."

9.03 Promotion. An employee permanently assigned to a position assigned to a higher pay range shall advance to the pay step in the higher pay range providing the minimum increase in pay rate. Advancement to any additional steps shall be in accordance with the schedules set forth in Exhibits "A" and "B" and "C".

9.04 Lateral Transfer. Upon transfer to a job in the same pay range, the employee shall retain his former rate of pay and continue in the same wage schedule.

. . .

EXHIBIT "A" 1/

. . .

EXHIBIT "B" 2/

. . .

EXHIBIT C 3/

BACKGROUND

The June 17, 1992, grievance states the following as the basis of the grievance:

1/ Exhibit A is effective January 1, 1992, and states a salary schedule consisting of separately headed columns for "PAY RANGE" and "CLASSIFICATION", and hourly rate columns headed thus:

A	B	C	D	E	F
START	6 MO. PROB.	1 YEAR	2 YEAR	3 YEAR	4 YEAR

2/ Exhibit B is effective November 1, 1992, and sets forth the same salary structure as that described in Footnote 1/ for Appendix A.

3/ Exhibit C is effective January 1, 1993, and sets forth the same salary structure as that described in Footnote 1/ for Exhibit A.

> New employee hired at a level higher than the 'START' rate in pay range 10 of Exhibit 'C' of current contract. Hiree is not filling a promotional vacancy or transferring from within the Walworth County system.

The grievance specifies Section 4.06, 9.02 and "any and all articles and sections that may apply" as the contractual basis for the grievance.

Joanne Burns is the "New employee" referred to in the grievance. She started work in that position on July 1, 1992.

The County's Placement Of Burns

The incumbent of the position Burns filled resigned effective May 1, 1992. The position was posted to Courthouse unit members from March 23 through March 30, 1992. One unit employe signed the posting, was tested on April 6, and failed the test. The County then reposted the position, at a higher pay rate, to all County departments, and advertised the position to the public. As of May 5, 1992, six interested applicants had been tested, with only two of them passing the test. One of the two applicants who passed the test withdrew, and the remaining applicant was referred to the Clerk of Courts for an interview. The Clerk of Courts wanted the position to be awarded competitively, and asked that the Personnel Department recruit more applicants. The Personnel Department reviewed and revised the position and reposted it in the second week of May. It concurrently sought outside applicants. Nine applicants responded, none of whom were Courthouse unit members. Three of the nine applicants passed a test administered on June 4, 1992. These three applicants were interviewed during the second week of June. Each of the three applicants was then working as a Legal Secretary, and each was making more than the County intended to pay. Burns was making $14.28 per hour in her position. The County ultimately selected Burns, and offered her the job on June 15, 1992.

The County placed Burns at the "3 YEAR" rate of the contract.

Evidence Of Past Practice

On February 28, 1990, the Union filed a grievance on the County's placement of Gerald Huck. While this matter is not, strictly speaking, evidence of past practice, it serves to preface the parties' differing views of relevant practice. Huck served the County from January 5, 1987, through March 4, 1989. He was rehired by the County on February 5, 1990. Prior to his rehire, he worked for Kenosha County for $14.40 per hour. The County

placed him at the top rate of his pay range, which was, at that time, $10.43. Huck would not agree to return to the County at the entry rate.

The County denied the grievance, and Janice St. John, the County's Personnel Director, detailed the basis of the denial in a memo dated April 16, 1990, which reads thus:

> It is a common personnel practice in Walworth County for the County to advance place an employee in the assigned pay range based on (1) business and recruitment needs, (2) prior work experience of the employee, and/or (3) the impact of the decision on other employees with the same classification. Advance placement is always based on the circumstances existing at the time of hire, and conditions may change over a period of time.

St. John also noted her belief that "several current bargaining unit employees began employment . . . at the maximum rate of the assigned pay range" and cited as examples Judith Anderson, Mary Keyes, Michele Kilpin, Janeen Mehring, Linda Romenesko, Jerald Smith and Peggy Walbrandt. She also noted that in other cases, "employees have started at rates above the minimum", and cited as examples "Jane Frye and others". The Union did not accept this response, and the grievance was processed to arbitration, where the parties reached the following settlement agreement:

> 1. The Union agrees to withdraw the grievance dated 2-28-90 without prejudice to the filing of future grievances on the same type of claim.
>
> 2. The County agrees to give the Union President or designee three (3) days advance notice prior to the hiring decision when it contemplates hiring an individual at above the start rate. Upon request of the Union prior to the hiring decision, the County will confer with the Union on this subject.
>
> 3. By entering into this agreement, neither party waives what they perceive to be their rights under the collective bargaining agreement and/or applicable state statutes as it relates to the County's ability or inability to start an

> employee at a rate of pay other than the start rate as contained in Exhibits "A," "B" or "C" for the 1990-91 Agreement.

The parties do not dispute that the County notified the Union of its intent to place Burns above the start rate.

Julia Dian Strunk serves as the Union's Secretary, and testified that the Union, during the processing of the grievance, sought to determine on what St. John based her view of the "personnel practice" articulated in the April 16, 1990, memo. According to Strunk, all of the employes except Anderson were transfers. Anderson was a rehire, and Strunk denied that the Union was notified that she was placed at the maximum. Strunk acknowledged that not all of the transfers were represented employes prior to the transfer.

Strunk noted that the Union has consistently opposed County attempts to place newly hired employes above the start rate, citing the Huck grievance and the Union's express opposition, stated in two separate letters, in January of 1992, to the Personnel Department's announced intention to fill a Clerk Typist IV position at above the start rate.

St. John testified that a manual and a computer assisted search of existing County personnel records established that the positions stated in her April 16, 1990, memo were essentially correct. She specifically noted that the County had, since January of 1989, employed two newly hired employes at above the start rate. In addition, the County employed two former employes whom it placed at above the entry rate. St. John noted that the Union grieved only one of those placements -- Huck's. She did note that she did not believe the County formally notified the Union of any of these advance placements. She also noted and documented several transfers beyond those mentioned in her April 16, 1990, memo.

Evidence Of Bargaining History And County Personnel Policies

The County and the Union reached their first collective bargaining agreement covering the Courthouse unit in 1971. The County adopted a Personnel
Policy on December 16, 1969, which was published on January 1, 1970. Section 3.03 (a) of that policy reads thus:

> The minimum rate established for the class is the normal hiring rate, except in those cases where circumstances appear to warrant appointment of an employee at a higher rate. Appointment above the minimum step rate may be

made when the Personnel Director determines that it is necessary in the best interests of the County.

The County's Personnel Policy has been amended over time. The County, at the time of hearing, maintained a Personnel Code which contains the following provisions:

> 1.03 Applicability. The Personnel Code shall apply to personnel administration for all positions, employees, and departments of Walworth County, except as other wise provided by state statute or otherwise expressly provided within the Personnel Code . . .
>
> These policies shall apply to union represented employees where collective bargaining agreement language is silent on a particular issue. Any policy contained herein which is more generous in application than a provision of a collective bargaining agreement shall not apply to a union represented employee. When any provision of a collective bargaining agreement is in conflict herewith or is more generous than this chapter, the provisions of the collective bargaining agreement shall prevail.
>
> . . .
>
> 13.06 Pay plan administration general policies . . .
>
> (A) New employees. The normal starting rate for an individual newly employed by the County shall be the minimum rate of the assigned pay range, except as provided below:
>
> 1. The appointing authority must obtain prior approval from the Personnel Director to offer a pay rate exceeding the minimum pay rate . . .

The Code, at Section 13.06 (C) states that "A rehired employee shall be considered a new employee" with two listed exceptions. The Code also contains provisions governing the pay range placement of employes who are promoted, demoted, or are laterally transferred.

From 1971 through 1987, the parties' labor agreements had provided for a salary schedule consisting of pay ranges and

classifications subject to separately stated steps linked to the employe's date of hire, completion of a sixty day probation period, and first employment anniversary. In their 1988-89 agreement, the parties redesigned the probation period to extend, in the absence of mutual agreement otherwise, six months. They revised the salary schedule, set forth as Exhibits A and B, to include the following steps: "START"; "AFTER PROBATION"; "ONE YEAR"; and "18 MONTHS". Section 9.07 of the 1988-89 agreement reads thus:

> New Employees. New employees shall receive a step increase upon completion of their probationary period. They shall advance through the rate range according to the schedule set forth in Exhibits "A" and "B".

In their 1990-91 agreement, the parties again modified the salary schedule. What appears as Exhibit A of that agreement "applies only to employees hired prior to 1/1/90" and "expires on 6/30/90". Exhibit A continues the four steps noted above from the 1988-89 agreement. Exhibit B of the 1990-91 agreement "applies to all new employees hired on and after 1/1/90, and to all other employees (hired prior to 1/1/90) as of 7/1/90." That exhibit states the following steps: "START"; "6 MO. PROB."; "1 YEAR"; "2 YEAR"; "3 YEAR"; and "4 YEAR". Exhibit C continues this six step system. What appeared, in the 1988-89 agreement as Section 9.07 appears as Section 9.02 of the 1990-91 agreement, and reads thus:

> New Employees. New employees hired at the start rate shall receive a step increase upon completion of the probationary period. They shall advance through the rate range according to the schedule set forth in Exhibits "A" and "B" and "C."

St. John noted that the six month steps of the predecessor agreement precluded the need for the reference added to Section 9.02 of the 1990-91 agreement, since any step increase required six months. She noted the County made the initial proposal for this change, and acknowledged that the County did not specifically state any impact this language would have on the advance placement of employes.

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

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the facts, the Union argues that it "has

consistently opposed advanced placement of new and rehired employees." Acknowledging that the parties have "accepted . . . (p)lacement above the pay range minimum", the Union asserts that such placement has occurred only as governed by Sections 9.03 and 9.04 and involving "certain internal personnel transactions such as promotion between bargaining units and lateral transfers between bargaining units." The evidence shows, according to the Union, no practice "which would provide for advanced placement of any new or rehired employee(s)", and does show that all but three of the new hires or rehires from December of 1990 through October of 1992 have been effected at the start rate. That Hilbert Steen was hired at the six month step shows only, the Union contends, that the Union was unaware of his placement until well after it had been effected.

The Union's next major line of argument is that "the Agreement does not provide any enabling authority from which the county can place new or rehired employees at wage steps above the applicable start rates . . . (but) does provide for the placement of new employees and periodic movement through the pay ranges based upon the time spent in the pay range." To accept the County's interpretation has, the Union argues, significant implications concerning, among other points, whether an employe placed above the start rate must serve a probation period and the extent of the County's ability to alter employe placement unilaterally. While arbitral authority on the issues posed here is limited, the Union contends that what authority exists supports its position.

The Union then addresses its view that the County's "principal justification for its action of hiring new employees above the start rate appears to be embedded in its view of what took place as part of the 1990-91 bargaining history." The Union notes that the County seeks an inference that "by adding the phrase "(h)ired at the start rate", the Union is now precluded from claiming that the contract bars advanced placement of new employees." The Union argues that this inference is based "on the construction maxim of 'expressio unius est exclusio alterius'", and that reliance on this maxim "is misplaced here", since the reference to "(h)ired at the start rate" does not create "clearly discrete and recognizable classes". More specifically, the Union contends that the 1990-91 bargaining did not create separate classes of employes hired above and employes hired at the start rate since "there has never existed a class of new employees which were hired above the start rates"; the reference agreed to was "general in nature and non-exclusionary"; the County's view of the reference undercuts the "clear meaning and purpose" of the increments in the salary schedule; and the County's interpretation renders Section 7.02 superfluous.

Beyond this, the Union contends that the evidence proves that the reference agreed to in the 1990-91 bargaining was inserted "for a very limited nature." To expand this reference as the County suggests would, according to the Union, unpersuasively work a forfeiture of the Union's position on advance placement and would grant the County through arbitration a point it neither clearly communicated nor achieved in negotiation.

The Union concludes that the grievance should be sustained and that the County should be ordered to "cease and desist in its illegal action . . . and place Ms. Burns properly on the schedule on a prospective basis."

The County's Initial Brief

After a review of the facts, the County argues that "(a)lthough the County normally starts individuals newly hired . . . at the Start Rate, there have been many occasions where the County has started such individuals at a rate higher than the Start Rate". To demonstrate this point, the County points to a record search "of individuals hired into the . . . (Courthouse) bargaining unit since January 1, 1989". That search shows that twenty individuals were hired into the Courthouse unit "at a wage rate that was higher than the Start Rate listed in the contract", the County asserts. This group of twenty can, the County notes, "be broken down into three categories:" (1) two individuals "newly hired as County employees"; (2) two individuals who had left County employment and were rehired as County employees; (3) sixteen individuals who moved into the Courthouse unit from "another bargaining unit or the non-represented unit".

The County contends that the Union "concedes that the County can start a current County employee from another bargaining unit or the non-represented unit at a rate higher than the Start Rate", and that the Union "has been aware for many years that the County has been doing this and the Union does not object." Beyond this, the County asserts that Sections 7.09 and 9.03 do not specifically authorize the above start payments the Union acknowledges have occurred. From this it follows, according to the County, that "(s)ince the Union permits the County to pay the higher rate for these individuals, it cannot discriminate against individuals who are rehired County employees or newly hired County employees."

The County contends that the practice of paying newly hired employes a rate above the start rate is uniform across other County bargaining units. More specifically, the County asserts the evidence demonstrates the following hiring patterns:

Bargaining Unit	Number of Employes Hired Above Start Rate		
	New Employes	Rehired Employes	Current

Employes			
Local 1925A	59	17	20
Local 1925B (Lakeland)	NA	NA	1
Local 1925C	NA	NA	3
Local 1444	11	NA	4
Human Services Professionals	1	1	3

The County contends these figures are meaningful since "(n)one of the AFSCME contracts contain provisions that either specifically require the County to pay the Start Rate . . . or specifically prohibit the County from paying a wage rate above the Start Rate to such individual." The Local 1444 agreement does, the County notes, "specifically provide for payment above the Start Rate for individuals who transfer from another County unit". The County also notes that the Human Services Professionals Association contract "does specifically provide that the County can hire new employees above the minimum rate."

Beyond this, the County asserts that its Personnel Policies, which were in place prior to the first Courthouse unit contract, specifically authorize the payment challenged by the Union here. Since the County's ordinances make this policy applicable to represented employes where an agreement is silent, the County concludes that the Personnel Policies are applicable here.

The County's next major line of argument is that the revision to the 1990-91 labor agreement specifically recognized the right of the County to pay individuals starting in the Courthouse unit at a rate above the start rate. The reference to "hired at the start rate", according to the County, "(c)learly . . . recognized the possibility of starting a newly hired or rehired individual at a rate above the Start Rate". Beyond this, the County rejects any assertion that changes to Section 9.01 in the 1992-93 agreement have any bearing here.

The County concludes that the grievance must be denied.

The Union's Reply Brief

The Union rejects the County's assertion that the evidence supports a finding of any binding practice. The Union contends the evidence demonstrates that "(w)henever the County attempted to pay new hires at rates above the minimum, and the Union was aware

of the scheme, they uniformly challenged the County's action through the grievance procedure." References to current employes transferring or being promoted into the Courthouse bargaining unit have been offered by the County to "confuse the case". Beyond this, the Union asserts that "(a)rbitrators have given great weight to the specific nature of a wage schedule", and that this principle would be undermined by accepting the County's contentions here.

The Union rejects the County's contention that a binding practice in the Courthouse unit can be based on practices outside of the unit. The evidence relevant here, according to the Union, establishes that "(t)he clear past practice in the instant bargaining unit is that there exists a mutual agreement to pay employees in accordance with the rate in the wage schedule."

The Union contends that the "burden of proof falls heavily on the County", and concludes that the silence of the agreement regarding payment above the start rate has not been overcome by the County's evidence. To accord the weight to past practice that the County asserts it is due is, according to the Union, particularly troublesome here. Since "the hiring operation of the Employer is generally shielded from the contract's direct operation", and since a hiring above the start rate is a transaction "to which the union is not party", it follows, the Union concludes, that there can be no finding that there has been an "institutional accommodation to hire rates above the minimum."

The role of County ordinances here is, according to the Union, "enigmatic" at best. Since the "contract speaks directly to the lack of discretion in paying rates other than the start rate", the Union rejects the applicability of such ordinances. Nor does the Union accept the County's contention that the creation of Section 9.02 constitutes acquiescence by the Union to the County's view that it is authorized to hire above the start rate. Beyond this, the Union repeats its contention that the County never articulated such a purpose to the Union in bargaining. The Union also rejects any contention that the County possesses any residual right to apply the contract as it asserts. Such a contention "flies directly in the face of industrial relations theory and practice", according to the Union.

Such considerations do not apply to the movement of transferring employes who may, according to the Union, "based on their contractual movement be placed above the minimum rate." Concluding that the "County has no more right to pay above the schedule as it does to pay below", the Union urges that "the grievance should be sustained."

The County's Reply Brief

The County argues that the Union's contention that Sections 9.03 and 9.04 govern "personnel movements of employees from other bargaining units" and authorize placement above the start rate is both unpersuasive and an abandonment of their position that Section 7.09 governs such placement. The County specifically rejects the applicability of Section 7.09, which applies to "fringe benefits", and specifically rejects the applicability of either Section 9.03 and 9.04. Since transferring employes are "new employees" for purposes of the Courthouse contract, it follows, according to the County, that Sections 9.03 and 9.04 have no applicability here. The County asserts that the Union's use of those sections attempts to mask a fundamental inconsistency in its position:

> Since the Union does not object when the individual is from another bargaining unit or from the non-represented unit, it cannot object only when the individual is a new hire or rehire. That is blatant discrimination.

The County urges that the practice it asserts concerns new employes to the Courthouse unit, which must be taken to include new hires and rehires as well as transfers.

The County then urges that any Union assertion that the consistent practice of the parties is to hire at the start rate must be rejected. The County's practice of hiring above the start rate predates the Union's first contract, and has continued to this case, according to the County. Beyond this, the County rejects the Union's assertion that it has consistently opposed above rate hiring.

The County disputes the validity of Union concerns for the integrity of the contractual salary schedule. More specifically, the County contends that it "does not often start new employees . . . in the Courthouse Unit at a rate above the Start Rate." Nor are Union concerns regarding the probation period or the creation of a "training rate" any more valid, according to the County. The County urges that these concerns are speculative, and ignore that the County hires above rate only when legitimate business concerns have dictated doing so. The facts posed here, according to the County, underscore this point and establish a need to act of sufficient depth that Section 2.03 can be considered applicable.

Beyond this, the County contends that the arbitral precedent cited by the Union is distinguishable from the facts of this case. The County also questions the Union's rejection of the amendment of present Section 9.02. If the Union's position is accepted, the County contends that this amendment has unpersuasively been

rendered meaningless. Noting that Section 2.04 permits the County to promulgate reasonable work rules, the County urges that its actions, in light of the Personnel Policies, constitute reasonable work rules.

The County then rejects the Union's assertion that Section 7.02 "requires starting new part-time employees at the Start Rate." That section as well as Section 7.01, according to the County, refers only to positions, and not to salary rates. Beyond this, the County asserts that the fundamental inconsistency in the Union's case is again manifested here, since reading the sections as the Union contends would mandate placing transferring employes at the start rate also.

The County concludes that it has demonstrated a legitimate reason to hire Burns above the start rate, and that the contract permits this action. It necessarily follows, according to the County, that the grievance must be dismissed.

DISCUSSION

The stipulated issue questions whether the County's placement of Burns violated the labor agreement. Although the parties have cited a number of agreement provisions, the fundamental focus is Section 9.02. The Union contends that the incorporation, in Section 9.02 among other provisions, of Exhibits A, B and C mandates that "(n)ew employees" be placed at the "START" rate specified in the Exhibits. The County contends that the reference, in Section 9.02, to "hired at the start rate" read in conjunction with its rights under Section 2.01 permit placement of a new employee at a step above the "START" rate.

Each party's position is plausible, and, as a result, Section 9.02 cannot be viewed as clear and unambiguous. The County's view suffers from the fact that the reference in Section 9.02 to "hired at the start rate" does not explicitly address whether the County is empowered to hire at any other step than start. The reference implies such a power. Since Section 2.01 does not expressly address this point, the guidance it offers is less than direct. The Union's view suffers from the fact that the incorporation of Exhibits A, B and C in Section 9.02 and other agreement provisions does not expressly deny the County the authority it seeks to assert here. The Exhibits imply that employes work their way through the salary schedule, beginning at the start rate.

Past practice and bargaining history are the most persuasive guides to resolve contractual ambiguity, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. In this case, the application of each guide is problematic.

Initially, it must be noted that the evidence does not support as broad a practice as either party asserts. More specifically, the Union's assertion that the County's placement of the vast majority of new hires at the start rate establishes, by practice, that the start rate is the only consensually established new hire rate overstates both the alleged practice and what the County seeks to demonstrate. No view of the evidence will establish that the County has uniformly placed new hires at the start rate. Beyond this, the County has not asserted a generalized right to place employes wherever it deems fit, for any reason or no reason at all. Rather, the County has contended that on a limited case by case basis it has the right to hire above the start rate. In this case, the County contends business necessity required it to place Burns above the start rate. The County has not asserted a general right to unilaterally alter the salary schedule.

Beyond this, the County's contention that the practice at issue is County-wide strains the scope of my authority. Even ignoring the variance in contract language from unit to unit, there is no evidence the Courthouse agreement incorporates the provisions of non-Courthouse unit agreements. Section 7.09 does grant Courthouse unit employes seniority which may follow them beyond County employment in the Courthouse, but does not apply to the reverse situation. There is no evidence the parties use coordinated bargaining to negotiate, at the same sessions, an agreement or agreements to cover several bargaining units. Against this background, the Union's contention that conduct in other units cannot be bootstrapped into a binding practice in the Courthouse unit is persuasive. Recourse to the conduct developed under other bargaining agreements would perhaps not violate the admonition contained in Section 4.02 that "(t)he arbitrator shall have no authority to add to, subtract from, amend or modify any provisions of this Agreement." It would, however, undercut the intent of that provision to bring in principles, developed among different units, which were not bargained to apply to the Courthouse unit. Evidence of non-Courthouse unit practice, at best, offers some guidance as to the context in which bargaining in the Courthouse unit occurred.

The source of the binding force of a past practice is the agreement manifested by the bargaining parties' conduct. While the proof required to prove the mutuality of a practice has been variously stated, the proof must be sufficient to demonstrate the practice had a mutually known effect. The proof here is not sufficient to demonstrate the Union specifically acquiesced to the County's view that it can place newly hired or rehired employes above the start rate. Until the Huck agreement, the County did not notify the Union of such advance placement, and it appears the

Union objected to any such placement it became aware of regarding newly hired or rehired employes.

Application of the evidence of bargaining history is also problematic. The reference, in Section 9.02, to "hired at the start rate" was inserted when the parties changed the salary schedule to a progression built on, beyond the post-probation step, four annual increments. The parties did not address the impact of that reference on the advance placement of newly hired or rehired employes. Bargaining history regarding the "hired at the start rate" reference will not support the conclusion the County asserts here.

To state the problematic nature of the evidence on past practice and bargaining history only prefaces the fundamental fact that each party acknowledges that a practice exists by which employes transferring into the Courthouse unit have been placed above the start rate. This acknowledged practice, viewed in light of the language of Section 9.02 and evidence of bargaining history supports the County's interpretation of Section 9.02 over that of the Union.

The acknowledged practice undercuts the strength of the Union's contractual arguments. The Union has forcefully argued that the structure of the salary schedule, coupled with its specific incorporation into a number of agreement provisions, such as Sections 7.02 and 9.02, implies that new employes must work through the progression system, beginning at the start rate. This argument is, however, undercut by the fact that transfers have been, with mutual agreement, placed above the start rate. If the contract is to be read as the Union asserts, the placement of transfers violates the contract no less than the placement of newly hired or rehired employes.

The Union's contention that the advance placement of transfers can be accounted for by other agreement provisions is unpersuasive. Sections 9.03 and 9.04 both refer to an "employee". This term cannot, by implication, be expanded to include employes other than those in the Courthouse unit. Doing so would read Section 1.01 out of existence. Beyond this, as noted above, Section 4.02 restricts an arbitrator to the "provisions of this Agreement." Sections 9.03 and 9.04 each refer to placement prior to an upward or lateral move. This former placement cannot be read to be placement in other than the Courthouse unit without stretching the rights at issue beyond the "provisions of this Agreement." If, in spite of Section 4.02, Sections 9.03 and 9.04 are read to refer to rights granted in another contract or by Ordinance, then the County's contention that practices developed under those contracts or Ordinances can become binding on the Courthouse unit must also be granted. That contention was,

however, rejected above, just as the Union's contention that Sections 9.03 and 9.04 can refer to non-unit placement must be here. That Section 7.09 provides Courthouse unit employes seniority after they leave the Courthouse unit only underscores that the reference to "employee" is to a member of the Courthouse unit.

The language of Section 9.02 favors the County's interpretation. The reference to "hired at the start rate" does imply that there can be employes who are not hired at the start rate. Beyond this, the reference to "New employees" does not distinguish, on its face, between classes of employes. The County's contention that "New employees" refers to employes who are new to the Courthouse unit does not strain the reference as much as the Union's does. The Union contends that "New employees" refers to newly hired or rehired employes, but not to transfers from other bargaining units or from the non-represented portion of the County's work force. As noted above, all of these employes are new to the Courthouse unit and its collective bargaining agreement, and it strains the general reference to "New employees" to subdivide it into various groups.

That evidence of past practice and bargaining history which is reliable also supports the County's interpretation of Section 9.02 more than the Union's. As noted above, the mutually acknowledged practice of placing transfers at above the start rate undercuts the persuasive force of the Union's contention that the salary schedule mandates initial placement at the start rate. The language of Section 9.02 generally applies to new employes, and there is no apparent reason to distinguish between newly hired or rehired employes and transfers who are new to the Courthouse unit.

The Union has persuasively contended that the bargaining which produced Section 9.02 did not specifically address the impact of the reference to "hired at the start rate" on newly hired or rehired employes. Thus, the Union's contention that this bargaining history is insufficient to grant the County the right it asserts here is persuasive. This contention is not, however, sufficient to establish that all evidence of bargaining history must be disregarded. Initially, it must be noted that Section 9.02, formerly stated as Section 9.07, was bargained to apply to "New employes" generally. The bargaining which produced the reference to "hired at the start rate" cannot alter that fact. Beyond this, the bargaining which did create the "hired at the start rate" did, at a minimum, acknowledge the practice of advance placement of transfers. If it did not, there would have been no reason to insert the reference to "hired at the start rate". This practice and the bargaining which acknowledged it undercuts the persuasive force of the Union's reading of the salary schedule.

More significantly here, it is apparent that the County has claimed the authority to make advance placement of any new employe, whether a transfer or not, since before its first contract with the Union. At no point in time has the County abandoned this position. At a minimum, this states the context against which bargaining has occurred. Beyond this, what evidence there is regarding other units indicates that the County has, on a County-wide basis, asserted a right to advance placement. While this does not establish a practice, it does underscore that the context the parties have bargained in has consistently been one in which the County, by its conduct, has asserted a right to place new employes above the start rate. At no time have the parties bargained to limit advance placement authority in the collective bargaining agreement. This is not to say the County Ordinances apply, absent bargaining, to Courthouse unit employes. This issue is not posed on this record. It does, however, demonstrate that the County has never bargained away the right it seeks to assert here. The Union is, then, persuasive in its contention that the County did not specifically state, in the bargaining which created what presently appears as Section 9.02, that the reference to "hired at the start rate" would govern the advance placement of newly hired or rehired employes. This argument undercuts the significance of that aspect of bargaining history, but is tempered by the fact that the result the Union seeks in this arbitration has not been won in negotiation.

In sum, the reference in Section 9.02 to "New employees" is broad enough, standing alone, to apply to any employe who is new to the Courthouse unit. There are no agreement provisions which can persuasively be read to distinguish employes transferring into the Courthouse unit from newly hired or rehired employes. Thus, Section 9.02 applies to all employes new to the Courthouse unit. The reference, in Section 9.02, to "hired at the start rate" both implies that new employes can be placed at other than the start rate, and acknowledges the practice of advance placement of employes transferring into the Courthouse unit. Section 9.02, then, applies to new employes generally, and the practice it acknowledges establishes that the salary schedule structure does not preclude placing certain new employes above the start rate. Thus, the County's advance placement of Burns did not violate the parties' labor agreement.

This has been a closely disputed, and well-argued case. It is, then, appropriate to touch upon certain of the arguments posed by the parties not addressed above. The Union's use of 53rd Judicial District Court, 94 LA 1102 (Borland, 1990), was appropriate. The case is not, however, useful here, since it was decided "in the absence of any bargaining history or past

practice". 4/ Each factor, though troublesome, is significant here.

Each party has cited numerous other contract provisions to support its view of Section 9.02. To construe any more contract provisions than necessary risks causing, not resolving, contractual disputes. I will note, however, that I can see no problem caused in the application of Section 7.03 by construing the reference in Section 9.02 to "New employees" to apply generally to employes new to the Courthouse unit. Section 7.03 is not, however, directly posed on this record, and I will not attempt to interpret it.

The County has contended its Ordinances apply to this fact situation if the collective bargaining agreement is silent on the point. As noted above, the parties' agreement does apply to the issues posed here. There is, then, no basis to speculate on what the County's Ordinances may or may not apply to.

That the contract governs the issue posed here precludes any need to address the scope of the County's rule-making authority under Section 2.04. Similarly, there is no need to speculate on whether the facts posed here impact "the public health, safety or general welfare" under Section 2.03.

The Union has forcefully argued that Section 9.02 cannot persuasively be read to create a class of newly hired employes who start at the start rate and a class which does not. This assertion has considerable force based on the language of Section 9.02 standing alone. That language does not, however, stand alone. The parties have, by practice, established those classes by permitting advance placement of employes transferring into the Courthouse unit. The issue fundamental to the interpretation of Section 9.02 is whether those employes are to be considered "New employees". As stated above, the record, in my opinion, dictates that they must be considered "New employees".

While the grievance has been posed as a policy grievance, the decision does not turn on employment policy. The Union has, paradoxically, been put in the position of arguing for a lower pay rate for a unit employe. This role reversal reflects the fundamental difficulty of the policy mix posed here. Any exception from the salary schedule poses difficulty for any existing employe who cannot move above the stated rates however meritorious their

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4/ Ibid., at 1106-1107.

service may be. The presence of a salary schedule guards against favoritism, but can cut against merit. This is a fundamental difficulty faced by bargaining parties. This fundamental issue is not posed for arbitration, however. The issue here is whether the agreement permits a limited exception to the initial salary schedule placement of a new employe. The tools for addressing that issue are not employment policy based. Rather, they are arbitration policy based. This means past practice, bargaining history, and other standard guides have been employed to determine the parties' intent. The conclusion offered here turns not on what sound employment policy may be, but on what the parties' agreement permits.

The Union has contended that granting the County's interpretation will eviscerate the contract. This grievance has posed whether the County can place a newly hired employe above the start rate. The award entered below affirms that Section 9.02, viewed in light of relevant past practice and bargaining history, provided that authority as applied to Burns. This does not, however, say anything beyond the facts litigated here. The County has established that Burns could not have been hired without affording her the placement questioned here. At most, this establishes that an advance placement can be effected where business necessity can be demonstrated. Nothing said above establishes a unilateral right on the County's part to subvert the negotiated salary schedule. This grievance has been litigated by the County as a reasonable application of a limited right. Nothing said in this decision can be taken beyond that point.

AWARD

Walworth County did not violate the collective bargaining agreement when it hired new employe, Joanne Burns, at a rate of pay above the start rate of pay provided in Pay Range 10.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 23rd day of March, 1993.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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