

excluding elected officials, supervisory, managerial, confidential, seasonal, temporary, casual and all other employees of the County.

ARTICLE 3 - MANAGEMENT RIGHTS

SECTION 1. The County possesses the sole right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the provisions of this contract. These rights, which are normally exercised by the Employer, include, but are not limited to, the following:

. . .

ARTICLE 5 - GRIEVANCE PROCEDURE

SECTION 1. A grievance is defined as any difference or dispute regarding the interpretation, application or enforcement of the terms of this agreement . . .

SECTION 2. The failure of the party to appeal a grievance in a timely fashion as provided herein shall be deemed a settlement and waiver of the grievance . . . However, if it is impossible to comply with the time limit specified in the procedure because of work schedules, illness, vacation, etc., these limits may be extended by mutual consent in writing.

. . .

SECTION 4 - Steps in Procedure

Step 1. Any employee who has a grievance shall first discuss the matter with the Union Steward. The employee, individually or with a Union representative, shall present and discuss the written grievance with his/her non-Union Supervisor within ten (10) days after the employee knew or should have known the cause of the grievance . . .

ARTICLE 8 - JOB POSTING

SECTION 1. When it becomes necessary to fill vacancies or new positions within the bargaining unit, the Employer will post such vacancies or new positions for five (5) working days, during which time interested employees may apply by signing the posting.

. . .
Posted positions shall be awarded as promptly as possible following a posting to be qualified applicant. Seniority and qualifications will be considered. When the qualifications of two or more bargaining unit employees are relatively equal, seniority shall be the determining factor. Regular employee applicants within the bargaining unit shall be considered first in filling vacancies for new positions . . .

BACKGROUND

The parties stipulated, at hearing, that there is no claim that the Register in Probate is a managerial, supervisory or confidential employe.

The parties also submitted the following Stipulation of Facts:

1. On January 23, 1991, Judge Robert W. Radcliffe, Jackson County Circuit Court Judge entered an order appointing the Jackson County Register in Probate/Probate Registrar (Order Attached). At the time of this order, the position of Register in Probate/Probate Registrar was considered a bargaining unit position.
2. This order was filed in the Personnel Office and was placed in the personnel file of the individual holding the position on February 1, 1991. This order was also immediately filed in the office of the Jackson County Clerk.
3. Pursuant to a request dated February 4, 1991, from the individual holding the position of Register in Probate/Probate Registrar at that time, union dues have not been withheld from

the Register's paycheck since February 4, 1991.

4. By letter from the Personnel Director dated September 3, 1991, the union was notified that the Jackson County Personnel Committee had established a non-union wage schedule for the Register's position.
5. By letter dated October 21, 1991, the individual holding the position of Register in Probate/Probate Registrar at the time the order referred to in #1 was signed, resigned her position effective November 15, 1991.
6. To fill this vacancy, Circuit Court Judge Robert W. Radcliffe appointed a new Register in Probate/Probate Registrar. The start date of the new employee was November 8, 1991. The filling of this position was done by appointment and the position was not posted.
7. The bargaining unit filed a grievance on the failure to post the position on November 1, 1991.
8. By letter dated November 13, 1991, the parties agreed to waive all timelines provided by the collective bargaining agreement from the date of the grievance.
9. The duties of the Register in Probate/Probate Registrar are provided in the attached job description.

The Order referred to in Paragraph 1 of the Stipulated Facts reads thus:

The Circuit Court for Jackson County, Wisconsin, the Honorable Robert W. Radcliffe, Circuit Judge, pursuant to the inherent powers and authority vested in the Circuit Court by Section 2 of Article VII of the Constitution of the State of Wisconsin and pursuant to the provision of Section 851.71 Wisconsin Statutes, does hereby appoint R. Lynne Bruley, Register in Probate-Probate Registrar for Jackson County, Wisconsin.

It is ordered that the Register in Probate-Probate Registrar shall serve at the pleasure of the Court until discharged as provided by law.

It is further ordered that the Register in Probate-Probate Registrar shall perform the following duties and have the following responsibilities: assisting the court in administration of formal probate procedures, conducting informal probate procedures, performing administrative and clerical duties relating to probate procedures, being responsible for the origination, preparation and implementation of the budget for the office of the Register in Probate-Probate Judge; maintaining records and files in the office of the Circuit Court as prescribed in Section 851.72 Wisconsin Statutes; the Register in Probate shall have the powers, duties and responsibilities as prescribed in Section 851.73 Wisconsin Statutes; and the Probate Registrar shall have the powers, duties and responsibilities as prescribed in Section 865.05 and Section 865.07 Wisconsin Statutes; the Register in Probate-Probate Registrar shall assist with formulating, determining and implementing policy as it pertains to the Register in Probate-Probate Registrar's office.

It is further ordered that the Register in Probate-Probate Registrar for Jackson County, Wisconsin, shall not be a member of the municipal employee's union.

The "attached job description" referred to in Paragraph 9 of the Stipulated Facts reads thus:

REGISTER IN PROBATE/PROBATE REGISTRAR

GENERAL STATEMENT OF DUTIES:

Assists the court in administration of formal probate procedures and conducts informal probate procedures. This is a paraprofessional position performing

administrative and clerical duties relating to probate procedures. The work is performed under the general supervision of the circuit court judge and in accordance with state laws and county regulations.

EXAMPLE OF WORK: (Illustrative Only)

- Schedules hearings, types and sends out notices and court calendars, and grants adjournment and time to pay on traffic fines in accordance with the judge's policies;
- Prepares and certifies documents concerning the administration of estates, probate wills, guardianship proceedings and conservatorship proceedings;
- Prepares probate calendar and maintains a record of all proceedings;
- Directs processing and approves all informal probate cases;
- Maintains records and prepares reports related to Probate Court matters;
- Serves the public on probate questions, furnishing information, assisting in procedures and filling requests as necessary;
- Examines wills and other documents for compliance with statutory requirements;
- Checks accounts filed by trustees, conservators and guardians;
- Collects money for filing fees, certified copies and other functions for the circuit court judge as needed;
- Enter all papers filed, hearings scheduled etc., on computer;
- Does related work as required.

QUALIFICATIONS

- Knowledge of office practices and procedures, terminology and equipment;
- Knowledge of basic bookkeeping and recordkeeping methods;
- Ability to type accurately;
- Ability to read and apply statutes and regulations pertaining to probate procedures.

TRAINING AND EXPERIENCE:

Graduation from high school or equivalent and some office experience, preferably with a legal office; post-high school course work in joint tenancies, estate tax or related fields and legal secretarial or paralegal experience are desirable; or any combination of training which provides the required knowledge, skills and abilities. Computer experience including experience with Wordperfect and Windows is essential.

THE PARTIES' POSITIONS

The Union's Brief

The Union waived the filing of a brief.

The County's Brief

The County initially argues that the grievance "was not filed in a timely manner as dictated by the collective bargaining agreement, and thus must be denied." More specifically, the County contends that Step 1 of Article 5, Section 4 requires that the grievance be filed within ten days after the employe knew or should have known the cause of the grievance. This requirement, the County concludes, "clearly has not been followed in the instant case." Noting that the Register in Probate/Probate Registrar was appointed by order filed with the County Clerk on January 24, 1991, the County asserts that "(a)s of the moment of

the filing in the clerk's office, this order became a matter of public record" which put the Union "on constructive notice of this action as of the moment it was filed." Even if this constructive notice is not accepted the County contends that "the Union did receive actual notice of the change in status of the position on February 4, 1991" when the employe appointed to the position requested that union dues not be withheld from her check. That the Union received no dues from that date, and that the withholding was effected through an employe who was an officer of the Union establishes, according to the County, that the Union had actual notice.

If the grievance is found timely, the County contends that it lacks merit. More specifically, the County argues that "(a)ccording to the current state of the law, the order of the Circuit Court Judge . . . should stand." Noting that the grievance originally challenged the failure to post the position, that "(t)he parties agreed to hold that grievance in abeyance pending resolution of the Iowa County case", and that the decision in that case led the Union to drop its challenge of the hiring process, the County concludes that the sole issue remaining is "the action of the Circuit Court Judge in removing the position from the bargaining unit." This issue was not, the County notes, addressed by the Court in Iowa County v. Iowa County Courthouse/Social Services Employees, Local 413, AFSCME, AFL-CIO, 166 Wis.2d 614, 480 N.W.2d 499 (1992). The County contends, however, that Manitowoc County v. Local 986A, 170 Wis.2d 692, 489 N.W.2d 722 (Ct. App., 1992) fully addresses this point, and affirms the power of the Circuit Judge to remove the position from the bargaining unit. This case should, the County concludes, govern this grievance since "(a)n arbitrator has no authority to overrule the decision handed down in a precedent setting, binding court case that is factually on point."

The County's next major line of argument is that the grievance cannot be made into "a unit clarification hearing" since the "parties have not agreed to allow the unit clarification standards to be applied to this case, nor was there any testimony submitted as to the specific duties of the position." That the Manitowoc County court did not go into unit clarification issues underscores the validity of this point, according to the County.

The County concludes that the grievance should be denied, either on the untimeliness of its filing, or on its merits.

DISCUSSION

The issue on the merits is stipulated, but the County has made a threshold point concerning the filing of the grievance. This issue was not apparent at the time of hearing, but has not been objected to. Beyond this, Paragraph 8 of the Stipulation of Facts covers, as the County has asserted, only the steps following the filing of the grievance. It is necessary, then, to address the County's objection to the timeliness of the filing of the grievance.

Article 5, Section 4, Step 1 requires that a grievance be filed "within ten (10) days after the employee knew or should have known the cause of the grievance." Section 2 of Article 5 provides the sanction for untimeliness, labelling a failure to "file . . . in a timely fashion" as "a settlement and waiver of the grievance."

The grievance posed here is a class action. As such, it does not fit well into the language of Step 1, which refers to "(a)ny employee". The agreement does not, however, exempt the Union as a body or classes of employees from the requirements of Step 1, and there is no persuasive reason posed here to imply such an exemption. The County correctly notes that the January 24, 1991, order ostensibly removed the Register in Probate/Probate Registrar from the unit. Whether or not the filing of this order with the County Clerk constitutes constructive notice, it is apparent from Paragraph 3 of the Stipulation of Facts that the Union was denied dues for the position since February 4, 1991. That the Union knew or should have known of this denial of dues stands un rebutted. While imprecision on the date the Union knew or should have known of this action must be acknowledged, that imprecision offers no support for ignoring the months which intervened between the Judges' order and the filing of the grievance.

The November 1, 1991, grievance was, then, not filed within ten days of the date the Union knew or should have known of the removal of the position from the bargaining unit. The passage of time could, perhaps, be ignored if the removal of the position is viewed as a continuing wrong, which could be grieved at any point in which dues were not deducted for the position, or when the position was filled without regard to the contractual posting procedure. On such a theory each failure to make the deduction, or to fill the position without posting would constitute "a current occurrence of a repeated or continuous violation". 1/ Continuing violation theories of timeliness are not uncommon in

1/ Sears, Roebuck & Company, 39 LA 567, 570 (Gillingham, 1962).

arbitration, 2/ and can be persuasive.

Application of a continuing violation view of timeliness is not, however, persuasive on this record. A continuing violation theory may be grounded on the assumption that the underlying dispute, if not resolved, can fester and adversely impact the work environment. 3/ There is also a strand of arbitral thought which seeks to avoid forfeitures which a waiver of a grievance can effect. 4/ Beyond this, there appears to be an arbitral reluctance to condone a contract breach. 5/

None of these policies are implicated on this record. The principle that arbitration should seek to avoid forfeitures is, if persuasive, persuasive only if the contract does not itself provide the forfeiture. As Arbitrator Kornblum put the point: If therefore, the protagonist of a grievance advances a tenable ground for permitting it to be heard on the merits without doing disservice to the contract that argument should be given every favorable consideration. 6/

In this case, Section 2 of Article 5 establishes the waiver of the grievance. Addressing the merits of the grievance, at a minimum, strains that provision. The strain could perhaps be overlooked if other considerations supported addressing the grievance. In this case, such considerations are not present.

Initially, it must be noted that the issue posed here is not one which is forfeited if the grievance is not addressed on its

2/ See, for example, the cases cited in Fairweather's Practice and Procedure in Labor Arbitration, (Third Edition, BNA, 1991) at 86; and How Arbitration Works, Elkouri & Elkouri (Fourth Edition, BNA, 1989) at 197.

3/ See Ibid. at 191-192.

4/ See Labor Arbitration Law and Practice, Nolan (West, 1979) at 169-170; and see, for example, Lycoming Division, Avco Corporation, 43 LA 765 (Kornblum, 1964).

5/ See, for example, Lockheed Missiles and Space Company, 61 LA 90, (Eaton, 1972).

6/ 43 LA at 767.

merits. The propriety of including the position of Register in Probate/Probate Registrar in the bargaining unit can be asserted by a unit clarification petition filed with the Commission. Such an action arguably does not pose the contractual provisions which limit arbitral authority here. Beyond this, the grievance does not pose a contractual violation which will be condoned if the merits of the grievance are not addressed. The County is the party to the labor agreement at issue here, and the underlying breach of the contract is that of a Circuit Judge and the Chief Judge of the circuit, both of whom have asserted their freedom from the County's obligation. Thus, if an issue which will adversely impact the work environment is posed by the grievance, that issue has not been posed by the party over whom the agreement affords an arbitrator any power over. That the County's authority over the Judge, or the Judge's authority over the County may be posed by the grievance raises issues which are, if contractually rooted, not necessarily amenable to a contractual resolution.

The final point poses the most significant basis for not addressing the merits of the grievance. The issue the grievance poses is ultimately legal in nature. There is, presumably, no basis in the recognition clause to exclude the position of Register in Probate/Probate Registrar from the unit. The January 24, 1991, order acknowledges this by asserting constitutional and statutory provisions which, in effect, void the labor agreement. Legal issues do arise, and can be addressed in arbitration. 7/ I can see, however, no persuasive basis for addressing legal issues in arbitration unless the parties' agreement specifically incorporates external law, or the parties stipulate that external law should be applied in the interpretation of their agreement. Arbitration is a dispute resolution process. In the absence of a contractual

7/ See, generally, How Arbitration Works, at Chapter 10.

provision or a specific stipulation establishing mutual agreement to incorporate external law into the agreement, arbitral forays into the law are as likely to provoke as to resolve disputes. In the absence of mutual agreement, there can be no assurance that an arbitrator's application of the law will be accepted by the parties. The parties entered into such a stipulation in the Crew Supervisor grievance (Case 92, No. 48157, MA-7526), but have not done so here. In the absence of that stipulation, my opinion on the viability of the Judges' order is gratuitous at best.

In sum, the grievance was not filed within ten days of the date the Union "knew or should have known the cause of the grievance" as required by Step 1 of Article 5, Section 4. The grievance has been, therefore, waived under the provisions of Article 5, Section 2. There is no persuasive basis to consider the underlying cause of the grievance a continuing violation of the agreement. Doing so strains the language of the provisions cited above, and will not resolve the underlying dispute, which is legal, not contractual, in nature.

AWARD

The grievance was not timely filed, as required by Article 5, Section 4, Step 1, and has thus been waived under the provisions of Article 5, Section 2. The Arbitrator is, therefore, without jurisdiction to determine if the Jackson County Register in Probate is appropriately in the bargaining unit.

Dated at Madison, Wisconsin, this 13th day of April, 1993.

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