

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
LaCROSSE COUNTY CERTAIN EMPLOYEES,	:	Case 137
LOCAL 2484, AFSCME, AFL-CIO	:	No. 48876
	:	MA-7745
and	:	
	:	
LaCROSSE COUNTY	:	
	:	

Appearances:

Mr. Daniel Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Robert Taunt, County Personnel Director, appearing on behalf of the County.

ARBITRATION AWARD

The above captioned parties, hereinafter the Union and the County or Employer, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to hear the instant grievance. A hearing, which was not transcribed, was held on April 21, 1993 at LaCrosse, Wisconsin. At the hearing the parties waived the arbitration board provision (Sec. 5.03.1) and the arbitration decision time limits provision (Sec. 5.03.3). Afterwards, the parties filed briefs which were received by July 7, 1993. Based on the entire record, the undersigned issues the following Award.

ISSUES

At the commencement of the hearing each side gave its version of the issues involved here. The Union stated the issue as:

Did the County violate the collective bargaining agreement by requiring Laura Willer to accept a non-certified Youth Care Worker position rather than a certified Youth Care Worker position? If so, what is the appropriate remedy?

While the County stated the issues as:

1. Is the grievance timely?
2. Is the remedy sought arbitrable?

3. Does Laura Willer have access to the position as posted?
4. Can Laura Willer accept a position not offered to her?
5. Is non-certified Youth Care Worker as set forth in the contract a position or a status?

Since there was no stipulation on the issues to be decided, the parties asked that the undersigned frame them in the Award. From a review of the record, the opening statements at hearing and the briefs, the undersigned has framed the issues as follows:

1. Is the grievance procedurally arbitrable?
2. Is the Union's proposed remedy substantively arbitrable?
3. Did the County violate the collective bargaining agreement by requiring Laura Willer to accept a non-certified Youth Care Worker position rather than a certified Youth Care Worker position? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1992-93 collective bargaining agreement contains the following pertinent provisions:

ARTICLE V

GRIEVANCE PROCEDURE AND ARBITRATION

. . .

- 5.02 In the event of any disagreement concerning the meaning or application of any provision of this Agreement, such disagreement shall be resolved in the manner hereinafter set forth; however, no matter not involving the interpretation or application of this Agreement shall be subject to these procedures. It is further provided that any grievance must be timely filed within twenty (20) workdays of known occurrence in order to be deemed a valid grievance.
- 5.03 Matters not involving the interpretation

or application of the terms of this Agreement may be processed through Step 3 of this paragraph (5.03). The Union Business Representative may be present at any step in the grievance procedure.

Step 1. The employee and the Union Steward shall attempt to settle the issue with the immediate Supervisor. If no satisfactory settlement is reached within three (3) working days, then;

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

. . .

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

. . .

ARTICLE IX

JOB POSTING

. . .

9.02 The job requirements, qualifications and rate of pay shall be part of the posting and interested applicants may apply in writing for said position to the County Personnel Department stating therein their qualifications for the position. The Union's presiding officer shall be provided with the name(s) of all bidders for any posted vacancy covered by this Agreement.

9.03 In filling a declared vacancy, the employee with the greatest seniority in the department, providing they have the skills, abilities, and efficiencies, Personnel Administrative Code or State Certification, whichever is applicable to efficiently perform the necessary job duties will be given first consideration, provided however, if an employee with substantially higher unit wide seniority, substantially being more than two (2) years seniority, should apply and has equal skills, abilities and efficiencies, and if necessary, state certification, that person shall have priority consideration. In addition, employees who are not working due to disability, vacation, or leave not exceeding six (6) months, shall be notified of said vacancy in writing to the address on record in the Personnel Department. If the absent employee(s) does not respond within five (5) workdays of said notice, it shall be deemed they have no interest in applying.

. . .

ARTICLE XXV

. . .

A-25.05 CLASSIFICATIONS AND PAY GRADES

Youth Care Classifications Effective January 5, 1992

		Step 2	Step 3	Step 4	
		After 6 Mos.	After 18 Mos.	After	30
Mos					
Pay	Step 1	<u>Or 975 Hrs.</u>	<u>Or 2925 Hrs.</u>	<u>Or</u>	
<u>4875 Hrs.</u>					

<u>Grade</u>	<u>Classification</u>	<u>Minimum</u>	<u>(All Hours Are Regular Hours)</u>		
YC-01	Youth Care Worker	8.1914	8.3891	8.5350	
9.0900					
	Part Time	7.6794	7.8648	8.0016	8.5219
YC-02	Youth Care Worker	7.7129	7.9001	8.0458	
8.3675					
	Non-Certified				
	Part Time	7.2308	7.4063	7.5429	7.8445
			. . .		

LETTER OF UNDERSTANDING

. . .

Youth Care Worker (Non-Certified) shall be the designation for those Youth Care Workers who do not receive the training required by the State of Wisconsin in order to work in the Secure Detention Facility. When positions are posted, they will be designated Certified or Non-Certified. There will be a maximum of six Non-Certified positions in the Juvenile Detention Facility, provided that there shall be at least one certified Youth Care Worker per shift scheduled in the Non-Secure Shelter. There shall be one seniority list for Certified and Non-Certified combined.

Implementation of the Non-Certified worker category shall be by vacancies occurring on or after 1/1/92. Certified Youth Care Workers shall be allowed to bid on vacancies as provided in Section 9.04 and the last opening may be declared by the County to be Non-Certified. Shifts will be filled by seniority in a "fill-from-the-top-down" system, meaning Non-Certified must be hired on the shift vacant after more senior workers have bid.

FACTS

LaCrosse County has a Juvenile Detention Facility that operates seven days a week, twenty-four hours a day. This facility consists of both a Secure Detention Facility and a separate Non-Secure Facility. State regulations covering Juvenile Detention Facilities mandate that the staff who work in a Secure

Detention Facility be state certified through the Jail Officer Certification process. Workers in the Non-Secure Facility do not need to be state certified. The state grants certified status to a person after they complete a 96 hour training course.

Prior to January, 1992, there was just one classification/pay grade for Youth Care Workers at the Juvenile Detention Facility. That classification/pay grade was certified Youth Care Worker. All Youth Care Workers at the Juvenile Detention Facility were required, as a condition of their employment, to be state certified. In negotiations for a 1992-93 agreement, the Employer proposed creating a second classification/pay grade for workers at the Juvenile Detention Facility. This classification/pay grade was called non-certified Youth Care Worker and was to be paid less than the certified Youth Care Workers. As the name implies, non-certified Youth Care Workers would not be required, as a condition of their employment, to be state certified. This new classification was ultimately incorporated into the parties' 1992-93 labor agreement. As a result, that contract contains two classifications/pay grades for workers at the Juvenile Detention Facility: certified Youth Care Worker and non-certified Youth Care Worker. The latter is paid less per hour than the former. Other provisions relating to the non-certified Youth Care Worker are spelled out in a contractual Letter of Understanding.

Sometime after the 1992-93 contract was signed, a first shift Youth Care Worker quit, thereby creating a first shift vacancy. This full-time vacancy was filled by Angie Brown, a second shift certified Youth Care Worker. Brown's former position on the second shift was filled, in turn, by Sue Stalsbury, a third shift certified Youth Care Worker. The Employer then posted Stalsbury's former full-time position on the third shift as a non-certified Youth Care Worker vacancy. This was the first time a non-certified Youth Care Worker position was posted. The posting for the non-certified Youth Care Worker position mistakenly listed a certified Youth Care Worker salary.

Laura Willer, a part-time certified Youth Care Worker then working on the third shift, was the only bidder for the posted full-time non-certified vacancy. Willer was initially found to be ineligible for the vacancy by the (County) Personnel Department on the grounds she was still on probation as a new employe. However, since there were no other bidders for the vacancy, Juvenile Detention Facility Supervisor Ron Allers offered Willer the position anyway. Allers communicated his offer to Willer in writing on April 23, 1992. When he did so, Allers indicated that the pay rate for the vacant position would be at the non-certified Youth Care Worker rate, rather than the certified rate that had been listed in the original posting. Willer responded in writing that same day: "I accept the position as posted. Thank you." Willer started in the full-time non-certified Youth Care Worker position on May 10, 1992. Glenn Schmoother, another third shift

worker, later filled Willer's former part-time position on the third shift.

On May 29, 1992, Willer received her first paycheck wherein she was paid at the non-certified Youth Care Worker rate. On either June 4 or 5, 1992, Willer complained to Allers that she should be paid at the certified rate, not the non-certified rate.

When the matter was not resolved, Willer filed a grievance on June 16, 1992. The grievance was not resolved and was ultimately appealed to arbitration.

As of the time of the hearing, Willer was the only Youth Care Worker filling a non-certified position. Thus, she is the only Youth Care Worker being paid at the non-certified rate. All other Youth Care Workers at the Juvenile Detention Facility are paid at the certified rate.

POSITIONS OF THE PARTIES

Union's Position

The Union's position is that the Employer's procedural and substantive objections to the grievance are without merit.

Responding to the Employer's timeliness argument, the Union initially challenges the Employer's interpretation of the word "workdays" as the term is used in Section 5.02. According to the Union this term refers to five days per week, not seven days as the Employer argues. Next, the Union asserted at the hearing that the grievance arose on the date Willer received her first paycheck (i.e., May 29, 1992). Counting from that date, the Union contended the grievance was filed within the 20 day timeframe mandated by Section 5.02. In their brief the Union submits that an alternate date for determining timeliness (other than May 29) is the date Willer and a steward met with departmental supervisors to discuss the matter (i.e., June 4 or 5, 1992). Whichever date is used, the Union contends the grievance was timely filed.

Next, the Union addresses the Employer's argument that the requested remedy cannot be granted due to the language found in Section 5.03.2. The Union believes the Employer's reliance on that language is misplaced on the grounds that it applies to a different situation than exists here. The Union argues it is not seeking to have the arbitrator amend the existing allocation of classifications to a pay grade. It asserts that has already been done. Instead, the Union submits that the remedy it seeks here, which the arbitrator is empowered to grant, is to have the grievant placed in the appropriate position. According to the Union the appropriate position is the certified Youth Care Worker classification rather than the non-certified Youth Care Worker classification.

The Union responds to the Employer's other contentions as follows. First, with regard to the Employer's argument that Willer did not have access to the posted position due to her probationary status, the Union contends that probationary employes, such as Willer, have a contractual right to bid because there is no exclusion of probationary employes from the bid process. In the alternative, the Union notes that Willer was awarded the vacancy anyway despite her being on probationary status. Second, it asserts that the Employer's argument that Willer accepted a position which was not offered to her begs the question. In its view Allers could not offer, and Willer could not accept, a position which violated the contract. It asserts that is what happened here. Third, it is the Union's view that it does not matter whether the non-certified Youth Care Worker is a position or a status.

With regard to the merits, the Union contends that the contract language applicable here is found in the Letter of Understanding, particularly the last two paragraphs. The Union reads that language as providing that once an employe is certified they will not lose their certified status. It notes in this regard that Brown, Stalsbury and Schmoocher were all certified workers who filled vacancies here and retained their certified status. According to the Union Willer should have been treated likewise and retained her certified status. Additionally, the Union acknowledges that the "last opening" can be declared to be non-certified, but it argues that the "last opening" in this situation was not the full-time position which Stalsbury vacated and Willer filled, but rather was the part-time position which Willer vacated and Schmoocher filled. The Union argues that the Employer's distinction between filling full-time and part-time positions is not contractually based.

In summary then, the Union argues that the County violated the labor agreement when it did not allow Willer to keep her certified status when she changed positions. In order to remedy this alleged contractual breach, the Union asks the arbitrator to uphold the grievance, award Willer a certified position and make her whole.

Employer's Position

The Employer's position is that the grievance should be denied on both procedural and substantive grounds.

With regard to the former, the Employer initially contends that the grievance was not timely filed. In notes in this regard that Section 5.02 provides that a grievance is to be filed within 20 workdays of the "known occurrence". It submits that did not happen here. According to the Employer the event that triggered the time limitation was either the date Willer accepted the position (which was April 23, 1992) or the date she started

working in the new position (which was May 10, 1992). Relying on these two dates, the Employer contends that the grievance filed June 16, 1992 was filed 37 or 54 days, respectively, after the "known occurrence". For counting purposes, the Employer counts every day of the week as a "workday". Its rationale for doing so is that the Juvenile Detention Facility operates seven days a week, not five days a week as other units of County government. Finally, the Employer characterizes the Union's argument that the grievance arose on May 29, 1992 (when Willer received her first paycheck) as a sham argument. It therefore contends that the grievance was untimely and should be denied on that basis. If the arbitrator finds otherwise, the Employer argues that any remedy should be limited to 20 workdays before the grievance was filed.

Next, the Employer contends the remedy sought by the Union is not substantively arbitrable. The Employer cites 5.03.2 to support this proposition. That section provides that "questions affecting the allocation of classifications to a pay grade" are not arbitrable. According to the Employer the Union's proposed remedy here seeks to do just that by upgrading the grievant's pay grade from the non-certified pay grade to a higher pay grade (i.e., the certified Youth Care Worker pay grade). It therefore submits that the requested remedy is not under the arbitrator's purview.

With respect to the merits, the Employer makes the following arguments. First, it contends that Willer did not have access to the position as posted. In support thereof, it notes that Willer was a probationary employe at the time she bid on the posted position. According to the Employer, it has a long-standing practice of not allowing probationary employes to bid on jobs. The Employer reasons that since Willer did not have access to the bidding/posting procedure, she could not accept the position "as posted". Additionally, it is the Employer's view that any irregularities on the posting have no bearing on the position which Willer was awarded. Second, the Employer notes that Willer accepted a position which was not offered to her. By this, the Employer refers to the way Willer accepted Allers' offer of employment. The Employer submits that if Willer intended her written response to be a counter-offer to Allers for a certified Youth Care Worker position, it was not communicated as such to him. Third, the Employer contends that the designation of a non-certified Youth Care Worker is a position, and not a status. The Employer submits that since it is a position, it can be filled by over-qualified individuals as happened here. The County's view is that it has consistently administered the provisions of the contract for certified and non-certified workers such that there was no unfairness nor contract violation in promoting Willer from a certified position to a non-certified position. The Employer notes in this regard that Willer suffered no loss in pay or

benefits by moving into a non-certified position.

In summary then, the Employer argues that the grievance should not be sustained. It contends that if the grievance is sustained, this will create new contractual requirements which do not currently exist. It therefore requests that the grievance be denied.

DISCUSSION

Procedural Arbitrability

Since the Employer contends that the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance is procedurally arbitrable.

Section 5.02 of the contractual grievance procedure establishes a timetable for filing grievances. Specifically, it provides that "any grievance must be . . . filed within twenty (20) workdays of known occurrence." This of course means that grievances must be filed within twenty (20) workdays of their occurrence in order to be timely.

The question here is when the instant grievance arose. The facts pertinent in making this call are as follows. Allers offered Willer the position on April 23 and she accepted it that same day. She started in that position on May 10. On May 29, Willer received her first paycheck for working in that position. On either June 4 or 5 she complained to Allers about her pay and they attempted to resolve her complaint. A written grievance was filed June 16. The Employer contends the grievance arose on either the date Willer accepted the position or the date she started in that position (i.e., April 23 or May 10, respectively).

The Union asserts that the grievance arose on either the date Willer received her first paycheck or the date she and a steward met with Allers to discuss the matter (i.e., May 29 or June 4/5, respectively).

In situations such as this where a party announces its intention to do a given act (in this case Allers telling Willer she was going to be paid at the non-certified worker rate), but the act is not culminated until a later date (in this case Willer receiving her first paycheck wherein she was actually paid at the non-certified worker rate), arbitrators have oftentimes held that the occurrence for purposes of applying contractual time limits is the later date. 1/ In accordance with this view, the undersigned concludes that the occurrence for purposes of applying the contractual time limits here is not when Willer accepted the position or when she actually started in that job. This is because it was still possible after those dates that the Employer could have changed its position concerning her rate of pay. That being so, the activity complained of (i.e., the rate of pay Willer received) did not ripen or come to fruition until she received her first paycheck.

1/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, p. 196.

Based on the foregoing, it is held that the occurrence which triggered the running of the contractual time limitation was when Willer received her paycheck on May 29. Pursuant to the contractual time limitation, a grievance challenging her rate of pay had to be filed twenty (20) "workdays" after that date. The instant grievance, which was filed June 16, was within that time frame whether a five day or seven day work week is used. 2/ Accordingly, then, the instant grievance is found to be procedurally arbitrable.

Substantive Arbitrability

Next, the Employer contends that the remedy sought by the Union herein is not substantively arbitrable because of the language found in Section 5.03.2. That section provides, in pertinent part, that "no questions affecting the allocation of classifications to a pay grade will be considered arbitrable." According to the Employer, the Union's proposed remedy here seeks to do just that, so it is not within the arbitrator's purview. I disagree. In my view the language just cited precludes an arbitrator from deciding whether an entire classification is assigned to the proper pay grade. For example, at present the non-certified Youth Care Worker classification is assigned to pay grade YC-02. If the Union's proposed remedy in this case was to move that entire classification to a different or higher pay grade, such as YC-01, I would agree that the cited language would be applicable. However, such is not the case. Specifically, the Union is not seeking to have an entire classification, namely the entire non-certified Youth Care Worker classification, reallocated or moved to a different or higher pay grade, namely the certified Youth Care Worker pay grade. Instead, the Union's proposed remedy is limited to just one person, namely the grievant. While the grievant is admittedly the only person in the non-certified classification at present, the undersigned believes that the important distinction here is that the Union's proposed remedy does not seek to reallocate the entire non-certified Youth Care Worker classification to the certified Youth Care Worker pay grade. As a result, I find that the Union's proposed remedy here is not covered by Section 5.03.2, so that section is inapplicable.

It therefore follows then that the remedy sought by the Union here is substantively arbitrable.

Merits

2/ In light of this holding, I believe it is unnecessary to address the question of whether the word "workdays" in Section 5.02 refers to a five-day or seven-day work week. In my view, that question need not be resolved here. Consequently, no additional comments will be made concerning same.

Having so found, attention is now turned to the merits. What happened here was that the Employer created a non-certified Youth Care Worker position. This was the first time the Employer had done so. Previously, all vacancies had been certified. This non-certified position was created after several vacant slots were filled in what the contract characterizes as a "fill-from-the-top down" system. This is how it worked: a first-shift full-time Youth Care Worker quit, thereby leaving a vacancy on that shift. A worker on the second shift filled that vacancy. This created a full-time vacancy on the second shift which was filled, in turn, by a Youth Care Worker from the third shift. This movement created a vacancy on the third shift. The Employer decided that this third shift full-time vacancy would be a non-certified vacancy and it posted it as such. Willer, a third shift part-time Youth Care Worker, filled the vacancy. Willer's former part-time position was eventually filled by Schmoocher, another third shift worker.

After Willer filled the third shift vacancy, she was paid at the non-certified rate. She grieved her rate of pay contending that she should be paid at the certified rate because she was, and still is, certified as a Youth Care Worker by the state.

My analysis begins by noting that although the parties address the following matters at length in their briefs, none of them are considered dispositive by the undersigned in the outcome of the case. First, the parties disagree as to whether probationary employes can bid on vacancies. The Union contends that they can, while the Employer disputes this assertion. This matter arose because Willer was a probationary employe at the time she bid on the third shift vacancy. However, since Willer was given the position by the Employer irrespective of her probationary status, I find it is unnecessary to decide in this case whether probationary employes can bid on vacancies. Given this finding, no additional comments will be made concerning same.

Second, there is no question that the posting involved here listed the incorrect salary. Specifically, it listed the salary for the vacant position as being in the certified pay range when it should have listed the salary as being in the non-certified pay range. Certainly it would have been preferable had this mistake in the applicable pay range not occurred. However, it did so the question is what impact this mistake has here. I find it has none because the mistake in the applicable pay range was corrected by management before Willer accepted the position. This happened when Allers offered Willer the job. Allers' written job offer to Willer contained the corrected pay range (i.e., the non-certified pay range). Given this correction, Willer was told before she accepted the position that it was a non-certified position that paid at the contractual non-certified pay range. Thus, this is not a case where Willer moved into a vacancy thinking it was a certified position that paid at the certified rate. She knew it was not. Finally, I find that the exact language Willer used to

accept Allers' job offer is not controlling. Willer used cryptic language when she accepted Allers' job offer (i.e., where she wrote "I accept the position as posted.") By this statement, she meant she was accepting a non-certified position which paid at the certified rate. However, the simple fact of the matter is that she could not do that because no such combination exists; it is either one or the other (i.e., a non-certified position paid at the non-certified rate or a certified position paid at the certified rate). Employes cannot mix and match positions and pay rates on their own motion.

Having so found, attention is now turned to the pertinent contract language which both sides agree is the last two paragraphs of the Letter of Understanding. There it provides as follows:

Youth Care Worker (Non-Certified) shall be the designation for those Youth Care Workers who do not receive the training required by the State of Wisconsin in order to work in the Secure Detention Facility. When positions are posted, they will be designated Certified or Non-Certified. There will be a maximum of six Non-Certified positions in the Juvenile Detention Facility, provided that there shall be at least one certified Youth Care Worker per shift scheduled in the Non-Secure Shelter. There shall be one seniority list for Certified and Non-Certified combined.

Implementation of the Non-Certified worker category shall be by vacancies occurring on or after 1/1/92. Certified Youth Care Workers shall be allowed to bid on vacancies as provided in Section 9.04 and the last opening may be declared by the County to be Non-Certified. Shifts will be filled by seniority in a "fill-from-the-top-down" system, meaning Non-Certified must be hired on the shift vacant after more senior workers have bid.

The first sentence of the first above-noted paragraph provides that those Youth Care Workers who are not trained (by the state) to work in a Secure Detention Facility will henceforth be known as non-certified workers. The first sentence of the second above-noted paragraph provides that the implementation of this new category will be by vacancies after January 1, 1992. Reading these two sentences together, this language gives the Employer the right to create non-certified positions after January 1, 1992. That is exactly what happened here. The Employer determined that a third shift vacancy which previously was a certified position would become a non-certified position. Such was its contractual

right.

After the new position was created, the Employer posted it as such (i.e., a non-certified position). As the name implies, certification by the state was not required for the job. However, when this posting occurred all the Youth Care Workers were certified. Not surprising then, the person who got the job (Willer) was certified. Although Willer was certified, the critical point is that certification was not required for this particular position. Consequently, Willer was over-qualified for the position she filled since she was a certified worker who voluntarily moved into a non-certified position.

The Union contends that Willer should have been allowed to keep her certified status after she moved into the new non-certified position. Technically though, she has retained her certified status. By that I mean that the County has not stripped Willer of her state-certified status. It is the state that grants certified status, not the County, so only the state can withdraw certification. Since Willer still has certified status, she can potentially assume a certified position in the future. In that sense then, Willer's certification has followed her from her old position into her new position. Having said that, this does not mean that any Youth Care Worker position Willer fills automatically becomes a certified position. Clearly it does not.

This is because it is the Employer, and not the employee, that determines whether a given Youth Care Worker position is certified or not. Here, as previously noted, the Employer determined that the third shift position Willer filled would be non-certified. What the Union essentially proposes to do here is change the status of that position back to what it was previously (i.e., a certified position) because the person who filled it (i.e., Willer) is certified. However, I find no contractual support in the Letter of Understanding for the Union's proposition that an employee's certification converts a non-certified position into a de facto certified one. That being the case, Willer's existing certification does not change the official status of the position she now holds. Said another way, certified employees cannot turn a non-certified position into a certified position on their own motion. Only the County can make that change. It follows from this finding then that although Willer is certified, she is not entitled to be paid the certified rate because she is in a non-certified position.

The Union also relies on the language in the last paragraph of the Letter of Understanding dealing with the "last opening" to support its contention that a contractual violation occurred. According to the Union, the Employer designated the wrong slot to be non-certified. In the Union's view, the "last opening" in the context of this case was not the third shift full-time position vacated by Stalsbury and filled by Willer, but rather was the third shift part-time position vacated by Willer and filled by

Schmoocher. At first glance, the Union's contention appears correct since the third shift part-time position vacated by Willer and filled by Schmoocher was, in fact, the last one out of the four that were filled. Be that as it may, I am not persuaded that the

third shift part-time position was the "last opening" within the meaning of the contract based on the following rationale. I read the word "opening", as it is used in the phrase "last opening", to refer to an opening of the same type that preceded it. For example, if a series of full-time openings were involved, I would look at that series to determine which one was the "last opening."

Conversely, if a series of part-time openings were involved, I would look to that series to determine which one was the "last opening." In this case, it so happened that the openings that preceded the third shift full-time opening were full-time openings on the second and first shifts, respectively. The "last opening" in this series of full-time vacancies was the one on the third shift. The Union essentially ignores the distinction between full-time and part-time openings and combines the two. In my view though, it is necessary to compare the proverbial "apples with apples" instead of "apples with oranges". I would characterize the full-time openings on the first, second and third shift as the apples, while the part-time opening on the third shift is an orange. As such, the part-time third shift opening should not be included with the full-time openings to determine which one constitutes the "last opening." It therefore follows then that the third shift part-time opening was not the "last opening" here.

Instead, in the context of this case, the "last opening" was the third shift, full-time position vacated by Stalsbury and filled by Willer. Since that was the one selected by the Employer to be designated as non-certified, I find that the Employer's actions here comported with the contract. Accordingly, no contract violation has been found.

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

AWARD

1. That the grievance is procedurally arbitrable;
2. That the Union's proposed remedy is substantively arbitrable;
3. That the County did not violate the collective bargaining agreement by requiring Laura Willer to accept a non-certified Youth Care Worker position rather than a certified Youth Care Worker position. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 11th day of August, 1993.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator