BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SHEBOYGAN COUNTY	Case 220 No. 49778 MA-8060
and	
SHEBOYGAN COUNTY INSTITUTIONS EMPLOYEES LOCAL 2427, AFSCME, AFL-CIO	

Appearances:
Ms. Louella Conway, Personnel Director, on behalf of the County.
Ms. Helen Isferding, Staff Representative, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the County and the Union respectively, are signatories to a collective bargaining agreement providing for final and binding arbitrations. The Wisconsin Employment Relations Commission designated the undersigned, a member of its staff, to hear the above-captioned matter pursuant to a request for arbitration by the parties. Hearing was held on December 2, 1993, in Sheboygan, Wisconsin. No stenographic transcript was made. The County made a motion to bifurcate the hearing to determine whether the matter was substantively arbitrable. The undersigned granted the motion. The parties then completed their briefing schedule with respect to the question of substantive arbitrability on January 4, 1994. Based upon the record herein and the arguments of the parties, the undersigned issues the following decision.

ISSUE:

The instant issue before the Arbitrator is whether or not the grievance filed by Susan Goebel is arbitrable.

In the event that the answer is in the affirmative, the undersigned will hear the merits of the case.

RELEVANT CONTRACT PROVISIONS:

ARTICLE 10

PROBATIONARY PERIOD, DEFINITIONS, AND GENERAL CONDITIONS

1. Probationary Period

All newly hired employees, without previous county experience in the job to which they are hired, shall serve a probationary period of six (6) months. Former employes who are rehired within five (5) years shall serve a sixty (60) day probationary period: Former employees who are rehired after five (5) years shall serve a six (6) month probationary period.

a. Probationary Progress Reports

Probationary Progress Reports will be prepared and discussed with employees during the probationary period at the end

of the second (2nd) and fourth (4th) month.

b. Termination of Probationary Employees

Probationary employees may be terminated without recourse to the grievance procedure, but the requirements of Article Thirty-one (31) shall be followed.

c. Probationary Period for Temporary Employees

A temporary, seasonal or student employee who becomes a regular employee without a break in continuous service shall be deemed to have served their probationary period upon completion of six (6) months of continuous service.

d. Management reserves the right to extend probationary periods for employees out on Worker's Compensation to ninety (90) additional days after proper notification to the union. This shall apply to employees hired after January 1, 1989.

. . .

ARTICLE 27

SENIORITY

It shall be the policy of the institutions to recognize seniority. (As used herein the term "seniority" shall mean the period of continuous employment from the last date of hiring.)

. . .

4. Accumulation. The seniority rights of an employee shall continue to accumulate during periods of lay off and for other legitimate reasons.

BACKGROUND:

The grievant, Susan Goebel, was hired as an Assistant Cook in the County Jail on October 1, 1990. As an Assistant Cook, she cooked for the inmates, prepared meals, followed menus, and made sure that the silverware were counted.

In the beginning of 1993, the County decided to abolish the food service at the Jail. It made the decision to prepare and transport prisoner meals at its health care institution, called Sunnyridge. Only two positions were left at the Jail, transporting the meals on a bus and washing the dishes. Goebel's choices were to face a potential layoff, to bump into some other position for which she was qualified, or to apply for work at Sunnyridge in a new bargaining unit. She applied for and took a job at Sunny Ridge as a Cook in March of 1993. After orientation as a new employee, she began at the starting rate of pay as provided by the County Institutions collective bargaining agreement.

There was no separation of employment between Goebel's leaving the Jail and starting at Sunnyridge.

For some purposes she was treated as a new employe, i.e., she went through new employee orientation and was hired at the starting rate. For other purposes, she was granted some limited rights based upon her past tenure at the Jail. She was credited with longevity previously earned and for her years of service in calculating vacation entitlement at Sunnyridge.

POSITIONS OF THE PARTIES:

Union

The Union's argument is very simple. It contends that she is a hiree with previous county experience in the job to which she was hired...she cooked at the Jail and she cooked at Sunnyridge. Pursuant to the language of Article 10 1., there is no probationary period in this situation and just cause provisions of the agreement apply. In the Union's view, she was a cook and continued as a cook. Goebel, it maintains was not a "former employe" of the County as she never quit working for the County merely transferring to another department and bargaining unit. Stressing that the County recognized her seniority for some purposes (longevity and vacation eligibility), the Union emphasizes that Goebel never experienced a break in service.

As an alternative argument, the Union claims that Goebel was hired on March 11, 1993, when she was told she had the position. She was fired on May 19, 1993, some sixty-eight days later. Because the sixty-day period had expired, the County needs just cause to terminate her.

County

The County maintains that Goebel should be considered a new employe under the provisions of this particular collective bargaining agreement. The fact that she worked in another department under a different labor agreement should not affect the fact that she chose to divorce herself from that unit and to become a member of this bargaining unit. Pointing to arbitral precedent which states that "seniority is a relationship between employees in the same seniority unit, rather than a relationship between jobs", the County argues that Goebel had no seniority in the new bargaining unit. Because she had no seniority, she was on probationary status as provided by the labor agreement.

The County claims that the arbitrator must honor the provisions of the agrement which clearly state that probationary employees have no recourse to the grievance procedure. It points out that the grievant herself acknowledged that she had no seniority in the new bargaining unit.

It asserts that because the grievant was discharged within the sixty day probationary period, she has no recourse to the grievance procedure and the grievance is not substantively arbitrable.

DISCUSSION:

The substantive arbitrability of Goebel's grievance must rise or fall with the interpretation of Article 10, Section 1 and subsection b. If it is concluded that Goebel did not have "previous county experience in the job to which they (she was) are hired", Goebel would be required to serve a six month probationary period in which she could be terminated without recourse to the grievance procedure. The language of subsection b. makes it clear that there is no recourse for discharged employes who are probationary employes. Therefore, in the view of the undersigned, the only real question is whether

Goebel was exempted from serving a probationary period because of her previous experience at the County Jail.

The facts demonstrated that Goebel was classified as an Assistant Cook at the County Jail whose primary duty was to cook for the prisoners. She was hired at Sunnyridge as a Cook 1, whose primary duty was to cook for the residents of the institution.

With respect to issues of substantive arbitrability, the County bears the burden in convincing the arbitrator that the grievance is not arbitrable. 1/ Here the County has failed to prove that Goebel's previous experience cooking at the Jail is not previous county experience in the job to which she was hired, namely cooking at the institution. The preliminary evidence adduced at hearing suggests that Goebel's duties at the institutions were similar if not identical with those at the Jail. A fair reading of the second phrase in the first sentence must lead to the conclusion that she was not required to serve a probationary period and was not a probationary employe pursuant to subsection 1 b.

The County has stressed that Goebel was hired as a new employe without seniority and must be considered a probationary employe on this basis. The County, however, has considered her former employment at the Jail for some purposes and not for others. But for the express language in Article 10 exempting those with previous county experience in the job to which they were hired, this argument may have been persuasive. Given the express language of Article 10 and the County's action in crediting Goebel's service at the Jail at least for some purposes, the arbitrator does not find that the definition of seniority as set forth in Article 27 serves as a bar to Goebel's exemption from serving a probationary period. Rather to make such a finding would render this phrase in the first sentence of Article 10 to be meaningless.

Accordingly, the undersigned finds that Goebel was not a probationary employe at the time of her termination. Hearing should be rescheduled to take evidence on the merits of the discharge.

Dated at Madison, Wisconsin this 25th day of January, 1994.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator

1/ In light of the Steelworker's Trilogy, this arbitrator believes doubt as to arbitrability should be resolved in the affirmative. How Arbitration Works, Fourth Edition, Elkouri and Elkouri, at p. 218.