

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 NORTHERN PINES UNIFIED SERVICES : Case 16
 : No. 50550
 and : MA-8293
 :
 WISCONSIN COUNCIL 40, AFSCME, AFL-CIO :
 :

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing for the Union.
 Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. James M. Ward, appearing for the Employer.

ARBITRATION AWARD

Wisconsin Council 40, AFSCME, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. Northern Pines Unified Services, herein the Employer, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Cumberland, Wisconsin, on April 5, 1994. There was no transcript made of the hearing. The parties completed the filing of post-hearing briefs on July 25, 1994.

ISSUES:

The parties were unable to stipulate to the issues and agreed that the arbitrator would frame the issues in his award. The undersigned believes the following to be an accurate statement of the issues:

Is the grievance arbitrable? If so, did the Employer violate the collective bargaining agreement when it refused to allow the grievant, William Ellmann, to bump Marion Summers, a less senior employe?

If so, what is the appropriate remedy?

BACKGROUND:

The Employer operates under the auspices of a board of directors comprised of representatives from five Wisconsin counties, namely, Barron, Burnett, Polk, Rusk and Washburn, for the purpose of providing statutorily mandated services to certain residents of those counties, namely, the mentally ill, the developmentally disabled and the alcohol and drug dependent. The Employer charges fees to its clients for services rendered, which fees can be paid by the client or by third-party reimbursement. The Employer also receives state and federal aid. In addition, the five above-named counties provide a subsidy, prorated on the basis of each county's respective population, to the Employer. Said subsidy presently amounts to 19 percent of the Employer's total budget.

The grievant, William Ellmann, commenced his employment with the Employer on June 6, 1989, in the position of a full-time psychiatric social worker in the Employer's Ladysmith office. The title of the job description for said position was "Psychiatric Social Worker, Rusk County Office." As a condition

of hire, Ellmann was required to live in Rusk County.

At an unspecified time, Rusk County officials apparently began questioning the level of services which were being received by residents of Rusk County from the Employer in comparison to the share of the subsidy being assessed to Rusk County. A study by the Employer's Executive Director, Rudy Besmer, revealed that Rusk County was receiving a disproportionately high level of services vis a vis the other four participating counties. At about the same time, Besmer concluded that there was a growing need for additional adult mental health services in the Employer's main office in Cumberland. In examining the staffing needs, Besmer decided that Ellmann was the most logical employe to be transferred from Ladysmith to Cumberland. Ellmann's primary work with the Employer had been with adults, although he did handle some juvenile cases and he did work with juveniles as a part of family groups. He also had worked with juveniles in his previous employment. One other psychiatric social worker was employed in the Ladysmith office in a half-time position. That position was occupied by Marion Summers. Summers worked almost exclusively with juveniles and was working in that capacity as a contract employe when Ellmann was hired in 1989. On January 1, 1990, Summers became an employe of the Employer as the half-time psychiatric social worker in the Ladysmith office. Thus, the Employer decided that by transferring Ellmann to Cumberland, it could rectify a possible imbalance between service levels and funding levels in Rusk County and, at the same time, it could compensate for an increasing need for adult mental health services in Cumberland.

On March 24, 1993, 1/ Ellmann was informed verbally that he would be transferred from the Ladysmith office to the Cumberland office effective May 17. At some unspecified point in time thereafter, the date of the transfer was accelerated by one week and Ellmann commenced work in Cumberland on May 10. In a written memo dated March 29 to Roger Uecker, Ellmann's supervisor at that time, Ellmann objected to the relocation of his position to the Cumberland office and urged the Employer to reconsider said relocation. In a written memo to Ellmann dated March 31, Uecker informed Ellmann that the Employer had decided to proceed with the transfer as of May 17 and, further, that the cost of his travel time and mileage were not reimbursable because his primary/full-time work site was being changed to the Cumberland office. In another memo dated April 6, Ellmann sent Uecker additional reasons why he did not believe his position should be transferred to Cumberland.

On April 14, in the presence of both Barbara Sperling, the Employer's Personnel Manager, and Roberta Rudiger, Union Steward, Ellmann verbally informed Uecker that he was filing a grievance in response to his transfer to Cumberland. Ellmann based his grievance on the following reasons: the transfer was a violation of his seniority status as related to other therapists in the Rusk County office; his letter of hire stated his position was a full-time position in Rusk County; and, the transfer to the Cumberland office was unreasonable. In a memo dated April 20, the Employer denied the grievance. Among the reasons given by the Employer for the denial was that Article 4 of the contract is mute on the topic of seniority as it relates to the transfer of work site and therefore is not applicable, and, that the transfer was within the rights of the Employer. A written grievance protesting Ellmann's involuntary transfer was filed on May 5. The Employer submitted a written response to the Union on May 14. Said response denied the grievance. In a memo dated May 21 the Union advised the Employer that it was dropping Ellmann's grievance.

Ellmann submitted the following memo to the Employer on May 28:

Since my full-time mental health position in Rusk County was abolished and the work force there reduced, I am exercising my seniority rights to bump Marion

1/ Unless otherwise specified, all other dates herein refer to 1993.

Summers from her mental health position in Rusk County.

On June 1, Ellmann received the following memo from the Employer:

No position has been abolished, nor has there been any reduction in the work force of mental health therapists within Northern Pines Unified Services. Therefore, bumping rights are not applicable. As of May 10, 1993, your full-time work site is the Cumberland office of Northern Pines Unified Services.

On June 9 Ellmann filed a written grievance protesting the Employer's refusal to allow him to bump Summers. The Employer denied said grievance and it became the basis of the instant dispute.

POSITION OF THE UNION:

The grievance was timely filed. Ellmann reported to work in the Cumberland office on May 10 as instructed. On May 28 he asserted his right to bump and was informed on June 1 that he would not be allowed to bump. He filed his grievance on June 9, within the eight working days required by the contract.

Ellmann had the right to bump a less senior employe, since the Employer did abolish a position. The job posting in 1989 of the position for which Ellmann was hired contained the title "Psychiatric Social Worker, Rusk County Office". The letter from the Employer notifying Ellmann that he had been hired stated "It is imperative that you live in Rusk County as the position is a full time position in that office." There is no doubt that the position of full-time Psychiatric Social Worker, Rusk County, held by Ellmann, was abolished on May 17. Section 4.03 provides for employes whose positions are abolished, as was this position, to bump a less senior employe and to move into a position for which the employe is qualified.

As a remedy, the Union requests that Ellmann be granted his contractual right to bump according to the language of Section 4.03. Additionally, the Employer should be required to pay mileage at the applicable rate for all miles

driven to the Cumberland work site, as well as compensation at the applicable rate for all hours spent driving to the Cumberland work site, from May 17 until the Employer honors Ellmann's bumping rights.

POSITION OF THE EMPLOYER:

Ellmann's grievance is not arbitrable since it was untimely filed with reference to the date when he knew that the Employer would not honor his request for a less senior employe to be transferred, rather than himself. Although Ellmann did not explicitly demand to bump a less senior employe in the Ladysmith office during the April 14 meeting, he did contend that someone with less seniority should be involuntarily transferred. Such a contention constitutes a tacit bumping request. Uecker's response of April 21 denied the tacit request to bump by specifying that Article 4 was mute on the topic of seniority as it relates to the transfer of work site. The written grievance did not list a purported violation of Ellmann's seniority rights. Ellmann did not formally request to bump Summers until May 28, approximately 5 weeks after Uecker's response.

Ellmann knew or reasonably could have known no later than April 21 that his purported seniority rights (and concomitant bumping rights) would not prevail. Uecker's denial of Ellmann's belated bumping request via his letter of May 28 can not serve as a vehicle to revive an otherwise invalid grievance.

Among the expressly reserved management rights germane to this case, are the rights to assign employes in positions with the Employer; to maintain efficiency of Employer operations; to determine methods, means and personnel by which Employer operations are to be conducted; and to determine the kinds and amounts of services to be performed and the number of positions and kind of classifications to perform such services. Arbitrators have long recognized that even where the contract does not expressly provide for involuntary transfers, this remains a fundamental management right unless limited by the contract.

The involuntary transfer of Ellmann was a reasonable action. The Employer considered other options. With his adult-oriented case load, Ellmann was a good match for the job in Cumberland. When compared with Summer's heavy case load in the area of mental health services for children, Ellmann was the more expendable of the two employes in terms of personnel needs in Ladysmith.

An involuntary transfer does not constitute an event which triggers bumping rights pursuant to Section 4.03 of the contract. Ellmann's position was not abolished. Rather, he merely changed work sites. Once in Cumberland, Ellmann performed the same services for the same type of clients as he had in the past. The title of Section 4.03 clearly designates that said provision governs layoffs. Ellmann was not laid off. Additionally, the bumping request was untimely, since Ellmann had been working in Cumberland for almost three weeks when he gave written notice of his intent to bump Summers. By that date, the Cumberland job had become the status quo.

The residency requirement imposed upon Ellmann as a condition of hire is irrelevant for purposes of determining whether the Employer violated Section 4.03 of the contract when it refused to allow him to bump Summers. Such an alleged injustice does not rise to the level of a contract violation.

The grievance should be found not to be arbitrable because it was filed in an untimely manner. Further, the grievance is without merit and, if found to have been timely filed, then it should be dismissed accordingly.

RELEVANT CONTRACTUAL PROVISIONS:

Section 1.05, c, f, i and k, pages 2 and 3.
Section 3.01, circled part on page 5.

DISCUSSION:

When Ellmann advised the Employer on April 14 that he was grieving his transfer, one of the reasons he cited as a basis for the grievance was that the transfer was a violation of his seniority rights since there were other therapists in the Ladysmith office with less seniority than he had. Either at that meeting on April 14 or shortly thereafter in its written response of April 20, the Employer informed Ellmann that it considered Article 4 to be mute on the topic of seniority as it relates to the transfer of work site and therefore was not applicable. Clearly, the issue of seniority and its relevance to the involuntary transfer of Ellmann were discussed by the parties early in the grievance procedure. Even if during the meeting on April 14 Ellmann never specifically demanded that he be allowed to bump Summers, a less senior psychiatric social worker, the Employer's contention that Ellmann's argument should be construed to have been a tacit bumping request is reasonable and persuasive. Thus, it is concluded that Ellmann's grievance dated June 9 did not raise a new issue, which issue was unknown to Ellmann until shortly before said date, by alleging that the Employer had violated his seniority rights and the contract in refusing to allow him to bump Summers. The undersigned has no doubt that in April Ellmann had expressed to the Employer his belief that he had a contractual right to bump Summers and, further, that Ellmann knew the Employer did not intend to allow him to exercise his seniority to bump Summers. Clearly then, there was no justification for Ellmann to delay filing his grievance over that refusal until June 9. Such a delay resulted in the grievance being untimely filed.

Assuming, for the sake of argument, that the grievance filed on June 9 did raise a new issue which had not been raised by the verbal grievance filed on April 14, the grievance filed on June 9 still would not be found to have been filed on a timely basis. Ellmann's request to bump Summers was made on May 28 and was denied by the Employer on June 1. The written grievance contesting said denial was filed on June 9. Ellmann's transfer had already occurred on May 10. He knew in April that the Employer had not agreed to rescind the transfer. There is nothing in the record which would justify a finding that even Ellmann's request on May 28 to bump Summers was timely, much less the grievance which he filed on June 9.

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

AWARD

That the grievance filed by William Ellmann on June 9, 1993 was not filed in a timely manner in accordance with the contractual requirements; and, therefore, said grievance is not arbitrable and it is hereby denied and dismissed.

Dated at Madison, Wisconsin, this 18th day of October, 1994.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator