BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
PIERCE COUNTY COURTHOUSE EMPLOYEES, LOCAL 556, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 97 No. 50609 MA-8317
and	
COUNTY OF PIERCE	

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of Pierce County Courthouse Employees, Local 556, American Federation of State, County, and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, 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 Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of JoAnn Manor, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on May 11, 1994, in Ellsworth, Wisconsin. The hearing was not transcribed, and the parties filed briefs by August 30, 1994.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the County violate Article 25, Section 1, by denying the Grievant the rate of pay of the Chief Extension Secretary for October 19, 20 and 21, 1993?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 9 - GRIEVANCE PROCEDURE

. . .

> Section 2. All grievances must be presented promptly and no later than fifteen (15) work days from the date the employee(s) knew or should have known of the cause of such grievance.

. . .

ARTICLE 25 - WAGES

> Section 1. All employees shall be paid their classified rate of pay at all times, except when working in a higher classification, for which they shall receive the higher rate of pay.

BACKGROUND

The Union filed the grievance on November 19, 1993. 1/ The grievance form cites Article 25, Section 1, as the governing provision, and seeks the following relief:

> To comply with labor agreement, Art. 25, Sec. 1, Pay voucher dated 10-25-93 - for 21 hours at higher wage rate. To pay all future vouchers at higher rate (when submitted).

David Sorenson, the County Clerk, denied the grievance in a memo to the Union which states the grievance was "not filed in a timely manner."

The Grievant became a part-time Extension Secretary in the Extension Office in May of 1992. Ed Haas serves as an Extension Agent and as Department Head of the Extension Office. The Extension Office employs three clericals. Gayle Nelson serves as Chief Extension Secretary. Barb Fritz and the Grievant serve in the position of Extension Secretary. Nelson and Fritz are full-time employes. The Grievant is scheduled to work 40% of a full-time position. She typically works on Monday and Friday, but her actual hours of work vary from week to week.

Haas testified that the duties which distinguish the position of Chief Extension Secretary from that of Extension Secretary focus on budget-based responsibilities. He noted Nelson oversees the administration of the budget and prepares vouchers on a monthly basis. She also does extensive work with the Ag and Extension Education Committee. Haas estimated that, very roughly, Nelson spends 20% of her time on these committee and budget based duties. Each of the clerical employes of the Extension Office, Haas noted, performs a number of overlapping duties such as the preparation and distribution of Extension Office correspondence.

Bev Bierbrauer was an Extension Secretary prior to the Grievant's assumption of the position. Haas noted she worked for periods of time when Nelson was on leave, but never received Nelson's rate of pay. Similarly, Haas noted that Fritz worked during Nelson's absences without receiving Nelson's rate of pay. From May of 1992 until June of 1993 the Grievant worked, while Nelson was on leave, without receiving Nelson's wage rate. Sorenson noted that employes from the Telephone Operator/Receptionist classification have been moved into the Extension Office on a temporary basis, and have received the pay rate of the Chief Extension Secretary. He testified that the County has not, throughout his tenure, afforded out of class pay in the absence of such an

1/ References to dates are to 1993, unless otherwise noted.

inter-departmental transfer.

In July, the Grievant was called into work on while Nelson was on vacation. Haas was not in the Extension Office for that work week. On his return to the office, Nelson instructed him to sign the Grievant's pay voucher. That voucher paid the Grievant Nelson's rate of pay for July 6, 7 and 8.

On October 19, 20 and 21 Haas called the Grievant to come into work while Nelson was on leave. Haas, on October 25, signed a voucher paying the Grievant Nelson's rate of pay for those three days. The payroll department declined to pay the Grievant the higher rate, thus prompting the grievance. In October, the Grievant earned $10.13 per hour, while Nelson earned $10.38 per hour.

Further facts will be noted in the DISCUSSION section below.

THE UNION'S POSITION

The Union phrases the issues for decision thus:

> Did the County violate the collective bargaining agreement when it failed to pay the Grievant, JoAnn Manor, the pay rate of the higher classification when she was required to work in it?
>
> If so, what is the appropriate remedy?

After a review of the evidence, the Union contends that there can be no question that the grievance was timely filed. Article 9, Section 2, affords the Grievant "fifteen (15) work days" to file a grievance. Noting that the Grievant works two days per week, and did not know of the County's denial of the higher rate until sometime "after the first of November," the Union concludes that "the grievance dated November 19 is well within the 15 work days."

Turning to the merits of the grievance, the Union asserts that "the County offers two, contradictory, lines of defense." The first is that the Grievant did not perform the work of the higher rated classification. This defense is unpersuasive, according to the Union, because "the County could put no one on the witness stand nor introduce any evidence as to what the grievant did or did not do as compared to what the incumbent would have done on the dates in question."

The County's second line of defense is that only an employe who is moved from outside the Extension Office is entitled to the higher rate of pay. The Union argues that "(t)he total evidence for this thesis is the raw assertion of Sorenson."

Contending that there is no dispute that the Grievant was called in to replace a higher rated employe who was on vacation, the Union contends that "the clear and unambiguous language of Article 25 Section 1 must be given force and effect." The Union concludes that the Grievant must be "made whole."

THE COUNTY'S POSITION

The County states the issues for decision thus:

> Did the Employer violate Article 25, Section 1 when it failed to pay the Grievant at the Chief Extension Secretary's wage rate for 3 days during which she worked in her regular department (October 19, 20 and 21, 1993)?
>
> If so, what is the appropriate remedy?

After a review of the evidence, the County contends that "the absence of the Chief Extension secretary does not transform the work which the Grievant performed into Chief Extension secretary work."

A review of the evidence establishes, the County contends, that there is considerable overlap in the work duties performed by the three clerical employes in the Extension Office. The work duties which distinguish the work of the Chief Extension Secretary from the other two employes is, the County argues, "Ag and Extension committee work, overseeing the department's budget, and preparing vouchers." Because the Grievant did not perform any of these duties on the days in question it necessarily follows, the County concludes, that its refusal of the higher rate did not violate the labor agreement. The County adds that a review of arbitral precedent underscores this conclusion.

Past incidents involving the payment of the higher rate involved employes from outside of the Extension Office who had to give up their normal duties to perform those in the Extension Office. This is, the County avers, distinguishable from the Grievant, who only performed her typical duties on days other than her normally scheduled days.

That Haas approved the higher rate for the Grievant in July and, initially in October, is, the County contends, irrelevant. In July, Haas did not give prior approval for the higher rate, but "signed off after the fact" because he was out of town when the Grievant performed the work. In October, he initially approved the Grievant's request because "he knew that his approval would not be processed if the request was found to be contrary to the parties' collective bargaining agreement." The County contends that however Haas' approval is viewed, it does not establish a practice binding the County.

The County concludes that the evidence shows only that "it was the work days which were different, not the work performed." Even if an employe could be considered to have worked out of class for the three days in question the County asserts that such pay should have been afforded the full-time Extension Secretary rather than the Grievant. The County concludes that there has been no violation of Article 25, Section 1, and that the grievance should be denied.

DISCUSSION

Sorenson's November 23 denial of the grievance notes that the grievance was not timely filed. The issues adopted above reflect this threshold issue.

There is no persuasive evidentiary support for the assertion the November 19 grievance is not timely. The relevant payroll period for October 19, 20 and 21 appears to have ended October 29. There is no persuasive evidence to undercut the Union's assertion that the Grievant did not receive the check for those three days until after November 1. Under Article 9, Section 2, the Grievant had fifteen work days to file the grievance. Even without regard to her two day per week schedule, the November 19 grievance would have fallen within fifteen work days of her receipt of the pay check denying her the pay sought here.

I have not adopted either party's statement of the issue on the merits. The Union's presumes the Grievant was required to work in Nelson's classification. This presumes as fact a disputed point. The County's refers to "her regular department" which points to a past practice testified to by Sorenson. The Union disputes both the existence and the relevance of this practice. The issue I have adopted highlights the governing contractual provision, the facts to which that provision must be applied, and is broad enough to incorporate each party's arguments.

The interpretive issue regarding Article 25, Section 1, does not turn on the contract language, but on the application of that language to the grievance. The determinative point is whether the Grievant was "working in a higher classification" on October 19 through October 21. The most appropriate form of analysis for out-of-class pay disputes is, in my opinion, that stated by Arbitrator Daugherty in Wilson Jones Co., 51 LA 35, 37 (1968):

> In all such cases the critical questions are (a) What are the key or core elements of the jobs involved which distinguish one job from the other(s) and justify the wage rate differentials between (among) them agreed to by the parties, and (b) did the aggrieved employee(s) perform actual work that "invaded" said core elements?

Daugherty also addressed the governing considerations when the work of the questioned classifications overlap:

> In many such cases there are substantial areas of overlap in the operations specified for two or more jobs . . . But in such case an employee in one job cannot properly be said to have taken over the work in another job until and unless he has been required to perform operations that . . . are key and relatively exclusive to the latter classification.

Application of these broad standards to the grievance is not without difficulty.

The initial difficulty is to establish what are the "core elements" distinguishing the position of Chief Extension Secretary from that of Extension Secretary. Testimony contrasting the duties of the two positions was limited. Haas' testimony that the key differences are Nelson's budgetary responsibility, together with her work with the Ag and Extension Education Committee, stands essentially unrebutted.

The next element of the Daugherty standard concerns whether the Grievant performed work on October 19 through 21 which invaded these core duties of the Chief Extension Secretary. The difficulty posed here is that the actual duties performed by the Grievant on the dates in question is less than clear. Haas testified that Nelson typically did not leave voucher preparation duties or budget oversight duties for other employes to assume. While this testimony is unrebutted, Haas also testified he could not remember the specific duties performed by the Grievant on October 19 through October 21.

The uncertainty regarding the Grievant's duties on the October dates does not, standing alone, establish the entitlement for out-of-class pay sought in the grievance. The standard noted above highlights that pay differentials are based on differences in work responsibility. Without a demonstration that the Grievant assumed a higher level of work responsibility, the standard above has not been met. In the absence of persuasive proof that the Grievant performed voucher preparation, budget administration, or work with the Ag and Extension Education committees, the second element of the Daugherty standard stands unproven. It follows that the Grievant has not been proven to have been "working in a higher classification" on October 19 through October 21.

Before closing it is appropriate to tailor these general conclusions more specifically to the parties' arguments. The Union contends that it is undisputed that the Grievant was called in to replace Nelson, and concludes the Grievant is entitled to Nelson's rate unless it is shown that Nelson would have performed duties other than those performed by the Grievant.

This contention portrays the overlap between classifications as the basis for out-of-class pay. This portrayal overlooks that the basis for higher pay is a higher level of skill or responsibility for certain job duties. By

analogy, a cabinet-maker may receive a premium over a rough carpenter rate. It does not follow from this that the rough carpenter would carry the cabinet-maker's pay rate for carrying the cabinet-maker's tool box. To perform the core duties of the cabinet-maker it is necessary to get the tools to the job. The pay differential, however, rests in the performance of a cabinet-maker's specialized skills. By the same token, a supervisory premium rests, typically, on a level of authority including the authority to discipline. An employe could command such a premium on an out-of-class basis without disciplining anyone. The payment reflects that, on a temporary basis, the out-of-class employe has become the focus of that authority should its exercise prove necessary. In this case, there is no persuasive evidence the Grievant assumed any enhanced budgetary authority. She assumed greater hours of work, but there has been no persuasive showing she assumed duties other than those she typically performs.

The County has pointed to a practice by which out-of-class pay is not afforded for employes working within their own department. The language of Article 25 does not reflect departmental distinctions. Nor does the record show a binding practice on this point. The binding force of a practice is rooted in the agreement manifested by the parties' conduct. 2/ In this case, the record shows only that two non-Extension Office personnel received the rate of the Chief Extension Secretary, while filling in for her. What duties the non-Extension Office personnel performed either before, after or during the temporary fill-in is not clear. Sorenson testified that he is unaware of any examples of intra-departmental out-of-class pay. This testimony establishes less than an "unequivocal" or "clearly enunciated" course of conduct "accepted by both parties." Haas, who initially approved the out-of-class pay for the October dates, was unaware of this asserted practice or with the principles applied by the County in addressing requests for out-of-class pay. The asserted practice, then, was unknown to County department heads, much less the Union.

It is worth noting that full and part-time employes in the position of Extension Secretary have filled in for the Chief Extension Secretary without receiving out-of-class pay. The Grievant did so on a number of occasions. This does not necessarily establish a practice precluding out-of-class pay within the Extension Office. It does, however, underscore that the overlap in duties between these positions is considerable and well-known within the department. This underscores that a request for out-of-class pay under Article 25 must be rooted in the assumption of the core duties of a higher rated position. The Daugherty standards noted above detail the proof necessary to sustain such a request.

That the Grievant received out-of-class pay in July offers little guidance for this grievance. Haas approved the pay on Nelson's recommendation that he do so. The factual basis of Nelson's recommendation is not clear, and thus affords no guidance here.

AWARD

The County did not violate Article 25, Section 1, by denying the Grievant the rate of pay of the Chief Extension Secretary for October 19, 20 and 21,

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2/ The basis of the binding force of a practice is discussed at some length in a companion case to this grievance, County of Pierce, MA-8316 (McLaughlin, 11/11/94), and is not repeated above.

1993.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 15th day of November, 1994.

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

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