BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SHEBOYGAN COUNTY SUPPORTIVE SERVICES, LOCAL 110, AFSCME, AFL-CIO and SHEBOYGAN COUNTY	Jodell Henning grievance dated 6-2-92 (Refusal to return Grievant to her former position) Case 172 No. 48019 MA-7481

Appearances:

Ms. Helen Isferding, District Council 40 Staff Representative, 1207 Main Avenue, Sheboygan, WI 53083, appearing on behalf of the Union.

Ms. Louella Conway, Personnel Director, Sheboygan County Courthouse, 615 North 6th Street, Sheboygan, WI 53081, appearing on behalf of the County.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of the parties' 1989-91 collective bargaining agreement (herein Agreement or Contract).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the Sheboygan County Courthouse on January 21, 1993. The hearing was not transcribed, but the parties authorized the Arbitrator to maintain an audio cassette recording of the proceeding exclusively for his own use in award preparation. Briefing was completed on February 20, 1993, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the Employer violate the contract or past practice of the parties when it refused to return Jodell Henning to her previous Economic Support Worker position?

2. If so, what is the appropriate remedy?

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

By way of further enumeration and not as a limitation because of such enumeration, the Employer shall have the explicit right to determine the specific hours of employment and the length of the work week and to make such changes in the various details of the employment in the various employees as it, from time to time, deems necessary for the effective and efficient operation of County business.

. . .

ARTICLE 22

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. Probationary employees may be terminated without recourse to the grievance procedure, but the requirements for the termination reports shall be followed.

The following definitions shall apply:

a. A regular full-time or regular part-time employee is hereby defined as a person hired to fill a regular position.

b. A temporary employee is one hired for a specified period of time and who will be separated from the payroll at the end of such period.

c. A temporary employe who becomes a regular employe

without a break in continuous service shall be deemed to have served their probationary period upon completion of six (6) months of service. His/her seniority shall date from the original date of hiring.

. . .

ARTICLE 24

SENIORITY

Sheboygan County shall, during the life of the herein contract, for the employees covered by the same, recognize seniority as herein provided.

. . .

B. Vacancy/Job Posting

1. Whenever an approved vacancy is to be filled within the bargaining unit, notice of said vacancy shall be posted for five (5) working days prior to the public posting for the information of all employees on appropriate bulletin boards where bargaining unit employees work.

The vacant position shall be awarded to the most senior qualified applicant in the department where the vacancy exists. If no one within the department applies for the position, the position shall then be offered to the most senior qualified bargaining unit employee before filling the position with a non-bargaining unit employee. Any employee filling a position under this section shall serve a probationary period of six (6) months, unless waived or lessened by the department head.

. . .

C. Layoff

For the purpose of layoff, the County recognizes seniority therefore, whenever the County

> determines it is necessary to decrease the work force and to layoff employees, such layoff shall, subject to the following procedures, be in inverse order of the employee "seniority". The order of layoff shall be as follows.
>
> In determining the above priorities and carrying out layoffs, the following conditions shall apply:
>
> . . .
>
> b. Full-time Employees/Position: full time employees who are laid off have the right to elect to induce layoff consideration (bumping) of any less senior employee. The employee must have the training and experience to carry out the work responsibilities. Bumping may not be exercised against employees in a higher position.
>
> . . .

BACKGROUND

Among its functions, the County's Human Services Department delivers services through four separate divisions, Social Services, Community Programs, Public Health, and Aging, each of which is treated as a separate "department number" for Agreement Art. 24 purposes. The County's child support enforcement services are provided outside of Human Services, through the Child Support Enforcement Agency which is also treated as a separate department for Art. 24 purposes.

Among the bargaining units of County employes that the Union has represented for many years is the instant unit of nonprofessional employes in the Courthouse and auxiliary departments and buildings.

Grievant began her employment with the County in 1981. In November of 1991, she held the non-probationary position of Economic Support Worker II, later renamed as Economic Support Specialist (herein ES Specialist) in the County's Division of Social Services. During the time Grievant held that position, the State delegated to the County the authority to establish selection criteria and methods for individuals employed in that classification. Pursuant to that delegation, the County has uniformly screened applicants for ES Specialist positions by administering qualifying tests. The only exception of record was when former ES Specialist Linda

Beatty was awarded an ES Specialist position immediately after she served in a position that both worked with and supervised the work of ES Specialists. Grievant and others similarly situated were grandfathered from those changes and were not required to take the County's newly-designed tests as a condition of continued employment in that classification. There has never before been a case in which an employe was returned to an ES Specialist position following an unsuccessful Art. 24 B.1. probationary period.

On November 18, 1991, Grievant began work in a lower-paying bargaining unit position of Secretary I in the Child Support Enforcement Agency (a position referred to herein as CS Secretary). Grievant was awarded the CS Secretary position as the senior qualified bidder responding to a posting pursuant to Agreement Art. 24 B.1.

On May 4, 1992, as the end of Grievant's six month Art. 24 B.1. probationary period drew near, Grievant met with James Graf, the head of the Child Support Enforcement Agency, for a review of her performance and status. Graf informed Grievant at that time that Grievant was not working out in the CS Secretary position. Following that review, Grievant wrote County Personnel Director Louella Conway a memorandum dated May 11, 1992, with a copy to Graf, as follows:

> RE: Probation
>
> On May 4th, 1992, I had my review with Mr. Graf, at which time he stated that he would extend my probation period for only two weeks so I would have time to apply for the Child Support Receptionist position when posted, but could not guarantee I would get the position, therefore because he stated I am not working out or "do not fit in", I am requesting to go back to my old position as Economic Support Specialist.
>
> At a previous meeting with you, you stated I could not return to the position because it is a higher paying position than Secretary I, However I am not a Secretary I because I have not completed my probation period.
>
> You also stated I could not "BUMP" someone, bumping is language stated in our contract only under Lay-offs. The person that is in my position or the last ESS hired is still on probation therefore would be the one to be released.
>
> Please advise me by Tuesday, May 12th, 1992 because time is of the essence, so I can give Jim notice of the date leaving, time

to wrap things up and time to give notice to the Economic Support personal [sic] as to where I should be effective May 18th, 1992.

Thank You

Conway responded by letter dated May 12, 1992, also with a copy to Graf, as follows:

I am in receipt of your letter of May 11, 1992 questioning your request to return to your previous position of Economic Support Specialist.

I have reviewed the contract and Article 24, Seniority, provides that an employee filling a position shall serve a probationary period of six months. There is no language providing that an employee may return to a previous position.

When we met you questioned your ability to go back to your previous position. I stated that there is no provision for such a move, however, if that would occur it would be necessary for you to "bump" another employee. Based on the contract language in Article 24, Sub C(b) "Bumping may not be exercised against employees in a higher position." Your present position is at Grade 9. The Economic Support Specialist is at Grade 13, a higher position.

Based on the provisions of the contract there is no provision allowing you to return to your previous position.

You do have the opportunity to sign postings for other positions within the unit. At present the position of Reception Clerk is posted through Thursday, May 14, 1992. If you wish to be considered for this position, please contact the Personnel Office.

Grievant wrote Conway again on May 20, 1992, this time with a copy only to Union Staff Representative Helen Isferding, as follows:

I am requesting that I be sent back to my Economic Support Specialist Position because as of May 20, 1992, I am still on probation at the Child Support Agency. However it has been established that I have not worked out which you are aware of.

> The last time I wrote you, you stated that I would be "BUMPING" someone from a job, but as of today there are two postings for ESS. This means that I would not be "Bumping" as you stated.
>
> I will be meeting with you on Friday, May 22, 1992 at which time I expect to get an answer. If a decision is made prior to this date, I would appreciate knowing what it is.

The record contains a job posting for two ES Specialist positions in Social Services department that was dated May 20, 1992 and that called for submission of applications on or before May 27, 1992.

On that deadline, Grievant wrote Conway as follows:

> I am requesting consideration of the posted position of Economic Support Specialist which I held at one time. Two postings of this position are available of which I would like to be placed in one of them. As you know I am already an employee of the County for over 11 years.

The County required Grievant to take the same paper and pencil test given to all other applicants responding to that posting.

On June 1, 1992, the grievance giving rise to this arbitration was initiated, asserting that

> "[Grievant] was denied the opportunity to return to her previous position of Economic Support Specialist at the Department of Human Services" [in violation of Agreement] Article 22. [Grievant] served a six month probation for the county when she was hired in 1981. The six month probation in the Child Support Office was for the position only. Past practice has always been to return the the [sic] previous position. [Corrective action desired:] Make the grievant whole and return her to her previous position of Economic Support Specialist at the Department of Human Services, with full back pay and interest.

By memo dated June 4, 1992, ES Manager Sharon McCormick informed Grievant as follows:

> Per your telephone request on 6/4/92, you received 71 on the written screening instrument taken on Monday, June 1st.
>
> Qualifications for hiring an Economic Support Specialist have been 74 or higher.

On that basis, Grievant's application in response to the ES Specialist posting was denied.

On June 7, 1990, Grievant wrote Conway as follows:

> I am requesting consideration of the Account Clerk II posted position. I am already an employee of Sheboygan County for 9 years and I'm requesting a lateral change from the Income Maintenance Unit to the Accounting Department in the Finance Department.
>
> Thank you.

Thereafter, the grievance was denied on June 10, 1992 by Conway on the basis that, "Upon review of the labor agreement, I find that no violation has occurred. There is no provision for an employee to return to his/her position."

The grievance was subsequently heard by the County's Personnel Committee at the Fourth Step and denied by notification dated August 12, 1992. The matter was thereafter submitted for arbitration as noted above.

At the hearing, Grievant testified that when she bid for the CS Secretary job, she assumed -- without asking anyone in Management -- that she would be entitled to return to her previous job during her Art. 24 B.1. probationary period, based on her knowledge of how other employers deal with such situations and based on what Marlana Fiorentino had told Grievant had happened to her.

The record establishes that after Fiorentino was awarded a higher-paying Child Support Coordinator (herein CS Coordinator) position, she was unfavorably evaluated by Graf and was ultimately returned by Graf to the lower-paid position she previously held in the Clerk of Courts office. On March 25, 1991, a grievance was initiated by Union Steward Margaret Halbach, asserting that:

> [on March 22, 1991,] Marlana's job as Child Support Coordinator was terminated without just cause and she was bumped back to her previous position in the Clerk of Courts office [in alleged violation of Articles 2, 3, 22] and any others that may apply . . . [corrective

> action desired:] Reinstate Marlana to the job as Child Support Coordinator with full back pay with interest. Make the Grievant whole. Make the Union whole.

On March 27, 1991, Graf responded to the grievance, with a copy to then Personnel Director John Bowen, as follows:

> In compliance with Grievance Procedure - Article 25 of the Sheboygan County Supportive services Labor Agreement, the following is my answer to the Grievance.
>
> Marlana's job as Child Support Coordinator was terminated without just cause and she was bumped back to her previous position in the Clerk of Courts Office.
>
> > Management Rights Reserved - Article 3 and Probationary Period - Article 22 provides management the right to promote, transfer, or demote for proper cause. It has also been an accepted practice for promoted employees to serve a 6 month probationary period. Regrettably, Ms. Fiorentino could not qualify for this position due to varying factors. Grievance Denied.

Approximately one year later, after the matter apparently reached the arbitration step of the grievance procedure, that grievance was ultimately settled. The settlement agreement, which was executed by Fiorentino, Conway, Isferding and others on various dates in April of 1992, reads as follows:

> . . . agreement has been reached with regard to the above mentioned grievance. The provisions of the settlement are as follows:
>
> > 1. Payment of $747.00 to the grievant representing the pay steps the employee would have been eligible for had she maintained the position (see attached) [no attachment was made a part of the instant record]
> >
> > 2. Removal from her file of documents relating to the evaluation and subsequent removal from the

position of Child Support Coordinator.

3. Dismissal of the grievance and relinquish re-instatement to the position of Child Support Coordinator.

4. The above settlement is agreed to between the parties and is determined to be non-precedent setting.

The above settlement is a full and complete settlement of the issues.

Union Steward Halbach testified that at no point in the processing of the Fiorentino grievance did the Union ever take the position that the Employer would violate the Agreement if it were to return an employe to the previously held position where the employe fails to satisfactorily perform a bid job during the Art. 24 B.1. probationary period. Rather, according to Halbach, the Union only took issue with Graf's decision that Fiorentino had not performed the CS Coordinator position well enough to successfully complete the Art. 24.B.1 probationary period.

Halbach also testified that between 8 and 10 years ago, under agreement language materially the same as Art. 24, bargaining unit employe Vicky Lesch was twice returned to her previously held position (Clerk Typist II) when she did not work out in higher-paying jobs that she was awarded through the posting procedure (Court Secretary and Clerk Secretary).

POSITION OF THE UNION

Grievant should have been unconditionally returned to her previous position when, during her Art. 24 B.1. probationary period, she requested to return after learning of Management's decision that she was not working out in the CS Secretary position. The Agreement is silent regarding the rights and status of an employe during the Art. 24 B.1. probationary period. Article 24 C. prohibits employes from bumping to a higher-paying position under the layoff language of that section. That section does not apply here both because this case does not involve a layoff situation and because there were vacancies while Grievant remained on her Art. 24 B.1. probationary period to which Grievant could have been returned without anyone being bumped.

The evidence concerning past practice establishes that employes who fail in or do not like the new position they have bid for are to be returned to the position they held when they were awarded the posted position. There has been no showing of any prior instance in which an employe who did not successfully complete the Art. 24 B.1. probationary period was not returned to the position the employe had last held. Steward Margaret Halbach testified that Vicky Lesch

moved back from a posted position during the probationary period, and that another employe was bumped to accommodate her return. To the same effect, in March of 1991, when Supervisor James Graf decided that Marlana Fiorentino would not successfully complete her Art. 24 B.1. probationary period, he directed in writing that she be "bumped back to her previous position . . .". The grievance filed in that case challenged the removal of Fiorentino from the new job, not the general propriety of returning an employe to the previously held position where the employe was properly determined to have failed during the probationary period. The fact that the parties later agreed that their settlement terms would not create a precedent does not preclude the Union from now holding the County to the above-quoted aspect of Graf's answer because Graf's return of Fiorentino to her previously held position was neither challenged in the grievance nor addressed in the terms of the settlement.

In any event, the County violated the posting provisions in Art 24 B.1. when it failed to award Grievant the ES Specialist position posted on May 20, 1992. Grievant should not have been required to take a test because she had performed the ES Specialist job for eleven years. There is no legal requirement that Grievant be tested in these circumstances, and the County did not require testing when former supervisor Linda Beatty bid for and was return the status of an ES Specialist which she had previously held on the same grandfathered basis as the Grievant. Furthermore, Grievant's test score of 71 was not a legitimate basis on which to conclude that Grievant was unqualified for the ES Specialist position. Roxanne Meyer gave uncontroverted testimony that she took the test for ES Specialist in May of 1991 and that Sharon McCormick told her that she had failed the ES Specialist test because she had not achieved a minimum passing score of 70. The County's unexplained and undenied tampering with the minimum qualifying score makes the artificial 74% qualifying threshold an invalid basis on which to disqualify Grievant. Based on her prior experience and the fact that she achieved what Meyer was told was a passing score above 70, Grievant was qualified for the ES Specialist position. By failing to award her the position in response to her bid for same, the County therefore violated the posting language of Art. 24.

On either or both of those bases, the County's failure to return Grievant to her former position of ES Specialist violated the Agreement and the parties' past practice. The appropriate remedy is reinstatement as an ES Specialist with full back pay including interest.

POSITION OF THE COUNTY

The County did not violate either the contract or past practice when it refused to return Grievant to her previous Economic Support Worker position. The contract contains no provision entitling an employe who elects to post for a position in another department to return to that employe's former position. To allow employes to opt to return to a former position would jeopardize the management and direction of County departments. Especially so if the employe were allowed to bump another employe in doing so. Indeed, Article 24 C.b. expressly provides

that an employe may not bump into a higher position.

The Union's evidence is far from sufficient to establish a past practice entitling employes to return to their former positions after they elect to post for a different position. The prior instances relied on by the Union consist of one case eight or ten years ago and a second situation in which the Union grieved the County's attempt to return the employe to her former position, which situation was rendered entirely irrelevant herein by the parties' agreement that the settlement reached in the case would not create a precedent. That evidence is insufficient to establish a past practice because it is not unequivocal, it is not clearly enough enunciated and acted upon, and it is not readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Moreover, in the two prior instances cited by the Union, the employe had posted to a higher-paid position, so that the return involved movement to a lower-paid position, unlike the situation in the instant case.

When Grievant elected to bid for a different position in a different department, Grievant gave up her status as an ES Specialist. Grievant did so in reliance on unfounded assumptions that she would somehow retain grandfathered status and a right to return to her previous position, without seeking prior clarification from the County.

For those reasons, Grievant had no special right to return to her former position arising out of her having held it prior to her electing to bid for a different position.

The County also did not violate the Agreement or past practice when it denied Grievant's attempt to bid for posted Economic Support Specialist openings. Rather, the County properly treated Grievant the same as it would have treated any other employe who bid for a posted ES Specialist vacancy. The County gave Grievant the same test it gives all applicants for that position. The only exception of record was Linda Beatty who was returning to an ES Specialist position following a period of time as an ES Supervisor which involved ES Specialist work and some supervisory responsibilities. The fact, that Grievant had been grandfathered during her prior service as an Economic Support Specialist as regards various eligibility requirements for that position while she was holding it, did not entitle her to such special status after she gave up her ES Specialist position and later applied for it while holding a different position in a different department.

Grievant's bid was properly denied because she did not attain the minimum passing score of 74%. No one with a score lower than 74 has ever been deemed qualified to be an ES Specialist. The fact that Grievant scored as low as she did on the test despite years of prior experience in the ES Specialist job provides further support for the County's conclusion that she was not minimally qualified for the position.

For those reasons, the answer to ISSUE 1 must be "No," and the grievance must be denied

in all respects.

DISCUSSION

ISSUE 1 - Claimed Right to Return to Former Position

ISSUE 1 calls for various determinations both about the nature of the Art. 24 B.1. probationary period and about the rights of employes during such periods. As both parties recognize, the Agreement does not specifically address either of those matters.

It can be noted that, unlike the Art. 22 definition of the probationary period for newly hired employes defined in Art. 22, Art. 24 B.1. does not expressly permit termination of probationary employes without recourse to the grievance procedure. It follows that employes terminated during the Art. 24 B.1. probationary period have recourse to the grievance procedure.

On the other hand, the inherent nature of a "probationary" status and the need to interpret Art. 24 B.1. so that term is not rendered meaningless require the conclusion that the County need not meet the full "proper cause" standard as regards its decisions whether an employe is satisfactorily performing in a job awarded through Art. 24 B.1. posting. The Arbitrator is therefore persuaded that the County's decisions as to success or failure of employes on an Art. 24 B.1. probationary period are subject to a lesser standard, proscribing only decisions that the Union shows were arbitrary, capricious or made in bad faith.

It surely follows from the above that employes are entitled to grieve allegedly arbitrary, capricious or bad faith Management decisions that they have failed to satisfactorily perform during their Art. 24 B.1. probationary period. However, a similar resort to contract interpretation standards does not provide persuasive guidance regarding whether employes, whom Management properly determines to have failed to satisfactorily perform the bid job, have a right to return to their former position.

Among the factors favoring an interpretation recognizing a right to return to the position previously held are the fact that jobs posted under Art. 24 B.1. are "awarded" based on seniority and qualifications; the fact that employes on Art. 24 B.1. probation would necessarily have previously successfully completed an Art. 22 probationary period as a newly hired employee; the general applicability of the Art. 3 "proper cause" standard for discharge; the absence of a no-grievance-procedure-recourse provision in Art. 24 B.1. such as appears in Art. 22; and the ability of Management to control the extent of its exposure to the potential difficulties associated with returning an employe to a former position both by use of its express authority to waive or lessen the Art. 24 B.1. probationary period and, of course, by its prerogative to determine that the employe is satisfactorily performing in the bid job.

Among the factors favoring an interpretation recognizing no such right are the general rights reserved to Management in Art. 3; the fact that Art. 24 B.1. does not expressly provide such a right; and the fact that, unlike discharged employes, employes properly determined to have failed during the Art. 24 B.1. probationary period would not thereby lose the right to bid for other posted jobs based on their seniority and qualifications.

In the absence of persuasive interpretative guidance from the language of the Agreement itself, the resort to past practice expressly anticipated by the parties' agreed-upon wording of ISSUE 1 is entirely appropriate.

The Arbitrator finds that the past practice evidence presented in this case persuasively supports Grievant's right to be returned to a position equivalent to the CS Specialist position she previously held once Graf informed her that she was not working out in the bid CS Secretary position.

In the Fiorentino case, it was Graf's initial decision and action that returned Fiorentino to her former position, not the no-precedent terms of the grievance settlement worked out later regarding the Union's claim that Graf had improperly concluded that Fiorentino's probationary period performance was unsatisfactory. The settlement agreement made no reference to Fiorentino's being placed or returned to her former position, and the Union did not assert that it was improper for an employe to be returned to the previously held position where Management properly found the employe's probationary performance unsatisfactory. The settlement agreement also does not provide that the Union would not rely in the future on those of Graf's actions that were unaffected by the terms of that agreement. Accordingly, neither Graf's pre-grievance return of Fiorentino to her previous position nor his explanation of that action in his grievance answer are subject to the no-precedent pledge in the settlement agreement.

Graf appears to have unconditionally returned Fiorentino to her former position. The County has not claimed or shown that Fiorentino was required to await a posted vacancy or to subject herself to a review of her qualifications for her formerly held position, or to compete for her formerly-held position based on seniority and qualifications. Graf's grievance answer makes reference to "an accepted practice" regarding the probationary period. His answer treats his decision to return Fiorentino to her previous position in the Clerk of Courts Office as the necessary consequence of Graf's determination Fiorentino had not qualified for the CS Secretary position during the probationary period. Graf sent a copy to then Personnel Director John Bowen, and there is no County claim or showing that the County ever disavowed or sought to reverse Graf's return of Fiorentino to her previously held position.

Graf's return of Fiorentino to her previously held position upon concluding that she could not qualify for the CS Secretary position, occurring as it did on March 22, 1991, constitutes a comparatively recent indicator that County Management considered Graf's return of Fiorentino to

be the appropriate course of conduct to be followed by Management where an employe fails to satisfactorily perform during an Art. 24 B.1. probationary period. The subsequent grievance processing over the lengthy period preceding the date of the settlement agreement would have brought Graf's action and grievance response to the attention of the parties' principal representatives, including the successor Personnel Director, Conway, who was among those who signed the settlement agreement. Graf's return of Fiorentino and his related grievance answer in March of 1991 occurred earlier in time than Grievant Henning's November, 1991 decision to bid for the CS Secretary position in the instant case. So it is plausible, as Grievant claims, that her assumption that she would be returned to her former position if things did not work out in a bid job was based in part on conversations with Fiorentino about the latter's situation.

Halbach testified that Vicky Lesch was also twice returned to her former position, under contract language materially the same as that in Agreement Art. 24 B.1., when she experienced difficulties in jobs she was awarded through the posting procedure. The County did not claim or show that Halbach's testimony in those regards was inaccurate in any respect. While those examples occurred some 8-10 years ago, they nonetheless lend further support to the notion that the established and mutually-accepted procedure in the instant relationship has long been that employes performing unsatisfactorily during an Art. 24 B.1. probationary period are to be returned to their former position rather than merely removed from the bid job and left to fend for themselves by bidding for vacancies for which they may be qualified if and when suitable bargaining unit postings occur.

It is also noteworthy that the County was put on notice that the Union was relying on past practice from the very initiation of the grievance, which so states on its face. In that context, the absence of any County claim or showing that other employes have ever been treated differently than Fiorentino and Lesch were treated suggests either that failures during Art. 24 B.1. probationary periods have been few and far between (which would justify basing conclusions on a relatively few examples) or that the parties' have had a longstanding and uniform practice consistent with the treatment shown to have been given Fiorentino and Lesch.

For all of those reasons, the Arbitrator finds the instant record sufficient to establish a past practice to the effect that employes whom Management properly concludes have failed to perform a bid job satisfactorily during the Art. 24 B.1. probationary period are to be returned to a position equivalent to that which they last previously held. By so finding, the Arbitrator is not determining whether past practice supports the Union's further contention (not directly at issue on the facts of this case) that employes have been historically treated as free to return to their former position at any time during the Art. 24 B.1. probationary period even where Management has not determined their probationary performance to be unsatisfactory.

There remains the County's contention that Grievant had no right to bump another employe from her former position because, unlike any of the prior instances cited by the Union,

Grievant Henning sought to bump back to a higher-paying position, contrary to the Art. 24 C.b. proviso that "Bumping may not be exercised against employees in a higher position." The Arbitrator finds no merit in that County contention.

Unlike the potential circumstances in a layoff bumping situation, the position Grievant previously held was higher-paying than the CS Secretary position only because she had taken the somewhat unusual step of bidding for a lower-paying position when it was posted. Because it is Management's decision that her performance was unsatisfactory -- rather than merely a change of heart on Grievant Henning's part -- that prevented Grievant from successfully completing her Art. 24 B.1. probation as a CS Secretary, returning her to a higher-paying position does not grant Grievant the sort of unfair advantage over other employes that Art 24 C.b. language appears designed to prevent in the potential circumstances of a layoff bumping situation.

Moreover, the language relied on by the County appears only in Art. 24 C.1. dealing specifically with layoffs. The situation to which that language applies would involve a full-time employe facing a layoff arising from a County decision to decrease the work force. In that circumstance, the employe would have the right to elect to induce the layoff of any less senior employe in any classification and position for which the bumping employe has the training and experience to carry out the work responsibilities. By contrast, the instant case involves no decrease in the work force and no opportunity for Grievant Henning to decide which junior employe in which classification she wanted to bump.

For those reasons, the possibility that Grievant might have been bumping the least senior employe in her former classification and department from a position higher-paying than the CS Secretary position that she failed to satisfactorily perform during her Art. 24 B.1. probationary period does not constitute a persuasive basis on which to differentiate the treatment to be accorded Grievant from that which was accorded to Fiorentino and Lesch. (The Arbitrator is not basing that determination in any way on the Union's claim in its brief that Fiorentino's return to her former position in the Clerk of Courts office resulted in the bumping of another employe. Whether that return bumped another employe is unclear, at best, because Ann Wondergem's testimony about an employe from Accounting being bumped back to Accounting appears likely to have been referring to the situation that occurred when an arbitrator ordered that Fiorentino be awarded the opportunity to serve an Art. 24 B.1. probationary period as a CS Secretary in the first place.)

Graf determined that Grievant was not performing satisfactorily as a CS Secretary during her Art. 24 B.1. probationary period. Graf appears to have so informed Grievant on May 4, 1991. In accordance with the parties' past practice, Grievant was therefore entitled under Art. 24 B.1. to be returned to a position equivalent to the CS Specialist position she previously held, without that return being conditioned on a posted vacancy being available or on Grievant being the most senior employe qualified applying or on a determination whether Grievant was qualified for

the position she held prior to beginning her Art. 24 B.1. probationary period. The County's screening test is not a requirement imposed by law. Grievant was eligible to hold her CS Specialist position by reason of a previously-served probationary period and a grandfathered eligibility status. Neither her bid for a CS Specialist position nor her failure to successfully complete her Art. 24 B.1. probation in that position are a proper basis on which to require her to re-establish her qualifications for the CS Specialist position. Rather, she was entitled to be (and is being) returned to that position free of any such condition by operation of the Agreement interpreted in accord with the parties' past practice. On the other hand, Grievant's return to work as a CS Specialist does not remove any prior disciplinary actions that may be in her record. (Neither the Grievant's prior disciplinary record nor the record of the other arbitration case involving the Grievant that is presently pending before the instant Arbitrator were made a part of the record in the instant matter.)

The foregoing determinations make it unnecessary to determine the validity of the Union's alternate contention that the posting language in Art. 24 B.1. required the County to award Grievant one of the ES Specialist vacancies posted on May 20, 1992.

ISSUE 2 -- Remedy

By way of remedy, the Arbitrator has ordered conventional reinstatement and make-whole relief. As noted, the record indicates that Grievant was informed by Graf on May 4, 1992 that she would not successfully complete her Art. 24 B.1. probationary period as a CS Secretary. She made her consequent interest in being returned to ES Specialist known to the County on May 11, 1992. As Grievant's own memorandum to that effect recognizes, the County should be deemed entitled to a reasonable period of time within which to effect a return of Grievant to ES Specialist. The Arbitrator finds two weeks an appropriate period for that purpose. Accordingly, the beginning point for any back pay due Grievant under the remedy ordered has been established as May 25, 1992.

The Union's request for interest on any monies due Grievant under this Award is denied because there is no Union claim or showing that interest on back pay is mutually understood to be a customary element in back pay remedies in grievance arbitrations under the Agreement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

> 1. The Employer, Sheboygan County, did violate Art. 24 B.1. of the contract, interpreted in accord with the past practice of the parties, when it refused to return Jodell Henning to her

previous Economic Support Worker position (which is now referred to as an Economic Support Specialist position).

2. The appropriate remedy is that Sheboygan County shall immediately:

a. offer Jodell Henning unconditional reinstatement to her former Economic Support Specialist position in the Division of Social Services with full restoration of seniority and of other rights and privileges. If Henning's former position no longer exists, then the County is to offer her unconditional reinstatement to an equivalent Economic Support Specialist position in the Department of Social Services.

b. make Grievant Jodell Henning whole, without interest, for any loss of wages and benefits she experienced due to the County's failure on and after May 25, 1992, to return her to her previous status as an ES Specialist.

3. The Arbitrator retains jurisdiction for a period of 60 days following the date of this Award to resolve, at the request of either party, disputes concerning the meaning and application of the remedy specified in 2, above.

Dated at Shorewood, Wisconsin
this 21st day of May, 1993 by

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator