BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WAUSHARA COUNTY SOCIAL SERVICES AND COMMUNITY PROGRAMS EMPLOYEES UNION, LOCAL 1824, WCCME, AFSCME, AFL-CIO and WAUSHARA COUNTY	Case 52 No. 52247 MA-8887

Appearances:

Mr. James L. Koch, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, N 7633 Jupiter, Fond du Lac, Wisconsin 54937, for Waushara County Social Services and Community Programs Employees Union, Local 1824, WCCME, AFSCME, AFL-CIO, referred to below as the Union.

Mr. James R. Macy, with Mr. Timothy J. McCoy on the brief, Godfrey & Kahn, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, for Waushara County, referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Kathryn Surprise, 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 23, 1995, in Wautoma, Wisconsin. The hearing was transcribed, and the parties filed briefs and a reply brief or a waiver of a reply brief by August 7, 1995.

ISSUES

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

Is the grievance arbitrable?

If so, did the Employer violate the collective bargaining agreement by refusing to award the Social Worker IV - Experienced Worker - Long Term Support position to the Grievant?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

PREAMBLE

THIS AGREEMENT is made and entered into by and between . . . the "Employer" and the . . . "Union", for the purpose of maintaining harmonious labor relations; to establish a uniform scale of wages, hours and working conditions; to assure the efficient and economical operations of the County; to secure and sustain maximum productivity of each employee; to facilitate a peaceful adjustment of all grievances and disputes which may arise between the Employer, employees, and the Union; and further to set forth the entire agreement between the Employer, the Union, and the employees covered by this agreement.

ARTICLE 1 - RECOGNITION

1.01 - The Employer recognizes the Union as the exclusive representative pursuant to Section 111.70 of the Municipal Employment Relations Act for the purposes of collective bargaining . . .

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 - Except as otherwise herein provided the operation and control of the Waushara County Department of Social Services and Community Programs Board is vested exclusively in the Employer and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the Waushara County Department of Social Services and Community Programs Board;

. . .

D. To hire, promote, transfer, schedule, and assign employees in positions within the Departments;

E. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

. . .

G. To maintain efficiency of operations;

H. To take whatever reasonable action is necessary to comply with State and Federal Law;

I. To introduce new or improved methods or facilities;

J. To change existing methods or facilities;

K. To determine the kinds and amounts of services to be performed as pertains to operations, and the number and kind of classifications to perform such services;

L. To determine the methods, means, and personnel by which operations are to be conducted . . .

ARTICLE 6 - SENIORITY

6.01 - Definition: Seniority means an employee's length of continuous service with the employer since his/her last date of hire within the bargaining unit. Seniority shall not be diminished by approved temporary leaves of absence or layoff . . .

ARTICLE 8 - GRIEVANCE PROCEDURE

8.01 - Definition of Grievance: A grievance shall be defined as a dispute concerning the interpretation, application, and/or enforcement of the terms of this Agreement . . .

8.05 - Procedural Steps: . . .

D. **Step 4:** If the grievance is not resolved at Step 3, the Union shall notify the Committee or subcommittee through the Administrative Coordinator's office of its intent to submit

the grievance to arbitration within ten (10) working days of the Step 3 response.

8.06 - Arbitration: Any grievance which cannot be settled through the above procedures may be submitted to an arbitrator.

. . .

8.07 - Decision of the Arbitrator: The decision of the Arbitrator shall be in writing to the Employer and Union. The Arbitration decision shall be final and binding upon the parties. The Arbitrator shall not add to, delete from, nor modify the specific provision of the Agreement . . .

ARTICLE 9 - DISCIPLINARY PROCEDURES

9.01 - The Employer may discipline, reprimand, suspend and discharge employees for just cause . . .

ARTICLE 10 - JOB POSTING

10.01 - Posting: When the Employer deems it necessary to fill a vacancy or a new position, the Employer shall post a notice of such vacancy or new position on the bulletin boards in each department for a period of five (5) working days. The posting shall contain the desired job requirements, the rate of pay, and instructions where interested parties may apply. The position will be filled within fourteen (14) calendar days after the selection of the successful applicant, or as may be mutually agreed.

10.02 - Job Award: The most qualified employee applying shall be assigned the position provided that where qualifications are relatively equal, seniority shall become the determining factor. Seniority for purposes of this Article shall be defined to give preference to those applicants in the Department (Social Services or Community Programs Board) where the vacancy exists . . . Should no bargaining unit employee apply or qualify, the Employer may hire from outside the bargaining unit.

10.03 - Trial Period: The employee who receives the position shall serve a thirty (30) calendar day trial period in the position.

. . .

ARTICLE 32 - NON-DISCRIMINATION

32.01 - Neither the employer nor Union shall discriminate on the basis of race, color, religion, sex, national origin, handicap, or age as provided by law. It is understood that this Article shall not be subject to Article 8, Section 8.05, Step 4 and 8.06 of this Agreement . . .

APPENDIX A
CLASSIFICATION AND COMPENSATION PLAN

. . .

	Start	**6 mos.**	**15 mos.**	**24 mos.**
Social Worker IV (Masters)	. . .			

BACKGROUND

The grievance form, filed on January 4, 1995, reads thus:

> (Circumstances of Facts); (**Briefly, what happened**) Management failed to award the posted Social Worker IV position to Kate Surprise pursuant to Article 10.
>
> (The contention-what did management do wrong?) (**Article or Section of contract which was violated if any**) The applicable sections violated are as follows: Preamble, Article 1, 2, 6, 8, 9, 10, 32 and/or any others that may apply.
>
> (The Request for Settlement or corrective action desired): Award the position of Social Worker IV to Kate Surprise retroactive to 12-21-94 with full back pay, seniority and . . . benefits.

The posting referred to in the grievance was for the position of Social Worker IV - Experienced Worker - Long Term Support, in the Employer's Social Services Department. The posting stated the "Qualifications" for the position thus:

Master's Degree in Social Work or related field required.

Three years experience.

See attached Position Description.

The "attached Position Description" had been revised in December of 1994. The Position Description repeated the Masters Degree requirement stated on the face of the posting. The Position Description for that position had previously been revised in March of 1994 and stated the following under the heading "Education, Training and Experience:" "Master's degree in social work or related field recommended . . ."

The Grievant was the only employe to sign the posting. At the time she signed it, she was classified as a Social Worker II in the Long Term Support Unit. She had been hired by the Employer in August of 1989 as a Social Worker I. At the time she signed the posting, she was three courses short of earning a Masters Degree in Public Administration. The remaining course work would have taken her roughly one year to complete. Throughout her employment, she has been interested in moving into administrative duties. There is no dispute that her work and academic records are satisfactory or better.

The previous incumbent in the Social Worker IV position sought by the Grievant was Pat Enright. Enright occupied that position from March of 1991 until he submitted a letter of resignation, dated December 13, 1994, from the position. His resignation was effective January 11, 1995. Throughout that period of time Enright served as the Lead Worker of the Long Term Support Unit. He reported to Lucy Rowley, the Director of the Department of Social Services. Rowley, in turn, reported to the Social Services Board which in turn reported to the County Board of Supervisors.

Rowley hoped to fill the position offered to Enright with an employe possessing a Masters Degree. The Social Services Board, however, wanted to fill the position from within. Rowley recommended to the Social Services Board that if the position was filled from within, then Enright, as the successful bidder, should acquire a Masters Degree. The Social Services Board authorized Rowley to offer the position to Enright. She did so in a letter dated March 18, 1991, which states:

> . . . I am pleased to offer you the opportunity to post from your current Social Worker II position to the Experienced Worker, Long Term Support Services, Social Worker IV position. You will have a 30 day trial in this position. If at the end of the trial period you are to continue in the Social Worker IV position, there will be an additional 5 months of probation . . . I will need for

> you to include in your acceptance letter your agreement to initiate a plan for the completion of a Masters degree. This plan must be in place by the end of your probationary period . . .

Enright accepted this offer, and in his letter of acceptance, dated March 25, 1991, stated the following:

> I agree to the stipulation of initiating a plan for the completion of my masters degree and would like to discuss this more in depth with you so that I can further my education in an area that would best be suited for this position.

Enright subsequently advised the Employer in writing that:

> In keeping with the agreement to express my intent to begin graduate studies toward the pursuit of a masters degree I submit the following plan for a course of studies. It is my intent to start working towards a Masters Degree in Public Administration with an emphasis in Gerontology in the spring semester of 1992 at the University of OshKosh (sic) . . .

Enright did not enroll in the program cited in this letter.

Enright's failure to follow through on his commitment to enroll in a Masters Program caused concern among unit members and the management of the Social Services Department. In a letter to Enright dated November 30, 1992, the Program Manager of the Department of Social Services raised a number of concerns regarding Enright's performance and set forth a number of performance based deadlines including a requirement for the submission of "Graduate School Documentation" by December 10.

Rowley revised the position description and promptly posted the position after receiving Enright's resignation. She posted the position promptly because she did not want to risk losing any of the positions allocated to the department. She added the requirement of a Masters Degree to avoid repeating what she viewed as the mistake of allowing Enright to assume the position without a Masters Degree. Her understanding of relevant State and Federal regulations was that filling the position with a person not having a Masters Degree might subject the Employer to a loss of funding. The Employer did not, however, experience any loss of funding while Enright filled

the position. It is undisputed that she did not report her change of the Position

Description to the Social Services Board prior to posting the position. It is also undisputed that the Employer did not offer to collectively bargain this change with the Union prior to the posting.

Rowley and Deb Behringer, the Employer's Administrative Coordinator, informed the Grievant that she would not be awarded the Social Worker IV position because she did not possess a Masters Degree. The Grievant offered to agree to commit, in writing, to the completion of her program, as Enright had. The Employer declined the offer.

The posting deadline was December 21, 1994. The Social Services Board met on December 28, 1994. Rowley advised the Social Services Board that the Grievant was the sole applicant for the position and did not possess a Masters Degree. She also stated her own desire to require the degree as a requirement of the position. The Social Services Board agreed that the requirement of a Masters Degree should be enforced. The Employer advertised the position outside of the bargaining unit, but, as of January 25, 1995, put "the interviewing process . . . on hold until the union grievance concerning that position has been resolved."

Rowley's concerns about the Social Worker IV position formerly held by Enright extended beyond the need for a Masters Degree. She was not convinced the Lead Worker functions of the position had translated into the supervision over unit personnel she hoped for. She voiced these concerns to the Social Services Board, which began to consider the need for the position. In late January of 1995, William J. Downie, the Chair of the Social Services Board, reported to the Personnel Committee his own concern that the Social Worker IV position should carry supervisory authority. The Social Services Board minutes of its February 28, 1995 meeting indicate "(r)eorganization of department management has come out of the union discussion, as a byproduct, but will be pursued with a plan presented to the Board at the March meeting."

Downie stated the Social Services Board's view of its contemplated reorganization in a letter, dated March 1, 1995, to Kay Saarinen-Baar, the President of the Union, which states:

> This letter is to inform the Union that the Department of Social Services will not be proceeding to hire for the now vacant Social Worker IV, Lead Worker - Long Term Support position. The previous posting and advertising are withdrawn. We are in the process of evaluating the supervision and management needs of the Department and will be making recommendations to the Social Services Board, Personnel Committee and County Board of Supervisors in the near future.

> It is imperative that the fiscal, managerial and supervisory functions needed for the Department to continue to run its business efficiently and effectively be reviewed and that the recommendations reflect this process.
>
> Currently in Long Term Support, Child and Family Services and the Support Services Unit there is one position with supervisory responsibilities for 22 staff positions. In the Economic Support Unit there is one supervisory position for 7 staff positions. Some direct supervisory responsibilities fall to the Director and others currently fall away. The development of self directed work teams . . . has been hampered by workload, personnel issues and fiscal restraints. New State standards for the provision of children's protective services, permanency planning for children in foster care and case management in long term support have posed procedural issues that must be addressed. The fragmentation of reporting, program and fiscal management that has evolved needs to be brought together at the management level.
>
> An evaluation and planning process is underway.

On March 29, 1995, the Social Services Board voted to recommend a reorganization of the department. That recommendation was communicated to the Personnel Committee, which accepted the recommendation. The County Board approved the reorganization on May 9, 1995. As a result of the reorganization, the Employer created an additional entry level Social Worker I position in the Long Term Services Unit. The posted Social Worker IV position was not filled. A companion Social Worker IV position was eliminated, and the Employer created what it viewed as a non-unit supervisory and managerial position.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union states the issue for decision thus:

> Did the Employer violate the Collective Bargaining Agreement

when it unilaterally and arbitrarily denied the Grievant Katherine

> Surprise the vacant "Experienced Worker Social Worker IV" position, of December 13, 1994, and if so what is the appropriate remedy?

After a review of the factual background, the Union notes that wages, hours and conditions of employment "are mandatory subjects of bargaining in Wisconsin." Noting that the labor agreement governs job posting, that County personnel policies set standards "for changing Job Descriptions," that the educational requirements "for the position in question have remained constant throughout the many past years," and that the parties have failed to negotiate any waiver of these standards, the Union concludes that the Employer's action regarding the position sought by the Grievant was totally unilateral.

That the Employer intended to fill the position vacated by Enright on December 12 is, the Union argues, established by its advertising the vacancy in January. Rowley's testimony establishes that the Grievant was qualified for the position, according to the Union. The only change in the position description was the requirement of a Masters Degree "in social work or related field," and the Union notes that the Grievant was close to the completion of the work necessary to receive such a degree.

With this as background, the Union asserts that the unilateral requirement of a Masters Degree "is in direct violation of the Agreement, and especially when one considers that the change was not implemented in accordance with, Wisconsin Statutes 111.70, Wisconsin Chapter 19 and (the Employer's) own Policy and Procedures." The Union contends this assertion is underscored by the Employer's earlier selection of Enright, who had no Masters Degree and no pending effort to acquire one. That Rowley may not have wished to repeat her experience with Enright affords, the Union argues, no basis to deny the position to the Grievant. To conclude otherwise would, the Union avers, undermine the agreement's unambiguous posting language, and ignore the fact that the Grievant satisfactorily assumed the duties of the position she posted for.

Since the Employer's action to abolish the position once held by Enright took place after the filing of the grievance, the Union contends that this constitutes a denial of a promotional opportunity in violation of the contract and of arbitral precedent. Any raising of the educational requirements for the position could, the Union asserts, only be enforced against new hires, not retroactively against existing employes. Since the Union has demonstrated the Grievant's qualifications for the position, and since the Employer's assertions that persons with a Masters Degree would perform more ably or would not subject the Employer to funding problems remain unsubstantiated, the Union concludes the Grievant must be awarded the position.

Dismissing the purported reorganization as "a last ditch effort to support (its) denial of the posting," the Union concludes that objected to evidence relied on by the Employer to establish this reorganization affords the Employer no defense.

Viewing the record as a whole, the Union concludes thus:

> The most reasonable and fair interpretation of this grievance arbitration would be to support the position of the Union, and order the Employer to follow the intent and purpose of the Negotiated Agreement, by awarding the grievant . . . the vacant "Experienced Worker Social Worker IV" position with full back pay and retroactive benefits.

The Employer's Initial Brief

The Employer states the issues thus:

> Two major issues are presented by the grievance. First, is the grievance arbitrable? . . . The second issue is whether the Labor Agreement's reservation of management rights to the County encompasses the right to specify and require a Master's degree as a minimum job qualification for the Department's Social Worker IV position.

After a review of the factual background, the Employer contends that the grievance is not substantively arbitrable. Section 8.01 defines a "grievance" to pose "a question of interpretation, application or enforcement of the Labor Agreement," and, according to the Employer, the Grievant was unable to specify any provision violated by the Employer. Since Section 8.07 mandates that an arbitrator neither "add to, delete from, nor modify" any contract provision, the Employer contends that the Grievant's inability to link any Employer action to a contract provision is fatal to the grievance's arbitrability. Since the right to set minimum requirements for a position is a reserved right not flowing from the agreement, the Employer contends that to sustain the grievance requires arbitral creation of a contract obligation. The Employer then contends that since the position has been eliminated, the grievance is moot, and thus beyond the authority of an arbitrator to address.

If the grievance is determined arbitrable, the Employer asserts that it properly exercised its authority to require a Masters Degree as a minimum qualification of the Social Worker IV position. Although this right "is not explicitly addressed by the Labor Agreement," the Employer argues that it is a reserved right, routinely upheld in arbitral precedent. Subsections G through L of Article 2 only underscore this conclusion, according to the Employer.

Nor will the evidence demonstrate anything other than that the requirement of a Masters Degree is reasonable and "directly related to the leadership and supervisory responsibilities of the Social Worker IV position." State and federal funding requirements, the Employer's adverse experience with Enright's "blatant disregard" of obtaining a Masters Degree, and the Employer's requirement of a Masters Degree in related positions establishes, the Employer concludes, the reasonableness of its refusal to move the Grievant into the position.

Arbitral precedent establishes, the Employer asserts, that it reserves the right to fill a vacant position before or after a job posting. The same authority establishes its right to reorganize itself and to adjust job classifications accordingly. The abolition of the Social Worker IV position was, against this background, proper. The Employer underscores that discussions of this reorganization preceded the filing of the grievance.

That the Employer afforded Enright the opportunity to obtain a degree while holding the Social Worker IV position establishes no more than that Enright taught it a lesson. The Employer argues that Enright's conduct cannot be considered a past practice or in any way binding.

The Employer concludes that the grievance must be found not arbitrable or dismissed.

The Union's Reply

The Union waived the filing of a reply brief.

The Employer's Reply

The Employer argues that the Union has mischaracterized the evidence. More specifically, the Employer asserts that the Union's contention that the Masters Degree requirement was not announced to the Grievant until after the grievance was filed is "just simply wrong." The linking of a Masters Degree to the Social Worker IV position can be noted in the labor agreement, the December job posting and in published notices regarding legislative changes.

The Employer then challenges the Union's contention that Rowley unilaterally implemented the change to require a Masters Degree for the position sought by the Grievant. Rowley communicated to relevant County Board committees and the personnel department regarding the change. Beyond this, the Employer notes that Enright's filling of the position had been itself predicated on his attainment of a Masters Degree while in the position.

The Employer then challenges the Union's contention that the Social Worker IV position, with the exception of the Masters Degree requirement, did not change from the time Enright

assumed the position until the Grievant posted for it. A side-by-side examination of the two job descriptions manifests, the Employer asserts, fundamental changes in duties. Beyond this, the

Employer asserts that the Union's contention that the Grievant performed the duties of a Social Worker IV for several months is flawed, since she did not perform the responsibilities added to the posted position.

Nor does the Union's assertion that the Employer's actions denied it a bargained promotional opportunity withstand scrutiny. The changes in the position reflect no more than the implementation of its management rights, according to the Employer. Nor can a refusal to bargain be squared with the evidence since there is no evidence the Union ever requested such bargaining. That other unit members could have signed the posting establishes, according to the Employer, that there has been no loss of a bargained promotional opportunity.

Even if a contract violation could be found on the evidence, the Employer asserts that the Union "improperly asks this arbitrator to ignore evidence directly relevant to the remedy they request . . ." Asserting that the "plain fact is that the posted position was never filled and was eliminated," the Employer concludes that the remedy sought by the Union "is simply not possible."

The Employer concludes that the grievance is either without merit or is moot, and should be denied in either case.

DISCUSSION

The Employer asserts a threshold issue of arbitrability. The issue is jurisdictional in nature. Citing Jt. School Dist. No. 10 v. Jefferson Ed. Asso., 78 Wis.2d 94 (1977), the Employer contends arbitration of the grievance is "improper" since the parties have not mutually agreed to submit issues of this type to arbitration. The governing principle that "arbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed to submit" flows from the "Steelworkers trilogy" and states the legal bedrock on which the enforceability of arbitration rests. 1/

Jefferson states not just this governing principle, but the analytical framework which puts it into practice. The legal determination of arbitrability proceeds thus:

> The court's function is limited to a determination whether there is a

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1/ 78 Wis.2d at 101, citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 2/

2/ Ibid., at 111.

Noting "the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes," 3/ the Jefferson Court noted that a grievance should be found arbitrable unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 4/

With one exception already acknowledged by the Union, the Employer's assertion that the grievance is not arbitrable must be rejected. The Section 8.01 definition of "grievance" mandates that a grievance pose an issue "concerning the interpretation . . . of this Agreement." The grievance specifically cites Articles 1, 2, 6, 8, 9, 10 and 32.

It is not readily apparent how the Preamble or Article 1 can be viewed, on their face, to cover the grievance. The Preamble notes the purpose of the agreement is to maintain "harmonious labor relations," and Article 1 defines the bargaining unit. If the grievance poses interpretive issues through these provisions, it is not clear how any dispute would fall outside of Section 8.01. If this is the case it is not clear why the parties chose to restrict the definition of a grievance to those disputes posing issues of contract interpretation.

Article 2, however, does cover the grievance on its face. Section 2.01 E requires "just cause" for the Employer's exercise of its right to "suspend, demote, discharge, and take other disciplinary action against employees." The grievance alleges that the action involved is the Employer's refusal to grant the Grievant "the posted Social Worker IV position." This is clearly not a suspension, demotion or discharge. It is, however, apparent this denial, if undertaken for disciplinary purposes, could constitute "other disciplinary action." The interpretive issue thus posed is whether the Union can establish facts sufficient to establish both that the denial of the position was disciplinary and that the denial lacked just cause. This issue requires the application of a contractual provision to the evidence. This exhausts the limited arbitrability analysis of Jefferson. That analysis was not designed to test the merits of a grievance but to test whether an arbitrator has the authority to apply contract provisions to the evidence.

Similar considerations, with one exception, govern the remaining contractual allegations. The Employer argues that the evidence dictates the conclusion that no contract provision governs the grievance. This points to the arbitrability of the grievance, however, for it presumes an application of the contract to the evidence. It may be that the Employer properly applied the provisions of Article 10 to the Grievant. It is, however, impossible to reach this conclusion without some examination of the evidence. For example, Section 10.02 states that the "most qualified employee applying shall be assigned the position . . ." The Employer's contention that

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3/ Ibid., at 112.

4/ Ibid., at 113.

this provision must be harmonized with its authority under Article 2 requires an evaluation of

the Grievant's qualifications and the Employer's authority to establish qualifications and to create and eliminate positions. That evaluation presumes the grievance is arbitrable. The Jefferson analysis confirms this, for on its face, Section 10.02 covers the grievance.

The Employer's contention that the grievance is moot poses similar considerations. If the Employer has the authority under Article 2 to eliminate the posted Social Worker IV position, then the grievance is, arguably, moot. The determination of mootness presumes, however, an application of at least Articles 2 and 10 to the grievance to determine if the Employer does have the authority to eliminate the previously posted position.

The sole exception to the conclusion that the Jefferson analysis requires arbitral consideration of the grievance turns on Article 32. Article 10, on its face, presumes the award of a vacant or new position to the qualified applicant. The determination of qualifications is subject to, at a minimum, the limitations of Sections 10.02 and 10.03. From this, it is arguable that the grievance can challenge the Employer's denial of the position based on its refusal to extend to the Grievant, a female, the same latitude extended to Enright, a male, to meet the qualifications criterion. Arguably, this meets the first element of the Jefferson analysis. Article 32 establishes, however, that the grievance cannot withstand the second element of the Jefferson analysis. The second sentence of Article 32 "specifically excludes" allegations of discrimination "on the basis of . . . sex" from the arbitration process.

It is thus necessary to address the merits of the grievance. The evidence focuses on an application of Articles 2 and 10. The Preamble, Articles 1, 6 and 8 do no more than underscore that the Grievant is entitled to the benefit of the contract in being considered for the position. Article 6 at most underscores that the Grievant possesses seniority rights. Those rights are specifically established in Section 10.02, and are, in any event, irrelevant here. The Grievant was the sole unit applicant for a position which was eliminated. Her seniority is relevant only to an assessment of the rights of competing applicants. Since there are no competing applicants, seniority is not in issue.

The evidence establishes that the Employer's denial of the position has no disciplinary connotations within the meaning of Article 9. Even assuming the Employer's refusal to extend to the Grievant the same agreement it extended to Enright can be a form of discipline, it is apparent the Employer's action toward the Grievant did not in fact discipline her. Rowley's testimony manifests no intent to sanction, or to document for future sanctioning, any inappropriate behavior on the Grievant's part. No other Employer action has been established which could be considered discipline of the Grievant. Rowley determined not to repeat what she had come to view as the mistake of permitting Enright to complete Masters Degree study on the job. There is no evidentiary basis to doubt that the Grievant could have fulfilled the promise Enright proved incapable of keeping. This does not, however, have disciplinary overtones. In a certain sense, the Grievant paid for Enright's conduct. To consider the Employer's conduct a form of discipline would, however, deny the Employer any discretion to respond to its own mistakes and ongoing

administrative needs. This flies in the face of the discretion granted under Subsections I, J, K and L of Section 2.01.

Thus, any contractual violation pointed to by the grievance focuses on Articles 2 and 10. That the Employer can reorganize its positions is not in dispute. Section 2.01 generally addresses this, and the subsections of that section specify the necessary authority. Section 10.01 acknowledges the authority by limiting the posting process to those positions the "Employer deems it necessary to fill." Thus, the reorganization which resulted in the elimination of the Social Worker IV position is not in dispute here. Rather, the issue is whether something prefatory to or within the reorganization violated the agreement.

The Union essentially argues that the Employer, by posting the Social Worker IV position, deemed it necessary to fill the position, and violated Article 10 by not filling it with the Grievant. This contention poses two related issues. One is whether the Employer improperly raised the recommendation of a Masters Degree to a requirement. The other is whether the Employer violated Article 10 by refusing to fill a posted position.

The Union asserts that the Employer made the recommendation for a Masters Degree a requirement in violation of the labor agreement, County Ordinances and its statutory duty to bargain. Even assuming the Employer's statutory duty to bargain is posed here, that duty affords no basis to grant the grievance. The Commission has stated the Employer's duty to bargain thus:

> A municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language . . . Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck. 5/

The evidence establishes that the contract addresses the dispute, whether it grants the Grievant a remedy or not. At a minimum, Articles 2 and 10 cover the grievance. That the grievance seeks an award of the posted position, not bargaining, underscores this point. The Union has consistently maintained the Employer violated the labor agreement. The Employer cannot have violated the labor agreement if the agreement does not cover the dispute. If, however, the

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5/ City of Madison (Fire Department), Dec. No. 27757-B (WERC, 10/94) at 10, citations omitted.

agreement covers the dispute, the Employer cannot have violated its duty to bargain.

In sum, the Employer was under no duty to bargain the change since that change is covered by the contract. Even if a waiver by contract was not proven, there is no evidence the Union ever requested bargaining. This is not, then, a case in which the duty to bargain plays a dispositive role.

Nor is any Employer violation of the labor agreement apparent in Rowley's action to amend the position description to require a Masters Degree. Initially, it should be stressed that the degree requirement challenged by the Union is not, standing alone, a significant change in the position description. There is no evidence of a challenge to Rowley's conditioning the offer of the Social Worker IV position to Enright on his earning a Masters Degree. That the Employer was less than zealous in enforcing this requirement cannot obscure that it treated the degree as a requirement of the position well before the December 1994 amendment of the position description. Beyond this, even under the pre-December 1994 position descriptions it appears that the Employer could have preferred a candidate with a Masters Degree to one lacking the degree. At most, the December 1994 amendment clarified that the "recommendation" was a "requirement."

There is no contract provision which prohibits the December 1994 amendment of the position description. Section 10.02 mandates that a posting "contain the desired job requirements," but is silent on how those requirements are set. The Employer's contention that Article 2 grants it that authority stands unrebutted.

The Union contends that the Employer's alteration of the Social Worker IV position description violated its own ordinances and policies. There is no apparent contractual authority for an arbitrator to interpret these enactments. The Union's arguments stress that the Employer cannot deliberately undermine agreement provisions. The persuasive force of this argument can be granted. 6/ From this it is arguable that Employer disregard of its own policies manifests such an effort. The record shows, however, no reason to question Rowley's good faith. She promptly posted the position held by Enright to preserve its existence. The promptness of the posting cannot detract from her testimony that she was unhappy both with Enright's failure to acquire a Masters Degree and with his role in the peer-evaluation system. The evidence shows that she and Social Services Board members shared a concern on the type and amount of supervision afforded within the Social Services Department. The modifications made to the Social Worker IV position description reveal, then, no more than her desire to preserve Enright's position within the table of organization and to address problems within the position which arose during his tenure.

In sum, there is no demonstrated contractual violation in the Employer's amendment of the Social Worker IV position description to require a Masters Degree. That the Grievant did not possess a Masters Degree at the time of the posting is undisputed.

6/ See, generally, Labor and Employment Arbitration, Bornstein and Gosline, (Matthew Bender, 1995) at Section 30.02.

In the absence of a contractual basis to strike this qualification from the position description, the Employer's refusal to award the Grievant the position cannot be considered to violate Article 10. Section 10.02 mandates that the most qualified unit employe should be awarded the position, but this presumes that the Grievant was "qualified." The evidence does indicate the Grievant may be the employe the Employer hoped to get when it offered the Social Worker IV position to Enright. This cannot obscure that the December 1994 posting specifically sought to correct the problems caused by Enright's failure to complete his degree requirements.

The remaining assertion concerning Article 10 is whether the Employer violated the labor agreement by not filling the Social Worker IV position. In the absence of a demonstration of a bad faith attempt to avoid the operation of Article 10, no contract violation is apparent. As noted above, Section 2.01 grants the Employer the authority to reorganize positions, and Section 10.01 presumes this authority by extending the posting process to positions the Employer "deems it necessary to fill." Section 10.01 sets a time limit for filling a posted position, but that time limit is triggered by "the selection of the successful applicant." No such selection occurred here. That provision cannot be interpreted as a guarantee that a posted position will be filled. Rather, it serves to assure that the posting process, once completed, proceeds to a timely completion. Even if it is presumed Article 10 points to the filling of a posted position, this must be squared with the authority granted the Employer under Section 2.01. Reading Article 10 to mandate the filling of any posted position renders significant portions of Section 2.01 meaningless, and in any event cannot overcome the fact that the Employer has, under Section 2.01 F the right to "relieve employees from their duties for lack of work or other legitimate reasons." Once the Employer determined, in good faith, to delete the posted and filled Social Worker IV position to effect its reorganization effort, the incumbent could be laid off.

As discussed above, the good faith of the reorganization effort has been established. There is, then, no persuasive evidentiary basis to support a conclusion that the Employer's refusal to fill the posted position was a deliberate attempt to subvert the operation of Article 10.

The record supports the Employer's assertion that there is no contractual basis to overturn either its decision to revise the posted Social Worker IV position description, or its decision not to fill the posted position. The Grievant's frustration at not receiving a promotional opportunity she has worked toward is apparent and understandable. There is, however, no contractual basis to recreate that opportunity.

AWARD

The grievance is arbitrable.

The Employer did not violate the collective bargaining agreement by refusing to award the Social Worker IV - Experienced Worker - Long Term Support position to the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 29th day of November, 1995.

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

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