BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, A.F.S.C.M.E, AFL-CIO and ST. CROIX COUNTY, WISCONSIN	Case 140 No. 52672 MA-9072

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 364, Menomonie, Wisconsin 54751, for Wisconsin Council of County and Municipal Employees, A.F.S.C.M.E, AFL-CIO, referred to below as the Union.

Ms. Victoria L. Seltun, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, for St. Croix County, Wisconsin, 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of Lisa Dahl and Marilyn Zais. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on October 3, 1995, in Hudson, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by December 26, 1995.

ISSUES

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

Did the County violate the labor agreement in the manner in which it assigned the Grievants to the wage schedule upon their change in job positions?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

Section 2.01 The County possesses the sole right to operate County government and all management rights repose in it, subject to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

a. To direct all operations of County government.

. . .

c. To hire, promote, transfer, schedule and assign employees in positions within the County.

. . .

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

. . .

ARTICLE 3 - GRIEVANCE PROCEDURE

. . .

Section 3.04 Arbitration Decision. The Arbitrator . . . shall not have the authority to change or to modify the terms of the collective bargaining agreement.

. . .

ARTICLE 8 - JOB POSTINGS

Section 8.01 Notice of Vacancy. In the spirit of equal employment and promotional opportunity for all employees, female and male, the Employer agrees to post notice of all vacancies and new positions, which the Employer decides to fill, on all appointed bulletin boards, in all bargaining units.

. . .

Section 8.07 Pay Level. An employee who is awarded a position through the posting procedure which pays more than his/her formerly held position, shall go the pay level of the newly awarded position, which will provide him/her with an increase in pay. Thereafter, s/he shall progress through the pay level system, if any, beginning time progression on the first day in the new position.

An employee electing to fill a position which pays less than his/her formerly held position shall go to the pay level of the new position commensurate with his/her length of service and shall thereafter progress through the pay level system, if any, beginning time progression on the first day in the new position.

APPENDIX B

Human Services Union

. . .

Section 2 Reclassification. With the approval of the Human Services Director and Supervising Committee, an employee may be reclassified to a higher classification with one of the lines of progression as listed below:

Family Resource Aide I, II
Social Worker I, II, III
Human Services Aide I, II
Economic Support Specialist I, II, III, IV (Lead Worker)
Clerk I, II, III
Economic Support Aide I, II

. . .

APPENDIX C

General Government Support Services Union

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WAGE SCHEDULE -- GENERAL GOVERNMENT SUPPORT SERVICES

Effective January 1, 1995

Classification	**Start Wage**	**After 6 mo.**	**After 1 yr.**	**After 2 yrs.**	**After 3 yrs.**	**After 4 yrs.**
. . .						
Pay Range Two	8.82	9.08	9.33	9.61	9.87	10.19
. . .						
Zoning Secretary (unlicensed)						
Pay Range Three	9.26	9.52	9.80	10.04	10.33	10.64
. . .						
Legal Clerical						
. . .						
Pay Range Four	9.74	10.00	10.27	10.54	10.77	11.09
Legal Secretary Zoning Secretary (licensed)						
. . .						

BACKGROUND

The Procedural Background

On April 24, 1995, the Union filed a grievance challenging the salary schedule placement of Marilyn Zais. Debra Kathan, the County's Personnel Director, responded to the grievance in a memo dated May 8, 1995, which states:

> The aforementioned grievance is denied. Ms. Zais was placed on the wage grid in an appropriate manner which we feel reflects the spirit and intent of the contract, as recognized in Article 8, Section 8.07. This has been our procedure since the newest contract took effect in January of 1994.
>
> We understand the difficulty that the GGSS Union faces in adjusting to this procedure, since it is a departure from the procedures in place prior to 1994, none-the-less, it has been similarly implemented in this and other unions affected by the master contract with no grievances filed.

On May 10, 1995, Kathan and Janet M. Smith, the President of the Union's Local 576B, executed a document confirming the Union's agreement to the reclassification of Lisa Dahl from "the Legal Clerical position to a Legal Secretary position." On May 11, 1995, the Union filed a grievance challenging Dahl's salary schedule placement. In June of 1995, the parties agreed to consolidate the two grievances, and litigated them as a single dispute.

The Evidence On The Merit Of The Grievances

The Union serves as the exclusive collective bargaining representative of four separate units of County employes: the Highway Department Unit, the Human Services Department Unit, the General Government Support Services Unit (GGSS) and the Health Center Unit. The parties have a "Joint Labor Agreement" covering these units. At the end of this joint agreement appear specific appendices stating provisions unique to each unit.

Prior to her reclassification in April of 1995, Zais worked for the County as a Zoning Secretary (unlicensed) at Pay Range Two. In April, Zais secured a Plumbing Inspector II license. The County granted a request to reclassify her, and moved her from the "After 1 yr." step of Pay Range Two to "Start Wage" step of Pay Range Four.

Dahl worked in the District Attorney's Office as a Legal Clerical until her reclassification in May of 1995. Prior to that reclassification, Dahl had been assigned on two occasions to fill in for an employe classified as a Legal Secretary who was on a leave of absence. The first interim assignment occurred in September of 1994. In that case, the County moved her from the "After 1 yr." step of Pay Range Three to the "After 1 yr." step of Pay Range Four. Kathan characterized that movement as "an error." The second interim assignment occurred in January of 1995. In that case, the County moved her from the "After 1 yr." step of Pay Range Three to the "After 6 mo." step of Pay Range Four.

The balance of the evidentiary background is best set forth as an overview of Kathan's testimony. Kathan noted that the negotiation of the Joint Labor Agreement represented a change in the parties' bargaining. Prior to that agreement, each unit negotiated a separate labor agreement. She stated that the negotiation of this agreement had significant implications regarding postings and reclassifications. Prior to the Joint Labor Agreement, reclassifications were not handled consistently. In the Human Services Unit, a reclassified employe would receive a five percent raise. That raise could move the employe off the wage grid. If it did so, the employe retained that rate until the steps of the pay range corresponding to the employe's reclassified position "caught up" to the employe's reclassified rate.

Reclassifications were, Kathan noted, more common in the Human Services Unit than in the GGSS. In the GGSS, job postings were the most common vehicle for promotion. In the GGSS, prior to the negotiation of the Joint Labor Agreement, a reclassification afforded the reclassified employe full credit for their years of experience with the County, independent of experience in a particular pay range.

Kathan approached the bargaining for a Joint Labor Agreement with concerns about the disparate ways the various units treated reclassifications. She noted that GGSS members had voiced concerns that permitting full credit for years of service often led to a lower rated employe training a reclassified employe. The bargaining for the Joint Labor Agreement took place in the summer and fall of 1993. By December, the parties had reached a tentative agreement. She noted that the discussions specifically dealing with reclassifications were brief and centered on the Human Services Unit. Those discussions led to the creation of Section 2 of Appendix B. The parties spent a considerable amount of time discussing job postings and what would constitute an appropriate increase in promotional settings.

Kathan noted that Dahl's reclassification reflected an immediate need in the District Attorney's office. The District Attorney wanted each of his secretaries to be able to perform all of the duties of the office. Dahl filled in for an employe classified as a Legal Secretary on two occasions, and when that position opened on a permanent basis, the District Attorney wished to move Dahl into the position based on her solid performance on an interim basis. This ultimately led to the agreement by which the Union and the County agreed to reclassify Dahl into the position, thus avoiding a posting.

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

THE PARTIES' POSITIONS

The County's Initial Brief

After a review of the evidentiary background, the County asserts that Section 8.07 governs the grievances, and unambiguously "mandates that the employee be placed at the level where they will receive an increase in pay." That section mandates placement commensurate with experience only in cases of voluntary demotion.

Arbitral precedent and arbitral commentary establish extrinsic evidence cannot be used to alter the effect of clear and unambiguous language. Since Section 8.07 is unambiguous, and since both grievants received an increase in pay, it necessarily follows, according to the County, that their placement on the wage grid did not violate the labor agreement.

The County then contends that Section 8.07 applies to a reclassification no less than to a job posting. Kathan's testimony establishes, the County argues, that prior to the 1994-96 labor agreement "reclassifications and job postings were treated differently based upon the specific bargaining unit involved" and that the parties entered negotiations "to come up with a single, more equitable procedure." Appendix C does not undercut this assertion, according to the County, since it "makes no specific reference to 'reclassifications.'" Adopting any other conclusion would, the County urges, lead to illogical results, since it would have no incentive to reclassify employes because it could compel a lower wage rate by posting a position.

The County next asserts that the Union bears the burden of proving, "by a preponderance of the evidence that the County's interpretation of Section 8.07 of the labor agreement is improper." The Union has, according to the County, failed to meet this burden. Arbitral precedent establishes that its interpretation of "diagonal movement" squares with the majority rule, while the Union's interpretation of "vertical-upward" movement does not. Beyond this, the County notes that it has, "on at least 10 instances," moved employes in precisely the manner it moved the grievants. The County concludes that this failure to challenge "may be characterized as acquiescence with and acceptance of the interpretation of the employer by the Union."

Viewing the record as a whole, the County concludes that "the instant grievances must be denied."

The Union's Reply Brief

The Union acknowledges the persuasive force of the arbitral precedent cited by the County, but concludes that the clear and unambiguous language of Section 8.07 mandates the rejection of the County's position. Since neither grievant was involved in the posting procedure, the Union concludes that Section 8.07, by its terms, cannot govern the grievances. This conclusion is, the Union adds, underscored by Section 3.04.

Nor can bargaining history be said to support the County's position, according to the Union. What discussion occurred at the table "involved the Human Services unit" and resulted in the creation of Section 2 of Appendix B. Asserting that "Kathan testified that prior to the implementation of this Agreement employees in the general services unit had moved vertically rather than diagonally when reclassified," the Union concludes that bargaining history cannot afford the County's interpretation any support.

The Union challenges the County's view of the reclassifications which occurred during the life of the current labor agreement. The bulk of those reclassifications arose under Appendix B, Section 2, which does not apply to the General Services Unit. The Union adds that the distinction this draws between a reclassification under Appendix B and a job posting under Article 8 only underscores the distinction the Union seeks to enforce with the grievances.

That Dahl did not grieve a temporary reassignment to a higher classification has, according to the Union, no bearing on her grievance. The Union asserts that it had no knowledge of this, and that out-of-class work cannot be considered a reclassification.

Since Kathan acknowledged that "an employee's position on the wage grid represents years of service (not years of service in grade) unless one has fallen under the provisions of Sec. 8.07," it follows, according to the Union, that Appendix C governs the salary schedule placement of each grievant.

Viewing the record as a whole, the Union concludes that the grievances must be sustained, and "the employees should be made whole for all losses . . ."

The County's Reply Brief

The County argues initially that the Union's attempt to restrict Section 8.07 to postings cannot be squared with the evidence. Difficulties with the movement of both Human Services Unit and General Services Unit employes set the stage for the bargaining for a 1994-96 agreement. Those difficulties were discussed at the table and the parties agreed on a uniform means of handling salary schedule movement.

Kathan's testimony also establishes, the County contends, that the parties intended to create a means of paying employes in a consistent fashion without regard to whether an employe moved on the salary schedule through a posting or through a reclassification. That reclassification language unique to the Human Services Unit appears in Appendix B establishes no more than that the wage schedule of those employes "has very detailed lines of progression which the other Units lack." The County then contends that Appendix B is silent on the placement of reclassified employes, yet those employes move consistent with the terms of Section 8.07. This establishes, the County concludes, the persuasive force of its view of relevant bargaining history.

The Union's attempt to distinguish between payment for work in a higher classification and a reclassification is, the County asserts, strained. The fact of significance here is, according to the County, that neither Dahl nor the Union grieved the payment which is consistent with the County's interpretation of Section 8.07.

The County contends that the silence of Appendix C regarding salary schedule movement must be contrasted with its "reasonable and proper" application of the contract. That contrast underscores, according to the County, that the grievances lack merit.

DISCUSSION

I have adopted the County's statement of the issues as that appropriate to the record. This statement of the issues focuses generally on a violation of the labor agreement, but this statement should not obscure that this case ultimately turns on practice.

The Union contends that Appendix C mandates that GGSS employes move across the wage grid based on years of service in the County, without regard to years of service within a classification. Appendix C is, however, silent on this point. The reclassification scheme used for the Human Services Unit prior to the Joint Labor Agreement demonstrates that the silence of Appendix B does not necessarily mandate that movement on it correspond to actual years of County service. The Union's contention thus rests on practice.

The County's contentions are no less dependent on practice. The County contends that Section 8.07, either standing alone or read with Article 2, authorizes it to move employes on the Appendix C wage grid without regard to years of County service. Section 8.07 is, however, restricted to cases in which an employe "is awarded a position through the posting procedure." Neither Zais nor Dahl secured their positions through the posting procedure. This interpretive dilemma cannot be lightly dismissed. That the parties addressed reclassifications in Section 2 of Appendix B means, at a minimum, that it cannot be assumed that the term "posting" in Article 8 also encompasses "reclassification." Section 3.04 cautions against arbitral modification of contract language and thus against making this assumption. Beyond this, if Section 8.07 must be read as binding regarding a reclassification, why are the other requirements of Article 8 not also binding? How, for example, can Dahl's movement into the Legal Secretary position be squared with the notice requirements of Section 8.01? The answer inevitably must be that the parties, through practice, have limited the applicability of Section 8.07 to movement on the Appendix C wage grid following a reclassification. Kathan's May 8, 1995 response to the Zais grievance underscores the significance of practice, viewed in light of bargaining history, to the County's position.

In sum, the silence of Appendix C coupled with the express limitation of the scope of Section 8.07 precludes finding the labor agreement clear and unambiguous regarding the movement of employes on the wage grid following a reclassification. The testimony at hearing turned on practice and bargaining history. That evidence must be evaluated to resolve the interpretive dilemma posed by the grievances.

The sole aspect of practice which the evidence unequivocally supports is that, prior to the negotiation of the Joint Labor Agreement, movement in the GGSS after a reclassification

turned on years of County service, independent of time served in a classification. Because the evidence will not support a conclusion that the 1993 bargaining altered this practice, the Union's interpretation of Appendix C must be favored over the County's.

The criteria defining a binding practice have been variously stated by arbitrators. The binding force of a practice ultimately turns on the agreement manifested in the bargaining parties' conduct. 1/ In this case, the evidence turns less on the circumstances defining the practice than on the existence of the parties' agreement on the point. Kathan's May 8, 1995 letter confirms the general existence of previously understood procedures "in place prior to 1994." Her testimony specified that those procedures involved reclassified GGSS employes receiving full credit for their years of County service. The Union's correspondence surrounding the filing and processing of the grievance confirms their understanding that Appendix C movement turned on actual years of County experience.

The Joint Labor Agreement, as noted above, contains no language expressly limiting or abrogating this practice. Kathan's testimony will not support a conclusion that the parties reached such an understanding in the bargaining process. It is apparent that she, on the County's behalf, desired a uniform system. It is not, however, apparent that any agreement was reached on this point. The discussions specifically directed to reclassification concerned the Human Services Unit. Those discussions produced Appendix B, Section 2, which is not applicable to Appendix C. While it is apparent the parties discussed posting procedures, there is no evidence of discussions linking those procedures to a reclassification. In light of the express limitation of Section 8.07 to the posting procedure, evidence of such discussions is essential to a finding that the parties intended to extend Section 8.07 to GGSS reclassifications. Kathan noted GGSS unit members' concerns that the past practice regarding reclassifications led to lower rated employes training higher rated reclassified employes. That these concerns could not be linked to across-the-table discussions further weakens the persuasive force of the County's contention that the parties intended to link Section 8.07 to GGSS reclassifications.

In sum, the evidence demonstrates the parties, prior to the negotiation of the 1994-96 Joint Labor Agreement, understood that reclassified GGSS employes received credit for all of their County service. The bargaining for that agreement did not, through contract language or through an express abrogation of the practice, limit the effect of the practice. Thus, the County's failure to grant Zais and Dahl credit for their actual years of service must be considered a violation of Appendix C.

Before closing, it is necessary to tie this conclusion more closely to the County's arguments. The County persuasively notes the policy basis for its desire to create a uniform

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1/ See Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, Arbitration and Public Policy, (BNA, 1961).

system of salary schedule movement. The evidence will not, however, support the conclusion that this policy basis was communicated to the Union or resulted in a mutual understanding on the point. As noted above, GGSS member concerns about the training of higher rated reclassified employes by employes with less County experience but more within-classification experience was not tied to across the table discussions. Beyond this, the diagonal movement stated in Section 8.07 lessened, but did not eliminate the possibility that this could happen. Ultimately, however, the most significant difficulty with the County's position is that Section 8.07, by its terms, is limited to the posting process. If the parties sought to create a uniform system, it is difficult to understand why they did not expressly say so. That the parties specifically addressed reclassifications in Appendix B underscores this difficulty.

The County persuasively argues that the provisions of Appendix B are traceable to the established progression lines within the Human Services Unit, and to the parties' mutual desire not to post every movement within those progression lines. The force of this argument must be acknowledged. That movement of reclassified Human Service employes presently tracks Section 8.07 underscores the force of this argument. The difficulty with the argument is that the prior practice regarding the Human Services Unit did not link movement on the grid to actual County service before or after the negotiation of the Joint Labor Agreement. The fact remains that the parties treated reclassifications under Appendix B separately from reclassifications under Appendix C. This area of evidence is, then, as consistent with the conclusion that the parties continued to treat the Human Services Unit differently from the GGSS as it is with the conclusion that the parties agreed to a uniform system governing both.

The County's contention that it is illogical to reward a reclassification more generously than a posting can be granted to the extent it clarifies that Section 8.07 makes it less expensive to promote through posting than through reclassification. It should, however, be noted that rewarding Zais for acquiring certification or Dahl for her performance cannot be dismissed as an illogical or absurd result. More significantly, the logic of the compensation system must be left to the parties. The interpretive point here turns on the bargaining process, not on the policy appropriate to a compensation system. The evidence establishes a practice but fails to demonstrate an abrogation or limitation of that practice.

The County's assertion that the Union has acquiesced in its application of Section 8.07 is not supported by the evidence. County documentation of this point lists three instances cited as job postings, six reclassifications and two interim assignments. All of the job postings fall within the scope of Section 8.07 and are inapplicable here. Four of the six cited reclassifications fall under the terms of Section 2 of Appendix B and are inapplicable here. The two remaining reclassifications are those of Dahl and Zais. The interim assignments concern Dahl's assumption of the duties of the Legal Secretary who took a Workers Compensation leave of absence. The first of those assignments occurred in September of 1994, and Dahl was given full credit for her County experience while paid as a Legal Secretary. Kathan labelled this "an error." However characterized, this underscores the impossibility of finding a consistent pattern on which to support

a finding of Union acquiescence. That the Union was not advised of any of these transactions underscores the difficulty of granting binding force to this evidence.

Arbitral precedent cited by the County to establish diagonal movement as the majority rule is unhelpful here. For whatever reason, the parties agreed, prior to the negotiation of the Joint Labor Agreement, that GGSS movement following a reclassification did not follow the majority rule. That this practice was not modified in the 1993 bargaining is the determinative point here.

The County's arguments have, then, considerable persuasive force, but lack sufficient support in the evidence to be preferred over the Union's. They do, however, underscore the unique facts of this case and thus the need to restrict the conclusions reached above to the facts posed here.

The issue of remedy does not require extensive discussion. Both Zais and Dahl should be moved to the step on the Appendix C wage grid corresponding to their actual County experience, and paid as if they had been so placed when their reclassifications first became effective.

AWARD

The County did violate the labor agreement in the manner in which it assigned the Grievants to the wage schedule upon their change in job positions.

As the remedy appropriate to the County's violation of Appendix C and relevant practice, the County shall place Zais and Dahl at the step in Appendix C which affords them credit for all of their County experience. The County shall make each employe whole by compensating them for the wages and benefits each would have earned but for the violation found above. This compensation should cover the period from the effective date of each employe's reclassification through the date the County places each employe on the Appendix C wage grid in accordance with the terms of this award. The amount of compensation should reflect the difference between the wages and benefits each employe earned during this period and the amount each employe would have earned but for the County's failure to credit each with their actual time of service with the County.

Dated at Madison, Wisconsin, this 9th day of February, 1996.

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

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