

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DOUGLAS COUNTY PROFESSIONAL HUMAN
SERVICES EMPLOYEES UNION, LOCAL 2375,
AFSCME, AFL-CIO

and

DOUGLAS COUNTY (HUMAN SERVICES)

Case 218
No. 52805
MA-9109

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
appearing on behalf of the Union.

Mr. John Mulder, Douglas County Personnel Director, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on November 8, 1995, in Superior, Wisconsin. The hearing was not transcribed. Afterwards the parties filed briefs whereupon the record was closed on December 18, 1995. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the longstanding past practice by exempting the least senior employe from performing intake duties and requiring more senior employes to stay on the intake schedule?

The parties further stipulated that the reference in the stipulated issue to "the least senior employe" refers to Christine Jasmin.

The parties further stipulated that in the event the arbitrator sustains the grievance, the remedy is for the Employer to keep "the least senior employe" (i.e. Jasmin) on the intake schedule.

PERTINENT CONTRACT PROVISIONS

The parties' 1994-95 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 2.

MANAGEMENT RIGHTS

The county board possesses the sole right to operate the county and all management rights repose in it unless otherwise limited in the collective bargaining agreement or applicable Federal or State laws.

- A. To direct all operations of the Department;
- B. To hire, promote, schedule and assign employees in positions within the Department;
- . . .
- H. To change existing methods or facilities;
- I. To determine the methods, means and personnel by which Departmental operations are to be conducted;

. . .

ARTICLE 8.

SENIORITY

Section 1. The seniority of all employees covered by the terms of this Agreement and completing their probationary period shall begin with the employee's original date of employment. An employee's seniority shall not be diminished by temporary layoffs

due to lack of work or lack of funds or any other contingency beyond the control of the parties to this Agreement. Such seniority shall be considered unit-wide seniority and shall be used for fringe benefit determination and as otherwise mentioned herein. Seniority shall also accrue on a departmental basis, with the Department of Human Services, Child Support and Enforcement Agency and Juvenile Court Office constituting separate departments.

Section 2. Should it become necessary to reduce the work force for any reason, the principle of departmental seniority shall be recognized and applied. The qualified employee having the greatest length of service shall be the last laid off and the first called back to employment.

Section 3. Recall of an employee shall be provided for in the following manner:

...

Section 4. An employee loses seniority rights for any of the reasons set forth in the following paragraphs:

...

FACTS

Certain employees in the Human Services Department perform intake duties on Mondays and Fridays during the day as part of their regular duties. Those employees do this on a rotating basis pursuant to a schedule which is established. As the name implies, employees doing intake handle the calls that come into the Human Services office. In doing so, they encounter the broad spectrum of topics traditionally encountered by social workers such as chemical dependency, family problems, etc. Taking intake calls is considered undesirable work by those who do it because the person doing it cannot leave the office or make home visits (i.e. they are tied to their desk). Employees who perform intake duties do not get additional pay for performing same.

Not all the department's 23 employees are on the intake schedule. Those who are on the intake schedule are social workers and juvenile court officers. The department's six (welfare fraud) investigators are exempted from the intake schedule as is one juvenile court officer (Patricia Schanen). Thus, prior to the incident involved here, seven employees in the bargaining unit were exempted from the intake schedule (i.e. the six investigators plus Schanen). The parties dispute why Schanen is exempted from the intake schedule. Schanen, whose actual job title is Juvenile

Court Officer III, reports directly to a juvenile judge. Schanen is also the senior employe in the bargaining unit. Union witnesses testified Schanen is exempted from the intake schedule because she is the senior employe in the bargaining unit. The Employer's witness testified Schanen is exempted from the intake schedule because she is the Juvenile Court Officer III directly assigned to a juvenile judge.

On May 15, 1995, Department of Human Services Supervisor Steve Koszarek issued a memo to department employes which established the intake schedule for the next four months. In addition to listing the new rotation schedule, this memo also indicated that after employe Christine Jasmin finished her June rotation, she would be taken off the intake schedule. Thus, Jasmin was exempted from performing intake duties in the future. At the time this memo was issued, Jasmin (who is a social worker) was the least senior employe in the department.

The record indicates that Jasmin filled a newly created social worker position which is known as a 51.42 position (referring to Section 51.42 of the Wisconsin Statutes). This position differs from other social worker positions in the department in that it is partially funded from Medicare reimbursement. This social worker position also differs from other social worker positions in the department in that it is under the control of the County's 51.42 Board. Koszarek testified that when the Employer created this new (51.42) position, it intended to exempt the incumbent from performing intake duties. Jasmin is the first person to fill this newly created position.

The Union grieved Jasmin's exemption from the intake schedule.

The record indicates that after the grievance was filed, the Employer hired two more social workers (Steve Siebers and Amy Roberts). Neither was exempted from the intake schedule.

Insofar as the record shows, Jasmin is the first social worker to be exempted from the intake schedule.

POSITIONS OF THE PARTIES

The Union views this as a past practice case. Consequently, it makes the arguments traditionally made in such cases, namely that a binding past practice exists which the Employer unilaterally changed. With regard to the alleged practice, the Union contends that the parties had a binding past practice with regard to who performs intake duties. According to the Union, the past practice was that the least senior employe (which Jasmin was at the time) was assigned to intake duties along with other employes. The Union believes this practice underscores the value the parties have placed on seniority in terms of work assignments. The Union argues that the Employer unilaterally changed this practice when it exempted Jasmin from the intake schedule in June, 1995. Next, the Union acknowledges that Schanen was exempted from the intake schedule.

According to the Union, the reason Schanen was exempted was because she was the most senior employe in the bargaining unit. To support this premise, it cites the testimony of its witnesses. Next, the Union asserts that in the context of this case, the source of funding for Jasmin's position is irrelevant. In the Union's view, the source of a position's funding does not warrant exempting an employe from what the Union characterizes as "the rules of the work place." Finally, responding to the Employer's contention that its unilateral action is within its management rights, the Union asserts that it never agreed to such an unrestricted view of management rights. The Union argues that if the arbitrator dismisses the grievance he will be upsetting a long historical relationship between the parties. The Union therefore requests that the grievance be sustained. In order to remedy this alleged (contractual) breach, the Union asks that Jasmin stay on the intake schedule.

The County views this as a work assignment case. Consequently, it makes the arguments traditionally made in such cases. First, it avers there is no language in the contract which governs the assignment of intake duties. It also submits there is no contract provision which allows senior employes to opt out of certain duties (such as intake duties) or pick and chose what part of their job they will do. It also calls the arbitrator's attention to the fact that the grievance does not cite a specific contract provision as allegedly being violated, nor does the stipulated issue which the parties agreed on. That being the case, the Employer contends there is nothing in the contract which excuses employes from being assigned work because of their seniority. Next, the Employer argues that the Management Rights clause (Article 2) gives it the authority to schedule intake duties. To support this premise it cites the language in that article which empowers it to direct its operations, schedule and assign employes, change existing methods and determine the personnel by which departmental operations are conducted. The County asserts that this language gives it the right to determine who is on the intake schedule. It notes that it has previously determined that the six investigators and Schanen (the Juvenile Court Officer III) would not be on the intake schedule. The Employer believes it exercised its management right reasonably when it decided to exempt one more employe (Jasmin) from the intake schedule. The Employer also contends it did not waive its management right to make such an assignment nor did it agree to be bound by any informal "practice" which restricted the exercise of its management rights. Next, with regard to the Union's contention that a past practice exists, the Employer argues that the Union failed to prove the existence of same. The Employer argues in the alternative that even if a past practice is found to exist, it does not involve a major condition of employment. The Employer therefore argues that the Union's claim of a violation of a past practice is unfounded. Accordingly, the Employer requests that the grievance be denied.

DISCUSSION

What happened here is that the Employer exempted an employe (Jasmin) from performing intake duties. She had previously been on the intake schedule and performed intake duties. At issue is whether the Employer could exempt Jasmin from the intake schedule as it did.

While at first glance this would appear to be a contract interpretation dispute, it is not. The Union does not rely on any particular contract language to support its case or allege that the Employer violated a specific contract provision. The reason for this is quite simple: a review of the contract indicates that no language exists in same concerning the scheduling of intake duties. Additionally, the seniority clause (Article 8) does not require that job assignments be made on the basis of seniority or that employes can pick or chose their assignments based on their level of seniority.

That being the case, the Union relies on an alleged past practice concerning the assignment of intake duties which it asks the arbitrator to enforce.

Before addressing the threshold question of whether there is or is not an applicable past practice, it is noted at the outset that past practice is primarily used or applied in the following circumstances: 1) to clarify ambiguous language in the parties' agreement; 2) to implement general contract language; 3) to modify or amend apparently unambiguous language in the agreement; or 4) to establish an enforceable condition of employment where the contract is silent on the matter. Circumstances (1), (2) and (3) are inapplicable here. This is because there is no contract provision that the alleged "practice" is suggested as clarifying (#1), implementing (#2), or modifying (#3). Consequently this is a category (4) case since the Union seeks to have the alleged "practice" supplement the contract so as to be binding on the parties and become an enforceable condition of employment. In situations such as this where a party wishes to clothe a course of conduct with contractual status, that practice must reflect as many elements of a contract as possible. Simply put, the practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

That said, the focus turns to whether the Union established the existence of a practice governing assignment to the intake schedule. To support its contention that a practice exists, the Union relies on the fact that until Jasmin was exempted, the least senior employe had previously been assigned to intake duties along with all the other social workers. The Union submits this action established a binding past practice concerning the assignment of intake duties which the Employer was obligated to continue. The Employer obviously disagrees.

Based on the rationale which follows, I find that the previous assignment of intake duties documented in the record is not sufficient to establish a binding past practice which is entitled to contractual enforcement. The Union's underlying theory that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice, particularly when the pattern of conduct arises from the exercise of a management right. That is precisely the case here. Previously, employe placement on the intake schedule was not the result of bargaining but rather

the Employer's unilateral act. The Employer had previously decided that the six investigators would be exempt from the intake schedule. The Employer had also previously decided the Schanen (the Juvenile Court Officer III) would be exempt from the intake schedule. 1/ Such was its contractual right. The Employer had the right to make these decisions and take this action because it had reserved to itself, via the Management Rights clause (Article 2) the right to direct all operations in the Human Services Department, assign employees, change existing methods and determine the personnel by which departmental operations are conducted. This means that the previous assignment of intake duties which existed prior to June, 1995, was the product of the Employer's management prerogative. Said another way, it arose from the exercise of a management right.

Since the assignment of intake duties which existed prior to June, 1995, was set by the Employer as an exercise of its management function, the Union had the burden of showing that the Employer knowingly waived its management rights and agreed to be bound in the future by a practice concerning the assignment of intake duties which restricted its management rights. I find no proof in the record of same. Accordingly, it is held that the Union did not prove that the Employer waived its management right to change who performs intake duties. Since the Employer never waived its right to do so, it could change same.

Having held that the Employer could change who performs intake duties, the remaining question is whether the Employer did so in an arbitrary or capricious manner when it exempted Jasmin from the intake schedule in June, 1995. I find it did not. As previously noted, the County has already exempted seven employees from the intake schedule (six investigators plus Schanen). What it did here was simply add one more exemption -- Jasmin. The record indicates Jasmin filled a new social worker position. This particular social worker position differs from other social worker positions that already existed in the department in two respects: its funding is different and it is under the control of the County's 51.42 Board. In the great scheme of things, these two differences are not that great. Be that as it may, they are sufficient enough to show that the Employer's decision to exempt Jasmin from the intake schedule has some factual basis. It is therefore held that Jasmin's exemption passes muster.

In so finding, the undersigned is well aware that Jasmin's exemption resulted in a situation

1/ Although the parties dispute why Schanen was exempted from the intake schedule (whether it was because she was the most senior employee in the bargaining unit or because she is attached to a juvenile judge), the undersigned need not decide in this case why she was exempted. What is important here is that she was exempted from the intake schedule.

where it was the least senior employe who was exempted from the intake schedule. However Jasmin is no longer the least senior employe. The record indicates that two more social workers have subsequently been hired and neither was exempted from the intake schedule. Thus, the two least senior social workers are now on the intake schedule. This means that Jasmin's exemption can no longer be challenged on the grounds that the least senior employe was exempted because the current least senior employe is not exempt from the intake schedule.

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

AWARD

That the Employer did not violate a past practice by exempting Jasmin from performing intake duties and requiring more senior employes to stay on the intake schedule. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 14th day of May, 1996.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator