

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 348, AFSCME, AFL-CIO

and

PORTAGE COUNTY

Case 129
No. 53671
MA-9421

Appearances:

Mr. Jeffrey J. Wickland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Gerald Lang, Personnel Director, Portage County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and County named above jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned as the arbitrator in the grievance of Gary Mansavage. A hearing was held in Stevens Point, Wisconsin, on June 5, 1996, at which time the parties had an opportunity to present their evidence and arguments. The parties filed briefs by June 26, 1996.

ISSUE:

The issue is:

Did the County violate the collective bargaining agreement when it did not award the Grievant, Gary Mansavage, the Maintenance Worker position for the posting that closed on January 23, 1995? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE 3 - MANAGEMENT RIGHTS

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

1. To direct all operations of the work force;

2. To establish reasonable work rules and schedules of work;
3. To hire, promote, transfer, schedule and assign employees;
- . . .
12. To determine the methods, means and personnel by which County operations are to be conducted;
- . . .

ARTICLE 7 - JOB POSTING

A) Job Posting: When the County deems it necessary to create new jobs or fill vacancies in the bargaining unit, it shall post the job title, qualifications, wage rates and the year which the rate applies to. Said posting shall be posted for a period of five (5) working days overlapping two (2) consecutive weeks in all departments on a county-wide basis. "Department" for purposes of this article shall be as follows: (1) Health Care Center; (2) Library; (3) Courthouse, and (4) "Health and Human Services, Department on Aging, and Portage House."

All employees who are interested in the position shall sign the posting in the space provided. Probationary employees shall be limited to posting for additional hours or different hours in the same classification in the same office. However, the employee applying for the position with the most seniority within the affected department who can qualify shall be given the position. In the event the position is not filled, or no one applies within the department, the employee applying from within the bargaining unit with the most seniority who can qualify shall be given the position.

. . .

ARTICLE 19 - HOURS OF WORK AND OVERTIME

A) Work Week: A work week is defined as seven (7) consecutive days starting at 12:01 a.m. on Sunday of each week and ending at 12:00 midnight on the following Saturday.

. . .

3. Courthouse Maintenance Employees: Courthouse maintenance employees shall work forty (40) hours per week, Monday through Friday. The workday shall be eight and one-half (8 1/2) hours with a thirty (30) minute lunch period, without pay, and two (2) fifteen (15) minute breaks with pay approximately midway through each portion of the shift on each side of the lunch break. The time of the breaks shall be subject to the discretion of the department head.

Employees on permanent day shifts shall be notified that they will be given night assignment as soon as the supervisor becomes aware of the need for such assignment. Employees classified as Maintenance Worker I shall not be transferred from building to building, unless and until all directly affected Maintenance Worker I employees have met simultaneously with, and conferred with, the supervisor regarding the potential transfer.

• • •

BACKGROUND:

The Grievant is Gary Mansavage, a Maintenance Worker who started working for the County in 1984. He used to be classified as a Maintenance Worker II, but the County had a reorganization in 1994 that changed both the Maintenance Worker I's and II's to a single classification of Maintenance Worker.

The Maintenance Department consists of a Superintendent of Facilities, Chester Przybylski, two maintenance technician specialists, three maintenance leadworkers, three maintenance workers (including the Grievant), and eight and one-half custodians. The reorganization plan submitted to the personnel committee contains a statement that the three Maintenance Worker positions working days would report to the Library, Law Enforcement Center and County-City Building but would work in other buildings as needed and assigned.

In January of 1995, the County posted a position for Maintenance Worker which is the subject of this grievance. There were no posted hours for the position. The positions in the Maintenance Department are never posted for specific shifts or hours. Five people, including the Grievant, signed the posting. The position was offered to Bruce Glodowski, but he turned it down when he learned from Przybylski that the job would be more day work than night work. Glodowski works 2:30 to 11:00 p.m. at the Gilfrey Building. During his interview, he was told that about 90 percent of the work would be during the day hours. A custodian, Donald Pechinski, got the job. The Grievant was not interviewed for the position and he has more seniority than Pechinski.

The person who vacated the position, Cheryl Hetzer, worked 6:00 a.m. to 2:30 p.m. and was responsible for the Law Enforcement Center. Pechinski also works days, mainly 6:00 a.m. to 2:30 p.m. at the Courthouse. Another Maintenance Worker, Mark Fecht, is assigned to the Library and works 7:00 a.m. to 3:30 p.m.

When the Grievant was hired in 1984 as a Maintenance Worker I, he was on a rotating shift, working either 6:00 a.m. to 2:30 p.m. or 2:30 to 11:00 p.m. In 1989, he was reclassified to a Maintenance Worker II, and his regular hours became 2:30 to 11:00 p.m. Przybylski told the

County personnel committee that he wanted the reclassification because of the increased requests from departments to remodel work areas. Przybylski wanted the Grievant to work the second shift because the Grievant does a lot of painting work for the County, and this work needs to be done after regular business hours. Przybylski considers painting to be the Grievant's main qualification, and the Grievant is agreeable to painting while on a ladder or a scaffold. There is no position specifically called the "painter" but it was merged into the classification of the Maintenance Worker II position. The Grievant spends about 50 to 55 percent of his time painting, and then fills in as a custodian the rest of the time, although he retains his pay rate of Maintenance Worker while filling in as a custodian. He is called in to paint during the day about once a year.

The Grievant agrees that Przybylski has the authority to change the hours of work of Maintenance Workers.

Przybylski did not interview the Grievant because he already was a Maintenance Worker, and he did not consider the Grievant to be qualified to do all the duties of the position. He thought the Grievant had never done any plumbing work, that the Grievant had incorrectly changed light ballasts, and that he had taken too long to change oil in a truck and had not done that task correctly. Przybylski stated that the title of "painter" was eliminated but that was what the Grievant got when he got reclassified as a Maintenance II in 1989.

Dotty Mansavage, the Head Steward for the Union, filed the grievance and met with Przybylski and Union President Colleen Stevens in the first step of the grievance. Przybylski told the Union representatives that there were no hours on the posting, that the Grievant already had the title and pay of the job he posted for, and that he could put the hours of a position wherever he wanted or wherever he needed help. He told them that the Grievant was not qualified for the job, that he took too long to change oil, that he couldn't change a ballast. The Grievant said he never changed oil for the County, and once when he changed a ballast, he did not take the right one out of the supplies with him because it wasn't where the rest of them were.

The job description for the old Maintenance Worker II position (now called simply Maintenance Worker) calls for the following tasks, knowledge, skills, and abilities: sweeping, mopping, stripping floors, cleaning carpets, emptying waste containers, washing windows, cleaning washrooms, changing light bulbs, switches, receptacles and ballasts, minor plumbing problems, minor remodeling jobs, patching and sanding walls, painting walls and trim, cutting and raking grass, shovelling sidewalks, trimming shrubbery, cultivating flowers, moving furniture and supplies, and other related work. The Grievant has performed all of those tasks, and he stated that he has the knowledge, skills and abilities called for in the job description.

The updated job description for the Maintenance Worker position has a little more detail in the tasks, adding such things as conducting minor repairs of furniture and equipment, caulking joints in buildings, unplugging drains, toilets, replacing traps and toilet seats, servicing overhead doors, picking up and delivering mail, etc. The Grievant's review of the updated job description

revealed that he has not serviced overhead doors or picked up the mail, but has done the rest of the tasks. The day shift person usually gets the mail and does most of the grounds maintenance work.

When the Grievant met with Personnel Director Gerald Lang and Przybylski, Przybylski told him that he was not going to give the Grievant the job because he needed people who could work together. The Grievant testified that he has worked with Jeff Duda, Joe Niel, Don Pechinski, Reggis Lepak, Cheryl Hetzer, and he gets along with them. The County did not tell the Grievant until about the third step of the grievance procedure that he was not eligible to post for the position because he already was a Maintenance Worker.

Other employees in the County have posted within their same classification to either different shifts and hours or different offices. Cheryl Hetzer signed a posting for a Maintenance Worker I position in 1988, while she was working rotating hours at the Courthouse as a Maintenance Worker I. The posting was apparently for a day shift at the Annex building, although the posting did not state any hours of work.

In 1990, Hetzer posted for a Maintenance Worker II position and got it. This posting was apparently for a day shift at the new Law Enforcement Building, although the posting again does not list the hours or location of work. The Grievant also posted for that position and was told that Hetzer was more senior. Hetzer left that position and it was posted in 1995, which is the subject of this grievance.

Other examples of employees who have used the posting procedure to change hours or offices include Sandy Fritz, a Legal Secretary who posted out of the Child Support Agency into a Legal Secretary position for Branch III. The position was the same, but the office and supervisor were different. Donna Johnson posted for a Deputy Clerk in the Clerk of Courts, and she was already a Deputy Clerk. Deputy Clerks are specialized, and her assignment changed through the posting procedure. At the Health Care Center, numerous employees have posted for all three different shifts as well as different wings of the facility. The hours were not always put on the posting but have been since about 1990 or 1991, according to Activity Assistant Mira Melcher, a Union Steward and Union Executive Board officer. She has worked for the County Health Care Center for 15 years, and employees have posted for different shifts during that period of time. Employees also post for more or fewer hours in the same position. Another employee, Kathy Owens, was a Typist II in the Department of Aging and posted to a Typist II in the same department, which was a position with the same hours but a different assignment. In 1993, she became a Typist I in Planning and Zoning Department and a Typist II in the Extension Office, following a leave of absence. Then in 1994, she posted to the Administrative Secretary position in Planning and Zoning Department.

THE PARTIES' POSITIONS:

The Union:

The Union argues that normal hours for the Maintenance Worker position in question are 6:00 a.m. to 2:30 p.m., and that bargaining unit members have routinely been allowed to post for different hours in their position classification both within and outside of their departments. The Union also asserts that the Grievant is qualified for the Maintenance Worker position in question.

The Union contends that the Maintenance Worker position is a permanent day position, and Article 19, Section A, Part 3 holds that employees on permanent day shifts shall be notified that they will be given night assignments as soon as the supervisor becomes aware of the need for such assignment. The Grievant testified that such assignments occurred on an occasional and temporary basis for special assignments or construction projects. Before the reorganization of the Department in 1994, the three Maintenance Worker II positions had certain duties uniquely assigned to them depending on their shifts and buildings. The permanent day shift position held by Hetzer was responsible for mail pick up and delivery, and the position held by the Grievant had primary responsibility for painting. The person holding the position sought by the Grievant, Pechinski, has normal hours of 6:00 a.m. to 2:30 p.m. Glodowski applied for the position but withdrew from consideration when he learned that the position was a day shift, or 90 percent days. The position had the same day shift hours when held by Hetzer. In the reorganization, an early proposal would have had all three Maintenance Workers working days, but the County dropped that proposal and kept two permanent day positions and one second shift position. Further, the labor agreement contemplates maintenance employees on permanent day shifts.

The Union asserts that bargaining unit members are allowed to bid for bargaining unit positions in the employee's same position classification. While Article 7 does not require the County to post the normal hours of work, Article 19 recognizes certain maintenance positions as having permanent day shifts. The contract limits probationary employees from posting to more or different hours in the same classification in the same office. But non-probationary employees have routinely been allowed to post into vacancies in their same classification in the same or different office or department. For example, when the County posted a Maintenance Worker I position in 1988, Hetzer held the position of Maintenance Worker I with normal second shift hours, and she signed the posting and was awarded the position which had permanent day shift hours, as contemplated by Article 19. Her case is analogous to the Grievant's case. And the Grievant is the most senior qualified applicant and should have been offered the position.

Then in 1990, when Hetzer got a Maintenance Worker II position that was a permanent day shift, Przybylski told the Grievant that Hetzer got the position due to her seniority. The practice of bargaining unit members successfully posting for vacancies involving different hours or different assignments in the same classification is wide spread at the Health Care Center where multiple shifts are run. The employees there even post for different shifts and different wings in identical classifications. The Union brought forth other examples, such as Owens who posted for a different assignment within the same department, and another who posted for the same position in a different office.

The Union contends that the County's interpretation of the labor agreement is inconsistent with the contract and the practice of the parties when it suggests that an employee cannot post into a different set of hours in his or her own classification. Even probationary employees have this right with a limitation, and regular non-probationary employees have at least as many rights and benefits as probationary employees. The County has waived any right to assert its managerial prerogative in this regard.

The Union also argues that the Grievant is qualified for the job. He moved from a Maintenance Worker I to a Maintenance Worker II in 1989 after the Department Head convinced the Personnel Committee that his responsibilities justified the reclassification. His job duties did not change as a result of the reorganization, and he has been required to perform all of the duties in the job description for the position at issue. Glodowski was more senior than the Grievant, but once Glodowski withdrew his name, the Grievant should have been considered for the position, but the County passed him over for a less senior employee from a lower classification. The County has waffled on its rationale for passing on the Grievant, arguing at times that he was already a Maintenance Worker and his hours were assignable, while at other times arguing that he was unqualified for the position he already held. The Union states that the County must take a position and argue consistently that the Grievant either is not qualified for the position or is not qualified to post because he is a Maintenance Worker.

The Grievant has performed the duties of a Maintenance Worker for at least seven years. There is no evidence that he could not perform the duties of the job on the first shift as well or better than he performed such duties on the second shift.

The County:

The County contends that granting the Grievant the vacancy would fly in the face of management rights, the job posting procedure, and the hours of work for maintenance department employees. Article 3, the Management Rights article, gives the County the right to determine the work shift of the Grievant. Article 7, Job Posting, states that the County shall post the job, title, qualifications, wage rates and the year in which the rate applies to. The work shift is not posted because it is not required and because the Department Head may need to change the hours of work of the Maintenance Department employees to meet the demands of the Department.

Further, the County points out that the job posting defined the position as a Maintenance Worker with a wage of \$11.43 per hour. The Grievant is already a Maintenance Worker with a wage of \$11.43 per hour. Article 7 also states that the employee with the most seniority within the affected department who can qualify shall be given the position. The Department Head testified that the Grievant failed in the past to satisfactorily perform some of the functions of the posted position. On one occasion, the Grievant took over six hours to change the oil on a garden tractor and cross threaded the drain plug, and a qualified Maintenance Worker would have changed the oil in a matter of minutes and would not have damaged the drain plug. On two other occasions,

the Grievant installed the wrong ballast in florescent light fixtures and a Maintenance Technician had to properly repair the fixture.

The labor contract, in Article 7, states that the Employer has the right to set reasonable qualifications and post same, and that employees who do not meet qualifications need not be given a trial period. The Department Head testified that he did not deem the Grievant to be qualified to perform the job functions of the posted Maintenance Worker position. The Grievant is primarily a painter who primarily performs painting and custodial duties.

The County also asserts that the phrase in Article 7, "Employees who do not meet qualifications need not be given a trial period," is dispositive because it provides, contrary to the Union's contention, that employees are not automatically entitled to the trial period. In order to receive a trial period, job applicants must first meet the qualifications for a posted job.

The County cites Article 19, which defines the Courthouse Maintenance Employees' hours of work as 40 hours per week Monday through Friday, and states that employees on permanent day shifts shall be notified that they will be given night assignment as soon as the supervisor becomes aware of the need for such assignment. Therefore, the Department Head, and not the job posting procedure, determines the work shifts of Maintenance Department employees.

The exhibits all reflect a consistent practice of the maintenance Department and Courthouse area job announcements in that they do not identify work shifts. It is not required as part of the job posting. The Grievant agreed during his testimony that the contract language gave the Department Head the right to schedule work shifts.

The Health Care Center operates under its own separate seniority list and is a much different operation than the Maintenance Department, the County notes. The fact that the Health Care Center does post work schedules for nursing assistants and other classifications has no relevancy to the Maintenance Department. The fact that a Legal Secretary in the Child Support Department posted into a Legal Secretary position in Circuit Court Branch III has little correlation with the job posting at issue. Others have posted to different departments and different supervisors, but in this case, the department and supervisor remains the same.

The County also notes that Przybylski testified that in his 31 plus years, the job posting procedure was never used to determine an employee's work shift. And Lisa Jakusz, Personnel Specialist, has prepared job postings for the Courthouse Maintenance Department for the past 11 and one-half years, and those job postings never designated the work shift.

DISCUSSION:

The County has shifted gears several times here in telling the Grievant why he could not have the day job he wants. First, Przybylski told Dotty Mansavage and Colleen Stevens that he

was not qualified, then he told the Grievant that he needed someone who could get along with other people. Then the County took the position that he already has a Maintenance Worker position so it would be futile to post for a Maintenance Worker position, since he already has the title and pay rate. However, parties on both sides are entitled to change their minds and refine their arguments and case as they proceed to try to settle it through the grievance process. They are even allowed to do so during arbitration hearings. The arbitration process is not meant to be a trap for the unwary and grievances are not to be treated as formally as legal pleadings. Unions have often been given such leeway, and employers are entitled to the same leeway.

If Przybylski had at least given Mansavage an interview for the posting, perhaps the two of them could have a better understanding of certain facts. For example, Przybylski thought that Mansavage took too long to change oil in a machine, while Mansavage did not recall ever changing oil while working for the County. There was also some factual dispute as to whether Mansavage could change a ballast. If they had a discussion regarding the posting, perhaps Przybylski would have a better understanding of Mansavage's capabilities, and Mansavage would have a better understanding of Przybylski's expectations, rather than hearing such matters during a grievance. Then, whether or not Przybylski was willing to reassign Mansavage to day hours, such understandings would be helpful to both of them in the future. There will be future postings.

Obviously, the Grievant wants to work day time hours, the County wants him to stay at his night time hours, and the nub of this dispute over hours has a heavy impact regarding a remedy. If, for example, I were to state that the Grievant should be given the position for which he posted, what would prevent Przybylski from changing his hours from 6:00 a.m. to 2:30 p.m. to 2:30 p.m. to 11:00 p.m.? Such an action would not violate the collective bargaining agreement. The hours are not locked in by contract and can be moved and assigned. Przybylski could move all the Maintenance Workers' hours. Thus, the remedy that the Union seeks -- a day job for Gary Mansavage -- is beyond my authority to grant. I cannot grant the Grievant a day shift with specific hours where the contract leaves such hours within the discretion of management.

The Grievant may certainly post for a position which he already holds -- whether that position be for a day shift or a different building assignment or whatever. His seniority may get him that position. But nothing guarantees that his hours will be what he wants them to be.

What the Union wants is for seniority to be used to determine a shift preference. The collective bargaining agreement does not have this type of language, common to some bargaining units. The contract here allows for seniority to control in the following manner, pursuant to Article 7, Section A:

. . . the employee applying for the position with the most seniority within the affected department who can qualify shall be given the position. (Emphasis added.)

The "position" at issue is a Maintenance Worker's position -- a position already held by the

Grievant. Therefore, his seniority cannot be used to get him that position. The position is not synonymous with the shift. The Superintendent still has the ability to establish schedules of work, to schedule and assign employees, to maintain efficiency, and to determine the personnel by which operations are to be conducted, all according to Article 3.

The Union has noted that the labor contract refers to permanent day shifts in Article 19. However, this language talks about assignments as opposed to postings. The assignments are within the authority of the Department head. Article 19 does not create certain hours or hour, contrary to the Union's assertion. In fact, it states that a work week is 40 hours. While it refers to permanent day shifts, it does not state what day shift hours are, and the main thrust of this language is to give employees fair notice when their hours are being changed.

It is true that employees have used the posting procedures to post for different shifts, different locations, different assignments, within or outside of their existing classifications. However, the labor contract does not require that the County post the hours or that senior employees get their choice for the more desirable hours. The Union argues that the County has waived any right to assert its managerial prerogative in this regard. I disagree. Parties do not generally waive their rights under collective bargaining agreements without some strong showing that one party has been misled to its detriment. The bargaining unit members have not relied on the County's permissive use of posting for different hours, shifts, locations or assignments to their detriment -- in fact, those examples have been a benefit to employees even though not required by contract. The Health Care Center, for example, did not post shifts or hours at one time, but started to do so for the convenience of employees. However, the County is not obligated to post the hours of shifts.

If the Union wants shift preference by seniority, it needs to bargain for that language.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 29th day of July, 1996.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator