

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CHIPPEWA COUNTY PROFESSIONAL
BARGAINING UNIT

and

CHIPPEWA COUNTY

Case 200
No. 54092
MA-9547

Appearances:

Ms. Christel Jorgensen, Business Agent, on behalf of the Union.

Ms. Margaret McCloskey, Personnel Director, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Chippewa Falls, Wisconsin, on August 26, 1996. The hearing was not transcribed and the parties thereafter filed briefs which were received by September 17, 1996. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Whether the County violated the contract by not posting for bargaining unit members the vacancy created by Susan Klinger-Walloch's promotion and, if so, what is the appropriate remedy?

BACKGROUND

The County in May, 1995, combined its Social Services and Community Programs Departments to create a new Human Services Department ("Department"), handled by C.W. King. At that time, Mary Ann King held the position of Social Services Supervisor in the Department. She resigned in August, 1995, thereby leaving vacant her supervisory position.

Sue Ann Klinger-Walloch then held the half-time position of Community Clinical Coordinator, a bargaining unit position. She applied for and was awarded King's vacant supervisory position effective September 1, 1995. The County did not post the vacancy created by Klinger-Walloch's promotion out of the bargaining unit.

The County combined the two prior departments in order to save expenses in the face of a decline in revenues. Thus, the County's eligible residents dropped from about 60-70 clients to about 37 core residents as a result of newly-imposed certification requirements, thereby causing a revenue shortfall. Human Services Director King testified that the County is "currently staffed to serve 60 odd clients"; that that is why he has not filled 4.5 vacancies; that the County is no longer responsible for performing mediation functions for the courts; that the removal of mediation from the Community Coordinator position has resulted in less than a full-time slot; and that he expects to receive less aid from the State of Wisconsin. He also stated that certain supervisory work formerly performed by then-Community Programs Supervisor Marvin Schneider, now a Human Services Supervisor, has been transferred to Klinger-Walloch; that her treatment of clients has been carried over from her former bargaining unit position; that "We have a clear history of supervisors doing bargaining unit work"; and that there would be less efficiency and less cost-effectiveness if Klinger-Walloch's job were not combined in this fashion.

Schneider testified that Klinger-Walloch performs all of the Community Support Supervision duties that he once performed; that she "in part" is still treating clients in the same fashion that she did when she was in the bargaining unit; and that, "My guess is that it is less than a quarter" of her total time.

Klinger-Walloch testified that she performs all of the duties in her new job description (Joint Exhibit No. 6); that her new "job responsibilities have changed dramatically"; that "one-quarter of my time is spent on clients and working with the team", just as she did when she was in the bargaining unit; and that "I'm doing all of them" -i.e., her former Community Support Clinical Coordinator job duties. As for her old job duties (Joint Exhibit No. 7), she stated, "I'm doing all of them." She added that she now decides for herself what functions she should perform without checking with management in contrast to what she formerly did when she was in the bargaining unit.

In support of the grievance, the Union argues that "the Clinical Coordinator position is covered by the labor agreement and, therefore must be posted or performed by bargaining unit members as long as the work exists." The Union also claims that the County's concerns over effectiveness and efficiency cannot negate the contract; that the contractual wage for the vacant Clinical Coordinator position clearly shows that said work is bargaining unit work; and that no past practice supports the County's position.

The County, in turn, contends that it has the right to not fill the vacant Clinical Coordinator's position pursuant to the contract's management rights and posting provisions; that "Nowhere in the contract is there a definition or recognition of 'bargaining unit work'"; and that the disputed work "is being done with a different focus, different responsibility and different perspective than when it was performed by a bargaining unit member." It further maintains that Klinger-Walloch is now performing supervisory work and that sustaining the grievance would

"defeat the purpose of merging and streamlining the former Social Services and Community Programs Departments" because "there would be no point in attempting to strive for fiscal responsibility."

The resolution of this issue in part centers on the application of Article 2, entitled "Management Rights", which states:

Article 2, Management Rights

Except as expressly modified by other provisions of the contract, the County possesses the sole right to operate the County and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the County;
- B. To hire, promote, transfer, schedule and assign employees in positions within the County;
- C. To suspend, demote, discharge and take other disciplinary action against employees;
- D. To relieve employees from their duties;
- E. To maintain efficiency of County operations;
- F. To take whatever action is necessary to comply with State or Federal law;
- G. To introduce new or improved methods or facilities;
- H. To change existing methods or facilities;
- I. To determine the kinds and amounts of services to be performed as pertains to County operations and the number and kind of classifications to perform such services;
- J. To determine the methods, means and personnel by which County operations are to be conducted;
- K. To take whatever action is necessary to carry out the functions of the County in situations of emergency;
- L. As in the past, to contract for goods and services.

The County correctly points out that this language gives it broad powers to schedule and assign employees; to maintain the efficiency of County operations; to introduce new or improved methods; to change existing methods; to determine the number and kind of classifications to perform such services, and to "determine the methods, means and personnel by which County operations are to be conducted."

These rights, however, are not unlimited. Article 2 also states that they arise "except as expressly modified by other provisions of the contract. . ." This being so, this case turns on

whether these rights have been expressly modified in other parts of the contract.

The Union points to Article 1, entitled "Recognition", in support of its claim that the work here can only be performed by bargaining unit employees. This language states:

The County recognizes the General Teamsters Union, Local 662, as the exclusive bargaining representative of all regular full time and regular part time professional employees of the County, in classifications listed in Appendix B of this Agreement including related positions, but excluding administrative, managerial, supervisory, public health professional, confidential, clerical, temporary and part time employees employed less than 976 hours per year for collective bargaining of wages, hours and conditions of employment.

This language does not provide that the Union has exclusive jurisdiction over all bargaining unit work, which is the key issue here. Instead, it only grants recognition to the Union over bargaining unit members which is a separate question. Hence, it does not "expressly" override the broad management rights spelled out in Article 2, ante.

Elsewhere, the contract provides in Article 8, Section 5, that "All new or vacant positions which the County has determined to fill shall be posted. . ." This posting proviso, however, does not control because it by its very terms only covers those vacant positions which the County has determined to fill. Here, since the County has decided not to fill the vacant Community Clinic Coordinator's slot, this proviso does not expressly override the County's rights under the management rights clause.

Furthermore, the contract has no provision which states that bargaining unit work can only be performed by bargaining unit personnel. Hence, there is no contractual provision which "expressly" prohibits the County from assigning bargaining unit work to non-bargaining unit personnel under the unique facts herein.

Moreover, there is no clear past practice showing that the County in the past has only assigned bargaining unit work to bargaining unit personnel. To the contrary, Human Services Director King testified without contradiction that supervisors in the past have performed bargaining unit work. If anything, past practice therefore supports the County's position.

To be sure, the work in dispute here - which now takes up about twenty-five (25) percent of Klinger-Walloch's time - does represent a larger share of non-bargaining unit work than non-bargaining unit personnel have performed in the past. But that is a difference in degree, not kind, which is why there is no past practice in the Union's favor.

The Union thus mainly relies on the contractual wage provisions and applicable job descriptions in support of its assertion that such an assignment is prohibited.

A contractual wage provision does indeed stand for the proposition that the wage for a given position must be paid whenever that work is performed by bargaining unit employees. The payment of that wage, however, is a separate question of whether that work can only be performed by bargaining unit personnel. The same is true for job descriptions. While they detail the kind of work that bargaining unit personnel must perform, that is a separate question of whether non-bargaining unit personnel can also perform it.

That is why unions regularly seek contract language to the effect that only bargaining unit employees can perform bargaining unit work. They seek such an express proviso because a mere wage provision, without more, is insufficient to override an employer's right under a broad management rights clause to assign work elsewhere. Under the Union's theory, however, the arbitrator is being asked to construe the contract as if it contained such a proviso.

That, I cannot do. The contract here expressly gives the County very broad authority to manage its operations except to the extent "expressly modified by other provisions of the contract." Here, because there is no such express modification and because there is no past practice supporting the Union, it must be concluded that the County is not prohibited from assigning the work in dispute to non-bargaining unit personnel and that it thus is not required to fill Klinger-Walloch's former bargaining unit position.

It must be pointed out, though, that this ruling is based on the narrow facts of this case and the County's own acknowledgement in its brief that "King was able to leave the Union position unfilled without causing any harm to any employee." Accordingly, nothing herein should be misconstrued to mean that supervisors can perform bargaining unit work if that entails either laying off bargaining unit personnel or reducing their hours. Furthermore, nothing herein should be misconstrued to mean that non-bargaining unit employees can spend more than twenty-five (25) percent of their time doing bargaining unit work which is what Klinger-Walloch is now doing. Those issues are not before me and they hence do not have to be resolved in this proceeding.

In light of the above, it is my

AWARD

That the County has not violated the contract by not posting for bargaining unit members the vacancy created by Susan Klinger-Walloch's promotion. The grievance is therefore denied.

Dated at Madison, Wisconsin, this 4th day of October, 1996.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator