BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LaCROSSE COUNTY CERTAIN EMPLOYEES,
LOCAL 2484, AFSCME, AFL-CIO

and

LaCROSSE COUNTY

Case 149
No. 53804
MA-9464

Appearances:
Mr. Daniel Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. William Shepherd, LaCrosse County Assistant Corporation Counsel, 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 providing for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to chair a tripartite arbitration panel to decide the grievance of Nancy Allen. The other members of the panel were union-designated arbitrator Steven Day and county-designated arbitrator Nikki Gyllander. A hearing, which was not transcribed, was held on April 3, 1996 at LaCrosse, Wisconsin. Afterwards, the parties filed briefs and reply briefs which were received by July 31, 1996. Based on the entire record, the arbitration panel issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Did the County violate the collective bargaining agreement by refusing to allow the grievant to return to her former classification during the trial period? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

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

ARTICLE II

ADMINISTRATION

2.01 Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote, or suspend or otherwise discharge or discipline employees for just cause; the right to decide the work to be done and allocation of work; to determine the services to be rendered, the materials and equipment to be used, the size of the workforce, and the allocation and assignment of work and workers; to schedule when work shall be performed; to contract for work, services, or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; and, to adopt and enforce reasonable rules and regulations.

. . .

ARTICLE IX

JOB POSTING

9.01 When a vacancy is declared by the County for any position covered by this Agreement, notice of said vacancy shall be posted on the bulletin boards as established in 3.01 for seven (7) calendar days.

. . .

9.04 Employees filling promotional vacancies shall be on a trial period of at least fifteen (15) working days, not to exceed three (3) calendar months. An employee who fails to have the ability to handle a classification obtained through job posting during the trial period, shall be returned to their former classification and pay as if there had been no interruption.

. . .

ARTICLE XIX

EQUAL OPPORTUNITY

19.01 The parties to this Agreement agree that they shall not engage in any action of employment discrimination as specified in the Wisconsin Statutes against any individual on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record.

19.02 In the event the employer must accommodate the disability of a qualified applicant or an employee, no such accommodation will be deemed an amendment of the terms of this agreement or otherwise be treated as precedential. No accommodations will be made which conflict with the collective bargaining agreement.

FACTS

Grievant Nancy Allen started her employment with the County in 1979 as a receptionist in the Human Services Department. In 1980, she bid into another position in that department which was then known as Income Maintenance Worker, but now is known as Economic Support Specialist (hereinafter ESS). This job did not involve substantial typing or repetitive movements. Allen worked in that position for the next 14 1/2 years. During that time frame, Allen had recurring neck, shoulder and back problems for which she received treatment from a chiropractor. The treatment she received is known as a spinal adjustment. Allen received four spinal adjustments in the four-month period between December 27, 1994 and May 1, 1995. This averages one treatment a month during that time period.

In March, 1995, 1/ Allen applied for a vacancy in the Clerk Entry classification. The parties' labor agreement contains 16 pay grades with various classifications assigned to each grade. Pay grade CU-1 is the lowest and CU-16 is the highest. When she applied for the Clerk Entry position, Allen was in pay grade CU-12, Step 3 which paid $11.17 an hour at the time. The pay grade for the Clerk Entry position just referenced is CU-1, Step 3, and paid $8.82 an hour at the time. Thus, Allen bid from one of the higher-paid positions in the bargaining unit down into the lowest paid position in the bargaining unit. Specifically, she bid into a position which paid $2.35

1/ All dates hereinafter refer to 1995.

less an hour than what she was earning. The record does not indicate why Allen wanted this voluntary demotion. Allen was subsequently awarded the Clerk Entry position and started in it on May 1, 1995.

Allen had no performance problems with her new Clerk Entry job which involved sitting all day in front of a computer monitor and typing. In fact, her supervisor (Joan Campbell) praised her work performance and indicated that her level of transcription in May and June was satisfactory. However, after being in the job for just a short while, Allen's recurring neck, shoulder and back problems increased. Allen received 13 spinal adjustments in the three-month period between May 1 and August 7, 1995. This averages about four treatments a month during that time period. Both Allen and her chiropractor attributed her increased neck, shoulder and back problems to the repetitive nature of the work she was doing in that particular job (i.e., sitting all day and transcribing dictation). Allen therefore decided she should return to her former ESS position because it involved less repetitive work than what she was doing.

On July 12, Allen told Campbell that she wanted to return to her former ESS position because she was convinced that the work she was doing in her new position (i.e., sitting all day and typing) had increased her neck, shoulder and back problems. Allen confirmed this in writing the next day (July 13) with the following memo to Campbell:

> This is to confirm our conversation yesterday in regard to my requesting to return to my previous position within the 90-day trial period. As discussed, this is due to health reasons having to do with back and neck strain. Thank you for all of your support and assistance. It has been a pleasure to work for you!
>
> /s/ Nancy Allen

Campbell approved Allen's request to return to her former ESS position and then referred the matter up the Employer's chain of command.

Allen then went to her previous supervisor, Shirley Ross, and told her that she wanted to return to her former ESS position. By her own admission, Allen did not get along well with Ross. As a result, Allen knew that Ross was not happy to hear that she (Allen) wanted to return to the department. During their conversation, Allen told Ross that after she returned, she would eventually try to bid out of the ESS position into another (unspecified) position.

When Allen's request to return to her former ESS position reached Human Services Department Director Nikki Gyllander, she (Gyllander) denied same. The personnel office subsequently denied Allen's request as well.

On July 20, a pre-grievance meeting was held concerning the matter. Those present at the

meeting were Allen, Campbell, Union President Sue Mikkelson and County Personnel Director Robert Taunt. During this meeting, Taunt indicated he would not let Allen return to her former ESS position because if she did, she would just bid out again.

On July 25, Allen's chiropractor, Dr. Jack Schermerhorn, wrote the following letter:

> RE: Nancy Allen
>
> To whom it may concern:
>
> Nancy Allen has been under my care for the last several years with intermittant back related problems. Starting in late May Nancy has had an increase in neck, shoulder, and low-back pain. Orthopedic/neurological/muscle, and static palpation validate the patient's symptoms.
>
> The patients description of her job which entails sitting for long periods of time and transcribing -- correlates between her ergonomic aggravated back symptoms and past cases of transcribers with similar symptoms.
>
> I recommend that Nancy change jobs to a position where she can move more freely and do less repetitive activities such as her previous job.
>
> Chiropractically yours,
>
> Jack Schermerhorn /s/
> Dr. Jack Schermerhorn, DC

Shortly after the County received the above letter, it offered Allen the choice of staying in her existing Clerk Entry position or moving into another vacant Clerk Entry position. Allen opted for the latter, and moved into that second Clerk Entry position on August 7. Allen did not post for this second Clerk Entry position; rather, she was simply unilaterally moved into it by the County. The County did not post this vacancy and the Union agreed to waive the contractual posting requirement.

This second Clerk Entry position has different duties than the first Clerk Entry position. The second Clerk Entry position involves photocopying, being a backup receptionist, and doing some transcribing (although much less typing than the first Clerk Entry position). It also involves

more movement and less repetitive motion than the first Clerk Entry position does. By Allen's own admission, the second Clerk Entry position does not cause her as much neck, shoulder and back strain as the first Clerk Entry position did. Allen was still working in the second Clerk Entry position as of the date of the hearing herein. Allen received 18 spinal adjustments in the eight and one-half month period between August 7, 1995 and March 25, 1996. This averages to about two treatments a month during that time period.

Allen formally grieved the County's refusal to let her return to her former ESS position on July 28. On September 20, Personnel Director Taunt officially responded to the grievance with the following letter to Union President Mikkelson:

> This letter will serve as a statement of the County's position following Step 2 of Nancy Allen's grievance.
>
> Nancy bid from Economic Support Specialist Sr., CU-12 to Clerk, Entry CU-1. She developed an increase in problems with a pre-existing physical condition connected with sitting for long periods of time and transcribing, in the typing pool. Nancy asked for a return to her former position under Section 9.04 of the contract. The County has declined to return her but transferred her, as an accommodation to less demanding Clerk, Entry work.
>
> The applicable part of Section 9.04 states: "An employee who fails to have the ability to handle a classification obtained through job posting during the trial period, shall be returned to their former classification and pay as if there had been no interruption." Nancy has the ability to handle the Clerk, Entry classification in all of its requirements and performed very well according to her supervisor. There is no reason to return her to the previous position, which was filled. Further, her chiropractor indicates she has been under his care for the last several years. There is no indication that a return to the old classification will improve Nancy's condition. Nancy, herself, expressed a strong desire to leave Economic Support and if returned, would bid out at the next opportunity.
>
> Therefore, Nancy has the ability to handle the classification of Clerk, Entry. There is no reason under the contract to send her back. Other reasons not to send her back include disruption of the department and Nancy's own wishes.
>
> Her physical condition can be accommodated as a Clerk Entry, a position she is able to handle.

Thereafter, the Union appealed the denial of the grievance to the LaCrosse County Employment Relations Commission, which is a committee composed of County Board Supervisors. Following a hearing on the matter, the Commission voted to concur with the Union's grievance. Thus, it ruled in Allen's favor. After the Commission issued its decision sustaining Allen's grievance, Department Director Gyllander told Allen that she (Gyllander) thought the Commission's decision was wrong. The County's Human Services Department subsequently appealed the Commission's decision to arbitration.

Allen's chiropractor, Dr. Schermerhorn, testified at the hearing that in his opinion, Allen's present Clerk Entry job is better for her (physical condition) than the first Clerk Entry position was, but that the ESS job would be even better for her.

The record indicates that besides Allen, there have been three other bargaining unit employes who posted into different jobs and then sought, within the trial period, to return to their former position. This happened to Sue Armstrong in 1990, to Joyce Lanzel in 1995, and to Sherrie Bryant in 1995. All three employes were allowed to return to their former position. In each of the three instances, it was mutually agreed that the employe would return to their former position. The record indicates that the reason Lanzel's and Bryant's supervisors agreed to let them return to their former position is because they (i.e., the supervisors) felt the employe could not perform the duties involved in their new position. Insofar as the record shows, the instant situation with Allen is the first time an employe who wanted to return to their former position within the trial period was not allowed to do so.

The record also indicates that one of the junior ESS workers at the time of the arbitration hearing was Lisa Bina. If Allen is returned to an ESS position as a result of this arbitration decision, Bina may be the ESS worker displaced by that decision. Lisa Bina's father is a County Board Supervisor and a member of its Human Services Committee. That committee oversees the Human Services Department. Thus, Human Services Director Gyllander reports to the County Board's Human Services Committee.

POSITIONS OF THE PARTIES

Union

The Union contends the County violated the collective bargaining agreement by refusing to allow the grievant to return to her former classification during the trial period. It makes the following arguments to support this contention.

First, the Union asserts at the outset that the only conditions which are pertinent herein are those which existed at the time Allen's grievance was filed. The Union believes this is important because the Employer's subsequent efforts to accommodate Allen's physical condition by offering

her the second Clerk Entry position occurred after she filed her grievance.

Second, responding to the County's arguments concerning the ADA, the Union cites the stipulated issue (which refers only to the labor agreement) for the proposition that this case is not an ADA case and hence the ADA has no bearing herein.

Third, for purposes of background, the Union believes it is undisputed that Allen's recurring back problems became worse and her pain increased after she moved from the ESS job into the Clerk Entry position. However, if this point is disputed, the Union cites the fact that Allen's chiropractic treatments increased. The Union reasons that since the Clerk Entry position has increased her back pain, it follows that Allen does not have the physical ability to perform the first Clerk Entry job.

Next, the Union calls the Arbitrator's attention to the fact that Allen's supervisor, Campbell, initially approved Allen's request to return to her former ESS position. The Union implies that Campbell's approval committed the County to returning Allen to her former ESS position even though Campbell's approval was subsequently overturned further up the Employer's chain of command.

Fifth, the Union notes that when the Employer decided to offer Allen her choice of either of two Clerk Entry positions, it asked the Union to waive the contractual posting requirement for the second Clerk Entry position. The Union acknowledges that it ultimately agreed to do so (i.e., to waive the contractual posting requirement for the second Clerk Entry position). The Union asserts however that the County's request put it (the Union) in the untenable position of having to waive not only the posting requirement of Section 9.01, but also Section 19.02 (which provides that "no accommodations will be made which conflict with the collective bargaining agreement.") The Union therefore contends that transferring Allen to the second Clerk Entry position without that position being posted conflicts with the labor agreement.

Next, with regard to her current Clerk Entry position, the Union acknowledges that Allen is having less back problems in that position than she did in the first Clerk Entry position. Be that as it may, the Union asserts that Allen would have even less back problems if she returned to her old ESS position. According to the Union, Allen should not have to endure any increased back pain, even that associated with the second Clerk Entry position, when an ESS position is available which gives her less back problems.

As further support for its position here, the Union cites what it believes to be an applicable past practice. According to the Union, the practice is that employes who posted into another job could return to their former position during the trial period if they wanted. To support this premise, the Union cites the instances wherein employes Armstrong, Lanzel and Bryant all returned to their former position during the trial period. The Union contends these three instances show that when employes wanted to return to their prior position during the trial period, they were

allowed to do so. The Union avers that Allen is the only employe whose request to return to her former position has been denied. The Union therefore argues that since Allen is the only employe who has not been allowed to return to her former position during the trial period, she has been subjected to disparate treatment.

Finally, the Union makes the inference that the reason the County will not let Allen return to her former ESS position is because Lisa Bina would be the employe displaced, and the County is trying to protect Bina's job because her father is a County Board member. The Union also calls attention to the fact that the person who appealed this grievance to arbitration after the Commission found in Allen's favor is now sitting on the instant arbitration panel (i.e., County-designated arbitrator Gyllander).

In order to remedy this alleged contractual breach, the Union asks that Allen be returned to her former ESS position with a make-whole remedy. Additionally, the Union seeks interest on the back pay and a written apology to the grievant.

County

The County contends it did not violate the collective bargaining agreement by refusing to allow the grievant to return to her former classification during the trial period. It makes the following arguments to support this contention.

To begin with, it notes that after Allen asked to return to her former position, it transferred her to a second Clerk Entry position. The County asserts the reason it did so was to accommodate her physical impairments. According to the County, the work in the second Clerk Entry position is less demanding than the work in the first Clerk Entry position because there is less repetitive motion and the incumbent can move about and perform various tasks. The County contends that the second Clerk Entry job (i.e., the one Allen is currently in) does not cause her greater physical problems than did the ESS job. To support this contention, it cites the testimony of Allen's chiropractor (Dr. Schermerhorn) which it characterizes as being that the second Clerk Entry position is no better or worse than her ESS position. The County therefore believes that by moving Allen into the second Clerk Entry position, it not only satisfied the suggestion of her own chiropractor, but also provided her with a reasonable accommodation under the Americans With Disabilities Act (ADA).

Second, the County asserts that Allen has the ability to perform her present Clerk Entry job duties. To support this premise, it cites the testimony of Allen's supervisor (Campbell) that Allen did good work in both of the Clerk Entry positions she filled. The County contends this praise of Allen's work by her supervisor proves that Allen has the ability to perform Clerk Entry work (both in terms of the skill level and the effect of the job duties on her health). Since Allen is capable of doing the work she is currently doing, the County believes she should remain in her current position.

Third, the County argues it is not contractually obligated to return Allen to her former ESS position. As support for this contention, the County initially relies on the Management Rights provision (Article 2). The County also relies on Section 9.04. The County argues that notwithstanding the Union's contention to the contrary, Section 9.04 does not give employes the unilateral right to decide if they will return to their former position. Instead, the County reads that provision as giving the Employer the right to decide if the employe can perform the work of their new position. As previously noted, the County decided that Allen can perform the work in her current Clerk Entry job. The County asserts that the Union's interpretation of Section 9.04 (which it characterizes as being that the County has no discretion but to grant Allen's request to return to her former position) is not contractually supported. The County therefore contends that Allen does not have a contractual right to return to her former ESS position.

Next, the County contends that the instances where employes Bryant and Lanzel were allowed to return to their former positions are distinguishable from what occurred here. According to the County, the reason those employes were allowed to return to their former position was because they (Bryant and Lanzel) did not have the ability to perform the duties of their new jobs. To support this contention, it cites the testimony of those employes' supervisors to that effect. The County asserts that here, though, Allen does have the ability to perform the duties of her current Clerk Entry position.

Fifth, the County contends that just because Allen's supervisor (Campbell) initially approved Allen's request to return to her previous position, Campbell's approval was not binding. According to the County, line supervisors (such as Campbell) have no authority to approve an employe's return to their previous position; instead, approval further up the chain of command is needed. The County notes that did not happen here because both the department director and the personnel office did not approve Allen's request to return to her previous position.

Finally, the County vehemently denies the Union's inference that the action taken herein was an effort by the County to protect the job of Lisa Bina because her father is a County Board member. According to the County, there is no credible evidence in the record to support that inference. The County asserts that its actions here have nothing to do with Lisa Bina.

In conclusion then, the County argues that its actions here did not violate the contract. It therefore requests that the grievance be denied and that Allen remain in her current position. However, in the event the Arbitrator finds that a contractual violation occurred and orders Allen returned to her former ESS position, the County contends that no back pay should be awarded because of the County's good faith effort to provide her with a reasonable accommodation for her health concerns.

DISCUSSION

The factual context for this matter is as follows. The grievant, a long-term ESS worker, voluntarily bid down into a Clerk Entry position. She was awarded the position and subsequently moved into it. Shortly after moving into the new job she concluded that the repetitive nature of the work she was doing (i.e., sitting all day and typing) was aggravating her existing neck, shoulder and back problems. She therefore sought to return to her former ESS position. Her line supervisor approved her request but this approval was subsequently overturned by management officials further up the ladder. Thus, Allen was not allowed to return to her former ESS position as she requested. She then grieved same. The County then gave Allen the choice of staying in her existing Clerk Entry position or moving into another Clerk Entry position (which I have previously characterized as the first Clerk Entry position and the second Clerk Entry position, respectively). She opted for the second Clerk Entry position and subsequently moved into it. She was still working in that position (i.e., the second Clerk Entry position) as of the date of the hearing.

At issue here is whether the grievant has to be returned to her former ESS position. The Union contends that she does while the County disputes that assertion. If it is found that the grievant does have a contractual right to return to her former ESS position, then the County violated the contract because it has refused to let her do so. On the other hand, if the grievant does not have a contractual right to return to her former ESS position, then no contractual violation occurred.

My analysis begins by noting that although the parties addressed the following two matters at length in their briefs, neither is considered dispositive by the undersigned in the outcome of the case. First, the parties disagree over the significance of Campbell's approval of Allen's request to return to her former ESS position. The Union implies that Campbell's approval committed the County to that course of action and could not be overturned. The problem with this notion however is that it ignores the reality inherent in any chain of command. The reality, of course, is that when a subordinate makes a decision which then goes up the ranks, the decision of the subordinate can be changed. That is exactly what happened here. Campbell's supervisors were certainly empowered to overturn Campbell's decision. The County made it abundantly clear both by their actions in overturning Campbell's decision and the explicit statement in their brief concerning same that it believes that first-line supervisors (such as Campbell) are not empowered to return employes to their former positions. This is the Employer's call to make. Consequently, the fact that Campbell approved Allen's request does not affect the outcome herein. Second, the Union faults the County for asking it to waive the posting requirement of Section 9.01 when the County decided to offer Allen the second Clerk Entry position in order to accommodate her physical condition. According to the Union, this request put it in an "untenable position". Assuming for the sake of discussion that the Employer's request did put the Union between the proverbial rock and a hard place, it cannot be overlooked that it was simply a request. The Union then had the choice of either agreeing or disagreeing with same. As was its right, the Union decided to waive the contractual posting requirement for the second Clerk Entry position so that Allen could move into that position. In doing so, it essentially made a side agreement with the

County to disregard the contractual posting requirement as it relates to the second Clerk Entry position. Side agreements which make an exception to the labor agreement for a particular instance are certainly not unheard of in labor relations. Having made such a side agreement here, the Union is hard pressed to now claim that the Employer's failure to post the second Clerk Entry position constitutes a contractual violation. In point of fact, the parties' side agreement to not post the second Clerk Entry position supersedes the contractual posting requirement. Thus, in this particular instance, the County was not obligated to post the second Clerk Entry position because the parties' expressly agreed that the position would not be posted so that Allen could move into it.

In contract interpretation cases such as this, the undersigned normally focuses attention first on the contract language and then, if necessary, on the evidence external to the agreement such as an alleged past practice. In this case though, I have decided to structure the discussion so that this normal order is reversed. Thus, I will address an alleged past practice first. My reason for doing so is as follows. If I addressed the contract language first, and found it to be clear and unambiguous, there would be no need to look at an alleged past practice for guidance in resolving the dispute. Were this to happen, the case could be decided without any reference whatsoever to the alleged past practice. The obvious problem with this is that the Union sees this case, in part, as a past practice case. I have therefore decided to utilize this format so that the Union's past practice contention is not dodged.

Past practice is a form of evidence commonly used to fill contractual gaps. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract contains gaps or is silent on a particular point. In order to be binding on both parties, an alleged past 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.

The Union contends that the applicable practice is that employes who posted into another job could return to their former position during the trial period if they wanted. To support this contention, the Union cites three instances where employes posted into different jobs and then sought, during the trial period, to return to their former position. In these instances, the employes were allowed to return to their former position.

According to the Union, Allen's situation is identical to the instances just noted. I disagree. In my view, Allen's situation differs from the instances just noted in the following respect: in the above-noted instances there was a mutual agreement to the move by both the Employer and the employe. Thus, the employe wanted to return to their former position and the Employer did not oppose same. The record indicates that the reason the Employer let the employes return to their former position was because it concluded that the employes did not have

the ability to handle their new classification. 2/ Here, though, there is no mutual agreement to the requested move. While Allen wants to return to her previous position the Employer opposes same because of its belief that Allen has the ability to handle the Clerk Entry classification. 3/ This lack of mutuality differentiates Allen's situation from the instances noted above. On that basis alone, Allen's situation is distinguishable from the instances noted above. Consequently, there is no past practice which controls the situation herein.

Having so found, attention is now turned to the contract language. Both sides agree that the contract language applicable here is the second sentence of Section 9.04. It provides:

> An employee who fails to have the ability to handle a classification obtained through job posting during the trial period, shall be returned to their former classification and pay as if there had been no interruption.

My analysis of this language follows. This sentence essentially provides that if an employe moves into a new classification and does not have the ability to do it (i.e., the employe cannot perform the duties in the new job), then the employe can move back to their old position within a certain time frame (i.e., the training period). That said, this provision does not give employes the automatic right to return to their old position. For example, the language does not say that any employe who wants to return to their former job during the trial period can do so. Instead, the language establishes a specific criteria which must be met in order for this to happen. The criteria is this: "An employe who fails to have the ability to handle the classification. . .shall be returned to their former classification." Although this sentence does not explicitly say who it is that decides whether the employe has the ability to handle the classification, the undersigned believes it is implicit that it is not the employe alone. If it were the employe alone that made this call, then the employe would, in effect, have an automatic right to return to their former position. As previously noted, the language does not say that. It is therefore concluded that the determination of ability is made by the Employer. As a practical matter, this finding means that the Employer controls whether an employe who has posted into a new position can return to their former position. If the Employer decides the employe does not have the ability to handle their new classification, then the employe will be returned to their former position. Conversely, if the Employer decides the employe does have the ability to do the work of their new classification,

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2/ In making this statement, the undersigned is relying on the testimony of Campbell and Schoenberg who supervised Lanzel and Bryant, respectively. Armstrong's supervisor did not testify.

3/ The question of whether Allen has the ability to handle the Clerk Entry classification will be reviewed later in the Discussion.

then the employe does not have a contractual right to return to their former position.

Given the foregoing finding, the final focus of inquiry is whether the record supports the Employer's decision that Allen has the ability to handle the Clerk Entry classification within the meaning of Section 9.04. Based on the following rationale, I find that it does. It is noted at the outset that the word "ability" has both mental and physical aspects. In this case, there is no question that Allen has the mental ability to perform Clerk Entry work. In fact, Allen's Clerk Entry supervisor praised her work performance. The real question in this case is whether Allen has the physical ability to perform Clerk Entry work due to her recurring neck, shoulder and back problems. The Union asserts that in making this call (i.e., deciding whether Allen has the physical ability to do Clerk Entry work) the only conditions which are pertinent are those which existed when the grievance was filed. Thus, the Union believes the arbitrator should limit his review to just the first Clerk Entry position. I disagree. In my view, no basis exists for limiting the inquiry in that fashion. The undersigned cannot simply ignore the fact that Allen is no longer working in the original Clerk Entry position she filled. The Employer moved her out of that job after it learned that the work she was doing (i.e., sitting all day and typing) was increasing her existing neck, shoulder and back problems. The job which the Employer moved Allen into was still part of the classification Allen had posted into, but it involved different duties. Specifically, the second Clerk Entry job involves more movement and less repetitive duties than the first Clerk Entry job did. The reason the Employer moved Allen into this second Clerk Entry job was to accommodate her physical condition and lessen, to the extent possible, her neck and back strain. At the time of the hearing, Allen had been in the second Clerk Entry job for nine months. She acknowledged at the hearing that this second Clerk Entry job does not cause her as much neck, shoulder and back strain as the first Clerk Entry job did. However, Allen wants to go back to her former ESS position because, in her view, it would cause her even less strain than the second Clerk Entry job does. The problem with this contention is that her personal wishes are not controlling. What is controlling is the pertinent contract language. As previously noted, Section 9.04 provides that after an employe posts into a new classification, they can only return to their old job if the Employer decides the employe does not have the ability to handle their new classification. In this case, the Employer's decision that Allen has the requisite mental and physical ability to handle the work of the Clerk Entry classification (specifically, the position she is currently in) passes muster because it is supported by the record evidence. It is therefore concluded that Allen does not have a contractual right to return to her former ESS position. 4/ As a result, the stipulated issue is

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4/ In light of this holding that Allen does not have a contractual right to return to her former ESS position, the undersigned need not address why the County did not want Allen to

answered in the negative.

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

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return to her former ESS position (namely the inference that the County was protecting the job of ESS employe Lisa Bina because her father is a County Board member). Consequently, no additional comments will be made concerning same.

AWARD

That the County did not violate the collective bargaining agreement by refusing to allow the grievant to return to her former classification during the trial period. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 20th day of November, 1996.

By Raleigh Jones /s/
Raleigh Jones, Chair, Arbitration Panel

UNION	**COUNTY**
I concur.	I concur.
_____	Nikki Gyllander /s/
Steven Day	Nikki Gyllander
_____	11-14-96
Date	Date
I dissent.	I dissent.
Steven Day /s/	_____
Steven Day	Nikki Gyllander
11-15-96	_____
Date	Date

gjc
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