

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MANITOWOC COUNTY SUPPORTIVE SERVICES
EMPLOYEES LOCAL 986-A, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 323
No. 54819
MA-9797

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Steven J. Rollins, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Manitowoc County Supportive Services Employees Local 986-A, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Manitowoc County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Manitowoc, Wisconsin, on April 3, 1997. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on June 13, 1997.

BACKGROUND:

On September 13, 1996, the County's Human Services Department laid off two Economic Support Specialists effective September 30, 1996, due to declining case loads. 1/ Later two more

1/ Exs. 16 and 17.

positions were eliminated; one was a Fraud Investigator and the other was an Economic Support Specialist. On October 11, 1996, the Union filed a grievance alleging that the County violated the parties' collective bargaining agreement in that positions were eliminated due to lack of work; yet, work was performed by Senior Aides.

The County acts as the Host Agency for Senior Aides, a program operated under the Older Americans Act. The Senior Aides are employed and paid by the Curative Rehabilitation Center in Green Bay, Wisconsin. The Union and County entered into a side agreement on Senior Aides which provided as follows:

It is agreed by the Manitowoc County Human Services Department and AFSCME Local 986A, AFL-CIO, that:

1. A person shall be placed in the agency as a Senior Aide under the Older Americans Act to perform clerical functions in the Economic Support Division.
2. This placement shall be for no more than 20 hours per week, per Federal regulations.
3. This placement shall not last more than two years, per Federal regulations.
4. This placement shall not supplant any current or future union position.
5. The cost of the placement to the Human Services Department shall be \$250 per year for each year of the placement, with the balance of the cost being borne by the Older Americans Act.

The County had two Senior Aides. One Senior Aide basically stamped things and put packets together and one did filing. 2/ The Senior Aides are not employees of the County and the cost to the County to retain them is negligible. The grievance was denied by the County and was processed through the grievance procedure. On December 9, 1996, the Union, in writing, informed the County of its intent to arbitrate the grievance. 3/ On January 13, 1997, the Union, in writing, informed the County of its continuing intent to arbitrate the grievance. 4/ On

2/ Tr. 74.

3/ Ex. 7.

January 15, 1997, the County raised the issue of timeliness claiming more than 30 days had passed between the December 9, 1996 and January 13, 1997 notices. 5/ The matter was appealed to the instant arbitration.

ISSUES:

The parties were unable to agree on a statement of the issues.

The Union states the issues as follows:

1. Did the Employer violate the collective bargaining agreement or a side agreement by laying off employes and retaining Senior Aides?
2. Is the Employer violating the collective bargaining agreement or a side agreement regarding Senior Aides by using Senior Aides to do bargaining unit work?

If so, what is the remedy?

The County states the issues as follows:

1. Has the Union lost the right to arbitrate this grievance because of its failure to provide required notices in a timely manner?
2. Did the Employer violate the collective bargaining agreement or a side agreement regarding Senior Aides by laying off employes and retaining Senior Aides? If so, what is the remedy?
3. Is the Employer violating the collective bargaining agreement or a side agreement regarding Senior Aides by

4/ Ex. 8.

5/ Ex. 9.

using Senior Aides to do bargaining unit work? If so, what is the remedy?

The undersigned frames the issues as follows:

1. Is the grievance arbitrable?
2. If so, did the County violate the collective bargaining agreement or a side agreement regarding Senior Aides by laying off employees and retaining Senior Aides?

If so, what is the appropriate remedy?

3. Is the County violating the collective bargaining agreement or a side agreement regarding Senior Aides by using Senior Aides to do bargaining unit work?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 2 - SENIORITY

- A. Seniority: It shall be the policy of the Employer and the Union to recognize seniority.
- B. Definition: Seniority shall be defined for the purposes of this Agreement as the net credited service of the employee. Net credited service shall mean continuous employment in the County beginning with the date and hour on which the employee began to work after last being hired. However, it is understood that job posting preference shall be given first to Bargaining Unit seniority. The Bargaining Unit seniority shall be defined as net credited service within the Bargaining Unit. Bargaining Unit seniority shall include that which was accrued in the previously existing Human Services and Courthouse Bargaining Units as well as from the presently existing Bargaining Unit. County and Bargaining Unit seniority shall include time spent in the armed forces of the Country (if such military service occurred after date of hire). County and Bargaining Unit seniority shall not include

unpaid temporary leaves of absence in excess of six (6) months in any period of twelve (12) consecutive months.

- C. Seniority List: The Employer shall give to the President of Local 986-A, on or before January 31 of each year, a seniority list of all employees, which provides information in the categories which appear in Appendix "D" and "E" of this Agreement. That information shall be current for January 1 of the same year.

...

- E. Layoffs: In reducing employee personnel, the last person hired shall be the first person laid off, and the last person laid off shall be the first person rehired. All temporary employees shall be laid off before regular employees are laid off.

...

ARTICLE 10 - DEFINITIONS OF EMPLOYEES

...

- D. Temporary: A temporary employee is a person hired for a specified period of time (not to exceed six (6) months) and who will be separated from the payroll at the end of (sic) period. Temporary employees receive none of the benefits contained in this Agreement. Temporary employees shall not be used to replace, reduce or displace regular employment.

...

ARTICLE 8 - GRIEVANCE PROCEDURE

- A. Definition of Grievance. Should any differences arise between the Employer and the Union as to the meaning and application of this Agreement, or as to any question relating to wages, hours, and working conditions, they shall be settled under the provisions of this Article.

- B. Time Limitations: The failure of a party to appeal a grievance in a timely fashion will be treated as a settlement to that particular grievance, without prejudice. However, if it is not possible to comply with the time limitation specified in the grievance procedure because of work schedules, illness, vacations, holidays, any approved leave or time off, these time limitations may be extended by mutual agreement.

The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure.

C. Steps in Procedure:

. . .

Step 4 - Arbitration:

- a. Notice of Arbitration: If a satisfactory settlement is not reached in Step 3, the Union shall notify the Employer in writing within thirty (30) calendar days of receipt of the written decision of the Personnel Committee of its intent to process the grievance to arbitration. The Union shall notify the Employer in writing within every thirty (30) days thereafter, advising the Employer of the status of the grievance, until a petition for grievance arbitration is filed.

UNION'S POSITION:

Arbitrability

The Union contends that the last sentence of Article 8, C., Step 4, a. was added to the contract during negotiations for the 1996-97 collective bargaining agreement. It submits that a past grievance had a time lag before the petition was filed because of a Union need for research, consultation and decision making, so the County wanted additional notifications in future grievances. The Union claims that the time frame was based on the Step 3 response so that notification had to be given within 30, 60, 90, 120 days, etc. of the third step response. It insists that the January 17, 1997 letter was within the subsequent 30 day period and the grievance meets the timelines of the agreement. It argues that if there is any ambiguity in the language, it must be construed against the drafter, which in this case is the County. The Union maintains that it acted properly and the grievance is arbitrable.

Merits

The Union contends that the Senior Aides were not to replace bargaining unit employees. It further claims that the Senior Aides were not supposed to do any bargaining unit work. The Union points out that Senior Aides do filing and filing is normally done by Economic Support Specialists and in the past, one day a month was set aside for filing by Economic Support

Specialists. It concludes that Senior Aides worked with Economic Support documents. The Union notes that the side agreement provides that Senior Aides "shall not supplant any current or future position." It observes that Economic Support workers were laid off and their positions eliminated and because the Senior Aides have been doing the work of laid off employees, they have supplanted Economic Support workers in violation of the side agreement. It seeks an order that the Senior Aides not be utilized until the staff is returned to pre-layoff staffing, that an Economic Support Specialist be reinstated and any employee adversely affected be made whole.

COUNTY'S POSITION:

Arbitrability

The County contends that the grievance is not arbitrable because the Union failed to provide a timely periodic report that it intended to arbitrate the grievance. It points out that the January 13, 1997 notice was made more than 30 days after its initial notification of intent to arbitrate and the Union has lost its right to arbitrate. It submits that the Union's interpretation of the contract language is at odds with the plain meaning of the contract and is logically inconsistent.

It argues that the plain language is easy to understand and the 30 day blocks from the third step response as pushed by the Union would allow as many as 59 days to pass between status notices, clearly at odds with the express terms. It insists that the County never agreed to the Union's strained interpretation which is incompatible with the plain language. It concludes that the grievance is not arbitrable as the Union failed to provide the required notice within thirty (30) days of the date it advised the County of its intention to arbitrate the grievance.

Merits

The County contends that it has not violated the collective bargaining agreement or the side agreement regarding Senior Aides. It notes that the Union's argument is based on both Senior Aides and Economic Support Specialists doing filing, yet filing is not an essential aspect of the job duties of a Specialist and this duty is not included in the job description as an essential function. It observes that any filing done by Economic Support Specialists was because of inadequate clerical support to do this function. The County takes the position that dismissal of the Senior Aides would not result in the recall of any laid off Economic Support Specialist because Senior Aides are not employees and are not paid by the County and receive no benefits from the County and thus, if they were dismissed, no one would take their place and the clerical work would remain undone. It insists that there is not any money to recall any Economic Support Specialist.

The County takes the position that the Senior Aides did not perform any of the paraprofessional work of the Economic Support Specialists and to the extent they perform clerical

work, such is authorized by the side agreement. It notes that no clerical employes have been laid off. The Economic Support Specialists, according to the County, were laid off due to a reduction in case load and lack of funds. It concludes that it has not violated the collective bargaining agreement nor the side agreement. The County contends that even if it did violate these, the only remedy would be to terminate the Senior Aides. It asks that the grievance be denied.

UNION'S REPLY:

The Union objects to the County's claim that the Senior Aides are volunteers as the record contains no reference to them as "volunteers." The Union reiterates that the side agreement provides that Senior Aides will not supplant any current or future Union position and the filing of files for Economic Support cases is the work of Economic Support workers. It reasons that Senior Aides have been doing the work of Economic Support workers and there has been a layoff of such workers; therefore, Senior Aides have supplanted Economic Support workers. It submits that the County's economic argument is a diversion of the focus from the collective bargaining agreement and any modifications thereof. It concludes that the County violated the side agreement regarding Senior Aides.

COUNTY'S REPLY:

The County contends that the language of Article 8, C., 4., a. is not ambiguous so that Union's argument that it must be construed against the drafter is without merit. The County states that the only question is whether the "thereafter" refers to the receipt of the third step response or the Union's notice. It claims it is the latter because the "additional notifications" are triggered by the initial notification of intent to arbitrate and the additional notification was intended to eliminate uncertainty created by the Union's failure to regularly advise the County of the status of pending grievances and the only date that provides certainty is the Union's notification as that provides certainty to both parties.

The County insists that even if the language is ambiguous, it should not be construed in the manner suggested by the Union because the language had input from both parties so the County does not have sole authorship of the language. The County further argues that accepting the Union construction would add another term, namely, "60 days" when the express language provides "30 days." It insists that the Union's attempt to add time to the formula for computing deadlines is an attempt to modify the terms of the agreement. It concludes that it would be improper to construe the language of Article 8, C., 4., a. as the Union suggests.

DISCUSSION:

Arbitrability

Article 8, Section 3, Step 4, paragraph a. provides as follows:

Notice of Arbitration: If a satisfactory settlement is not reached in Step 3, the Union shall notify the Employer in writing within thirty (30) calendar days of receipt of the written decision of the Personnel Committee of its intent to process the grievance to arbitration. The Union shall notify the Employer in writing within every thirty (30) days thereafter, advising the Employer of the status of the grievance, until a petition for grievance arbitration is filed.

The critical question here is what does the word "thereafter" refer to in the first sentence. The Union argues that it refers to "receipt of the written decision of the Personnel Committee." The County argues it applies to the Union's written notice of intent to process the grievance to arbitration. The language standing alone can be interpreted either way. Past practice does not exist as this language was negotiated into the contract in the last round of negotiations. Negotiating history is also not very enlightening as to the interpretation to be applied. While preliminary language was drafted by the County, the final language was the product of negotiations. The undersigned finds that the language is ambiguous. It seems that the County's interpretation is a little stronger than the Union's; however, the meaning of the language is not clear. The interpretation as argued by the County would remove the merits from the jurisdiction of the Arbitrator. Generally, parties do not waive the jurisdiction of the Arbitrator with language unless such language is clear and unambiguous and doubts as to the interpretation of the contract are resolved against forfeiture of the right to process a grievance. 6/ Inasmuch as the contract is not clear and unambiguous that the word "thereafter" applies to the Union's notice rather than the third step response, the undersigned concludes that the grievance should not be held untimely but finds that it is arbitrable.

Merits

The first issue is whether the County violated the collective bargaining agreement when it retained the Senior Aides and laid off the Economic Support Specialists. Article 2, Section E merely requires the layoff of temporary employes before regular employes are laid off. Article 10, Section D defines temporary employes and this definition does not include Senior Aides. The Senior Aides are not employes of the County. They are not hired or paid by the County. The record simply fails to show any violation of the contractual layoff provision by the

6/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at 194.

County's retention of the Senior Aides when the Economic Support Specialists were laid off.

The second issue is whether the County violated the side agreement regarding Senior Aides. The side agreement provides, in pertinent part, as follows:

1. A person shall be placed in the agency as a Senior Aide under the Older Americans Act to perform clerical functions in the Economic Support Division.

. . .

4. This placement shall not supplant any current or future union position.

It must be noted that the side agreement states that the Senior Aide performs clerical functions and shall not supplant any current or future Union position. The evidence establishes that no clerical positions were eliminated and thus arguably, no Senior Aide supplanted any Union position. The Union has argued that Senior Aides do filing and the Economic Support Specialists also do filing, so the Senior Aides are performing bargaining unit work, thereby supplanting Economic Support workers.

First of all, the side agreement specifically recognizes that Senior Aides will be performing bargaining unit work and secondly, the side agreement speaks in terms of position not in terms of bargaining unit work. Additionally, the mere fact that Economic Support Specialists do filing does make such work into a position. It may be that all employees do filing or use the phone or the copy machine, but merely because Economic Support Specialists make copies or do filing does not mean that this is exclusive bargaining unit work to this position. Filing is clerical work and not a core duty of the Economic Support Specialist positions which were laid off. 7/ Filing duties appear to be a core duty of the Economic Support Clerk/ Typist 4 classification. 8/ Even though the Senior Aides do filing which is a marginal or incidental duty of the Economic Support Specialists, the evidence simply fails to establish that the Senior Aides supplanted any Economic Support Specialist position, and it is therefore concluded that the County is not violating the side agreement by retaining Senior Aides and laying off Economic Support Specialists.

On the basis of the above and foregoing, the record as a whole and the arguments of the

7/ Exs. 12 and 13.

8/ Ex. 19.

parties, the undersigned issues the following

AWARD

1. The grievance is arbitrable.

2. The County did not violate the collective bargaining agreement or the side agreement regarding Senior Aides when it laid off the Economic Support Specialists and retained the Senior Aides, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 15th day of July, 1997.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator