

BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN

**KENOSHA COUNTY LOCAL 990, AFSCME, AFL-CIO
COURTHOUSE AND SOCIAL SERVICES CLERICAL**

and

COUNTY OF KENOSHA

Case 170 No. 54969 MA-9844

APPEARANCES

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 624, Racine, Wisconsin, 53401-0624, appearing on behalf of the Union.

Mr. Frank V. Volpintesta, Corporation Counsel, Kenosha County, 912 56th Street, Kenosha, Wisconsin, 53140, appearing on behalf of the County.

ISSUE

The Union stated the issue: *Did the County violate the collective bargaining agreement when it failed to post the newly created specialized caseload position in the County's Medical Unit in the Division of Economic Support which was created effective September 3, 1996? if so what is the appropriate remedy?*

The County stated the issue: *Is the County required to post work assignments under the current collective bargaining agreement and in light of past practice?*

As the parties were unable to stipulate to an issue, they agreed the arbitrator should frame the issue; the arbitrator states the issue as follows:

Did the employer, Kenosha County, violate the collective bargaining agreement when it failed to post for bidding a specialized caseload position in the Medical unit of the Division of Economic Support? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article I - Recognition

Section 1.1 Bargaining Unit. The County hereby recognizes the Union as the exclusive bargaining agent for Kenosha County Courthouse employees and Social Services Clerical employees, excluding elected officials, County Board appointed administrative officials, and building service employees for the purposes of bargaining on all matters pertaining to wages, hours and all other conditions of employment.

Section 1.2 Management Rights. 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 for proper cause; the right to decide the work to be done and location of work; 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; however, whenever a new position is created or an existing position changed, the County shall establish job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

Article VI - Seniority

Section 6.4. Layoff.

1. If the County must reduce the number of employees within a classification or within a department, the employee with the least amount of bargaining unit seniority shall be selected for layoff. The employee so selected shall have the right to bump a less senior bargaining unit employee in an equal or lower classification of the employee's own choosing in any department, provided such employee has more seniority than the employee being bumped, and provided further, that such employee meets the same minimum qualifications as would be expected of anyone obtaining the job through the normal job posting procedure.

Article VII - Job Posting

Section 7.1. Procedure. Notice of vacancies which are to be filled due to retirement, quitting, new positions, or for whatever reason, shall be posted on all bulletin boards within five (5) working days; and employees shall have a minimum of five (5) workdays (which overlap two (2) consecutive weeks) to bid on such posted job. The successful bidder shall be notified of his selection and his approximate starting date within five (5) workdays.

Section 7.2. Contents of Posting. The job requirements, qualifications, shift and rate of pay shall be part of the posting and sufficient space for interested parties to sign said posting, or they may in writing notify the department head of their application. When an employee is absent from work, his steward may sign said posting for such absent employee.

BACKGROUND

Kenosha County operates a Department of Human Services. Within that Department is a Division of Economic Support. Within the Division there are 5 units: Medical Unit, IST I, IST II, IST III, and Western County. IST stands for Integrated Service Team. There are teams in each one of the units and each team has its own immediate supervisor. All the units handle Food Stamps and Medical Assistance cases. The IST units also handle AFDC cases. Historically, the IST units have referred to their caseloads as "generic," and the Medical Unit and Western County have referred to their caseloads as "specialized"; this is due to the fact that the Medical Unit and Western County, at the time of the grievance, did not handle any AFDC matters. Recently, either just before or after the grievance in this matter was filed, employees in the Medical Unit have been assigned a limited number of AFDC cases.

Kristin Gorecki was an Economic Support Specialist in the IST II unit. On or about October 25, 1995, Ms. Gorecki's caseload of Food Stamp, Medical Assistance and AFDC cases was transferred to other members of the Economic Support staff because Ms. Gorecki went on a leave of absence. On or about August 16, 1996, Economic Support employee Lauren Fox exercised her bumping rights under the collective bargaining agreement and bumped into the position held by Kristin Gorecki. Ms. Fox exercised her bumping rights because she had been notified that effective August 30, 1996, the job that she held of "HMO Enrollment Specialist" was being eliminated. When Ms. Fox exercised her bumping rights, the caseload of Ms. Gorecki and now the caseload of Ms. Fox in the IST II unit was Medical Assistance, Food Stamps, and AFDC. However, on August 27, 1996, Ms. Fox and other Economic Support staff were notified that as of September 3, 1996, Ms. Fox would be performing the duties of Economic Support Specialist in the Medical unit and her caseload would include only food stamps and Medical Assistance. Ms. Fox was also notified that she and the other two employees in the Medical unit, Dan Mack and Rosemary Mrozak, were scheduled to receive AFDC training.

This change in Ms. Fox's caseload led to the filing of the grievance which is the subject of this arbitration. The Union alleged that the position previously held by Ms. Gorecki, to which Ms. Fox had exercised her bumping rights, had been dissolved and a new position within the Medical unit handling a specialized caseload (Medical Assistance and Food Stamps) had been created without the posting of the new position in the Medical unit in violation of the collective bargaining agreement. The Union contends that the new position must be posted according to the collective bargaining agreement, as well as past practice and understandings of the parties.

The grievance, dated October 3, 1996, alleging a contract infraction of the September 3, 1996, failure to post, was processed through the parties' collective bargaining agreement grievance

procedure. The parties were unable to resolve the grievance, and the Union petitioned the Wisconsin Employment Relations Commission on February 27, 1997, to appoint an arbitrator from the Commission. An arbitration hearing in this matter was held by the arbitrator on Tuesday, July 1, 1997, in the City of Kenosha. The parties were given the opportunity, but declined to file briefs. The hearing was not recorded, and there is no transcript of the record. The

hearing was closed at approximately 4:50 p.m. on July 1, 1997.

POSITION OF THE PARTIES

The Union:

The Union's position is that when the "*composition*" of a job is changed, in this case from an IST II generic caseload position to a Medical unit specialized position, that by contract and past practice, including agreements reached between the County and the Union, a new position has been created and that by not posting the position in the Medical unit to allow all employees in the bargaining unit to bid, the County violated the collective bargaining agreement. The Union offered extensive testimony through its witnesses and exhibits that for approximately the past 20 years when a position in one of the five units within the Economic Support Division opened, or a vacancy was created, that position was posted and employees bidding for that position had a reasonable expectation that the caseload they were bidding to would be the same caseload as held by the previous incumbent. The Union presented testimony that if the specialized caseload units, Medical and Western County, received any AFDC cases, those cases were, within a short period of time, transferred to the generic caseload units, IST I, II, and III.

It is further the Union position that regardless of the language in the formal job posting, the practice has always been that an employee that bids under a job posting expects to receive, and consistently has received, the type of caseload that was being handled by the employee in the position for which they are bidding. That, the Union argues, is a practice that has consistently interpreted applicable sections of the layoff and job posting provisions of the collective bargaining agreement.

The Union does not dispute management's right to change the composition of the work being done by the positions within the Economic Support Division, but argues that if management does change the composition of the caseload for a single position, then that position should be posted and opened up for bidding by members of the bargaining unit. The Union also stated its position that if management changed the composition of the caseload or changed the job duties for all of the positions within the Economic Support Division, a bid posting procedure would not be applicable because all employees would be treated the same.

The Union presented evidence of a significant difference in duties when an Economic Support Specialist handles AFDC cases. Members of an IST unit can handle Food Stamps and Medical Assistance cases being done by the Medical unit and the Western County unit because that is part of their normal caseload. However, the same is not true for an employee in the Medical unit or the Western County unit; they cannot handle AFDC cases because AFDC is a complex area and it is not possible for someone to take over those cases without training. If AFDC cases arise as circumstances of clients change in the Medical unit or the Western County unit, those AFDC cases are, within a short period of time, transferred to one of employees in one of the IST units who are the only employees that handle AFDC cases on a regular basis.

In summary, it is the Union position that an employee should have a reasonable expectation that when they bid for a job, the duties of that job will not be changed on them once they have bid for and accepted the position. An employee would not bid for a posting if they could not be sure that the job duties would not be changed on them, and that when job duties are shifted and changed, a

new position is created, and as in this case, the job should be posted for bidding by qualified applicants.

The County:

It is the position of the County that a job posting is only required for a specified classification under the collective bargaining agreement. A posting is not required for a change of the job duties of the previous incumbent in the position. Nor is a posting required where caseloads are modified and transferred between units, such as in this case. It is the County's position that the job posting document itself makes clear that someone bidding, for example, to an Economic Support Specialist I position (a classification under the collective bargaining agreement) can be assigned a specialized, generic or combination of those two types of caseloads. The County states that the collective bargaining agreement under the management rights clause makes clear that the County has the right to assign the job duties for the position and to manage those duties as it needs to serve the public that it represents.

The County offered evidence that there have been transfers of bargaining unit employees to different jobs and different job duties without a job posting. It is the County's position that there is not a consistent past practice that where job duties changed or were transferred, that there had to be a job posting allowing bidding by members of the collective bargaining unit. The County summarized those instances in an exhibit developed from business records and, like the Union, introduced examples of settlement agreements between the parties arising from grievances and resolutions of matters wherein the parties had worked out assignment of particular employees to particular jobs and/or allowing posting and bidding to particular positions and their resultant job duties. The County relied on the collective bargaining agreement and the management rights clause which it states is unambiguous and makes clear that the County can determine the duties that an employee within a particular classification will perform, and that past practice should not override specific unambiguous language in the collective bargaining agreement. The County also offered testimony that employees within the Medical unit, who had not previously on a regular basis handled AFDC cases, are now handling a limited number of (5) AFDC cases out of a caseload of approximately 250. The County asks the arbitrator to find that an employee does not bid for a caseload, does not bid for particular job duties, and does not bid for a particular supervisor, but rather bids on a position within the Economic Support Division in a classification covered by the collective bargaining agreement. The County offered evidence that the County has previously taken a position in writing, as part of the resolution of one employee matter, that it retains the right to assign and change the duties within the various job positions in the Economic Support Division, and that it has not waived its contractual right to do so.

DISCUSSION

Both the Union and the County in their statements of the issue and in the Union's opening statement relied on the collective bargaining agreement and past practice to support their respective positions.

Both parties offered little in the way of testimony as to the meaning of the applicable contract language, but offered significant evidence as to the practice of the parties regarding the issue before the arbitrator. This reliance on practice to interpret the contract supports a finding that the parties themselves realize that the contract language is ambiguous to a degree, and the arbitrator so finds.

The contractual management rights clause gives the County the normal retained rights as well as the particular ones outlined therein. The language gives the County the right to establish the duties of the jobs set forth in the collective bargaining agreement and the Union on the record admits this right. But that is not what this grievance is about. It is about what happens when those duties are changed enough to significantly alter a job to which an employee bids.

A provision in the management rights clause gives the Union position some support: ". . . *whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this agreement.*" The County has recognized a duty to treat employees in these situations fairly and equitably; this can reasonably support an argument that the practice alleged by the Union, and acknowledged in some cases by the County, provides for job posting and a bid process when jobs are revised or created.

The job posting language of Section 7.1 is interpreted by the arbitrator to give the County the right to determine when a vacancy is to be filled. Having decided to close down a generic position in IST II and move the duties except for AFDC to the Specialist position in Medical unit, has this created a vacancy ". . . *for whatever reason . . .*" requiring the County to post the transfer of these duties? The County answers that question by stating that the Section 7.1 language just quoted does not apply because it has just shifted duties, and it has not created a job or a vacancy requiring a job posting. The Union answers the question by attempting to prove in its case that by practice and contract, this shifting of duties and change of duties to a new unit creates a new job and, therefore, a vacancy requiring the use of the posting procedure under Sections 7.1 and 7.2 of the collective bargaining agreement.

The County bolsters its argument by showing that there is nothing in the language of 7.2 that requires the County to set forth the job duties in the actual job posting. In fact, copies of job postings introduced by both parties show that the posting language does not cover the specific duties, but rather states that the bidder for an Economic Support Specialist position can be expected to perform work that includes generic and specialized functions. Therefore, does the language of 7.1 and 7.2 plus the language of the job posting, taking into account the language previously cited from the management rights clause, allow the County to move, in this case, the job from IST II to the Medical unit without a posting. Absent clear and unambiguous language of the collective bargaining agreement, and in the face of substantial past practice evidence from the parties, the arbitrator must look to the practice of the parties to determine the intent of the parties. 1/

The Union, through its witnesses, substantially proved that for the past approximate 20 years changes in job duties in fact have been posted and that employees have always had the reasonable expectation that when they bid for a job they would assume the duties of the previous incumbent. The job Lauren Fox bumped into, exercising her seniority, was shifted from IST II to the Medical unit, and the duties changed by eliminating AFDC cases. That is why in this case the Union argues bargaining unit employees should be allowed to bid for this "*new position.*" This expectation was supported by Union adverse witness Fox (now a supervisor), although she did not totally support the proposition that there has been a job posting every time that job duties have been transferred. It is

also clear from the testimony that until recently, the Specialist job duties did not include the handling of AFDC cases.

Again, the heart of the Union case is that historically when an employee bid for a job in the

Economic Support unit, the employee, with rare exception, was assigned the caseload that had previously been assigned to the former incumbent. The County is correct that the job posting itself states that the bidder could be assigned to either a generic or specialized caseload or both, but the weight of the evidence makes clear that the generic/specialized distinction was almost always maintained by the County. This is supported by the memorandum from the County which states: "As we prepare to move into W-2 we need to move away from specialization and ensure all economic support staff are prepared to deal with all aspects of the AFDC replacement program." 2/ It can reasonably be argued that the County has come to the recognition that a practice has developed wherein it has allowed too much specialization to occur within the Economic Support Division. This position is also bolstered by the County's attempt in another recent memorandum to establish that ". . . *employees fill positions not caseloads. Caseloads remain the responsibility of Management.*" 3/ However, even in that case, the County continued the apparent practice of assigning only Medical Assistance and Food Stamps to the Medical unit employees and AFDC to employees with generic caseloads in the IST units. This resolution of an apparent duties alignment problem was in February of 1996, seven months before the instant grievance. The County was perhaps trying to put the Union on notice that a change in procedure was in the works. That "notice" has been further enhanced by the County by the assignment of five AFDC cases each to the specialized positions in the Medical unit out of approximately 240 cases each for those same employees. The County's witness could not remember whether this assignment of AFDC cases was made before or after the grievance was filed. At any rate, the generic positions in the three IST units handle an AFDC caseload of 50 cases each.

The County position is that all these recent moves are its right and that the practice of the parties is not conclusive enough to override the County's inherent right to transfer duties and change the caseload of the positions within the Economic Support Division without having to post the altered caseload. The Union counters this argument by its position that its proffered evidence proves that there has been a binding practice of long standing accepted by the County and the Union to post these job changes and job transfers.

A pattern of practice can be shown by a pattern of conduct which occurs with such frequency that the parties understand that it is the accepted way of doing things. 4/ While an unquestioned pattern may not have been shown by the Union, the pattern is strong enough to call into issue the County's position, particularly in light of recent County moves to change the pattern of essentially allowing employees to bid caseloads. While the County contends it didn't consciously intend a "*bid on caseload*" practice to develop, the practice nonetheless exists and is appropriately considered. It is incumbent on the arbitrator to establish the intent of the parties under the contract and the parties' practice, particularly where the labor agreement is in certain respects ambiguous, is a commonly accepted means of determining the intent.

It is this arbitrator's finding that the employees have, based on the history of the parties, a reasonable expectation to assume that when they bid for a position within the Economic Support Division that they will receive the caseload of the previous incumbent. It follows, therefore, that when the County changed and transferred the caseload, subject of the grievance, the County was creating a new caseload or "vacancy" for which the employees in the bargaining unit should be allowed to bid

rather than just assign the revised caseload to an existing employee without a posting and opportunity to bid.

The County has, as stated earlier, put the Union on notice that it will begin to assign AFDC cases to all employees within the Division as well as offering training in this area to employees who

heretofore did not handle these cases. This is the County's right, but until the parties agree or negotiate otherwise, when the County creates a new position, as in this case before the arbitrator, by significantly changing the caseload to which the employee bid, the County must post the job and allow qualified bargaining unit employees an opportunity to bid. 5/

It is the decision of the arbitrator that the County in this case did violate the collective bargaining agreement by failing to post the specialized caseload position in the Medical unit of the Economic Support Division in the Department of Human Services.

AWARD

The grievance is sustained.

REMEDY

The County shall post the specialized caseload position in the Medical unit of the Economic Support Division within ten (10) working days of the date of this decision pursuant to the procedures of Article VII -- Job Posting of the Collective Bargaining Agreement.

Dated at Madison, Wisconsin, this 8th day of August 1997.

Paul A. Hahn /s/

Paul A. Hahn

Arbitrator

ENDNOTES

1/ Initially, the arbitrator is troubled by the use of grievance settlements by both parties to prove their cases. Such use runs the risk that in the future the parties will be less willing to enter into such settlements if they are to be used against them in other proceedings; to some extent, the same can be said for other agreements that were resolved prior to the issue becoming a grievance. The arbitrator has given little weight to those exhibits.

2/ Union Exhibit five (5), memorandum dated August 27, 1996, re: HMO Enrollment Position.

3/ County Exhibit twenty-seven (27), memorandum dated February 2, 1996, re: Staff Realignment - DES.

4/ **Weyerhaeuser Company and IAM and Aerospace Workers Harmony Lodge 831**, 105 LA 273, 276 (Nathan, 1995)

5/ The arbitrator does not believe that the current assignment of five AFDC cases to the specialized position renders the position significantly different and thus, no posting is required. What might be the appropriate number to trigger posting is best left to the parties to decide.