

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

MONROE COUNTY ROLLING HILLS  
EMPLOYEES, LOCAL 1947, AFSCME, AFL-CIO

and

MONROE COUNTY

Case 131  
No. 54061  
MA-9536

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,  
appearing on behalf of the Union.

Mr. Ken Kittleson, Personnel Director, Monroe County, appearing on behalf of the  
County.

ARBITRATION AWARD

Monroe County Rolling Hills Employees, Local 1947, AFSCME, AFL-CIO and Monroe County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an arbitrator from its staff to resolve the Tom Fuenger grievance. The Commission appointed Thomas L. Yaeger, a member of its staff, pursuant to that request. Hearing in the matter was held on August 8, 1996, in Sparta, Wisconsin. The parties filed post-hearing briefs by March 3, 1997.

ISSUE:

The County phrases the issues as:

1. Did the Union violate the collective bargaining agreement when it filed a grievance seven months after the aggrieved incident?
2. Is the grievance arbitrable?
3. If the answer to the arbitrability question is affirmative, did the Employer violate the collective bargaining agreement when it adjusted the grievant's pay classification from

Grade 6, Step 3 (\$8.26 per hour) to Grade 7, Step 1 (\$8.44 per hour) when the grievant was promoted from Maintenance I to Maintenance II on April 1, 1995?

4. If so, what is the appropriate remedy?

The Union phrases the issues as:

Did the County violate the collective bargaining agreement by the County's placement of the grievant in the wage schedule when he moved from the Maintenance I position (Grade 6, Step 3) to the Maintenance II position (Grade 7, Step 1)?

If so, what is the appropriate remedy?

The Arbitrator phrases the issues as:

1. Was Fuenger's October 30, 1995 grievance timely filed in accordance with the provisions of Article 4, Section 5 of the parties' collective bargaining agreement?
2. If so, did the County violate the collective bargaining agreement when it adjusted the grievant's pay classification from Grade 6, Step 3 (\$8.26 per hour) to Grade 7, Step 1 (\$8.44 per hour) when the grievant was promoted from Maintenance I to Maintenance II on April 1, 1995?
3. If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE 4 - GRIEVANCE PROCEDURE

. . .

Section 3. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, or other acceptable reasons, these limits may be extended by mutual consent in writing.

. . .

Section 5. All employee grievances must be filed by the aggrieved employee of the president of the Union, in writing, to the Union Grievance Committee, and a copy must be filed with the Administrator by the employee or Union representative no later than thirty (30) calendar days after the employee knew or should have known of the cause of such grievance. The Union Grievance Committee shall try to settle the grievance with the Administrator. The Administrator shall have five (5) work days to settle the grievance, in writing. If the grievance is not settled at this level, the Grievance Committee shall have fifteen (15) calendar days from the receipt of the Administrator's answer to submit the grievance to the Rolling Hills Committee in writing. The Grievance Committee shall present the grievance to the Rolling Hills Committee at its next regular meeting and the Rolling Hills Committee shall answer within five (5) days in writing. If the grievance remains unresolved, the Union shall have fifteen (15) calendar days from the receipt of the Rolling Hills Committee's answer to submit the grievance to the Personnel Committee in writing. The Grievance Committee shall present the grievance to the Personnel Committee at its (sic) next regular meeting and the Personnel Committee shall answer within five (5) days in writing. If the grievance is not settled at this step, the Union shall have fifteen (15) calendar days from the receipt of the Personnel Committee's decision to present the grievance for arbitration.

Section 6. The County and Union representatives shall attempt to select a mutually agreeable arbitrator from the Wisconsin Employment Relations Commission (WERC). If a mutually agreed selection cannot be achieved, the WERC shall appoint an arbitrator. The arbitrator shall make his/her findings known in writing simultaneously to the County Personnel Director and the Union, within ten (10) days after his/her final decision, and this decision shall be final and binding on both parties. Disputes or differences regarding bargainable issues are expressly not subject to arbitration of any kind, notwithstanding any other provisions herein contained. The arbitrator shall have no right to amend, nullify, modify, ignore, or add to the provisions of the Agreement. His/her authority shall be limited to the extent that he/she should only consider and decide the particular issue or issues presented to him/her in writing by the Employer or the Union, and his/her interpretation of the meaning or application of the language of the

Agreement. The party filing the grievance with the Wisconsin Employment Relations Commission shall be responsible for initial payment of the filing fee. The losing party shall assume the cost of the filing fee and reimburse the filing party, if appropriate, within thirty (30) days of receipt of the arbitrator's decision.

. . .

#### ARTICLE 12 - JOB POSTING

Section 1. All new or vacated positions shall be posted at each bulletin board for seven (7) days on a sheet of paper stating the job title, the job qualifications, job duties (consistent with actual duties performed), shift, rate of pay, and the date the job is to be filled. Interested employees shall sign their names to this notice. Seniority and qualifications shall be considered in the selection of the applicant for the new or vacated position; however, if qualifications are equal, seniority shall prevail. The Administrator and the Union representatives shall attempt to mutually agree on the nominee for the position. In the event of an arbitration hearing, the arbitrator shall consider seniority and qualifications and shall not limit consideration to whether the County acted in an arbitrary, capricious, and unreasonable manner.

Section 2. Any employee failing for any reason to qualify for any job or new position through the Job Posting procedure may return to his/her former job.

Section 3. The successful applicant shall be allowed sixty (60) calendar days to qualify for the position. Interim appointments may be made by the Administrator until such time as a regular appointment is made. The successful applicant, if moving into a higher pay rate, shall be paid the higher rate retroactive to his/her first day in said position after the sixty (60) days qualification time.

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#### BACKGROUND:

The basic facts of this case are not in dispute. On March 31, 1995, the Maintenance Supervisor at Rolling Hills Rehabilitation Center and Special Care Home retired and was replaced

by the Maintenance II employe, who had been with Rolling Hills for 20 years. The Maintenance II position was then filled by Tom Fuenger.

Fuenger was promoted from Maintenance I to Maintenance II effective April 1, 1995, in accordance with the contractual posting procedure. Upon his promotion, the grievant's salary was adjusted from Grade 6, Step 3 (\$8.26 per hour) to Grade 7, Step 1 (\$8.44 per hour). If the grievant had not been promoted to Maintenance II, he would have progressed to Grade 6, Step 4 (\$8.42 per hour) of the Maintenance I classification on or about July 1, 1995. The rate of pay for a Grade 7, Maintenance II employe at Step 3 on April 1, 1995, was \$8.81. These rates were those specified for calendar year 1994, because the parties' 1995-96 collective bargaining agreement was in interest arbitration at that time.

In determining Fuenger's rate of pay upon promotion to Maintenance II, the County followed Section 4.23 of its Personnel Policy.

4.23 CHANGES IN CLASSIFICATION. (1)

PROMOTION. Promotion is the movement of an employee from one position to another having a higher salary grade in the same department. When an employee is promoted to a position in a higher salary grade, the employee shall serve a three month trial period. If, during this period, the employee demonstrates ability to carry out the newly assigned duties and responsibilities, upon completion of the trial period, salary shall be retroactively adjusted from the first date of promotion to that step in the higher salary grade that grants the employee an increase in salary above what the employee would have been scheduled to receive at the next step within the grade prior to the promotion. Due to varying circumstances involved with promotions, the department head shall meet with the Personnel Director prior to the initiation of any personnel action involving a promotion. This effort should help avoid any misunderstanding which may occur when promotions are under consideration. All promotions shall be approved by the appropriate County Board committee and the Personnel and Bargaining Committee.

That Policy provided that because Fuenger was at Step 3 of his salary grade on April 1, 1995, he would be placed at Step 1 of his new salary grade inasmuch as that step gave him an increase over Step 4 of his prior salary grade, albeit a \$.02 an hour increase.

The issue of Fuenger's pay upon promotion was discussed with the Rolling Hills Nursing

Home Administrator, Schwarze, and he took the matter before the County Personnel Committee on June 8, 1995. The Personnel Committee voted to uphold management's decision on Fuenger's pay upon promotion. On June 13, 1995, Schwarze wrote to Union President Slawson, Union Officer Baumgarten, and Fuenger advising them of the Personnel Committee's decision.

DATE: June 13, 1995

TO: Carol Slawson, Union President  
Carol Baumgarten, Union

FROM: Gene Schwarze, Administrator

REGARDING: Maintenance Promotion Pay  
Casual Call Pay

The Monroe County Personnel and Bargaining Committee met on June 8, 1995 and was asked to define their policy on promotions and ensuing pay for situations such as Tom Fuenger. The Committee voted 3-0 not to change the pay decision made on Tom, or the step assigned to him.

An employee who signs into a higher pay grade will be placed on the step of the higher grade that provides an increase over what the employee would have made upon advancement to the next step in his old pay grade.

. . .

cc: Ken Kittleson, Personnel  
Ray Sunday, Housekeeping Supervisor  
Mal Raiten, Maintenance Supervisor  
Tom Fuenger, Maintenance II  
Violet Sletten, Laundry

On October 30, 1995, the subject grievance was filed, requesting that Fuenger be placed on the Maintenance II pay grade at the experience step consistent with his date of hire by the County, and be made whole from the date of the grievance. Schwarze responded to the grievance on November 6, 1995, as follows:

MEMORANDUM

DATE: November 6, 1995

TO: Carol Slawson, President  
Dan Pfeifer, Staff Representative  
AFSCME District Council 40

FROM: Gene Schwarze, Administrator

REGARDING: Grievance 95-9

Article 4, Sections 3 and 5, specify time limits during which a grievance shall qualify for processing.

Since a substantial amount of time has gone by since Mr. Fuenger was promoted, and since the union verified its awareness by previous discussions of the issue; and since Mr. Fuenger signified his awareness by telling the Administrator he was satisfied with his wage, all factors point to the grievance as being "dead on arrival;" management, therefore, cannot take action on your document.

cc: Ken Kittleson, Personnel Director  
grievance file

The grievance was heard and denied by the Personnel Committee and the Union appealed the denial to arbitration.

POSITION OF THE COUNTY:

The County argues that the subject grievance is not arbitrable because of the elapsed time between the incident and the grievance filing. The time period from June 13 to October 30 is more than the 30 days allowed in Article 4, Section 5 of the collective bargaining agreement. According to the collective bargaining agreement, the grievant had 30 days after the Administrator's letter denying the grievant's request, which would have been on or about July 13, 1995. However, since Fuenger did not file his grievance until October 30, 1995, a time limit violation has occurred and the grievance is not arbitrable.

Regarding the merits of the grievance, the County argues even though Fuenger's initial increase is small, because he is placed in a higher grade, he will enjoy four additional step

increases as opposed to the two he would have been entitled to in his old position. Additionally, the County asserts that it was just bad timing that the grievant did not receive his increase based on his anniversary before he got his promotion. Promotional salary assignments are dependent upon the date of the promotions compared to the employe's anniversary date, and the proximity of the step rate involved. Even though the result may be unfair to the grievant, it insures consistency in employe relations.



## POSITION OF THE UNION:

The Union asserts that the grievance is not untimely as the County argues, and, therefore, it is procedurally arbitrable. It reasons that if the grievant is being paid the wrong rate of pay, each new day of being paid the wrong rate constitutes a new violation of the collective bargaining agreement. Therefore, it concludes that the timing of the filing of the grievance only goes to the question of remedy.

On the merits, the Union argues that the County's "past practice" argument fails because two instances do not create a past practice. Also, the Union states that this grievance is different from the other instances because the grievant is staying in a Maintenance position; he is not changing to a different department, as the people in the cited examples.

Finally, the Union argues that the collective bargaining agreement supersedes the County Personnel Policy. Even though the collective bargaining agreement may be silent on how to handle inter-departmental promotions in light of the various grades and steps, the Union argues that the procedure followed from the Personnel Policy is not applicable. Therefore, Fuenger should be given an increase of 55 cents per hour and not 2 cents per hour, as he received, because he should be able to continue in the same experience step as he was in as that relates to the amount of time he worked for the County. That is what the contract pay grade experience steps require.

## DISCUSSION:

The threshold issue is whether the grievance was timely filed. If it was not, it is procedurally barred from consideration by the undersigned. Historically, contract grievance procedures have established a time frame reflecting the parties' preferences for the timely resolution of their differences. Those procedures often, as in this case, provide for the extension of those time limits by mutual agreement of the parties. Here, there was no request by the grievant or the Union for extension of time within which to grieve the County Personnel Committee's decision not to modify Fuenger's salary schedule placement after Schwarze had presented them with the concerns that had been raised by Fuenger. Consequently, more than 130 days passed after Schwarze advised Fuenger and the Union on June 13, 1995, of the Committee's decision, and before Fuenger filed his grievance. That amounted to more than 100 days beyond the contractually specified 30 days from June 13.

The Union has urged the undersigned to find that Fuenger's grievance related to a continuing violation of the contract because every day he worked he was being paid at an incorrect rate. If that were the finding, then the grievance could be timely filed at any time subsequent to his promotion. The Union cited the undersigned to an arbitration award wherein Arbitrator Greco found incorrect placement on the salary schedule to be a "continuing grievance" and as such "was not time-barred by contractual deadlines." The undersigned has reviewed that decision and has

concluded this case is distinguishable in one very significant way. In that case, management did not know there was an issue about placement on the salary schedule until the grievance was filed. In this case, Schwarze, the County Rolling Hills Nursing Home Administrator, was made aware of the grievant's belief he had been misplaced on the wage grid, and Schwarze presented the issue to the County Personnel Committee. Thereafter, Fuenger and the Union were advised by Schwarze that no change in his placement was going to be made.

In accordance with Article 4 - Grievance Procedure the grievant and Union knew on, or shortly after, June 13, 1995, that the Personnel Committee was not going to change his wage schedule step placement at the time of his promotion. He/they had 30 calendar days from then to file a grievance or ask for an extension. Neither occurred within that period, and it wasn't until more than 130 calendar days had passed after their notice that the grievance was filed.

In the undersigned's opinion, these facts distinguish this case from those factual situations where arbitrators have not found grievances to be time barred on the theory of a continuing violation. To find in this case that Fuenger's placement was a continuing contract violation would permit him or the Union to grieve the issue at any time they deemed appropriate, regardless how much time elapsed after they knew there was a dispute. That, in the undersigned's opinion, would not be a reasonable construction of the language of Article 4 - Grievance Procedure wherein it provides ". . . grievances must be filed . . . no later than thirty (30) calendar days after the employee knew or should have known of the cause of such grievance. . . ." That language indicates the parties' preference for giving prompt attention to disagreements that are grievable. In this instance, Fuenger and the Union knew at least one hundred thirty (130) days prior to filing his grievance "of the cause of such grievance." That delay was unreasonable and unexcused. Consequently, Fuenger's October 30, 1995 grievance was not timely filed, and the undersigned is therefore contractually barred from deciding the grievance on its merits.

Based upon the foregoing and the record as a whole, the undersigned issues the following

#### AWARD

Fuenger's October 30, 1995 grievance was not timely filed in accordance with the provisions of Article 4, Section 5 of the parties' collective bargaining agreement. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 12th day of August, 1997.

By Thomas L. Yaeger /s/  
Thomas L. Yaeger, Arbitrator