

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 2717-C, AFSCME, AFL-CIO

and

JACKSON COUNTY (HIGHWAY DEPARTMENT)

Case 104
No. 52058
MA-8827

Appearances:

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

Mr. James Michael DeGracie, Corporation Counsel, Jackson County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear a grievance regarding auxiliary positions not being posted. A hearing was held in Black River Falls, Wisconsin, on April 4 and 5, 1995, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by November 13, 1997.

ISSUE

The issue is:

Did the County violate the collective bargaining agreement by failing to post a state auxiliary position in the Highway Department? If so, what is the appropriate remedy?

BACKGROUND

A position called "State Auxiliary" is listed in the labor contract under Range 2 of the wage schedule. The parties stipulated that there were a total of three State Auxiliary positions.

Richard Gilbertson has worked for the County for 16 years. He started as a laborer, which

was called then "state stand-by," and in the late 1980's, he took a State Auxiliary position. He does not remember if he was asked or assigned or if the position was posted when he received it.

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State Auxiliary workers' duties include running a bull dozer, filling in or floating where ever needed, but mostly on state roads. The State Auxiliary person could work on County roads, but probably would not, except in emergencies. In the winter, they plow snow on the interstate road.

The Patrol Superintendent, Robert Gabriel, primarily works with the State trunk system and makes assignments on those roads, depending on the weather, the project, how many men are off, who's available and who has experience with machinery. Most men working on the State roads are assigned a truck. Patrolmen are employees who patrol the nine sections of the County each day, and then go to a project with other state personnel.

Highway Commissioner Michael Hemp noted that the terms "patrolman" and "state auxiliary" are terms used by the Highway Department to define work done on the State system, which gets a higher rate of pay. The labor contract calls for higher rates of pay in higher class jobs under Article 21, Section 3.

The State budget pays for work on State roads. The area maintenance supervisor for the Wisconsin Department of Transportation is William Leisso. He said that every year, the State enters into contracts with the counties to perform routine maintenance for the State trunk highway system including the interstate roads. The State reimburses the counties for wages, materials and machinery. If a county man works on State roads, the State picks up the actual hours that he worked for the State. There used to be more structure in positions regarding auxiliary positions, which were full-time in addition to patrolman. But a few years ago, there was a change whereby people were no longer classified as auxiliary per se or stand-by labor, and anyone beyond patrolman is called "extra help," at least by the State. The State gives general directions for what it wants done, and the counties give the actual assignments to specific employees at their discretion.

When the County was getting its first new tri-axle truck, Gabriel spoke with Gilbertson about using it. Gabriel was trying to place the truck with the right person who was flexible enough to go on State roads in the winter months, because the truck had a left-hand wing. If Gilbertson were to take that job with the tri-axle, he would also have to take a lower base rate of pay, because he would go to the Range 1 pay for laborers. However, with the pay differential for driving the truck, he would be at the same rate as he made as State Auxiliary.

Gabriel considered putting Gilbertson in the tri-axle to be a temporary move, and that he could not assure permanent placement without Hemp's permission. Gabriel posted notices of interest for those interested in a temporary State Auxiliary job for the summer to sign up. Kirk Goetzka signed up, then changed his mind, and Gabriel asked Goetzka to reconsider. Gabriel told him that he could not make any promises, but the job could be a full-time position.

Goetzka had been State stand-by. He decided that he did not want the temporary State Auxiliary posting because it was not full-time. Goetzka was filling in for another Patrolman, George Lewis, before signing for the Auxiliary position.

When Gilbertson took the tri-axle truck, he was told by Gabriel that his duties would be mainly driving truck, hauling gravel, black top, and working for the County. The tri-axle truck went into service in 1994, and Gilbertson plowed snow with it during the winter of 1993-94. He drove it all summer during 1994. He assumed that someone else would be doing the duties that he performed as State Auxiliary, as he was no longer doing those same duties that he performed when he was State Auxiliary. Gabriel asked him to take the State Auxiliary position back, and on June 29, 1994, Gilbertson wrote a note agreeing to do so as long as it did not change his job status.

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Before Gabriel asked Gilbertson to take back the State Auxiliary position, the Union filed a grievance on April 5, 1994, stating that management did not post the State Auxiliary (Range 2) position correctly, as a full-time position. After the Highway Committee heard the grievance, Hemp replied that the State Auxiliary position was never vacant, and that Goetzka was acting as a fill-in for other Patrolmen when they were issued other assignments.

THE PARTIES' POSITIONS

The Union

The Union argues that the notices for State Auxiliary positions were not appropriate where they indicated that the positions were temporary and the selections would be made by Gabriel and Orsen. Joint Exhibit 10 states that Goetzka "has been assigned" the State Auxiliary position. The positions were not posted pursuant to the contract. The County only posted a notice of interest for a temporary position and made the assignment on the preferences of the supervisors, not on the provisions of the contract. More senior employees may not have signed the notice of interest because of its temporary nature and the fact that seniority meant nothing.

The Union also asserts that the County was simply attempting to have Gilbertson drive a tri-axle and place Goetzka in a full-time auxiliary position. The Union contends that in order to do this, the County had to devise a scheme to bypass the labor contract.

The Union notes that the County contends that Gilbertson retained his auxiliary position and was simply assigned to drive the tri-axle, and that Goetzka retained his laborer position and was simply temporarily assigned auxiliary duties. Hemp testified that Gilbertson's and Goetzka's base rates of pay did not change during this whole procedure. The Union calls the County's arguments "hogwash."

Looking at the 1993 wage rates, prior to April of 1994, Gilbertson would have been an

auxiliary worker with a base wage of \$10.54 per hour, and Goetzka would have been a laborer with a base wage of \$10.44 per hour. Union Exhibit #14 shows that in the pay period ending on April 22, 1994, Goetzka's regular hourly rate was increased from \$10.44 per hour (laborer rate) to \$10.54 per hour (auxiliary rate). This procedure simply exchanged Gilbertson's position and Goetzka's position, completely bypassing the terms of the contract.

Once the Union filed the grievance, the County tried to fix its mistake. Gilbertson was to take his old auxiliary position back, and the payroll ending July 1, 1994 shows that Goetzka's rate of pay was reduced to the laborer's rate and Gilbertson's rate of pay increased to the auxiliary rate.

The Union believes that what happened was that Goetzka moved into a full-time auxiliary position without a posting. If there were a vacant auxiliary position, it should have been posted under the terms of the collective bargaining agreement. If there was no vacant auxiliary position, the County violated the bargaining agreement by unilaterally switching the positions of Gilbertson and Goetzka. The Union asks that the County be ordered to post the vacant auxiliary position with a make whole remedy or rule that the County violated the collective bargaining agreement by unilaterally switching employee positions.

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The County

The County asserts that there was no permanent State Auxiliary position vacancy, and therefore posting requirements were not applicable. The County states that the essential question is whether a person who temporarily agrees to perform other duties vacates his position, although it was not the intent that this move be anything but temporary. Article 7, Section 1 makes it clear that when a vacancy or new position is created, the posting requirements must be followed.

Gabriel posted the temporary auxiliary position and the time limits for the posting complied with the labor contract. Goetzka indicated that he did not want to sign the posting because it was not full time, and Gilbertson did not file anything to indicate that he was vacating the State Auxiliary position. Hemp stated that a person stepping down from a position normally gives him a notice to create a paper trail and avoid these kind of problems. Between January 1, 1993 and March 10, 1995, Gilbertson worked 4,640 hours as State Auxiliary and had 361 hours in overtime. During that same time, Goetzka worked 1,200 hours as State Auxiliary, which was only 38 percent of the time he worked.

The exhibits including the payroll records show that the County made a proper accounting with the State and made the employees whole. The State paid for the services of an auxiliary person, and during April and June, it was Goetzka. Gilbertson was paid by the County during that time. The accounting of the two employees reflect the dual system by which the County has to keep records. The accounting system does not indicate that the position of State Auxiliary was vacated. When Gilbertson assumed duties on County roads, another person had to perform duties on State roads. Management could have just assigned someone to perform those duties, but it gave

employees an opportunity to express their interest. Goetzka and Young expressed their interest, and the senior man was given the assignment.

The County asserts that it has the right to direct the operations and assign employees. Management and Gilbertson agreed that he would operate the tri-axle truck on County roads for a period of time. The State system was temporarily covered by Goetzka. The County did not treat this as a permanent move. The Union's position that the County must make permanent replacements as a result of temporary assignments will significantly jeopardize the efficiency of the Highway Department. Questions of when a temporary placement becomes a permanent vacancy will cause grievances. Anyone asked to perform duties outside of their job classification would trigger a job posting, under the Union's position. Jobs that need to be done quickly could not be started until a posting period is finished.

DISCUSSION

The collective bargaining agreement states in Article 7, Section 1, that:

When it becomes necessary to fill vacancies or new positions within the Bargaining unit, the Employer will post such vacancies or new positions for five (5) working days, during which time interested employees may apply by signing the posting. Job postings shall state the job to be filled, qualifications for the job and the rate of pay. Posted positions shall be awarded as promptly as possible following the posting period to a qualified applicant. The qualified applicant with the most seniority shall be selected to fill the vacancy or new position. This Section does not prohibit the Employer from advertising vacancies during the job posting period.

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Gilbertson's move to a tri-axle truck created a temporary vacancy in the State Auxiliary position, which the County posted. The Union objects because the posting indicated that it was a temporary job for the summer season, and that the decision would be made by Gabriel and Olsen.

The fact that the posting was for a temporary position rather than a full-time or permanent position does not violate the labor contract. The Union believes that employees who had more seniority than Goetzka would have signed the posting if the position had been a permanent position. Those employees had the same opportunity as Goetzka to sign the temporary posting. Whether the position would have become permanent was speculative at the time, and the County did the correct thing by posting the job as a temporary position.

The posting notice itself has odd language where it states that the decision would be made by Gabriel and Olsen. Both Gabriel and Olsen would still have to follow the seniority provisions of Article 7, Section 1 in awarding the temporary position. However, there is no evidence that they did not, and there is no violation of the contract by the fact that the posting states that they would make the decision. If they did not follow the contract in awarding a position, it would have created

another grievance.

While the Union believes that all the County did is to have people trade jobs without following the posting requirements of the contract, the record does not support that conclusion. The record shows that there was a temporary opening by Gilbertson's move to a tri-axle truck on County roads, that the temporary State Auxiliary position was posted, that the State Auxiliary position never became permanent, and that Gilbertson went back to his State Auxiliary position.

The Union has a legitimate interest in seeing that positions are posted correctly. I find no contract violation with the temporary posting of this position. It is not necessary to reach the issue of when a temporary position becomes a permanent position, because the position was only filled during April, May and June of 1994.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 11th day of December, 1997.

Karen J. Mawhinney /s/

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