

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**KEWAUNEE COUNTY COURTHOUSE EMPLOYEES,
LOCAL 2959, AFSCME, AFL-CIO**

and

KEWAUNEE COUNTY

Case 46
No. 55313
MA-9979

Appearances:

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

Ms. Elma E. Anderson, Corporation Counsel, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County", are parties to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Kewaunee, Wisconsin, on October 10, 1997. The hearing was not transcribed and the parties thereafter filed briefs that were received by December 26, 1997.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Did the County violate Article 14, Section D, of the contract when it failed to post the vacant Deputy County Clerk II and Deputy County Clerk III positions and, if so, what is the appropriate remedy?

BACKGROUND

The Union and the County have been parties to a series of collective bargaining agreements since 1975, all of which have contained the language now found in Article 14, Section D, of the contract. It states:

D. POSTING

1. The Board shall not post any new or vacant position within the scope of the bargaining unit for a period of eight (8) calendar days. Any interested employee may apply for the position in writing to the Chairman and members of the Personnel Committee.

2. At the end of the eight (8) day posting period the applicants shall be interviewed and their qualifications reviewed by the Personnel Committee and then the position will be filled by the Personnel Committee with the most senior qualified employee. Any transfers to a vacancy in the Department of Social Services must comply with the State Social Service Merit System rules for hiring.

3. The provisions of posting of vacancy in a position and transfer to that position by seniority shall not apply to the following: Deputy County Clerk, Deputy County Treasurer, Deputy Clerk of Court, Deputy Register of Deeds and Register in Probate. If, however, the Supreme Court of the State of Wisconsin determines that the contract provisions relating to appointed County Deputy Officers and the Register in Probate supersedes statutory provisions relating to their appointment, then this paragraph shall be removed from this contract from the time of said Supreme Court decision.

At present, there are four full-time staff positions in the Clerk of Courts' office, including the Clerk of Courts. All positions in the Clerk of Courts' office, except the elected Clerk of Court, have been in the bargaining unit at all relevant times.

On April 11, 1997, 1/ Mary Rose Verdigan retired as Deputy Clerk of Courts III, a class grade 5 position. After he was informed of Verdigan's pending retirement, the Clerk of Court posted a notice of vacant position for her job pursuant to Article 14, paragraph D, of the contract. Marliea Daul applied for and received said position and she thereafter was transferred into the Clerk of Courts' office on or about April 1 so she could be trained before Verdigan left.

At that time, the other personnel in the Clerk of Courts office were Becky Deterville and Karen Theys. Deterville, a Deputy Clerk of Court II, was in a class grade 4 position. She entered the Clerk of Courts' office as a clerk-typist in April 1991 and she was made a Deputy Clerk of Courts I on January 4, 1993. Theys, a Deputy Clerk of Court I, was in a class grade 3 position. She entered the Clerk of Courts' office on December 9, 1994, as a clerk-typist and was promoted to Deputy Clerk of Court 1 on April 15.

On or about April 14, the Clerk of Court promoted Deterville to a Deputy III position and Theys to a Deputy II position. He did not post either position. The Union on May 14 filed a grievance, hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union argues that the County violated Article 14, Section D, of the contract by not posting for the two Deputy Clerks of Court positions. It maintains that the Wisconsin Supreme Court's refusal to hear the case left standing COUNTY OF EAU CLAIRE V. AFSCME LOCAL 2223, 190 Wis. 2d. 298, 526 N.W. 2d 802 (Ct.App. 1994), which found that the provisions of a collective bargaining agreement covered employees in the Register of Probate and the Clerk of Courts' offices. The Union asserts the Wisconsin Supreme Court's affirmance in such a published decision triggers that part of Article 14, Section D, which states that said positions need not be posted until such time as the Wisconsin Supreme Court rules that they are in the bargaining unit. The Union also claims that the County has improperly expanded the "titles to include two positions in the office as deputies. . ." when the parties themselves initially agreed to only exclude one of these positions. As a remedy, the Union requests that the jobs be posted and that affected employees be made whole.

The County, in turn, maintains that Article 14, Section D, expressly "excludes Deputy Clerks of Court from the provisions of posting of vacancy in a position and transfer"; that said provision has been in effect in prior contracts since about 1975; that the Wisconsin Supreme Court's denial of a petition of review in EAU CLAIRE, supra, "is not a decision of the Supreme Court of the State of Wisconsin"; and that, as a result, the contractual language excluding Deputy Clerks of Court from the contractual posting provisions remain in effect.

DISCUSSION

The resolution of this case turns on Article 14, Section D, which states in pertinent part:

...

3. The provisions of posting of vacancy in a position and transfer to that position by seniority shall not apply to the following: Deputy County Clerk, Deputy County Treasurer, Deputy Clerk of Court, Deputy Register of Deeds and Register in Probate. If, however, the Supreme Court of the State of Wisconsin determines that the contract provisions relating to appointed County Deputy Officers and the Register in Probate supersedes statutory provisions relating to their appointment, then this paragraph shall be removed from this contract from the time of said Supreme Court decision.

If one assumes that the Wisconsin Supreme Court has already ruled on this matter when it refused to grant review and thus affirmed the Court of Appeals' decision in COUNTY OF EAU CLAIRE, supra, it then follows that the County was, indeed, required to post the two Deputy Clerk positions as the Union contends. However, the Union does not cite any legal authority in support of its claim that the denial of said review in a published decision represents an

authoritative ruling by the Wisconsin Supreme Court that the County under this contract must post the positions in issue.

The County, by contrast, cites STATE V. SHILLCUTT, 119 Wis. 2d. 788, 806, 350 N.W. 2d. 686 (1984), wherein the Wisconsin Supreme Court ruled:

The final question is what if any conclusion is to be drawn concerning the merits of a case from this court's denial of a request for certification. The court of appeals appears to have based its decision in this case partly on the fact that this court had earlier denied a request to hear the case on certification. [citation omitted] This is improper. A denial by this court of a request for certification carries no implication of approval or agreement. STATE V. NYE, 105 Wis. 2d 63, 65, 312 N.W. 2d 826 (1981). . . .A denial of a request for certification means nothing more than 'unusual circumstances' are not present to require this court to review the case. . ." Therefore, it is improper to infer from a denial of a request for certification anything insofar as the merits of a particular case are concerned. (Emphasis added).

...

Applying this rule here, it must be concluded that the Wisconsin Supreme Court, in fact, did not affirm or in any other way rule on the merits of the dispute in COUNTY OF EAU CLAIRE, supra.

As a result, EAU CLAIRE only stands for the very narrow legal proposition that the disputed positions therein (subject to a remand) can be placed in the bargaining unit for all matters except those relating to hiring and firing. Here, by contrast, the posted positions already are in the bargaining unit. Moreover, the Wisconsin Supreme Court has never ruled on whether the County here is required to post the positions set forth in Article 14, Section D, #3. As a result, the County was not required to do so.

This result, of course, is disappointing to the Union because it is not at all clear that the Wisconsin Supreme Court will ever squarely rule on this issue. Indeed, the odds of it ever doing so are extremely remote. The Union's only effective recourse therefore may be at the bargaining table where the parties are free to bargain over this issue.

The Union also argues that the County has violated Article 14, D, through its "unilateral expansion of titles to include two positions in the office as deputies. . ." While the record shows that an additional deputy position was recently created, Article 14 on its face does not limit how many such positions can be created. Moreover, there is no bargaining history showing that the parties originally agreed that only one such position was covered by Article 14, Section D. Absent any such clear contractual prohibition or bargaining history, I therefore conclude that the County did not violate this part of the contract when it created a second deputy position.

In light of the above, it is my

AWARD

That the County did not violate Article 14, Section D, of the contract when it failed to post the vacant Deputy County Clerk II and Deputy County Clerk III positions; the grievance is therefore denied.

Dated at Madison, Wisconsin, this 20th day of February, 1997.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

FOOTNOTES

1/ Unless otherwise stated, all dates hereinafter refer to 1997.

