BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARINETTE COUNTY (COURTHOUSE) EMPLOYEES, LOCAL 1752, AFSCME

and

MARINETTE COUNTY

Case 163
No. 54882
MA-9819

Appearances:

Mr. David A. Campshure, Staff Representative, AFSCME, Council 40, 1566 Lynwood Lane, Green Bay, WI 54311, for the Union.

Mr. Frank M. Ganzlmar, Human Resource Director, Marinette County, 1926 Hall Avenue, Marinette, WI 54143-1728, for the Employer.

ARBITRATION AWARD

The Marinette County Courthouse Employees Union, Local 1752, AFSCME, hereinafter referred to as the Union, and Marinette County, hereinafter referred to as the Employer or the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a commissioner or a member of its staff to hear and decide a grievance filed by the Union. The undersigned was so designated. A hearing was held in Marinette on August 12, 1998, and was transcribed. The parties filed post-hearing briefs and reply briefs. The record was closed on December 2, 1997.

ISSUE:

The Union frames the issue as follows:

Did the County violate the parties' collective bargaining agreement, when it paid Jeanne Lantagne at the Range D rate of pay because it failed to submit the Niagara Secretary/Receptionist

position to the Reclassification Committee for re-evaluation after the experience requirements for the position were increased? If so, what is the appropriate remedy?

The County states the issue as follows:

Did the County violate the parties' collective bargaining agreement, when it paid Jeanne Lantagne at the Range D rate of pay? If so, what is the appropriate remedy?

I adopt the County's statement of the issue.

PERTINENT CONTRACTUAL PROVISIONS

5.02. **Filling a New Job or Vacancy.** A new job or vacancy within the County shall be filled as follows:

Posted on the County bulletin board five (5) working days before the job operation begins. Said posting shall contain the job requirements, qualifications and starting rate of pay;

Copy furnished to the Union secretary;

Employee desiring posted jobs will sign the posted notice or make a written application to the department head concerned.

5.03 **Awarding Bid on New Job or Vacancy.** At the end of the bidding period, the vacancy or new job will be awarded on the basis of the following provisions:

The department head shall confirm with the Union secretary the posted names.

Bargaining unit employees from the department in which the vacancy exists shall have the first opportunity to fill the position if qualified.

If no bargaining unit Employee from the department applies or qualifies, it shall be open to any bargaining unit Employee from any department if s/he is qualified.

A) If no bargaining unit Employee bids on the posted job and is qualified, the County shall have the right to recruit personnel from outside the workforce.

The bargaining unit Employee shall demonstrate h/er ability to perform the job posted within thirty (30) days for Group B and sixty (60) days for Group A employees, and if deemed qualified by the Employer, shall be permanently assigned the job. Should such Employee not qualify or should s/he desire to return to h/er former job, s/he shall be reassigned to h/er former job without loss of seniority.

In the event it becomes necessary to discontinue or suspend a job for a period of time, a notice to that effect shall be posted immediately, and a copy furnished to the Union.

In contested cases, the County agrees to provide proposed designated Union representatives with sufficient information to show that the selected individuals made a timely and proper application during the posting period.

Reclassification shall not be considered a vacancy and posting shall not be required.

25.01 **Limited Term Employee(s) (LTE)**: A) An LTE is one who is hired for a period not to exceed ninety (90) days and who shall be separated on or before the end of said period; however, should a temporary Employee be continued in employment or be rehired within ninety (90) days following the termination of h/er temporary employment, the period of h/er temporary employment shall be considered toward fulfilling h/er probationary period. A limited term Employee's term of employment shall not exceed ninety (90) days unless s/he becomes a permanent employee through application for a permanent position from a job posting. An extension of up to one (1) month for the term of a temporary LTE's employment will be allowed. The Employer will provide a list of such Employees, including the hire date of said LTE's and update said list. An LTE hired for the Fuel Assistance Program shall be limited to one-hundred eighty (180) days. No more than two (2) Fuel Assistance Program LTE's shall be hired. There shall be no extension of the 180 days.

Appendix A - 1995, 96, 97 Wages, pp. 21-23 (annexed hereto as Exhibit A).

Appendix A - Listing of all Courthouse Employees Pay Ranges (annexed hereto as Exhibit B).

Appendix B - Rules for the Administration of the Classification and Compensation Plan, Paragraph 1, c) (Successful Bidders) and Paragraph 5 (Reclassification Requests and Re-evaluation Process) - (annexed hereto as Exhibit C).

BACKGROUND

Both parties agree to the essential facts. On February 7, 1994, some three weeks after the grievant, Jean Lantagne, had been hired as a temporary secretary/receptionist for the Niagara office of the Marinette County Human Services department, she was hired as a permanent employee to perform the same job responsibilities. The permanent position Ms. Lantagne was hired to fill was a newly created one, duly created by the County, and both posted and advertised in a local newspaper. Both the notice and the ad correctly described the position title and pay. The pay fell in a range described in the Collective Bargaining Agreement between the parties as Range D.

The qualifications for the position were also correctly listed, except that the job notice posted and ad that was published recited that any applicant "must have at least 1 year of general clerical experience." This was contrary to the determination of the Courthouse Job Evaluation Committee that applicants for the position need have prior experience of "less than one year."

The Courthouse Job Evaluation is a six person committee, three of whose members are appointed by the Union and three of who are appointed by the County. Under the procedure followed by the County, all newly created County positions are referred to this Job Evaluation

Committee. Various factors of the position being evaluated (including any prior experience required) are quantified into points. The points are totaled, and the final sum determines the pay range for the position.

In the instant case, the Job Evaluation Committee determined that the new position of secretary/receptionist for the County's Human Services office in Niagara required less than one year's previous experience. The total points for the new position added up to a placement of the position in Pay Range D..

For reasons that do not appear in the record, a County personnel "coordinator" changed this qualification to "must have at least one year of general experience." Had this determination been made by the Courthouse Job Evaluation Committee, the higher experience required would have generated enough additional points for the position to be assigned Pay Range E, a higher range. The pay range to which the position was assigned, however, remained as Range D (which was consistent with the Committee's mandate).

It is clear that this change was made at the sole volition of the coordinator who neither had the authority nor was directed by anyone to make this change. It is also undisputed that the Courthouse Job Evaluation Committee had no knowledge of the personnel coordinator's action. Although this coordinator was not disciplined in writing for her action, the County Administrator met with her privately (after the fact), advised her that she lacked any authority to make changes of this kind, and warned her not to do it again. The coordinator is no longer employed by the County, but her employment termination was not related to this incident.

On June 6 and 7, 1995, the Courthouse Job Evaluation Committee reviewed one-third of "all the Courthouse Union jobs as listed in Appendix A of the (then) current Union contract." (Exhibit 12). The Committee's review included a reevaluation of Ms. Lantagne's position in the Niagara office. It increased the position's "Supervision Work Direction Required" factor from Level A to Level B (worth an additional 34 points) and also increased the "Minimum Experience Required" from Level A to Level B (worth an additional 25 points). A Level B "minimum Experience Required" factor is "1 - 2 years."
These point increases enabled Ms. Lantagne's position to be lifted from Pay Range D to Pay Range F. The pay range increase was prospective, however, to January 1, 1996.

The grievant believes that the original change made by the personnel coordinator should have resulted in 25 more points being awarded to her position *ab initio.* This would have given the position a total of 392 points and placed it in Pay Range E. The grievant seeks the difference between what she was paid and what she would have been paid if the pay range been increased to from D to E.

Initially, the County denied this matter was subject to the grievance process. That matter went to hearing before Examiner Raleigh Jones of the Wisconsin Employment Relations Commission. Examiner Jones ruled the matter was subject to the grievance process of the parties' collective bargaining agreement.

POSITIONS OF THE PARTIES

Union's Position

The Union first argues that altering the position description after the Committee has scored a position, but before it is posted "blatantly circumvents the intent of the language contained in Appendix B, Section 5. The Union believes that after the Personnel Coordinator changed the experience requirement, the position should have been reevaluated by the Committee. Had this been done, the Union asserts the position would have gone from a Pay Range D to a Pay Range E.

The Union next contends that the Personnel Coordinator is an agent of County management, and the County is bound by the acts of its agents. The Union argues that finding for the County in this matter "would be a green light for the County to alter job requirements and descriptions after the positions have been evaluated by the Committee." Following this line of argument, the Union adds that "(i)t would also be a signal to the County that it can resolve problems by simply disavowing itself of any and all decisions made by its agents."

Furthermore, according to the Union, the Personnel Coordinator was cloaked with "apparent" or "actual" authority. The Union notes that the Personnel Coordinator was not disciplined in writing for her transgression, but merely told not to do it again. This seems to the Union to indicate that the Personnel Coordinator "did not grossly exceed her authority." Citing several arbitration cases in which the representations of management personnel to employees were held to be binding, even though the management personnel making those representations exceeded their authority, the Union argues that the action of the Personnel Coordinator in the instant case must be imputed to the County.

Finally, the Union posits that the posting and advertising of the position with the changed minimum experience requirement was not the result of a "clerical error," as claimed by the County. It was, instead, according to the Union, "an error in judgment by a member of management." Because of that error, states the Union, only applicants with at least one year's experience were considered. Consequently, the Union concludes, the County is bound by this error of judgment and must be held to pay the grievant on the basis of the qualifications actually used when filling the position.

The Union requests the Arbitrator to sustain the grievance and make the grievant whole. The Union's proposed remedy includes an order to the County to pay the grievant the difference in wages between Ranges D and E from her date of hire (February 7, 1994) to January 1, 1996 (the date her position moved to Range F).

Position of the County

The County argues that the Personnel Coordinator had "absolutely no authority" to modify any factors which determine an overall point value for a position, and characterizes her action as a "clerical error." Furthermore, posits the County, " . . . it is the Evaluation Committee that determines the pay rate, not the job advertisement."

In response to the Union's demand that the grievant be made whole, the County maintains that the grievant has never been less than whole. The County points out that the rate of pay for the

position was correctly stated and known to the grievant when she accepted the position. The grievant, says the County, has been consistently paid the rate for her position that was properly established by the Evaluation Committee. Management was never aware of the unilateral action taken by the personnel coordinator until the grievance in this matter was filed.

The County notes that the process for job evaluations was a joint effort by the parties, negotiated and memorialized in the collective bargaining agreement. Under this process, the County states, the parties intended that only prospective, not retroactive, pay adjustments be made. Under this rationale, the County believes the only remedy for an employee who disagree with how his or her position was rated lies in the reevaluation process.

Reply of the Union

In reply, the Union disagrees with the County's characterization of the action of the personnel coordinator as a "clerical error." The truth is, according to the Union, that the personnel coordinator, " . . .as a part of management, exercised judgment (poor as it was) by altering the experience requirement."

The Union believes that the grievant's knowledge of the proposed rate of pay for the position when she accepted the position is totally irrelevant. The union argues that if the County posted a position in Pay Range F when in fact it had received a pay range H designation by the Committee, under the County's logic the successful applicant for the position would be bound to the lower rate if he or she had been aware of it when accepting the position.

The Union does not take serious issue with the County's contention that the County Administrator was unaware of the change made by the personnel coordinator. Nonetheless, maintains the Union, the principles of agency require that the County be bound by the personnel coordinator's action. Her action, states the Union, must be imputed to the County. The Union again asserts that the personnel coordinator was not formally reprimanded for her action, and argues that this constitutes evidence that she did not greatly overstep her bounds.

The Union takes issue with the County's contention that a ruling in favor of the grievant would severely compromise the job evaluation process that the Union and ,management worked hard to put into place. On the contrary, the Union argues, sustaining the grievance would strengthen the process by sending a message to the County that it cannot alter job requirements after the Committee has evaluated a position.

The Union also takes issue with the County's argument that sustaining the grievance would "add retroactivity and an appeal process never bargained for by the parties." The Union believes this statement is misleading in that "(t)he instant grievance is not an appeal of the Committee's evaluation, but a complaint regarding the County's actions in not resubmitting the position to the Committee after altering job requirements."

The Union maintains that since the grievant was hired on the basis of a stricter minimum experience requirement, it is only by granting her a retroactive pay award that she can be made

whole. The County should pay for the mistake made by one of its employees, argues the Union, not the grievant.

In conclusion, the Union reiterated its view that the County violated Appendix B, Section 5 of the parties' collective bargaining agreement. The Union believes the violation consisted of the County's failure to send the Secretary/Receptionist position of the Niagara Human Services office back to the Committee for evaluation after the minimum experience factor was increased by a County employee and the successful applicant hired and paid on the basis of a pay range predicated on a lower experience factor.

Reply of the County

In response, the County reasserts its view that the personnel coordinator was not an agent of county management. The County reiterates that its management had never condoned the action of the personnel coordinator, and denies it has any interest or intent to alter job descriptions after Committee evaluations.

DISCUSSION

Both parties agree that the action of the County's personnel coordinator in changing the minimum experience factor for the Secretary/Receptionist position was a mistake. The County characterizes it as a "clerical error;" the Union, as poor judgment.

I am inclined to the latter view. In my view, the personnel coordinator's action represents a professional ineptness produced by either arrogance, ignorance, or naiveté. That it was likely well-intentioned is immaterial. In fact, it was accomplished without direction, authorization, consultation or knowledge of any County official. Under these circumstances, the disciplinary restraint apparently exercised by the coordinator's immediate supervisor, the County Administrator, following discovery of the "mistake" is remarkable.

Contrary to the assertions of the Union, however, that restraint does not transform the *ultra vires* action of the Personnel Coordinator into one which binds the County to its ramifications.

It is clear that the personnel coordinator was never granted any authority to alter or modify any work product of the Courthouse Job Evaluation Committee. Her responsibility in this instance was limited to clerical tasks: posting the job notice and causing it to be published in a Niagara area newspaper. Obviously, she exceeded her authority. The apparent lenience of the County Administrator in dealing with her following discovery of her unauthorized action cannot serve as a retroactive legitimization of the action.

But the Union further contends that the Personnel Coordinator's knowledge of her alteration must be imputed to the County. Yet, absent any showing that the Personnel Coordinator was either directed to make the change in the job requirement or was invested with independent authority as to the management and direction of County government affairs in matters of this sort, knowledge of her

action in this instance cannot be fairly imputed to the County. The record demonstrates that this employee worked under supervision, not independently. She was neither directed to take the action she took, nor accorded even a whisper of authority sufficient to override a Committee determination. Accordingly, her action must be viewed as an unauthorized aberration of which the County had no knowledge.

Moreover, if the issue were whether the County were liable for payment to the newspaper which ran the altered job advertisement, the "apparent authority" of the person placing the ad on behalf of the County would be both relevant and material. In the matter at hand, however, the "apparent authority" of the Personnel Coordinator is neither relevant nor material, for it does not appear that the grievant placed any reliance on the altered "previous experience" factor, except, perhaps, to note that she qualified under it.

In other words, the grievant was not injured by the "mistake." Arguably, other prospective applicants who were deterred from making application for the Secretary/Receptionist position by the erroneously upgraded "previous experience" factor could claim "injury" by the personnel coordinator's unauthorized action. Arguably, the members of the Courthouse Job Evaluation Committee also suffered "injury" in that their lawful deliberations and conclusions were unlawfully upset.

But the grievant cannot complain. The personnel coordinator did not attempt to change the Committee's determination of the proper Pay Range for the position. That remained as directed by the Committee. The grievant was aware of the salary assigned to the position for which she applied. That was apparently acceptable to her. She accepted the position and was paid the salary she anticipated (and which had been noticed) when she applied for the position. 1/

Moreover, there is no evidence that even the Personnel Coordinator had any intention of altering the Committee's determination as to which Pay Range the position should be assigned. It is entirely possible that she merely intended to increase the "previous experience" requirement without altering the pay range assignment, and did not recognize the conflict this alternative would produce. In any event, absent any actual or apparent authority, her intent is both speculative and immaterial.

The Union argues that after the Personnel Coordinator increased the experience requirements for the job, the position should have been returned to the Courthouse Job Evaluation Committee for reevaluation. But even assuming *arguendo* that the County had fortuitously learned of the Personnel Coordinator's "mistake" and referred the matter back to the Committee, it is by no means clear that the Committee would have concurred with the Personnel Coordinator's opinion. Indeed, the converse, i.e., reinstating the Committee's original "previous experience" factor, seems to me to be the more likely course the Committee would have taken. After all, the Committee had just evaluated the position and reached its conclusions. The Committee would have also been

aware that making the change proposed by the Personnel Coordinator would require upgrading the position to a higher Pay Range. Other than the apparent differing personal opinion of the Personnel Coordinator (of which the Committee may even have been aware in the first instance) there was simply no evidence or data that suggested any such change was necessary at that time.

Thus, I am not persuaded that the County violated Appendix B, Section 5 of the collective

bargaining agreement because it failed to have the position in question reevaluated after the personnel coordinator unilaterally increased the "previous experience" factor of the job. I do not perceive how the County could have accomplished such reevaluation: no change had been authorized or directed; none of its responsible officers were aware of the change until after this grievance was filed. Those circumstances, coupled to my unwillingness to impute to the County the personnel coordinator's knowledge of the unauthorized change she'd made, leads me to believe that there was no corrective action the County could have taken until one of its officers learned of the change.

Accordingly, I find that the County did not violate the parties' collective bargaining agreement when it paid Jeanne Lantagne at the Range D rate of pay.

AWARD

The grievance is denied and hereby dismissed.

Dated at Madison, Wisconsin this 12th day of March, 1998.

A. Henry Hempe, Arbitrator

ENDNOTE

1/ I do not mean to suggest that the grievant's awareness and acceptance of the salary to be paid her is entirely determinative of this matter, for they go only to the issue of "apparent authority." If, for instance, the Personnel Coordinator, had understated the Committee's pay range determination for the position, that "mistake" is not only correctable but should be corrected upon discovery, even if the successful applicant had accepted the lower pay. The point is that under the collective bargaining agreement of the parties only the Committee had the right to create job requirements, duties, and conditions. Any unauthorized action that interferes with this authority is simply illicit and void.

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