

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**GENERAL TEAMSTERS UNION, LOCAL 662, affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO**

and

COUNTY OF CHIPPEWA, WISCONSIN

Case 206
No. 55785
MA-10091

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, referred to below as the Union.

Ms. Margaret M. McCloskey, Chippewa County Personnel Director, 711 North Bridge Street, Room 100, Chippewa Falls, Wisconsin 54729-1876, appearing on behalf of County of Chippewa, Wisconsin, referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Mary E. Hemauer, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 11, 1998, in Chippewa Falls, Wisconsin. The hearing was not transcribed. The parties filed briefs by May 7, 1998.

ISSUES

The parties stipulated the following issues for decision:

Does the County violate the collective bargaining agreement by denying unit employees the ability to hold more than one position with the County?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

Except as expressly modified by other provisions of the contract, the County possesses the sole right to operate the County and all management rights repose in it. These rights include but are not limited to, the following:

- A. To direct all operations of the County;
- B. To hire, promote, transfer, schedule and assign employees in positions within the County;

. . .

- E. To maintain efficiency of County operations;
- F. To take whatever action is necessary to comply with State or Federal law;

. . .

- J. To determine the methods, means and personnel by which County operations are to be conducted;

. . .

ARTICLE 4 – GRIEVANCE

. . .

Section 5. Steps in Procedure.

. . .

4. Arbitration. . . .

F. Decision of the Arbitrator. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the areas where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

...

ARTICLE 8 - SENIORITY, JOB POSTING AND PROMOTION

...

Section 5. Posting. All new or vacated positions which the County has determined to fill shall be posted by the responsible Department Head or Supervisor on the main bulletin board for the bargaining group involved for three (3) working days stating the job that is to be filled, on what date it is to be filled, and the rate of pay. The following factors shall be considered in filling new or vacated positions: (1) qualifications and ability to perform the work; and (2) seniority. Testing and interviewing via the posting procedure shall be at the County's expense and without loss of time to the employee.

BACKGROUND

The grievance states the relevant circumstances thus:

Signed a job posting for a half time position Crime Victim Office. Personnel Office notified that I was not eligible to sign the posting while I am employed for the county presently in a one half time position.

The grievance states the "Relief Sought" thus:

Consideration for the one half time position in the Crime Victim Office as Department Head states hours currently working would not be in conflict.

Margaret M. McCloskey, the County Personnel Director, responded to the grievance in a letter dated August 25, 1997, which states:

I received your grievance on being denied the ability to post for a second part-time position with the County. You state that there would be no conflict in hours of work.

A conflict in regularly scheduled hours of work is not the determining factor. Because of restrictions and issues involved in enforcing the Fair Labor Standards Act, the County has a long-standing policy that no employee may hold two separate positions within County employment. This is a broad policy, covering all employees, and doesn't distinguish between bargaining units and Management.

Further, there has been no violation of the collective bargaining agreement.

. . .

The positions set forth in this exchange set the themes elaborated on at hearing.

The hearing established that the factual background to the grievance is undisputed. The Grievant is currently employed on a one-half time basis as the County's Child Care Coordinator. She has been a County employe for roughly twenty-one years, and has served in her present position for roughly seventeen years. For the past eleven years, she has worked on a one-half time basis.

The Grievant would like to return to full-time status and signed a posting for a position in the Crime Victim Witness Program. The posting stated the vacancy was a one-half time position. The Grievant contacted the department head to determine if the posted vacancy would conflict with her duties as Child Care Coordinator. She learned that the posted position was for afternoon hours, and would not conflict with her current position, which consists of morning hours. Thus, she signed the posting.

Sometime after signing the posting, Shirley Ramharter, the County's Personnel Specialist, informed the Grievant that she could not be considered for the posted vacancy because County Personnel Policy forbids employes from holding more than one County position. This policy is referred to below as the Policy. The Grievant responded that she would like to fill both positions, and wished to be considered for the vacant position. The County declined to interview her or to consider her as an eligible applicant for the posted position.

Delores Gund, the Union's Steward, testified that she was unaware of the Policy until the processing of this grievance.

Jocelyn Brost has served on the County Board since April of 1984. She has been a member of the Personnel Committee since April of 1986, and has chaired that Committee since 1990. She noted that in late June of 1993, the Personnel Committee considered whether

to permit employes to hold more than one position with the County. The Committee's consideration may have been prompted by a grievance, but in any event resulted in discussion summarized in Committee minutes thus:

3.3 Employees Holding More Than One Part Time Position.

McCloskey stated she had received requests from employees to hold more than one part-time position within the County. She said she felt it was a bad idea, but had asked Ramharter to check with other counties regarding their policies. McCloskey stated after reviewing the issue she was recommending that Chippewa County not allow an employee to hold more than one position, because it could involve problems with overtime and create problems as to whether an employee was exempt or non-exempt from the Fair Labor Standards Act. Also there might be cross-union problems with dues and posting rights. McCloskey stated she was requesting approval to prepare a written policy for approval by the Personnel Committee. . . . Motion carried.

Brost testified that although the request that employes be permitted to hold more than one position had superficial appeal, she concluded that the problems it might bring outweighed any benefit which could be expected to flow from granting the request. The problems she feared include calculating overtime, other benefits and scheduling work and paid leave. The motion approved by the Personnel Committee was proposed as a County Ordinance, but on the advice of the Corporation Counsel, the Committee pulled its request prior to a vote by the Board. The Corporation Counsel advised the Personnel Committee that its approval of the motion was sufficient to create personnel policy, and that there was no reason to add such policies to County Ordinances.

The parties also adduced testimony concerning the implementation of the Policy. In January of 1994, the County hired Kris Peterson-Anderson as a Deputy Register in Probate on a limited term basis. In January of 1996, the County created one and one-half full-time equivalent Judicial Assistant positions. The County awarded Peterson-Anderson the one-half time position for 1996. In January of 1997, Peterson-Anderson became a full-time Judicial Assistant. Gund testified that for roughly six months in 1990, the County employed Margaret Cameron on a one-half time basis as a Social Service Aide and, simultaneously, on a one-half time basis as an Economic Support Worker. It is undisputed that in February of 1994, the County's Law Enforcement Committee voted to approve a proposal to create one full-time secretarial position split between the Sheriff's Department and the Department of Emergency Government.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union argues that arbitral precedent establishes that "(i)n both discipline and promotion cases, management gathers the evidence, makes the decision, and is in the best position to explain the decision," thus "placing the burden of proof on (the) employer in posting cases." To justify filling the position from outside the bargaining unit, it follows that the County must establish that it considered the factors set forth in Article 8, Section 5.

Article 8, Section 5 clearly and unambiguously establishes that the "only factors the County is to consider when filling a unit position are qualifications and ability to perform the work and seniority." By denying the Grievant the position in the Crime Victim Office without considering the factors noted above, the County violated the labor agreement.

That the Grievant holds a one-half time position in Child Care has no bearing on this conclusion. The Grievant had confirmed with the head of the Crime Victim Office that the posted position's hours would not conflict with her existing hours. The absence of County rebuttal on this point must, the Union contends, be considered significant. Beyond this, "(t)he County has conceded (the Grievant) was qualified and able to perform the Crime Victim job." This establishes a contract violation.

Nor can the County persuasively contend that its unilaterally adopted Policy can supersede the labor agreement. The Policy "was never negotiated with the Union" and the labor agreement, which was negotiated with the Union, precludes consideration of points other than "seniority and qualifications." Whatever the reasons for the Policy may be, they "are irrelevant to determining the existence of a contract violation." The contract "does not cease to apply merely because the (employer) claims a good reason for violating it."

Even if the basis for the Policy could be considered relevant, "the County's justifications . . . are unpersuasive." That employees could hold jobs in two units or could hold both exempt and non-exempt positions under the Fair Labor Standards Act "are irrelevant to this grievance, because members of the bargaining unit have no right to post for jobs outside the unit, and all unit jobs are hourly." Sustaining the grievance would not, the Union contends, compel the County to ignore conflicts in hours or other conflicts when filling positions. Beyond this, the evidence establishes that the County "has not applied its policy consistently."

The Union concludes that its grievance should be sustained, the Grievant should be awarded the posted position, and should be made whole for any lost wages or benefits.

THE COUNTY'S POSITION

The County notes that the Grievant has been a Child Care Coordinator in the Human Services Department for seventeen of her twenty-one years of employment, and voluntarily went

from full-time to one-half time status eleven years ago. Because she wished to return to full-time status, the Grievant signed a posting for a one-half time position in the Crime Victim Witness Program. Placing her in that position would, however, contravene its clear and proper Policy.

Brost's testimony establishes that the Personnel Committee carefully considered the Policy. The County summarizes those considerations thus:

(Brost) said the committee examined issues such as the positions being union/non-union, Exempt or Nonexempt (under the Fair Labor Standards Act), problems with computing overtime between departments, and computing benefit levels. She said that the federal government looks at total hours of employment with a given employer: if both positions were Nonexempt, then additional hours in either department would have to be paid time-and-a-half; but what if one position were Nonexempt and the other Exempt? She said a given department's scheduling might have to be changed over time: how would this be handled when more than one department was involved? She said there were concerns about the possibility of one position's being under one union contract, while the second position was under another union's.

Against this background, the Personnel Committee concluded that however much it might wish to allow employes to hold more than one position, "the great potential for difficulties with that allowance far outweighed the benefits to be achieved from it." That the County Board did not adopt the Policy as an Ordinance is irrelevant here, since the approval of the Personnel Committee is sufficient to "create personnel policy."

The County then contends that the Union has been unable to prove that the administration of the Policy has been inconsistent. None of the cases cited by the Union demonstrate anything other than that the purported inconsistencies involve positions not governed by the Policy.

The County concludes that the evidence establishes that the Personnel Committee acted in the best interests of the County in establishing the Policy, which "is a basic management right of the County . . . covered in Article II." Since the Policy "has been evenly and consistently applied since its adoption" it necessarily follows, according to the County, that "(t)here has been no contract violation." The grievance must, therefore, be denied.

DISCUSSION

The issue is stipulated, but requires that certain prefatory points be addressed before the issue can be resolved. First, the stipulated issue seeks an interpretation of the collective bargaining agreement. This point is significant since the parties' arguments touch on potentially statutory

issues. Second, it should be stressed that the issue questions the application of the Policy to the Grievant's attempt to be placed in the one-half time position noted in the grievance in addition to her one-half time position as Child Care Coordinator. Thus, the interpretive issue is not whether the Policy is, standing alone, reasonable. Nor is the issue whether the Policy is enforceable against County employees generally. Rather, the issue is whether the Policy governs the facts posed by this grievance.

Because the stipulated issue focuses on the labor agreement, the interpretive issue is whether the County, under Article 2, can assert the Policy to preclude the application of Article 8, Section 5 to unit employee requests to be placed in more than one part-time position. Even if the language of either Article 2 or Article 8, Section 5 could be considered clear and unambiguous, their relationship cannot. Thus, it is arguable that the language of either or both provisions can be supplemented by recourse to interpretive aids.

The most persuasive guides to the interpretation of ambiguous language are past practice and bargaining history, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. In this case, however, neither guide is available. There is no evidence of bargaining history. Not coincidentally, there can be no meaningful use of past practice. Gund's testimony that the Union was unaware of the Policy until the processing of the grievance stands un rebutted.

Against this background it is apparent that there can be no use of bargaining history. It is no less apparent that there can be no use of past practice. The binding force of past practice is rooted in the agreement implicit in the conduct of the bargaining parties. Since the Union was unaware of the Policy, there can be no finding that its implementation constitutes a binding practice.

Thus, resolution of the stipulated issue must turn on the language of Article 2 and Article 8, Section 5. On these facts, the language cannot support the County's position. The Article 2 rights asserted by the County are broadly stated, and do not directly address the posting process. Whether Article 8, Section 5, can be considered clear and unambiguous, it clearly and unambiguously applies to the posting process. Thus, the County contends that its general authority under Article 2 must be read to preclude application of a specific provision addressed to the filling of vacancies.

This contention is not reconcilable to the admonition of the first paragraph of Article 2 that the County's "management rights" are "expressly modified by other provisions of the contract." There is no dispute that the one-half time position posted in the Crime Victim Office is a "new or vacated" position "which the County has determined to fill." Article 8, Section 5, unambiguously mandates that such a position "shall be posted." Beyond this, Article 8, Section 5 demands that:

The following factors shall be considered in filling new or vacated positions:

(1) qualifications and ability to perform the work; and (2) seniority.

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Since it is undisputed that the County never applied these factors to the Grievant, application of Article 2 as the County asserts would read Article 8, Section 5 out of existence. Such a conclusion is irreconcilable to the first paragraph of Article 2 and to Article 4, Section 5, Subsection 4, F.

The scope of this conclusion is best detailed by tying it more closely to the arguments of the parties. The County's contention that the Policy is reasonable can be granted. The difficulties which are noted by Brost and are detailed in the Personnel Committee minutes are considerable points, evaluated by Board members in good faith. The issue posed here is not, however, whether the County can deny a position to the Grievant because her possession of two positions might pose a conflict of hours or some other type of conflict of interest. Rather, the issue is whether the denial can occur without any application of the factors specified in Article 8, Section 5. To permit this to occur reads Article 8, Section 5 out of existence. As noted above, this violates the first paragraph of Article 2, the final paragraph of Article 4 and Article 8, Section 5.

Whether the County has consistently applied the Policy is of limited significance to this conclusion. The evidence would indicate the enforcement has been consistent, with minor deviations. As the County persuasively points out, its consideration of splitting a full-time position between two departments has no bearing on the grievance. The facts surrounding Cameron's position are sketchy at best, and difficult to hold against the County's implementation of its Policy. The Peterson-Anderson case is, however, applicable to the grievance in a limited sense. The County persuasively notes her assumption of additional hours was temporary in nature, designed to fill a gap until a permanent replacement could be found. The Grievant, unlike Peterson-Anderson, seeks a permanent position. This cannot, however, obscure that the County did not apply the Policy by rote to Peterson-Anderson's situation. In any event, this minor deviation falls short of establishing any fundamental inconsistency in the County's implementation of its Policy.

The weakness in the County's position is not that the Policy has been administered inconsistently, but that it has been administered without notice to or bargaining with the Union. Bargaining issues aside, it is unpersuasive to read a negotiated contractual provision out of existence based on an unannounced policy directive.

The parties' stipulation of the issue and the provisions of the final paragraph of Article 4 preclude consideration of law outside of the contract as a basis to preclude application of Article 8, Section 5 to the grievance.

These considerations do not mean the County cannot consider potential conflicts created by employe requests to hold more than one position. Rather, it means that such considerations must be made on a case-by-case basis, in the application of the factors specified in the second sentence of Article 8, Section 5. If, for example, the Grievant's duties as Child Coordinator precluded her filling certain hours in the Crime Victim Office, then the County could have considered that in assessing her "qualifications and ability to perform the work." The conclusions stated above should

not be read to defeat the concerns underlying the Policy. Rather, those conclusions establish only that the Policy cannot be used to void the application of Article 8, Section 5. The concerns underlying the Policy must be reconciled with that provision on a case-by-case basis, and cannot be used to supersede the application of Article 8, Section 5.

In sum, the general authority of Article 2 cannot be read to preclude application of the specific terms of Article 8, Section 5 to the Grievant's request to fill the position posted in the Crime Victim Office. To do so would unpersuasively read a provision of general management right to preclude the application of a provision specifically directed to the filling of posted vacancies. More significantly, such an interpretation reads Article 8, Section 5 out of existence in violation of the first paragraph of Article 2 and the final paragraph of Article 4.

It is now necessary to address the issue of remedy. At hearing, the Union sought to have the Grievant considered for the position in the Crime Victim Office. In its brief, the Union seeks to have the Grievant placed in the position. The County's contract violation is rooted in its failure to apply Article 8, Section 5 to the Grievant. The evidence does not establish who, if anyone, other than the Grievant signed the posting, or how the Grievant compares to any other applicant under the factors noted at Article 8, Section 5. Standing alone, this uncertainty precludes awarding the position to the Grievant at this time. Beyond this, awarding the position to the Grievant ignores that the provisions of Article 8, Section 5 have yet to be applied to her. The factors of the second sentence are to be applied by "the County" not by an arbitrator. Accordingly, the Award entered below requires the County to apply the factors specified in Article 8, Section 5, to the applicants for the position, including the Grievant. If the application of Article 8, Section 5 means the Grievant should receive the position, the Award requires that she be made whole. Because of the uncertainty implicit in the Award, I have retained jurisdiction to resolve problems traceable to the implementation of the remedy.

AWARD

The County does violate the collective bargaining agreement by denying unit employees the ability to hold more than one position with the County when it makes the denial without applying the factors noted in Article 8, Section 5.

As the remedy appropriate to its violation of Article 8, Section 5, the County shall reconsider the applicants for the posted one-half time position in the Crime Victim Office which is the subject of this grievance. In its reconsideration, the County shall apply the factors noted at Article 8, Section 5 to the applicants who signed the posting, including the Grievant. If the application of those factors establishes that the Grievant should be, under the terms of Article 8, Section 5, the successful applicant, then the County shall offer the position to the Grievant. If the Grievant accepts the position and if she complies with all relevant contractual requirements, then the County shall make her whole for the wages and benefits she would have earned but for its violation of Article 8, Section 5.

For the sole purpose of resolving any dispute regarding the implementation of the remedy noted above, I will retain jurisdiction over the grievance for a period of not less than forty-five days from the date of issuance of this Award.

Dated at Madison, Wisconsin, this 8th day of July, 1998.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator