

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MARATHON COUNTY SOCIAL SERVICES
DEPARTMENT PROFESSIONAL EMPLOYEES
UNION, LOCAL 2492-A, AFSCME, AFL-CIO**

and

MARATHON COUNTY

Case 256
No. 56110
MA-10174

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of the labor organization.

Ruder, Ware & Michler, S.C., Attorneys at Law, by **Attorney Dean R. Dietrich**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the municipal employer.

ARIBTRATION AWARD

Marathon County Social Services Department Professional Employees Union Local 2492-A, AFSCME, AFL-CIO, (“the Union”) and Marathon County (“the County”) are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the WERC appoint a member of its staff to serve as arbitrator to hear and decide a grievance concerning the interpretation and application of the terms of the agreement relating to seniority and wage rates. The Commission designated the undersigned, who conducted a hearing in Wausau, Wisconsin, on May 13, 1998. The parties filed written arguments by July 9, 1998, and waived the filing of reply briefs.

ISSUE

At hearing, the parties concurred in my statement of the issue as follows:

“Did the Employer violate the collective bargaining agreement by placing Judy Finger at the Social Worker III, 30-month step upon her appointment on November 2, 1997? If so, what is the appropriate remedy?”

RELEVANT CONTRACTUAL PROVISIONS

MARATHON COUNTY
DEPARTMENT OF SOCIAL SERVICES
PROFESSIONAL EMPLOYEES
LABOR AGREEMENT

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Article 2 – Management Rights

The County possesses the sole right to operate the department and all management rights repose in it, but such rights must be exercised consistently with the other provisions in this contract. These rights include but are not limited to the following:

- A. To direct all operations of the Social Services Department;
- C. To hire, promote, transfer, assign and retain employees;
- F. To maintain efficiency of department operation entrusted to it;
- I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;
- L. To take whatever action is necessary to carry out the functions of the department in situations of emergency;

The rights of management set forth above are not all inclusive, but indicate the type of matters or rights which belong to and are inherent to management. Any of the rights, powers and authority the County had prior to entering into this collective bargaining agreement are unqualified, shall remain exclusively in the

County, except as expressly and specifically abridged, delegated, granted or modified by this Agreement.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the right of the County to exercise these management rights.

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Article 6 – Seniority

A. Probationary Period: New Employees shall be on a probationary status for a period of one year (12 months). Employees discharged before the end of this probationary period shall have no rights of appeal. If still employed after one year (12 months), their seniority shall date from the first date of hiring. The union acknowledges that the employer has the right to discharge a probationary employee for any reason without union interference.

B. Layoff and Vacancies: In the event it becomes necessary to reduce the number of employees in the department, the probationary employees shall be the first to be laid off and then the employees with the least seniority. Employees laid off in a reduction of force shall have their seniority status continued for a period equal to their seniority at the time of layoff, but in no case shall this period be more than two (2) years. When vacancies occur in the department while any employees hold layoff seniority status, these employees shall be given the first opportunity to be recalled and placed on these jobs provided they are capable of performing the available work of the department. In the event an employee declines to return to work when recalled under this section, such employee shall forfeit all accumulated seniority rights.

C. Termination and Notice: Any employee covered by this Agreement whose employment is terminated for any reason other than disciplinary action shall be entitled to twenty (20) working days notice. Professional employees shall give to the County twenty (20) working days notice of their intention to resign.

D. Loss of Seniority: An employee shall lose his seniority rights for the following reasons only:

1. If the employee quits;
2. If the employee has been discharged for just cause;
3. If the employee fails to notify the County within one (1) week of intentions upon recall from layoff and does not report for work within two (2) weeks of recall (certified, return receipt mail).
4. If the employee has been in layoff status longer than provided for above.
5. If the employee has been in a management or nonunion position for more than six (6) consecutive months. Employees in a management or other nonunion position for six (6) months or less who for any reason are to resume a union-covered position lose no seniority. Employees in a management position less than six (6) months who are laid off, resign, or are terminated if the termination is not for disciplinary reasons, keep their seniority and must, on or before the final date in the management or non-union position, notify the employer of their desire to resume a union-covered position, at which time the employee in a union-covered position with less seniority shall be removed in favor of the person with more seniority. Seniority for this purpose runs despite the employee's management position (but in no case for more than six (6) months). Any break in employment with the agency shall be deemed severance and the person shall lose all seniority.

Article 7 – Job Posting

A. Posting: When the employer deems it necessary to fill a position a notice of the vacancy due to retirement, quitting, new positions, or for whatever reason, shall be posted on all bulletin boards for five (5) working days (to overlap two consecutive weeks). The union shall receive a copy of the posting.

B. Notice and Application: The job requirements, qualifications, and rate of pay shall be part of the posting and sufficient space for interested parties to sign said posting, or they may in writing notify the Department Head of their application within five (5) posted days.

C. Qualifications: To apply for a vacancy the employee must have the basic qualifications for the job or have a state certification for the vacancy.

D. Filling Vacancy: When management reasonably determines aptitude and ability are equal, seniority shall govern the promotion, transfers and filling of vacancies. The union acknowledges that the employer need not follow seniority rules for management and other nonunion positions. The union acknowledges that the employer has a right to choose any persons within or without the agency for management and nonunion positions.

E. Probation: Employees filling promotional vacancies shall be on a probationary period for six (6) months.

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**Appendix A – Salary Schedule
Effective January 1, 1997**

ANNUAL RATES

RANGE	CLASSIFICATION	STARTING	6-MONTHS	30-MONTHS
1	Social Worker I	26,580	27,747	28,825
2	Social Worker II	28,286	29,543	32,215
3	Social Worker III	32,562	34,059	37,375

HOURLY RATES

RANGE	CLASSIFICATION	STARTING	6-MONTHS	30-MONTHS
1	Social Worker I	12.78	13.34	13.86
2	Social Worker II	13.60	14.20	15.49
3	Social Worker III	15.65	16.37	17.97

BACKGROUND

This case concerns the Union’s efforts to lower the classification and reduce the pay of Judy Finger, a former supervisor who voluntarily returned to the bargaining unit after more than eight years as an exempt supervisor. The County classified and paid her as a Social Worker III, 30-month step; the Union’s grievance, as filed, sought to have Finger classified and paid as a

Social Worker I, starting rate. At hearing, the Union agreed that it was a management determination as to whether Finger met the qualifications for a Social Worker III, but it held to its position that the collective bargaining agreement required Finger to be paid at the starting rate.

There are few, if any, material facts in dispute. Ms. Finger began employment with the County on August 1, 1988, as a Social Worker I. On March 3, 1989, the County reclassified her as a Social Worker II. On May 29, 1989, she accepted a position as Social Work Supervisor, a position outside the bargaining unit.

In the early summer of 1997, the County posted a notice of employment opportunity for a Social Worker position; the posting indicated it was for Social Workers I, II and III, with the successful applicant to be placed at the highest level consistent with qualifications. No unit members responded to the posting.

On October 10, 1997, Finger wrote to Department Head Dale Van Mieghem, requesting that she be allowed to leave her position as Social Work Supervisor and accept the vacant position, effective November 2, 1997. Finger stated she met the qualifications of a Social Worker III.

On that same date, Van Mieghem wrote to department staff to inform that the Finger “had chosen to become more directly involved with clients by accepting the social worker vacancy that we presently have.” The memo did not state what Finger’s classification or pay rate would be. At hearing, the parties stipulated that the County could place Finger at the Social Worker III level if management determined that she met the qualifications of that position .

On October 31, 1997, the Union grieved Finger’s classification as a Social Worker III, paid at the 30-month step, contending that as a new employe in the bargaining unit, she should be classified and paid as a Social Worker I, starting pay step. As of October, 1997, Finger earned \$21.87 per hour as a Social Work Supervisor; under the collective bargaining agreement in force calendar years 1995 through 1997, the 1997 starting pay rate for a Social Worker I was \$12.78 per hour; the starting rate for a Social Worker III was 15.65, and the Social Worker III, 30-month rate was \$17.97 per hour.

The County denied the grievance, and the Union advanced the matter to Step Two, the Personnel Director. On December 5, 1997, County Personnel Director Brad Karger denied the grievance. Along with some discussion of his impression of the union’s motivation in bringing the grievance, Karger explained his denial as follows:

In the absence of any controlling language, the County has the right to exercise its judgment in determining the appropriate job classification and pay step for a management employe returning to the bargaining unit. See Article 2 – Management Rights which reserves certain rights to the County:

- A. To direct all operations of the Social Service Department.
- C. To hire, promote, transfer, assign and retain employees.
- I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the workforce, to determine the work to be performed by employees, and to determine the competence and qualifications of employees.

In deciding to classify Judy Finger as a Social Worker III, the Social Services Director considered the length of her tenure with the County, the level of responsibility she assumed (including supervising the work of Social Workers in all 3 job classifications) and he made a reasonable judgment as to the appropriate job classification and pay step. Nothing in the Labor Agreement restricted the Director's authority to take this action and thus, there has been no violation of the Labor Agreement.

On December 10, 1997, Union Staff Representative Phil Salamone advised Karger of the Union's decision to advance the grievance to the full Personnel Committee. On February 3, 1998, Karger notified Salamone that the Committee had denied the grievance. On February 4, 1998, Salamone notified Karger that the Union would be requesting a grievance arbitrator from the WERC. The Union did so in fact request.

POSITIONS OF THE PARTIES

In support of the grievance, the Union asserts and avers as follows:

This is a policy grievance filed by the Union to challenge the accelerated salary placement of a former supervisor re-entering the bargaining unit. The collective bargaining agreement is rather clear and unambiguous in providing that an employee hired into the bargaining unit starts at the rate termed "starting" rate. That is, "start" means "start."

Under this collective bargaining agreement, “seniority” means “service time,” or continuous time in the unit. The parties who framed the agreement provided special and specific language defining exactly how a supervisor, who was formerly a unit employe, could return to the unit without penalty. The language clearly provides that to do so the employee had to return before six months had elapsed. The collective bargaining agreement expressly permits retention of seniority only where the employee remains in a supervisory position for less than six months.

The collective bargaining agreement is extremely precise and definitive in describing that in a situation exactly like the one here, the employee in question loses all unit seniority. The language is clear and unambiguous and must be given full effect.

The county’s theory would enable an employe to enter, leave and return to the unit at any seniority threshold the county chose – thus making the clear and unambiguous language of the wage schedule and article 6 meaningless. This would enable the county to show all forms of improper favoritism, regardless of the dictates of the collective bargaining agreement.

There can be no doubt that the collective bargaining agreement has been violated. The arbitrator should so rule, and frame an appropriate remedy.

In opposition to the grievance, the County asserts and avers as follows:

The collective bargaining agreement is silent on the procedure for determining the appropriate wage rate when assigning a non-bargaining county employee to a bargaining unit position and the county therefore has the right to determine the appropriate rate.

The Union’s claim that the County violated the collective bargaining agreement is ludicrous and totally without merit. The salary schedule is merely that, showing the progression; there is no contract language governing the placement of employees on the schedule, so no contract violation occurred.

The employer is vested with the authority to assign employees as the employer deems necessary unless a provision in the collective bargaining agreement explicitly limits that right. No contractual provision specifically prohibits the County from placing Judy Finger at the 30-month rate of a Social Worker III.

The County thoroughly considered Ms. Finger's experience, qualifications and years of service to the County and reasonably made a judgment that she should be placed at the 30-month rate of a Social Worker III. To place her at the starting rate, or the Social Worker I rate, would be unjust. The arbitrator may rely on the established concept of equity and fairness in denying the grievance.

One may be led to believe that because Judy Finger previously supervised the bargaining unit members, it is the Union who is attempting to cause an undue hardship to one of its own members. Judy Finger's dedicated years of service to Marathon County cannot be overlooked and one can only conclude that she was placed at the appropriate wage step.

Further, no binding past practice exists that would require the county to place a long term employee at the start rate when transferring duties. Absent a past practice to give guidance, the County's exercised right to place Judy Finger at the 30-month rate is fair and reasonable and must prevail.

The County is vested with the exclusive authority to place Judy Finger at the 30-month rate upon her job transfer. No provision within the collective bargaining agreement limits the County's authority in this regard. This placement was reasonable and in good faith based upon the County's consideration of her tenure with the County. Absent contract language or past practice, the Arbitrator must conclude that no violation of the terms of the agreement occurred.

DISCUSSION

Some may find it odd that the Union would propose an \$11,000 annual pay cut for one of the municipal employees it represents, or that it would advance to arbitration a grievance over the matter. But administering a collective bargaining agreement can sometimes be complex and complicated, and some innocent individuals can get hurt in the name of protecting the collective rights of the many.

Marathon County and the Marathon County Social Services Department Professional Employees Union, Local 2492-A, AFSCME, AFL-CIO, have a collective bargaining agreement which addresses the issue of bargaining unit employees who assume management or otherwise unrepresented positions. In clear and unambiguous terms, the collective bargaining agreement states that an employee loses seniority rights "if the employee has been in a management or nonunion position for more than six (6) consecutive months." The collective bargaining agreement also provides that "employees in a management or other nonunion position for six (6) months or less who for any reason are to resume a union-covered position lose no seniority."

Judy Finger was covered by the collective bargaining agreement from August 1, 1988 to May 29, 1989, when she accepted a position as a Social Work Supervisor. After more than 100 consecutive months outside the bargaining unit, she returned to the unit on November 2, 1997. Accordingly, by the explicit, express, clear and unambiguous terms of the collective bargaining agreement, she had lost all seniority rights. This collective bargaining agreement was executed on March 28, 1995, and thus should have been available to Finger at the time she decided to return to the unit.

The Union contends that Appendix A, the Salary Schedule, establishes that employees with no seniority are placed first at the starting rate, then progress through the 6-month and 30-month rates. As the Union writes, “start” means “start.”

The Union is correct. There is no way consistent with an understanding of the English language to interpret “Starting” on a salary schedule other than that this is the rate that new employees start at. To paraphrase Rodgers and Hammerstein – “employees start at the very beginning, the contractual place to start.” I can not discern what “starting” could mean other than “this is where a new employee starts on the pay schedule.”

I do not accept the County’s argument that there is no contract language governing the placement of employees on the schedule. Under the County’s reasoning, the absence of an 18-month step would not prevent the county from paying a rate half-way between the 6-month and 30-month rate, under the general aegis of “management rights.” The management rights listed in the collective bargaining agreement can only be exercised “consistently with the other provisions” of the agreement. The explicit language of Article 6 – which the County inexplicably fails to even mention in its brief – establishes Finger’s loss of seniority. Taken with the explicit salary schedule of Appendix A, the collective bargaining agreement does not support the County’s actions and interpretation.

Therefore, I find that the County did violate the collective bargaining agreement by placing Judy Finger at the Social Worker III, 30-month step upon her appointment on November 2, 1997.

Having determined to sustain the grievance, I now face the issue of the remedy. The Union, which previously sought, first, Finger’s reduction to the starting rate for a Social Worker I, then the starting rate for a Social Worker III, asks only that I fashion “an appropriate” remedy. The County, denying the validity of the underlying grievance, did not propose a remedy in the event I sustained the grievance.

I note at the outset that no bargaining unit employee posted for the vacancy prior to Finger’s appointment, thus apparently indicating that no individual employee suffered any harm by Finger’s salary level. I also note that Finger voluntarily returned to the unit, relying in reasonable

good faith on the County's representation that she would be paid at the Social Worker III, 30-month rate. I further note that the Union identified this as "a 'policy' type grievance," and that its policy interests – the application of its interpretation of Article 6 – have been fully validated. I further note that the Union stated expressly on the record that it harbors no animosity toward Finger, and that its motivation is not to do her harm. I finally note that any financial arrangement between Finger and the County applicable to her service as a supervisory employee is not before me, and is arguably beyond the scope of the collective bargaining agreement.

Accordingly, it is my

AWARD

1. That the grievance is sustained.
2. That Judy Finger's hourly pay rate is frozen at the level as of the date of this award.
3. That Judy Finger shall advance on the salary schedule when she accumulates sufficient service based on a November 2, 1997 starting date on the salary schedule.
4. That I shall retain jurisdiction for thirty (30) days from the date of this Award.

Dated at Madison, Wisconsin this 17th day of August, 1998.

Stuart Levitan /s/

Stuart Levitan, Arbitrator