

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**NORTHWEST UNITED EDUCATORS-
BARRON COUNTY SOCIAL SERVICES
(PROFESSIONAL EMPLOYEES)**

and

BARRON COUNTY

Case 132
No. 56070
MA-10165

(Peter Arnold Grievance)

Appearances:

Ms. Kathryn Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, appeared on behalf of the District.

Mr. Michael Burke, Executive Director, Northwest United Educators, appeared on behalf of NUE.

ARBITRATION AWARD

The above-captioned parties, hereinafter NUE and the County, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on April 16, 1998, in Barron, Wisconsin. After the hearing the parties filed briefs, whereupon the record was closed on May 28, 1998. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issue(s) to be decided in this case. NUE framed the issue as follows:

Did the County violate Article V, Section 5.01, when it denied the grievant's request for the vacancy in the Adult Services Unit? If so, what is the appropriate remedy?

The County framed the issues as follows:

1. Does Article V, Section 5.01, have any application in the situation in which the position being posted is a Social Worker I or Social Worker II position, and the employee who wishes to post is already classified as a Social Worker II?
2. If so, did the County violate the collective bargaining agreement when it did not award the social worker position, which it posted in August, 1997, to the grievant?
3. If so, what is the appropriate remedy?

Having reviewed the record and arguments in this case, the undersigned finds the following issues appropriate for purposes of deciding this dispute:

1. Does Article V, Section 5.01, have any application in the situation in which the position being posted is a Social Worker I or Social Worker II position, and the employee who wishes to post is already classified as a Social Worker II?
2. Did the County violate the collective bargaining agreement when it decided to keep the grievant in the Children's Unit and not transfer him to the Adult Services Unit as he requested? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

The parties' 1996-97 collective bargaining agreement contained the following pertinent provisions:

ARTICLE V- PROMOTIONS

5.01 When the County chooses to fill a vacancy or create a new job, a notice of the vacancy shall be posted on the employees' bulletin board for at least five (5) days concurrent with public advertisement of the position. Said notice shall

contain the prerequisites for the position, and said prerequisites shall be consistent with the requirements for the position. Those employees within the bargaining unit who meet the prerequisites may apply. Probationary employees, however, may not post for positions, except in the sole discretion of the County. Following the five (5) day notice, applicants will be tested according to the requirements of the Merit System Rule. In the event none of the bargaining unit applicants qualify, the County may then hire an external applicant for the position.

5.02 Social Worker I will be reclassified to a Social Worker II after two years of experience as a Social Worker I in the Barron County Department of Social Services, satisfactory performance, and achievement of the Merit System minimum inservice training requirements. Social Workers II will be eligible for reclassification to a Social Worker III after they have had three years of experience as a Social Worker II, 12 graduate credits from an accredited school of social work or extension programs, 255 hours of inservice training, and specified staff development activities. Promotion from a Social Worker II to a Social Worker III will be at the discretion of the Employer.

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ARTICLE XXII – MANAGEMENT RIGHTS

22.01 The Employer possesses the right to operate the Department and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

- A. To direct all operations of the Department;
- B. To establish reasonable work rules;
- C. To hire, promote, transfer and assign employees in positions within the Department;
- D. To relieve employees from their duties subject to other provisions in this contract;
- E. To maintain efficiency of department operations;

- F. To take whatever action is necessary to comply with state or federal law or to respond to emergencies;
- G. To introduce new or change existing methods or facilities;
- H. To determine the kinds and amounts of services to be performed as pertains to department operations;
- I. To contract out for goods or services provided there is no layoff of existing employees;
- J. To determine the methods, means and personnel by which department operations are to be conducted.

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FACTS

NUE is the exclusive collective bargaining representative for the professional employees in the County's Department of Social Services. The bargaining unit now consists solely of social workers. Grievant Peter Arnold is a social worker and thus is a member of that bargaining unit. There are three categories of Social Workers: I, II and III. Arnold is a Social Worker II.

The Department of Social Services has several units. The units which are pertinent herein are the Children's Unit and the Adult Services Unit. As the titles of these units indicate, the social workers in the Children's Unit work with children and the social workers in the Adult Services Unit work with adults. Arnold currently works in the Children's Unit.

In August, 1997, the County posted a vacancy for a Social Worker I or II. The posting was as follows:

POSITION POSTING

SOCIAL WORKER I OR SOCIAL WORKER II:

Qualifications: Position requires four-year degree in Social Work; knowledge and abilities in human service systems, assessment and development of social work plans, human growth and development and therapy techniques. SW II requires a minimum of two years of social work experience.

Starting Date: September 1, 1997, or thereafter

Salary: \$2,243 - \$2,423 per month

After the position was posted, Arnold heard rumors via the office grapevine that whoever filled the (posted) position would probably be assigned to work in the Adult Services Unit. Arnold decided he wanted to work in that unit, so he applied for the posting. His written request was as follows:

August 6, 1997

Shirley H. McGiffin, Director
Barron County Department
of Social Services

Dear Ms. McGiffin:

This correspondence is to request that I be considered for the Social Worker position available in the Adult Services Unit.

I have been a dedicated employee in the Children's and Family Unit of the Barron County Department of Social Services for seven years. During these years, I have experienced many changes and would look forward to the new challenges the Adult Services position would offer.

My skills in working with a wide variety of ages, personalities and ethnicities have grown steadily. As a result, I feel confident that I could assume the responsibilities of the new position without difficulty. Given the opportunity, I feel I would be an asset to the unit. I continue to look forward to working for the Department and serving the people of Barron County.

Thank you for your consideration in this matter.

Sincerely,

Peter T. Arnold /s/
Peter T. Arnold
Social Worker II

In a memo dated September 25, 1997, McGiffin responded to Arnold as follows:

To: Peter Arnold, Social Worker

From: Shirley H. McGiffin, Director

Date: September 25, 1997

Re: Social Worker Position – Adult Services Unit

This memo is written to acknowledge receipt of your request of August 6, 1997, to move from the Children and Family Services Unit to the Adult Services Unit.

Based on the needs of the Department, your request is being denied. I believe your skills are best utilized in the Children and Family Services Unit.

McGiffin acknowledged at the hearing that Arnold was qualified for the posted position. She further acknowledged he was qualified to work in the Adult Services Unit. McGiffin testified she nonetheless denied Arnold's request to be removed from the Children's Unit and assigned to the Adult Services Unit for two reasons. First, she felt Arnold should stay in the Children's Unit because it would be difficult for a newly-hired social worker to work on the hard cases Arnold was then handling in the Children's Unit. Second, she knew that the Children's Unit would soon be down two social workers because one was on maternity leave and another was expected to leave soon as her husband was looking for another job. There are eight social workers in the Children's Unit.

The County subsequently decided to hire an external applicant for the vacancy. Thus, the position was not filled by an internal applicant. The external applicant who was hired was subsequently assigned to work in the Adult Services Unit.

NUE filed a grievance on Arnold's behalf on September 30, 1997 challenging the denial of his request to be transferred to the Adult Services Unit. The County denied the grievance and the matter was ultimately appealed to arbitration.

The record indicates that the Department has used the same generic format for posting social worker positions for decades. For example, a 1978 posting for a Social Worker I position listed the same three categories (i.e. qualifications, starting date and salary) as are listed on the posting involved here. Insofar as the record shows, none of the Department's previous job postings have listed specific job duties. Thus, after an employee posts for and is awarded a Social Worker position, there is nothing on the job posting which guarantees that the employee will perform specific job duties.

The record further indicates that social workers can have their job assignments changed when management deems it necessary to do so. This has happened on numerous occasions. As an example, a social worker who normally performs Adult Services duties can be assigned to perform Intake duties. When this has happened, NUE has not grieved management's right to change work assignments.

The record further indicates that the first collective bargaining agreement for the County's social services employees was negotiated about 1971. The job posting language in the parties' initial labor agreement was the same as in the current labor agreement. Thus, the job posting language has not been changed over the years. When the initial bargaining unit was formed, professional and non-professional employees were included in the same bargaining unit. The Child Support employees were added in 1976. Effective with the 1989-90 collective bargaining agreement, the single bargaining unit was split into two bargaining units – one for professional employees and one for non-professional employees. Prior to the split into two bargaining units, non-professional employees had posting rights into professional positions, subject to their qualifications and seniority. The record contains several examples of non-professional employees who posted into professional positions. After the parties agreed to split the bargaining unit into separate professional and non-professional bargaining units, the opportunities for promotions of this type were diminished.

Another change in the composition of the professional bargaining unit occurred recently. In July, 1996, the County created a Child Support Agency which was separate from the Department of Social Services. When this happened, the County petitioned the Wisconsin Employment Relations Commission to remove the Child Support positions from the bargaining unit and proposed the creation of a separate and new bargaining unit for the professional courthouse employees. Late in 1997, the Wisconsin Employment Relations Commission ruled in favor of the County on that matter, and as a result the instant bargaining unit in the Department of Social Services is now comprised solely of social workers.

POSITIONS OF THE PARTIES

NUE

NUE views this case as a job posting case. That being so, it relies exclusively on the posting provision (Sec. 5.01) to support its case. It contends the grievant's job posting rights were violated when the County denied his transfer request. It makes the following arguments to support this contention.

First, NUE notes at the outset that the County interprets Sec. 5.01 (the posting provision) to apply only to those situations where a Social Worker I posts for a Social Worker II position. The Association reads that provision differently. Specifically, it reads Sec. 5.01 to also apply to a situation, like the one herein, where a Social Worker II bids for another Social Worker II position. The Association asserts that were it otherwise, and a Social Worker II could not bid for another Social Worker II position, this would mean that a Social Worker II would have no further posting rights under the contract because the Association acknowledges that Social Worker IIs cannot post into Social Worker III positions. NUE argues that the County's interpretation of Sec. 5.01 is erroneous. According to NUE, there is nothing in the posting provision which prevents a Social Worker II from posting into a different Social Worker II position, or for that matter, even a vacant Social Worker I position (which admittedly would entail a reduction in pay). NUE argues that since there is nothing in Sec. 5.01 which precludes a Social Worker II from bidding into another Social Worker II position, the County is trying to add language to that provision that does not exist. In making this argument, NUE acknowledges the point that the County has the right to transfer and assign employees within the Department. It further acknowledges the point that if the grievant is awarded the position in the Adult Services Unit, he could still be reassigned by management back to the Children's Unit. Nonetheless, NUE argues that these two points do not eliminate the job posting rights which are granted to employees under Sec. 5.01. According to NUE, the County simply ignored the grievant's job posting rights in this instance. It argues it was a contract violation to do so. As NUE sees it, a contrary interpretation of Sec. 5.01 will render that language meaningless.

Second, NUE comments on the grievant's qualifications for the position in the Adult Services Unit. It notes in this regard that he has eight years experience with the Department. It characterizes him as a valuable employee and notes that his supervisors wished him well in his effort to get the vacant (Social Worker) position in the Adult Services Unit. It therefore argues the grievant was qualified for the posted position.

In order to remedy this alleged contractual breach of the posting language, NUE asks that the grievant be awarded the position he sought in the Adult Services Unit and that the employee currently in that position be reassigned to the grievant's position in the Children's Unit.

County

The County disputes NUE's assertion that this is a job posting case. In the County's view, this is not a job posting case, but rather a work assignment case. That being so, the County relies on the contract provision covering work assignments (Article XXII) to support its position here. It contends that provision specifically gives it the right to make work

assignments, so it did not violate the contract when it denied the grievant's request to transfer into the Children's Unit. It makes the following arguments to support this contention.

First, the County addresses Articles V and XXII of the contract and their applicability here. It argues that Article V, specifically Section 5.01 which NUE relies on, does not apply to this situation. The premise for this argument is as follows. It notes at the outset that the position which was posted was a Social Worker position, not an Adult Services Unit position. It also notes that the job posting did not list specific job duties. The County believes these points are significant because the grievant already is a Social Worker II and he signed a posting to be hired as a Social Worker II. The County avers that by signing the posting, the grievant was not seeking a promotion because he already works as and is paid as a Social Worker II. Rather, he was trying to use the promotion provision as a vehicle for selecting specific job duties (namely, Adult Services duties). The County asserts that the assignment of job duties has been expressly reserved to management by the Management Rights clause (Article XXII). It contends the application of that provision here supports the County's position. The County asserts that if the Union wants Section 5.01 to apply to the assignment of duties within the same classification (i.e. Social Worker II), then the Union must bargain for and obtain an express definition of "promotion" which provides for the posting of duties rather than positions.

Second, the County argues that past practice supports its position here. It notes in this regard that management has used generic postings for Social Worker positions for many years which never listed job duties in the postings, just job titles. Thus, employees have not been guaranteed specific job duties. It also notes that for many years, management has changed the duties performed by individual social workers based on the needs of the Department, and the Union has never challenged management's right to make those assignments. The County believes that this past practice makes it clear that Article V has no application in the situation in which the posting is for a Social Worker II position, and the employee is already classified as a Social Worker II.

Third, the County addresses what it characterizes as the history of the bargaining unit. It notes in this regard that while the current unit is comprised solely of social workers, the unit previously consisted of more classifications of employees. The County avers that when it did, there were more promotional opportunities than exist now. The County submits that the diminished opportunities for posting is not the result of an onerous contract interpretation, but rather the result of the bargaining history just noted.

Finally, the County argues that its decision to continue to assign the grievant duties in the Children's Unit was neither arbitrary nor capricious. It cites the following to support this premise. First, it notes that had it granted the grievant's transfer request to move to the Adult

Services Unit, it would be three social workers short in the Children's Unit. Second, the County calls attention to the fact that it is up to management to best utilize staff to get the work done. Director McGiffin felt it would be hard for a newly-hired social worker to step in and work on the tough cases which the grievant had been working on in the Children's Unit, and her belief has not been shown to be unreasonable.

Based on the reasons set forth above, the County requests that the grievance be denied.

DISCUSSION

It is noted at the outset that the parties have approached this contract interpretation case from different perspectives. NUE sees it as a job posting case and therefore relies on the posting language contained in Section 5.01 (the promotion provision). In contrast, the County sees it as a work assignment case and therefore relies on the work assignment language contained in Article XXII (the management rights clause). In the analysis which follows, I find it is a work assignment case covered by Article XXII.

Attention is focused first on Article V, Section 5.01. Article V is entitled "Promotions". The first section of that Article, Sec. 5.01, deals with the filling of positions. An overview of that section follows. The first sentence provides that in the event the County chooses to fill a vacancy or create a new job, the County will post the vacancy. The second sentence provides that the posting will contain the prerequisites for the position. The third sentence provides that bargaining unit employees who meet the position's prerequisites may apply for same. The fourth and fifth sentences have no bearing on this case and therefore are not summarized here. The last sentence of the section provides that if none of the bargaining unit applicants qualify, the County may hire an external applicant for the position.

While at first blush this case would appear to be covered by Section 5.01 since a posting is involved, I find that section has no application herein. The following shows why. My discussion begins with a review of the facts pertinent to the posting. In August, 1997, the County decided to fill a vacant Social Worker I or II position, so it posted the vacancy. This posting listed the prerequisites for the position. The grievant subsequently asked to be considered for the vacancy. There is no question that the grievant possessed all the prerequisites for the Social Worker I or II position because at the time he was already classified as, and paid as, a Social Worker II.

The last point referenced above is important in this case because the grievant was not seeking a promotion when he asked to be considered for the Social Worker I or II vacancy. By that, I mean he was not seeking a promotion in the traditional sense (i.e. a higher salary, supervisory responsibilities, etc.) Instead, what the grievant was trying to do when he asked to be considered for the posted vacancy is use the posting provision as a vehicle for selecting his

job duties. Specifically, he wanted to move into the Adult Services Unit from the Children's Unit. While the posting in question did not list any job duties or identify which unit the person would be assigned, the grievant heard via the office grapevine that whoever filled the position would probably be assigned to the Adult Services Unit. His letter to McGiffin made it clear that he wanted to move into the Adult Services Unit. In essence then, the grievant sought a transfer from one unit to another.

NUE believes the posting language covers transfers. However, notwithstanding NUE's contention to the contrary, the posting language does not apply to or cover transfers and the assignment of job duties. Instead, another contract provision does. That provision will be reviewed next.

Article XXII (the Management Rights clause) covers, among other things, transfers and the assignment of job duties. That clause specifically gives management the right to transfer employees and to assign them specific job duties. In this case, management decided to not grant the grievant's transfer request. The Management Rights clause gives management the right to make that call provided its decision was not arbitrary or capricious.

I find that management's decision to not grant the grievant's transfer request was not arbitrary or capricious because of the following record evidence. First, at the time the grievant requested the transfer out of the Children's Unit, that unit was already about to be down two social workers. If the grievant had transferred out, the unit would be down one more. Second, Director McGiffin felt it would be difficult for a newly-hired social worker to step in and work on the hard cases the grievant was then handling in the Children's Unit. Nothing in the record establishes that her belief was exaggerated or overblown. It is therefore held that the County did not act arbitrarily or capriciously when it decided to keep the grievant in the Children's Unit and not transfer him to the Adult Services Unit.

NUE argues that if a Social Worker II cannot bid for another Social Worker II position with different duties, then for all intents and purposes a Social Worker II has no further posting rights under the contract. As a practical matter, that is true. However, the fact that posting rights for Social Worker IIs are limited cannot be attributed solely to the interpretation of Sec. 5.01 reached above. There are other factors as well. First, there is another contractual basis in that the parties have agreed that Social Worker IIs cannot post into Social Worker III positions. In Section 5.02, it specifically provides that promotion from a Social Worker II to a Social Worker III is at the discretion of the Employer. Since just two of the Department's 24 social workers are classified as Social Worker IIIs, it can be inferred that the County has exercised its discretion (to promote) sparingly. Second, the record indicates that promotional opportunities for unit employees have diminished over the years as the number of classifications in the unit have decreased. Thus, the reduction in the size of the bargaining unit is also responsible for the diminished posting opportunities for Social Worker IIs.

Finally, it is noted that the County's past practice buttresses the result reached herein. The following shows this. To begin with, the record indicates that for decades the County has posted what can be characterized as generic postings for Social Worker I and II positions. These postings contained the qualifications needed, the starting date and the salary. None of these postings listed specific job duties, nor did they identify which unit the employee would be assigned to (such as the Children's Unit, the Adult Services Unit, etc.) This means that past postings have not guaranteed that social workers would perform specific job duties. The posting involved here was similar to previous postings. It likewise did not guarantee that whoever filled the position would be assigned certain duties (such as working in the Children's Unit). Second, it has previously been noted that management has the contractual right to change the duties performed by social workers. The record indicates that over the years, management has exercised that right on numerous occasions. Specifically, social workers assigned to one unit have been assigned to perform duties in another unit. When this has happened, NUE has not challenged management's right to change work assignments. Third, the posting provision contained in Section 5.01 has not previously been interpreted as allowing employees to post for specific duties they would like to perform (such as working in the Children's Unit). If NUE wants Section 5.01 to apply to transfers and the assignment of duties within the same classification (i.e. such as the Social Worker II classification), it must bargain a change in that contract language.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That Article V, Section 5.01, does not have any application in the situation in which the position being posted is a Social Worker I or Social Worker II position, and the employee who wishes to post is already classified as a Social Worker II.

2. That the County did not violate the collective bargaining agreement when it decided to keep the grievant in the Children's Unit and not transfer him to the Adult Services Unit as he requested. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 19th day of August, 1998.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

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