

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MANITOWOC COUNTY SUPPORTIVE SERVICES EMPLOYEES,
LOCAL 986-A, AFSCME, AFL-CIO**

and

MANITOWOC COUNTY

Case 341
No. 56773
MA-10408

Appearances:

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

Mr. Steven J. Rollins, Corporation Counsel, Manitowoc County, appearing on behalf of the County.

ARBITRATION AWARD

Manitowoc County Supportive Services Employees, Local 986-A, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Manitowoc County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Manitowoc, Wisconsin, on February 17, 1999. The hearing was transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on June 3, 1999.

BACKGROUND

The facts underlying the grievance are not in dispute. The grievant Cheryl Bohm is employed as a Clerk/Typist IV in the Human Services Department. The grievant began her employment with the County on July 25, 1988, in Human Services as an IM 1 and advanced over the years and was reclassified as an Economic Support Specialist III on July 29, 1992, and she held this classification until May 5, 1997, when the grievant posted into the Clerk/Typist IV position and took a decrease in pay. In June 1998, the County had a vacancy in Economic Support and posted for an Economic Support Specialist I on June 15, 1998. The grievant posted for the position and as she was the most senior applicant, she was offered the position. On June 26, 1998, the grievant accepted the position provided she was paid \$13.13 per hour which was the top rate of the Economic Support Specialist III, the same rate she was paid before she left to transfer to the Clerk/Typist IV. The County offered to pay the highest rate of the Economic Support Specialist I classification or \$11.69 per hour. The grievant declined this offer and the County appointed someone else to the position of Economic Support Specialist I. Thereafter a grievance was filed which asserted that the refusal to place the grievant at the Economic Support Specialist III level violated the contract. The grievance was denied and appealed to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issues. The Union poses the issues as follows:

Did the County violate the collective bargaining agreement by denying Cheryl Bohm the classification as Economic Support Specialist III when it awarded the Economic Support position posted June 15, 1998?

If so, what is the remedy?

The County states the issues as follows:

Does the County have the right to determine the composition of its own workforce?

Did the County violate the collective bargaining agreement by posting an Economic Support Specialist I position after an Economic Support Specialist III position was vacated? If so, what is the remedy?

Did the County violate the collective bargaining agreement when it offered Cheryl Bohm the Economic Support Specialist I position that she bid on at the highest rate of pay on the Economic Support Specialist I pay scale? If so, what is the remedy?

The undersigned frames the issues as follows:

Did the County violate the collective bargaining agreement by offering the grievant the vacant position at the top rate of the Economic Support Specialist I classification rather than the top rate of the Economic Support Specialist III classification? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

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ARTICLE 11 – TRIAL PERIOD

An employee, upon being promoted or transferred to another classification, shall serve a trial period of forty-five (45) calendar days [six (6) months for paraprofessionals (economic support specialists, social service aides, systems programmer/analyst and administrative assistant)] in the new classification.

An employee who cannot do the work of the new classification within the forty-five (45) day (six (6) months for paraprofessionals) trial period shall be returned to his or her former position. The Employer may step the employee back to his or her former position at any time during the trial period, subject to the grievance procedure.

The employee may return to his or her former position if he or she so elects during the initial forty-five (45) calendar day (six (6) months for paraprofessionals) of the trial period upon written notice to his or her Department Head.

As provided herein, the employee shall be entitled to the pay rate for the position he or she is promoted or transferred to effective the date the employee performs the functions of the new position, until the employee is stepped back or returns to his or her former position. The employee shall receive a one (1) pay step increase in wages to the next higher pay step on the new classification upon promotion, and thereafter he or she shall progress on the wage schedule (APPENDIX A or B) according to the service requirements of each step.

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ARTICLE 22 – JOB POSTING

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Whenever any vacancy occurs within an Employment Group (Courthouse or Human Services) it shall be awarded to the employee from that Group with the greatest seniority within seven (7) working days after the completion of the posting period. If no employee from that Employment Group applies for or, having bid the vacancy, is not qualified for the vacant position, it shall be awarded to the employee applicant, from the remaining Employment Group (Courthouse or Human Services), with the greatest seniority.

A “vacancy” shall not mean an opening in a position which occurs as a result of a position incumbent leaving the position during the trial period in Article 11 – Trial Period. If an employee, who has posted into a position, elects to return to the employee’s former position during the trial period, the position shall be filled by the employee with the next greatest seniority who posted for the position. The position shall not be re-posted unless no qualified employee remains on the posting list.

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ARTICLE 24 – PROMOTIONS AND RECLASSIFICATIONS

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B. Human Services

1. Promotions

Promotions within the Human Services Group shall be granted on the basis of seniority providing the applicant for such position is qualified and eligible for such position.

2. Reclassification

a. Reclassification shall be granted within the following groups:

1. Economic Support Specialist, Trainee- 2-3
2. Clerk/Typist 2-3-4
3. Social Service Aide 1-2-3
4. Administrative Assistant
5. Verification Specialist
6. Economic Support Specialist Lead Worker

b. Reclassification shall be granted automatically on the following basis:

1. Upon successful completion of the experience required for each specific position of the Manitowoc County Human Services Department as defined in Appendix C of this Agreement.

2. Upon successful completion of the training or education requirements set forth by the Manitowoc County Human Services Department as defined in Appendix C of this Agreement.

3. Upon the satisfactory determination of the Director, or in his or her absence, his or her designee, that conditions for reclassification have been met.

4. In the event the Employer's agent(s) have unjustly or incorrectly evaluated an employee or unjustly refused or failed to approve a reclassification, the employee shall have recourse to the grievance procedure.

3. Employees shall be considered for reclassifications when requirements for the reclassification have been met. The department shall perform all necessary evaluations to determine whether an employee has attained the requirements for a reclassification. Evaluations shall be completed and the results communicated to the employee not more than thirty (30) days prior to, nor more than thirty (30) days after the employee's request for reclassification has been received by the supervisor. The department shall notify the employee of its decision on a reclassification within thirty (30) days of the employee's request for reclassification or evaluation, whichever is later. If a reclassification is approved, it shall be effective as of the first pay period following approval of the reclassification. If a reclassification is denied, the employee may reapply after six (6) months from the date of the denial.

4. Employees shall progress along the pay grade steps when they have completed the appropriate number of months between the steps (e.g. 18 months between the 24 and 42 month steps.) The employee's length of service shall be evaluated using the anniversary date in the position as the starting time.

C. Standards. The standards for promotions and reclassification shall be set forth in Appendix C of this Agreement subject to the Employer's right to make further modifications in minimum qualifications of positions. In the event the Employer makes such modifications, the Union may demand negotiations on the impact of the modifications.

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APPENDIX A – WAGES, HUMAN SERVICES GROUP

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HUMAN SERVICES GROUP 1997 HOURLY RATES (3.75%)						
Classification	Start	6 Months	12 Months	24 Months	42 Months	60 Months
ES 3, SSA 3	\$11.37	\$11.71	\$12.05	\$12.39	\$12.75	\$13.13
ES 2, SSA 2	\$10.35	\$10.74	\$11.07	\$11.42	\$11.83	\$12.16
ES 1 (Trainee) SSA 1	\$9.77	\$10.19	\$10.58	\$10.97	\$11.37	\$11.69
C/T 4	\$11.07	\$11.38	\$11.71	\$12.05	\$12.40	\$12.76

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APPENDIX C – REQUIREMENTS FOR HUMAN SERVICES GROUP

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Economic Support Specialist (ESS Trainee). Entry level position during first (1st) year of employment. Works under close supervision of supervisor and direction of Lead Worker/Trainer. Minimum education requirement: High school graduation or equivalent. Relevant post-high school training/education and computer data entry experience is preferred. The achievement of a passing score on the ESS examination administered by the county is required for consideration (current employees of the county will only be allowed to take the test once in a 12-month period).

Economic Support Specialist (ESS) 2. Following one (1) year of employment at the ESS Trainee position or the end of the six-month probationary period, whichever comes last, with satisfactory performance appraisal, and with supervisory recommendation. Can work more independently, carries full caseload and demonstrates ability to effectively handle all routine aspects of the job. Must satisfactorily complete the DHSS-required number of hours of Economic Support-related training each year, including human relations skills.

Economic Support Specialist (ESS) 3. Experienced worker level position following minimum of three (3) years of experience as an ESS 2, and with written supervisory recommendation. Has demonstrated advanced skill, as evidenced by performance appraisal. Has demonstrated ability to work independently; error rate consistently within performance standard limits as evidenced by DHSS Quality Control, Food Stamp audit, agency targeted case reviews and supervisory review. Has demonstrated ability to handle difficult clients with skill and tact. Is able to compute routine and unusual case situations correctly. Can be called upon to assist in training of new workers. Must satisfactorily complete the DHSS required number of hours of Economic Support-related training each year, including human relations skills.

UNION'S POSITION

The Union contends that the grievant was qualified to receive the pay level of the Economic Support Specialist III because she had been in that pay class for a number of years. The Union argues that the grievant was given a promotion because she was moving from a classification Clerk/Typist IV at \$12.76 per hour to a classification with a higher rate of \$13.13 which pursuant to Article 11, paragraph four, entitled her to a step increase which would be \$13.13. The Union insists the grievant was qualified for the Economic Support Specialist III position because she met the criteria set forth in Appendix C of the parties' agreement. It points out that others in the Economic Support Specialist area were assigned changed caseloads prior to receiving training. It submits that the change from one classification to another does not mean starting at the lowest pay level.

The Union asserts that contrary to the County's position, the grievant had the skills to perform at the Economic Support Specialist III level and that the grievant did not require training for W-2 as the position does not deal with W-2 and the County's opinion was contradicted by the Economic Support Lead Worker as to whether the grievant would be regarded as grandfathered for state required training. It observes that the County did not inquire about whether the grievant would be considered grandfathered and the inconsistencies in testimony are stark.

It claims that the grievant was qualified for the position of Economic Support Specialist III but the County set terms not provided in the contract that the grievant would be paid at the highest rate for a trainee and could be reclassified after six months. It insists that

there is no basis for these terms which are different than the contract provides. The Union maintains the reference to the DeGroot case is not appropriate because that was part of a settlement, was not precedent setting and was based on its unique circumstances and the DeGroot matter must be entirely ignored.

It submits in summary that the grievant is qualified for the position and is entitled to Economic Support Specialist III pay. It asserts that even if they grievant entered as an ESS I, nothing in the contract prevents her from requesting a reclassification immediately and the County violated the contract by imposing a six month requirement. The Union believes the grievant should have entered the position as an Economic Support Specialist III as she met all the criteria and should be placed at the \$13.13 pay rate because it was a promotion. It seeks an order awarding the grievant the position at \$13.13 per hour and she be made whole from the date of her acceptance.

COUNTY'S POSITION

The County contends that the Economic Support Specialist I, II, and III are separate classifications contrary to the Union's position that they are all part of one classification or should be treated as such because they make up the Economic Support track. The County points out that the contract provides criteria for movement between classes and the wage schedule lists each class separately with time in grade steps for each. It asserts that the seniority lists contain the current classification of each employee and distinguishes job classification held by each. It asserts the Union admitted movement from one ESS level to the next was a change in classification. It refers to the testimony of the Human Services Director and the Personnel Director that the I, II, and III positions are different classifications and movement between them is a reclassification.

The County insists that the movement from a Clerk/Typist IV to an Economic Support Specialist I is a move from a higher pay range (\$11.07 to \$12.76) to a lower pay range (\$9.77 to \$11.69) and is governed by Article 11, paragraph 6.

The County maintains that it has the right to control the compensation of its workforce and its not required to fill a position that has been vacated at the same level as that vacated. The County relies on the management rights clause which gives it the sole authority to determine what positions are to be filled and at what level. It notes a grievance was filed over this by the Union and then withdrawn. It claims that there is no requirement that a vacated position be posted at a classification or rate of pay higher than that posted.

The County insists that the offer to place the grievant in the ESS I position with the right to request a reclassification in six months is consistent with past practice. It concludes that the grievance should be denied.

UNION'S REPLY

The Union contends that the parties disagree over whether the County is permitted by the collective bargaining agreement to place an employee who met all the qualifications of an ESS III at the ESS I pay level. It claims that the grievant should have been placed at the ESS III level at \$13.13 per hour. It notes that on promotion, an employee receives a one step increase and it claims that the County intended to utilize the grievant as a III.

The Union asserts that the parties disagree as to whether the County could delay the applicant's appeal for a reclassification. It cites Article 24 B asserting that the County has thirty days to evaluate and notify the employee and there is no set time limit for an employee to wait before requesting a reclassification. It asserts the County violated these contract provisions.

The Union argues that because the County failed to live up to the standards of the agreement, the grievant was unwilling to accept the position with altered standards and she was effectively barred her from the position unless she accepted the County's terms and would have had to gamble on the outcome of this arbitration as it would have cost her \$1.07 per hour and she could not afford to make that gamble of a 9% reduction in her current income.

The Union argues that there was no assurance that the grievant would be reclassified in six months and this time line violated the express terms of the contract. The Union claims that although the grievant may have required training, it was the County's intent to have her do the work of an ESS III but not to pay her at ESS III as she should be paid. It rejects the reference to DeGroot as a non-precedental agreement which reflects poorly on the County for bringing it up.

The Union notes that the County relied on the right to direct the workforce but ignored the words "unless otherwise provided herein." It submits that the clear language of the contract has moderated the County's right and the grievant should be awarded the ESS III position effective the date she accepted it.

COUNTY'S REPLY

The County contends that the Union omitted certain facts such as the grievant knew she was posting for an ESS I position and admitted she was offered an ESS I position. It repeats its arguments from its main brief that the ESS I, II, and III are separate job classifications which the Union attempts to obscure and claim the grievant was entitled to enter the position as an ESS III. The County argues that the Union totally ignores management's right to control the composition of its workforce and misstates the past practice in filling Economic Support Specialist positions. The County observes that it has posted ESS positions at all levels, most frequently at Economic Support Specialist I. The County takes issue with the Union's assertion that had the grievant entered as an ESS I, she could immediately request a reclassification because the contract expressly states that an employee can be reclassified

following one (1) year of employment at the ESS I position. The County admits it could require that a person who reenters a line of progression that a person has abandoned start at the bottom, but it has not and offered the grievant the top pay of ESS I. It notes, however, that the grievant never accepted the position, so she was never in a position to request to be reclassified.

The County asserts that the Union overreacts in its attempt to exclude the evidence regarding DeGroot. The County argues that when the matter first arose in the DeGroot case, it was unique, but when faced with the exactly same situation in the present case, it was no longer one of a kind and while the DeGroot settlement does not create a binding past practice, it is highly informative and cannot be entirely ignored.

The County submits that the Union makes a variety of other irrelevant arguments which contradict themselves and are totally irrelevant. It also insists the Union's proposed remedy reaches too far because the grievant rejected the position when it was offered her because the agreement provides that an employee shall perform the assigned work task and grieve later unless health and safety is endangered. It alleges that the grievant's failure to mitigate damages offsets any remedy.

The County concludes that it followed the collective bargaining agreement and the grievant's refusal to accept the position of Economic Support Specialist I when it was offered bars her from any relief.

DISCUSSION

Under Article 3 – Management Rights Reserved, the County has the right to post the vacant position as an Economic Support Specialist I. Although the language states “unless otherwise herein provided,” there appears no express provision that limits the County in determining what positions it will post. Article 22 discusses job posting procedures and provides that new positions that are created require negotiations for a wage rate and significant change in the job description, job duties, assignment or qualifications also require the parties to meet and negotiate as may be required. Here there was no new job or any significant change in the above factors. The County simply posted an Economic Support Specialist I position. The County had the right to do so and that right did not change merely because the grievant as an applicant arguably had greater qualifications than that sought by the County. Also, contrary to the grievant, the County was not required to post the position as an Economic Support Specialist III. Thus, the County's posting the position as an Economic Support Specialist I was within its management rights and did not violate any other provision of the contract.

In accordance with Article 22, the County awarded the position to the grievant as she had the greatest seniority and applied for the position of Economic Support Specialist I Trainee. (Ex-11). The grievant conditionally accepted the position provided she be paid \$13.13 per hour which was the top rate of an Economic Support Specialist III. (Ex-13). The

County declined to pay the grievant that amount. (Ex-12). The grievant could have accepted the position and filed a grievance as to pay but did not accept the position as offered. It appears that the grievant engaged in self-help and did not follow the adage, "work now, grieve later." Under the circumstances, the grievant waived the right to prosecute her alleged claim that she should be paid at the top rate of Economic Support Specialist III. The grievant knew the rate when she applied for the position and her assertions of economic hardship as a reason not to accept it and grieve later are not persuasive. The grievant's failure to accept the position as offered constitutes a waiver of any claim to the position and the theory of her case provides her no relief. Thus, the grievance is denied on the grounds that the grievant never accepted the offer of the position.

Even assuming that the grievant did not waive her claim to the position, the evidence fails to establish any violation of the collective bargaining agreement. Whether or not the grievant was qualified to perform at the Economic Support Specialist III level is irrelevant. There is no express provision that states that a position will be classified to meet the qualifications of the applicant. Article 11 provides that when an employee moves from a classification with a higher pay range to a classification with a lower pay range, he or she will be placed at the step of the new classification which provides a decrease in pay. The grievant was a Clerk/Typist IV and the pay range was \$11.07 to \$12.76. The pay range for an Economic Support Specialist I is \$9.77 to \$11.69. The grievant was making \$12.76 so was properly offered \$11.69. Contrary to the Union, this was not a promotion because the vacancy would have to be in the higher classification of Economic Support Specialist III, range \$11.37 to \$13.13. The Union's assertion that because the grievant was qualified for a III even if proved, would not make the vacancy an Economic Support Specialist III because it was posted and remained an Economic Support Specialist I. Thus, there is no violation of Article 11.

The Union also asserted a violation of Article 24 B and that requires successful completion of the experience required for each specific position in Appendix C. Appendix C provides that following one year at the ESS trainee position along with other requirements will a reclassification be given. The mere fact that the grievant had completed one year as a trainee some years ago did not mean the requirement did not apply. Suppose she had been a Clerk/Typist IV for fifteen (15) years after attaining the Economic Support Specialist III classification or had been hired from another County where she had been an ESS III, the requirement of Appendix C would not change where the applicant accepts the Economic Support Specialist I vacancy. There is no provision of the contract that recognizes or grants prior credit for experience in any classification. In short, the Union has failed to show any violation of Article 24 B.

The Union simply failed to prove any violation of any provision of the parties' collective bargaining agreement no matter how well qualified the grievant was. The County properly posted a vacancy for an Economic Support Specialist I and nothing in the agreement requires the County to change the posting based on the qualifications of the applicant. The normal time limits of the reclassification procedure specified in the contract provide the only reclassification scheme and it follows that the grievance lacks merit.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The grievant waived her right to claim any violation of the agreement by her failure to accept the position. Secondly, the County did not violate the collective bargaining agreement by offering the grievant the vacant position at the top rate of the Economic Support Specialist I classification rather than the top rate of the Economic Support Specialist III classification, and therefore, the grievance is dismissed in all respects.

Dated at Madison, Wisconsin, this 9th day of July, 1999.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator