

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MARATHON COUNTY HIGHWAY DEPARTMENT EMPLOYEES
LOCAL 326, AFSCME, AFL-CIO**

and

MARATHON COUNTY

Case 264
No. 57510
MA-10658

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of Marathon County Highway Department Employees Local 326, AFSCME, AFL-CIO.

Ruder, Ware & Michler, S.C, by **Attorney Dean R. Dietrich**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Marathon County.

ARBITRATION AWARD

Marathon County Highway Department Employees Local 326, AFSCME, AFL-CIO, hereinafter Union, and County of Marathon, hereinafter County, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on April 26, 1999, requested the Commission to appoint either a staff member or a Commissioner to serve as Arbitrator. The Commission appointed Paul A. Hahn as Arbitrator on July 8, 1999. (The arbitration had been originally assigned to James R. Meier on April 30, 1999 and was transferred to Paul A. Hahn due to a scheduling conflict). Hearing in this matter was held on July 21, 1999 in the Personnel Department conference room of the Marathon County Courthouse, Wausau, Wisconsin. The hearing was not transcribed. The parties filed post hearing briefs which were received by the Arbitrator on September 2, 1999. The parties were given the opportunity to file reply briefs but declined to do so. The record was closed on September 17, 1999.

ISSUE

Union

The Union did not submit a statement of the issue.

County

Whether the County violated the Labor Agreement when it assigned the responsibility of Crew Chief for the Bridge Crew on the basis of management discretion and did not follow the job posting article for such assignment. If so, what is the appropriate remedy?

Arbitrator

I adopt the issue as stated by the County as being a reasonable description of the issue as presented by the record.

RELEVANT CONTRACT PROVISIONS

Article 1 – Recognition

The County recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time employees of the Marathon County Highway Department excluding supervisory, professional and office personnel, the commissioner, assistant commissioner, engineer, assistant engineer, shop supervisor, patrol superintendent, assistant patrol superintendent, and purchasing agent for the purposes of conferences and negotiations with the employer or its authorized representative on questions of wages, hours and other conditions of employment.

Article 2 – Management Rights

Public policy and the law dictate clearly the Department's primary responsibility to the community as being that of managing the affairs efficiently and in the best interests of our clients, our employees, and the community. The employer's rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.

1. To utilize personnel, methods and means in the most appropriate and efficient manner possible.

2. To manage and direct the employees of the department.
3. To hire, promote, transfer, assign, or retain employees in positions within the department.
- ...
6. To determine the size and composition of the work force.

Any unreasonable application of the management rights shall be appealable by the Union through the grievance and arbitration procedure.

Article 3 – Grievance Procedure

1. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

6. Arbitration:

C. Arbitration Hearing: the arbitrator shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union which shall be final and binding upon both parties.

F. Decision of the Arbitrator: The arbitrator shall not modify, add to or delete from the express terms of the agreement.

Article 7 – Job Posting

1. Posting Period: Notices of vacancies 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 employer shall notify the union in writing in the event it decides not to fill a vacancy and/or abolish a position. The employer shall send a copy of the posting to the Union.

2. Requirements: The job requirements, qualifications, and rate of pay shall be part of the posting and sufficient space for interested parties to sign said posting.

3. Job Award: In filling a vacancy, the employee signing with the greatest seniority in the Department who can qualify shall be given the position. The County shall post on the bulletin boards the name of the employee who is awarded a posted job and also provide a copy to the Union.

There shall be a ten (10) day working trial period for any employee posting into a new position in the Highway Department where the employee may exercise the option of returning to the employee's former position.

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APPENDIX A SALARY SCHEDULE

EFFECTIVE - January 1, 1997

...

Crew Chief: The following premiums shall be added to the hourly rate of pay for employees assigned to perform in the role of a "crew chief":

Bridge Crew Chief	-	60 cents per hour
Shop Crew Chief	-	60 cents per hour
Paving Crew Chief	-	35 cents per hour
Construction Crew Chief	-	35 cents per hour
Asphalt Plant Crew Chief	-	35 cents per hour

When the Crew Chief is on vacation and the crew is operating, the senior employee shall be assigned crew chief responsibility and paid the hourly premium.

STATEMENT OF THE CASE

This grievance involves the Marathon County Highway Department and Highway Department AFSCME Local 326, representing the employees set forth in Article 1 - Recognition. (Jt. 1) The Union alleges a contractual violation by the County when it posted a Trades Technician II position in the Highway Department and did not include the assignment of Crew Chief for the Bridge Crew to the person filling that position. The posting was on December 22, 1998. (Jt. 2) The Union filed a grievance on December 30, 1998 alleging that the Trades Technician II position was not posted properly and that the County violated the collective bargaining agreement by appointing the Trades Technician II Crew Chief but not by

seniority in violation of Article 7 – Job Posting. (Jt. 2) On December 30, 1998 the grievance was denied by Highway Commissioner Speich in a memorandum to Union President Mike King. (Jt. 2) By letter dated February 26, 1999, County Personnel Director Karger denied the grievance. Karger stated that Article 7 – Job Posting does not address the posting of Crew Chief assignments because Crew Chief assignments are assigned to employees as referenced in Appendix A – Salary Schedule. (Jt. 1) The Union processed the grievance to the County Personnel Committee by letter dated March 1, 1999; the grievance was denied by the County Personnel Committee on April 5, 1999. Notification to the Union was sent by Personnel Director Karger on April 7, 1999. (Jt. 2)

Marathon County operates a Highway Department. As part of the operation, the County has what is called a Bridge Crew which is supervised by a Leadman or Crew Chief. Prior to the 1995-1997 contract negotiations, leading to the contract in place for this arbitration, a Crew Chief received a premium of 5 cents per hour when the employe was functioning as Crew Chief. (Jt. 1 and Co. 1) On December 22, 1995 the County posted a Trades Technician II position; the posting pursuant to the labor agreement stated that “the successful bidder for this position will be appointed the lead man of the Bridge Crew.” (Co. 2) At that time, the County had one Trades Technician II position. The collective bargaining agreement, Article 7, Section 3 provides that “in filling a vacancy, the employee signing with the greatest seniority in the Department who can qualify shall be given the position.” (Jt. 1) Employe Mike Plahetka, the senior and most qualified employe, was the successful bidder and became the Trades Technician II and Leadman of the Bridge Crew. (The parties at hearing stated that Leadman and Crew Chief are synonymous).

During the negotiations for the 1995-1997 labor agreement, the Union proposed that Crew Chief language be revised to provide that the Crew Chiefs, including the Bridge Crew Chief, would receive an extra 35 cents per hour and that the position of Crew Chief would be filled pursuant to the job posting procedure of Article 7. (Co. 3) The parties reached tentative agreement for a 1995-1997 labor agreement, ultimately ratified by the Union, wherein the language relating to Crew Chief was modified to provide that Bridge Crew Chief would receive a 60 cent per hour premium and that premium would be given to employes “assigned” to perform the role of a “Crew Chief.” The settlement further provided, in a separate paragraph, that when the Bridge Crew Chief is on vacation and the Bridge Crew is operating, the senior employe shall be assigned Crew Chief responsibility and paid the hourly premium. (Co. 4 and 5)

During 1998, as part of a Highway Department reorganization, the Highway Department added two Trades Technician II positions making a total of three positions. On December 22, 1998, the Highway Department posted for a Trades Technician II position. (Jt. 2) There was no mention in that posting of a Crew Chief’s duties being assumed by the successful bidder for that Trades Technician II position. No one bid for the Trades Technician II position. The position came open by the resignation of Plahetke. The County did not, because no one posted for the position, fill the Trades Technician II position from the posting and assigned the Crew Chief duties to a less senior employe. The Union then

filed the aforementioned grievance in this matter as the Crew Chief for the Bridge Crew was being appointed by the County rather than being selected through a job posting and by seniority under Article 7.

The parties processed the grievance through the contractual grievance procedure and were unable to settle the grievance; the grievance was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on July 21, 1999 in the City of Wausau, Wisconsin at the offices of the Marathon County Personnel Department. The hearing ended at 12:53 p.m.

POSITIONS OF THE PARTIES

Union

The Union argues that the posting of the Trades Technician II position in December of 1998, when employe Plahetke resigned, was a vacancy and since the position formerly included Crew Chief duties, the Crew Chief duties should have been part of the December 22, 1998 Trades Technician II position posting. The Union argues that the job posting language is clear that the resignation of Plahetke created a vacancy and the Trades Technician II position with Crew Chief duties is clearly a vacancy and that the "vacancy" language in the job posting article must be given its full effect. The Union argues that where language is plain and unambiguous, the Arbitrator may not resort to a matter of construction and must enforce the contract according to its terms.

The Union submits in the alternative that in the event the Arbitrator determines the language of the job posting procedure to be ambiguous that instances of past practice should be utilized to govern its interpretation. The Trades Technician II position was posted in 1995 as including Crew Chief duties; the Union argues that this is a past practice for this particular position. Therefore it is the Union position that the 1998 posting should have been posted with Crew Chief duties.

Lastly, the Union argues that the grievance should be sustained and that the County should be directed to re-post the Trades Technician II position on the Bridge Crew with the "Crew Leader" responsibilities as well as the added compensation. The Union further requests that the County make whole any successful bidder for losses incurred as a result of the alleged violation of the contract.

County

The County argues that the contract language which indicates the Crew Chief is to be assigned to an individual is clear and unambiguous. Reviewing Appendix A – Salary Schedule of the labor agreement the County points out to the Arbitrator relevant language as follows:

The following premiums shall be added to the hourly rate of pay for employees assigned to perform the role of a “crew chief”;

When the crew chief is on vacation and the crew is operating, the senior employee shall be assigned crew chief responsibility and paid the hourly premium.

The County argues that this language, negotiated into the 1995-97 labor agreement, provides that the Crew Chief responsibility is to be assigned by management and is not to be incorporated into any position that is filled through the job posting process. The County argues that the Crew Chief responsibilities are not treated the same as the responsibilities listed for various positions. Rather, the County submits the Crew Chief is a special assignment that, absent any restrictive language, is to be made by management in its discretion. The County avers that the language of Article 2 – Management Rights supports the County position that it has the right to make the assignment of Crew Chief in its discretion absent restrictive language.

As its alternative argument, the County argues that assuming *arguendo* that the contract language is unclear, the bargaining history shows that the agreement by the parties was that the assignment of a Crew Chief was a management prerogative. The County points out that in negotiations for the 1995-97 agreement the Union originally proposed contract language in its preliminary final offer which would make the Crew Chief responsibilities part of a position that would be filled pursuant to the job posting procedure of Article 7. The County points out that this language was rejected by the County and never incorporated into the labor agreement covering this grievance. The County argues that this is confirmed by the tentative agreement reached between the County and the Union which includes the new language regarding Crew Chief. Further the County argues that Brad Karger, Personnel Director for Marathon County, testified that in negotiating whether assignment of Crew Chief responsibilities would be by management or by a posting procedure, a compromise was reached. That compromise provided that the County would retain the right to assign the role of Crew Chief at its discretion but that seniority would be used to designate a temporary Crew Chief when the assigned Crew Chief was on vacation. The County submits that the Union cannot obtain through grievance arbitration something that it sought and failed to achieve through collective bargaining.

The County’s third argument is that the 1995 posting for Trades Technician II position does not support the Union’s grievance. The County first submits that one occurrence, where the job posting included the Crew Chief responsibilities, does not establish a practice requiring the County to use the job posting procedure for any other instance when assigning Crew Chief responsibilities. The County argues that it proved that in 1995 when the Trades Technician II position was posted there was only one Trades Technician II position in existence, and it was logical that the person awarded the position assume the responsibilities of Crew Chief. The County submits that the 1995 posting is different from the 1998 posting at issue in this matter. In 1998, there were three Trades Technician II positions in the Bridge Division and the County appropriately exercised its discretion to assign Crew Chief responsibilities to one of those three employees.

Lastly, the County submits that clear contract language authorizes the County to assign Crew Chief responsibilities exercising management discretion. The County argues that the Union's claim that Crew Chief responsibilities must be filled using the job posting procedure of Article 7 is without merit and that the contract language is clear on its face. The County submits that the Arbitrator must deny the grievance in its entirety.

DISCUSSION

This is a contract interpretation case. The parties have approached the issue from different viewpoints and with different arguments. The Union argues that the contract language is clear that Article 7 - Job Posting requires that the Crew Chief duties for the Bridge Crew be a part of the December 1998 job posting for a Trades Technician II position. The Union views the resignation of the previous bridge Crew Chief to create, under the job posting language, a vacancy that must be filled and that the vacancy includes the duties of the bridge Crew Chief. The Union argues that if I find the language of the job posting article ambiguous, then I should consider past practice to interpret the labor agreement. The Union offers the 1995 job posting of a Trades Technician II position, which was assigned the Crew Chief duties, as supporting its past practice argument.

The County on the other hand, argues that the contract language of Appendix A is clear that Crew Chief responsibilities are assigned by the County; the duties are not subject to the job posting procedure of Article 7. The County takes the position that if I find the language of Appendix A ambiguous then bargaining history for the 1995-1997 labor agreement proves that the use of the word "assigns" in Appendix A means that the County, at its sole discretion, makes the assignment of which employe will be a Crew Chief and receive the commensurate premium; such assignment is not subject to seniority.

I do not find either the job posting article or Appendix A ambiguous. The job posting article is straight forward that vacancies in "positions" are to be posted unless the County decides not to fill the position. The question then is whether the Crew Chief duties are a position or duties assigned to a position. I believe Appendix A makes clear that the duties of Crew Chief for the Bridge Crew and other crews are assigned; they are assigned as additional duties to an employe on the Bridge Crew for which that employe receives additional compensation. I believe the plain reading of the contract language, and in particular Appendix A, can only logically be read that if Crew Chief was a position it would be included in the list of positions in Appendix A and would not be separately described as "employees assigned to perform in the role of a 'crew chief.'" (Jt. 1)

The word "assigns" has a meaning which I believe and find does not support the Union position in this case. It is axiomatic under accepted arbitration case law that words are to be given their ordinary and popular meaning. 1/ The word "assign" can mean delegate, appoint, elect, authorize, empower or entrust. 2/ These words do not connote any mutuality between

two parties in making an assignment. Nor do the words express or contemplate that seniority or any other qualifier is attached to the word.

1/ *When interpreting agreements, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning.*

Common Law of the Workplace, Theodore J. St. Antoine editor, pg. 69 (1998).

2/ *Bartlett's Roget's Thesaurus, Little, Brown and Company, Inc. First Edition (1996).*

Under the Management Rights clause of the Agreement, sub-paragraph 3, the County can assign employees. (Jt. 2 Article 2) Neither party offered that the use of the word 'assign' in that Article is limited by the use of seniority.

Another arbitral standard is that words are to be given their intended effect. 3/ In the management rights clause the parties gave the County the right to assign subject to any limitation elsewhere in the agreement. There is no reason to believe that the parties intended a different use of the word in Appendix A of the agreement. This is particularly true when I look at the entire language related to Crew Chief in Appendix A. The language of the Crew Chief provision also states: "When the Crew Chief is on vacation and the crew is operating, the senior employee shall be assigned Crew Chief responsibility and paid the hourly premium." To give the contract language effect can only mean that seniority applies in the case of an employee acting as Crew Chief when the regular Crew Chief is on vacation but not when the regular Crew Chief is assigned those duties by the County. The language of Appendix A is very similar to the 'assignment of snow removal duties' also set forth in Appendix A. On an arguably stronger set of facts for the Union in another case, the arbitrator found that snow removal duties are 'assigned' by the County and are not subject to the job posting procedures of the agreement. 4/

3/ *Arbitrators apply a presumption that parties intended their words to have effect and not to be interpreted in a way that causes a provision to perish or be superfluous.*

Common Law of the Workplace, supra, at pg. 71.

4/ *MARATHON COUNTY HIGHWAY EMPLOYEES LOCAL 326, AND MARATHON COUNTY (HIGHWAY DEPARTMENT) CASE 262, No. 57447, MA-10627. BURNS (1999)*

Even if I had found the contract language to be ambiguous, the Union's past practice argument would not succeed. The circumstances of the 1995 posting and the 1998 posting are different on their facts and therefore those differences plus the one time occurrence of assigning the Crew Chief duties in the 1995 job posting do not establish a past practice.

The County's alternative position bolsters its argument that the parties understood that the County would assign the Crew Chief duties without regard to seniority. As set forth in the statement of the case, the Union in the negotiations for the 1995-1997 contract, under which this grievance is being arbitrated, attempted to propose language that would have made the Crew Chief duties subject to the Article 7 job posting procedure. That proposed language was never adopted by the parties. I credit the exhibits of the bargaining history and the testimony of the County witness that the parties reached a compromise in the negotiations for this agreement that the County would have the sole right to assign the Crew Chief responsibilities in exchange for assigning Crew Chief duties by seniority when the regular Crew Chief was on vacation and for enhancing the premium for these duties above the Union's original proposal. The Union in confirming the tentative settlement in correspondence to the County uses the word "assign" in a manner to confirm this understanding. In testimony, the Union witnesses confirmed that prior to the 1995-1997 negotiations and contract emanating therefrom, the County had assigned Crew Chief responsibilities on a temporary basis. I find it doubtful that the County would give up that right when negotiating the assignment of these duties on a permanent basis, and I find that the record supports this conclusion. And that the Union told its members at the Union contract ratification that its understanding with the County was to agree to disagree about the issue in this matter is of no consequence, as clearly that statement was never made to any management representative of the County.

In this case, the contract language, the bargaining history and the absence of any past practice establish that the County had the right to assign the duties of bridge Crew Chief to a qualified employe who was not the most senior.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The County did not violate the Labor Agreement when it assigned the responsibility of Crew Chief for the Bridge Crew on the basis of management discretion and when it did not follow the job posting article for such assignment. The grievance of the Union is denied.

Dated at Madison, Wisconsin this 21st day of September, 1999.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

