BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**ONEIDA COUNTY HIGHWAY EMPLOYEES**
**LOCAL UNION #79, AFSCME, AFL-CIO**

and

**ONEIDA COUNTY**

Case 141
No. 58067
MA-10832

*(Monico and Minocqua Posting Grievance)*

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Appearances:

**Mr. David Campshure**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

**Mr. Carey L. Jackson**, Personnel Director, on behalf of the County.

## ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Rhinelander, Wisconsin, on January 19, 2000. The hearing was not transcribed and the parties there agreed that I should retain my jurisdiction if the grievance is sustained. The parties thereafter filed briefs and reply briefs that were received by March 13, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

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## ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Was the grievance timely filed under Article 5 of the contract?

2. If so, did the County violate Article 5 of the contract when it transferred employees Michael Gengalo and Keith Palubicki to its Monico and Minocqua shops without first posting those positions and, if so, what is the appropriate remedy?

## BACKGROUND

Highway Maintenance Workers Gengalo, Palubicki and Johnson were hired on August 19, 19996, June 30, 1997 and December 22, 1997, respectively, at which time they were assigned to the main highway shop in Rhinelander. Gengalo was subsequently assigned to the Monico shop on October 9, 1996; Palubicki was subsequently assigned to the Monico shop where he has served continuously since December 3, 1997; and Johnson was subsequently assigned to the Minocqua shop where he has served continuously since May 19, 1998.

Operator I Steve Schramke – who was on the Union's negotiating committee and who has served as Chief Steward – testified that the Union's original January 16, 1998, grievance (Union Exhibit 1), protesting the failure to post for these three positions was filed by Union President Thorn who presented it to Highway Commissioner Robert H. Maas who told Thorn that the transfers were temporary. Saying "We really didn't have anything" to grieve at that time, the Union decided to drop its grievance. On cross-examination, Schramke added that he had no first-hand knowledge as to whether Thorn gave Maas a copy of the grievance, but that a copy of the grievance is gone from the Union's files thereby indicating, in his mind at least, that Thorn gave it to Maas.

Chief Steward Scott Tromp testified that the Union filed the instant grievance on January 7, 1999 (Joint Exhibit 2), when it did because "a year plus" no longer made Gengalo, Palubicki and Johnson temporary employes and because more senior employes after a year had been wronged because they had been denied the winter snowplow overtime opportunities given to Gengalo, Johnson and Palubicki. Tromp added that Maas told him the word "temporary" in Article 5 of the contract means "hours or years" when he asked Maas for a time frame as to how long temporary employes could be assigned to a position before it was posted; that the

Monico and Minocqua positions in fact are permanent jobs that should be posted; that up until recently, there was only one employe assigned to the Monico shop, whereas now there are about six employes; and that Gengalo, Palubicki and Johnson are not listed on the work board.

On cross-examination, Tromp said that the three disputed positions are Highway Maintenance positions; that they do not represent any advancement in rank for other employes under Article 5, Section A, of the contract; and that one of the three disputed positions was formerly held by Bob Steinbauer who retired.

Steven Skubal testified that beats have always been posted for Patrolmen and that "a large portion" of past postings have designated beats (Union Exhibit 4). On cross-examination, he acknowledged that Johnson, Gengalo and Palubicki are not assigned to state beats.

Maintenance Worker Palubicki testified that he does not hold any posted beat; that he never signed any posting for the Monico shop; that he was called in for overtime only when other Monico employes were unavailable; that he has worked out of the Rhinelander shop since January 1, 2000; and that he now has no assigned beat. On cross-examination, he said his job at Monico was to help others and that he has never been assigned to state roads.

Highway Commissioner Maas testified that he made the disputed assignments because of increased work loads and because "We needed some extra help out there"; that the County only posts state bids because the State of Wisconsin wants the same person to work on a section of road; and that employes Brinkmann, Tropp, Paddock and Bogel were not assigned to any beats at the time of their hires and that they then did not grieve. He added that the Union in contract negotiations proposed contract language aimed at changing the meaning of the word "temporary" in Article 5 (County Exhibit 2), and that it subsequently withdrew its proposal. He also said that Article 5 does not deal with Highway Maintenance workers who are temporary employes because they become Operator I's after three years.

On cross-examination, he said that no Helper beats existed before Johnson, Gengalo and Palubicki were hired; that the chalk board is not "chiseled in stone", which is why their names are not listed there; that there is no set period of time that temporary positions can last, which is why they can last up to 2-3 years; that the County in the past has posted for Highway Maintenance Workers; and that employes in the past have posted down to Highway Maintenance Worker positions.

Maas added that the three slots in issue already existed because of prior downsizing which saw the number of bargaining unit members shrink from about 68 to about 34, which is why he did not need County Board approval to fill them. He also stated that the Monico and Minocqua shops have been in operation for about 25 and 20 years respectively; that the

Minocqua shop once had five employes and that the Monico shop had one employe for a "long, long time"; that Highway Maintenance employes automatically become Operator I's; that the three employes were hired for the Rhinelander shop where they worked for the first six months of their employment; that he did not post for the Monico and Minocqua shops because "We can transfer help where we need it"; and that there may not be any work out there next winter or summer.

## POSITIONS OF THE PARTIES

The Union asserts that the County violated the parties' agreement that "vacancies be filled through the posting process"; that the "County is required to post both beat positions and new positions"; that "Appointing employes to shops contradicts the principle of shop seniority"; and that "Resolution of Grievance 10-85 strongly supports the Union's position in this case." The Union also contends that the grievance is timely; that the parties "recognize the principle of shop seniority"; that the positions herein are permanent and hence must be filled through the contractual posting procedure; that a past practice supports its position; and that bargaining history does not support the County's contrary position. The Union asks as a remedy that the County be ordered to post the disputed positions and that it be ordered to make assignments permanent in the future and to post them.

The County claims that the grievance is untimely because it was not filed within 10 days of the event; that the grievance "is really about overtime and who gets first chance at it"; that the grievance "totally disregards the hiring of Highway Maintenance Workers and their assignment to the Rhinelander shop without posting"; that the disputed positions are temporary in nature and hence need not be posted; that the temporary assignments promote efficiency; that no past practice supports the grievance because Helper Beats never have been posted; and that the Union in negotiations unsuccessfully sought contract language seeking to modify Article 5. The County cites MANITOWOC COUNTY (SHERIFF'S DEPARTMENT), Case 279, No. 49681, MA-8028 (McGilligan, 1993), in support of its claim that the grievance is untimely and asserts that Article 5 does "not apply to the assigning of Gengalo and others to assist with the work load at the outside shops"; that the "Union failed to produce any evidence that the County ever posted a Patrolman's Helper beat for work on County or Town roads"; and that the Highway Commissioner properly exercised his right to assign employes.

## DISCUSSION

The first issue that must be resolved here is whether the grievance is timely under Article 6, entitled "Grievance Procedure", which states in pertinent part:

. . .

> "Section B - Submission of Grievance: The grievance shall be submitted, in writing to the department head, no later than ten (10) working days after the employe knew or should have known of the cause giving rise to the grievance."

. . .

The record is unclear as to whether the Union first grieved over this issue in January, 1998. Former Union Chief Steward Schramke testified that he believed Union President Thorn, who did not testify, presented a grievance to Maas at that time. Schramke admitted, however, that he had no first-hand knowledge as to whether Thorn filed the grievance and Maas testified that he could not recall whether a grievance was then filed.

Nevertheless, even if a grievance was not filed at that time, the grievance is still timely because the Union reasonably waited to see whether Gengalo, Palubicki and Johnson were going to be moved from temporary to permanent status. The Union therefore was entitled to wait a year since the filing of any grievance before then could have led the County to claim that the grievance was premature. Moreover, given the County's own opaque definition of how long an employe can remain a temporary employe, it is difficult to see exactly when a grievance can be filed under the County's theory of the case. And lastly, since Gengalo, Palubicki and Johnson are still treated as temporary employes by the County, the Union in essence is claiming that the County's violation of the contract is continuing, thereby enabling the Union to grieve at any time. See *How Arbitration Works*, Elkouri and Elkouri, pp. 281-282 (BNA, 5th Ed., 1997). Under all these circumstances, the grievance is timely.

The County asserts otherwise by citing MANITOWOC COUNTY (SHERIFF'S DEPARTMENT), SUPRA, wherein Arbitrator Dennis P. McGilligan ruled that a grievance was untimely because the union did not appeal a first-step denial in a timely fashion and because the contract there stated that the "failure of a party to appeal a grievance in a timely fashion will be treated as a settlement of that particular grievance, without prejudice". Id., at p. 3. Here, there is no such language dictating dismissal of an untimely grievance. In addition, the case here involves significant facts not found there, i.e., the fact that the County itself has failed to clearly articulate just how long any such "temporary" assignments can last; the fact that the County may have claimed that any grievance filed earlier was premature; and the further fact that the grievance here is a continuing one. For all these reasons, MANITOWOC COUNTY is inapplicable.

As for its merits, I previously ruled in ONEIDA COUNTY, Case 134, No. 57116, MA-10522, (August 4, 1999), Beat Posting Grievance, that:

. . .

> "a binding past practice has arisen to the effect that beats must be posted on certain job openings and that the County therefore violated that past practice when it failed to list Unit #7 Beat on the posting herein." Id., at 9.

. . .

Here, the County points out that it has never posted Helper Beats before and that, as a result, there is no past practice. But that is true only for one reason: the County never before created any Helper Beats. And, while the County asserts that Helper Beats are different from other beats and that only State Beats must be posted, I find for the reasons stated in my earlier decision that *all* beats must be posted unless otherwise specifically excluded, as the parties' 1997 Letter of Agreement (Joint Exhibit 3) expressly recognizes that all employes are to be assigned to specified beats.

I also found in my earlier decision that:

> "while Maas under certain situations is free to temporarily assign employes to different jobs just as he had in the past – a right the Union does not dispute – that is a separate question of whether Maas must award permanent jobs to employes who successfully bid on permanent vacancies." (Emphasis in original). Id, at 10.

It is certainly true, as pointed out by the County, that the situation there differed somewhat from the situation here because that position was previously held by someone who retired, which is not the case here for two of the positions.

However, Article 5, Section A, also covers new positions, because it states:

> Section A – Opportunity for Advancement: Opportunity for advancement to higher classifications shall be provided for as follows: In the event of a permanent vacancy, or the creation of a new job classification, the Highway Commissioner shall cause to be posted on the main shop bulletin board and all outlying shop bulletin boards, a notice of such vacancy or new position. Said notice shall be posted for a five (5) day period. At the end of that five day period, the notice shall be removed and the position shall be filled within five (5) days.

(1) Permanent vacancy defined: A "permanent vacancy" means a vacancy created in any salary range because of the death, retirement, or termination of employment of any employee; all other vacancies are "temporary".

(2) The Commissioner shall have the right, without the requirement of posting, to shift employees into any lower or higher job classification or within any salary range where a temporary vacancy exists for the duration of the temporary vacancy.

Helper Beats must be posted under this language because they constitute a "new job". The County asserts otherwise by claiming that this language only is applicable to a "new job classification" and that the Helper Beats do not represent such a "new job classification".

This claim is without merit because the contract uses the terms "classification" and "position" interchangeably. For, as pointed out in the Union's Reply Brief at pp. 5-6:

. . .

That is a matter of semantics. In the Agreement the terms "classification" and "position" are used interchangeably.

Article 5, Section A: Opportunity for advancement to higher **classifications** shall be provided for as follows: In the event of a permanent vacancy, or the creation of a new job **classification**, the Highway Commissioner shall cause to be posted on the main shop bulletin board and all outlying shop bulletin boards, a notice of such vacancy or new **position**. Said notice shall be posted for a five (5) day period. At the end of the five day period, the notice shall be removed and the **position** shall be filled within five (5) days.

Article 5, Section D: Assignments of employees to fill such job vacancies or new **positions** shall be made according to seniority providing the employee considered can qualify for the **position** to be filled. The secretary of Local #79 shall be notified of the employee chosen for the job.

Article 13, Section B: **Classification** of employees will be made following the job posting procedure and the assignment of said employee to the **position**.

> Article 13, Section D: "The seniority rights of employees in any particular job **classification** shall accrue only following the posting of said **classification** and the appointment of the senior qualified employee in that **position**. (Boldface in original).
>
> The facts in this case are clear. The County created new County Helper positions at the Minocqua and Monico shops. It called the positions temporary and assigned them to Gengalo, Palubicki and Johnson without posting. The positions are not temporary, but permanent, and must be posted to the bargaining unit.

. . .

The County nevertheless asserts that the grievance must be denied because the Union in past contract negotiations unsuccessfully tried to change the meaning of the word "temporary". Again, I dealt with the issue in my prior Award wherein I ruled:

. . .

> Also without merit is the County's claim that the grievance must be denied because the Union in recent contract negotiations unsuccessfully proposed contract language reading: "However, an appointment to a temporary vacancy expected to last five (5) working days or longer shall be offered by seniority to all qualified employees."
>
> The Union correctly points out that it made its proposal to clarify the existing language relating to temporary positions and not to obtain a benefit that was not already provided regarding permanent vacancies. Thus, its proposal did not even refer to permanent vacancies as that term is defined in Article 5, Section (1) above, or to any of the three specific examples covered by it, thereby indicating that it was aimed at "temporary" vacancies that lasted more than five days. The Union's failure to obtain such clarifying language on that issue thus cannot be held against it regarding this issue. See *How Arbitration Works*, Elkouri and Elkouri, (BNA, 5th Ed., 1997), p. 505, which states "where a proposal in bargaining is made for the purpose of clarifying the contract, the matter may be viewed in a different light", as it then quotes Arbitrator Sidney A. Wolff's decision in HOSPITAL SERVICE PLAN, 47 LA 993, 993-94 (1966), wherein he ruled:

> If, in fact, the parties were in dispute on the proper interpretation of a contract clause and one of them unsuccessfully sought in collective bargaining to obtain clarification, it would not necessarily follow that the interpretation sought by the unsuccessful party was wrong." (Emphasis in original) Id. at p. 11.

The County also asserts that the Union's grievance "disregards the hiring of Highway Maintenance Workers and their assignment to the Rhinelander shop without posting." Such assignments, however, stand on a completely different footing than the ones here since all employes are assigned to the Rhinelander shop at the time of their hire. That does not contradict the well-established past practice of posting all other positions outside the Rhinelander shop.

Based upon the above, I therefore conclude that the County violated the contract when it failed to post the Monico and Minocqua positions in dispute. As a remedy, the County shall immediately post them and fill them pursuant to Article 5 of the contract.

The County in the future also must immediately post all vacancies caused by death, retirement, or termination of any employes along with all other newly-created positions. The County in all such situations is precluded from filling any of those positions on a temporary basis, as there is no merit to its claim that Maintenance Helper positions represent temporary positions for the three years it takes those employes to advance to the next highest classification.

In light of the above, it is my

## AWARD

1. That the grievance is timely.

2. That the County violated Article 5 of the contract when it transferred employes Michael Gengalo and Keith Palubicki to its Monico and Minocqua shops without first posting those positions.

3. That as a remedy, the County shall immediately post those positions and award them pursuant to Article 5. In addition, the County in the future must post all vacancies caused by death, retirement or termination of any employes, along with all other newly-created positions. As a result, it cannot fill any of those positions on a temporary basis.

4. Lastly, and pursuant to the agreement of the parties, I shall retain my jurisdiction indefinitely to resolve any questions that may arise regarding application of this Award.

Dated at Madison, Wisconsin this 24th day of April, 2000.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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