

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 986-B, AFSCME, AFL-CIO**

and

**MANITOWOC COUNTY  
(SHERIFF'S DEPARTMENT)**

Case 346  
No. 57297  
MA-10582

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Appearances

**Mr. James E. Miller**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1712 Cedar Court, Manitowoc, Wisconsin 54220, appearing on behalf of Local 986-B, AFSCME, AFL-CIO.

**Mr. Steven J. Rollins**, Corporation Counsel, Manitowoc County, 1010 South Eighth Street, Manitowoc, Wisconsin 54220, appearing on behalf of the Manitowoc County Sheriff's Department.

**ARBITRATION AWARD**

Manitowoc County Sheriff's Department Employees Local 986-B, AFSCME, AFL-CIO ("the Union" or "AFSCME") and Manitowoc County ("the County") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On February 18, 1999, the Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance concerning the interpretation and application of the terms of the agreement relating to the posting of vacancies. The Commission appointed Stuart D. Levitan as the impartial arbitrator. The matter was held in abeyance pending settlement discussions. When settlement talks proved futile, the parties reached a Stipulation of Facts which they submitted on February 3, 2000. The parties filed written arguments on March 21, 2000, and waived their right to file reply briefs.

**ISSUE**

The parties stipulated to the following issue:

Did the employer violate the collective bargaining agreement by posting a full-time Telecommunicator position on October 1, 1998, which would not become available until approximately February 1, 1999? If so, what is the remedy?

**RELEVANT CONTRACTUAL LANGUAGE**

**ARTICLE 3 – MANAGEMENT RIGHTS RESERVED**

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Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer ... is vested exclusively with the Employer. If any action taken by the Employer is proven not to be justified, the employe shall receive all wages and benefits due him or her for such period of time involved in the matter.

**ARTICLE 22 – JOB POSTING**

- A. Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in the department as well as the bulletin board in the office of the County Clerk for five (5) working days. Any employe desiring to fill any such posted vacancy or new position shall make application in writing and submit it to the Personnel Office. After the conclusion of the posting period, the envelope shall be opened at the Personnel Office in the presence of a representative of the Union and a representative of the County Personnel Committee, or its designee, at a time to be mutually agreed upon.
- B. Whenever any vacancy occurs it shall be given to the employe with the greatest seniority, provided the applicant for such position is qualified and eligible for the position. The awarding of the position shall occur within seven (7) work days after the completion of the posting period.

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**OTHER RELEVANT LANGUAGE**

The collective bargaining agreement between the County and the Sheriff Department Employees represented by the Wisconsin Professional Police Association provides as follows:

**ARTICLE 22 – JOB POSTING**

- A. Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in the department for five (5) working days. Any employee desiring to fill any such posted vacancy or new position shall make application in writing and submit it to the Personnel Office. The envelope shall be opened at the Personnel Office at the conclusion of the posting period. An Association representative may be present at the time envelopes are opened.
  
- B. Whenever any vacancy occurs it shall be given to the employee with the greatest seniority, provided the applicant for such position is qualified and eligible for the position. The awarding of the position shall occur within seven (7) work days after the completion of the posting period.

When the position of detective is filled, promotions to that position will be determined on the basis of qualifications as established through a combination of objective test results and an employee's related skill, knowledge and abilities.

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The collective bargaining agreement between the County and the Supportive Services Employees represented by AFSCME, AFL-CIO (Local 986-A) provides as follows:

**ARTICLE 22 – JOB POSTING**

Any bargaining unit employee accepting a position within County employ outside of this bargaining unit, but in a department having employees represented by this bargaining unit, shall have a six (6) month period of time in which bargaining unit seniority shall be frozen. If, after six (6) months, this person does not return to a position in the bargaining unit, all previous bargaining unit seniority for job bidding under this article shall be lost.

Any bargaining unit employee accepting a position within County employ outside of this bargaining unit, in a department not having employees represented by this bargaining unit, shall have a thirty (30) calendar day period of time within which bargaining seniority shall be frozen. If, after thirty (30) calendar days, this person does not return to a position in the bargaining unit, all previous bargaining unit seniority for job bidding under this article shall be lost.

Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs. The notices shall be posted on the bulletin board, in each department, as well as the bulletin boards located in the Courthouse break room, office of the County Clerk and the Personnel Department for five (5) working days. The notice of posting shall include the following minimum information: applicable upper and lower wage rates, hours of work, department, Employment Group, position title, job description, and qualifications. Any employee desiring to fill any such posted vacancy or new position shall make application in writing and submit it to the Personnel Department. After the conclusion of the posting period, the applications shall be opened at the Personnel Department in the presence of a representative of the Union and a representative of the Personnel Department, at a time to be mutually agreed upon.

Jobs may be posted prior to the actual vacancy with a stipulation as to the date the position will become vacant.

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 on 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 provided for 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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When new positions are to be created the Employer shall notify the Union in writing prior to filling the position. The department head shall complete a job content evaluation questionnaire using the form agreed to by the Employer and the Union. The parties shall meet and negotiate the wage rate for the new position.

The Employer shall notify the Union in writing of any significant change in the job description, job duties, assignment, or qualifications of a position it may desire. If requested by the Union, the position shall be re-evaluated using the job content evaluation questionnaire form agreed to by the Employer and the Union. The parties shall meet and negotiate as may be required under the circumstances. Significant changes shall be defined as a change of one (1) pay grade or more.

Negotiations as herein provided shall be initiated by written request of the Union to the Personnel Committee.

When tests are administered by the Employer, the Employer shall provide a quiet location removed from distractions.

The collective bargaining agreement between the County and the Human Services Department Professionals represented by AFSCME, AFL-CIO (Local 986-A) provides as follows:

#### **ARTICLE 22 – JOB POSTING**

Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin boards at each job site, in the Counseling Center and Human Services Department East, as well as bulletin boards in the office of the County Clerk and Personnel Office for five (5) working days. Jobs may be posted prior to the actual vacancy with stipulation as to the date the position will become vacant. Any employee desiring to fill any such posted vacancy or new position shall make application in writing and submit it to the Personnel Office. After the conclusion of the posting period, the applications shall be opened at the Personnel Office in the presence of a representative of the Union and a representative of the County Personnel Committee, and a representative of the Department's Administrative Staff.

Whenever any vacancy occurs it shall be given to the employee with the greatest seniority within seven (7) working days after the completion of the posting period; however, when a position is posted prior to the vacancy date, it will be awarded to the Bargaining Unit employee with the greatest seniority within seven (7) working days of the vacancy date, subject to the qualifications of the Department merit system.

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The employer shall post a notice of all job vacancies from any other county department(s) on the Counseling Center and Human Services Department East bulletin board for the information of the Union Employees.

A copy of all postings shall be given to the steward or his/her designee.

The collective bargaining agreement between the County and the County Highway Department Employees Local 986, represented by AFSCME, AFL-CIO, provides as follows:

#### **ARTICLE 22 – JOB POSTING**

- A. Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board of the Department and the Personnel Department for five (5) working days. Tri and Quad axle trucks will be posted by equipment number. Any employee desiring to fill any such posted vacancy or new position shall make application in writing and submit it in a sealed envelope to the office of the Highway Commissioner. After the conclusion of the posting period, the envelopes will be opened at the Highway Commissioner's office in the presence of a representative of the Union at a time to be mutually agreed upon.
- B. Whenever any vacancy occurs it shall be given to the employee with the greatest seniority within seven (7) work days after the completion of the posting period.
- C. However, when the County deems it necessary to fill a foreman position, promotions to that classification will be determined on the basis of relative skill, ability, experience, and other qualifications. Where qualifications are relatively equal, seniority shall be the determining factor.

- D. When objections are made by the Personnel Committee regarding the qualifications of an employee to fill the position, such objections will be presented to the Union Committee for consideration.
- E. If there is any difference of opinion as to the qualifications of an employee, the Personnel Committee and the Union Committee shall take the matter up for adjustment through the grievance procedure.

The collective bargaining agreement between the County and the Health Care Center Employees, Local 1288, represented by AFSCME, AFL-CIO, provides as follows:

#### **ARTICLE 21 – JOB POSTING**

Notice of vacancies and new positions shall be posted within five (5) working days after the vacancy occurs on the bulletin board in the institution as well as the bulletin board immediately outside of the Personnel Department for five (5) working days. A copy of each job posting shall be submitted to the Local Union Vice-President. The posting shall include a statement defining which weekend off and which holidays the position has. Any employee desiring to fill any such posted vacancy or new position shall make application in writing at the institution's Human Resource office or by signing a posting. After the conclusion of the posting period, the applications shall be reviewed at the institution's office in the presence of a representative of the Union at a time to be mutually agreed upon. The Employer shall notify this Union designee when those jobs are filled.

Whenever any vacancy occurs it shall be given to the employee with the greatest institutional seniority within the department within seven (7) work days after the vacancy date, provided the applicant is qualified for such position. If there is no qualified applicant within the department, then the position shall be given to the remaining employee with the greatest institutional seniority, regardless of the department, provided the applicant is qualified for such position. Once in a new position, institutional seniority carries forward and is applicable after the trial period for bidding on another vacant position, with qualifications pursuant to the Agreement.

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The collective bargaining agreement between the County and the Health Department Employees and Health Care Center Nurses, Local 5068, represented by AFT, AFL-CIO, provides as follows:

## **ARTICLE 10 – POSTING**

Whenever a new position is created, or any present position becomes vacant and the employer determines to fill that position, the following procedures shall be followed: The employer shall post such position on the bulletin boards in the department and the Personnel department until the position is filled. Within the first five days of the posting period, each employee in the bargaining unit interested in applying for the position shall endorse his/her name on the space provided thereon. The employer shall consider such applicants on the basis of the qualifications and seniority. Employees not selected to fill the position on the basis of seniority shall be given the reason(s) in writing.

After the initial five days, interested employees may post into the position but will be considered on the same basis as individuals from outside the bargaining unit.

If the employer is unable to fill a vacancy internally, he/she shall be free to fill the vacancy in accordance with County policies.

## **BACKGROUND**

The parties stipulated to the factual background, including the following salient points:

The grievant, Karen Johnson, was a part-time Telecommunicator employed by the County, with a bargaining unit seniority date of October 6, 1997. As such, she was eligible to exercise posting rights under the parties' collective bargaining agreement.

On October 1, 1998, the County posted a Position Available notice for a full-time Telecommunicator position. The posting included the statement that the position would become available "approximately 2/1/99." The following day Johnson wrote to inform the County Personnel Department she was "applying for the position of Telecommunicator located in the Sheriff's Department available approx. February 1, 1999." On October 9, 1998, the County announced that the position had been awarded to Johnson, adding that the placement would "not take effect until the new part-time telecommunicators are trained."

On October 30, 1998, the Union filed a grievance alleging that the collective bargaining agreement did not allow for advance postings. The Union sought full-time status, pay and benefits for Johnson effective October 9, 1998. The grievance was signed by Shelley Braun. The record is silent on Johnson's attitude toward the filing of the grievance.

Effective February 1, 1999, Johnson was scheduled as a full-time telecommunicator and received full-time benefits under the collective bargaining agreement.

On June 22, 1998, the employer had pre-posted a Telecommunicator vacancy to be filled August 1, 1998; the Union filed no grievance.

### **POSITIONS OF THE PARTIES**

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

The conflict between the Employer and the Union in this proceeding lies squarely with the question of whether the collective bargaining agreement allows the County to prepost positions, in this case five months before it anticipate the position would be needed. Further, the Union argues that if such an advanced posting is permitted or even if done in error, that part-time employees who are awarded such bids are entitled to the pay difference in pay and benefits retroactive to the date the position was awarded.

The problem with the County's position answering the grievance is that there was no vacancy to be posted until the County Board approved it; at best, there was a potential vacancy at the time of the posting. When the position was posted in October 1998, there was no guarantee that an actual position would ever be created.

The County's reliance on the management rights clause is simply not a reasonable interpretation of either that clause or the posting provisions in the collective bargaining agreement. The Union maintains that the contract clearly states that a posting is to be put up when a vacancy actually occurs. The one other instance of such a circumstance which the County cites does not support a finding of a past practice in this regard.

A review of the County's other collective bargaining agreements supports the Union's view, in that there are two collective bargaining agreements which explicitly give the County the right to pre-post potential vacancies. Those contracts were negotiated by the same Union representative who negotiated the instant contract. The absence of such or similar language in this collective bargaining agreement is clear evidence that posting positions prior to their effective date was not contemplated nor permitted under this collective bargaining agreement. If the parties had wanted to grant the County the ability to post prior to the actual date, they obviously could have negotiated the language, as they did in the other two collective bargaining agreements.

As remedy, the Union asks for the grievant to be given full-time status and the difference between full-time pay and benefits for the hours she worked from the date she was awarded the position.

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

Advance postings are permitted under the collective bargaining agreement because they are not expressly prohibited or otherwise restricted by the contract. Article 3 expressly vests the Employer with the right to manage the work and direct the workforce in the absence of any provision to the contrary. The Union's reliance on the two contracts which mention advance postings is misplaced, in that the only things those contracts support is the proposition that a contract must explicitly discuss a management right if that right is to be limited. The notion that a reserved right can be limited by an act of omission simply doesn't make any sense.

Even if the Union was right, it has demanded the wrong remedy by claiming pay and benefits as though she became a full-time employer on October 9, 1998. The grievant has been compensated as a full-time employe as of the day the position became available. Further, the Union's suggestion that she should be made whole back to October 1998 improperly intrudes upon the Employer's right to control the size and composition of the workforce by retroactively staffing a position before it was authorized. Under the totality of the circumstances, granting the Union's remedy would give the grievant an unjust windfall. It would also constitute an improper modification of the collective bargaining agreement by the arbitrator.

Under the management rights clause, the right to manage and direct the workforce is vested with the employer unless the contract provides otherwise on a specific issue. The Union attempts to stand this reservation of rights on its head in the present case, and is in fact self-defeating. The very fact that the collective bargaining agreement is silent on this issue means that the right is both reserved to and vested in the employer. Further, the Union's remedy is a thinly veiled attempt to usurp the employer's right to determine when a vacancy exists. Because the employer acted within its reserved management rights and did not violate the collective bargaining agreement, the grievance should be denied.

### DISCUSSION

When Karen Johnson applied for the position of Telecommunicator on October 2, 1998, she knew the position would become available on or about February 1, 1999. A week later, the County announced it had awarded her the position, effective upon the training of the new part-time telecommunicators. Three weeks later, the Union grieved, claiming the collective bargaining agreement did not allow for such advance postings, and seeking an award for Johnson of full-time status, pay and benefits effective October 9, 1998. That is, the Union seeks about four months back pay at full-time rates for time Johnson was a part-time employee.

In support of its claim, the Union notes that that the collective bargaining agreements between the County and the Human Services Department Professionals and the Supportive Services Employees include language which explicitly authorizes the employer to post jobs prior to their actual vacancy. The Union argues that because these collective bargaining agreements were negotiated by the same employer and the same agent who bargained the collective bargaining agreement under review in this grievance, this establishes that the parties were able to bargain language allowing advance postings when they chose; since no such language in the collective bargaining agreement before me explicitly authorized such actions, the Union asserts, no such authority exists. The County argues that because advance postings are not prohibited or otherwise restricted by the collective bargaining agreement, they are implicitly permitted under the Article 3 grant of management rights, which includes the rights to hire and promote.

Had the Union offered evidence that the collective bargaining agreement now under review formerly included language authorizing advance postings, which authorization was later eliminated, its arguments would be far more persuasive. But there is no such evidence in the record. Moreover, the fact that the same individual may have bargained different collective bargaining agreements with different provisions does not force the conclusion that the absence of a particular clause from the collective bargaining agreement now under review was intentional.

The collective bargaining agreement explicitly vests with the employer the exclusive management and direction of the work force, including the right to hire and promote, unless otherwise restricted. The collective bargaining agreement also sets a deadline of five working days within which notices of vacancies and new positions must be posted. The collective bargaining agreement sets no restrictions on advance notice or postings. Posting a vacancy before its actual creation certainly satisfies the five day deadline, which is the only relevant restriction on the employer's rights regarding hiring and promotion. The employer pre-posted an earlier Telecommunicator vacancy on June 22, 1998, to be filled August 1, 1998, without grievance from the Union.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

**AWARD**

That the grievance is denied.

Dated at Madison, Wisconsin this 25th day of May, 2000.

Stuart Levitan /s/

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Stuart Levitan, Arbitrator