

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

JUNEAU COUNTY

and

**AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, LOCAL 1312, AFL-CIO**

Case 125
No. 56300
MA-10231

(Grievance of Jerome Wilke)

Appearances:

Mr. Mark Hazelbaker, Attorney at Law, 721 Lois Drive, Sun Prairie, Wisconsin 53590, appeared on behalf of the County.

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

ARBITRATION AWARD

On March 24, 1998, Juneau County and Wisconsin Council 40, AFSCME, AFL-CIO, jointly requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on July 16, 1998, in Mauston, Wisconsin. A transcript of the proceedings was made and distributed by July 22, 1998. Post-hearing briefs were submitted, the last of which was received and exchanged by January 4, 2000.

This Award addresses a dispute over the seniority date of Jerome Wilke.

BACKGROUND AND FACTS

Jerome Wilke, the grievant, was hired on December 12, 1984 into the Juneau County Highway Department, where he subsequently held a number of positions. Wilke suffered a series of injuries causing him to miss work in 1992, 1993, and 1994. Wilke had surgery in September, 1993, and there arose a dispute as to whether his injuries were compensable under Worker's Compensation. In April of 1994, Wilke was returned to work with certain restrictions. By August of 1994, Wilke experienced back and foot pain sufficient that he was no longer able to perform highway work.

While off work from his Highway Department job, Wilke sought alternative employment. Specifically, he sought to perform Telecommunicator work in the County's 911 operation. When Wilke initially solicited the work, he was advised that none was available. During this time, his Worker's Compensation claim was in dispute and scheduled for hearing. In mid-August of 1994, Wilke was called by then-Personnel Director ViAnn Cabezal who offered him 911 Telecommunications training and work. For several weeks, beginning in September, 1994, Wilke was trained to do dispatch. He was given spot assignments during this time period. He worked part-time, always with a veteran Telecommunicator in his presence until March or April of 1995. During that time he requested and received additional hours.

In November of 1995, a full-time Telecommunicator job became vacant. Wilke applied for the job and received it. It is Wilke's view that the Telecommunications work became available and that he successfully pursued it. It is the Employer's view that the Telecommunications work represented light duty which Wilke was capable of performing. The Employer believes that notwithstanding the character of the work, Wilke remained an employee of the Highway Department.

Prior to the worker's compensation hearing, scheduled for November of 1994, the underlying dispute was settled. The settlement agreement reflects a lump sum payment, payment of certain medical expenses, and certain monies considered "TTD benefits". The settlement declares that it is a "full and final settlement of all the issues set forth. . .under the worker's compensation act. . ." On November 22, 1994, Mr. Wilke submitted the following letter: "As of 11-15-94, I resign my position at the Highway Department."

It was the testimony of Barbara Hoile who was the County insurance coordinator in 1994 and is the current County Personnel Director, that a telephonic meeting occurred on or about November 22. According to Hoile, the telephone conference occurred after the worker's compensation settlement. Hoile testified that Wilke was in a room with Mr. Steensrud, Highway Superintendent and Mr. Frisch, Highway Department office

manager, when she had a telephone conversation with them over Wilke's status. According to Hoile, there was an agreement entered into during that telephone conversation. Hoile testified that Wilke committed to resigning from the Highway Department and going to work in the 911 Center. Hoile indicates that Wilke was to come in as a new hire in the 911 Center. She indicated that there were three individuals then recently hired into the 911 department and that Wilke would have a seniority date of September, 1994, placing him behind the three new hires. At the time, the employees in the 911 Center were not organized.

On November 29, 1994, Hoile sent Wilke the following insurance letter:

Dear Jerome:

As of November 15, 1994, you are no longer eligible for HMO health insurance coverage due to your resignation from the Highway Department.

As an employee of 911 you are eligible for WCA health insurance coverage provided by the County. If you are interested in having coverage through WCA, please contact me as soon as possible at 847-9303.

It was Hoile's testimony that Wilke approached her early in 1995 and on two other occasions, to see if he could get his seniority date back. She advised him that he had made a deal and that that was not possible. Hoile gave the following testimony:

Q. Have you ever had discussions with Mr. Wilke since 1994 concerning his seniority date?

A. A number of times.

Q. Tell us them starting with the first occasion on which you had such a discussion.

A. Early 1995, I believe. I was still in the county clerk's office working as insurance administrator and also as a member of the union. He came and talked to me and wanted to know if he could get his seniority date. It had always been a question, and I said, "No, unless you know of some reason why." That happened a couple times.

We moved then across the street and he had been in to see me a couple more times and wanted to know if this was his seniority date. I said yes.

We had talked about that, and we had agreed to that. Nothing happened. He just left, and nothing was said after that, until this grievance came. He knew what his date was.

Q. In the 1998-99 contract were there changes in the substantive provision of the contract, in which his seniority date became material?

A. I believe in the new one that they now have shift change picks. The most senior gets the shift change that they want. . .

. . .

It was Wilke's testimony that he could not recall any conversation such as the one Hoile described. He claimed that no such agreement existed. Wilke denies any recollection of any subsequent conversation with Hoile about a change in his seniority date.

The County did not immediately reduce Wilke's vacation benefit level. County officials discovered what they claimed to be an error in March of 1996. Upon the discovery of that error, Wilke's vacation benefit was recalculated down. ViAnn Cabezal testified that she advised Wilke of the correction in March of 1996. Hoile was not present for that conversation, but testified that she had advised Wilke that his benefit would be reduced during their alleged conversation in November of 1994.

In October of 1997, a seniority list, reflecting Wilke's modified seniority date, was posted. According to Wilke, that was the first time he realized his seniority date had been altered.

It is the County's view that Wilke was terminated from his job in the Highway Department and rehired into his 911 position. If so, the termination was atypical. His letter is specific to the Highway Department. His physical employment was not broken in November, 1994. Traditional termination steps were not followed. Wilke was not provided a COBRA letter. Hoile testified that the COBRA discussion was verbal, and meaningless, given the grievant's access to WCA insurance at County expense. There was no exit interview. It appears that none of this was done because there was an understanding that Wilke was going to work in the County's 911 Center.

On December 12, 1997, Union representative White wrote Hoile a letter making inquiry as to Wilke's seniority date. White's letter argues that Wilke's seniority date should reflect his December 10, 1984 original hire by the County. An exchange of letters followed, culminating in the filing of a grievance on February 2, 1998.

ISSUE

The parties stipulate the following two issues:

1. What is the grievant's seniority date under the terms of the labor agreement?
2. What is the grievant's benefit date under the terms of the labor agreement?

Additionally, the Employer believes there is a procedural issue:

3. Was the grievance filed timely?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 5 – GRIEVANCE PROCEDURE

. . .

5.03 Time Limitations: The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a settlement and waiver of the grievance. The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. However, if it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing. . .

5.06 Steps In Procedure:

1. The employee, alone or with one Union representative, shall submit a written grievance to his/her immediate supervisor within twenty (20) working days after he/she knew or should have known of the cause of such grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later. The employee's immediate supervisor, within seven (7) working days, notify the employee of his/her decision.

. . .

ARTICLE 7 – SENIORITY

7.01 Definition:

Seniority is defined as the length of uninterrupted service with the Employer. Seniority shall be established for all employees and shall be accumulated for all employees from the date of hire.

...

7.04 Loss of Seniority:

Seniority and the employment relationship shall be broken and terminated if the employee:

- A. Quits
- B. Is discharged

...

POSITIONS OF THE PARTIES

The Union contends that this grievance is timely. It is undisputed that once the grievance was filed, the Union appealed it through the steps in a timely manner. The Union focuses its argument on the initial submission of the grievance. With respect to the initial submission of the grievance, the Union cites arbitral authority for the proposition that where an employer has violated the contract by applying an incorrect seniority date, the violation is renewed each day the employer applies the incorrect seniority date. This constitutes a continuing violation.

The Union goes on to contend that it is untrue that Wilke sat on his rights for two and one-half years as the County alleges. The evidence shows that he acted in a timely manner as soon as he understood there was a problem. Wilke testified that when he became a full-time Telecommunicator in November, 1995, he believed that he was entitled to three weeks vacation annually. The Union notes Wilke's testimony to the effect that he used in excess of two weeks vacation each of the successive years, including the fact that he carried vacation forward. Wilke did not become aware of any change in status until October, 1997, when he observed a seniority list that showed his seniority date effective September, 1994. This prompted an exchange of letters between the parties. It was only upon receipt of the final

letter in the series, January 28, 1998, that the grievant knew that the County was not going to correct the error. The grievance was filed with the County on February 2, 1998, well within the 20 working day time limitation set forth in the contract.

The Union contends that the contract clearly and unambiguously defines seniority. Clear and unambiguous contract terms must be given their plain meaning. In this agreement, seniority is defined as the length of uninterrupted service with the Employer. That definition does not require uninterrupted service in a bargaining unit, or in a particular department. This clear provision must be enforced. Wilke's seniority was not broken when he "resigned" from the Highway Department. Section 7.04 of the Agreement sets forth seven events which cause a break in termination of seniority. Only criteria A., "Quits", is applicable to this dispute. The Union contends that Wilke did not quit. What he did was to resign from one department in order to take a job with another. The Union notes that Wilke's "resignation letter" was not initiated by the employe, but rather required by the Employer. Moreover, Wilke was not terminating his employment, but was resigning from his position in the Highway Department.

At the time of his "resignation letter", November 22, 1994, he had already been working in the Sheriff's Department for over two months. He had no break in service with the County. The Union contends that the County's view of the Worker's Compensation settlement agreement should be afforded little weight. Wilke resigned his position at the Highway Department; he did not resign his position with the County. Wilke was not treated as an employe resigning his employment. He was given no exit interview, nor a COBRA statement.

The Union contends that the Worker's Compensation settlement is irrelevant to this dispute. The Union notes that it was not a party to the resolution of the Worker's Compensation claim. There was no labor organization representing Mr. Wilke at the time, since the Telecommunicator positions were, at the time, unorganized. When the positions became organized, the parties met to negotiate a contract applicable to these positions. In those negotiations, the parties agreed to apply the previous contract's definition of seniority to the Telecommunicators without modification. Whatever agreement may have existed between Wilke and the County was subsequently superceded by the negotiation of the collective bargaining agreement applicable to his Telecommunicator position. Whatever argument the County had prior to those negotiations was abandoned by virtue of its entering into the collective bargaining agreement and into the language of Section 7.01 of that contract.

It is the position of the County that Wilke's seniority date must be determined by reference to the date he was hired as a Telecommunicator. The County goes on to claim that it is undisputed that it treated Wilke's seniority date as the date on which he was employed as a Telecommunicator for the entire period of time since December 14, 1995, the date on which he was finally employed permanently as a Telecommunicator. It is also undisputed that Wilke signed a letter of resignation from the Highway Department dated November, 1995.

The Employer notes that the Highway contract contains a provision providing that all seniority is lost and the employment relationship is severed upon the resignation of the employe. Wilke signed a letter of resignation as a part of a settlement in which he received a considerable amount of money. He was represented by counsel on that matter. As a matter of equity, in addition to the legal effect of that agreement, he simply cannot be allowed to repudiate the part of that settlement which he no longer wishes to accept. He must take the bitter with the sweet.

The County contends the grievance is untimely. The County claims that Wilke did not file a grievance until after more than one and one-half years. The contract requires that he file grievances within ten (10) days of the date on which he knew or should have known that a violation occurred. The County argues that Wilke was on notice that his seniority date had been changed from the moment that he was first paid as a Telecommunicator. The County's payroll checks contain a statement of accrued vacation. Every day, Wilke was on renewed notice.

The County finds it noteworthy that Wilke asserted his grievance after the Personnel Director involved in negotiating the agreement left her job and moved to Arizona. His wait spanned two full contract and two full vacation cycles. In the view of the County, memories are faded and witnesses have left. This is precisely the reason the parties put time limits in their collective bargaining agreement. The County urges that this arbitrator respect the finality that the parties have negotiated into their agreement.

DISCUSSION

Hoile testified that she and Wilke discussed his seniority date on a number of occasions. She points to 1995 as a time frame in which Wilke made inquiry into the finality of his seniority date, and that she assured him that his date was final. Cabezal testified that she told Wilke that the County had adjusted his vacation benefit in March of 1996. Cabezal's testimony was that she advised Wilke that they were making a change on his vacation. Wilke denied both sets of conversations. I credit the testimony of Hoile and Cabezal.

I do not regard the continuing violation theory to be applicable. That doctrine is typically invoked under circumstances where employes belatedly discover that some ongoing provision of the contract has been breached. The doctrine allows for the filing of a grievance due to the ongoing nature of the grieved matter. However, inherent in the doctrine is that once employes become aware of a violation, they respond in a timely fashion. That is not the circumstance presented here. I believe that Wilke was aware of the seniority date change and sat on his claim.

It appears that Wilke allowed the seniority date matter to sit for some period of time. It also appears that his claim was prompted as much by the negotiated change in the contract which provided shift selection rights by seniority as it was by the posting of his seniority date. In October of 1997, his new date was posted. A grievance was not filed until February 2, 1998. A series of letters were exchanged between the October seniority date posting and the February 2 grievance. The first of those letters was the Union's letter dated December 12, 1997. This letter is dated more than 20 working days after the seniority posting went up, and was made known to Wilke. Article 5.06 requires the submission of a grievance within 20 working days after the grievant knew or should have known of the cause of his grievance. That did not happen in this dispute. Section 5.03 addresses the consequence of the failure to timely file a grievance. That provision regards such a failure as "a settlement and waiver of the grievance." As a consequence, I believe this grievance must be dismissed as untimely.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 29th day of June, 2000.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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