BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LINCOLN COUNTY COURTHOUSE EMPLOYEES, LOCAL 332-A, AFSCME, AFL-CIO

and

LINCOLN COUNTY

Case 193
No. 58373
MA-10932

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, on behalf of Local 332-A, AFSCME, AFL-CIO.

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

ARBITRATION AWARD

On December 29, 1999, Lincoln County Courthouse Employees, Local 332-A, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Lincoln County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned James R. Meier was appointed to hear and decide the dispute. A hearing was held before the undersigned on March 20, 2000 in Merrill, Wisconsin. There was no stenographic transcript of the proceedings made. The record was closed on May 26, 2000 with the filing of the final brief.

ISSUE

The Union submitted the issue as:

> Did the County violate the collective bargaining agreement when it refused to reclassify the grievants as directed by the Personnel Committee? If so, what is the appropriate remedy?

The County submitted the issue as:

Whether the County violated the collective bargaining agreement when it failed to pay an additional wage increase due to a reclassification request based solely upon Personnel Committee action. If so, what is the appropriate remedy?

I conclude that the issue is:

Did the County violate the collective bargaining agreement when it failed to reclassify the grievants pursuant to the approval of their reclassification requests by the Lincoln County Personnel Committee? If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

One or the other of the parties, or both, have cited the following contract provisions as relevant to the determination of this issue:

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The County possesses the sole right to operate County Government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:

A. To direct all operations of the County;

B. To establish reasonable work rules;

C. To hire, train, promote, transfer, assign and retain employees;

D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

E. To lay off employees from their duties because of lack of work or any other legitimate cause;

F. To maintain efficiency of department operations entrusted to it;

G. To take whatever actions as necessary to comply with state or federal law;

H. To introduce new or improved methods or facilities;

I. To change existing methods or facilities;

J. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, and to determine the work to be performed by employees;

K. To utilize temporary, part-time or seasonal employees when deemed necessary; provided such employees shall not be used for the purpose of eliminating existing positions;

L. To determine the methods, means and personnel by which operations are to be conducted.

Any unreasonable exercise or application of the above-mentioned management rights which are mandatorily bargainable shall be appealable through the grievance and arbitration procedure; however, the pendency of any grievance or arbitration shall not restrict the right of the County to continue to exercise these management rights until the issue is resolved.

. . .

5.02 Arbitration:

. . .

6. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the terms of the Agreement.

. . .

ARTICLE 12 – RECLASSIFICATION

12.01 An employee seeking a reclassification shall present such request in writing to the department head. The department head shall notify the employee in writing of his/her recommendation within ten (10) working days. This recommendation shall be forwarded to the Personnel Committee for consideration at the next regularly scheduled meeting.

> A union employee who is reclassified shall be paid at the pay rate in the new pay grade to which the position is reclassified consistent with the employee's length of service with the County. The effective date of the reclassification shall be the first day of the first pay period following approval.
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> . . .
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> **ARTICLE 28 – AMENDMENTS**
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> 28.01 This Agreement may be amended any time during its life upon the mutual consent of the parties. Any amendment supplemental to this Agreement shall not be binding upon either party unless executed in writing by the authorized representatives of the Union and Employer.

Position of the Union

The Union submits that the language of Article 12 – Reclassification is sufficient by itself to determine the outcome of the dispute and that every prerequisite contained in Article 12 for reclassification has occurred. That being the case, the contract has necessarily been violated since the employes have not been paid consistent with their reclassified status.

The Union cites Arbitrator Whitney in CLEAN COVERALL SUPPLY CO., to the effect that an arbitrator cannot ignore clear contract language and Elkouri & Elkouri, How Arbitration Works, to the effect that disagreement between the parties as to meaning of language, does not make the language ambiguous, nor will an arbitrator give clear and unequivocal language a meaning other than that expressed. Where the language is clear it should be enforced whether the results are harsh or such enforcement meets the expectations of the parties.

The Union points out that under Article 5.6 of the parties' agreement (Jt. Ex. 1) the arbitrator is not to modify, add to or delete from the terms of the Agreement.

As well the Union posits that arbitrators have closely held to the limitations put on them by a contract and cites Arbitrator Fieger to that effect

> Not only is it axiomatic that the clear language of the agreement must be honored, but here the contract in exact terms forbids the arbitrator from ignoring 'in any way' the specific provisions of the contract nor giving, to either party, rights which were not obtained in a negotiating process.

The Union quotes Arbitrator Rauch to the effect that parties are charged with the knowledge of the provisions and significance of contract language:

> One of the most important facts about the collective bargaining process is that the parties involved are familiar with the employee and the business problems in respect to which they seek agreement. Therefore, when a tentative agreement is reached, both of them know what it was expected to accomplish. Probably more important, however, is the fact that the entire Union membership reviews the terms of tentative commitments and, based on the knowledge which the individual employee has of the matter is (sic) question, decides whether those terms are acceptable.

Anticipating that the County will argue that past practice should control the outcome of this case, the Union submits first that past practice has no relevancy where the language is clear and unambiguous as is Article 12 and even if found relevant, since only 6 of 33 reclass requests were denied by the County Board and only 3 of those affected an employe, there is insufficient practice to constitute a binding past practice. Finally, implicit in its framing of the issue, is the Union's argument that if past practice proves anything, it is that the County Board merely confirms the decision of its Personnel Committee.

Position of the County

The County asserts that the contract language is silent and ambiguous as to the approval procedure of reclassification requests and that when the labor agreement is read in its entirety and past practice is considered, no contract violation has occurred.

The contract language is ambiguous because it only states that reclassification requests shall be forwarded to the Personnel Committee for consideration but does not state either that the personnel committee has the authority for final approval, or that the Personnel Committee's action is forwarded to the County Board.

Citing Elkouri & Elkouri, the County submits that an agreement is ambiguous if plausible contentions may be made for conflicting interpretations of the language. Ambiguity is not found on the face of the language itself, but on its application to the facts at hand and that proof of a consistent prior practice may itself persuade the arbitrator of the ambiguity of a contract provision which is seemingly clear on its face.

The County submits that the Personnel Committee is a review committee of the County Board which makes recommendations to the County Board for its consideration and action. Thus there is a gap in the contract language and therefore the language is ambiguous. As the arbitrator's role is to determine the intent of the parties, and the contract is ambiguous, it is appropriate to look at bargaining history and past practice as well as the language of the contract to determine the parties' intent.

Principles of the use of past practice as an aid in contract interpretation emphasized by the County include first, where practice has established a meaning for language under prior contracts, that meaning should be continued. Second, where a party has continuously failed to object to the other party's interpretation, such failure should be considered assent to that interpretation, thereby providing the necessary mutuality and finally that it is appropriate to use past practice to fill in the gaps in contract language where the language is silent.

Applying these principles to the facts of this case, the County asserts that the practice of the parties supports the County's interpretation of the language and cites as evidence that in all 33 reclassification requests in the 13 years between 1985 and 1998 all requests required approval by the County Board in order to be implemented. Further the official records of the County show that both the Personnel Committee and the County Board view the Personnel Committee as a review and recommendation committee, and on several occasions, the Board refused to reclassify positions even where the Personnel Committee had recommended reclassification.

Additionally, in 1994 the County informed the Union in writing of its position that reclassification requests must go before the full County Board and that the Personnel Committee has no independent authority to grant such requests. The Union did not challenge the County's interpretation and did not file a grievance then or even after the County Board rejected the Personnel Committee's recommendation to reclassify the position.

The County finally argues that whereas Article 12 on reclassification is ambiguous and in need of interpretative help from past practice analysis, Article 2 – Management Rights clearly and unambiguously reserves to management the right to determine the ultimate outcome of reclassification requests.

The arbitrator is duty bound to apply clear language in a contract and as Article 2 is clear and in the absence of limiting contract language, the arbitrator should find the Union's contentions of a violation of contract to be without merit.

FACTS

As the parties agree, the facts of the case are straightforward and uncontroverted. On August 9, 1999 Lincoln County Register of Deeds Fiscal Clerk, Pamela K. Gilson wrote Jolene Callahan, the Lincoln County Register of Deeds, and requested reclassification to the position of Program Assistant. (Jt. 2A) On August 13, 1999 Lincoln County Register of Deeds Fiscal Clerk Sarah Koss, wrote Jolene Callahan, the Lincoln County Register of Deeds, and requested reclassification to the position of Program Assistant. (Jt. 2B) On the same date Jolene Callahan wrote Lincoln County Administrative Coordinator John Mulder and forwarded her recommendation for reclassification of the two employes. (Jt. 5) On August 31, 1999, the

Lincoln County Personnel Committee met and after considering the requests voted 3 to 2 to approve the requests. (Jt. 6) On September 21, 1999 the Personnel Committee signed and submitted for consideration by the Lincoln County Board Resolution 37-99 which would "accept the recommendation of the Personnel Committee and approves the following reclassifications to become effective September 6, 1999." (Jt. 7a) The Lincoln County Board took up Resolution 37-99 at its meeting on September 21, 1999, and after discussion tabled the resolution for one month on a vote of 19 to 3. (Co. 3)

The grievance on behalf of Sarah Koss and Pamela Gilson as drafted by Charlene Waller, Steward, is dated September 29, 1999 with a "Date of Alleged Infraction" of September 24, 1999. (Jt. 8) The Board again took up Resolution 37-99 at its meeting on October 19, 1999 and after discussion decided to delay further action on a vote of 13 to 7. (Co. 1) The County responded to the grievance by letter of October 22, 1999 asserting that the reclassifications in question would need to be approved by the County Board and citing past reclassifications as showing County Board approval. (Jt. 9) By letter of October 26, 1999 the Union acknowledged the first step denial and gave notice of appeal to the Personnel Committee. (Jt. 10) At the November 11th meeting of the Personnel Committee a motion to sustain the grievance failed for lack of a second and a motion to deny the grievance failed on a tie vote. The committee directed the Administrative Coordinator to work with the Register of Deeds and the grievants to work out a compromise. (Jt. 11) Settlement efforts failed and by letter of November 19th, the Union asked that the matter be rescheduled by the Personnel Committee for its December meeting. (Jt. 12) At its meeting on December 8th, the Personnel Committee took up the grievance with all parties present and adopted a motion to resubmit the reclassification requests to the County Board and place it on the Board's agenda for its meeting on December 21st. (Jt. 13) On December 21st a motion to take from the table failed on a vote of 12 to 10. (Co. 2) The Arbitrator found that the grievants complied with Article 12. All reclassifications since 1985 have occurred only after County Board approval. (Co. 4 testimony)

The issue before the arbitrator is whether the employes, Koss and Gilson are entitled to reclassification by sole reason of compliance with Article 12 and by the Personnel Committee action of August 31, 1999. No argument was made that the action by the Board was arbitrary or capricious as that issue is not before the Arbitrator.

DISCUSSION

The threshold question is whether Article 12 of the contract is clear and unambiguous. I am urged by the Union to find that it is not and I am urged by the County to conclude that it is ambiguous. Article 12 is not ambiguous. It is simple and straightforward.

The County submits that more than 15 years of reclassification history, all of which goes beyond the language of Article 12, should constitute evidence of ambiguity. To that the Union replies that clear language needs no extrinsic aids of interpretation and anyway, since only 6 of 33 reclassifications were rejected by the County Board and only 3 of those 6 involved incumbents, there is insufficient variance from the recommendation of the Personnel Committee to constitute a proof of anything other than that the Personnel Committee is the decision making body.

In looking at the contract, as well as the entire record, I am persuaded that Article 12 does not state the complete agreement of the parties. Note for instance that Article 12 is two short paragraphs long where Article 11 on Transfers and Promotions is two pages long.

I conclude that these circumstances call for the application of the principle that past practice itself may be evidence of a meaning which might in general usage connote some other fact or meaning. [ARBITRATOR DEAN, CIRCLE STEAL CORP. 85 LA 738]. I find this extensive and consistent practice to be sufficient to conclude that Article 12 does not completely state the prerequisits for reclassification and is therefore the use of past practice for "gap filling" is appropriate. Elkouri & Elkouri 5th ed at 654.

Has the past practice been clearly enunciated and acted upon? The question then becomes whether the elements of past practice are present in such degree that the practice constitutes a past practice which has become a part of the contract. A past practice "to be binding on both parties should be: (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice; (4) accepted by both parties." Arbitrator Jules Justin in CELAVESE CORP. OF AMERICA, 24 LA 168, 172 (1954) and cited in Elkouri & Elkouri 5th ed. at p. 632.

As referenced above, every reclassification that has occurred for employes covered by this contract has occurred only after adoption of a resolution by the County Board, for at least the last 15 years. Reclassifications recommended by the Personnel Committee for 6 positions have been rejected by the County Board and have not occurred. The history of County Board review of Personnel Committee consideration referenced in Article 12 is unequivocal.

Every reclassification request recommended by the Personnel Committee has resulted in a Resolution to the County Board signed by at least the Personnel Committee, has been referenced in the County Board Agendas and resultant Board consideration and action, if any, has been memorialized in Board minutes. Further, both County 12 and Joint 9 indicate that the requirement of Board consideration and approval has been stated by the County for years. County 12 is a letter of February 8, 1994 from the Lincoln County Corporation Counsel, Bugstiom to Mr. Phil Salamone, AFSCME Staff Representative in which she states in pertinent part that the Personnel Committee has "adopted the Union's proposal and agreed to send the

same (reclassification requests) to the County Board for their approval. This final step is necessary since the Committee has no independent authority to grant these reclassifications on any terms." Joint 9 is a letter from Lincoln County Administrative Coordinator John Mulder to Mr. Phil Salamone, AFSCME Staff Representative, stating that reclassifications need full Board approval and citing County Board Resolutions in 1997 and 1998 approving reclassifications. I am satisfied that the requirement of County Board consideration and approval as a prerequisite to reclassifications has been clearly enunciated and acted upon.

The third element of binding past practice is that it be readily ascertainable over a reasonable period of time as a fixed and established practice. As noted, the requirement of Board consideration and approval has been implicit in the actions of the Personnel Committee, County Board, department heads, human resource professionals for the last 17 years. Further, the acquiescence of affected employes to the delays inherent in Board consideration and even occasional reclassification rejection by the Board indicate an established practice. I find that the requirement of Board consideration has been readily ascertainable over a reasonable period of time as a fixed and established practice.

The final element of binding past practice is that it be accepted by both parties. The mutual acceptance may be tacit and may be inferred from the circumstances. [ARBITRATOR BORONI, 88 LA 734, 737]. Awareness of a practice is to be presumed from its long established and wide spread nature. [ARBITRATOR VALTIN in BETHLEHEM STEEL CO 33 LA 374, 376 (1959)]. Further it is noted that nothing in the exhibits is inconsistent with a finding that the parties accepted the fact that Board approval is required and finally there is no bargaining history to the contrary. I find that the practice is accepted by both parties.

In regard to the question of a practice of a prerequisite of Board action, there is little doubt as to its existence. There is no evidence of a reclassification ever occurring without Board approval, and even though the instances of reclassification rejection by the Board are not extensive, the acceptance of those decisions is evidence of the parties' intent.

In considering the practice in conjunction with the language of Article 12 of the Agreement, it appears that the practice supplements the incomplete procedure set out in Article 12. In sum, the language of Article 12 supplemented by the practice provides that where a Union member seeks reclassification, the employe requests support in writing from the Department Head, who responds within 10 days and which response goes to the Personnel Committee for its consideration at its next meeting; the recommendation of the Committee then goes to the County Board for its consideration and action. Thus, under Article 12, an employe can commence a series of considered decision making steps which may result in the employe's reclassification by action of the County Board.

While the issue before me is whether Personnel Committee approval is sufficient for reclassification and not whether the Board action was arbitrary or capricious, I will note that the testimony of the Administrative Coordinator was that he recommended against the

reclassifications because organizationally the County allows only one Program Assistant per office of the size and complexity of the Register of Deeds and that to grant the request as recommended by the Register of Deeds would violate that organizational regime. The evidence shows that this was a concern to the Board as well.

AWARD

The grievance is dismissed.

Dated at Madison, Wisconsin this 22nd day of August, 2000.

James R. Meier /s/
James R. Meier, Arbitrator

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