

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 1667, AFSCME, AFL-CIO**

and

**VERNON COUNTY**

Case 119

No. 58776

MA-11055

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**Appearances:**

**Mr. Daniel R. Pfeifer**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Klos, Flynn & Papenfuss, by **Attorney Jerome J. Klos**, appearing on behalf of the County.

**ARBITRATION AWARD**

Local 1667, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Vernon County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the parties' agreement. The undersigned was so designated. Hearing was held in Viroqua, Wisconsin on June 8, 2000. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on November 27, 2000.

**BACKGROUND**

In October, 1998, the County received a deficiency citation from the State in its activity program. As a result, in July, 1999, the County updated the job description for the position of Activity Aide to include one year experience in an activity department or recreational capacity with geriatric, mentally ill or developmentally disabled persons. (Ex-7) On or about July 31, 1999, the County posted a vacant Activity Assistant position and the grievant posted for it. (Ex-3) The grievant, a CNA, lacked the one year experience requirement and was not selected. None of the other posters met this requirement and the County hired an applicant from the outside who met the requirement. A grievance was filed over the grievant's non-selection which was denied and appealed to the instant arbitration.

**ISSUE**

The parties stipulated to the following

Did the County violate the collective bargaining agreement by not awarding the vacant Activity Aide position to the grievant? If so, what is the appropriate remedy?

**PERTINENT CONTRACTUAL PROVISIONS**

**ARTICLE II  
Management's Rights**

2.01 Subject to the provisions of this Contract and applicable law, the County possesses the right to operate the Manor and all management rights repose in it. These rights include, but are not necessarily limited to, the following:

- A. To direct all operations of the Vernon Manor;
- B. To establish reasonable work rules and schedule work;
- C. To hire, promote, transfer, schedule and assign employees to positions within the Vernon Manor;
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
- E. To relieve employees from their duties because of lack of work or other justifiable economic reasons;
- F. To maintain efficiency of Vernon Manor operations.
- G. To take reasonable action necessary to carry out the functions of the Vernon Manor in situations of emergency;
- H. To take whatever action is necessary to comply with State or Federal law;
- I. To introduce methods or facilities which are new or exist elsewhere;
- J. To change existing methods or facilities;

K. To determine the kinds and amounts of services to be performed as pertains to Vernon Manor operations; and the number and kinds of classifications to perform such services;

L. To contract out for goods; and

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

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ARTICLE XI  
Seniority, Probation, Layoff  
Rehire and Job Posting

. . .

11.09 When it becomes necessary to fill a vacancy or a new position, the Manor shall bulletin such new position or vacancy for a period of ten (10) days, asking for applications, and the qualified employees within the Manor with the longest period of service within the department of the Manor where the vacancy occurs shall be assigned to the new position or vacancy. If no applicant has such seniority within the department of the vacancy, then the qualified employee within the Manor with the longest period of service shall be assigned to the new position or vacancy.

11.10 All new or vacated job positions shall be posted for the minimum of ten (10) days preceding the selection of the employee to fill the new or vacated job position. The rule of Section 11.09 above shall be the factor in the selection of the applicant for the new or vacated job position. The notice shall include the rate of pay, shift and work area and the duties of the position. Said position shall be filled on the 12<sup>th</sup> day following the original date of posting. The successful applicant shall be allowed forty-five (45) days to qualify or to return to employees former position, if dissatisfied. Interim appointment to the new or vacated position may be made by the Administrator.

**Union's Position**

The Union observes that the County posted a vacancy for an Activity Assistant on July 31, 1999 and four employees posted for it including the grievant, who had the most seniority. It notes that none of the applicants were selected but an outside employee was hired.

It states that the County has traditionally hired CNA's from the Manor to fill Activity Aide positions. It refers to Section 11.09 of the agreement which provides the senior qualified employee gets the vacancy. It submits that the grievant has the greatest seniority and was not awarded the position, so the County has the burden to show that the grievant was not qualified. It points to the testimony of the Manor's Administrator who testified that the job description was changed to require one year experience working in an activity department or recreational capacity with geriatric, mentally ill or developmentally disabled persons. It asserts that the person hired allegedly had a year of experience with activities in a group home but the Administrator did not know the person's education or training background or what her duties were at this group home. It submits that the Administrator testified that this person was hired because the Activity Department had received deficiencies from a State survey but claims these were in the area of activity programming which was the responsibility of the Activity Department supervisor and the deficiencies were corrected prior to the new Activity Aide being hired.

The Union notes that Section 11.10 allows forty-five (45) days for an applicant to qualify for a position and it submits that the grievant should have at least been granted the trial period. It concludes that the County violated the agreement by not awarding the vacant Activity Aide position to the grievant and it requests the grievant be awarded said position.

### **County's Position**

The County contends that this case is not complicated. It states that it exercised its rights under Sec. 2.01 of the agreement to establish new qualifications for a vacant position and the applicant didn't meet the qualifications. It submits that the Union's argument that the grievant would have qualified under the old job description is immaterial as management changed the requirements as was its right. It notes that a CNA can participate in an activity with a resident in accordance with a resident care plan devised by the Activity Aide in response to an individual's need and aptitude. It observes that qualified training or specialized experience is required to make the determination of and the duration and timing of any such activity. The reasonableness and the necessity to make the change in the job description, according to the County, is supported by the State citation and the success of the new program observed by management after the change was made. It insists that experience in working as an Activity Assistant is essential as the needs of the residents are individualized requiring specialized programming which demands a special understanding of the people working with the resident. It concludes that the County performed its duty and function under the law and the contract and there was no violation of the labor contract.

### **DISCUSSION**

The parties' collective bargaining agreement contains a broad management rights clause which grants the County broad discretion to make changes to maintain efficiency. In this case

the County added the requirement for Activity Aide of one year experience in an activity department or recreational capacity with geriatric, mentally ill or developmentally disabled persons. (Ex-7) This change was made in response to a state and federal survey to meet the needs of residents. The County by its management rights clause is given the authority to make changes in job requirements as reasonably required to meet survey deficiencies. The mere fact that this was not a previous requirement and the County had hired CNA's to fill an Activity Aide position does not mean that it is required to maintain an old requirement which prevents it from correcting deficiencies.

Article XI of the parties' agreement requires the posting of a vacancy and provides that the qualified employee within the Manor with the longest period of service shall be assigned to the vacancy. (Ex-1) The issue here is whether the grievant is qualified. The grievant testified that she did not meet the specific requirement of one year in an activity department. The grievant clearly failed to meet the requirements of the position and was found not qualified. The County decision that she was not qualified is not unreasonable, arbitrary or capricious.

The Union asserts that the grievant should be given a trial period as provided in Article XI, Section 11.10. Section 11.10 provides for a forty-five (45) day period to qualify for the successful applicant which requires the applicant meet the job requirements. This section does not require a trial period for an unqualified applicant. It simply provides that a qualified employee must demonstrate that he/she can perform the job and a trial period is not a training period as the applicant must have met the qualifications required before a trial period is allowed. Thus, the grievant who admitted she did not meet the required one year of experience was not entitled to a trial period.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes the following

**AWARD**

The County did not violate the collective bargaining agreement by not awarding the vacant Activity Aide position to the grievant, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 5th day of December, 2000.

Lionel L. Crowley /s/  
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Lionel L. Crowley, Arbitrator

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