

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**BROWN COUNTY PARA-PROFESSIONAL LIBRARY EMPLOYEES,
LOCAL 1901-D, AFSCME, AFL-CIO**

and

BROWN COUNTY (LIBRARY)

Case 640
No. 58680
MA-11031

(Library Associate Position at Howard Branch)

Appearances:

Mr. David Campshure, Staff Representative, Wisconsin Council 40, AFSCME, 1566 Lynwood Lane, Green Bay, WI 54311-6051, appearing on behalf of Local 1901-D.

Mr. James M. Kalny, Director of Human Resources, Brown County, 305 East Walnut Street, Green Bay, WI 54305-3600, appearing on behalf of Brown County.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Brown County Library Para-Professional Employees, Local 1901-D, AFSCME (hereinafter referred to as the Union) and Brown County (hereinafter referred to as the County) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen to serve as arbitrator of a dispute regarding the transfer of a Library Associate, Johanne Stuart, from the Central Library to the newly reopened Howard Branch Library. The undersigned was so assigned. A hearing was held on August 30, 2000, in Green Bay, Wisconsin, at which time the parties were afforded the full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The hearing was not transcribed. The parties submitted post hearing briefs and reply briefs, the last of which was received on November 29, 2000, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties agree that the issues before the Arbitrator are:

1. Did the County violate the parties' collective bargaining agreement when it transferred the Library Associate position from the Central Library to the Howard Branch?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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Article 1. MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due h/er for such period of time involved in the matter.

The Employer shall adopt and publish reasonable rules which may be amended from time to time. However, such rules will be subject to the grievance procedure.

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Article 6. MAINTENANCE OF BENEFITS

A. The Employer agrees to maintain existing benefits that are mandatory subjects of bargaining and are not specifically referred to in this Agreement.

B. The parties further agree that certain preexisting mandatory conditions of employment, which were previously in other parts of the Agreement shall be placed in this part of the Agreement. Said mandatory conditions of employment are not meant to affect or limit the maintenance of benefits clause noted in Section A above.

Personal effects, such as glasses, watches, etc., damaged or destroyed as a result of job duties shall be replaced by the Employer.

The above stipulations are intended to cover normal conditions that occur or exist; however, should special conditions arise on matters that are mandatory subjects of bargaining, said matters are to be taken up with the Union to arrive at a satisfactory solution. Employees shall be given a copy of all their evaluations.

. . .

Article 23. SENIORITY

It shall be the policy of the Employer to recognize seniority and to post each January a seniority list of employees, showing anniversary dates and continuous service credits.

(a) LAY OFFS: If a reduction of employee personnel is necessary, the last person hired shall be the first person laid off and the last person laid off shall be the first person recalled. No regular employees shall be laid off if there are part-time, temporary or seasonal employees working.

(b) PROMOTIONS: Whenever any vacancy occurs due to a retirement, resignation, new position or for whatever reason, the job vacancy shall be posted within ten (10) days of vacancy. The vacancy shall be posted on bulletin boards for a minimum of five (5) work days; vacancies not filled within thirty (30) days of the date of posting, such vacancies shall be reposted.

The job requirements and qualifications shall be a part of the posting and sufficient space provided for interested parties to sign said posting. If no regular employee makes application for this job by signing the posting, it shall be given to the temporary or grant employee applying (signing) who has the most seniority, subject to the right of the Employer to determine whether the employee applying for said position has the proper qualifications to perform the job. All new positions and salary rates shall be negotiated by the parties. The Union shall receive notice of all postings and the successful applicant.

Promoted employees shall serve a fourteen (14) day trial period. If the employee fails to qualify, or if s/he wishes, s/he may return to h/er former position during the trial period. Upon completion of the trial period, s/he shall receive the classification rate of pay. The trial period may be extended by mutual consent of the Employer and the Union.

(c) **QUALIFICATIONS DISPUTES:** If there is any difference of opinion as to the qualifications of an employee, the Employer and the Union committee may take the matter up for adjustment through the grievance procedure. The Employer reserves the right to make immediate temporary assignments to fill any vacancy until such time as said vacancy is filled pursuant to the procedures outlined herein.

(d) **ACCUMULATION:** The seniority rights of an employee shall continue to accumulate during periods of layoff and for other legitimate reasons. Seniority for regular part-time employees shall be based on the original date of employment.

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BACKGROUND

The Employer provides general governmental services to the people of Brown County, Wisconsin. Among these services is the operation of a public library system employing, among others, employees in the classifications of Librarian, Library Assistant and Library Associate. The Library Assistants, Senior Library Assistants and Library Associates are represented by the Union in the Para-Professionals bargaining unit. The Librarians are members of a separate professionals bargaining unit, as are the Library Clerks.

The County's library system consists of a Central Library and eight branch libraries. One of the branches, Howard, was a small and aging facility, and the County determined to replace it with a new and larger branch. The new branch was finished in 2000. Whereas the old Howard branch was supervised by a Librarian III and staffed by a Librarian I, a Senior Library Assistant and four clerks, the new branch added one and a half Librarian I positions, another Senior Library Assistant, a Library Associate and seven-plus clerks. The County posted a Librarian, a Senior Library Assistant, a part-time Maintenance Worker and seven part-time Clerk jobs for bid. One of the Librarian jobs was filled by transferring a Librarian from the Central Library to Howard. The new Library Associate's slot was filled by the transfer of Johanne Stuart from the Second Floor Reference Department at the Central Library to the Howard Branch. Stuart's position at the Central Library was eliminated and she was moved to the new facility. That transfer is the subject of the instant grievance, as the Union

contends the Howard job should have been posted as a vacancy for bid by all members of the bargaining unit and Stuart should have been laid off and allowed to exercise her bumping rights.

The County engaged in discussions about the staffing of the Howard Branch with the Union, as it did with the Professionals bargaining unit and the Clerks bargaining unit. The Professionals did not protest the transfer of a Librarian to the new branch, but the para-professionals and the County could not come to agreement on the County's desire to fill the Library Associate's slot through transfer. Failing agreement, the County proceeded with the transfer and the Union filed the instant grievance. At the arbitration hearing, the County presented evidence of past personnel transactions, which it contended showed that unilateral transfers had been implemented without grievance or protest. The Union disputed the validity of the County's examples, contending that many involved other bargaining units and that in others there may have been side deals to allow the transfers.

Additional facts, as necessary, are set forth below.

The Position of the Union – Initial Brief

The Union takes the position that the County violated the contract by not posting the new Library Associate position at Howard. In order to evade the posting and bumping provisions of the contract, the County transferred Stuart from her position at the Central Library and then abolished that job. The contract clearly does not allow this. Article 23 is exceptionally broad and it provides that “*Whenever any vacancy occurs* due to retirement, resignation, *new position or for whatever reason*, the job vacancy shall be posted . . .” This language is clear and unambiguous. The Arbitrator cannot, and should not, ignore it. Otherwise management will have a green light to transfer employees whenever it wishes to fill a job, picking and choosing at the expense of negotiated seniority rights.

The County's reliance on the Management Rights clause is misplaced. Article 1 gives management the general right to “transfer” employees, but it is a fundamental precept of contract interpretation that specific language, such as that in Article 23, must govern over general language, such as that in Article 1. In Article 1, the County claimed a general right to transfer, but that same Article recognizes that the right is limited as “otherwise herein provided.” In Article 23, the County specifically agreed that its policy would be “to recognize seniority” and to post every vacancy occurring “for whatever reason.” The recognition of seniority means that a transfer cannot be unilaterally imposed. It must be open for bid. The posting language means that a new job cannot be filled by fiat. It must be posted. The location of a job is an important benefit in a county-wide system with multiple work locations. It is absurd to argue that a job at one location is the same as a job at another and that an opening at Howard is not a different job from an Associate's position at the Central Library.

The County attempted to prove a past practice of unilaterally transferring employees, but on close examination, the evidence shows no mutual, binding practice. Of the 28 “transfers” listed on the County’s document, 15 involved other bargaining units and are irrelevant to this dispute. Of the 13 remaining transfers, many involved the switch of a vacant position from one site to another. Obviously the County can relocate vacant positions. Those positions are ultimately posted at the new locations and that is fully consistent with Article 23. In the remaining instances, there is not a single case where an employee was moved from one location to another, without either the posting of a position or the exercise of bumping rights. The County has never before attempted to completely circumvent the provisions of the labor agreement and the Arbitrator must conclude that no past practice exists to support its current effort.

Finally, even if the Arbitrator believed that a past practice existed to support the County’s position, it is well-established that past practice cannot trump clear language. If there have been instances in which the County acted unilaterally and the Union failed to challenge it, that means only that there are unremedied past contract violations. Past practice is relevant only in interpreting ambiguous language, and if – as is the case here – there is no ambiguity, even the clearest and lengthiest practice must yield. Given the broad and clear language of Article 23, no plausible argument can be made that external evidence is needed to understand what the contract says. Accordingly, under any view of the facts, the Arbitrator must sustain the grievance and order the County to post the Associate’s position at Howard. The Arbitrator should also retain jurisdiction over this matter to insure compliance with his Award.

The Position of the County – Initial Brief

The County takes the position that there has been no violation of the agreement and that the grievance should be dismissed. This dispute centers on whether the County has the right to transfer an employee. Article 1 of the contract expressly reserves to management the right to transfer employees. It is a matter of black letter law that an arbitrator must give contract language its plain meaning and the contract here is absolutely plain. Johanne Stuart’s job was transferred from the Central Library to the Howard branch. There was no reduction in force, no creation of a new job, no layoff to be made, no vacancy to be filled. The right to transfer employees is a fundamental prerogative of management and here the County did what the contract authorizes the County to do.

The Union’s theory of this case is that a vacancy was created in the classification of Library Associate at the Howard branch, but that theory is fallacious. No vacancy is created if there is no vacant job. Johanne Stuart never left her position. There was no opening for anyone to bid for and no occasion for Stuart to have to bump. If this is a vacancy, then the right to transfer employees is completely illusory. The rules of construction require the Arbitrator to read the contract to give full meaning to all clauses and to avoid any interpretation that renders a provision a nullity. Giving the promotions language of Article 23,

the meaning requested by the Union simply writes out of the contract the County's right to transfer employees. The more rational reading is one which safeguards the right of employees to use seniority to claim vacant positions, but precludes them from claiming other people's jobs when a transfer is effected.

The Union seeks a result that was never intended and that is shown by the internal inconsistencies that develop when Article 23 is applied to the instant situation. If this was a promotion, the employee who claimed Stuart's job would be required to serve a 14-day trial period. Stuart would presumably move to that employee's job and have to serve a 14-day trial period. Since the position at Central Library no longer exists, Stuart would no job to return to if she did not successfully complete the 14 days. In practical terms, Stuart could not exercise her right to return to her former job and the County could not exercise its right to have a 14-day trial period before making the job permanent. That makes no sense, because the promotion language was never intended to apply to this situation. If a promotion is limited to a truly vacant position, the system works smoothly and predictably, just as the parties intended.

Beyond the plain words of the contract and the rational functioning of the posting system, the County's interpretation is supported by past practice. While management at the Library tries to transfer only vacant positions, there have been cases in the past where employees have been transferred, just as Stuart was, without any grievance or protest. In 1990, Jan Grall was transferred and again in 1992 and 1996. As part of the transaction in 1992, Trish Burton was transferred. In 1994, Colleen DePouw was transferred. There was no posting involved in the 1992, 1994 and 1996 transfers. These were not accidents or anomalies. Again, the County tries to avoid transferring employees, but where it has had the need to do so, it has done so. This is further demonstrated by the more frequent transfers involving the Professional employees' unit. That bargaining unit has virtually identical language to the para-professionals contract, and there have been at least nine transfers in the professionals' bargaining unit since 1990. Indeed, one of the positions at the new Howard branch was filled by the transfer of a librarian. A practice in the same workplace, involving another Union with identical language, is powerful and persuasive proof of the practice within the industry and bolsters the practice within the para-professionals bargaining unit.

As the clear language of the contract grants management the right to transfer employees and since there is no express limitation on that right and since the practice in this bargaining unit and other bargaining units at the Library has been to allow transfers, the Arbitrator must conclude that the County acted properly when it transferred Johanne Stuart. Accordingly, the grievance must be denied.

The Position of the Union – Reply Brief

The Union takes issue with the County's claim that it can effectuate the involuntary movement of an employee just by calling it a transfer. What happened in this case was the creation of a new job. There had not been a Library Associate at the Howard Branch before

this. There was also the abolition of an old job. The Library Associate position in the Second Floor Reference section at the Central Library ceased to exist. The contract specifies what happens when new jobs are created – they are posted. It specifies what happens when existing jobs are eliminated – the incumbent has the right to bump. There is no gap in the contract that must be filled with an implicit right to transfer.

The County seeks to proceed in this case as if the words “or for whatever reason” did not exist in the language defining how vacancies are created. That language exists because the parties, or at least the Union, understood that employees may wish to post into jobs that are not more highly paid, but that are more desirably located. The breadth of the term proves the parties’ intent that all jobs be posted. There was evidence at the hearing of employees making lateral moves through the posting procedure and that is not unusual.

The County’s argument that the elimination of Stuart’s old position at the Central Library somehow means the posting language cannot be applied is simply not logical. It may be that there is no old job for her to return to, and thus, the 14-day trial period is not meaningful. The same result would obtain where the County posted a job and then elected not to fill the job of the successful bidder. The County cannot cite its own unilateral decision to abolish a position as the basis for ignoring the posting language in the contract.

Neither can the Arbitrator accept the County’s claim that the Union is somehow forcing it forfeit its contractual right to transfer employees. Quite to the contrary, it is the County that seeks to eviscerate the employees’ right to post for jobs and to have a trial period to determine whether they wish to retain the new job. The County accomplishes this in part by redefining when a vacancy exists. The County’s theory that a vacancy exists only when a new position is added to the table of organization flies in the face of the term’s common meaning. Surely a vacancy exists when an employee quits or retires or is promoted to a new classification. In those cases, there is no new position, yet there is surely a vacancy.

The County’s recitation of past instances to establish a practice is flawed. It fails to point out that the 1992, 1994 and 1996 cases all involved a posting of some type. As for the practice in the Professionals bargaining unit, there may be many reasons that the Professionals chose not to grieve the transfers in their unit and the Arbitrator cannot simply assume that they agree with the County’s reading of the contract. Moreover, each unit separately bargains and separately administers its contract. Different bargaining history and different contract administration will inevitably yield different interpretations of the agreements and the practice of one unit cannot be held to prove a practice in another unit.

The Position of the County - Reply Brief

The County reiterates its position that a seniority provision, even a broadly worded seniority provision, does not take precedence over every other provision of the contract and does not by implication erase the specific grant of a right to transfer employees. The Union is

correct that specific language governs over general, but that is only true if there is a conflict between the provisions. Here, there is no conflict. If there is a vacancy, seniority applies. However, there is no vacancy to apply the language of Article 23 to – there is one job and there is already an incumbent. An employer has discretion in deciding whether to declare a vacancy and the County is not obliged to create a vacancy when its needs are better met by a transfer.

As to the evidence of past practice, the Union addresses only those instances where a vacancy was posted and ignores those where a true transfer took place. In 1984, two professional positions were transferred from the Central Library to East, without posting. In March of 1990, Jan Grall was transferred from the Bookmobile to DePere and the position at the Bookmobile was abolished. Grall asked to be allowed to bump and that request was granted on a non-precedential basis. However, it was the transfer that triggered the bumping and this is inconsistent with the Union's claim that transfers are not permitted. In 1992, Grall was unilaterally transferred, with no bumping, from Ashwaubenon to East. There was no posting of any type. In 1996, Grall was again transferred, from East to Wrightstown. There was no posting at Wrightstown. Grall was moved because management deemed it necessary. Numerous professional employees were also moved in what were clearly unilateral transfers. The practice is beyond dispute.

DISCUSSION

At the outset, I would note that the evidence of past practice presented in this proceeding is largely irrelevant. This case involves the re-opening of a facility, with a need for an increase in staffing levels. In response, the County posted several new jobs for bid in this bargaining unit and others, and also reallocated position from other facilities to this one. As detailed below, the question on which this case turns is whether there was a vacancy created by the planned increase in staffing levels. The past practice evidence deals with transfers in a variety of bargaining units, including this one, but does not shed light on what constitutes a vacancy.

Article 1 of the collective bargaining agreement gives management the right to “transfer” employees. Article 23 of the contract addresses the calculation and uses of seniority. It nowhere mentions transfers, but in Section (b), it speaks to “Promotions” and sets forth a procedure allowing employees to use their seniority to claim jobs for which they are qualified. While a “transfer” is not the same thing as a “promotion” the terms are often used loosely in labor relations. In part, this is because almost all promotions involve a transfer to another job. One common definition of a promotion is “the transfer of an employee to a higher job classification,” while a transfer is defined as a “shift of an employee from one job to another . . .” 1/ The contract here uses the heading “Promotions” to describe job transactions that could involve purely lateral transfers. Under the language of Article 23(b),

the job posting procedure is triggered “Whenever any vacancy occurs due to a retirement, resignation, new position or for whatever reason” and reasonably read, this would allow employees to post for vacancies in the same classification and even lower rated classifications. The question in this case is not whether the movement of Johanne Stuart from the Central Library to the Howard Branch is characterized as a transfer. It is whether there was a vacancy at Howard. Posting is only required where there is a vacancy. If there was, it had to be posted. The job opportunity may have been a transfer, a promotion or a demotion, depending upon who posted for it. However it is characterized, a vacancy must be offered to the bargaining unit. By the same token, under the clear language of Article 23, if the transaction here did not involve a vacant position, the posting language does not apply.

1/ CCH Dictionary of Labor Terms, cited in Elkouri and Elkouri, How Arbitration Works (Volz, et. al., BNA 5th Ed.) at page 775.

The County denies that there was a vacancy and cites the familiar rule that an Employer has great latitude in determining whether a vacancy exists. That is true as far as it goes, but it is a statement of an Employer’s rights where it elects not to fill a job that has come open. In that context, the right to determine whether a vacancy exists is the right to choose to do without a position and absent specific contract provisions on minimum staffing and the like, arbitrators are properly deferential to management’s judgment. Posting procedures insure that employees have a fair chance at available opportunities in the work force, but they do not compel management to create those opportunities. In this case, for example, if the Union had grieved the decision not to fill Stuart’s slot at the Central Library once she was moved to Howard, management could properly respond that it had the right to elect not to declare a vacancy at the Central Library, even if the job had not been eliminated from the table of organization. In contrast, the issue here concerns a position that was filled – the Library Associate’s position at Howard – and if that was a vacancy within the meaning of Article 23, management could not persuasively argue that it has the discretion to decide that a vacancy did not exist there and bypass the posting procedure.

The County’s premise here is that a vacancy does not exist because no job was added to the overall workforce. That has some relevance, but it is not the only test. Where an employee quits or retires, there is no job added to the workforce. The head count remains the same, but there is a vacancy. An existing position lacks an incumbent. If the County determines that it still needs that position at that location, it must post the job. This situation is the converse. A need existed at the Howard, but there was no position. A position existed at the Central Library, but there was no need. Had the County transferred Stuart, then declared a vacancy at the Central Library, this transaction would rather clearly be a sham intended to evade the posting procedures of the contract. That is not what happened.

The County reallocated the position of Library Associate from Second Floor Reference at Central Library to the Howard Branch. Contrary to the Union's conception of the transaction, this was not the elimination of a job and the creation of another job. This was instead a single transaction, which created neither a vacancy in Howard nor a layoff at the Central Library. Certainly, the County could have elected to handle this as two separate transactions, and if it had, the posting language and layoff language would have come into play. However, the contract as written does not require the County to structure a genuine reallocation in that fashion. If Article 23 specified that transfers were to be accomplished by seniority, clearly the County would have been required to post the transfer opportunity at Howard. The contract does not so require. Instead, the posting procedure, while very broad, requires a vacancy before seniority comes into play. There was no vacancy, and thus, the language of Article 23 was not triggered.

The Union argues forcefully that allowing this transfer will establish a precedent, allowing the County to ignore the job posting procedure in the future. This decision is confined to the facts of the case and the Union's concern is valid only to the extent that the County is willing to confine itself to reallocations and is content to permanently eliminate the position at the site an employee is transferred from. As discussed above, where the evidence suggests that the reallocation is a sham, intended to frustrate the posting rights of employees, the County would not have the right to take unilateral action. There is no evidence in this record that would support the conclusion that the County was engaging in such an evasion.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The County did not violate the parties' collective bargaining agreement when it transferred the Library Associate position from the Central Library to the Howard Branch.

The grievance is denied.

Dated at Racine, Wisconsin, this 7th day of March, 2001.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator