

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LA CROSSE COUNTY (LAKEVIEW HEALTH CARE CENTER)

and

LAKEVIEW INSTITUTION LOCAL 1403, WCCME, AFSCME, AFL-CIO

Case 183
No. 59230
MA-11227

Appearances:

Mr. Robert B. Taunt, County Personnel Director, La Crosse County, Room 202, 400 4th Street North, La Crosse, Wisconsin 54601-3200, appearing on behalf of the County.

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of the Union.

ARBITRATION AWARD

La Crosse County (Lakeview Health Care Center), hereinafter referred to as the County, and Lakeview Institution Local 1403, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties request the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr. to arbitrate a dispute over the denial of a posting. Hearing on the matter was held in West Salem, Wisconsin on December 6th, 2000. Post-hearing written arguments were received by the arbitrator by January 29th, 2001. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon the framing of the issue and agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

“Did the County violate the collective bargaining agreement when it failed to award the Activity Therapy Assistant position to the grievant?”

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE II

ADMINISTRATION

2.01 Except as otherwise provided for in this Agreement, the County retains the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause, the right to decide the work to be done and location of work, to determine the construction, maintenance or services to be rendered, the materials and equipment to be used, the size of the work force, and the allocation and assignment of work or workers; to schedule when work shall be performed; to contract for work, services or materials, to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; and to adopt and enforce reasonable rules and regulations.

2.02 The Administration agrees to make every effort possible to provide a like position, or as similar as possible a position, to employees whose positions are being deleted through reorganization of a department or a position.

2.03 In the event the above is not possible, those employees mentioned above shall be given preference in a new position before any new employee is hired in accordance with Section 6.02 of this Agreement.

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ARTICLE IV

PROBATION, SENIORITY AND JOB POSTING

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- 4.05 When an employee is laid off due to the shortage of work, lack of funds, or the discontinuance of a position, such employee may take any other position for which the employee may qualify and that the employee's seniority will permit them to hold.
- 4.06 In filling vacancies, making promotions, or where new jobs are created within the Bargaining Unit, those qualified employees available with the most seniority shall be given preference. Any such employee shall be given a trial period of at least fifteen (15) working days, not to exceed three (3) calendar months. If at the end of the trial and training period it is determined that an employee is not qualified to perform the work, they shall return to their old position and rate.
- 4.07 When vacancies, new jobs, and promotions occur, such conditions shall be posted in a conspicuous place listing the pay, duties, and qualifications, to include whether it is a day, evening or night shift, which shall not restrict the right of the Administration to transfer staff as needed. This notice of vacancy shall remain posted for seven (7) working days. Employees interested shall apply in writing within the seven (7) working day period. Within five (5) working days of expiration of the posting period, the employer will award the position to the most senior applicant qualified. Copies of all job postings will be given to the President, or Secretary, of the Local at the time declared vacancies are posted.
- 4.08 The County agrees to furnish two (2) bulletin boards at Lakeview Health Center. The boards shall be used by the Union only for announcements of Union business to its members. Their locations will be determined by mutual understanding between the Department Head and the Local. There shall be no defamatory materials, cartoons, or any other material not related to the welfare of the employees, posted on said bulletin boards.

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BACKGROUND

The pertinent facts herein are not in dispute. On July 7, 1999 the County posted the position of Activity Therapy Assistant. This position would be located at the County's Neshonoc Center, hereinafter referred to as the Center. Under qualifications for the position was the following requirement: Good Attendance Required. Bob Roraff, hereinafter referred to as the grievant, properly bid for the position as did at least one other employee who had lesser

seniority. The County's Supervisor of Activities Tina Johnson reviewed bids for the position. Johnson denied the grievant's bid noting on his bid form... "attendance not acceptable." Thereafter, on July 23, 1999 the instant grievance was filed and processed to arbitration. There is no dispute that the grievance is properly before the arbitrator. On August 6, 1999 the following letter was sent to Union President Margaret Kramer:

Margaret Kramer
Union President, Local 1403
Lakeview Health Center
902 East Garland
West Salem, WI 54669

Dear Meg:

Re: Grievance filed 7/23/99 by Robert Roraff

Robert Roraff bid on an Activity Aide position posted July 7-14, 1999. The posting stated ****Good Attendance Required**** as a basic qualification for the position. Mr. Roraff was not offered the position because his attendance record indicates he is not a "qualified" employee.

Attendance is an important qualification for the activity aide position because the assignment is in a small department with minimal resources for replacement. Frequent absences in my department interfere with resident care and cause hardship for co-workers. In the activity department, programming for residents would have to be canceled if staff are not available. Frequent cancellations of programming can put the facility out of compliance with State-Federal regulations.

Robert Roraff has had several evaluations addressing his poor attendance. On January 1, 1997, Mr. Roraff had used 426.3 hours of sick leave available. In 1997 he used 45 days of sick leave and, in 1998, he used 31 days of sick leave. Mr. Roraff had utilized all of his accumulated paid sick leave by July, 1998 and has since, in general, reduced his absences to one per month using each sick leave day as he earns it.

Mr. Roraff's evaluations have also addressed the pattern in his use of sick leave. In the past 12 months, Mr. Roraff has been absent at least one day each month, almost always adjacent to a scheduled day or weekend off. It is difficult to accept that his absences are related to work stress when the call-ins usually follow days off from work. Both the pattern and change in frequency when paid benefits were no longer available would indicate Mr. Roraff has some control over which days and how often he has been absent from work. In fact, Mr. Roraff regularly called in sick after every vacation he has taken in the past two years.

In the past, Lakeview has denied a bid due to poor attendance when the change in position required an increased reliance on the employee being present when scheduled. In this case, the size and resources of the activity department and the demanding work load of the Neshonoc Center laundry program require reliable employees. For an employee with a poor attendance record to be considered for a position of increased responsibility, the facility requires the employee to demonstrate improved attendance over a substantial period of time. Mr. Roraff needs to demonstrate a pattern of good attendance in order to be considered for future postings.

If you have questions, please contact me.

Sincerely,

Ann Clark /s/
Ann Clark, OTR, NHA
Administrator

The record demonstrates that in 1998 the grievant was absent from assigned shifts 32 days. Prior to the July posting he was absent 7 times and another 10 times thereafter for a total of 17 times in 1999.

In 1985 the grievant informed the County of headache problems. On January 28, 2000 the grievant's doctor, Gregory G. Fischer, M.D., provided the following letter:

RE: Robert Roraff
Gundersen Lutheran #13-66-22-8
DOB: 03/17/1957

To Whom It May Concern:

Robert Roraff is a patient of mine in the Neurology Clinic with mixed headaches, tension type and migraine without aura. His headaches are significantly worse at times under stress, such as during a particularly stressful day at work. I have followed him in the Neurology Clinic since July 5, 1985. He is currently on several medications including Celexa 40 mg at bedtime, Tylenol #3 up to 20 per month max, Egsic Plus up to 20 per month max and Imitrex 50 mg which he is using about 2 per month. He also uses Ambien 10 mg for sleep, on occasion.

The patient's job as a Nurse's Aide at Lakeview can be quite stressful and since the headaches are often worse at the end of a hard day, I think it would be worthwhile for him to try a different position. I understand a Recreational Therapy position may be available for him and I think this would be quite appropriate.

Sincerely,

Gregory G. Fischer, M.D. /s/
Gregory G. Fischer, M.D.

The record demonstrates that other than attendance the grievant is qualified for the disputed position. The record also demonstrates that Administrator Ann Clark had denied an employee a job bid based upon the employee's poor attendance. That employee had asserted a migraine headache problem and the matter was not grieved by the Union.

Union's Position

The Union contends there is a difference between qualifications and attendance. The Union argues that attendance would fall under fitness or physical fitness, which is not a requirement under the instant collective bargaining agreement. The Union points out the parties agreed that the grievant is otherwise qualified for the position. In support of its position the Union points to FLORIDA POWER CORPORATION, 81 LA 51 (1983) wherein the arbitrator held the Union nor the grievant never waived the strict application of seniority and ability and further, that as there was no criteria for physical fitness in the contract, there was a strong argument and rationale for awarding the job to the grievant. The Union also points out the arbitrator noted he did not have the authority to add to the contract the terms "fitness" or "physical fitness."

The Union also argues the term "availability" does not encompass the prior attendance of the grievant. The Union points out the grievant has never been disciplined for excessive absenteeism and argues an employee's absenteeism record is normally not proof of lack of ability to do a job but a subject for corrective measure. The Union also argues the County was aware of the grievant's medical problems and points out it never sought a medical certificate from the grievant even when the County could have under the terms of the collective bargaining agreement.

The Union contends the County must demonstrate the necessity for good attendance. The Union points out that at the Center there were previously one (1) supervisor and two (2) employees and now there would be one (1) supervisor and (3) three employees. The Union also points out the grievant's current classification, Resident Aide, and the Activity Aide position receive the same rates of pay.

The Union asserts that the collective bargaining agreement provides for a fifteen (15) to three (3) calendar months trial period. The Union argues the grievant should have been given a trial period, particularly in light of the grievant's doctor advising the new position may be less stressful on the grievant.

The Union would have the undersigned sustain the grievance and award the position to the grievant.

County's Position

The County, in acknowledging the grievant had informed it of having migraines, had not provided any documentation of diagnosis or treatment. The County also points out the grievant acknowledged he had been counseled about his absenteeism. The County argues that because there are only three (3) employees in the Center, attendance is especially important. The County points out these three (3) employees must juggle vacation, holidays and sick leave because absent staff at the Center are not replaced by other County employees.

The County also argues it must have the ability to establish qualifications for jobs. The County argues it must get work done efficiently, stay within minimal state funding and provide a viable service. The County argues it has the right under the management rights clause to establish qualifications and this grant of powers should be construed liberally.

The County also points out the grievant was aware when he signed the bid that good attendance was required. The County contends the grievant's thirty-two (32) days of absence in 1998 and seven (7) days prior to the posting in 1999 demonstrates poor attendance. Particularly when the County counsels employees as "Needs Improvement" if they are absent seven (7) or more times.

The County points out that the grievant did not offer any medical explanation until six (6) months after the denial. The County argues that the letter is insufficient to establish some permanent disability, indicating the headaches begin at the end of the work day and offers no knowledge the doctor even knew the duties of the vacant position.

The County also argues the County can not accommodate an employee with employment at the Center when that employee has an attendance problem. Because of limited staff at the Center the good attendance is a requirement.

The County would have the undersigned deny the grievance.

DISCUSSION

The record herein demonstrates that the County established good attendance as a requirement for the position of Activity Therapy Assistant. The record also demonstrates that the County does not transfer employees from other positions to the Center's Activity Therapy Assistant positions if one or more of the three (3) employees who are in this classification are absent. Unlike FLORIDA POWER CORPORATION, the County has used the good attendance qualification on previous postings and has, on at least one previous occasion, denied a posting to an employee who had a poor attendance record. Therefore the undersigned finds the County did not violate the parties collective bargaining agreement when it established "good attendance" as a requirement for the Activity Therapy Assistant position.

The record demonstrates the grievant does not have a good attendance record and that he has been counseled about his attendance on several occasions. The record also demonstrates the grievant was aware when he signed the posting that good attendance was a requirement for the Activity Therapy Assistant position.

Further, as noted by the County, there is no evidence the grievant's doctor was aware of the duties and responsibilities of the disputed position. There is also no evidence in the record to disprove Clark's assertions that over the last two (2) years, the grievant called in sick after every vacation and that his sick leaves were generally adjacent to a scheduled day off or weekend. Thus, the grievant's doctor's contention that the grievant's headaches are worse at the end of a stressful workday is not supported by the grievant's actual use of sick leave. The undersigned notes here that the Doctor's letter was not given to the County until six (6) months after Johnson denied the grievant's bid.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented, the County did not violate the collective bargaining agreement when it denied the grievant the Activity Therapy Assistant Position. The grievance is denied.

AWARD

"The County did not violate the collective bargaining agreement when it failed to award the Activity Therapy Assistant position to the grievant."

Dated at Madison, Wisconsin this 25th day of April, 2001.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

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