

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**RUSK COUNTY PROFESSIONAL EMPLOYEES ASSOCIATION
LOCAL 608, LABOR ASSOCIATION OF WISCONSIN, INC.**

and

RUSK COUNTY

Case 95
No. 59246
MA-11231

(Shelia Poradish Grievance)

Appearances:

Mr. Thomas Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Kathryn J. Prenn**, appearing on behalf of the County.

ARBITRATION AWARD

The Rusk County Professional Employees Association, Local 608 (herein the Union), and Rusk County (herein the County) are parties to a collective bargaining agreement dated July 13, 1999, covering the period from January 1, 1999 through December 31, 2001 and providing for binding arbitration of certain disputes between the parties. On October 3, 2000, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on a denial to Sheila Poradish (herein the Grievant) of a reclassification to the position of Social Worker III and requested the appointment of a member of the Commission's staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on February 22, 2001. The proceedings were not transcribed. The parties filed briefs on April 9, 2001. The County filed a reply brief on May 9, 2001, and the record was thereupon closed.

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.

ISSUE

The parties were unable to stipulate to an issue. The Union would frame the issue as follows:

Did the Employer violate the expressed and implied terms of the collective bargaining agreement when it denied Sheila Poradish to be reclassified as a Social Worker III?

If so, what is the correct remedy?

The County would frame the issue as follows:

Did the County violate the collective bargaining agreement when it denied the request of Sheila Poradish to be reclassified from a Social Worker II to a Social Worker III?

If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

Did the Employer violate the express or implied terms of the collective bargaining agreement or past practice when it denied the request of Sheila Poradish to be reclassified from a Social Worker II to a Social Worker III?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

ARTICLE I - RECOGNITION

. . .

Section 1.03: The County and the Association agree that at all times it will abide by the laws of the State of Wisconsin as they relate to collective bargaining, and to the rights of the Association and all Association members.

OTHER RELEVANT LANGUAGE

ARTICLE IX – JOB POSTING

Section 9.01 – Vacancy defined: A vacancy shall be defined as a job opening within the bargaining unit not previously existing or a job created by the termination of employment, promotion of existing personnel, when the Employer decides the need for such a job continues to exist.

Section 9.02: When a vacancy is to be filled, the position shall be posted for seven (7) working days. The posting shall list a summary of the duties, minimum qualifications required, the rate of pay, and the effective date of the position.

Section 9.03: Any employee interested in such promotion may sign the posting. The employee having the greatest seniority, who is qualified for the position shall be given the position. If there is a question of who is more qualified, the Employer shall take education, ability, and experience into consideration. If, within thirty (30) days, the employee's performance is not up to the standard of qualifications required, or if the employee wishes to return, he/she shall return to his/her former job. In this event, the position shall be again posted, following the same procedure above. Present employees shall be given an opportunity to fill the position before a new employee is hired, if qualified.

BACKGROUND

The Rusk County Department of Health and Human Services employs three different classifications of social workers, SW-I, SW-II and SW-III, with the position of SW-III being the highest classification within the bargaining unit represented by the Union herein. There also exists a classification of Social Service Worker, which is comparable in wage to a SW-I. At present, there are twelve bargaining unit employees in the Department, only one of which is a SW-III. Under departmental guidelines, reclassification to SW-III is predicated upon meeting certain established criteria, including, *inter alia*, a Bachelor of Social Work degree, five years experience as a social worker and at least six graduate credits toward an advanced social work degree.

The Grievant, Sheila Poradish, has a Bachelor of Arts Degree in Social Work from Mount Senario College. She has been employed by Rusk County since 1994. In June, 1995, she was classified as a SW-I. In June, 1996, she was reclassified as a SW-II. In 1999, she enrolled in a Masters Degree program at the University of Minnesota – Duluth and has acquired eight credits toward her degree. She is currently assigned to the Department's Children and Family Services Unit. The Department's only SW-III works in the Long Term Support Unit, thus there are no SW-IIIs in the Children and Family Services Unit. On June 5, 2000, the Grievant made a request for reclassification to SW-III to her superiors in the Department and the Rusk County Board of Supervisors, which was subsequently denied by the

Personnel Committee of the Rusk County Board. On June 13, 2000, Social Worker Supervisor Ted East sent the Grievant a letter indicating that there were changes taking place in the hiring and reclassification procedures, but not explaining what the changes were. He recommended that if the Grievant were dissatisfied she should follow the procedures available to her in the personnel policy or the contract.

On July 12, 2000, the Grievant resubmitted her request, which was denied by the Personnel Committee on August 2, 2000. On August 4, 2000, Gary Rivers, the Health and Human Services Director, informed the Grievant in writing of the denial and explained that the Committee's action was based on a perceived lack of need for an additional SW-III at the present time. On August 15, 2000, the Grievant filed a grievance based upon the denial of her request for reclassification. The grievance was processed according to the procedure set forth in the parties' collective bargaining agreement without successful resolution and thereupon proceeded to arbitration. Additional facts will be included, as necessary, in the Discussion section of this award.

POSITIONS OF THE PARTIES

The Union

Appendix A of the parties' collective bargaining agreement recognizes four classifications of social worker employees: Social Services Worker, Social Worker I, Social Worker II and Social Worker III. The Grievant is a Social Worker II. To become a Social Worker III, an employee must meet the following specified minimum criteria: 1) five years of social work experience, 2) a Baccalaureate Degree in Social Work, 3) six graduate credits in Social Work, 4) 72 hours of inservice training and 5) demonstrated job skills. Two other social workers in the Department, with these skills, have been promoted to Social Worker III and the Grievant's qualifications are equal to or better than those of the other employees based upon the exhibits produced at the hearing.

In the past, the County has maintained three Social Worker III positions. There is no evidence that any of these positions have been eliminated, nor that they have been bargained away. There is, at present, however, only one Social Worker III in the Department. Further, there is an opening for a Social Worker III in the Children and Family Juvenile Intake Division, in which the Grievant works.

The County argues that there is no need for an additional Social Worker III at present. Nevertheless, the Grievant is performing the duties of a Social Worker III, but only receiving the pay of a Social Worker II, which is over \$90 per month less. By refusing to grant the Grievant a reclassification, the County violated her rights as a member of the Union under Article I, Section 1.03, and the long standing past practice of the parties in reclassifying employees who meet the specified criteria. Therefore, the grievance should be sustained and the Grievant made whole.

The County

The contract has no provision addressing the promotion of social workers to higher classifications. In such a situation, the employer has broad discretion in determining the criteria and circumstances for promotion of employees. NEW BRITAIN MACHINE CO., 45 LA 993, 995-96 (1965). Further, the contract does not specify that the Department needs to have a specified number of Social Worker IIIs, leaving that determination also within the employer's discretion. DOUGLAS COUNTY, CASE 230, NO. 55366, MA-9996 (JONES, 9/2/98)

Where the contract is silent, established practice may reflect the proper response to a particular circumstance. TEXAS UTILITY GENERATING DIVISION, 92 LA 1308, 1312 (1989). In this case, the County has in the past determined promotions to Social Worker III based upon need as well as the meeting of established criteria. Prior to 1989, the County promoted employees according to the State Merit System, which required the Director's approval, as well as the employee having specified qualifications. Since 1991, the County has used an internal system for promotion which is based upon the State Merit System. Since that time, all promotions to the position of Social Worker III have included a finding of need by the Director. The record reflects numerous situations where Social Worker IIs had qualified for Social Worker III status, but were not reclassified to Social Worker III because there was no immediate need. This includes the current Social Worker Supervisor, Ted East, who is also a former Union President. East testified that he never understood a promotion to Social Worker III to be automatic. The cases of reclassification cited by the Union are unique. Those employees were promoted at a time when the Department was undergoing a reorganizational experiment, which has since changed.

At the present time, there is no need for another Social Worker III. The current unit has two Social Worker IIs, two Social Worker Is and two Social Service Workers. The Social Worker III position entails some supervisory and team leadership functions, which are not needed at the time. The Social Worker Supervisor oversees the unit, but in his absence the staff works collaboratively and does not need someone to assume the Supervisor's role. Even the Grievant concedes that the other Social Workers have skills and abilities similar to her own and while the County does not deny the Grievant's qualifications, it maintains that a reclassification is not warranted in the absence of need. The grievance should, therefore, be dismissed.

The Union Reply

The Union did not file a reply brief.

The County Reply

The Union's reliance on past practice focuses on qualifications without addressing the criteria of demonstrated need. Both the Department Director and the Social Worker Supervisor testified to the additional factor of a demonstrated need for an employee who can perform supervisory duties when needed as a precondition to reclassification. There is no merit to the Union's assertion that qualifications alone should dictate an employee's reclassification, otherwise any employee who qualified for a supervisory position would be entitled to it, whether there was a need for an additional supervisor or not.

There is also no merit to the Union's suggestion that the fact that there were three Social Worker IIIs at one time creates a minimum staffing requirement. There was initially only one Supervisor III. The other two were hired in unusual circumstances which no longer apply. One of those employees has since been promoted to Supervisor and another has left County employment, leaving only one Supervisor III at present, which the County deems sufficient.

The Grievant does not presently perform Supervisor III duties, as the Union asserts. The Supervisor III position carries with it additional responsibilities, as well as a supervisory role in the absence of the Supervisor, which the Grievant concedes she does not perform. Since the Grievant's responsibilities are not unique and are consistent with the others in her department, she is not entitled to a reclassification and the grievance should be dismissed.

DISCUSSION

In a case such as this one, it is typically not the arbitrator's role to second guess the use of discretion by the Personnel Committee in denying a reclassification request by making a *de novo* examination of the stated criteria for reclassification and replacing the Committee's use of judgment with his own. Rather, the arbitrator's function is to determine whether the reclassification decision, whatever it may be, was the result of a rational, deliberative process and that the Committee was not arbitrary, capricious or unreasonable in its actions.

The Union argues that the Grievant is entitled to be reclassified to the position of Social Worker III as a matter of right. This right is predicated on a combination of contract language and alleged past practice. It is claimed that the contract provides for the position of Social Worker III and that historically the County has maintained three such positions in the bargaining unit, although there is at present only one. Further, in the past elevation to the position of Social Worker III has been merited by obtaining certain specified qualifications, which the Grievant has.

The contract itself has little to say about this circumstance. As indicated by the Union, the position of Social Worker III is included in Appendix A, which sets out the wage schedule

for the different positions. Further, Article I, Section 1.03, does provide that the County will recognize and abide by the rights of Association members. Beyond this, however, the contract is silent. There is no reference to the procedure, if any, for advancement, nor to the qualifications necessary to achieve it. Typically, where a contract does not specify a procedure or establish criteria for reclassification, the authority to determine the basis and method for reclassification falls within management's residual powers. So long as management does not act arbitrarily or unreasonably, it has broad discretion in exercising this authority. Based upon the contract alone, therefore, it cannot be said that there is an automatic right to advancement.

The Union maintains further, however, that there is a binding past practice of promoting employees to the level of Social Worker III upon their acquiring certain specified qualifications and that there is a further practice within the Department of maintaining three Social Worker IIIs in the bargaining unit. The County contends that there is no consistent past practice in this area and that, further, the lack of controlling contract language leaves the area of reclassification within management's discretion.

It has been said that, "Past practice may be used (a) to clarify ambiguous contract language; (b) to implement general contract language; or (c) to create a separate, enforceable condition of employment. Some arbitrators use past practice to modify or amend clear and unambiguous contract language." 1/ In any event, however, "In the absence of a written agreement, past practice, to be binding on both parties, must be 1) unequivocal; 2) clearly enunciated and acted upon; 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by the parties." 2/

1/ *THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS* § 2.19 (T. St. Antoine 1st ed. 1998).

2/ *CELANESE CORP. OF AMERICA*, 24 LA 168, 174 (JUSTIN, 1954).

With respect to reclassification, the record reveals that since at least 1991 the County has established certain qualifications for attaining the level of Social Worker III. These are set forth in Joint Exhibit 7, as follows:

Qualifications for Social Worker III Classification

Experience

Must have five years of social work experience in this Agency (other Agency experience that is comparable may be accepted, however not necessarily on a year by year basis).

Training

Workers with a BSW must acquire (6) graduate credits. Workers with a non-BSW must acquire (12) graduate credits. In addition, 72 hours of inservice training is required. Graduate credits and inservice training hours must be determined to be determined to the worker's job by the Director and the Supervisor.

Demonstrated Skill

With appropriate supervision and latitude for individual judgement, is able to perform the following: Provide services to families or individuals involving difficult personal and social problems which require skilled study, evaluation and planning/ [sic] Carries out plans for needed services and refers and assists client to other resources as needed. Participates in the development of policy, interprets program and policy to community, and participates in community planning as assigned. Establishes and maintains working relationships within the agency and the community.

It is not disputed that the Grievant meets these qualifications.

It is disputed, however, whether the County has an established practice of reclassifying social workers whenever they meet the specified qualifications, regardless of need. The record reveals that since 1973, the County has had twelve social workers who have been with the County the requisite five years to qualify as a SW-III. Of those twelve, five have been promoted to SW-III. Of the seven who were not promoted, one did not meet the other qualifications and the qualifications of another are not known. Five, including the Grievant, had obtained the other requisite qualifications. Of the five who were promoted, three were promoted in five years or less. One, the current Director, was promoted in five years and two months. One, the current Social Worker Supervisor, was promoted in six years. Thus, of the ten employees who have met the qualifications for SW-III since 1971, only three were promoted to SW-III within five years of beginning employment. This does not rise to level of being a fixed, established practice. The record regarding the County's practice is not particularly instructive, however, due to the changes the Department has undergone over the years. The current job description for SW-III was created in 1993, subsequent to the reclassifications of JoAnn Friedel and Deb Klund. Since that time, no other bargaining unit members have been reclassified to SW-III. The job description describes the duties of a SW-III, as follows:

...

GENERAL SUMMARY:

This is the advanced agency-trained social work position which provides services to a select caseload involving difficult personal and social behavior problems requiring skilled study, evaluation, and planning. There exists

substantial latitude for independent action regarding not only case management planning but also in carrying out plans and coordinating with other service providers. Included is the undertaking of in-depth social studies utilizing a variety of resources from which to compile comprehensive reports and base decisions.

REPORTING RELATIONSHIPS:

1. Reports to: Social Work Supervisor
2. Directs Work of: Individual contributor. Occasionally delegates cases or work to another social worker.

ESSENTIAL FUNCTIONS OF THE JOB:

1. Spends over 50% of time conducting juvenile delinquency court work (Juvenile Intake).
 - A. Interprets police reports, medical evaluations, and educational assessments in order to make decision regarding whether to deal with juvenile informally through D.S.S. or to refer him/her to D.A. for formal court proceedings.
 - B. If case is dealt with informally, makes decision regarding appropriate supervision and treatment.
 - C. If case goes to court, monitors court proceedings and evaluates police reports to make sure they meet the state standards for evidence.
 - D. Gathers data from various sources and condenses it into a report in order to make recommendations to the court regarding disposition.
2. Conducts independent child abuse and neglect investigations in order to determine whether protective measures need to be taken on child's behalf and other appropriate forms of action.
3. Provides individual and family counseling consistent with Family Based Theory in order to establish appropriate programs and/or treatment plans.
4. Performs assessments of contracting services.
5. Participates in the development of policy, interprets programs and policy to the community, and participates in community program as assigned in order to foster public relations and awareness.
6. Maintains case records containing pertinent, accurate, and current information, prepares correspondence, reports and other records as required.

There is no evidence as to what the job description and specified duties for SW-III were prior to 1993. There is also little evidence comparing the previous job description for SW-III to the

duties actually being performed by those social workers who were awarded reclassifications. It is not possible, therefore, to compare the Grievant's circumstances to those of any social worker reclassified to SW-III to prior to 1993.

Likewise, there does not appear to be a consistent practice within the Department of maintaining at least three SW-IIIs on staff. On January 16, 1992, JoAnn Friedel and Deb Klund were promoted to SW-III. At that time, Ted East was also a SW-III. This is the only time the Department had three SW-IIIs at the same time, a situation which ended when East was promoted to Supervisor in 1997. When Friedel accepted other employment in 1998, Klund remained as the only SW-III. Prior to 1992, there had never been more than one SW-III at a given time.

The thornier issue is the question of need. The County maintains that a decision to add a SW-III involves a two-prong approach, not only requiring a qualified employee, but also having a demonstrated need of such. The County asserts that, regardless of the Grievant's qualifications, there is not a need for another SW-III at present, and it was on this basis that her request was denied. The Union argues, however, that the Grievant is, in fact, performing the listed duties of a SW-III and was told as much by her Supervisor. Inasmuch as she is performing the duties and has the qualifications, she should be classified as a SW-III.

The evidence on this point is troubling to me. As stated previously, the Grievant has the qualifications for SW-III, as they are set out in Exhibit 7, and her resume, contained in Exhibit 8, bears this out. The County does not dispute this point. In fact, the Director testified that he did not even review the Grievant's qualifications when the request was made because he had already determined that no SW-III was needed at present and, therefore, her eligibility was irrelevant. It is this question of need which is at the crux of the issue. Director Rivers testified that present need is the threshold issue in a reclassification analysis. If there is no present need for a SW-III, he does not address the question of eligibility. In the Grievant's case, upon receiving her request, he determined there was no demonstrated need for another SW-III and, therefore, recommended to the Personnel Committee that the request be denied. He did not tell the Grievant he did not see a need for another SW-III, nor that need was a criterion, nor that he would recommend denial of her request on those grounds. After the Grievant was informed of the denial, Supervisor East wrote her a letter dated June 13, 2000, which did not explain the basis for the denial, nor, again, mention demonstrated need as being a precondition for reclassification. Rather, it remonstrated with her for a perceived inappropriate display of disappointment and recommended that she pursue the procedures available under the contract or personnel policy. Consequently, she applied again on July 12. Director Rivers, again, made no effort to explain the reclassification criteria or to inform her of his position. The prerequisite of demonstrated need only first appears in Rivers' August 4 memorandum to the Grievant informing her of the second denial.

The County's behavior in this sequence of events is troubling for a number of reasons. First, it seems unusual to use demonstrated need as a basis for reclassification. Need implies a vacancy which requires filling because some necessary function is not currently being provided. In such a case, where the County perceived such a need, it would be required, under Article IX of the contract to post the position and fill it in the manner therein provided. Indeed, under the language of the contract, were the County to attempt to fill a "demonstrated need" by circumventing the posting process it might well subject itself to a grievance on that basis. Reclassification requests, on the other hand, typically occur when employees either meet a set of predetermined qualifications, or when they believe their present duties conform to a higher classification. Reclassification, therefore, is not so much a matter of filling a need as it is a recognition that the employee is, in fact, already filling it.

Regarding the Grievant's current duties, she testified that she is already performing the functions of a SW-III, as set forth in the County's position description (Exhibit 6). She further testified that as recently as January, 2000, Supervisor East told her she was performing the duties of a SW-III as set forth in the job description. Two points bear mentioning here. First, Director Rivers testified as to having no opinion on the Grievant's duties or level of performance as compared to the other staff in her unit. For him, the analysis ended once he had determined there was no "demonstrated need" for another SW-III and he inquired no further. Second, East did not avail himself of the opportunity to refute the Grievant's testimony regarding their conversation, which lends support to her contention. Based on the Grievant's testimony, therefore, and the failure of her two immediate supervisors to contradict it, I take it as established that the Grievant does, in fact, perform the duties set forth in the written job description for the SW-III position.

The County's position, however, is not based on the written job description. It contends, instead, that there are additional duties, which are a necessary part of the SW-III position and which the Grievant does not perform. According to Director Rivers, the position of SW-III requires greater responsibility than that of SW-II. The employee must be able to work independently and must be able to develop policies and procedures without supervision. According to the testimony, the Grievant already does these things. Most importantly, however, a SW-III must be able to act in a supervisory capacity when the supervisors are not present. In the opinion of Rivers and East, there is no current need for an employee to perform the quasi-supervisory functions of a SW-III and, in fact, the current SW-III, Deb Klund, does not do so. According to East, in the absence of a supervisor, the social workers work in a collaborative fashion, with none taking a lead role. This is the linchpin of the County's denial of the Grievant's request. Yet, the job description, which has been in place since 1993, makes no mention of the supervisory role, which the County contends is the *sine qua non* of the SW-III position. Nor did Rivers, East or the Personnel Committee ever apparently supplement the description, either orally or in writing, to include these supervisory duties for the edification of any prospective candidate.

Equally problematic are the implications of this practice as it has developed. The County and Union have bargained the position of SW-III into the contract. The County then developed a written job description and established qualifications for the position, which it has the power to do. The qualifications were last updated in 1991 and the job description in 1993. According to the testimony of Rivers and East, however, the County subsequently did two things. First, it added additional supervisory duties to the position outside the written description. Second, it made a determination that there is no need for bargaining unit employees to perform those duties. These decisions, taken together, have the effect of rendering the position of SW-III a nullity. No future employees can qualify for the post, because it requires the performance of duties which the County will not assign. Once the current SW-III leaves her position, it will effectively cease to exist.

Yet, according to the contract, the position of SW-III does exist. It has not been bargained away. Furthermore, there is a written job description and there are written qualifications for the position which have been in existence for over eight years without amendment. Additionally, the evidence establishes that the Grievant not only meets the qualifications, but also performs the duties of the position as set out in the description. By the testimony of the Director, it was only the lack of need for an employee to perform the unwritten supervisory duties of a SW-III, which he further testified that no one else, not even the existing SW-III, performs, that barred the Grievant from reclassification. This is an unreasonable and untenable position, which has the effect of permitting the County to assign the Grievant the listed duties and responsibilities of a SW-III, while denying her the corresponding title and compensation. Under the language of the contract, the County may create a position, develop a job description, post it and fill it or decline to fill it as its perception of need dictates. When an employee is qualified for the position and is performing its stated functions, however, it may not arbitrarily and unreasonably withhold a reclassification. Inasmuch as the Grievant's qualifications and duties conform to the written criteria established by the County, I find that is what occurred here.

The County asserts, under *NEW BRITAIN MACHINE CO.*, 45 LA 993 (McCoy, 1965), that its discretion in awarding reclassifications is nearly unfettered. I do not disagree with that precedent, but find it to be inapposite. *NEW BRITAIN MACHINE CO.* involved an employee who grieved the awarding of a vacant factory position to a less qualified, less senior employee where there was no contract language requiring the company to give priority to qualified senior employees. This case does not involve filling an open position, but rather whether the County may, without reasonable justification, withhold reclassification from an employee who presents the qualifications and performs the duties of the higher classification. I hold that it cannot. In so doing, I do not substitute my judgment for the County's, because I find that there was no exercise of judgment on the County's part based upon the established criteria and that, since the fulfillment of those criteria by the Grievant is satisfactorily established, the reclassification was unreasonably withheld.

Based upon the foregoing, and upon the record as a whole, I hereby issue the following

AWARD

In denying the Grievant a reclassification to the position of SW-III, the County violated the express and implied terms of the parties' collective bargaining agreement. It is therefore ordered that the County shall make the Grievant whole by:

1. Forthwith reclassifying her to the position of SW-III; and
2. Paying backpay representing the difference between the established rates for SW-II and SW-III from June 5, 2000 to the date of this award.

I will retain jurisdiction over this award for a period of 90 days in order to resolve any issues that may arise over its implementation.

Dated at Eau Claire, Wisconsin, this 2nd day of August, 2001.

John R. Emery /s/

John R. Emery, Arbitrator