BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

and

FOREST COUNTY

Case 84
No. 59938
MA-11466

(Drouillard Grievance)

Appearances:

Mr. Richard Thal, General Counsel, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division by 340 Coyier Lane, Madison, Wisconsin, appearing on behalf of Forest County Courthouse Employees Association.

Ruder, Ware & Michler, S.C. by **Attorney S. Bryan Kleinmaier**, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin, appearing on behalf of Forest County.

ARBITRATION AWARD

On May 10, 2001 the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter the "Association" requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide a grievance pending between the parties. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. A hearing was held before the undersigned on July 27, 2001 in Crandon, Wisconsin. The parties submitted post-hearing briefs by September 5, 2001. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to stipulate to the issues to be determined in this case.

The Union suggested the following issues for determination:

Did the County violate the collective bargaining agreement when it paid the Grievant at a reduced rate? If so, what is the appropriate remedy?

The County's suggested issue is as follows:

Whether the County violated Article XXI of the collective bargaining agreement when it paid the Grievant ten percent less than her classified wage rate during her first six months of employment in job positions represented by the Forest County Courthouse employees?

Based upon the relevant evidence and arguments in this case, I frame the issues as:

Whether the County violated the collective bargaining agreement when it paid the Grievant less than the classified wage rate in job positions represented by the Forest County Courthouse Employees Association from November 1, 2000 through October 31, 2001? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II – MANAGEMENT RIGHTS – SUBCONTRACTING

Section 2.01 - Management Rights: The Association recognizes the Employer as having the right to plan, direct and control the operation of the work force, to hire, to layoff, to discipline or discharge for just cause, to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, to determine and uniformly enforce minimum standards of performance, to transfer, schedule and assign employees to positions within the County. All of the above shall be in compliance with and subject to the terms and provisions of this Agreement and state and federal laws. The Association shall have the right of appeal through the grievance procedure for any unreasonable exercise or application of any of the foregoing.

. . .

ARTICLE IV – PROBATIONARY PERIOD

Section 4.01 - Conditions: All newly hired employees shall serve a six (6) month probationary period. Upon mutual agreement between the Employer and

the Association, the probationary period may be extended by an additional two (2) months. During said probationary period, they shall not obtain any seniority rights and shall be subject to dismissal without prior notice or recourse to the grievance procedure. All employees retained after completion of the probationary period shall automatically be considered permanent employees and shall be subject to all conditions and benefits covered by this Agreement. In the event the probationary period is extended an additional two (2) months beyond the regular six (6) month probationary period, the employee shall be entitled to all fringe benefits after the initial six (6) months of employment.

. . .

Section 4.03 - Insurance: A probationary employee shall be allowed to carry, if he/she prefers, the group hospital and surgical insurance coverage during his/her probationary period; however, the entire cost of the premium shall be borne by the employee until completion of the probationary period.

ARTICLE XXI – CLASSIFICATION AND WAGES

. . .

Section 21.02: Newly hired employees shall receive ten percent (10%) less than their classified rate during the probationary period. During the second six (6) months of employment, the employee shall receive five percent (5%) less than the classified rate. Upon completion of twelve (12) months of employment, the employee shall receive the rate of the classification.

BACKGROUND AND FACTS

The essential facts are not in dispute. The Grievant, Holly Drouillard, was hired by Forest County, hereinafter "County" on April 27, 1997, as a jailer/dispatcher in the Forest County Sheriff's Department and was represented by the Forest County Deputy Sheriff's Association. Drouillard served a 12-month probationary period as a jailer/dispatcher.

On or about September 6, 2000, Drouillard, while still employed as a jailer/dispatcher for the County, completed an Application for Employment for the position Terminal Operator/Child Care Coordinator, a position represented by the Forest County Courthouse Employees Association, hereinafter "Association." Another County employee, Penny LeMaster, completed an Application for Employment on September 13, 2000, for the same position. At the time of her application, LeMaster was a member of the Courthouse bargaining unit and held the position of Economic Support Assistant. LeMaster did not exercise her bargaining unit-posting rights for the Terminal Operator/Child Care Coordinator

position. Both Drouillard and LeMaster interviewed for the Terminal Operator/Child Care Coordinator position with the Social Services Committee and LeMaster was awarded the position.

As a result of LeMaster receiving the Terminal Operator/Child Care Coordinator position, her vacant Economic Support Assistant position was offered to Drouillard after the position was posted and no one applied. Drouillard did not complete a new Application for Employment for the position nor did she interview for the position.

After Drouillard accepted the position, but before her first pay check was processed for work performed in the Economic Support Assistant position, the County's Social Services Committee met and recommended to the County Personnel Committee that Drouillard's hourly rate should be reduced by five percent. The County Personnel Committee met and decided that Drouillard's hourly rate of pay would be reduced by ten percent for six months and by five percent for an additional six months.

Drouillard began working as an Economic Support Assistant on November 1, 2000, and received ten percent less than the classified rate for an Economic Support Assistant. The parties agreed that Drouillard could transfer her accrued but unused sick leave benefits and receive contractual vacation benefits based upon her total years of service with Forest County. Drouillard continued to receive health insurance coverage with the County paying the same percentage contribution as the County paid when Drouillard was a Sheriff's Department represented employee.

Drouillard testified that when Chuck Sekol, Social Services Director, offered her the Economic Support Assistant position, he stated he did not know what her rate of pay would be because she "was not somebody off the street." Drouillard testified that Sekol informed her that the Social Services Committee had not yet taken action regarding her rate of pay and benefits. Sekol was not called as a witness at hearing.

On January 15, 2001, Drouillard transferred to another Courthouse bargaining unit position, Deputy Clerk, and remains a member of the Courthouse bargaining unit. Drouillard continued to receive ten percent less than the Deputy Clerk classified rate until May 1, 2001, when her rate changed to five percent less than the Deputy Clerk classified rate.

Betsy Ison, Forest County Clerk, testified that she became the Grievant's supervisor when the Grievant moved to the Deputy Clerk/Bookkeeper position on January 15, 2001. Ison testified she did not consider Drouillard a probationary employee, did not complete a six-month probationary employee evaluation and did not make a recommendation regarding Drouillard's continued employment in relation to probationary status.

The parties stipulated that the County hired Ron Skallerud on March 17, 1996, as a Deputy Sheriff represented by the Forest County Deputy Sheriff's Association. Skallerud began employment with Forest County Social Services Department in a non-represented,

professional Social Worker position on November 9, 1998. Skallerud received credit for his two years of service as a Deputy Sheriff and started at the two-year rate of pay for a Social Worker II position.

S. James Kluss, Executive Director of WPPA and business agent for the Union, testified that the Personnel Committee of the County oversees all personnel matters for all employees of the County. Kluss testified that it is his understanding that the probationary period is for newly hired employees to the County and that the trial period is for employees that move from one County position to another.

POSITIONS OF THE PARTIES

The Association

The Association asserts that Drouillard was not a newly hired probationary employee on November 1, 2000, and thus the County improperly reduced her rate of pay in conflict with the parties' collective bargaining agreement. The Association argues that Section 21.02 requires that an employee be "newly hired" and in a "probationary period" in order for the employee's rate of pay to be reduced by ten percent. The Association reminds the Arbitrator of the rule of contract interpretation which directs that the agreement is to be viewed as a whole document, giving effect to all relevant contractual terms.

The Association states that Drouillard was hired by the County on April 20, 1997, and completed her probationary period on April 20, 1998. The Association argues that since Drouillard had already completed her probationary period and was not informed, as required by arbitral principles, that she must serve a second probationary period then she was not a probationary employee. In further support of her non-probationary status, the Association points out that Drouillard continued to receive health insurance, vacation and sick leave benefits.

The Association asserts that the County has an established past practice of recognizing credit for years of service for employees who change jobs and move to a new department and that this practice supports its interpretation of Section 21.02. The Association relies on the County's treatment of Ron Skallerud when he moved from the Sheriff's Department to a Social Worker II position in 1998. The County credited Skallerud with his two years deputy experience and started him at the two-year rate of pay. The Association asserts that due to the infrequent nature of the occurrence and the similarity to the Grievant's situation, sufficient facts exists to establish a past practice.

Based on the above arguments, the Association asserts that the County has violated the labor agreement and the grievance should be sustained.

The County

The County asserts that the controlling issue in this case is whether the Grievant was a "newly hired employee" when she began working as an Economic Support Assistant on November 1, 2000. The County argues that the language of Article XXI is clear and unambiguous. The County notes that the language states "newly hired employees" must serve a six-(6) month probationary period and will receive a reduced hourly rate. The County asserts that since the collective bargaining agreement does not distinguish between employees who previously worked in other County departments from other "newly hired employees," the County's definition is consistent with the contractual language. The County cites the decisions of COUNTY OF WALWORTH, CASE 121, NO. 47912, MA-7431 (MCLAUGHLIN, 3/23/93), LORAIN COUNTY, OHIO, 98 LA 605 (SHANKER, 1991), and CITY OF KIEL, CASE 43, NO. 48589, MA-7648, (NIELSEN, 11/29/93) and concludes that all three support its definition of a "newly hired employee."

The County argues its definition of "newly hired employee" is supported by its treatment of the Grievant when she transferred from the Economic Support Assistant position to the Deputy Clerk/Bookkeeper position and LeMaster when transferred from the Economic Support Assistant position to the Terminal Operator/Child Care Coordinator position. The County asserts that since both the Grievant and LeMaster held positions represented by the Courthouse bargaining unit at the time of their transfers, the County credited both with time spent serving the probationary period. The County argues that this treatment of the Grievant and LeMaster is consistent with its definition of a "newly hired employee" as an employee who is either new to County employment or new to a bargaining unit.

The County next asserts that the past practice alleged by the Association is not applicable. The County argues that the facts surrounding the County's employment of Ron Skallerud do not meet the requisite criteria to establish a past practice. Specifically, the County argues that Skallerud accepted a non-represented position with the County when he moved to the Social Worker II position and as a result he was not obligated to serve a six month probationary period nor was there an obligation to reduce his hourly rate by ten percent as per the Sections 4.01 and 21.02 of the collective bargaining agreement. The County asserts that the circumstances of Skallerud's employment are significantly different from the Grievant's circumstances, thus a practice is not established and further, that a single incident does not create a binding past practice.

For all of the above reasons, the County asserts Drouillard was correctly classified a "newly hired employee" and requests that the grievance be denied in its entirety.

DISCUSSION

At issue in this case is whether the County was within its contractual rights to reduce the classified rate of the Grievant during her first year of employment in a position represented by the Courthouse bargaining unit. The Association asserts that the contract was violated and

argues that the County's actions are inconsistent with the probationary language of Article XXI and Article IV and a past practice of crediting employees that move from one bargaining unit to another bargaining unit with their total years of service in establishing their hourly rate of pay. Each of these arguments is addressed below.

Contract interpretation is only necessary if the contract is ambiguous. When an agreement is ambiguous, then an extrinsic analysis of the parties past practice and bargaining history is used to determine the parties' intent. Alternately, if the words are "plain and clear, conveying a distinct idea," then there is no reason to interpret the agreement. See Elkouri and Elkouri, How Arbitration Works, 5th Edition, p.470 (1999). In this case, because "a single, obvious and reasonable meaning appears from a reading of the language in the context of the rest of the contract ... [then] that meaning is to be applied." UNITED GROCERS, 92 LA 566, 569 (GANGLE, 1989) citing NOLAN, Labor Arbitration Law and Practice, (1979).

Looking first to the language of Article XXI, the County has the contractual right to reduce the hourly rate of a newly hired employee by ten percent during the probationary period and by five percent for the next six months. Article IV provides that the probationary period is six (6) months. Thus, if Drouillard was a newly hired employee on probation, the County was within its rights to reduce her hourly rate by ten percent for her first six months in a Courthouse bargaining unit position and by five (5) percent for the next six months.

The first question the parties argue is whether Drouillard is a newly hired employee. The Association asserts that Drouillard was not newly hired on November 1, 2000 because she was a newly hired employee in 1997, while the County defines a newly hired employee as an employee who is new to the County or is new to a bargaining unit thus making Drouillard a newly hired employee when she started in the Courthouse bargaining unit. These two distinct definitions are both supported in arbitral decisions.

In ARCO CHEMICAL, 102 LA 1051, 1054 (MASSEY, 1994), Arbitrator Dunham Massey concluded that an employee who has maintained continuous service to an employer does not become a new employee upon transfer because the "presumption must be that the collective bargaining agreement does not reach the Company commitments made before or outside of the bargaining relationship." Alternately, in WALWORTH COUNTY, SUPRA, Arbitrator McLaughlin found that it "strains the general reference" to define "new employees" as anything more than employees new to the collective bargaining unit and further, that "there is no apparent reason to distinguish between newly hired or rehired employees and transfers who are new to the Courthouse unit."

Though I find the definition in ARCO CHEMICAL more alluring, it is not dispositive in this case to define "newly hired employee." Of greater significance is the cumulative language of Article XXI and Article IV and the inconsistent manner in which Drouillard was treated by the County. Even if I was willing to conclude that Drouillard was a "newly hired employee" as the County contends, she was not a "newly hired employee" on probation. The County

incorrectly focuses solely on the term "newly hired employee" as the contractual basis for reducing Drouillard's hourly pay and ignores the contract language of Article IX and Article XXI which create the obligation for Drouillard to be both "newly hired" and considered a probationary employee in order for her pay rate to be reduced.

Arbitral standards require that the arbitrator give effect to all clauses and words of the agreement. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 493 (1999). If alternate interpretations of a clause are possible and the result of applying one of the interpretations would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, the inclination will be to use the interpretation that would give effect to all provisions. ID.

Drouillard's employment in the Courthouse bargaining unit began on November 1, 2000, therefore, pursuant to Article IV, she began serving a six-month probationary period on that day. Her probation would have ended on June 1, 2000. No evidence or testimony was presented indicating that Drouillard was ever informed that she was a probationary employee nor does the evidence support the conclusion that the County regarded her as one.

Betsy Ison, County Clerk, who was Drouillard's supervisor beginning on May 1, 2001, and was therefore Drouillard's supervisor at the time she would have completed probation, testified that she did not complete a probationary evaluation or make any recommendations regarding Drouillard's continued employment. Ison testified that she did not consider Drouillard to be a probationary employee.

Probationary employees per Article IV have available to them group health and surgical insurance coverage provided the probationary employee pays the full premium. Drouillard testified that she continued to receive health insurance coverage after she moved from the Sheriff's Department to Courthouse bargaining unit positions and that she continued to pay the same portion of the health insurance premium which is the same amount non-probationary employees in the Courthouse bargaining unit pay. Thus, for purposes of health insurance, the County did not consider Drouillard to be a probationary employee.

The County allowed Drouillard's previously earned sick leave balance to follow her to the Courthouse bargaining unit position. Evidence was not presented at hearing as to whether she earned sick leave beginning on November 1, 2000, or whether she was allowed to use sick leave. Lacking this information, it is impossible to ascertain whether the County considered Drouillard a probationary employee for purposes of sick leave.

The County agreed to calculate Drouillard's vacation leave benefits based on her total years of service to the County. No evidence was presented as to whether she was allowed or denied the use vacation leave, such a denial would have been consistent with a probationary employee status. Yet even lacking this evidence, since the County calculated her vacation leave based on her total service to the County, it did not consider her to be a probationary employee for purposes of vacation leave.

In light of the evidence, I conclude that Drouillard was not a "newly hired employee" in probationary status pursuant to the collective bargaining agreement beginning on November 1, 2000, when she moved from the Sheriff's Department to positions represented by the Courthouse bargaining unit because the County did not identify her as such nor did it subject her to the diminished rights and benefits of a probationary employee.

With regard to Drouillard's rate of pay from May 1, 2000 through October 31, 2000, Article XXI addresses two time periods relevant to the hire of a new employee. The first sentence addresses the time the newly hired employee is on probation and the second sentence refers to the six (6) months that follow the new employee's probationary period. The second sentence modified the first sentence. Drouillard was not a new hire on November 1, 2000, nor was she considered a probationary employee, therefore she was not completing her "second six (6) months of employment" which is prerequisite to reducing her classified rate.

The County cites arbitration decisions that validate its position and actions. After reviewing these cases, I do not find that the facts are sufficiently on point to establish these cases as precedential to this issue. Both the CITY OF KIEL and LORRAINE COUNTY decisions are termination cases where non-regular non-represented employees of municipal employers are hired to regular positions, terminated and are attempting to use their non-bargaining unit hire date for purposes of obtaining bargaining unit protection. Both of these cases can be distinguished because the employees were not governed by the labor agreements nor did not receive any labor agreement benefits during their non-regular, non-represented status, whereas Drouillard was provided benefits and was thus in part, governed by the labor agreement. With regard to COUNTY OF WALWORTH, SUPRA, as previously indicated, it would be persuasive if it was appropriate for the County to isolate the term "newly hired employee," but viewing the collective bargaining agreement as a whole and specifically the probationary language, and in light of the County actions, I do not find the County's argument convincing.

The parties disagree as to whether an established past practice exists as a result of a single incident when the County paid Ron Skallerud at the two-year social worker rate after he moved from the Sheriff's Department to a non-represented social worker position. The Association's argument is hindered the fact that Skallerud moved from a represented position to a non-represented position and had the right to negotiate his individual terms of employment with the County. The County's assertion that a single incident cannot create a binding practice is hampered by the improbability that the unique circumstances of the incident will arise regularly. In as much as my analysis does not require that a conclusion is reached on whether a binding past practice exists, it is not necessary that I decide this question.

As the discussion has established, the County and the Association agreed that during a new employee's first 12 months of employment, which includes the probationary period, the employee will receive diminished wages and diminished levels of benefits. The County's actions indicated that they did not regard Drouillard as a probationary employee since she was afforded benefits due to her prior employment in the Sheriff's Department, therefore, she was not regarded as a "newly hired employee," thus the County did not have the contractual right to reduce her classified rate.

AWARD

1. Yes. The County violated the collective bargaining agreement when it paid the Grievant less than the classified wage rate in job positions represented by the Forest County Courthouse Employees Association from November 1, 2000, through October 31, 2001.

2. The appropriate remedy for the violation found in item one above is as follows: The County shall make Drouillard whole without interest for the difference between what she was paid and what she would have been paid had her classified wage rate not been improperly reduced as noted in one above.

Dated at Wausau, Wisconsin this 3rd day of December, 2001.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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