BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ONEIDA COUNTY COURTHOUSE EMPLOYEES
LOCAL ASSOCIATION NUMBER 158, WPPA/LEER

and

ONEIDA COUNTY

Case 154
No. 59883
MA-11445

Appearances:

Mr. Mark R. Hollinger, Attorney at Law, Katarincic & Hollinger, LLC, 205 East Wisconsin Avenue, Suite 330, Milwaukee, WI 53202, appearing on behalf of the Union.

Mr. Carey L. Jackson, Labor Relations and Employee Services Director, Oneida County, Oneida County Courthouse, P.O. Box 400, Rhinelander, WI 54501-0400, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the Employer named above are parties to a 1998-2000 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned as the arbitrator to resolve the grievance involving a position held by Bernie Wanty. A hearing was held on August 14, 2001, in Rhinelander, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by October 22, 2001.

ISSUE

The parties did not stipulate to the framing of the issue. The issue is:

Did the County upgrade or reclassify the position of Bernie Wanty? Should Wanty have been placed on the wage scale at grade 7, year 1 or year 2?

BACKGROUND

Bernie Wanty was hired in 1997 as an Assistant Maintenance Technician. The job required general maintenance and custodial duties. The County also has a position called Maintenance Technician, held by James Keso. Wanty was doing more of the technical work, such as boiler maintenance, electrical work and construction. In August of 2000, Wanty talked to his supervisor, Curt Krouze, about the work he was doing which was beyond his duties as Assistant Maintenance Technician. Krouze agreed with Wanty that if he was doing the work, he should be compensated for it.

Krouze was Wanty's supervisor for about two and a half years. When Krouze became aware that Wanty was handling higher level tasks, he went to the Building and Grounds Committee and discussed the matter of Wanty's position and his work. Krouze learned that the Maintenance Technician was giving Wanty the tasks that Krouze was assigning to him. Wanty was starting to handle the majority of the higher level functions. Keso was handling the majority of the functions of the Assistant Maintenance Technician due to a medical condition and a lack of training. Keso was getting close to retirement, and he declined an offer from Krouze for the training for the higher level tasks. The Building and Grounds Committee met with the Personnel Committee, and they discussed upgrading Wanty's job to a Maintenance Technician while down grading Keso's job to an Assistant Maintenance Technician. The Building and Grounds Committee passed the matter on to the Personnel Committee with the recommendation that those jobs be upgraded and downgraded as such.

On January 23, 2001, the Personnel Committee approved upgrading Wanty's position to a Maintenance Technician position and down grading Keso's position to an Assistant Maintenance Technician.

Wanty did not use the contractual process to seek a reclassification, and was surprised when Krouze initiated the change in his position. Wanty did not file a grievance over his placement on the salary schedule.

Krouze thought that after the upgrade, Wanty should be placed at year 1 because it was a promotion. Krouze did not want Wanty to be placed at the probation rate, because Wanty had been performing those duties for nearly a year. Krouze and Personnel Director Carey Jackson discussed the appropriate placement for a wage rate and agreed on the placement. Krouze considered using a promotion process, but did not want to use that process because Wanty would have had to start at the probationary wage rate or hire rate.

The contract language in Article 6 regarding reclassifications and upgrades came into the parties' agreement in a consent arbitration award in 1995, and the language has not changed. The Association filed a grievance over the implementation of the language, and in May of 1996, the parties reached a letter of agreement to settle the grievance. The letter of agreement states how employees who are reclassified or promoted are placed into the wage schedule, but it does not refer to upgrades.

Lisa Charbarneau has been the Administrative Assistant to the Personnel Director for the last eight years. She testified that in 1996, Income Maintenance Workers asked for a reclassification. Jackson prepared a report dated August 6, 1997, which recommended that a reclassification not take place but that an upgrade was warranted. Jackson's report stated that a reclassification was not appropriate as there had not been a substantial increase in duties and responsibilities associated with the positions. He found an upgrade to be appropriate because Income Maintenance Assistants were performing the same work as Income Maintenance Workers, the wages in comparable counties justified the upgrade, and most of the other Counties had changed the title of Income Maintenance positions to Economic Support. The positions were in fact upgraded. In 1997, Income Maintenance Workers were at grade level 4, year 3 at $9.78 per hour. Following the upgrade to Economic Support Specialists, the same people were at grade 6, at the hire rate of $10.36. If those same positions had been reclassified, they would have gone to grade 6, year 3 at $11.48.

Charbarneau testified that the major difference between a reclassification and an upgrade is that the upgrade does not necessarily mean that there has been a substantial change in duties, while the standard for a reclassification is that there must be a substantial change in duties. In the case of Income Maintenance Workers, their duties did not change. Another difference is that the County Board of Supervisors is not involved in decisions to upgrade or downgrade a position. Both processes of reclassifications and up or down grading jobs involve positions rather than individuals. Jackson testified that upgrades may be based on other factors, such as the need in this case to change positions because of a medical condition. Another distinction is that reclassifications do not include downgrades.

In 1997, the Landfill System Technician was at grade level 5, year 3 at $10.78. His position was upgraded in 1998 to grade level 8, hire rate of $10.84. If his position been reclassified, he would have been at year 3 in grade level 8 at $11.64.

The Property Mapping Technician was at grade 8, year 5 at $11.77 in 1997. His position was upgraded in 1998 to grade 11, hire rate of $12.28. If the position had been reclassified, he would have been at year 5 at $13.84.

The Payroll/Purchasing Clerk was at grade 5, year 3 until she was upgraded in 1998 at grade 7, year 1 at $10.61. If she had been reclassified, she would have been at year 3 for $11.13.

Charbarneau was not aware of any other upgrades since 1998. The Association met with Jackson over the upgrades noted above. Jackson offered the Association the opportunity to meet to discuss the wages of Wanty. The parties did not meet to discuss Wanty's wages.

THE PARTIES' POSITIONS

The Union

The Union argues that the contract draws a distinction between the reclassification of an individual employee from one position or occupation to another, versus the upgrade or downgrade of an entire position. When an individual employee believes that there has been a substantial change in his/her duties and responsibilities, he/she is permitted to initiate the reclassification process. Although reclassification and upgrade and downgrade are at times used in a confusing interchangeable fashion, the distinction between the two concepts is clear.

The Union states that in the reclassification process, the employee is either reclassified to a higher salary grade or remains at his/her existing wage rate. Section I, Parts 1-7 of Article 6 makes no mention of moving downwards or demoting an employee. Reclassification decisions are not subject to the grievance procedure, and no union would ever allow an employer to have the unilateral right to demote bargaining unit members without an appeal to the grievance process. While the County is not explicitly authorized to initiate the reclassification process, it is not barred from doing so, and did so in this case when Krouze initiated Wanty's reclassification process.

The Union asserts that the contract language dealing with upgrades and downgrades speaks to reviewing a position, and that unlike reclassifications, a position or occupation can be downgraded. The incumbent employee in a downgraded position suffers no reduction in pay. The contract anticipates that a position may not have an incumbent employee, unlike the reclassification process.

The Union contends that the County's definitions of reclassification versus upgrade are contrary to the plain meaning of the contract. While the County claims it upgraded Wanty as an individual, it reclassified him because it decided he was actually doing the work of a Maintenance Technician. Such a reclassification requires that he be paid at grade 7, year 2, pursuant to the 1996 Side Letter of Agreement which this arbitrator previously affirmed. The Side Letter makes no distinction between County initiated reclassifications as opposed to employee initiated reclassifications. All reclassifications are to receive the same treatment.

The Union notes that if the County claims it's an upgrade because it initiated the process as opposed to an employee initiating the process, it would be a race to have all employees seek reclassifications in order to avoid having the County place them where it wants on the wage schedule. While Krouze claimed that Wanty was really promoted, there was no job posting. It appears to the Union that the County wanted to demote Keso and reclassify Wanty without dealing with Keso as a performance issue. If downgrades apply to individuals, the County has a loophole by which it can demote or discipline without proving the reasonableness of its actions. It is bad enough that the County can downgrade a position and the Association has no grievance recourse. If the County cannot demote or downgrade

individual employees, it cannot upgrade individuals either. While the County may argue that a downgrade is not in fact discipline because the incumbent employees receive the same pay, pay is not the only aspect of a demotion to consider.

The Union asserts that the County does not have a binding past practice to support its definitions of reclassification and upgrade. The contract is not so ambiguous or unclear so as to make it susceptible to modification by past practice. Although the wording of Article 6, Section I, Parts 1-7 is at times ponderous and confusing, the intent of the parties with respect to the distinction between reclassification and upgrade/downgrade is clear and unambiguous. On County Exhibit #15, Jackson lumps reclassification and upgrade together as if they are interchangeable and synonymous, which is contrary to the County and Union's interpretation. It shows how inconsistent the County has been as to the interpretation of this contract provision.

Moreover, the Union argues, since the County upgraded the positions of Income Maintenance Workers and knew it had to negotiate wages for the positions, it was also incumbent upon the County to negotiate a wage for Wanty if his position were upgraded. This was not done because he was reclassified from one position to another. All of the positions in County Exhibits #16-19 were negotiated and do not authorize the County to take similar actions unilaterally.

The County

The County first points out that the Union had contended that the term upgrade and the term reclassification meant the same thing. The Union has the burden to prove that they are the same. The County agrees with Union regarding the matter of pay — if Wanty were reclassified, he should be placed at year 2 as the Union contends. If the two terms are not the same in meaning and practice, then the County has to act reasonably in placing him on the wage scale.

The County submits that the dictionary definitions of the terms are different. Upgrade is to promote to a higher grade or rank. Reclassification is to classify anew. A reclassification can result in a grade level increase, decrease or lateral transfer. An upgrade can only result in a grade level increase. By contract language, a reclassification request only occurs when an employee believes his/her job has substantially changed in duties and responsibilities and submits a request for a review. Wanty did not request a reclassification. However, an upgrade does not have to have a substantial change in duties and responsibilities and it does not require an employee request. Moreover, the process for an upgrade is less restrictive in its procedure and involves fewer people. The final approval for a reclassification is the County Board of Supervisors, while the final approval for an upgrade is the Personnel Committee.

The County states that the contract is silent as to wages during an upgrade. This is for flexibility to take into account the variables of each case. When the County upgrades a position and sets a wage placement, it must offer to meet with the Union to negotiate that wage placement. There is nothing that says the Union must meet with the County. The Union refused to negotiate Wanty's rate of pay following the position upgrade. Even if the Union disagreed with the County's assertion that this was not a reclassification, the Union should have met with the County on the wage issue.

The County argues that the historical data supports its case. The consent award incorporated the reclassification procedure into the contract, and there have been no changes since then. In December of 1996, employees of the Social Services Department requested that their positions be reclassified. The process was performed in accordance with Article 6, Section 1, Parts 1-7. The recommendation of the Personnel Director was that a reclassification was not warranted as there was not a significant change in duties and responsibilities, but an upgrade was appropriate because two different classes of employees were doing the same work, a name change was justified for this type of work, and the market data showed that these employees should be paid more money. The Union did not file a grievance to claim that the employees should be reclassified rather than upgraded, and it met with the County to properly pace the positions on the wage scale. The County also reviewed and upgraded three additional positions, and the Union did not file a grievance and claim that reclassification and upgrades were the same thing. Instead, the Union met with the County to place the upgraded positions on the wage scale. In each case, the parties agreed to place the employees at a wage rate different than what they would have received if the actions were the result of reclassifications.

Therefore, the County contends, the parties have clearly made a distinction between reclassification and upgrade. Historically, the Union has been willing to meet with the County to establish the wage level when an upgrade occurs. Since the Union refused to meet with the County in this case, it should not complain now about the County's wage placement.

The County submits that it acted in a reasonable and responsible manner in setting Wanty's wage placement. It found out that he was performing isolated tasks of the Maintenance Technician position and it gave him credit for six months prior to learning this by placing him at year 1 on the wage scale. No one provided evidence that he was performing those tasks in February of 2000. The prior decision by this arbitrator in the Darges case has no bearing on the present case. The arbitrator made no judgments about upgrades and wage placements under such an event. The Side Letter of Agreement applied to reclassifications.

DISCUSSION

The contract language at issue here is lengthy, but bears repeating here. Article 6 – Seniority – Promotions – Reclassification – Layoff, Section I, states:

Section I: The County shall have the right to initiate reclassification procedures as described at the end of this section. The following steps shall be followed when an incumbent employee requests reclassification:

1. When an incumbent employee believes that his/her job has substantially changed in duties and responsibilities, he/she shall make a written request to their Department Head as well as the designated Courthouse Association Reclassification Committee asking them to review the employees classification. If the Department Head and/or Association Committee find that the reclassification request is appropriate, the request will be forwarded to the appropriate Committee of Jurisdiction for their review. Included in the request shall be supporting documentation justifying the request. Job factors to be considered may include, but are not limited to, typical duties performed, qualification requirements, complexity of work, the extent of supervision or guidance provided, the variety and degree of knowledge and skills required, mental requirements, responsibility for public contact, responsibility for decision making, supervisory responsibilities, and working conditions.
2. The Personnel Office will in all instances, prepare up-dated job descriptions with the cooperation of the employee and the Department Head.
3. The Committee of Jurisdiction will review the request and will make a determination as to whether or not to forward the request to the Personnel Committee. The decision of the Committee of Jurisdiction shall be recorded in the Committee's minutes. A copy of those minutes shall be forwarded to the Personnel Office. When a Committee of Jurisdiction forwards a reclassification request to the Personnel Committee with a recommendation that a study of the position be conducted, a copy of all documentation on the request shall accompany the request. If the Committee of Jurisdiction decides not to forward the request to the Personnel Committee, the Department Head shall notify the incumbent employee of the reasons for that denial in writing.
4. Upon completion of the study by the Personnel Director, the employee, union rep, and Department Head shall meet with the Personnel Committee regarding the request. All parties shall be afforded the opportunity to present pertinent information to the Committee.
5. After listening to the parties, the Personnel Committee shall go into closed session to discuss what they have heard and to review materials. The Personnel Committee shall return to open session to make their decision. This decision shall be communicated in writing to the employee, the Association, the Department Head and the Chairperson of the Committee of Jurisdiction. Unless mutually agreed otherwise in writing, the Personnel Committee shall make a decision not more than forty-five (45) days from receiving the request.
6. When necessary, the Personnel Committee shall submit a resolution to the Oneida County Board of Supervisors for consideration.
7. The decisions of the Personnel Committee and/or County Board of Supervisors are final and shall not be subject to the grievance procedure.

> The County has the right to review all positions to determine their proper classification. County initiated reviews of positions shall be handled by the Personnel Director in the manner he/she deems most appropriate. Should the County initiate a review of a position, the Department Head and incumbent employee, if there is one, shall be notified and shall participate in the investigation/analysis of the position. Upon completion of the investigation, the Department Head and incumbent employee, if there is one, shall be notified of the findings and recommendation of the Personnel Director. The Personnel Committee has the authority to up-grade and down-grade positions as it deems appropriate. The Personnel Committee's decisions in this regard shall not be subject to the grievance procedure. However, no incumbent shall suffer a reduction in wages caused by down-grading a position. In addition, the incumbent shall receive whatever raises are negotiated during contract negotiations unless agreed otherwise during such negotiations. This agreement does not infringe upon the County's right to create or delete positions as covered under Article 7 Vested Rights of Management as found in the current courthouse union agreement.

While the Union argued at hearing that there was no distinction between a reclassification and an upgrade, it has acknowledged in its post-hearing brief that there is such a distinction, but it makes a distinction between incumbent employees and positions. Essentially, the Union argues that employees are reclassified while positions are upgraded or downgraded. This is not the case – in all circumstances, it is positions that are either reclassified or upgraded or downgraded.

The contract language dealing with the reclassification procedure refers to positions in two instances. In Article 6, Section I, Part 2, the contract calls for updated job descriptions. Obviously, new job descriptions apply to positions, not individuals, and the new job descriptions remain when incumbent employees leave those positions. In Part 3, the language again refers to "a study of the position."

It would be a strange position indeed for the Union to argue that once an employee is reclassified, the position is not also reclassified. Under that scenario, once the incumbent left, the position would go back to what it was before the employee received the reclassification, and a new employee in that position would not be getting the same duties and responsibilities that warranted the reclassification in the first place. Surely, the Union would find itself in the odd circumstance of having to argue that the new person should have the higher classification also – without having to go through a reclassification procedure. Duties and responsibilities stay with a position and don't regress due to the loss of an incumbent employee in that position.

The parties argue over the past practice and the Union asserts that the contract language is clear enough so that no past practice applies. However, the Union admits that the language is sometimes confusing – which is really an admission that the language is not so clear and unambiguous. The Arbitrator would find that while the language is ambiguous enough to look to past practices, she is reluctant to find a binding past practice based on the short period of time that this language has been in place and interpreted. It is generally accepted that past practices must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. There are four prior instances since 1997, and while they all favor the County's interpretation, they do not amount to the type of binding past practice simply due to the short period of time involved. The Union acquiesced in the County's interpretation, again favoring the County's position in this case. However, four cases in 1997 and 1998 do not meet the criteria of a reasonable period of time as a fixed and established practice. Nonetheless, the way the County has used the language of Article 6 tends to support its position in this case.

Furthermore, the unrebutted testimony of Charbarneau and Jackson confirmed that in either upgrades or reclassifications, the County was looking at positions and not individuals. Thus, based on the testimony and evidence, the parties' past practice, and the contract language, the reclassification procedure as well as the upgrade/downgrade procedure apply to positions, not to individual employees.

While the Union fears that the County could use the process to downgrade a position and in effect demote an employee as a disciplinary measure, that case is not before me. If the County were to use a demotion as a disciplinary measure, the Union could grieve the matter as it can grieve other disciplinary actions.

In determining whether a position has been reclassified or upgraded, it is not so much the process used as the end result that tells the story. For example, the Income Maintenance Workers asked for a reclassification, but the end result was an upgrade based on the recommendation of the Personnel Director. This was consistent with Article 6, Section I, Paragraph 4, which calls for a study by the Personnel Director. In the case of either reclassifications or upgrades/downgrades, the Personnel Director makes recommendations.

The County used the process specifically noted in Article 6, Section I, where the Personnel Committee has the authority to upgrade and downgrade positions as it deems appropriate, and its decisions are not subject to the grievance procedure. It used this process to help solve an unusual circumstance. If Wanty and Keso had simply switched positions, Keso would have suffered a pay cut. Since he was nearing retirement and had a medical condition that kept him from performing all aspects of his position, and Wanty was performing that work, the County could help both employees by using the upgrade and downgrade process. Moreover, it was not a matter of simply reclassifying Wanty's position – because a reclassification would have created two positions of Maintenance Technician, where the County only needed one such position.

The parties agree how reclassifications are to be treated on the wage schedule. Since the contract does not address the placement on the wage schedule of positions upgraded or downgraded, the County placed Wanty on the schedule where it thought appropriate but also gave the Union the opportunity to negotiate over the wages. The Union should not now complain about the fact that Wanty's position was placed on the salary schedule without the placement being negotiated, where the Union had the chance to bargain over the wage placement but declined to do so. It could have done so while still reserving its right to argue that the action was a reclassification instead of an upgrade.

Based on the record, I find that Wanty's position was upgraded but it was not reclassified, and that the placement of Wanty's wages at grade level 7, year 1 does not violate the collective bargaining agreement.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 4th day of January, 2002.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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