BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN COUNTY PLEASANT VIEW HOME EMPLOYEES, LOCAL 1162, WCCME, AFSCME, AFL-CIO

and

GREEN COUNTY (PLEASANT VIEW NURSING HOME)

Case 146
No. 59865
MA-11434

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Green County Pleasant View Home Employees, Local 1162, WCCME, AFSCME, AFL-CIO.

Mr. William E. Morgan, Corporation Counsel, on behalf of Green County.

ARBITRATION AWARD

Green County Pleasant View Home Employees, Local 1162, WCCME, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Green County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on June 21, 2001, in Monroe, Wisconsin. There was no stenographic transcript made of the hearing and post-hearing briefing was completed by August 9, 2001. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

The parties stipulated there are no procedural issues, but were unable to agree on a statement of the substantive issues and agreed the Arbitrator will frame the issues.

The Union would state the issues as follows:

Did the Employer violate the collective bargaining agreement by failing to grant the Grievant the Kitchen (Dietary) position she applied for in conjunction with the Housekeeping/Linen position? If so, what is the appropriate remedy?

The County states the issues as being:

Did the County violate Section 9.01 of the collective bargaining agreement by not giving due consideration to the Grievant's seniority? If so, what is the appropriate remedy?

The Arbitrator concludes that based upon the two grievances and the arguments of the parties, that the issues are more accurately stated as follows:

(1) Did the County violate the parties' Collective Bargaining Agreement when it posted the Food Service Worker – 1 day/week position and the Housekeeping/Linen – 4 days/week position as separate positions, rather than as one combined full-time position? If so, what is the appropriate remedy?

(2) Did the County violate the parties' Collective Bargaining Agreement when it did not award the Food Service Worker – 1 day/week position to the Grievant? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions are cited:

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The Union recognizes the rights and responsibilities belonging solely to the County, prominent among, but by no means wholly inclusive are the right to hire, promote, discharge or discipline for cause. The right to decide the work to be done, and the location of the work. The Union also recognizes that the County retains all rights, powers and authority that it had prior to this Agreement except as modified by this Agreement. Reasonableness of management's decisions are subject to grievance procedure. However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members. 1/

1/ This wording from the parties' 1999-2000 Agreement (Joint Exhibit No. 1) differs from that cited by the County in its brief.

. . .

ARTICLE 4 – SENIORITY

4.01 Seniority rights shall prevail at all times during the life of this Agreement provided skill and ability are reasonably equal.

. . .

ARTICLE 9 – JOB POSTING

9.01 All vacancies for existing or newly created full-time jobs or full-time shifts shall be posted for at least seven (7) working days. Any employee who possesses the required qualifications established by the employer may sign such a posting. For other vacancies in existing or newly created job openings or shifts, the following procedure shall be followed:

1. The vacancy shall be posted for at least seven (7) working days, and employees will be permitted to bid on such vacancy. The posting will advise that a copy of the job description is available.

2. If, as a result of filling the primary vacancy, another vacancy is created (because a present employee has bid into the initial vacancy), normal job posting procedures will be followed [i.e. the secondary vacancy will be posted for seven (7) days, and employees will be permitted to bid on such vacancy].

3. Any remaining job vacancies created by the primary and secondary posting may be filled in a manner determined by the Employer. An up to date listing of such vacancies shall be posted. The Employer shall maintain a listing of the vacancies it intends to fill. Current employees who are interested in the remaining jobs should make their interests known to the respective supervisors for consideration for the position. If the Employer elects to post such vacancies, normal posting procedures will be followed.

The Employer shall select from among signatories an employee to fill the new or vacated job. Equal consideration shall be given to seniority and qualifications in making such promotions. If an individual assumes a new position under this section, he/she shall be ineligible to sign for another job posting for a period of three (3) months from the time he/she assumes said new position. However, this restriction does not apply to

an employee who may have had an opportunity to post into a new position which results in increased hours, increased wages or better hours (e.g. nights to pm's, pm's to days) than their present position.

9.02 An employee awarded a job shall be given a fair trial for a period not to exceed thirty (30) days, but if it shall, at the end of thirty (30) days, be decided by the Employer that such employee is not qualified or adapted to the new position, he/she shall be returned to his/her old position without loss of seniority. If, at the end of the thirty (30) day trial period, the employee desires, he/she shall be returned to his/her old job without loss of seniority.

. . .

BACKGROUND

The County owns and operates the Green County Pleasant View Nursing Home. The Union is the exclusive collective bargaining representative for "all employees" of the Home, excluding supervisory, confidential, craft and professional employees.

The Grievant has been employed at the Home for 17 years. Her first three years at the Home she was employed part-time (2 days a week) in Food Service, where her duties included, among others, working on the food line, placing trays on the carts, placing coffee, milk, etc. on the trays, and running the dishwasher. Since then, the Grievant became employed full-time, currently working as a Housekeeper. As a Housekeeper, the Grievant's duties include mopping floors, dusting, and cleaning the bathrooms in residents' rooms. She also does some laundry work in the position. She works five days a week, working every third weekend.

On November 29, 2000, the positions of "Food Service Worker – 1 day/week" and "Housekeeper/Linen – 4 days/week" were posted. The postings were on one sheet and included the statement at the bottom that "The two above positions have been combined in the past to make one full time position and can be again. . ." Employees were permitted to sign both postings.

The "Food Service Worker" position is in the Dietary Department and the Supervisor is Rebecca Brown. The "Housekeeper/Linen" position is in the Housekeeping/Linen Department and the Supervisor is Avis Lueck. Both positions are in the lowest pay grade and have the same hourly wage rate. The Food Service Worker (FSW) position actually works Saturday and Sunday, every other weekend.

The Grievant signed both postings. Employees are paid double time on Sundays. The Grievant wanted the two jobs so that she would be working the same number of hours (80) in a pay period as in her current position, but would work every other Sunday, instead of every

third Sunday. There are also overtime opportunities in the Dietary Department, which are not generally available in Housekeeping/Linen.

The Grievant was the most senior employee (172 months) to sign for the FSW position and second most senior employee to sign for the Housekeeper/Linen position, until the most senior employee withdrew her name.

Prior to this posting, the same person held both the FSW 1 day/week position and the Housekeeping/Linen 4 days/week position for approximately four years. Prior to that time, one person had not held both positions.

The Grievant did not get the FSW position; rather, it was awarded to two part-time Food Service employees who were the two least senior bidders, Anderson and Steitz. At their request, the hours were split between the two of them. Anderson had 61 months of seniority, all of them working in Food Service. Steitz had 15 months of seniority, all working in Food Service, and also works part-time as a cook and food service supervisor for an area school district. Anderson has filled in as a Cook's Helper and Steitz has filled in as a Cook's Helper and as a Cook.

Lueck asked the Grievant if she was still interested in the Housekeeping/Linen position after the FSW position had been awarded to Anderson and Steitz, and the Grievant indicated that she was not interested in the Housekeeping position without the FSW position. Lueck testified that she was prepared to give the Grievant the job if she wanted it. As everyone else had withdrawn their name, the position was awarded to the least senior bidder.

The Union timely grieved the awarding of the FSW position to less senior employees than the Grievant, and subsequently also grieved posting the positions separately instead of as one full-time position. The parties attempted to resolve their disputes through their grievance procedure, but were unsuccessful and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union initially notes that the Grievant signed for both the FSW 1 day/week and the Housekeeper/Linen 4 days/week postings and ultimately was the most senior applicant in both cases (the more senior applicant for the Housekeeper/Linen position having withdrawn from consideration). Upon being advised that she was not granted the FSW position, the Grievant declined the offer of the Housekeeping/Linen position as it would have resulted in her going from a 5 day a week Housekeeper position to 4 days per week.

The Union asserts that Section 9.01 of the Agreement provides that equal consideration shall be given to seniority and qualifications. In this case, it is clear that the Grievant was by far the most senior of the applicants for the positions. As the testimony of Leuck makes clear

that the Grievant would have received the Housekeeper/Linen position, it is the FSW position that is in dispute.

The Dietary Department includes three skill levels, the highest being the Cook's classification, the second highest being the Cook's Helper classification and the lowest, the position at issue, the FSW position. The FSW is in the lowest pay grade and is an entry-level position that has many times been filled with applicants without any previous experience.

On weekends, there are four dietary workers assigned to work, including a Cook's Helper and another FSW who works regularly in the kitchen. It is unlikely that having the Grievant present every third weekend would cause any disruption in the operations of the Department. Further, the Grievant would be gaining experience while working in Dietary during the regular workweek. Brown also conceded that she would have placed the Grievant in the position if she had not decided to give the hours to the less senior employees.

The Union asserts that the County has exhibited prejudice against the Grievant. Brown, who is not the Grievant's present supervisor, expressed concern over her work, while Lueck, who is the Grievant's present immediate supervisor, did not express those same concerns.

Section 9.02 of the Agreement provides for a fair trial period of 30 days for the employee awarded the job. While this does not mean an employee who is clearly unqualified must be given a trial, in this case the Grievant should have been given a fair opportunity to show that she could in fact perform the duties to management's satisfaction.

The Union concludes that in order to give meaning to the totality of the Agreement, individual clauses should not be read out of context. The Agreement provides that equal consideration must be given to seniority and qualifications. The Grievant has performed the duties of an FSW in the past and the position is not one that places a large amount of responsibility on an individual. An opportunity exists for the Grievant to be evaluated in the new position. The previous incumbent in the position had also only worked in the Dietary Department on an occasional basis without creating any operational problems. As the position would have provided an opportunity for additional earnings to the Grievant, the Union seeks a make-whole remedy in addition to the request that the Grievant be granted the combined FSW and Housekeeper/Linen positions and also asks that the Arbitrator retain jurisdiction to resolve any disputes as to remedy.

County

The County asserts that it has not violated the Agreement by failing to award the FSW position to the Grievant or by failing to combine the FSW and Housekeeping/Linen position into one position. Regarding the latter issue, the County cites Sec. 2.01 of the Agreement, "Management Rights" and asserts it has not bargained away its right to determine the nature and type of work to be performed, including job descriptions and job duties. The determination of whether or not the combining of the positions is warranted is solely to be

made by the County, and is not subject to grievance or arbitration. There is also nothing inherent in the two positions that would require that they be combined, and except for the prior incumbent in the two positions, they have not historically been combined. It also must be remembered that the Grievant withdrew her name from the running for the Housekeeping/Linen position. While Lueck indicated that the Grievant may have received the position, that is not a guarantee, and she still would have had to prove her qualifications for a position in which she had never performed.

The issue of whether or not the Grievant was given "equal consideration" for the FSW position raises the question of whether or not "equal consideration" was required in this circumstance. Section 9.01 describes the method for filling new or existing jobs, and specifically provides that equal consideration is to be given to both seniority and qualifications in deciding who is to fill the position. This echoes Section 4.01, which provides that seniority rights shall prevail at all times, provided that ability and skill are reasonably equal.

In this case, there were at least three posters for the FSW position who had experience and qualifications in food preparation. The Grievant testified that she had worked part-time in food service for three years in the early 1980's, working approximately two days per week. Since that time, the Grievant has been employed solely in the Housekeeping Department. The other two posters for the position, and who received the job, are both current employees of the Food Service Department. One has over five years' tenure in her current position and the second has over a year. The latter individual, Stietz, is also currently employed by an area school district as a food service supervisor, and has run their food program for at least eight years. There is no challenge to the testimony of Brown that the two posters who received the position have significant experience, skills and ability in food preparation. The Union's sole argument apparently is that seniority trumps all, which is not the case under this Agreement.

The parties have explicitly bargained that seniority is not dispositive in terms of awarding positions, but is part of a balancing test. Brown testified that since the Grievant's experience in the kitchen in the early 1980's, there have been significant changes in the Department both as a result of the changing population of the nursing home, as well as changes in regulations. Brown was well within her rights to determine that the two individuals currently in the Department had the most ability and skill to meet the current needs of the position. The Grievant had not worked in any capacity in the kitchen in several years, and by her own admission had passed on the opportunity to sign up for an "availability" list in 1997. If she had done so, she would have received additional training and experience which may have been sufficient to result in her receiving the position when combined with her seniority.

Finally, the County asserts that the gist of the Grievant's argument revolves around the FSW position, since she took herself out of the running for the Housekeeping/Linen position. It is the County's position that since the Grievant has abandoned the pursuit of that position, and there is no requirement that the positions be combined, the sole remedy available would be to award the FSW position to the Grievant, resulting in her putting in a six day work week. Such a remedy is neither necessary, nor appropriate.

In its reply brief, the County disputes the assertion that seniority is the only consideration. Section 9.01 provides that equal consideration shall be given to both seniority and qualifications. The Union seems to infer from this that an individual who possesses the base qualifications and the most seniority should be given the position. The Union also appears to argue that the FSW position can be given to any individual without any previous experience. The County questions whether there was any testimony to that effect and asserts it is immaterial at any rate. Further, Sec. 9.01 does not stand alone. The Agreement includes Sec. 4.01, which provides that seniority rights shall prevail, provided ability and skill are reasonably equal. When read together, those two sections make clear that seniority is to be the "tie-breaker" only. Had there been two individuals with equal, relevant experience in the kitchen, seniority would prevail. Where, as here, the two individuals in this case who received the position had significantly more relevant experience, seniority does not come into play when evaluating those two individuals vis-à-vis the Grievant.

The County also disputes the assertion that placing the Grievant in the Department would not have resulted in the disruption of the operations of the Dietary Department. Brown testified that there have been times when the individuals in the FSW position have had to fill in for the Cook's Helper, and even times, albeit rarely, when they have had to fill in for the Cooks. Thus, it makes significantly more sense to place an individual in the FSW position who has the ability to perform at those higher levels. The County also disputes the assertion that the Grievant would be "gaining experience while working in Dietary during the regular work week." The position in question is a one-day-a-week position that is scheduled only to work on weekends, and the rest of the week, had the Grievant received both positions, she would have been scheduled to work in the Housekeeping/Linen Department. The County also disputes the characterization of Brown's decision as being due to prejudice against the Grievant. While a factor in her decision was her personal observation of the Grievant's work habits, that hardly constitutes prejudice. Personal observation is a legitimate basis upon which to make a hiring or placement decision, while prejudice implies an unfair or distorted bias. That is not the case here.

Finally, the Union relies on Sec. 9.02, which provides for a 30-day trial period. That provision is not really relevant, as it does not come into play until the analysis required by Secs. 4.01 and 9.01 has been conducted. The Union cannot "leapfrog" over those two provisions. The County requests that the grievances be denied in their entirety.

DISCUSSION

Issue (1)

The Union impliedly argues that the one day/week FSW position and the four days/week Housekeeping/Linen position should have been posted as one combined position and the Union's second grievance (Joint Exhibit 3) expressly raises this issue. The record does not support the Union's position in that regard. Article 2 of the parties' Agreement reserves to management the right to determine the work to be done, as well as, "all rights, powers and

authority that it had prior to this Agreement, except as modified by this Agreement." No provision has been cited to the Arbitrator that qualifies management's right to determine the number and types of positions that will perform the work. The posting for the two positions noted that the two positions were combined in the past to make one full-time position and "can be again." That statement appears to recognize that where, as was the case with the immediate prior incumbent, one person holds both positions, it can be considered the equivalent of a full-time position. It is noted that prior to the former incumbent, one person did not hold both positions. Further, the positions are in different departments under different supervision. Therefore, it is not unreasonable for management to consider them to be two separate positions.

Issue (2)

Two provisions have been cited with regard to the issue concerning the awarding of the FSW position, Sec. 4.01 and Sec. 9.01. Article 4 – Seniority, Section 4.01 provides:

> Seniority rights shall prevail at all times during the life of this Agreement provided ability and skill are reasonably equal.

The relevant wording of Article 9 – Job Posting, Sec. 9.01, provides:

> Equal consideration shall be given to seniority and qualifications in making such promotions.

The Union relies on the wording of Sec. 9.01 and asserts that the Grievant should have been awarded the position based upon her much greater seniority. The County asserts that Sec. 4.01 and Sec. 9.01 must be read together to mean that seniority only comes into play when skill and ability are reasonably equal as a "tie breaker". The Arbitrator does not agree. The County's assertions amount to saying that Sec. 9.01 is either meaningless or says the same thing as Sec. 4.01. Neither interpretation is persuasive.

These provisions are what is known as "modified seniority" clauses, which require something other than adherence to "strict seniority". Sec. 4.01 is known as a "relative ability" clause which requires a comparison between the qualifications of the employees bidding for the position and seniority only becomes a determining factor if the qualifications of the bidders are "reasonably equal" or "relatively equal" or "substantially equal". Section 9.01 is also a "modified seniority" clause, but it is considered a "hybrid" clause, which "requires consideration and comparison in the first instance of both seniority and relative ability" (Emphasis supplied). Elkouri and Elkouri, *How Arbitration Works* (5th Edition) at pp. 838-840. As discussed in Elkouri and Elkouri,

> It seems clear that under "hybrid" clauses the relative claims of seniority and of ability must be determined by comparing and weighing against each other the relative difference in seniority of competing employees and the relative

> difference in their abilities. Thus, in comparing two or more qualified employees, both seniority and ability must be considered, and where the difference in length of service is relatively insignificant and there is a relatively significant difference in ability, then the ability factor should be given greater weight; but where there is a relatively substantial difference in seniority and relatively little difference in abilities, then length of service should be given greater weight.
>
> At 840.

Thus, Sec. 4.01 and Sec. 9.01 do not state, nor require, the same thing and the result under one standard could vary from the result under the other. It is a principle of contract interpretation that where there is an inconsistency or a conflict between the wording of a general provision and the wording of a more specific provision, the latter should be given precedence. Elkouri and Elkouri, at 498. Thus, the County erred in applying the relative ability standard in Sec. 4.01 in this situation. It is Sec. 9.01, specific to the posting provision, that must be applied.

Applying Sec. 9.01 to the facts of this case, both seniority and qualifications must be considered. Regarding seniority, the Grievant has 14 years and 4 months of seniority, Anderson has 5 years and one month, and Steitz has 1 year and three months. 2/ Thus, under the seniority factor, the difference in seniority greatly favors the Grievant.

2/ Under Sec. 4.06 of the Agreement, part-time employees attain seniority based on time worked, i.e. every 173 hours worked is considered to be one month for seniority purposes.

Under the qualifications side of the equation, the County relies most on "experience", and also on the ability to fill in in higher-rated jobs. The Grievant worked part-time in the Food Service Department for her first three years at Pleasant View and filled in sporadically in Food Service in 1997. The Grievant never filled in as a Cook's Helper or Cook when she worked part-time in Food Service. Anderson has worked part-time in Food Service for over 6 years and during that time has filled in as a Cook's Helper. Steitz works part-time in Food Service and has filled in as a Cook's Helper and as a Cook, and also works part-time for an area school district as a Cook and supervisor in its food service program. In comparing those qualifications, it is important to keep in mind the position that is in question, and the qualifications must of course, relate to the work in that position. Certainly, experience in the job is relevant, as it demonstrates the ability to perform the work. However, it is also necessary to consider the level of skill, ability and/or experience that is necessary to perform adequately in the job.

Brown testified that due to the changes in the types of patients that the Home now serves from when the Grievant worked in the Food Service Department, and the effort to meet their individual dietary needs, that the Grievant's experience was less relevant. She further

testified that one of the duties of an FSW is to fill in for a missing employee, including at times filling in for a Cook's Helper or for a Cook, and that this is especially critical on weekends. Because Anderson has filled in as a Cook's Helper and Steitz has filled in both as a Cook's Helper and as a Cook, and is a cook in her other job, Brown felt that they were better qualified for the FSW position. Brown conceded, however, that the FSW position is an "entry-level" position and that at times outside applicants with no prior experience have been hired into the position and that they have still been assigned to work weekends. She further testified that when such applicants are hired, they get 6-8 days of training. Brown also conceded that the majority of the food for the weekend meals is prepared on Friday. She further testified that if the Grievant had been the only applicant, she would have been given the job, thus conceding she was qualified for the position. It is concluded that experience in the job is of limited necessity in being able to perform adequately in the position.

What it boils down to then, is the ability of Anderson to fill-in for an absent Cook's Helper and Steitz's ability to fill in for an absent Cook's Helper or Cook versus the presumed inability of the Grievant to do so. The County concedes that the need to have an FSW fill in for an absent Cook has been in "rare circumstances". Most importantly, however, the comparison being made by the County is the applicants' ability to do a job other than the job posted, i.e., the FSW position. Again, this is an entry-level position, and while the ability to fill in in higher-rated positions is of value to an employer, the ability to work in a position higher than the one posted cannot be the primary comparison; rather the comparison must be the qualifications for the position that is posted. 3/

3/ It is also noted in this regard that no job descriptions whatsoever were offered into evidence in order to determine the significant duties of the positions.

Weighing the difference in qualifications against the difference in seniority between the Grievant and Anderson and between the Grievant and Steitz, the difference in their qualifications for the FSW position is outweighed by the substantial difference in their seniority. Thus, it is concluded that the County improperly denied the Grievant the posted FSW position and thereby violated Sec. 9.01 of the Agreement.

Remedy

With regard to the appropriate remedy, the County argues that since the Grievant withdrew herself from consideration for the four days/week Housekeeping/Linen position, and there is no requirement that the two positions be combined, the Grievant is at most entitled to the 1 day/week FSW position. The Arbitrator does not agree. The logical extension of that argument would be that the Grievant would have had to accept the four days/week Housekeeping/Linen position and give up her five days/week position, in hopes of prevailing on her grievance on the FSW position. That would place an unreasonable economic risk upon the Grievant in attempting to enforce what she believed were her contractual rights. It was the

County's actions in denying the Grievant the FSW position in violation of the Agreement that created the situation. Further, the County permitted employees to sign both postings and noted in the postings that the positions could be combined as they had in the past. Again, creating the possibility of this situation occurring. For these reasons, it is concluded that the Grievant's withdrawing from consideration for the Housekeeping/Linen position does not preclude her from being awarded that position as part of the remedy in this case. That said, while it appears the Grievant would have been given the Housekeeping/Linen position, her withdrawal from consideration for that job prevented that from occurring. While the position will be awarded to her as well as the FSW position, given the unique circumstances in this case, the remedy to be awarded is to be prospective only without backpay. The Arbitrator does not perceive a need to retain jurisdiction.

Based upon the foregoing, the evidence, and the arguments of the parties, the Arbitrator makes and issues the following

AWARD

The grievance as to the failure to post and treat the one day/week Food Service Worker position and four days/week Housekeeping/Linen position as one combined position is denied.

The grievance is sustained as to the failure to award the Grievant the one day/week Food Service Worker position. As the Grievant would have been the successful bidder on the Housekeeping/Linen position, as well as the Food Service Worker position, had the County not violated the parties' Agreement by denying her the Food Service Worker position, the Grievant is to be awarded both positions. However, she is awarded the positions prospective from the date of this Award without backpay. Therefore, the County is directed to immediately offer the Grievant both the one day/week Food Service Worker position and the four days/week Housekeeping/Linen position, consistent with the terms of Article 9 – Job Posting, of the Agreement.

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

David E. Shaw /s/
David E. Shaw, Arbitrator

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