

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between  
**ASSOCIATION OF MENTAL HEALTH SPECIALIST  
HUMAN SERVICE PROFESSIONALS**

and

**ROCK COUNTY**

Case 335  
No. 60389  
MA-11598

---

Appearances:

**Mr. John S. Williamson, Jr.**, Attorney at Law, appearing on behalf of the Association.

**Mr. Eugene R. Dumas**, Deputy Corporation Counsel, Rock County, appearing on behalf of the County.

**ARBITRATION AWARD**

The Association and the County named above are parties to a 2000-2001 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear and resolve a dispute regarding salary step increases. A hearing was held on April 3, 2002, in Janesville, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by May 7, 2002.

**ISSUE**

The parties did not agree on the framing of the issue. The County frames the issue as this:

Were the County's practices in establishing a date for employees to move to the next step of a pay grade to which they had been promoted or into which they had been placed at a point above the entry level, based on the date of such employee's promotion or entry into the pay grade, in violation of the collective bargaining agreement? If so, what is the appropriate remedy?

The Association frames the issue as this:

Did the County violate the collective bargaining agreement when it changed the anniversary date from the date of hire to the date the employee was: (a) promoted from Range II to Range III; (b) promoted from a non-professional unit to a position in the AMHS unit; or (c) voluntarily reduced from a supervisory position to an AMHS bargaining unit position. If so, what is the appropriate remedy?

Either party's framing of the issue is acceptable. The Arbitrator slightly prefers the Association's statement of the issue.

### **BACKGROUND**

The Association represents employees who were once represented by three separate unions. The Association and the County reached the first collective bargaining agreement for the merged unit sometime in 1998, although it was retroactive to 1996. The parties also agreed on the second contract a few months later in 1998, which covered 1998 and 1998. The parties' current contract is for 2000-2001. The contract contains both ranges for various positions in the bargaining unit as well as steps, from start through 20 years. The parties agree that the relevant language regarding wage progression procedures has not been changed since the first agreement. (See Discussion section for more on the language.)

On August 8, 2001, the Association brought a class action grievance against the County because some employees' anniversary dates were changed when those employees changed positions. As a consequence of the County's action, those employees did not receive step increases on their actual anniversary dates or dates of hire. Instead, they received step increases on anniversary dates from the dates of promotion or change in position. There are three groups of employees who were affected: (1) employees moving from a Bachelor's level to a Master's level positions; (2) employees coming from another bargaining unit into the Association's bargaining unit; and (3) employees who left a supervisory position to take a bargaining unit position.

Association President Linda Graf reviewed seniority dates and step increase dates for unit employees and identified employees whose step increase dates differed from their seniority dates, ruling out employees whose dates differed because they received certification or they had taken a leave of absence.

Graf's records show that Judy Schultz, John Dalee, Linda Sime, Tracy Mayer, Julie Fouts and Rebecca Westrick have moved from a Bachelor's position to a Master's position. They retained their seniority date for purposes of step increases. Graf identified the employees who came from a nonprofessional bargaining unit and moved into the Association's

bargaining unit as Judy Schultz, John Dalee and Kevin Leifker. They also retained their seniority date for purposes of step increases. All of them moved into their positions or units before the 1998 collective bargaining agreement. Employees who left supervisory positions to take bargaining unit positions were Terrence Haines and Ronald Metz, and they also retained their seniority date for purposes of step increases.

Graf then traced the employees' history for those whose seniority date had been changed. Five employees moved from a Bachelor's position to a Master's position and had their step raise date changed from their seniority date to the anniversary date of the promotion. They are Gina Washburn, Faith Mattison, Kerstin Emerson, Lori Frison, and Ryan Nedbalek. Seven employees who came from another bargaining unit into the Association's unit had their step raise date changed from their seniority dates to the dates they moved into this bargaining unit. They are Val Bly, Teresa Cleveland, Lea Gerue, Gabe Fieiras, Terry Murphy, Sherrick Anderson, and Tricia Stillen. Four employees moved from supervisory positions to bargaining unit positions and their step raise dates changed to from their seniority date to the date of the change in position. They are Jim Weisner, Carl McNutt, Nichole Kumlien and Gary Jones.

Fieiras raised the issue of his step increase date with the previous Association President, Pat Bailey, who apparently told Fieiras that there was nothing that the Association could do about it. Bailey was not a negotiator in 1998 when the parties entered into the agreement that first contained the wage progression language.

When Washburn moved from a Bachelor's position to a Master's position, she was informed by Lori Pope, Lead Personnel Analyst for the County, that her future step increases would occur yearly on her anniversary date of the promoted position. Washburn confirmed that in writing in her acceptance letter.

Victor Long, Labor Relations Consultant for the County, was involved in negotiations for the collective bargaining agreements. He recalled that the wage progression procedures in the contract were not agreed to until 1998, even though it was retroactive to January 1, 1996. Long assumed that employees who were promoted would receive their subsequent step increases based on the date of their promotion rather than the date of their hire with the County, but he did not know whether the parties ever specifically discussed that.

John Moldenhauer was on the negotiating committee for the Association when the parties negotiated the first agreement for the newly combined bargaining unit. He did not recall any discussion applying the language of the wage progression procedures except for employees going from Range I to Range II.

Since 1998, the County has administered the step increases consistently with its position in this grievance.

## **THE PARTIES' POSITIONS**

### **The Association**

The Association asserts that the unexpressed assumption of the County's chief negotiator was not based on the language governing progression from Range I to Range II, where the reference to the change in anniversary date specifically applies to such progression. There is no reference to any other movement or progression just as there is no reference to any other movement being automatic.

The contract language regarding seniority in Sections 8.02 and 9.02 draws no distinction between employees who remain in the same position or same pay range and those who do not. Thus, the parties carved out one exception to the seniority language for the automatic progress from Range I to Range II through certification. The County's extension of the limited exception to non-automatic movements violates the language of Sections 8.02 and 9.01. The County's practice cannot modify clear and unambiguous contract language.

Although the County acted consistently with Long's assumption, and although Bailey told his opinion to one member, there is no evidence that Bailey's opinion expressed the Association's agreement with the County's action. Even if such evidence existed, that incident would not establish a practice. The County failed to show that the Association accepted or endorsed the practice.

### **The County**

The County asserts that the grievance should be denied because the County's practices in administering the relevant collective bargaining agreement have been consistent with the language of the agreement. The issue before the Arbitrator is whether the County's practices in establishing a date for employees to move to the next step of a pay grade to which they had been promoted or into which they had been placed at a point above entry level, based on the date of their promotion or entry into the pay grade, violates the collective bargaining agreement. The answer is clearly no.

There is no evidence that the County acted contrary to the terms of the wage progression procedures which intended to address specific instances of the general situations where an employee would be placed in a new salary range scale and subsequent step increases would be out of sync with the normal pattern for employees having the same work responsibilities but varying levels of experience. There is no evidence that the County acted without the knowledge and acquiescence of the Association's leaders and members.

The County submits that the grievance should be denied because the present method of administering step increases has been ratified by the past practices of the parties and the Association has waived its right to bring the matter before the Arbitrator. The record meets

the well-established arbitral standard for apply the actual practices of the parties to clarify ambiguous contract provisions. The County's reliance on its understanding of the wage progression procedures was in good faith and the County acted openly. The County asks that even if the Arbitrator rejects its interpretation of the collective bargaining agreement, the remedy should not disregard the time limits provided for seeking redress for contractual violations.

### DISCUSSION

In paying step increases, the County has used employees' true anniversary dates in some cases, based on their date of hire or seniority, and then used employees' dates of promotions or movement in other cases, apparently based on the language of the "Wage Progression Procedures," which states:

1. Progression from Range I to Range II for Case Managers and Probation Officers will be automatic upon the employee's State certification as a Social Worker. The effective date of the increase will be the pay period immediately following notification with documentation of certification to management. The employee's wage rate will be increased to the step in Range II that provides an increase of at least three percent (3%) and the employee will be eligible for subsequent step increases each anniversary date of the promotion thereafter.
2. For progression to Range III, employees will be required to have the specified education for the position which will allow them to compete for vacant positions when they are posted.
3. For Registered Nurses in Range IV, newly hired nurses with no experience and possessing a bachelor's Degree will be hired at the 2 year step of the range. Nurses with no experience and without a Bachelor's Degree will be hired at the start step.
4. Employees with relevant experience may be hired above the minimum hire rate based upon years of experience, but no employee will be hired above the 4 year step.
5. An employee who meets the educational requirements for a Range III position may be placed and paid in a Range II position.

It is the language of number one above that has generated this dispute. The wage schedule calls for ranges and steps. The steps are based on one's starting time, 6 months, 2 years, 3 years, 4 years, 5 years, 6 years, 7 years, 8 years, 9 years, 15 years and 20 years. It is understood and agreed by both parties that if an employee starts in a particular range at the

starting rate, he or she will get the step increases upon his or her actual anniversary date or time employed by the County. The wage schedule is clear enough on its face. There is nothing ambiguous about it.

However, the parties carved out an exception in the language of the wage progression procedures in number one for Case Managers and Probation Officers who get State certification as Social Workers. The procedure allows for an automatic progression from Range I to Range II, and further provides for *subsequent step increases each anniversary date of the promotion thereafter*. This language is clearly a deviation from the wage schedule and intended to apply to those positions. There is nothing in the contract that allows for *other* step increases to be effective upon date of promotion rather than the anniversary date based on the date of hire.

Therefore, the County's practice of changing the true anniversary date for others who do not come under number one of the wage progression procedures violates the collective bargaining agreement. It violates both the seniority provisions of the contract as well as the wage schedule itself. The seniority provision provides for seniority beginning with the original date of continuous employment with the County, so employees coming from other bargaining units should have their time counted from the time of hire just as employees who had always been in this bargaining unit. The County may not unilaterally determine that step increases are based on some factor other than years of service where the parties have agreed to step increases based on years of service.

Any practice that conflicts with the collective bargaining agreement cannot stand, as the written agreement takes precedence over the practice. The County's practice may have been consistent since 1998 when the parties reached their first agreement, but it was inconsistent with the contract language.

As to the remedy, this grievance is a continuing violation of the contract. The failure to pay appropriate wage rates is a continuing or recurring grievance or violation, as contract violations remain unremedied each pay period. See NEVILLE CHEMICAL CO., 73 LA 405 (RICHMAN, 1959); BETHLEHEM STEEL CO., 34 LA 896 (SEWARD, 1960). However, the remedy may be limited to the time that the grievance was filed. Section 7.03 of the collective bargaining agreement states that grievances shall be filed within 14 days of the occurrence leading to the grievance or within 14 days of such time as the aggrieved should reasonably have been expected to be aware of the occurrence. Many of those employees affected were aware that their anniversary date had been changed for purposes of step increases from their date of hire to their dates of promotion. For example, the County shows that Washburn should have known of this by September 23, 1998. The Association did not bring a grievance until August 8, 2001. Therefore, any back pay due to those affected employees should run only from August 8, 2001, until the present. All employees whose anniversary date was incorrectly changed should be placed on the correct step of the salary schedule and be reimbursed for lost wages between August 8, 2001, and the present.

**AWARD**

The grievance is sustained.

The County is ordered to pay step increases in accordance with years of service according to the wage schedule, except for Case Managers and Probation Officers who attained State certification as Social Workers. Employees whose anniversary date was incorrectly changed shall be placed on the correct step of the wage schedule in accordance with their seniority and made whole for lost wages between August 8, 2001, and the present. The Arbitrator will retain jurisdiction until August 15, 2002, for the sole purpose of resolving any disputes over the scope and the application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 29<sup>th</sup> day of May, 2002.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator