BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN COUNCIL 40, LOCAL 79, AFSCME, AFL-CIO

and

ONEIDA COUNTY

Case 157
No. 60511
MA-11642

(Failure to Post Vacancy Grievance)

Appearances:

Mr. Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, for the labor organization

Mr. Carey L. Jackson, Labor Relations and Employee Services Director, for the municipal employer.

ARBITRATION AWARD

Wisconsin Council 40, Local 79, AFSCME, AFL-CIO and Oneida County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the county concurred 1/, for the Wisconsin Employment Relations Commission to provide a randomly selected panel of WERC-employed arbitrators to hear and decide a dispute concerning the interpretation and application of the terms of the agreement relating to the filling of vacancies. The parties jointly selected the undersigned, Stuart Levitan, to serve as the impartial arbitrator. Hearing in the matter was held in Rhinelander, Wisconsin on February 28, 2002; it was not transcribed. The parties filled written arguments and replies, the last of which was received on May 23, 2002.

1/ The County's original position of non-concurrence is discussed below in the BACKGROUND section.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties stipulated to the following statement of the issue:

"Did the county violate the contract Article 5 when it failed to post an Equipment Operator II position in April 1999 and instead posted a Highway Maintenance Worker?

If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE

Article 5 – Promotions

Section A – Opportunity for Advancement: Opportunity for advancement to higher classifications shall be provided as follows: In the event of a permanent vacancy, or the creation of a new job classification, the Highway Commissioner shall cause to be posted on the main shop bulletin board and all outlying shop bulletin boards, a notice of such vacancy or new position. Said notice shall be posted for a five (5) day period. At the end of that five day period, the notice shall be removed and the position shall be filled within five (5) days.

(1) Permanent vacancy defined: A "permanent vacancy" means a vacancy created in any salary range because of the death, retirement, or termination of employment of any employee; all other vacancies are "temporary".

(2) The Commissioner shall have the right, without the requirement of posting, to shift employees into any lower or higher job classification or within any salary range where a temporary vacancy exists for the duration of the temporary vacancy.

. . .

Section D – Job Assignments: Assignments of employees to fill such job vacancies or new positions shall be made according to seniority providing the employee considered can qualify for the position to be filled. The secretary of Local #79 shall be notified of the employee chosen for the job.

. . .

Section K – Highway Maintenance Worker to Equipment Operator I: Highway Maintenance Workers shall be promoted to Equipment Operator I after three (3) consecutive years of employment. The effective date shall be the first day of the next pay period following the three (3) years of employment.

. . .

Article 12 – Vested Rights of Management

Section A – Management Rights: The right to employ, to promote, to transfer, to discipline and discharge employees and to establish work rules is reserved by and vested exclusively in the Oneida County Board through its duly elected Highway Committee and duly appointed Highway Commissioner. The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure.

Section B – Management Property and Equipment: The management of the property and equipment of the Oneida County Highway Department is reserved by and vested exclusively in the Oneida County Board through its duly elected Highway Committee and duly appointed Highway Commissioner.

Section C – Management Right Regarding Staffing Levels and Discipline: The Highway Commissioner, through authority vested in him/her by the Highway Committee of the County Board, shall have the right to determine how many employees there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the Highway Department operation.

Section D – Management Right to Contract Any Work: The Highway Committee and Highway Commissioner shall have the sole right to contract for any work it chooses. The Highway Committee and the Highway Commissioner shall have the sole right to direct its employees to perform any work wherever located or contracted for in its jurisdiction.

Section E – Complying with State and Federal Laws: The County shall have the right to take whatever action is necessary to comply with State or Federal law.

Section F – Right to Layoff: The County shall have the right to layoff employees from their duties because of lack of work or for other legitimate reasons.

Section G – Determination of Hours/Changes in Employment Detail: The Board and/or its representatives shall have the exclusive right, subject only to the provisions of Article 17, to determine the hours of employment and the length of the work week and to make changes in the detail of employment of the various employees from time to time as it deems necessary for the efficient operation of the Oneida County Highway Department. The Union and its members agree to cooperate with the Board and/or its representatives in all respects to protect the safe and efficient operation of the Highway Department.

Section H – Restrictions: The above condition shall be subject only to the restrictions imposed by the Agreement and the statutes of the State of Wisconsin.

Section I – Right to Grievance Procedure: Any employee who feels that he/she has been wrongfully or unjustly treated according to the provisions of this Agreement may appeal through the grievance procedure of this Agreement.

Article 13 – Job Classification and Rates of Pay

Section A – Job Classifications: All employees will be classified by the job classification as listed in Addendum 1 and shall not receive less in pay while working in a job classification with a lower rate of pay. When required to work in a job classification with a higher rate of pay, the employee shall receive the higher rate of pay for that job classification.

. . .

BACKGROUND

Among its general government duties in north central Wisconsin, Oneida County maintains a Highway Department under the direction and control of the Highway Commissioner in working agreement with AFSCME Local 79. As the workforce has dwindled

from about 80 to about 30 over the last 20 years or so, the parties have endured a string of disputes over vacancies, promotions and postings.

This grievance concerns the county's decision to eliminate an Equipment Operator II (EO2) position upon the retirement of the incumbent, and create in its stead a new entry-level Highway Maintenance (HMW) position.

Paid Grade 11 wages of $12.931 per hour (post probation) in 2000, in three years a HMW automatically progresses to Equipment Operator I, a Grade 12 position paid $13.714. Promotion to EO2, a Grade 13 position paid $14.280, is by seniority "providing the employee considered can qualify for the position to be filled."

The HMW position performs a variety of semi-skilled tasks in the maintenance and repair of roads and county highways, but on occasion may be assigned duties normally performed by an EO1 or EO2. The EO1 position performs skilled work of a varied nature involving the operation of one or more types of motorized equipment in the maintenance and repair of roads and highways, but on occasion may be assigned duties normally performed by an EO2. Article 13, Section A of the labor agreement provides that employees who are assigned to perform work at a higher classification than their permanent assignment are paid the higher-classification wage rate for the time so assigned.

An EO2 performs skilled work of a varied nature involving the operation of various types of motorized heavy equipment, a position that requires a high degree of skill and a higher level and complexity of work than the EO1. There are certain pieces of equipment and certain levels of responsibility which are considered core EO2 duties and which account for that position's higher wage. This higher wage is also paid when these core EO2 duties are performed by an EO1 or HMW, as they occasionally are. It also happens that an EO2 may perform duties at the EO1 or HMW level, while still, pursuant to the labor agreement, at the EO2 wage.

There is no dispute over the wages paid to any particular employee performing any EO2 work; the union acknowledges that all employees, of whatever classification, were paid EO2 wages for all EO2 core work they performed. Instead, the union grieves the elimination of the EO2 position itself.

In 1997, the county employed seven EO2's who performed 5008.5 hours of work performing duties exclusive to that classification. This amount to 715.5 hours of EO2 work per full-time EO2, the equivalent of each full-time EO2 working about 34 per-cent of their time on EO2 work. The record does not reflect the additional hours, if any, that HMW's and EO1s spent performing – and being paid for – EO2 work.

In 1998, the county employed eight EO2's who performed duties exclusive to that classification for 3661 hours. This amounts to 457.63 hours of EO2 work per full-time EO2, the equivalent of each full-time EO2 working about 22 per-cent of their time on EO2 work. Again, there are no records regarding other employees performing these duties under an out-of-classification assignment.

In 1999, the county employed eight EO2's who performed 2709.03 hours of work performing duties exclusive to that classification. This amount to 338.63 hours of EO2 work per full-time EO2, the equivalent of each full-time EO2 working about 16 per-cent of their time on EO2 work.

That was also the year that Dave Richardson retired, and the county adopted Resolution #37-99 on April 20, as follows:

> WHEREAS, an Equipment Operator II in the Highway Department submitted a retirement notice with an effective date of April 29, 1999, and
>
> WHEREAS, the Highway Commissioner and the Highway Committee reviewed the needs of the department and determined that a full-time Equipment Operator II position was not necessary to meet those needs, and
>
> WHEREAS, the Personnel Committee did examine the current and future Highway Department Staffing options and have determined that changes are necessary to take into account current and future economic conditions.
>
> NOW THEREFORE BE IT RESOLVED, by the Oneida County Board of Supervisors that effective April 30, 1999 the following changes are hereby made to the Highway Department organizational structure:
>
> 1. The Equipment Operator II position being vacated on April 29, 1999 shall be eliminated;
>
> 2. The position of Highway Maintenance Worker located in the Highway Department shall be created.

There is record evidence for 1999 on out-of-classification assignment and pay. From Richardson's retirement and the elimination of the EO2 position through the end of 1999, eight Highway Maintenance Workers and Equipment Operator Ones were paid 583.25 hours for Operator 2 work. This amounts to about 73 hours, or about six hours per month, per

employee. The total number of hours spent on EO2 duties was thus 3292, of which 2709 (about 82%) were performed by EO2's.

In 2000, the county employed seven EO2's who performed 2440.75 hours of work performing duties exclusive to that classification. This amounts to about 350 hours of EO2 work per full-time EO2, the equivalent of each full-time EO2 working about 17 per-cent of their time on EO2 work. Also in 2000, 12 HMW/EO1s split 1242 hours – about 104 hours, or a bit more than a day per month – per employee. The total number of hours spent on EO2 duties was thus 3682, of which 66% were performed by EO2's.

In 2001, the county employed seven EO2's who performed 1761.25 hours of work performing duties exclusive to that classification. This amounts to about 250 hours of EO2 work per full-time EO2, the equivalent of each full-time EO2 working about 12 per-cent of their time on EO2 work. Also in 2001, 12 HMW/EO1s split 1115 hours – about 93 hours, almost precisely one day per month. The total number of hours spent on EO2 duties was thus 2876, of which 61% were performed by EO2's.

Thus, the record shows that fewer total hours are spent on EO2 work than in 1997 and 1998, but not in a consistent pattern. The record also shows a higher, and increasing, percentage of EO2 work being performed by lower-ranked employees since the elimination of Richardson's EO2 position.

In response to the county's elimination of the EO2 position and posting of a new HMW position, the Union grieved on April 28, 1999. As remedy for this alleged violation of Article 5 of the labor agreement, the union sought to have the position posted as an EO2, and to make the affected employees and the union whole. The Highway Commissioner, Robert H. Maass, denied the grievance on May 3, after which the union sought consideration by the Highway Committee. Following that committee's denial, the union sought review by the Personnel Committee, which denied the grievance on July 8.

On September 8, 1999, Wisconsin Council 40 Staff Representative David Campshure informed county Personnel Director Carey Jackson that he sought arbitration of the instance grievance. On September 14, Jackson wrote Campshure, *inter alia,* as follows:

> The County Board eliminated the Equipment Operator II position discussed in grievance #8-99. The County's position is the elimination of the position is not a grievable issue, therefore, the County is not required by contract to Arbitrate this matter.

On October 8, Campshure reiterated the union's intention to arbitrate the instant grievance. On October 13, Jackson reiterated the county's position that the matter was "not a grievable issue as the County Board has eliminated the Equipment Operator II position in question."

On May 9, 2000, the union filed a complaint with the Wisconsin Employment Relations Commission, alleging that the county's refusal to arbitrate the instant grievance constituted a prohibited practice within the meaning of sections 111.70(3)(a) 1 and 5, Wis. Stats. On March 1, 2001, the parties stipulated to the facts and thereafter filed briefs on August 20, 2001, at which time the record was closed. On October 18, 2001, commission hearing examiner Stephen G. Bohrer issued Decision No. 30213-A, wherein he found that the county had committed the prohibited practices as claimed by the union. Examiner Bohrer ordered the county to take certain remedial actions, including participating in an arbitration hearing concerning the resolution of the instant grievance.

On November 2, 2001, Council 40 Staff Representative Mark DeLorme submitted a Request to Initiate Grievance Arbitration of the instant dispute, wherein he requested a random panel of commission arbitrators. Examiner Bohrer's decision became the commission's by operation of law on November 13, 2001. On January 17, 2002, Council 40 Staff Representative Dennis O'Brien informed the commission that the parties had jointly selected the undersigned to serve as the impartial arbitrator.

This is not the first grievance the Union has brought regarding a County decision to forgo posting a position the Union felt was vacant.

In 1986, Highway Commissioner Maass left an EO1 position vacant after the incumbent was promoted to Leadman. The Union grieved, citing Article V, sections 1 and 1A, seeking as remedy the posting of the "job vacancy created" by the promotion. In his response, the Commissioner wrote the union steward that it was "management's position that we do not need an additional Operator I at this time and therefore, according to Article XIII (3) management will not be making that posting until it is determined by management an additional Operator I is needed." The Union did not pursue the grievance.

In 1987, Maass again left vacant an EO position (this time for an EO2) when the incumbent was promoted to Leadman. The Union again grieved, again citing Article 5, Section A, and again seeking to have the county "post the vacant Equipment #2 job." Again the county declined, Maass informing the Union president that the county was "not posting an Operator II position as the County feels we have enough people in that position to adequately fulfill our work load requirements." Corporation Counsel Lawrence R. Heath, writing on behalf of the county's Personnel Committee, later elaborated as follows:

. . .

> .... It is the determination of the Committee that Mr. Maass, as Highway Commissioner, has the authority under Article 14, Section C to determine how many employees will be employed or retained and that the Highway Commissioner has the additional authority under that Section as well as Section B to exercise full control and discipline in the proper conduct of the Highway Department operation and the management of the property and equipment of the Department.
>
> As a result, it is the determination of the Committee that Mr. Maass has not only the authority to determine how many employees will be employed but the number and types of different positions which need to be filled in order to effectively operate the Highway Department. For those reasons, the grievance is denied.

The Union ultimately agreed to "withdraw the grievance without prejudice."

The union filed a spate of grievances in the spring and summer of 1995, after the county eliminated a Shop Foreman and a Leadman position and created two non-represented positions of Shop Superintendent and Patrol Superintendent. Citing Article 5, Section A, the union sought to have the Leadman and/or Foreman positions posted to "allow union members to bid by seniority and obtain the vacancy." In a unified response to the two grievances, Jackson wrote Campshure that the grievances did not constitute grievable issues because THERE ARE NO VACANT LEADMAN POSITIONS TO BE POSTED (capitals in original)

The Union did not pursue these grievances any further.

A third related grievance filed that season, a follow-up to those two, did go to arbitration. In Case 118, Dec. No. 53542, MA-9384 (8/96), Arbitrator Lee Crowley addressed a situation under which a junior employee worked as a Leadman for 103.75 hours over a three-month period, after the county had abolished the union Leadman position in favor of an unrepresented supervisory position. In finding that the county did not violate the collective bargaining agreement when it failed to post the Leadman position, Arbitrator Crowley reasoned as follows:

> The crux of the parties' dispute here is whether the assignment of Miller to perform duties in the Leadman classification violated Articles 4 and 5 of the agreement by failing to post a Leadman vacancy. Article 5, Section 1 defines a

"permanent" vacancy and states that all other vacancies are "temporary." The language of this section is not clear but is ambiguous. However, Article 15, Section A provides that when an employe is required to work in a job classification with a higher rate of pay, the employe receives the higher rate. This language anticipates that the County will make temporary transfers of employes to higher classifications, and vice versa, and addresses how employes will be paid but does not deal with who or how employes will be transferred. Article 15 merely speaks to an employe required to work in a higher classification. It does not state that there has to be a vacant position or someone must be absent from a position as the term "position" is not used. The evidence indicates that Miller was assigned work in a higher classification in 1994 on June 2 and September 21 when it appears no one was on vacation or sick. Also, in 1995, Miller was assigned work of a higher classification on May 16, July 20 and August 23 and 24, when Stern was not on vacation. Freeman Bennett was assigned Operator II work in 1994 and 1995, where it appears no position was unfilled. This evidence establishes that the assignment of work of a higher classification does not create a vacancy, either temporary or permanent so the provisions of Article 5 are not applicable. Article 5 is applicable to vacancies or new positions that the County is going to fill on a permanent or temporary basis. However, the assignment of work for one day of a higher classification does not create a vacancy as the performance of work does not create a position, just a right to higher pay. This is logical because by the time the matter was posted or someone selected, the work would have been done already and no further work being required, the position would evaporate. Furthermore, an employer is not required to create a new position year round or even for four months just because an employe occasionally does work of a higher classification.

In other words, the mere fact that Miller occasionally worked in a higher classification, i.e., performed duties of a higher classification, did not create a position or vacancy, either permanent or temporary, that required the application of Article 5. There was no vacancy that required posting or assignment by seniority. Inasmuch as no posting was required, the County has not violated Articles 4 or 5.

In January 1996, the union filed a grievance when the county did not post a vacancy for leadman at the landfill after the incumbent's retirement. In denying the grievance, Jackson wrote to the union chief steward that the position was "no longer needed," and that the county board would be eliminating the position in question, which Jackson said "effectively eliminates" the grievance. On April 16, 1996, the county board adopted the following resolution:

WHEREAS, the Solid Waste operations have grown over the years such that a separate Solid Waste Department has been created and the supervisory functions have been relocated to the County Landfill thus providing direct supervision to the operation on a day to day basis, and

WHEREAS, the retirement of a Highway Department Leadman who was assigned to provide day to day supervision at the Landfill, has provided the County with the opportunity to evaluate the need for maintaining a Highway Department Leadman position at the Landfill, and

WHEREAS, the Highway Commissioner requested that the union position of Leadman, assigned to the Landfill, be eliminated, and

WHEREAS, the Highway Committee, the Personnel Committee and the Personnel Director having reviewed the request and recommendation of the Highway Commissioner are in the agreement that the elimination of the union position of Leadman is necessary for the efficient operation of the Highway Department, and

WHEREAS, the elimination of the Leadman position will result in a cost savings to the County of approximately $34,737 on an annual basis.

NOW, THEREFORE BE IT RESOLVED, by the Oneida County Board of Supervisors that effective the day of passage of this resolution, the union position of Leadman, which is normally assigned to the Landfill, is eliminated.

On April 19, 1996, Campshure wrote to Jackson as follows:

Due to the elimination of the position in question, the Union hereby withdraws grievance #1-96 without prejudice.

The Union acknowledges the County's right, as provided by Article 14, Section C, to eliminate bargaining unit positions as it deems necessary. All the same, should the County utilize a bargaining unit employee as a Leadman at the Landfill without first posting the position, the Union will file a grievance seeking to have the position posted.

Please call me if you have any questions.

More recently, Arbitrator Amedeo Greco issued three awards in which he each time found the county to have violated the provisions of Article 5. In Case 129, No. 56398, MA-10267 (7/99), Greco found that the county violated the collective bargaining agreement when it posted a vacancy as "Equipment Operator II/Backhoe" instead of just as an EO2, and when it failed to fill the position within five days. As remedy, Greco ordered the county to repost the position and award the position to the most senior bidder. In Case 134, No. 57116, MA-10522 (8/99), Greco found that the county violated Article 5 when it failed to post a vacancy designated by a particular "beat," or assigned area of coverage. As remedy, Greco ordered the particular beat in question to be awarded to a named employee, to list beats on all applicable future job postings, and to "permanently fill any posted vacancies caused by death, retirement or termination within five (5) days after the expiration of the posted posting position." In Case 141, No. 58067, MA-10832 (4/00), Greco found the county had violated Article 5 by transferring two employees to particular shops without first posting those positions. As remedy, Greco directed the county to "immediately post those positions" and award them pursuant to Article 5, and "in the future post all vacancies caused by death, retirement or termination of any employees, along with all other newly-created positions. As a result, it cannot fill any of those positions on a temporary basis."

I will discuss below the meaning and application I draw from this record of grievances and arbitrations.

POSITIONS OF THE PARTIES

The Union

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

> The contract language and arbitrator reasoning support the Union's position that the Equipment Operator II vacancy exists and must be filled by the method described in Article 5 of the collective bargaining agreement.
>
> The threshold question is whether Richardson's retirement created a vacancy. A vacancy is more than the absence of a former incumbent, but rather the continuation of the position the former incumbent held. Union witness Hall testified without challenge that he performed essentially the same duties with the same equipment as Richardson before his retirement.

The number of hours worked as EOII's by those from lower classifications is both substantial and has grown since 1999. The number of hours worked is especially significant when compared to Richardson's hours from 1998-1999. The confusing county-generated document which the county will argue shows a declining need for EOII's uses meaningless mathematical calculations and begs the question of why the county maintained the number of positions it formerly did.

The mere existence of the vacancy does not compel the county to post and fill it; management has the right to determine the level of services that will be provided to the public. The Union cannot compel the County to post a position for which the duties have been eliminated. But where the County has eliminated the EOII position and assigned those duties to other employees on an as-needed basis without posting or consideration of seniority rights for promotion, it has violated the collective bargaining agreement.

The County's claim to have eliminated this position while simultaneously creating another, lower paid position could be interpreted as a cynical attempt to avoid the required posting as ordered in a prior case.

The Union has, in the interests of efficiency and in support of on-the-job training, allowed the County a wide discretion in the temporary use of EOI and HMW personnel to do EOII work. But if the County's position here is upheld, the concept of promotion through seniority could be ignored at the caprice of the management.

The evidence at hearing, the contract language and prior arbitral decision support the existence of a permanent vacancy as defined by clear contract language. Arbitrator Greco has already, on three occasions, instructed the County to post and fill *any* permanent vacancies. Where the record shows, as this record does, that the same job duties are performed using the same equipment as before the retirement of the incumbent, then a permanent vacancy exists and must be filled according to the contract. The grievance should be sustained, the position posted and filled by the most senior applicant, and that applicant made whole from April 28, 1999.

The County

In support of its contention that the grievance should be denied, the county asserts and avers as follows:

The Oneida County Board eliminated the Equipment Operator II position on April 20, 1999, and therefore could not have violated the collective bargaining agreement because no vacancy existed that required posting.

The language of the management rights clause is clear and unambiguous and grants the County the unfettered right to determine how many employees there will be. The County clearly retained the right to eliminate the position, and was properly exercising that right, which is not limited.

The language in the collective bargaining agreement regarding promotions does not take precedent over the management rights language. Prior actions by the Union on previous grievances supports the County's right to eliminate bargaining unit positions as the County deems necessary.

The parties also have a well established past practice in regard to the employer's ability and right to eliminate positions, as reflected in numerous exhibits herein.

There has never been an instance where a position that the County Board has eliminated has thereafter been posted. There has never been a position which the Highway Commissioner decided to leave vacant that the Union successfully forced the Commissioner to post.

Parol evidence clearly establishes that the County retains the right to determine how many employees to employ or retain and in what capacity, while past practice clearly shows the County has exercised that right by leaving positions vacant and/or eliminating positions, and the Union has explicitly recognized that right in a written document.

The Union's reliance on the posting language is also faulty because it would lead to an impossible decision, namely posting a position that does not exist. There is no threshold requirement in the labor agreement that the County must meet in order to eliminate bargaining unit positions; still, the County did review the needs of the Highway Department, and made a reasonable determination that it only needed nine EOIII's, not ten as would have existed if it retained Richardson's position.

In response, the union posits further as follows:

While the union does not claim that a past practice exists to support its position, it strongly rejects the county's claim that one exists to support the county's position. First, the practices are certainly not unequivocal, and it is only in the relatively recent times that the county has taken to the use of creative interpretation of the language. The county improperly cites a 1996 grievance without noting that the union withdrew the grievance without prejudice and with the stated intent of filing another grievance if the county used a bargaining unit employee as leadman without posting the position. Indeed, the instant dispute is nearly identical to the situation the union said it would grieve.

Nor is the county correct in relying on the contractual provision regarding management rights to illuminate the understanding of the promotions clause, which section can be better understood in light of the language on job classification and rates of pay. This article instructs the parties how to resolve any differences when there is a new job, piece of equipment or change in duties. The county's interpretation would allow it to never fill an EOII on a permanent basis and therefore render meaningless the promotion language. The union strongly disagrees with that interpretation of the agreement.

The issue here is not to determine the number of workers in the Highway Department, but rather the manner in which the county exercises its awesome management power. The county did not eliminate the EOII job, it just said it did, and that's not reasonable. The county purports to add to the contract language in Article 5 the phrase "that the county intends to fill." This isn't a reasonable interpretation of the contract language! If the parties had intended for the language to be in the agreement, it would be in it.

As Arbitrator Greco recognized three separate times, permanent vacancies must be filled as described in the contract. The former EOII's retirement created a permanent vacancy that must be filled through the procedures of Article 5.

The settlement of this matter whoever prevails will not be of great financial important to the victorious side. However, the motives that bring this matter to the arbitrator are of great significance to the union. The union seeks a workplace that grants dignity to members as they perform their assigned duties and the opportunity to develop skills and achieve recognition.

This dispute is not about eliminating a job; it is about whether the county must post a position, a permanent vacancy that still exists, using the promotion process. The county's claim to have eliminated the EOII position is not

supported in the record by anything more than their words. The grievance should be sustained, the EOII position awarded to the most senior applicant, and the successful bidder made whole.

In its response, the county posits further as follows:

The Union errs in relying on several past arbitration awards, all of which can be distinguished by material and factual differences, or by the fact that different contract language from another county was involved. Indeed, as a past decision establishes, the creation of a HMW position where that worker may perform some higher-level duties does not create an EOII position that must be posted. And there has been no testimony that the person hired into the HMW position ever did any EOII work.

The Union also errs in contending that the unrebutted testimony showed that employee Hall performed essentially the same duties as Richardson, with the same equipment. Regardless of Mr. Hall's testimony, the evidence shows a 48% reduction in the number of hours that Hall operated the primary piece of EOII equipment, compared to Richardson's hours. The evidence clearly shows an annual decline in EOII machinery hours which the Union has not been able to refute.

The bottom line is whether or not the County had a reasonable basis for its decision to eliminate an EOII position. Based on its review of EOII equipment hours and the expectation that an employee would be returning to the Highway Department from the Landfill, the County determined that the numbers did not warrant the number of positions in existence. To avoid layoffs, the County waited for a retirement to reduce the number of EOII positions. As recognized by the Union, the County has the right to eliminate positions, and the County has an established past practice of making staffing level adjustments as necessary. For all these reasons, the grievance should be dismissed.

DISCUSSION

Oneida County took the opportunity of the retirement of a high-classification employee to abolish his position and create instead a lower-level one, a cost-savings move that eliminated an existing promotional opportunity for the unit. The question before me is whether such a course is inconsistent with the proper interpretation and application of the collective bargaining agreement.

I can only answer this question after analyzing and harmonizing two separate provisions in the labor contract. Under Article 5, Section A, the Highway Commissioner "shall cause to be posted" a notice "(i)n the event of a permanent vacancy," which is a vacancy "created … because of the … retirement of any employee." Under Article 12, Section C the Highway Commissioner, through authority vested by the county board's highway committee, "shall have the right to determine how many employees there will be employed or retained …."

How these provisions – one directing the highway commissioner to post a vacancy, the other granting the commissioner the power to set staffing levels -- relate will determine the outcome of this dispute.

As noted above, this is familiar territory, as the parties have fought frequently over the interpretation and application of Article 5. There have been numerous grievances, with WERC arbitrators issuing no fewer than four awards on this one article in less than four years.

The grievances which have stopped short of arbitration are also instructive. In the strict sense of the phrase, there is not a past practice here – but there is a shared experience between the parties that supports the county's interpretation. That is, since at least 1986 the county has been abolishing positions it felt it did not have the workload to justify. That, clearly, has been one reason why the unionized workforce has shrunk so dramatically.

However, the county's recent record in Article 5 arbitrations is not good -- in three separate awards over only nine months, Arbitrator Amedeo Greco found the county had violated Article 5 all three times. 2/ The county did prevail in a slightly older award by Arbitrator Lee Crowley.

2/ Greco's three awards actually encompassed four grievances, one of which is hard to classify – although Greco found that the County "did not violate" a prior settlement agreement, he nonetheless ordered that "the following steps must be taken in order to properly apply the Settlement Agreement." Case 130, No. 56399, MA-10268. Herein, citing the Greco Trilogy, I am referring to the three grievances which the County lost.

The Greco trilogy – three awards in just nine months – certainly shows the County to have been less than zealous in its adherence to the dictates of Article 5. However, contrary to the Union's contentions, I believe there are significant differences between those cases and the one before me.

In Case 134, No. 57116, MA-10522, the case involved the difference between temporary and permanently assigned beats and the proper posting required respectively, matters not at issue in the instant matter. Moreover, notwithstanding that the union prevailed in this grievance, there is language in this award which implicitly agrees with the employer's argument, namely

Arbitrator Greco's directive to the county that it "permanently fill any posted vacancies caused by death, retirement, or termination within five (5) days after the expiration of the posting position. (emphasis added). That is, this language implicitly accepts the argument that only those vacancies which are posted are required to be filled.

Arbitrator Greco seems to have reinforced this idea in Case 130, MA-10268, wherein he directed the county to immediately offer training after "receiving word of a pending retirement, quit or termination, and after having decided to fill any such vacancy...." (emphasis added). Thus, while the specifics of that dispute – involving implementation of a Settlement Agreement regarding training opportunities -- are not on point with the matter before me, this language would seem to significantly undercut the union's argument. The clear implication of Arbitrator Greco's award is that the posting provisions of Article 5 are triggered only after the county has made its management decision under Article 12 to fill the vacancy.

The companion grievance addressed in that same award, Case 129, No. 56398, MA-10267, involved the designation the county used in posting an EO2 vacancy, rather than any dispute over the existence of the vacancy itself. As such, it is not on-point with the dispute before me.

The final installment in the Greco trilogy, Case 141, No. 58067, MA-10832, again appears to involve the difference between temporary and permanent assignments, and thus is factually distinct from the matter before me.

The earlier Crowley Award, however, is directly on point, in that it involves the abolition of a higher-classified position and the assignment thereafter of lower-classified employees to do some of the higher-classified work, for which they were compensated at the wage rate of the higher classification. That, of course, is precisely what happened in the case before me. Accordingly, Arbitrator Crowley's analysis that the "evidence establishes that the assignment of work of a higher classification does not create a vacancy, either temporary or permanent so the provisions of Article 5 are not applicable" is important in my analysis.

The Crowley case involved a junior employee working as Leadman for 103.75 hours over a three-month period, or a little more than once a week. Crowley described such a workload as indicating that the subject employee only "occasionally worked in a higher classification." The workload at issue in the case before me shows even less frequent use of lower-ranked employees on higher-rated assignments.

From the abolition of the EO2 position through the end of 1999, highway maintenance workers and equipment operator I's worked about 583 hours on EO2 duties, averaging about 73 hours, or less than one day per month per employee. For 2000, this workforce totaled about

1242 hours, averaging about 104 hours or a bit more than one day per month per employee. In 2001, this cadre worked about 1115 hours on EO2 work, averaging about 93 hours or almost precisely one day per month. Thus, the *most* frequent use (expressed as an average) of lower-rated employees on higher-rated work was a bit more than one day per month – about four times *less* frequent than the amount of use Crowley described as "occasional," and thus not requiring a posting. Indeed, the employee in the Crowley case worked essentially the same number of hours in three months as the lower-classified employees herein worked, on average, over a full year.

The union places great stock in LANGLADE COUNTY, Case 90, No. 58113, MA-10847 (Nielsen, 6/00), even going so far as to rewrite the text of that award by inserting therein the facts of the instant matter. While much – but not all – of the underlying analysis is indeed supportive of the union's case, the significant factual differences substantially reduce its persuasive power.

First, the Langlade County case featured contract language which does not appear in the instant matter, specifically the following:

ARTICLE 6 - SENIORITY

> C. Whenever a vacancy occurs, or a new job is created, it shall be posted on all shop bulletin boards for a period of five *(5)* working days. The County may delay the posting of any vacancy or new job for up to a period of four (4) months until such position job is deemed necessary, provided no employee performs the work or operates the equipment for such position or job unless in an emergency. An emergency should be defined as a sudden pressing necessity, requiring immediate action. The secretary of the Union shall be provided with a copy of the posting. (emphasis added).

As Arbitrator Nielsen commented, this language "is unusually strong as to the need to either fill a vacant position or leave the equipment assigned to that position idle except in emergencies." And as is apparent, there is no comparable provision in the contract now before me.

While this difference in contract language is enough to differentiate the two cases, I also note the differences in the underlying facts. In LANGLADE COUNTY, the county continued to use the disputed heavy trucks 66% of the workdays during the construction season, which Arbitrator Nielsen said constituted using a ninth truck "on a regular basis." As noted above, the EO2 workload for EO2's in the case before me ranged from 12% to 16% in the three years

following the elimination of Richardson's position, and the total number of EO2 hours for all employees combined has actually decreased by more than 12% from 1999 and by more than 20% from the workload the last full year before the disputed personnel transaction. Morever, the percentage of time non-EO2's have performed EO2 work has ranged from about 18% to about 31%, or at best, less than half of what Arbitrator Nielsen described as "regular." Accordingly, I find that Oneida County did not assign non-EO2's to perform EO2 work "on a regular basis" as Arbitrator Nielsen used that term. For these reasons, I decline to follow that case.

The labor agreement between the parties anticipates that a certain amount of out-of-classification work will be assigned; that is the purpose of Article 13, Section A – to ensure that lower-classified employees are paid the higher wage when doing higher-classification duties. And as noted above, the union does not claim that any individual EO1 or HWM has not been properly compensated for doing EO2 work.

As Arbitrator Greco held, the requirement for properly posting vacancies is real and meaningful, and must be enforced. However, as Arbitrator Crowley held, the employer is not required to create or maintain a position year-round just because an employee occasionally does work of a higher classification. There is a level of out-of-classification work which would be unreasonable and constitute a violation of the working agreement; in the matter before me, however, the county has not reached that level.

Under the facts of this matter, I find that the continuing workload of EO2 duties does not establish that there is a vacant EO2 position which the county was required to post. Accordingly, on the basis of the record evidence, the language of the collective bargaining agreement and the arguments of the parties, it is my

AWARD

That the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 21st day of August, 2002.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

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