BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WASHBURN COUNTY PROFESSIONAL,
TECHNICAL AND CLERICAL EMPLOYEES UNION,
LOCAL 2816, AFSCME, AFL-CIO**

and

WASHBURN COUNTY, WISCONSIN

Case 42
No. 60355
MA-11589

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, appearing on behalf of Washburn County Professional, Technical and Clerical Employees Union, Local 2816, AFSCME, AFL-CIO, referred to below as the Union.

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Washburn County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The County and the Union jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as arbitrator to resolve a grievance captioned as 2001-06, filed on behalf of Local 2816. Hearing on the matter was held on February 21, 2002, in Shell Lake, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by August 21, 2002.

{PRIVATE }ISSUES{tc \l 5 "ISSUES"}

The parties stipulated the following issues for decision:

Has the County violated the collective bargaining agreement by refusing to allow probationary employees to post into vacancies under Article 10 of the parties' collective bargaining agreement?

If so, what is the appropriate remedy?

{PRIVATE }RELEVANT CONTRACT PROVISIONS{tc \l 1 "RELEVANT CONTRACT PROVISIONS"}

ARTICLE 5 GRIEVANCE PROCEDURE

Section 5.01. Definition of Grievance: A grievance shall mean any dispute concerning the interpretation or application of this contract.

. . .

Section 5.06. Grievance Arbitration:

. . .

D. Decision of the Arbitrator: The arbitrator shall not modify, add to, or delete from the express terms of the agreement and the decision of the arbitrator shall be limited to the subject matter of the grievance.

. . .

ARTICLE 7 EMPLOYEE DEFINITIONS

Section 7.01. Regular Full Time Employee: A regular full time employee is hereby defined as an employee who is scheduled to work the full hourly work day and work week in a permanent position.

Section 7.02. Regular Part Time Employee: A regular part time employee is hereby defined as an employee who is scheduled to work in a permanent position and who is not a regular full time employee. Regular part time employees are entitled to receive fringe benefits on a prorated basis. Hours worked in the previous quarter will be used to determine proration.

ARTICLE 8 PROBATIONARY PERIOD

Section 8.01. Duration: Newly hired employees shall serve a twelve (12) month probationary period. During the probationary period, the employee shall be subject to discipline and discharge without recourse to the grievance procedure.

Section 8.02. Benefits: Upon six (6) months of service, employees shall receive benefits as outlined in this agreement computed from their starting date of employment. Upon successful completion of the probationary period, employees shall receive all rights and privileges under the working agreement and may be disciplined or discharged for just cause only with full recourse through the grievance procedure of this agreement.

ARTICLE 9 SENIORITY, LAYOFF AND RECALL

Section 9.01. Definition: It shall be the policy of the Employer to recognize seniority. The seniority of all regular full time and regular part time employees covered by the terms of this agreement shall consist of the total calendar time elapsed since the date of original employment. . . .

ARTICLE 10 JOB POSTING, TRANSFER AND PROMOTIONS

Section 10.01. Vacancy Defined: A vacancy shall be defined as a job opening within the bargaining unit not previously existing or as a job created by the termination, promotion or transfer of existing personnel, if the Employer decides the need for such a job continues to exist.

Section 10.02. Posting Procedures: Whenever a vacancy occurs or a new job is created it shall be posted on a bulletin board for a period of seven (7) calendar days.

Each employee (or their designee) interested in applying for the job shall endorse their name upon such notice in the space provided. . . .

The employee with the greatest seniority who is able and qualified shall be given the job at equal pay or the next highest step, whichever is greater. If there is any difference of opinion as to the qualifications of any employee, the employee may take the matter up for adjustment under the grievance procedure. . . .

When an employee is awarded a position in a lower pay range the employee shall

be assigned in the new lower range to the step nearest the employee's rate of pay.

Section 10.03. Trial Period: Employees who receive a posted job shall be considered on trial for sixty (60) calendar days. Should the employee not qualify, or if the employee should desire, they shall be reassigned to their former position without loss of seniority. Such reassignment may occur at any point during the time covered by said sixty (60) calendar days.

Section 10.04. Employees within the bargaining unit who apply for available positions through the County's application process rather than through the posting procedure shall be entitled to maintain their accrued sick leave, vacation, seniority rights and other benefits, except that they shall serve a sixty (60) day trial period and shall not have the right of retrocession. During the trial period the employee shall not use vacation or sick leave.

. . .

ARTICLE 18 SICK LEAVE

. . .

Section 18.05. Newly Hired Employees: Newly hired employees shall not be allowed to use sick leave during the initial probationary period; however, at the completion of their initial probationary period, newly hired employees shall be credited with sick leave computed from their starting date of employment.

{PRIVATE }BACKGROUND{tc \l 1 "BACKGROUND"}

Grievance 2001-06 alleges that "Probationary employees (are being) denied their opportunity to post" in violation of "Section 10.02 and any other provision which may apply." The grievance seeks the County be ordered to "cease and desist" and "any other remedy that may be appropriate."

Michael Miller is the County's Administrative Coordinator/Personnel Director and issued letters dated April 6, 2001 to two probationary employees who sought to sign postings for then vacant positions. Each letter includes the following paragraph:

> Due to the fact that you are a probationary employee you are ineligible to post into a vacant position until your probationary period has ended.

The Union responded by filing Grievance 2001-06. Evidence at hearing centered on bargaining history and past practice.

Bargaining History Evidence

The parties' 1996-97 labor agreement stated the following under Article 8:

> Section 8.01. Duration: Newly hired employees shall serve a six (6) month probationary period. During the probationary period, the employee shall be subject to discipline and discharge without recourse to the grievance procedure.
>
> Section 8.02. Benefits: Employees shall receive benefits as outlined in this agreement. Upon successful completion of the probationary period, employees shall receive all rights and privileges under the working agreement computed from their starting date of employment and may be disciplined or discharged for just cause only with full recourse through the grievance procedure of the agreement.

In the negotiations for a 1998-99 labor agreement, the County proposed to change this language to create a one-year probationary period. The Union ultimately agreed, and the revised language has remained in place since then.

Steve Hartmann and Miller served as spokespersons for the Union's and the County's bargaining teams in negotiations for a 1998-99 labor agreement. Hartmann testified that the just cause provision was the linchpin of the discussions. Neither party raised any issue regarding the eligibility of probationary employees to sign for a posted position. The Union agreed to extend the probationary period to one year, but did not wish to affect the usage of, or eligibility for, any benefit other than access to the grievance procedure in cases of discipline or discharge. Hartmann stated he has consistently and "strongly" counseled probationary employees to be careful in signing for a posted position.

Miller testified that probationary period employees receive benefits that include health and dental insurance from the first of the month following their date of hire; Wisconsin Retirement System benefits consistent with statute and rule; holidays from their date of hire; and vacation and sick leave benefits that accrue from their date of hire but cannot be used until the completion of six months of employment. Distinguishable from these benefits are the rights and privileges recognized in Article 8 to date from the satisfactory completion of the probationary period. Those rights include usage of the posting procedure and access to the grievance procedure in cases of discipline or discharge.

Miller testified that during the negotiations for a 1998-99 labor agreement, the County secured a one-year probationary period in return for keeping vacation and sick leave usage tied to a six-month period. To permit posting for probationary employees clouds the effective operation of a probationary period. The one-year evaluation process is cut short if employees can switch

positions, and this complicates the evaluation process. From Miller's perspective, the initial

probationary period is for an overall review of employee competence. Once a probation period is completed, the County permits employee movement between positions and the Section 10.03 trial period is solely to determine immediate fitness for a specific position.

Anna Marie Brown has served as the Union's President and Chief Steward. She testified that the parties negotiated Section 10.04 in response to a situation involving a non-probationary employee who successfully applied for a position as an external applicant. Because the employee had not signed a posting, the trial period, "retrocession" and benefit retention rights were unclear, and the parties negotiated Section 10.04 to address the uncertainty. Hartmann participated in those negotiations, and acknowledged that the section gives employees two vehicles to apply for a position. Hartmann stated that he was unsure why this was necessary, and added that he was less concerned with making sense of the application process than resolving a problem. Miller testified that although the section is not restricted to probationary employees it is a probationary employee's sole access to a posted position.

{PRIVATE }Past Practice Evidence{tc \l 3 "Past Practice Evidence"}

Miller testified that he has consistently advised probationary employees who inquire about posted positions that they are ineligible to sign. The April 6, 2001 letters were the most recent statement of a long followed position. He searched County records and discovered a letter, dated December 16, 1996, from his predecessor, Stephen Pittelkow, to Julie Kessler, which states:

> Thank you for your interest in the job posting for the Secretary II position . . .
>
> Since you were still on probation at the time of the posting and not covered under the terms of the union contract, you are not eligible to post for the position.
>
> A copy of the letter is enclosed for your records. Please acknowledge your receipt and understanding of this letter by signing the original and returning it to the Personnel Department. If you have any questions regarding the job posting, please contact this office.

The letter contained a signature and a date line for the acknowledgement. Neither was completed, and the County's personnel files include no documentation of an acknowledgement of receipt of this letter. The letter listed Brown and one other Union official in the "cc" section. Brown testified that she is sure she received it, but cannot recall receiving it. She did not know why the Union did not grieve the issue.

Brown added that the parties discussed posting issues, including the eligibility of probationary employees to sign postings, during labor-management meetings held in 1996. She stated that the Union and County repeatedly expressed disagreement on this issue. Hartmann

added that the issue posed by Grievance 2001-06 has been a point of disagreement for years.

Further facts will be set forth in the **DISCUSSION** section below.

{PRIVATE }THE PARTIES' POSITIONS{tc \l 1 "THE PARTIES= POSITIONS"}

{PRIVATE }The Union's Initial Brief{tc \l 5 "The Union=s Initial Brief"}

After a statement of governing agreement provisions, the Union notes that "probationary employees are employees as defined in Article 7" who "have seniority by terms of Article 9." It follows that they qualify for posted vacancies "if they are the senior bidder and have the ability and qualifications." This conclusion rests on clear and unambiguous language.

The County's case rests on two bases. The first is traceable to Section 10.04 and the second is traceable to Section 8.02. The evidence establishes that Section 10.04 relates to a fact situation that has no bearing on this grievance. The parties amended Section 8.02 to "extend the probationary period to one year from the previous six months." Bargaining history establishes that this change affected only the Union's ability to grieve the discipline or discharge of a probationary employee. The amended language dates all other benefits to "the six month mark."

The County essentially argues that posting is among the "rights and privileges under the working agreement" that await "the satisfactory completion of the probationary period" under Section 8.02. No evidence supports this conclusion except Miller's unsubstantiated personal opinion. That the parties agree that probationary employees accrue seniority during the probationary period undercuts the opinion, as do the express terms of Section 18.05.

The Union concludes that "since probationary employees possess seniority, the Arbitrator is precluded from finding a limitation on their right to post." Even if such a limitation could be implied, it "could only be for the first six months of the probationary period based on the bargaining history of the parties' movement to a one year probationary period."

{PRIVATE }The County's Initial Brief{tc \l 5 "The County=s Initial Brief"}

The County contends that the contract clearly and unambiguously supports its contention that probationary employees have no posting rights. Under Section 8.02, "benefits" commence half way through the probationary period while "rights and privileges", including the just cause standard, are unavailable until satisfactory completion of the probationary period. "Posting" must be considered among the "rights and privileges" referred to in Section 8.02.

The Union's view would make the reference to "rights and privileges" meaningless, contrary to arbitral precedent. Beyond this, the Union's view of "fringe benefits" is unsupported by judicial precedent such as DODGELAND EDUCATION ASSOCIATION V. WERC, 240 Wis.2D 287

(2002). The case does not govern the grievance, but underscores that "words are to be given

their ordinary and popularly accepted meaning in the absence of evidence that the parties intended some other special meaning." Arbitration precedent underscores this.

Sections 10.03 and 10.04 underscore that job posting is a "right and privilege." Section 10.03 grants "retrocession" rights not available through "the County's application process." Retrocession rights are not reconcilable to the probationary period established in Section 8.02. Arbitral authority supports this conclusion. Any other conclusion would force the County "to take a more cautious approach in determining which employees are retained." On balance, "'rights and privileges' must mean something and there is little else in the contract that it can mean other than the right to post for vacancies."

To the extent the contract is unclear, bargaining history supports the County. The parties amended the language of Article 8 in the negotiations for a 1998-99 labor agreement. Miller's testimony establishes that to secure an extension of the probationary period to one year, the County agreed to a Union proposal to "make sure that probationary employees would still be able to use sick leave and vacation after six months of service." The parties did not discuss job posting during these discussions. Significantly, the Union was on notice prior to these negotiations that "the County had taken the position that probationary employees are not eligible to post for positions." Arbitral precedent affirms that the Union's failure to raise this issue during negotiations should be held against it.

Miller has consistently advised probationary employees that they cannot post for positions under the labor agreement. Evidence establishes that this position is consistent with that of his predecessor and that the Union was aware of this position. Thus, the Union's failure to negotiate for the interpretation it asserts in this arbitration flies against bargaining history and past practice. The County concludes that "the Arbitrator (should) dismiss this grievance in its entirety."

{PRIVATE }The Union's Reply Brief{tc \l 5 "The Union=s Reply Brief"}

DODGELAND has no bearing on this grievance, particularly since the Court addressed "fringe benefits" not "benefits" as stated in Section 8.02. The "ability to post by seniority is a benefit of the Agreement in the 'ordinary and popularly accepted meaning' of the term."

Nor are the "inconsistencies" pointed to by the County entitled to any more weight. The "trial period" of Article 10 does not trump the probationary period. The two are separate contractual creations, and if the County determined "they must 'defensively' terminate an employee prior to the end of the new position trial period" then the County would do so, presumably for job performance reasons "as is their right." The arbitration cases cited by the County add nothing to this since they involve distinguishable contract language and facts.

The County's assertion that bargaining history supports its position "is correct as far as it goes." It highlights only Miller's testimony, ignoring that of Union witnesses. That testimony establishes that the Union agreed to extend no more than the operation of the just cause provision from six months to one year. If the County anticipated affecting other benefits, then "it was their responsibility to enunciate it and secure it because the Union's position was that the only change was the extension for termination without just cause."

Nor is there reliable evidence of past practice. At best, the County communicated its view, and the Union noted its opposition. Some of the evidence of the asserted practice rests on positions the County did not communicate to the Union. This leaves no reliable practice, and returns any analysis of the grievance to the language of the agreement alone.

The County's Reply Brief

The County denies that Article 7 qualifies probationary employees for posting rights. Such an assertion ignores the provisions of Article 8. Contrary to the Union's analysis, Section 10.04 is applicable. That section provides a right of retrocession not available to probationary employees. Significantly, the provision concerns a "right" and this underscores that the parties expressly distinguish between "rights" which do not accrue until satisfactory completion of a probationary period and "benefits" which kick in after six months.

The Union mischaracterizes Miller's testimony concerning the bargaining for a 1998-99 labor agreement. Miller never asserted that "all provisions of the agreement except for sick leave and vacation" are available to probationary employees. Rather, he identified several rights and privileges, including "the use of seniority for job posting" which are not available to probationary employees. The evidence establishes a past practice denying such a right to employees prior to those negotiations. That evidence establishes that probationary employees have seniority, but cannot use it for posting purposes. The retrocession right granted under Section 10.03 and the right to use seniority to claim a posted position are rights that fall within the "rights and privileges" that Section 8.02 affords only to employees who have satisfactorily completed a probationary period.

DISCUSSION

The stipulated issue focuses on Article 10, which governs postings. The parties' arguments, however, call a number of other agreement provisions into play.

The second paragraph of Section 10.02 permits "(e)ach employee . . . interested in applying for the job" to "endorse their name upon" a job posting. The third paragraph awards the posted job to the "employee with the greatest seniority who is able and qualified." The

parties do not dispute that a probationary employee represented by the Union is an "employee"

within the meaning of the labor agreement. Sections 7.01 and 7.02 establish this. Standing alone, these provisions grant an employee, without restriction, access to the posting procedure.

These provisions do not, however, stand alone. Sections 8.01, 8.02 and 18.05 limit the rights of an employee who is on a probationary period. Section 8.01 has no direct bearing on the posting process, but Section 8.02 does. That section addresses the "benefits . . . rights and privileges" of employees during the term of a probationary period. Arguably, the first sentence of Section 8.02 is clear and unambiguous, but that section must be read with the following sentence. The relationship of these two sentences and their relationship to Article 10 is not clear and unambiguous, since each party advances a plausible reading for them.

Thus, the grievance cannot be resolved as a matter of "clear and unambiguous" contract language. Past practice and bargaining history are the most persuasive guides to the resolution of ambiguity in a collective bargaining agreement, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. This grievance contrasts the operation of these guides with more formal guides less well rooted in the parties' conduct.

Past practice evidence is not helpful in the resolution of the grievance. The persuasive force of past practice is traceable to the agreement manifested by the bargaining parties' conduct. Here, however, there is no reliable evidence of agreement. Miller's testimony establishes the consistency of his view regarding the posting rights of probationary employees. The difficulty is that Brown's and Hartmann's testimony establishes a no less consistently held, but opposed, viewpoint. Pittelkow's December 16, 1996 letter confirms the consistency of the County's view. Like Miller's testimony, however, it falls short of establishing Union agreement or acquiescence with the County's view. The letter cites Brown and the Union President as a "cc", and contains blank lines for a dated acknowledgement of receipt. Brown's testimony acknowledges receipt. In the absence of that testimony, there is debatable evidence of Union receipt.

This underscores the weakness of the past practice evidence. Brown's testimony establishes that the Union received the letter and that the Union voiced its opposition to the view stated in it. Her candor in acknowledging receipt of the letter precludes finding the letter to establish Union agreement with the County's view. As her testimony credibly establishes receipt, it also credibly establishes disagreement. Even without regard to Brown's testimony, the letter is troublesome evidence of past practice. Pittelkow asserts in the letter that a probationary employee "is not covered under the terms of the union contract." Neither party asserts this view here. In sum, the letter fails to establish a binding practice.

This poses bargaining history evidence. It establishes both agreement and disagreement concerning the rights of probationary employees to post for positions. Testimony establishes that this issue was a source of friction prior to the revisions. Miller's and Hartmann's testimony

establish that the parties did not specifically discuss this issue during the bargaining that produced a twelve month probationary period. The parties dealt with the impact of the extension of the probationary period on the just cause provision, and with the Union's desire to avoid any impact of extending the probationary period on employee benefit entitlements such as vacation and sick leave. The evidence establishes that the Union sought to restrict the negotiated change to nothing more than the just cause provision and that the County sought a one year period to review an employee's general fitness for work.

No view of the evidence establishes a specific act to link the extension of the probationary period to the extension of a ban on a probationary employee's right to sign a posting. As noted above, Article 10 affords no basis to conclude such a limitation exists. Thus, the interpretive issue is whether the evidence warrants concluding that the parties' revision of Sections 8.01 and 8.02 created the limitation. As noted above, this conclusion cannot turn on evidence of specific agreement. Rather, it turns on whether the broad language of Sections 8.01 and 8.02 is sufficiently specific, viewed against the context of the parties' negotiations, to link job posting rights to the probationary period.

The persuasive force of the County's view is that the governing terms of Section 8.02 did not, before or after the revisions of 1998-99, refer to a period of time but to the "successful completion of the probationary period." Section 8.02 also, before and after the revisions of 1998-99, distinguishes between "benefits" and "rights and privileges." The 1998-99 revisions altered the sentence structure, but maintained this distinction. If posting is a "right" or a "privilege," it was thus extended to one year because "successful completion of the probationary period" was revised in Section 8.01 to twelve months.

This argument has considerable persuasive force, particularly if viewed from the perspective of formal constructs of contract interpretation. However, the force of the County's argument is more logical than factual. Significantly in this case, the force of the County's view is undercut by evidence more closely focused on the parties' bargaining history.

The language of other agreement provisions codifies their bargaining history. Significantly, the language of the agreement undercuts the County's view. More specifically, the County's view demands a clear distinction between "benefits" and "rights and privileges." The labor agreement precludes making the distinction as neatly as the County argues. Section 10.04 links "seniority rights" to "other benefits." This reference denies a distinction between "rights" and "benefits". If such a distinction can exist, it implies seniority is a "benefit" not a "right" or a "privilege." Seniority is more difficult to characterize as "non-wage compensation" than vacation or sick leave, which the County points to as "benefits." Beyond this, seniority is crucial to the operation of the posting process. If, as Section 10.04 states, seniority is a "benefit", then posting must be. Seniority, in any event, is more closely linked to posting than to vacation or sick leave. Beyond this, none of the testifying witnesses could neatly distinguish between what constituted a "right", a "privilege", or a "benefit." From the testimony, it appears that the

parties agree that a probationary employee has access to the grievance procedure, outside of

discipline and discharge issues. If so, this makes the grievance procedure a "benefit" not a "right" or a "privilege." Whether or not this is the case, it exemplifies the impossibility of drawing neat enough lines between these references to support the County's view. Beyond this, Section 18.05 affords some support for the Union's view. That section underscores that the parties explicitly limited the "benefits" available to probationary employees when they chose to do so.

Bargaining history evidence concerning the revisions to the 1996-97 labor agreement affords no greater support for the County's view. The parties agree that the discussions that led to the creation of a twelve month probationary period centered on the just cause provision, and did not expressly extend to job posting. The Union sought to alter no more than the just cause/grievance process, while the County understood the Union's concerns to center on sick leave and vacation. Whatever their differences, the parties agreed, prior to the revisions, that employees could post for openings after six months of employment. After the bargaining, the parties agreed that the probationary period would move from six months to one year. The language they adopted would indicate they did no more than cut and paste the first two sentences of Section 8.02 to the extent necessary to preserve prior benefit entitlements and to add a six month extension to the probationary period. The difficulty with the County's view is that it asserts the parties undertook a more significant revision of Section 8.02 than the testimony of the participants indicates.

To establish the scope of this conclusion, it is necessary tie it more closely to the parties' arguments. The County argues that apart from the "rights and privileges" reference, its view is supported by the policy underlying the extension of the probationary period. A probationary employee who posts to another position complicates the evaluation process by shortening the time period and by shifting the review from general competence to specific competence in the posted job. The policy is well stated and persuasive, but policy to an arbitrator should focus on the parties' intent, not on the arbitrator's view of how to manage employees.

Significantly, Section 8.01 does not restrict the probationary period to the position an employee is hired into or to a single position. Rather, it refers to "newly hired employees" and specifies a twelve month time period. Thus, the County's policy argument to restrict the probationary period to a single position seeks a restriction not stated in the agreement. More to the point, Miller's and Hartmann's testimony on this point are notably similar. Hartmann counsels probationary employees to be very careful in posting for other positions, and Miller views it as a poor idea that puts unnecessary risk into the evaluation process. The similarity of their views reflects that nothing in the agreement compels the County to award a position to an employee who has yet to demonstrate competence by the time of a job posting. The County has the right to discipline or discharge "(d)uring" the probationary period. Thus, no probationary employee can compel the County to award a posted position prior to the employee's

demonstration of sufficient competence to perform their job. As the testimony highlights, such

an employee would put their probationary position at risk to attempt to compel movement to a posted position. Beyond this, such movement within the twelve month probationary period could expose a probationary employee to an additional level of risk if the County determined the employee's performance in the "original" job warranted movement to a posted position. If such an employee manifested performance problems in the posted position that had not occurred in the "original" position, the employee would become exposed to non-grievable discipline or discharge as a result of the job movement. The interpretive point is not whether it is wise to permit probationary employees to post. Rather, the interpretive issue is whether the agreement makes this an available option.

Concluding that a probationary employee can sign a posting does not introduce conflict between Articles 8 and 10. The trial period of Section 10.03 does not, by its terms, guarantee a sixty day duration, since "reassignment may occur at any point." Nor does the trial period conflict with the twelve month probation period. A probationary employee cannot compel movement into the posted position or a full sixty day trial period. Thus, the County could be confronted with a dilemma on returning a probationary employee to their prior position only if and after it chose to move the employee to a posted opening. Such movement would be to a non-probationary position only if the County either chose not to terminate or neglected to terminate the employee within the twelve month period set in Section 8.01.

The contradictions pointed to by the County presume that the use of "shall be given the job" in Section 10.02 and "shall be considered on trial for sixty (60) calendar days" in Section 10.03 place a mandate on it that cannot be squared with Sections 8.01 and 8.02. However, these "mandates" cannot alter the fact that the employee is probationary or that the operation of the mandates presumes County willingness to place a probationary employee in a posted position. A County decision to terminate a marginal employee based on work performance in the original job trumps either "mandate" in any event. More specifically, the time periods in either Section 10.03 or 8.01 presume County willingness to permit them to run their full course. As the Union argues, the County's good faith view of employee work performance makes these provisions reconcilable. The probationary employee cannot compel movement to a posted position or to non-probationary status.

The Union states alternative positions on when a probationary employee has access to the posting procedure. I do not view the language or bargaining history to pose significant doubt on this point. The revised first sentence of Section 8.02 entitles employees to "receive benefits . . . computed from their starting date of employment" but conditions this "(u)pon six months of service." To accept the Union's view that posting is a "benefit" thus demands the conclusion that probationary employees do not have access to the procedure prior to six months of employment. Whatever doubt can be said to exist on this point is resolved by bargaining history evidence. As noted above, the County stretched the language of the agreement and bargaining

history evidence too far to support a conclusion that the parties mutually agreed to extend a ban on posting to twelve months. The Union's assertion that probationary employees have a right to sign a posting from their date of hire similarly pushes the bargaining history and the language of the agreement farther than the evidence supports. The County consistently opposed the Union's view of a probationary employee's posting rights. The Union thus asserts that the 1998-99 revisions brought about an agreement never specifically discussed. The language and bargaining history do not go that far.

The County's assertion that the Union's view denies meaning to at least part of the second sentence of Section 8.02 has force. However, as noted above, the language of the labor agreement points away from the distinction drawn by the County, and no testifying witness could establish with finality how, if at all, a "benefit" is to be distinguished from a "right" or a "privilege." Beyond this, the primary thrust of the second sentence is to establish the right of non-probationary employees to the just cause process. That meaning remains. That there is some redundancy in the language of Sections 8.01 and 8.02 must be noted. This does not fully address the force of the County's argument. Ultimately, however, the 1998-99 revisions to Section 8.02 appear to have involved the parties' attempt to use as much of the prior language as possible, while establishing a twelve month probationary period that did not upset benefits which would otherwise be received at the six month level. To accept the County's position on this argument elevates a formal rule of contract interpretation over specific evidence of the parties' bargaining. I find this unpersuasive, and am unwilling to push the parties' agreement beyond what the bargaining history evidence permits.

The Union essentially asserts the language should be construed against its drafter. This rule of interpretation is better suited to commercial contracts where a well-represented entity seeks to enforce an unbargained contract than to a collective bargaining agreement negotiated "at arm's length." In any event, as with the general rules of interpretation noted above, this rule should, in my view, not trump specific evidence rooted in the bargaining parties' conduct. The parties' discussion of arbitral precedent faces the same problem. Of greater consequence is the language agreed to by these parties and the process that preceded it.

The parties stipulated to an issue of remedy, but the record poses no specific damage to an employee to remedy. Thus, the Award states my view of the appropriate scope of the limitation of Section 8.02 on the posting provisions of Article 10.

AWARD

The County has violated the collective bargaining agreement by refusing to allow probationary employees to post into vacancies under Article 10 of the agreement. Section 8.02 does not, however, grant a probationary employee the right to post until the completion of six months of service.

Dated at Madison, Wisconsin, this 24th day of September, 2002.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
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