

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 2375, AFSCME, AFL-CIO**

and

**DOUGLAS COUNTY**

Case 245

No. 60708

MA-11691

(Amy Roberts Grievance)

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Appearances:

**Mr. James E. Mattson**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Ms. Candace Fitzgerald**, Douglas County Human Resources Manager, appearing on behalf of the County.

**ARBITRATION AWARD**

At all times pertinent hereto, Local 2375, AFSCME, AFL-CIO (herein the Union) and Douglas County (herein the County) were parties to a collective bargaining agreement dated May 3, 2000, and covering the period January 1, 2000, to December 31, 2002, and providing for binding arbitration of certain disputes between the parties. On January 7, 2002, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the County's failure to post the position of Adult Services Social Worker to which Amy Roberts (herein the Grievant) was allegedly entitled, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on April 30, 2002. The proceedings were not transcribed. The County and Union filed briefs on June 13, 2002, and June 17, 2002, whereupon the record was closed.

**ISSUES**

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

Did the Employer violate the terms of the collective bargaining agreement (Article 12, Section 1-A) and the long standing past practice when it failed to post the vacancy in Adult Services and unilaterally assigned a less senior employee to the vacant position in Adult Services thus denying a more senior and qualified employee said position?

If so, the appropriate remedy is to award the Grievant (most senior and qualified) the position in Adult Services effective November 1, 2001, through December 10, 2001 (the date the Grievant secured a full-time position). The Employer to cease and desist from not posting vacant positions it intends to fill and refrain from unilaterally assigning other employees into said vacant positions which undermines seniority and posting rights of bargaining unit employees.

The County would frame the issue as follows:

Did the County violate the contract by not posting for bargaining unit members the vacancy created by the Adult Services Social Worker?

If so, what is the appropriate remedy?

The Arbitrator is persuaded that the County's proposed framing of the issues adequately presents the matters in dispute and adopts the same.

### **PERTINENT CONTRACT PROVISIONS**

#### ARTICLE 2.

#### **MANAGEMENT RIGHTS**

The county board possesses the sole right to operate the county and all management rights repose in it unless otherwise limited in the collective bargaining agreement or applicable Federal or State laws.

- A. To direct all operations of the Department;
- B. To hire, promote, schedule and assign employees in positions within the Department;

. . .

E. To maintain efficiency of County operations;

. . .

I. To determine the methods, means and personnel by which Departmental operations are to be conducted;

. . .

## ARTICLE 8.

### SENIORITY

Section 1. The seniority of all employees covered by the terms of this Agreement and completing their probationary period shall begin with the employee's original date of employment. An employee's seniority shall not be diminished by temporary layoffs due to lack of work or lack of funds or any other contingency beyond the control of the parties to this Agreement. Such seniority shall be considered unit-wide seniority and shall be used for fringe benefit determination and as otherwise mentioned herein.

Section 2. Should it become necessary to reduce the work force for any reason, the principle of departmental seniority shall be recognized and applied. The qualified employee having the greatest length of service shall be the last laid off and the first called back to employment.

. . .

## ARTICLE 12.

### PROMOTIONS AND VACANCIES

Section 1. In the event a job vacancy or new position occurs, within five (5) calendar days, a notice of the vacancy or new position shall be posted on the employees' bulletin board for at least five (5) days. Should management require time to review organizational needs with regards to vacancies or new positions a notice of this will be posted in five (5) calendar days. Said notice shall contain the prerequisites for the position and said prerequisites shall be consistent with the requirements for the position. Those employees within the bargaining unit who meet the prerequisites may apply and they will be considered in the following order:

- A. First, those employees who have applied from within the Department in which the vacancy occurred will be considered in order of their seniority rights, provided that they are able to perform the duties required by the job.
- B. Where there are no qualified applicants from within the Department in which the vacancy occurred, consideration will be given to other qualified employees in the bargaining unit, according to their unit-wide seniority.
- C. In the event none of the applicants qualify for the position, the Employer may then advertise publicly to fill the position.

Section 2. The Employer may make temporary appointment to any job vacancy where considered necessary because of the work requirements of that position while the procedure for filling such vacancy is carried out.

### **BACKGROUND**

The Douglas County Department of Human Services maintains three distinct units for Adult Services, Youth Services and Child Protection Services and employs social workers to staff them. The Grievant has been employed by the County since June 15, 1995, and, at the time the events leading to the grievance took place, she was working part-time as a social worker in the Adult Services unit, with a classification of Social Worker II. In August, 2001, one of the full-time social workers in the Adult Services unit died. The Grievant informed her supervisor, Mary Granstrom, that she was interested in the vacant position, but received no response. Rather than post a vacancy in the Adult Services unit, the County ultimately transferred social worker Cathy Coffman into the position from the Child Protection Services unit and redistributed her caseload among the other Child Protection Services and Youth Services social workers. Coffman was a full-time employee with a seniority date of April 5, 2001. No new employees were hired as a result of the loss of the deceased Adult Services employee. The Grievant filed a grievance based upon the County's failure to post and fill the Adult Services position, which was denied. The grievance then proceeded to arbitration. At the hearing, the parties stipulated that the Grievant was qualified for the full-time Adult Services position. Additional facts will be referenced, as necessary, in the discussion section of this award.

### **POSITIONS OF THE PARTIES**

#### **The Union**

Article 12 of the collective bargaining agreement specifies that a job vacancy must be posted within 5 days of the occurrence of the vacancy and that the position must be filled on

the basis of seniority, provided the candidate is qualified. This language is clear and unambiguous. According to Elkouri and Elkouri, How Arbitration Works, 5<sup>th</sup> Edition, arbitrators should apply clear and unambiguous contract language according to its terms.

There is also a long-standing past practice in the Department of posting vacant positions. The testimony establishes that new positions were always posted. Further, although work was occasionally redistributed within units without posting, whenever employees moved between units, the positions were posted. The only exceptions were two occasions when employees, with Union consent, were temporarily assigned to other units. The reassignment here was permanent and did not have Union consent.

The County's action undermines seniority, one of the employees' most fundamental contract rights. The Grievant expressed interest in the position and would have applied for it had it been posted. Arbitrators have long recognized that seniority is intended to protect the rights of senior employees to job protection and promotion preference over less senior employees and restricts the employer's power to unilaterally control the work force. (Citations omitted.)

The County did not have a valid reason for not posting the vacancy. The record shows that a vacancy did exist, but the County did not post it. Instead, it transferred a less senior employee into the position from another unit, thereby denying the Grievant, who was more senior and qualified for the position, from applying for it. Arbitral precedent holds that employers must post open vacancies and violate labor agreements by transferring employees to avoid posting obligations. [Cf; ROGERS-WAYNE PRODUCTS COMPANY, INC., 92 LA 882 (HOUSE, 1989); INTERSTATE CONTAINER CORP., 96 LA 553, (DILAURIO, 1991); CHROMALLOY GAS TURBINE, 113 LA 444 (MARX, 2000); CITY OF RACINE, A/P M-94-163 (YAFFE, 1994), RUSK COUNTY HIGHWAY DEPARTMENT, CASE 56 30 0014 72 (JACOBS, 1972)].

Reconfiguring the position is an "end run" around the contract. Management's asserted right to not fill vacancies must be weighed against the employees' rights to post for vacant positions. Testimony of supervisor Kate Peterson acknowledged that, in management's view, position shifting could go on indefinitely with the result that a position might never be posted. The ability to post for vacancies is a significant right, particularly for social workers, as arbitrators have acknowledged. [Cf; BROWN COUNTY, MA-5956, (MCLAUGHLIN, 6/11/90)].

The County pleads economic necessity in justifying its actions. This might have merit if the position was eliminated or left vacant, but it was not. Rather, the County merely transferred a less senior employee into the position. This practice was rejected in ANACONDA COMMUNITY HOSPITAL, 114 LA 132 (POOL, 2000). For the reasons set forth above, the grievance should be sustained.

## The County

The submission of a packet of job postings by the Union does not establish a past practice of posting, it merely shows that the County has posted positions when it has determined that a vacancy exists. Here, there was no vacancy. Due to considerations of workload and fiscal responsibility there was a reassignment of duties, but no additional staff was added. This practice has received arbitral approval. [Cf; VERNON COUNTY, CASE 93, NO. 51167, MA-8517 and CASE 94, NO. 51168, MA-8518 (JONES, 9/15/95)]

The Grievant would have had the right to post for a position, if it existed, but it did not. The County exercised its legitimate management right under Article 2 to manage its workload, evaluate its staffing needs and make assignments accordingly. Budget problems arising in the summer of 2001 caused Department managers to look for methods to control costs. It was known among social workers that the caseload in the Department was down and that when an opening occurred in any of the units staff would be reassigned. The contract does not address reassignment or transfer, therefore they are legitimately within management's purview under the management rights clause. Thus, acting on instructions of the County Board of Supervisors, the Department elected to not fill two clerical, one management and two social worker positions without objection from the Union. The decision to reassign social workers was not arbitrary, but was based on state standards regarding caseload size. On this basis, numerous social workers have been reassigned at various times.

After the grievance was filed, the Administrative Coordinator implemented the County Board's requested hiring freeze in light of the Governor's proposed shared revenue cuts. Thus, the Cathy Coffman transfer was not a job posting issue, a seniority issue, or a promotional opportunity. It was a reassignment of job duties, which in no way benefited Coffman. Coffman was qualified for the Adult Services unit and the transfer was the least disruptive alternative for all employees. Had the County elevated the Grievant, it would have required the lay off or reduction of a full-time employee, with a corresponding loss of wages and benefits. Social workers are social workers and, although the job duties vary somewhat from unit to unit, the essential job requirements are the same. This essential management function is recognized in Elkouri and Elkouri, How Arbitration Works, 5<sup>th</sup> Edition, pps. 702 and 723.

Because there was not a vacancy, the County did not have a requirement to post or fill a position. Instead, it appropriately reassigned work according to recognized state standards. The contract was not violated and the grievance should be dismissed.

## DISCUSSION

At the outset, it should be noted that the parties are in agreement on a couple of fundamental points. They both agree that, under the contract, if a vacancy existed in the Adult Services unit the County had an obligation to post it. They further agree that if such a vacancy

had been posted, the Grievant was qualified to fill it. The essential point of disagreement is whether there was, in fact, a vacancy in the Adult Services unit. If, as the Union contends, a vacancy was created by the death of the former social worker, then the County had a duty to post and fill the position according to the requirements of the contract. If, as the County asserts, the vacated position was eliminated and the work reassigned, then the County was within its management rights to reassign the work within the Department as it saw fit. Evaluating the merits of the respective positions requires a careful assessment of the language of the contract and the descriptive terminology used within the Department.

Article 2, the management rights clause, confers on management the general power to “. . . hire, promote schedule and assign employees in positions in the Department;” as well as to “. . . determine the methods, means and personnel by which Departmental operations are to be conducted.” That power is qualified, however, to the extent that it is “. . . otherwise limited in the collective bargaining agreement . . .” Thus, management has the autonomy to determine its workforce needs. When it addresses those needs, however, it cannot act in conflict with the other provisions of the contract. In this case, management’s reallocation of duties within the Human Services Department must not contravene the requirements of the posting and filling language of Article 12.

Article 12, Section 1, not only specifies that vacancies must be posted, it also sets forth the method by which they must be filled. Thus, subparagraph A gives preference to qualified applicant’s within the Department, on the basis of seniority. If no such applicants come forward, subparagraph B gives preference to other qualified applicants within the bargaining unit, on the basis of seniority. Inasmuch as the bargaining unit is comprised only of social workers within the Human Services Department, the word “Department,” as it is used in subparagraph A must mean something other than the Human Services Department as a whole otherwise subparagraphs A and B would be redundant. The logical conclusion is that “Department,” as here used, means one of the three distinct social worker units – Adult Services, Youth Services or Child Protection Services – within the Human Services Department. This is borne out by Union Exhibit #2, which reveals that internal job postings for social worker positions typically specify the unit within which the position is located. This gives weight to the Union’s argument that social worker positions are not generic, but are unit specific.

The County cites instances in the past where it has reassigned employees without Union objection in support of its action here. The evidence suggests, however, that those assignments were temporary, which was permissible under Article 12, Section 2. Inasmuch as Cathy Coffman’s reassignment was permanent, these past instances are not relevant.

The County also argues that it has not always posted vacated positions and, therefore, there is not a binding past practice requiring it to do so here. It buttresses its argument with County Exhibit #3, which reveals that after Cathy Coffman was reassigned to the Adult Services unit her former position in Child Protection was not filled. Also, when the Grievant

was ultimately awarded a full-time vacancy her former part-time position was not filled. I do not find the existence of such a practice based on the record, nor is such a finding essential to my award. There is no requirement that the County fill every vacated position, only that if it determines that there is a vacancy and fills it, it do so according to the requirements of the contract.

The County asserts that the death of the former social worker did not create a vacancy. Rather, it contends that it merely reassigned her duties to another bargaining unit member, and then, due to a reduced workload, was able to redistribute the other employee's former caseload among the remaining social workers in the Child Protection and Youth Services units and eliminate her former position. The reduction in force was made necessary by budget constraints and, by handling it in this fashion, the County was able to avoid laying off or reducing any employee in the bargaining unit.

Based on the record before me, I find that the death of the former social worker did, in fact, create a vacancy in the Adult Services unit and that the County was bound to post and fill it according to the terms of the contract. I base my decision upon the following considerations:

1. The County and the Union regarded the social workers units as distinct and treated them as such, as shown by the language of Article 12 and the history of posting positions for specific units.

2. When the previous social worker died, the County did not eliminate a position in Adult Services and redistribute her workload among the remaining Adult Services Social Workers. Rather, it transferred Cathy Coffman into her former position and then redistributed Coffman's former caseload and eliminated her former position in Child Protection Services. This is established by County Exhibit #3, which, as previously noted, shows that Coffman's former position has not been filled. Coffman remains, however, which can only be because she occupies a position in Adult Services.

This reveals that the County regarded the Adult Services position as vacant and Coffman's as expendable, based on caseload size. In addressing this situation, the County pursued what it perceived as the path of least resistance. By moving Coffman into Adult Services it was able to eliminate a position, redistribute the workload in Child Protection Services, where the caseload was down, leave all remaining staff in place and avoid a need for a layoff or reduction. Unfortunately, it also violated the contract. Once it determined that a position in Adult Services needed to be filled it was bound to post it and fill it according to Article 12. At that point, the Grievant, as the most senior and qualified applicant in the unit would have been entitled to the position and the attendant increase in hours. This scenario may well have required the County to then consider reducing or eliminating the position of its least senior social worker in order to meet its budget needs, but so be it. That is one of the advantages seniority provides and for which the Union has bargained.

Based on the foregoing and the record as a whole, I hereby enter the following

**AWARD**

The County violated the contract by not posting for bargaining unit members the vacancy created by the Adult Services Social Worker. In consequence thereof, the County shall pay to the Grievant a sum equivalent to the difference between her actual hours worked and a full-time position between November 1, 2001, and December 10, 2001, computed at her hourly rate of \$18.29, along with all additional benefits to which she would have otherwise been entitled.

The arbitrator will retain jurisdiction of this case for a period of sixty (60) days to address any issues arising in the implementation of this Award.

Dated at Madison, Wisconsin, this 14<sup>th</sup> day of November, 2002.

John R. Emery /s/

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John R. Emery, Arbitrator