BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE ASSOCIATION OF MENTAL HEALTH SPECIALISTS

and

ROCK COUNTY

Case 341
No. 61197
MA-11844

(Posting)

Appearances:

Mr. John S. Williamson, Jr., Attorney at Law, 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, appeared on behalf of the Association.

Mr. Thomas A. Schroeder, Rock County Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appeared on behalf of Rock County.

ARBITRATION AWARD

On April 8, 2002, Rock County and the Association of Mental Health Specialists filed a request with the Wisconsin Employment Relations Commission seeking to have William C. Houlihan, a member of the Commission's staff, hear and decide a grievance pending between the parties. A hearing was conducted on July 12, 2002 in Janesville, Wisconsin. A transcript of the proceedings was taken and distributed on September 25, 2002. Briefs were submitted and exchanged by September 26, 2002.

This dispute addresses the County's decision to reduce a Crisis Intervention position from .5 to .4 FTE.

BACKGROUND AND FACTS

Rock County and the Association of Mental Health Specialists are signatories to a collective bargaining agreement, the relevant portions of which are set forth below. In late

2001, an employee occupying a .5 FTE Crisis Intervention Worker position posted out of the position, leaving it vacant. On or about January 2, 2002, Rock County posted the vacated position as a ".4 Crisis Intervention Worker/Case Manager II". The position description which accompanied the posting described the duties of the position, and included the following provision: ". . .All positions are not eligible for health and dental insurance coverage. . ." One individual, Zbyszek Walczak, signed for, and was awarded the position.

A grievance was filed on January 3, 2002 challenging the County's posting of a .4 position and seeking the restoration of a .5 position. That grievance alleges the following:

> "A vacant .5 crisis unit position was posted as a .4 position in an obvious attempt to deny the potential employee insurance benefits. This position has historically been a .5 position. The amount of work in this unit remains consistent and, in fact, is expected to increase in 2002. The Department has created additional crisis positions and is expected to hire additional staff to manage the increased workload."

Charmian Klyve, Human Services Director, testified on behalf of the employer. It was Ms. Klyve's unrebutted testimony that each position in a 24 hour a day, 7 day a week operation requires 1.4 FTE to cover the shifts. It was her testimony that the easiest way to staff is to do so with one full-time position and one .4 position. She testified that a .4 FTE consists of two eight-hour shifts per week in each of the two weeks in a pay period. She contrasted that with a .5 position which is scheduled for two eight-hour shifts in one week of the pay period and three eight-hour shifts in the second week of a pay period. According to Ms. Klyve, the three-shift week results in a doubling up of coverage on certain shifts.

Two additional Crisis Intervention positions were added to the unit.

Mr. Walczak began employment with Rock County on or about February 17, 2002. Mr. Walczak's hours of work, identified by bi-weekly payroll period, are set forth in the table below:

Zbyszek Walczak

Training hrs:	
2/17/02 – 3/2/02	36.5
3/3/02 – 3/16/02	45.75
3/17/02 – 3/30/02	54.00

Pay Period:

		O.T.
3/31/02 – 4/13/02	45.5	5.5
4/14/02 – 4/27/02	32.5	
4/28/02 – 5/11/02	56.5	16.5
5/12/02 – 5/25/02	54.25	14.25
5/26/02 – 6/8/02	41.0	1.0
6/9/02 – 6/22/02	49	9.0
6/23/02 – 7/6/02	52	12.0

Ms. Klyve testified that many of the hours can be explained as the product of unplanned overtime and of Mr. Walczak filling vacant shifts.

ISSUE

The parties stipulated to the following issue:

Did the County violate the collective bargaining agreement when it hired Zbyszek Walczak as a .4 Crisis Intervention Worker in February of 2002? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

. . .

ARTICLE II – MANAGEMENT RIGHTS

2.01 Except as otherwise specifically provided herein, the management of the County of Rock and the direction of the workforce is vested exclusively in the County, including, but not limited to, the right to . . .abolish and/or create positions, the right to create job descriptions and determine the composition thereof, the right to plan and schedule work, . . .

. . .

ARTICLE VII – GRIEVANCE PROCEDURE

. . .

7.06 Step 4.

. . .

The arbitrator shall have jurisdiction and authority only to interpret the specific provision grieved and shall not amend, delete or modify any of the express provisions of this Agreement.

. . .

ARTICLE XIV – BENEFITS IN LIEU OF WAGES

. . .

14.02 Medical Insurance. A group comprehensive and major medical insurance plan shall be in force for all employees and their dependents should the employee enroll for such coverage. The County shall pay the premiums for this plan as set forth in the insurance appendix. The County shall pay any premium increase during the contract years. Regularly scheduled part-time employees shall be covered by said medical insurance and the premium paid by the County, provided the employee is normally scheduled to work eighty-five (85) hours or more per month.

. . .

ARTICLE XV – HOURS OF WORK, CLASSIFICATION, PREMIUM PAY

15.01 A. Regular Workweek. The regularly scheduled workweek for full-time employees shall be forty hours per week, 8 or 10 designated daily hours (10 hr./day, 40 hr. Monday-Thursday), excluding regularly scheduled hours on Saturday and Sunday. Any permanent change for employee, unit, classification of employees in said hours will be mutually agreed upon by the employee/employees, administration and the union. Any employee may request a flexible change in schedule in any two week time/pay period with approval from his/her supervisor. This provision shall also apply to part-time employees who have not previously (prior to January 1, 2000) worked Saturday or Sunday hours, but does not restrict the County's right to create or maintain part-time positions that include such hours.

. . .

C. Crisis Workers: Regularly scheduled work week of full time workers will be a total of eighty hours within a regularly recurring fourteen day pay period.

. . .

ARTICLE XXV – SCOPE OF NEGOTIATIONS

25.01 Scope. The parties agree that the clauses and provisions set forth in this Agreement constitute the entire agreement between the parties.

POSITIONS OF THE PARTIES

It is the position of the Association that the primary, if not sole motive for changing the .5 FTE position to a .4 FTE position is to avoid paying health insurance benefits. The Association argues:

> "Williston tells us that there is also in every contract an implied covenant that neither party shall do anything which shall have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing."
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> Cox, Reflections on Labor Arbitration, 72 *Harvard Law Review* 1482, 1496 (1959).

The Association goes on to argue that an employer who signs a collective bargaining agreement automatically assumes obligations to its employees that are implicit in the relationship, and one of them is to not seek ways to deny employees the contract's benefits.

This approach does not render the Management Rights clause meaningless; it only prohibits decisions made primarily to avoid paying for contractual benefits.

As a remedy, the Association seeks an order restoring the status quo by undoing the County's change of Crisis Intervention Worker position from .5 FTE to .4 FTE and to making the Grievant whole for any medical expenses he may have sustained from the date of his hire to the date the position is restored to a .5 FTE.

The Employer contends that in general, arbitrators have recognized broad authority in management to determine methods of operation. The Union seeks, without supporting contractual language, to restrict that authority by arguing that the County does not have the

right to fill a vacant position, previously occupied as a .5 position, at the level of a .4 position. Not only could it be argued that the County has an inherent right to take such action, the County's position in this case is buttressed by a broad management rights clause in the contract pursuant to which AMHS has ceded to the County the authority to "plan and schedule work", as well as the authority "to determine the methods and processes and manner of performing work."

The County points to Ms. Klyve's testimony that a 24/7 operation requires 1.4 FTE to cover an eight-hour shift. The .5 position creates additional unnecessary County costs by creating a "double up day".

As to Walczak's level of benefits, it is the position of the County that this grievance has nothing to do with the level of benefits. The grievance is dated January 3, 2002, a month before Mr. Walczak was hired, and asserts the County's contractual violation in posting the position as a .4 position. The County cites Article VII, "The arbitrator shall have jurisdiction and authority only to interpret the specific provision grieved. . ." and contends that the Arbitrator lacks jurisdiction and authority to decide this issue.

It is the position of the County that it may in fact have an obligation to offer Walczak medical insurance benefits. However, since this was not the issue grieved, there was no evidence presented relative to "normally scheduled" hours of Walczak, what if any overtime hours did Walczak request, and what if any consequence that either of these facts have on Walczak's entitlement. The County further questions whether someone can be added or removed from the County health insurance policy on a periodic basis. These are matters for subsequent evidentiary hearing, and argument.

DISCUSSION

Article II, the Management Rights clause of this agreement, gives the Employer the right to: "Abolish and/or create positions". That is what this Employer has done. Article XV, the Hours of Work provision of the agreement recognizes the existence of full-time and part-time employees. Article 14.2 establishes a standard for the Employer payment of health insurance premiums. The Employer is obligated to pay the premium ". . .provided the employee is normally scheduled to work eighty-five (85) hours or more per month." Implicit in this reference is the possibility that a part-time employee could be normally scheduled to work less than 85 hours per month. There is nothing in the collective bargaining agreement that indicates an employee cannot be hired for an appointment that is less than .5.

The Union contends that the Employer has reduced this position in order to avoid the payment of health insurance premiums. Under this contract, the Employer pays the full cost of the health insurance premium for employees who work 85 hours or more per month. That is a

significant component of the compensation for a half-time employee. No doubt economics entered into the consideration. The posting confirms the County was both aware of the lack of health insurance premiums for .4 employees, and placed potential bidders on notice of that fact.

Ms. Klyve testified that a .4 LTE is an ideal complement to a full-time employee in a 24/7 schedule. Her testimony was that that was an efficient way to schedule, and avoided overlapping schedules. Klyve further testified that a .5 position leads to a doubling up and to a staffing level above that which is required. The Union contends that there is nothing wrong with staffing above minimum levels. The Union further points to the existence of other .5 FTE positions, and contends that their continued viability demonstrates the County's willingness to tolerate whatever scheduling inefficiencies they may cause. The question as to the appropriate level of staffing is one historically reserved to the Employer under its Management Rights clause. Absent a violation of some other provision of the contract, the question of whether there should or should not be duplicative staffing is one reserved to the Employer. Here, there exists a rational basis for the Employer's decision to staff at .4 FTE.

The Union cites authority for the premise that the relationship between these parties is governed by an "implied covenant of good faith and fair dealing". I agree that these parties have an ongoing relationship with one another, subject to a good faith standard of behavior with respect to one another. However, the good faith standard is framed, in meaningful part, by the provisions of the collective bargaining agreement. That agreement sets forth the understandings of the parties, and establishes the framework against which to measure the parties' respective good faith. It is difficult to conclude that the Employer has violated this implicit duty of fair dealing in the face of a rational staffing decision, both anticipated and authorized by the collective bargaining agreement.

The County contends that Walczak's entitlement to health insurance is not properly before me. It is the County's view that the grievance was filed before Walczak began employment. The Association contends that as a part of the remedy in this proceeding, Walczak should be made whole for medical expenses incurred. Implicit in the County's position is that if the Association wishes to pursue health insurance benefits for this position, it should file another grievance. I disagree. The essence of the grievance filed in this proceeding was that the Employer filled the position at a .4 in order to avoid payment of health insurance benefits. The County was fairly on notice that the health insurance benefit status of this position was at issue in this proceeding.

The County is free to staff a position at less than .5 FTE. It is not free to work an employee at or above .5 FTE and then deny benefits that would otherwise be forthcoming on the basis that the staffing level was set below .5.

AWARD

The grievance is denied with respect to the Union's claim that the Employer is not free to abolish a .5 position and recreate it at .4. The grievance is sustained with respect to that portion of the Union's claim that an employee who is normally scheduled to work at or above 85 hours per month is entitled to health insurance.

JURISDICTION

I will retain jurisdiction in this matter in order to resolve any dispute that may arise with respect to Mr. Walczak's entitlement to health insurance premium payment. Should such a dispute arise, it is consistent with this Award that the parties be entitled to offer evidence and argument relating to Walczak's entitlement to health insurance.

Dated at Madison, Wisconsin, this 31st day of January, 2003.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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