BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN COUNTY PLEASANT VIEW HOME EMPLOYEES LOCAL 1162, WCCME, AFSCME, AFL-CIO

and

GREEN COUNTY (PLEASANT VIEW NURSING HOME)

Case 153
No. 63206
MA-12521

(Night CNA Posting grievance)

Appearances:

Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511, for the labor organization.

William Morgan, Corporation Counsel, Green County, Green County Courthouse, 1016 – 16th Avenue, Monroe, Wisconsin 53566, for the municipal employer

ARBITRATION AWARD

Green County Pleasant View Home Employees Local 1162, WCCMA, AFSCME, AFL-CIO ("the Union") and Green County ("the 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, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to the posting of positions. The Commission designated Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Monroe, Wisconsin on March 15, 2004; it was not transcribed. The parties submitted written arguments on March 29; on April 9, the County filed a reply; on April 12, the Union waived its right to file the same.

ISSUE

The Union frames the issue as:

> "Did the employer violate the collective bargaining agreement by failing to post a vacant full-time position, instead allocating the hours to two part-time positions? If so, what is the appropriate remedy?"

The County frames the issue as:

> "Does the arbitrator has jurisdiction due to the lack of timeliness of the grievance? If so, did the County violate the collective bargaining agreement when it combined positions for efficiency reasons? If so, what is the appropriate remedy?"

I frame the issue as:

> "Did the County violate the collective bargaining agreement when it abolished a full-time night CNA position and instead posted two part-time CNA positions? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 The Union recognizes the rights and responsibilities belonging solely to the County, prominent among, but by no means wholly inclusive are the right to hire, promote, as well as, for just cause, the right to demote, transfer, suspend, discharge or discipline. The right to decide the work to be done, and the location of the work consistent with the terms of this Agreement. The County has the right to plan, direct, and control the work force, to schedule and assign work to employees, to layoff employees for economic reasons, to determine the means, methods and schedules of operation for the continuance of its operations, to establish standards and to maintain the efficiency of its employees. The Union also recognizes that the County retains all rights, powers or authority that it had prior to this Agreement except as modified by this Agreement. The County has the right to establish reasonable work rules, and require employees to observe its rules and regulations. Reasonableness of management's decisions are subject to grievance procedure. However,

the provisions of this Article are subject to the other express provisions of this entire Agreement and these rights shall not be used for the purpose of undermining the Union or discriminating against any of its members.

. . .

ARTICLE 6 - GRIEVANCE PROCEDURE

6.01 In case any dispute or misunderstanding relative to the provisions of this Agreement arise, it shall be handled in the following manner. Time periods established herein shall be deemed of the essence, and failure by Grievant to follow them shall render the grievance null and void.

All grievances subjected to the Grievance Procedure must be commenced within fourteen (14) days of the date of the events giving rise to the grievance, or within fourteen (14) days of the date the grievant obtains knowledge of the facts giving rise to the grievance. In all events, no grievance may be commenced later than one hundred eighty (180) days after the events giving rise to the grievance. The running of the one hundred eighty (180) days limitation period shall not be deemed a waiver of subsequent grievances of the exact same nature which may occur at a later date.

STEP 1. Any employee who has a grievance shall report such grievance to their proper supervisor, who shall thereupon attempt to make mutually satisfactory determination within a reasonable length of time, not, however, to exceed five (5) calendar days. If the grievance pertains to subject matter that the employee's supervisor has no authority to correct, then the grievance may be commenced at Step 2.

STEP 2. In the event that no mutually satisfactory decision has been reached in said period of time, the employee shall then refer the grievance to the Union on a written form furnished by the Union. The Union shall thereupon bring the issue before the Nursing Home Administrator within ten (10) calendar days of the completion of STEP 1. The Nursing Home Administrator shall respond within ten (10) calendar days.

STEP 3. If the parties cannot reach a mutually satisfactory resolution, the Union shall within ten (10) calendar days, request that the grievance be brought before the County Personnel Committee. A meeting between the Union and the Green County Personnel and Labor Relations Committee shall be held at a mutually agreeable time within thirty (30) calendar days. The County shall deliver its response to the Union within twenty (20) days of the meeting.

STEP 4. If the County and the Union cannot reach a mutually satisfactory decision within thirty (30) days, the Union may, within thirty (30) calendar days after being advised that the grievance has been denied, request that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the matter. If the Commission finds it necessary to appoint an arbitrator not a member of the Commission staff, the parties shall equally share the expense of the arbitrator so appointed. The decision of the arbitrator shall be final and binding on both parties.

. . .

ARTICLE 9 - JOB POSTING

9.01 All vacancies for existing or newly created full-time jobs or full-time shifts shall be posted for at least seven (7) working days. Any employee who possesses the required qualifications established by the employer may sign such a posting. For other vacancies in existing or newly created job openings or shifts, the following procedure shall be followed:

1. The vacancy shall be posted for at least seven (7) working days, and employees will be permitted to bid on such vacancy. The posting will advise that a copy of the job description is available.

2. If, as a result of filling the primary vacancy, another vacancy is created (because a present employee has bid into the initial vacancy), normal job posting procedures will be followed [i.e., the secondary vacancy will be posted for seven (7) days, and employees will be permitted to bid on such vacancy].

3. Any remaining job vacancies created by the primary and secondary posting may be filled in a manner determined by the Employer. An up to date listing of such vacancies shall be posted. The Employer shall maintain a listing of the vacancies it intends to fill. Current employees who are interested in the remaining jobs should make their interests known to the respective supervisors for consideration for the position. If the Employer elects to post such vacancies, normal posting procedures will be followed.

The Employer shall select from among signatories an employee to fill the new or vacated job. Equal consideration shall be given to seniority and qualifications in making such promotions. If an individual assumes a new position under this section, he/she shall be ineligible to sign for another job posting for a period of three (3) months from the time he/she assumes said new position. However, this restriction does not apply to an employee who may have an opportunity to post into a new position which results in increased hours, increased wages or better hours (e.g. nights to pm's, pm's to days) than their present position.

. . .

ARTICLE 28 - MAINTENANCE OF STANDARDS

28.01 The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement, and conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

It is agreed that the provision of this Section shall not apply to inadvertent or bona fide errors made by the employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

BACKGROUND

Among its several general government functions, Green County owns and operates the Pleasant Valley Nursing Home. This grievance concerns the union's challenge to the county's reallocation of various certified nursing assistant (CNA) hours.

In the fall of 2003, a full-time CNA on the night shift transferred to an evening position, creating a vacancy on the night shift. Rather than post the vacant full-time position, Pleasant View administrator Dan Stoor took one day from the full-time position, adding it to two other one-day-per-week positions to create two new positions – one working three days a week, the other working four days per week.

Among other considerations, this reallocation of hours will result in an increase in the number of bargaining unit members eligible for health insurance (two, compared to one under the prior allocation), as well as an increase in the health insurance premium for those employees who take that benefit (the two new positions would each pay higher premiums than the former full-time position). An employee taking single coverage pays monthly premiums of $49 if working full-time, $159.25 if working four days per week, and $269.50 if working three days per week; for employees taking family coverage, the respective premiums are $121, $393.25 and $665.50.

Stoor posted the two new positions on September 30, 2003. The union grieved the matter on October 3, 2003, claiming violation of the "agreement to promote the welfare of the employees," including sections 2.01, 9.01 and 28.01 of the collective bargaining agreement. As remedy, the union sought to "keep the full time position on night shift – and any full time postings that may arise in the future."

On October 13, 2003, Stoor replied to union president Ruth McKibben as follows:

. . .

> The grievance alleges that management had violated provisions of the labor agreement by taking a full-time night CNA position and taking a day from that position and adding it to another part-time position thus creating two different part-time positions and eliminating the full-time position.
>
> This grievance challenges management's authority to determine the nature and amount of work to be done and how we will accomplish completing the work needing be done. These are management rights provided for in Article 2.01 Management Rights of the contract.

> The exact issue was grieved by the Union for similar situations in January 1999 and August 2000. In both these cases the grievances were denied by the Green County Personnel Committee and there was no further action taken by the Union.
>
> In closing, in keeping with the decisions in prior grievances, I must deny this grievance.

Following timely union appeal to the next step, county corporation counsel William Morgan wrote union staff representative Thomas Larsen on December 3, 2003, as follows:

> As you know, the Green County Personnel and Labor Relations Committee met on November 25, 2003, to discuss the above-referenced grievance. After reviewing the above grievance and after having heard our arguments in this matter, the Committee has directed that I deny this grievance.
>
> As you know, the nature and amount of work to be done is solely a management decision. Pleasant View has been allocated numerous positions with various schedules by the Green County Personnel and Labor Relations Committee. What Mr. Stoor did was fill a vacant 3-day and a vacant 4-day position. At this time, such a move gives us the best coverage and, in our opinion, does not harm to the Union. The number of positions has not been reduced, and, in fact, there are now more positions with benefits currently filled than there were prior to this move which, of course, is a benefit to the employees. In the future, it may very well be that we will again fill another full-time position. When that happens, that position will be posted.

On January 12, 2004, the Union submitted to the Wisconsin Employment Relations Commission a request to initiate grievance arbitration, which was assigned to the undersigned and scheduled for hearing on March 15. On February 20, County counsel Morgan wrote the undersigned, with copy to Union representative Larsen, as follows:

. . .

> . . .the Green County Personnel and Labor Relations Committee directed that I deny the grievance. A copy of my letter of denial mailed on December 3 is also enclosed with this letter as Exhibit 4. Pursuant to our contract with Local 1162, time is of the essence as to the grievance procedure. Subsequent to my letter of December 3, 2003, I received no further communication either oral or written from the Union regarding this matter. I have checked with the nursing home

> administrator, Don Stoor, and he did not receive any Union communication regarding this matter either. Step IV of our grievance procedure provides that the Union may within 30 days of a denial of a grievance request the appointment of an arbitrator. It appears to me that the WERC did not receive a request for an appointment of an arbitrator until January 12, 2004. Clearly, the request for an appointment of an arbitrator is beyond the time limit established in the contract. I would also note that this office was not requested to give a waiver of time limits as to this matter.
>
> I would ask that if Mr. Larsen is aware of any basis on which this grievance can properly go forward, that he contact me and yourself immediately, so that we can dispose of that issue prior to March 15.

Staff representative Larsen did not respond to Morgan's letter, other than to reiterate he felt the grievance was not time-barred.

POSITIONS OF THE PARTIES

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

> Contrary to an established tenet of labor relations, the employer is seeking to unilaterally change the *status quo* as to the distribution of the available hours for certified nursing assistants. There is no economic necessity for this change; in fact, what the employer has done will increase its costs. The employer did not take into consideration other ways to fill the positions.
>
> The elimination of the full-time CNA position results in a tangible loss of benefits to the bargaining unit, in that part-time employees must pay a significantly higher cost of their health insurance if they are unable to work enough hours.
>
> While the employer's point on timeliness is well-taken, this grievance should be resolved on its merits due to its continuing nature. A finding against the Union on the timeliness issue would be applied toward the remedy.
>
> Because it has violated the collective bargaining agreement by failing to post the vacant full-time position, the County should be required to cease and desist and to restore the status quo and repost the position as a full-time position with whatever combination of the remaining two days it feels appropriate.

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

> The provisions in the collective bargaining agreement for handling grievances is absolutely unambiguous, and establishes that grievances which violate the time periods are rendered null and void. Here, while the initial grievance was timely filed, the Union's request for appointment of an arbitrator was not.
>
> The County delivered notice of the Personnel Committee's denial of the grievance on December 3, 2003; even adding the three days which the statutes allow for delivery of items through the mail, the 30-day window for going to arbitration would have closed by January 5, 2004. Yet the request for arbitration was not received by the commission until January 12.
>
> It is well-settled that an arbitrator has only that jurisdiction which the contract confers. It is further clear that the time period for the Union to file its request had expired. Therefore, under the terms of the parties' collective bargaining agreement, the grievance is void and the arbitrator simply has no jurisdiction to hear and decide the matter.
>
> Seeking to salvage the grievance, the Union incorrectly identifies this as a continuing grievance. It is not, as there is no ongoing policy. While there may be continuing effects resulting from the decision to combine positions, it was a single event – the declaration of the decision to combine the positions – that triggered the grievance. There have been no further decisions or events, or other bases for finding a continuing violation.
>
> Even if the matter were timely, the County did not violate the agreement when it exercised its management right to combine three open positions in an effort to maintain the efficiency of its employees.
>
> As in typical, the collective bargaining agreement endows the County with broad rights of management, including the rights to control the work force, schedule and assign employees, and determine the means, methods and schedule of operations. To address certain staffing difficulties, the County combined one day from a full-time position with a one-day-per-week position.
>
> The Union's assertion that it needs full-time positions is outrageous and without merit. Absent a violation of the agreement, staffing levels are set by the employer.

Because the request for arbitration was untimely, and because the Union claim is without merit, the grievance should be denied.

DISCUSSION

The collective bargaining agreement requires that the Union make any request for arbitration within 30 days after being advised that the grievance has been denied. The contract further stipulates that time periods "shall be deemed of the essence, and failure by Grievant to follow them shall render the grievance null and void."

The County Personnel and Labor Relations Committee rejected the grievance on November 25, 2003. Corporation Counsel Morgan related that denial in a letter to AFSCME Staff Representative Larsen dated December 3, which Morgan asserts he hand-delivered to Union representative Larsen on that date. Larsen does not dispute Morgan's assertion.

The Union's request for arbitration was not received in the Wisconsin Employment Relations Commission offices until January 12, 2004, the 40th day after notice of the denial was communicated to the union. On its face, this would place the grievance beyond the timelines and thus make it null and void. The Union maintains I should nonetheless hear and decide the matter because the time limits in the agreement are ambiguous, and because the county's actions have resulted in a continuing violation. The Union also submits that any failings on its part regarding timeliness should only be considered when formulating the remedy.

While I agree that the two references to a thirty-day period make the language of 6.01 less than a model of clarity, I disagree with the union that the meaning is ambiguous. I also disagree with the union that this grievance involves a continuing violation, which has been defined as "a current occurrence of a repeated and continuous violation, which should be given status and properly can and should be given the same status, as if the same current violation were occurring for the first time." SEARS, ROEBUCK & CO., 39 LA 567, 570 (Gillingham, 1962). The action which the Union complains of was the County's decision to alter the composition of the CNA positions as reflected in the job postings of September 30, 2003. This was a discrete and specific act; the fact that the new incumbents in the new positions will draw continuing paychecks and have continuing assignments does not make this a continuing grievance.

The Union also suggests that the proper way to address the matter of timeliness is in the potential remedy, in the event I found the grievance meritorious. But timeliness does not go to remedy, it goes to underlying jurisdiction.

Pursuant to the collective bargaining agreement, the Union has thirty days after being advised that the grievance has been denied to request a Wisconsin Employment Relations Commission arbitrator. Although it missed that deadline by only ten days, the Union did miss the deadline. By operation of the collective bargaining agreement therefore, I am without jurisdiction to hear and decide this matter on its merits.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 22nd day of June, 2004.

Stuart D. Levitan /s/
Stuart D. Levitan, Arbitrator

SDL/gjc
6690