

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PIERCE COUNTY HUMAN SERVICES PROFESSIONAL EMPLOYEES,
GENERAL TEAMSTERS UNION, LOCAL 662**

and

PIERCE COUNTY

Case 134
No. 62626
MA-12373

(Julie Raethke Grievance)

Appearances:

Jill Hartley, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

Stephen Weld, Attorney, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and County or Employer, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on February 11, 2004, in Ellsworth, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs by March 9, 2004, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the County violate the contract when it transferred the grievant to the mental health/AODA position without regard to her seniority and refused to allow her to bump a less senior employee? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2002-04 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 3 – MANAGEMENT RIGHTS

Except as expressly modified by other provisions of the contract, the County possesses the sole right to operate the County and all management rights repose in it. These rights include, but are not limited to, the following:

. . .

- B. To hire, promote, transfer, layoff, schedule and assign employees in positions within the County;

. . .

ARTICLE 6 – SENIORITY

Section 1. Seniority rights for employees shall prevail under this Agreement and all Agreements supplemental hereto unless it is specifically noted otherwise in any Article or Section. . .Seniority is a period of continuous employment of employees by the Employer in the bargaining unit commencing with the first hour and date of work and including time for vacations, leaves of absences, military service as prescribed by law or other mutual agreement . . .

. . .

Section 2. Seniority is defined as the length of an employee's continuous service with the County from their last date of employment. Departmental seniority is defined as the length of service in any particular department or branch of County government. County seniority shall be used for computing fringe benefits. Departmental seniority shall be used for job postings within the Human Services Department.

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Section 4. When layoffs are necessary, those employees with the least seniority shall be laid off first provided those employees retained are capable of carrying on the operations. When employees are called back to work, those employees having the greatest seniority shall be recalled first provided they, together with those on the job, are capable of carrying on the usual operations. . .

Section 5. Permanent openings for jobs setting forth classification and rates of pay shall be advertised on the bulletin board for five (5) work days. Employees may apply for transfer or promotion by making a written request to their department head clearly identifying the job they want. Applicants indicating an interest in the job will be considered. In selecting the employee to fill the permanent vacancy, the County shall give consideration to the employee's seniority with the department where the vacancy occurs and the employee's past experience, prior training, skill and general personnel record with the County. If none of the job applicants qualify for the vacant job, or no one posts, the vacancy may be filled by hiring the necessary skills and ability or transferring a present employee to the vacant position.

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Transfer. Transfer is the movement of an employee from one position to another position in the same class and having the same pay range (maximum). There shall be no change in the pay rate of an employee who is transferred and the automatic anniversary date pay adjustments shall not be affected.

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FACTS

The parties stipulated to the following facts.

Pierce County (“County”) and General Teamsters Union, Local 662 (“Union”) are parties to a collective bargaining agreement which establishes the wages, hours and conditions of employment for the professional employees in the County’s Department of Human Services. The Human Services Department is comprised of several units, including the Office on Aging; Administrative Support; Children, Youth and Families; Alcohol/Drug Mental Health; Long Term Support; Child Support; and Economic Support.

Julie Raethke, the grievant, was hired as a social worker in June, 1982, and has worked as a Social Worker III for Pierce County since January, 1989. As a Social Worker III, she worked in the Children, Youth and Families unit until administratively transferred into the W-2 social worker position in the Economic Support unit in January, 2002.

The County contracted with the State of Wisconsin to provide the W-2 program and created the W-2 social worker position to assist W-2 participants. The position was funded primarily from State funds. In late spring of 2003 the County was notified that funding for the W-2 program for the 2004-05 contract term would be severely cut and would not cover the cost of maintaining the W-2 social worker position. Since maintaining a social worker position was not a requirement of W-2, and given the fact that funding would not pay for the position in January, 2004, the County concluded that it would not be financially feasible to maintain the W-2 social worker position. As a result, the County elected to not bid for the program in 2004-05, which effectively would result in discontinuation of the W-2 program in Pierce County, as well as elimination of the W-2 social worker position.

At the same time (approximately May, 2003) that the County elected to effectively eliminate the W-2 program as of January, 2004, it was attempting to fill a Social Worker III position in the Mental Health/AODA unit. The position, vacant since April, had been posted, but no one in the bargaining unit posted for the position. Rather than proceed to fill the position from outside at the same time that the County was faced with elimination of the grievant’s position in January, 2004, the County made the decision to transfer the grievant to the vacant position and avoid laying off a new hire in January, 2004.

On June 10, 2003, the grievant was notified by Director of Human Services Reggie Bicha that she was being transferred to the vacant social worker position in the Mental Health/AODA unit, effective July 7, 2003.

The grievant objected to the transfer and on June 13, 2003, filed a grievance claiming that the County violated the collective bargaining agreement by transferring the grievant to a different social worker position without consideration of her seniority rights and requesting, as a remedy, that she be allowed to utilize her seniority rights by bumping into a social work position of her choice. The County denied the grievance on the basis that the collective bargaining agreement grants the County the right to transfer an employee into a vacant position. The Union appealed, and the matter was advanced to arbitration.

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The following facts are also pertinent herein.

Raethke is the fourth most senior employee in the department. There are three employees above her in seniority and about 20 below her. Because of her seniority, Raethke has the experience and qualifications to fill any social worker position in the department. Over the years, she has held a number of different social worker positions with the County.

Prior to being transferred into her current position in the Mental Health/AODA unit, Raethke was the W-2 social worker in the Economic Support unit. She volunteered for that position in January, 2002. In that position she was the W-2 social worker and the child day care certifier. As previously noted, she held that position until July 7, 2003, when she was involuntarily transferred into the vacant social worker position in the Mental Health/AODA unit. That involuntary transfer is the subject of the instant grievance.

Raethke's current social worker job in the Mental Health/AODA unit is considered a difficult and undesirable job. There has been considerable turnover in that job in the past few years.

Bicha testified that the reason Raethke was selected to fill the vacant mental health social worker position was because her W-2 social worker position was soon to be eliminated and because Raethke is a very good social worker experienced in managing cases with the same types of clients served by the mental health unit.

Prior transfers in the department were made voluntarily. This was the first time an employee's position was eliminated, and then the employee involuntarily transferred to another position.

POSITIONS OF THE PARTIES

Union

The Union contends that the County violated the collective bargaining agreement when it transferred the grievant to the vacant mental health/AODA social worker position without regard to her seniority after a portion of her W-2 position was eliminated, and refused to allow her to exercise her seniority to bump a less senior employee. According to the Union, the grievant should have been given the opportunity to bump another employee with less seniority. It makes the following arguments to support this contention.

As the Union sees it, this case involves the question of what happens when an employee's position is eliminated. Building on that premise, the Union submits that nowhere

in the collective bargaining agreement have the parties specifically addressed an employee's seniority rights when his or her position is eliminated. That being so, the Union avers that the contract is silent on the procedure to be followed in the event an employee's position is eliminated.

The Union argues that since the contract is silent on that point, the contract provision which should be controlling herein is Article 6, Sec. 1. That section provides that "seniority rights for employees shall prevail. . . unless it is specifically noted otherwise. . ." According to the Union, this language required the County to honor Raethke's seniority, and allowed her to bump a less senior social worker after the County determined that her W-2 position would no longer be funded. The Union points out that did not happen, because Raethke was never given the opportunity to bump anybody. The Union avers that by refusing to allow Raethke to bump a less senior social worker, the County violated the seniority principles recognized in Article 6, Sec. 1.

Next, the Union comments as follows on the language contained in Article 6, Sec. 5. First, it notes that that section specifies that seniority will be considered in choosing applicants for vacant positions. Second, it disputes the County's claim that Section 5 allowed the County to involuntarily transfer Raethke to the vacant mental health/AODA social worker position. The Union avers that Section 5 is simply not applicable to the present situation because, in its view, Section 5 only applies to the procedure the County must follow for filling permanent openings within the bargaining unit; it has no application to this situation where Raethke's position was eliminated. The Union contends that while the mental health/AODA position was vacant at the same time the County learned of the funding cuts that would eliminate Raethke's W-2 job duties, the County should not be allowed to take advantage of this coincidence to the detriment of Raethke's seniority rights. Third, the Union acknowledges that Section 5 is silent as to the criteria the County must consider when transferring an employee to a vacant position in the absence of qualified applicants. Be that as it may, the Union argues that when the seniority article is read as a whole, it requires transfer by inverse seniority. It contends that if the County is allowed to transfer any employee without regard to their seniority, this would turn the seniority provision on its head and negate the employees' seniority rights. It also argues that to allow the County to disregard seniority in the case of involuntary transfers is illogical and contrary to the parties' intent to honor seniority in all matters except as noted otherwise. Thus, the Union's view is that the County's right to involuntarily transfer an employee into a vacant position must be exercised in accordance with the agreement's seniority principles. The Union submits that did not happen here, so Raethke's seniority rights were violated.

Finally, the Union argues in the alternative that even if Article 6, Sec. 1 does not control the facts in this case, Article 6, Sec. 4 does. That provision provides that "when layoffs are necessary, those employees with the least seniority shall be laid off first provided

those employees retained are capable of carrying on the operations.” The Union avers that the procedure just noted is the procedure that must be followed in the event of a layoff. The Union asserts that had the mental health/AODA position not been vacant at the time Raethke’s position was eliminated due to funding cuts, the County presumably would have been required to lay off a social worker. It submits that as the fourth employee on the seniority list, Raethke would not have been laid off; rather, the employee with the least seniority would have been laid off, and Raethke would have been able to exercise her seniority to remain employed instead of being laid off. The Union contends that the County should not be allowed to circumvent Raethke’s seniority rights under Article 6, Secs. 1 and 4 simply because there was a vacancy at the time Raethke’s W-2 position was eliminated. The Union also urges the Arbitrator to reject the County’s defense that Raethke’s transfer into the vacant mental health/AODA position was the most efficient way to handle the vacancy and the funding cuts which lead to the elimination of Raethke’s W-2 duties. As the Union sees it, the contract does not allow the County to exercise its discretion to violate employees’ seniority rights simply because the County deems it would be less disruptive or more efficient.

The Union therefore asks that the grievance be sustained. As a remedy, the Union asks that the County be ordered to cease and desist from violating the agreement, and also ordered to allow employees whose positions are eliminated to bump a less senior employee whose position they are qualified to perform.

County

The County contends that it did not violate the collective bargaining agreement when it transferred the grievant to the vacant mental health/AODA social worker position without regard to her seniority after her W-2 position was eliminated, and refused to allow her to bump a less senior employee. It makes the following arguments to support this contention.

It argues at the outset that several contract provisions support the County’s position herein. First, it relies on the management rights clause. It notes that one of the specific rights which it reserved to itself was the right to transfer employees. It then notes that the term “transfer” is defined in Article 6, Sec. 5 as the movement of an employee from one position to another in the same class and pay range. Putting the foregoing together, the County maintains that it expressly reserved to itself the right to move employees from one position to another in the same classification. It submits that is exactly what occurred herein, namely, that it transferred an employee from one social worker position to another social worker position. Second, the County relies on the last sentence of Article 6, Sec. 5 wherein it gives the County the right to transfer an employee to a vacant position when no one posts for it (i.e. the vacant position). According to the County, that sentence is clear and unambiguous and addresses the very fact situation involved herein because a vacancy existed, it was posted and no one within the bargaining unit applied for the position. Applying that language here, the County asserts it

then had the option of “hiring (from outside the bargaining unit) the necessary skills and ability” or “transferring a present employee”. The County notes that it elected to do the latter, and transferred a present employee (i.e. the grievant) from a social worker position in one unit to a social worker position in another unit. The County also emphasizes that the grievant was a Social Worker III prior to and after the transfer. The County contends that Article 6, Sec. 5 does not identify which “present employee” the Employer may choose to transfer. As the County sees it, that means that this decision on whom to select to transfer is left to the discretion of the County. While prior transfers, including the grievant’s 2002 transfer, were made on a voluntary basis, the County believes that nothing in Article 6, Sec. 5 prevents it from transferring a present employee involuntarily, if it construes such an involuntary transfer in the best interest of the County.

Next, the County addresses the Union’s (interrelated) contentions that the grievant’s seniority entitled her to bump a less senior employee in order to avoid transfer and/or the impending elimination of her position (i.e. layoff).

The transfer matter is addressed first. The County argues that there is no contract provision establishing the right to bump less senior employees when an employee is transferred. The County disputes the Union’s contention that the language contained in Article 6, Sec. 5 (wherein it references “seniority rights”) creates bumping rights. To support this premise, it cites several arbitrators who rejected union contentions that general seniority rights language prohibited transfers where the contract language did not restrict the employer’s right to transfer employees. The County believes this Arbitrator should hold likewise, because this contract does not contain any limits on management’s right to transfer. That said, the County does acknowledge that Article 6, Sec. 5 requires that the County give consideration to the seniority of an applicant who has posted for a vacant position, but it emphasizes that that provision does not require consideration of seniority when the County decides to transfer an employee where, as here, no one posts for the vacant position. As the County sees it, there simply is no requirement, either express or implied, which requires the County to consider seniority when, under the last sentence of Article 6, Sec. 5, the County fills a vacant position by “transferring a present employee to the vacant position.” The County argues that making transfer rights seniority contingent would be beyond the Arbitrator’s authority because it would confer a right not expressed in the parties’ agreement.

Next, the County addresses the Union’s contention that because of the impending elimination of the grievant’s W-2 position at the end of the year, she had bumping rights. The County disputes that contention. It avers that the right to bump another employee is created by contract and here, there is nothing in Article 6, Secs. 1 or 4 which either explicitly or implicitly gives a more senior employee the right to bump a less senior employee if a layoff is contemplated or an involuntary transfer is made. According to the County, what the Union is attempting to do in this case is create bumping rights where none exist.

In sum, the County believes that its actions herein complied with the collective bargaining agreement. It therefore asks that the grievance be denied.

DISCUSSION

I have decided to note at the outset that this case is going to be analyzed as a transfer case – not as a layoff case. Here’s why. The stipulated issue references a transfer, namely the grievant’s transfer to the mental health/AODA position. It does not reference a layoff. That said, I am well aware that the reason the Employer picked the grievant for transfer to that vacancy was because of the impending elimination of her existing W-2 position. While this position elimination might have resulted in a social worker’s layoff if Raethke had not been transferred into a vacant position, no layoff actually occurred here. Since no layoff actually occurred, but instead was simply contemplated, this case need not be analyzed as a layoff case.

As was just noted, at issue here is whether the grievant’s transfer violated the collective bargaining agreement. The Union contends that it did while the County disputes that contention. I answer that question in the affirmative, meaning that the grievant’s transfer did violate the collective bargaining agreement. My rationale follows.

My discussion begins with a review of the first contract provision that deals with transfers. It is the Management Rights clause. In that clause, the County retains those rights which are not bargained away or limited by the collective bargaining agreement. As it relates to this case, that clause specifically gives the County the right to “transfer” employees. While the word “transfer” is not defined in that clause, it is defined elsewhere in the agreement, namely the third paragraph of Article 6, Sec. 5 which is entitled “Transfer”. Therein, a transfer is defined as the movement of an employee from one position to another in the same class and having the same pay range.

The next question, contractually speaking, is whether any restriction or limitation is imposed on management’s right to transfer employees. There is. Two restrictions were just referenced in the preceding paragraph. I am referring, of course, to the restrictions that if the Employer transfers an employee, it must be to a position within the same classification and pay range. In this case, there is no dispute that the Employer complied with those two restrictions when it transferred the grievant from a social worker position in one unit to a social worker position in another unit. In doing so, her classification did not change. She was a Social Worker III before and after the transfer. Additionally, her pay range did not change.

That said, this case really does not involve either of those two restrictions. Instead, the crux of this case is whether there is any seniority restriction or limitation on management’s right to transfer employees. The focus now turns to making that call.

The final contract provision that deals with transfers is the last sentence of Article 6, Sec. 5. That section gives the County the right to fill a vacancy when no one posts into the vacant position. Specifically, it provides that if no employee posts for an open job, the Employer can fill the vacancy by 1) “hiring” (from outside the bargaining unit) or 2) “transferring a present employee to the vacant position.” According to the Union, this section has no application here. I disagree. In my view, it is directly on point and addresses the very fact situation involved here since a social worker vacancy existed in the mental health/AODA unit, it was posted and no one in the bargaining unit applied for it. Under this language, the County had the option of either hiring (from outside the bargaining unit) or “transferring a present employee to the vacant position.” As was its contractual right, in this instance the County chose the second option (i.e. “transferring a present employee”). It is therefore held that the Employer had the contractual right to transfer an employee into the vacant mental health/AODA position.

Having so found, the focus now turns to the question of which employee could be transferred into that vacant position. As previously noted, the employee which the Employer selected for the transfer was the grievant. The director of human services testified that the reason Raethke was selected for the transfer was because her W-2 social worker position was soon to be eliminated and because she is a very good social worker experienced in managing cases with the same types of clients served by the mental health unit. In making this transfer decision, the Employer did not consider Raethke’s seniority as a factor. At issue herein is whether it should have.

Section 5 does not say what criteria the County must consider when transferring an employee to a vacant position in the absence of qualified applicants. It is silent on same. That being so, the Employer is correct that there is nothing in the last sentence of Article 6, Sec. 5 that says that transfers have to be by seniority or based on seniority. Building on that premise, it is the Employer’s position that since the language does not identify which “present employee” the Employer may choose to transfer, that decision is left to the County’s discretion and there is no limit on whom they can select to transfer. Implicit in this view is that seniority plays no role in transfers. The undersigned could certainly accept the Employer’s proposed interpretation of the last sentence of Article 6, Sec. 5 if it was the only contract language applicable here. However, it is not. There is another contract provision yet to be reviewed which limits the County’s discretion in deciding who to transfer. It is Article 6, Sec. 1.

The following discussion shows why. The opening sentence of Article 6, Sec. 1 says that “seniority rights. . . shall prevail” unless specifically noted otherwise. The specific language provides thus:

Seniority rights for employees shall prevail under this Agreement . . . unless it is specifically noted otherwise in any Article or Section.

This sentence grants “seniority rights” a significant role. In fact, the role is so significant that “seniority rights. . . shall prevail” under this agreement in all matters unless noted otherwise. The last sentence of Section 5 (in the part dealing with transfers) does not contain a seniority exception. That being so, I find it is subject to the general principle established in Article 6, Sec. 1 that “seniority rights. . . shall prevail.” In so finding, I do not believe I am reading a new right (namely, “seniority rights” for transfers) into the agreement. Instead, I am simply following the standard principle of arbitral interpretation that agreements are to be read as a whole. Aside from that, when one looks at the sentence which immediately precedes the last sentence in Section 5 (i.e. the fourth sentence), one sees that seniority does not “prevail” there. Here’s why. That sentence (i.e. the fourth sentence), deals with filling permanent vacancies. It provides that when the Employer fills a permanent vacancy from among the applicants (i.e. employees who want to be considered for the vacancy, as opposed to employees who are involuntarily transferred via the option contained in the last sentence of Section 5), the Employer does not have to consider only the employee’s seniority. Instead, it says that the Employer “shall” also consider “the employee’s past experience, prior training, skill and general personnel record with the County.” There is no similar language for transfers. The inference which I draw from this is that the parties intended involuntary transfers to be covered by the general principle established in Article 6, Sec. 1 (i.e. that “seniority rights. . . shall prevail”) because they did not say otherwise. When the Employer made its transfer decision in this case, it looked exclusively at the last sentence of Article 6, Sec. 5 and ignored the first sentence of Article 6, Sec. 1. That was wrong. In my view, the last sentence of Article 6, Sec. 5 has to be read in conjunction with the first sentence of Article 6, Sec. 1. When that is done, transfers are subject to seniority. As previously noted, the Employer can certainly involuntarily transfer employees under Section 5, but when it does so, it has to consider the employee’s seniority in accordance with Article 6, Sec. 1. That did not happen here, because the Employer transferred an employee who is fourth on the seniority list (i.e. the grievant), while there are about 20 employees below her in seniority.

Given the foregoing, it is concluded that the County violated the collective bargaining agreement when it transferred the grievant to the vacant mental health/AODA position without regard to her seniority.

The focus now turns to what I consider the hardest part of this case – determining the appropriate remedy. According to the Union, the remedy is simple – the grievant should be able to bump into the social worker position of her choice (i.e. wherever she wants). I see that proposed remedy as problematic. Here’s why. Bumping rights are a creature of contract. Said another way, bumping rights are created by contract. Under this contract, no bumping rights are explicitly conferred and no bumping procedure is spelled out. The contract is silent on both. As a result, there is nothing in this contract that specifies how bumping works. That is significant because there are a variety of ways bumping could be implemented after an employee is transferred. That being so, I have decided to not grant the bumping remedy

requested by the Union. Also, for the purpose of consistency, I have dropped the portion of the stipulated issue that referenced bumping (i.e. the phrase “and refused to allow her to bump a less senior employee”) in the AWARD section.

Instead, I have decided that the following remedy is appropriate here. First, the County is directed to discard the transfer which is the subject of this grievance (i.e. the transfer which filled the vacant mental health/AODA social worker position) and do the transfer over. Next time, in deciding who to transfer, the Employer shall follow Article 6, Sec. 1 so that “seniority rights. . .shall prevail”. Second, whoever is transferred into the mental health/AODA position will displace the grievant. I am not ordering the County to restore the grievant to her former W-2 position because that position has been eliminated. Instead, I leave it to the parties to determine where the grievant goes after she is displaced from the mental health/AODA position. If the parties cannot resolve that question, I will, because I am retaining jurisdiction.

In light of the above, it is my

AWARD

That the County violated the contract when it transferred the grievant to the mental health/AODA position without regard to her seniority. In order to remedy this contractual breach, the County is directed to discard the transfer and do it over. Next time, in deciding who to transfer, the County shall follow Article 6, Sec. 1 so that “seniority rights. . . shall prevail”. Whoever is transferred into the mental health/AODA position will displace the grievant, who will then move into a yet to be determined position.

The undersigned will retain jurisdiction for at least 60 days from the date of this Award, solely for the purpose of resolving any dispute with respect to this remedy.

Dated at Madison, Wisconsin, this 21st day of July, 2004.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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