

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BAYFIELD COUNTY

and

LOCAL 1731, AFSCME, AFL-CIO

Case 80
No. 63421
MA-12583

(Lindahl Grievance)

Appearances:

James E. Mattson, Staff Representative, Wisconsin Council 40, 8480 East Bayfield Road, Poplar, Wisconsin, appearing on behalf of Local 1731.

Mark Abeles-Allison, Bayfield County Administrator, Bayfield County, 111 East Fifth Street, P.O. Box 878, Washburn, Wisconsin, appearing on behalf of Bayfield County.

ARBITRATION AWARD

Local 1731, AFSCME, AFL-CIO, hereinafter "Union," and Bayfield County, hereinafter "County," jointly requested that the Wisconsin Employment Relations Commission appoint Lauri A. Millot to arbitrate and decide the instant dispute between the Union "in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on May 20, 2004, in Washburn, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on August 21, 2004, at which time the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties agreed at hearing that there were no procedural issues in dispute, but were unable to agree on the substantive issue.

The Union frames the issue as:

Did the Employer violate the terms of the parties' Labor Agreement when it denied the Grievant pay at the appropriate salary step (18-month step and keeping her frozen at the start rate for Coordinator I)? And if so, the appropriate remedy is to make the Grievant whole for any and all lost wages and benefits by being denied the pay rate of the 18-month step for Coordinator I from March 1, 2003, to the present.

The County frames the issue as:

Has the County violated Article 14(3)(d), as modified by the April 1, 1999 Side Letter of Understanding, by continuing to pay Linda Lindahl at the start rate of the Coordinator I position? If so, what is the appropriate remedy?

Having considered the relevant facts and arguments of the parties, I accept the County's framing of the issue.

RELEVANT CONTRACT LANGUAGE

ARTICLE 4 Grievance Procedure

. . .

C. Decision of the Arbitrator

1. The decision of the arbitrator shall be in writing and set forth his/her opinions and conclusions on the issues submitted to him/her, in writing, and/or at the hearing.
2. The decision of the arbitrator shall be binding for both parties, shall be final, and is limited to terms and conditions set forth in this Agreement.
3. The arbitrator shall not have any authority to make any decision amending, changing, subtracting from or adding to the provisions of this Agreement, and shall be limited to the subject matter of the grievance.

. . .

Article 14
Promotions, Job Postings, Work Assignments,
Layoffs & Recall, Reclassifications,
Salary Step Placement and Demotions

. . .

Section 3 – Reclassification, Salary Step Placement and Demotions:

. . .

- D.** Employees who are transferred, voluntarily or involuntarily, shall be placed at the salary step level commensurate with the number of months employed at their former position. These employees shall serve a three (3) month period of probation. If they do not successfully complete their probationary employment, they may be returned to their former position.

. . .

2004 Levels and Grades in Rank of Pay

LEVEL	GRADE	HIRING RATE	6 MONTH RATE	18 MONTH RATE	
					. . .
7	1	18.41	19.00	19.69	HOME HEALTH STAFF NURSE
7	2	18.53	19.30	20.02	FORESTER (B.S. DEGREE) PUBLIC HEALTH STAFF NURSE RESOURCE SPECIALIST SOCIAL WORKER 1 COORDINATOR I ASSISTANT ZONING ADMINISTRATOR HEALTH DEPT. SANITARIAN

. . .

BACKGROUND AND FACTS

The Grievant, Linda Lindahl, began her employment with the County on May 16, 1997, in the non-union management position of Director of the Unit on Aging. On November 10, 1998, the Bayfield County Board voted to consolidate the Departments of Aging, Community Programs and Social Services into a Department of Human Services governed by a Human Services Board, thus resulting in the elimination of the Grievant's

Director of Aging position. Before the Grievant's position was eliminated and she was laid off, the Union and County negotiated and entered into a Side Letter of Understanding that reads as follows:

**Side Letter of Understanding
by and between
Bayfield County Department of Human Services
and
AFSCME Local 1731**

1) Because of the Department's changing to a human services department and two non-Union employees taking Union positions, the provisions of Article 14, Promotions, etc., as they deal with job positions, shall not apply to the Coordinator I position which will be filled by Linda Lindahl or to the Bookkeeper position which will be filled by Barbara Suminski.

2) Ms. Lindahl does not meet the qualifications for a Coordinator I position. Ms. Lindahl shall be red-circled as a Coordinator I at the starting rate of pay. This employee shall remain as a Coordinator I at the starting rate of pay and be eligible for negotiated (annual) increases. This change shall take effect on April 1, 1999.

In the event Ms. Lindahl becomes eligible for Social Worker I certification, she may then start through the six (6) month and eighteen (18) month step progression.

3) The new Bookkeeper classification shall be placed at Grade 9 as Ms. Suminski will be doing bookkeeping work and her new job description is very similar to current County bookkeeper employees. Because of her past experience, the County will place Ms. Suminski at the eighteen (18) month salary level effective July 1, 1999.

4) Both Ms. Lindahl and Ms. Suminski shall be covered by the letter of agreement provided to the Union by Ms. Prenn through her February 19, 1999 letter to Mr. Mattson. Item Number 1 of Ms. Prenn's letter of agreement shall not apply to Ms. Lindahl and Ms. Suminski, however all other provisions apply.

5) This Agreement shall be binding and effective April 1, 1999.

. . .

The Union representative approved the Side Letter in a letter dated May 5, 1999, and the County Personnel Committee approved the Side Letter on March 23, 1999.

As a result of the Side Letter, the Grievant has been paid at the starting rate of pay, with annual negotiated salary increases, since 1999. The Grievant has not pursued social worker certification.

The Coordinator I position which the Grievant currently holds is a full-time position in the Aging and Disabilities Section of the Department of Human Services. The position does not require a four-year degree nor certification as a social worker. Rather, these are preferred qualifications for the position. The Grievant received satisfactory evaluations in 2000, 2001, 2002 and 2003.

The Grievant holds a bachelor of science degree in the field of Recreation Leadership from Wisconsin State University – La Crosse. She earned 12 graduate credits from the University of Wisconsin-Superior in 1976 and has completed approximately 17 days of training offered or approved by the County.

On November 17, 2003, the Union filed a grievance alleging that the County had violated Article 14, Section 3-D of the 2002-2004 collective bargaining agreement when “Employee Linda Lindahl did not receive appropriate salary step level commensurate with employment months of service. Discriminated against and submitted to extreme duress during the process of forming a Human Services Department.” The grievance identifies the date of infraction as April 1, 1999, and seeks that the Grievant be “made whole effective March 1, 2003.” The County denied the grievance at all steps thus placing it before the Arbitrator.

ARGUMENTS OF THE PARTIES

Union Initial Brief

The Union asserts that the Side Letter entered into by the parties in April 1999, has serious flaws that need to be corrected. At the time the Side Letter was being negotiated, the County failed to effectively communicate with both the Grievant and the Union. The Grievant lacked any representation to assert that she was qualified for the Coordinator I position. The Union relied upon the incorrect information provided by the County as to the Grievant's qualification and was not in a position to communicate with the Grievant.

The Grievant is qualified for the Coordinator I position. The County did not dispute that the Grievant is performing the duties of the Coordinator I position. She has fulfilled all expectations of the Coordinator I position for greater than five years. Her job has changed and grown in scope and range of duties over time. In addition, the Grievant has attended numerous training seminars and classes which have made her a more qualified and valuable employee as verified in her job evaluations.

The Grievant performs very similar work as that of her co-workers Patti Carlson, Bobbie DeLizio and Jan Bergst who are social workers. The Assessment Plans and Client number data support the conclusion that the Grievant and the social workers perform similar duties.

The County's expectation that the Grievant obtain a Social Worker certification is arbitrary and capricious. Many of the Grievant's co-workers who perform similar work do not have a Social Worker certification. Comparable employees in the County's Department of Human Services are not required to hold Social Worker certification. To expect the Grievant to obtain Social Worker certification is unreasonable and burdensome. In addition to the costs associated with taking the required classes and commuting 100 miles per trip, the Grievant would be unable to recoup her financial outlay due to her age.

The impact of the wage disparity increases over time. The Grievant lost \$2,515.50 in annual wages in 1999. In 2006, her lost income will be \$3,061.50. The Grievant is entitled to "equal pay for equal work!"

County Initial Brief

The County argues that it is in full compliance with the Side Letter. The parties entered into a valid Side Letter that does not contain a sunset or expiration clause. At no time since the Side Letter was entered into has the Union attempted to negotiate over the content or modify the terms of the Side Letter even though two successor labor agreements were negotiated.

The language of the Side Letter is clear and unambiguous language and supports the County's actions. When the general language of the labor agreement is viewed in contrast to a specific side letter and following the principal of contract interpretation that where if there is a conflict between specific language and general language, the specific language is to be followed, then the Side Agreement should govern.

The County argues the language of the Side Letter is unambiguous and therefore its plain meaning is enforceable citing *SAFEWAY STORES*, 85 LA 472 (THORP, 1985) and Elkouri & Elkouri, *How Arbitration Works*, 5th Ed., p.199. The language and intent of the Side Letter entered into by the parties in 1999 is clear; the Grievant's wages would be red-circled until she achieved social worker certification.

Union Reply Brief

The Union points out that even if the language of the Side Letter is clear and unambiguous, it is the Arbitrator's responsibility to evaluate the Side Letter to determine

whether its effect is creating an absurd or harsh result. It is absurd and harsh to deny the Grievant step movement and there is arbitral authority which allows the Arbitrator to mitigate the harsh, unreasonable and unfair terms of the Side Letter.

The Union takes strong exception to the County assertion that the Grievant participated in the negotiations leading up to the Side Letter. First, the Grievant testified that she did not participate. Second, the Grievant was in a coercive situation since had the parties not reached agreement on the terms of the Side Letter, she would have been laid off. Finally, the terms of the agreement evidence the Grievant's lack of involvement since she would not have agreed to the additional education requirements given her age, tuition costs and the distance.

Based on the testimony offered at hearing and the arguments presented, the Union requests the Arbitrator to sustain the grievance and make the Grievant whole from March 1, 2003, to the present at the 18-month rate of pay.

County Reply Brief

The County refers the Arbitrator to the language of Article 4, Section C(3) which limits the Arbitrator's authority from making "any decision amending, changing, subtracting from or adding to the provisions of this Agreement." Given that the Side Letter remains in effect and the Union has not attempted to renegotiate its terms, the Union is attempting to use the arbitration process as an alternative to negotiations.

The County retains the right to set employment eligibility standards. The parties agreed that the Grievant did not meet the Coordinator I qualifications. As to the Union's claim that the other County Social Workers and Coordinators do not have social worker certification, all of them are eligible for social worker certification.

Finally, the Union's argument that the Grievant was harmed due to her lack of representation when the Side Letter was negotiated must fail because the Grievant communicated her concerns directly to the County during negotiations and at no time did the County prevent the Grievant from discussing the issue with the Union.

For all of the above reasons, the County requests that the grievance be dismissed.

DISCUSSION

The issue in this case is whether the Grievant is receiving the correct hourly wage.

Under Article 4, the Arbitrator's role is not to determine what the fair and equitable wage is for the Grievant. Rather, the Arbitrator must determine whether the Side Letter and Appendix A have been violated without amending, changing, adding to, or deleting from, the agreement.

The Union grievance alleges that the County is violating Article 14 of the collective bargaining agreement by not paying the Grievant at the 18 month wage rate since she has exceeded that level of experience. I would agree with the Union if the parties had not entered into a Side Letter of Understanding in 1999 when the Grievant was facing layoff. 1/ The Side Letter first provides that the “provisions of Article 14 . . . shall not apply” and next provides that the Grievant “shall be red-circled as a Coordinator I at the starting rate of pay” and that she will remain at the starting rate, subject to negotiated increase, until such times as she “becomes eligible for Social Worker I certification.” It is a well-known arbitral principle that the parties' contract reflects their intent. The parties intended to carve out benefits for the Grievant as a result of the unique circumstances surrounding the County's transition from a Social Services Department to a Human Services Department. The carve out language clearly establishes that the Grievant will remain at the starting wage step until she becomes eligible for social worker certification. The Grievant has not attained social worker certification eligibility and therefore the County is in full compliance with the Side Letter when it pays the Grievant at the starting Coordinator I wage rate.

1/ Section 46.23(3), Wis. Stats., provides that when a county changes from a social services delivery model to a human service delivery model, employees shall continue their employment without loss of seniority, status or benefits with the human services department. This contradicts the testimony offered at hearing.

The Union asserts that this situation is so egregious that it is within the Arbitrator's authority to rectify the wage disparity under the contract interpretation theory that advocates the avoidance of harsh or absurd results. This theory does not apply in these circumstances. The avoidance of harsh or absurd principle applies when an arbitrator is presented with an ambiguous contract and two equally plausible interpretations, one of which would lead to just and reasonable result and the other interpretation would lead to a harsh and absurd result. Elkouri and Elkouri, How Arbitration Works, 6th ed. p. 470-471. That is not the present situation. The language of the Side Letter is unambiguous and not susceptible to more than one interpretation. Even if I were to agree that the Grievant's red-circled wage is harsh or absurd, the parties voluntarily agreed to this result.

As to the Union's argument that the Grievant was harmed because she did not have any contact with the Union while the Side Letter was being negotiated, the record does not support this assertion. The Grievant shared her concerns regarding the qualifications component to the

Union and the County Personnel Committee in a memorandum dated March 22, 1999, in which she requested that either the social worker certification qualification be removed or the parties enter into a side letter that identifies the Grievant's "unusual circumstances." Exhibit 46. Although the Grievant testified that she "kept her mouth shut" until after the Union voted on whether the position would be accreted into the Union, she had already communicated with the Union and County and had quite possibly initiated the creation of the Side Letter. Just as the Grievant was facing layoff by the County if the terms of the Side Letter were not resolved, she was also facing layoff if the Union was not supportive to accreting her position into the Union consistent with the Side Letter. The Grievant was between a rock and a hard place and made an intellectual decision on how to protect her continued employment.

Finally, the Union argues that the Grievant is qualified to do her current job, as evidenced by her expanded duties and the positive evaluation of her supervisor, and thus the County's 1999 conclusion that she was not qualified, which justified her being held at the starting wage, is no longer applicable. This argument relies on disputed testimony and exhibits which compare the case load and duties of the Grievant and the County social workers. Assuming *arguendo* that the Grievant and the social workers are performing comparable work, the fact remains that the parties reached agreement on the prerequisites for the Grievant to advance on the salary schedule. These prerequisites are contained in the Side Letter and the Union has not attempted to modify this language in the context of collective bargaining during the last 5 years. Grievance arbitration is not the appropriate forum to modify negotiated language. Having said this, this decision should not be read by the County as an affirmation that I find it acceptable to continue to label and pay the Grievant as a Coordinator I if she is in fact performing comparable functions with comparable responsibilities to the social workers who receive higher wages. I specifically do not reach a conclusion as to whether she is performing comparable work to a social worker.

AWARD

1. No, the County has not violated Article 14 (3)(d), as modified by the April 1, 1999 Side Letter of Understanding, by continuing to pay Linda Lindahl at the start rate of the Coordinator I position.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 15th day of December, 2004.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

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