

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**SHEBOYGAN COUNTY SUPPORTIVE SERVICES, LOCAL 110,  
AFSCME, AFL-CIO**

and

**SHEBOYGAN COUNTY**

Case 360  
No. 63617  
MA-12646

(Posting Grievance)

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**Appearances:**

**Ms. Helen Isferding**, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, on behalf of the Union.

**Mr. Michael J. Collard**, Sheboygan County Human Resources Director, 508 New York Avenue, Sheboygan, Wisconsin 53081-4692, on behalf of the County.

**ARBITRATION AWARD**

Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO (herein the Union) and Sheboygan County (herein the County) have been parties to a collective bargaining relationship for many years. At the time of the events chronicled herein, the collective bargaining agreement in effect until December 31, 2002, had expired and the parties were negotiating a successor agreement, which was ultimately adopted on June 17, 2004. On April 29, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement in the County's demotion of Carol Klarman without posting the position to which she was demoted. The undersigned was appointed to hear the dispute and a hearing was conducted on August 11, 2004. The proceedings were not transcribed. The parties filed briefs on September 20, 2004, whereupon the record was closed.

**ISSUES**

The parties were unable to agree to a statement of the issues. The Union would frame the issues as follows:

Did the Employer violate the contract when it failed to post the Court Clerk II position presently being held by Carol Klarman?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Was Sheboygan County required by the collective bargaining agreement to post a Court Clerk II position before demoting an employee from Judicial Assistant to Court Clerk II?

If so, what is the appropriate remedy?

The Arbitrator adopts the statement of the issues proffered by the County.

**PERTINENT CONTRACT LANGUAGE**

**ARTICLE 3**

**MANAGEMENT RIGHTS RESERVED**

Unless otherwise herein provided, the Management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

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**ARTICLE 25**

**SENIORITY**

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B. Vacancy/Job Posting

1. Whenever an approved vacancy is to be filled within the bargaining unit, notice of said vacancy shall be posted for five (5) working days prior to the public posting for the information of all employees on appropriate bulletin boards where bargaining unit employees work.

The vacant position shall be awarded to the most senior qualified applicant in the department where the vacancy exists. The departments for the Health and Human Services Department shall be defined in Exhibit A. If no one within the department applies for the position, the position shall then be offered to the most senior qualified bargaining unit employee before filling the position with a non-bargaining unit employee. Any employee filling a position under this section shall serve a probationary period of six (6) months, unless waived or lessened by the department head.

If during the probationary period the employee's performance is inadequate or unsatisfactory, the employee may return to his/her former position.

The employee also has the option to return to his/her former position within the first ninety (90) days of the probationary period.

If this position has been filled by another employee, the employee shall bump the person in their former position.

Each bumped employee shall have the right to return to his/her former position. If no position exists, the employee hired last shall be on lay-off status.

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### **BACKGROUND**

Carol Klarman has been an employee in the County Clerk of Courts Office and a member of the bargaining unit since October, 1990. Prior to March, 2000, she worked as a Court Clerk II. In March, 2000, Klarman was promoted to the position of Judicial Assistant. The Clerk of Courts Office has, at any given time, three Judicial Assistants, who work with the County's five Circuit Court judges and maintain the County law library. Klarman, as the junior Assistant, was assigned to work with one judge and maintain the library. In January, 2003, one of the other Judicial Assistants left and Klarman was assigned to work with two of the judges. The newest Assistant was given the library duties. Klarman had difficulty adjusting to her expanded duties and the Clerk of Courts, Nan Todd, and Klarman's Supervisor, Julie Schroeder, determined to attempt to return her back to the position of Court Clerk II, to which Klarman agreed. On April 21, 2003, Human Resources Director Michael Collard wrote Union Representative Helen Isferding to request the Union's consent in

arranging a position exchange between Klarman and Mary Lou Stewart-Mayr, who was the most senior Court Clerk II who had an interest in a Judicial Assistant position, without posting the positions. The Union did not agree and refused to cooperate with the proposal. Thereafter, Todd and Schroeder met with Klarman on June 3, at which time Klarman agreed to a disciplinary demotion back to Court Clerk II. Klarman chose to forego Union representation at the meeting. Subsequent to the meeting, Klarman was demoted back to Court Clerk II and the opening for a Judicial Assistant was posted. Another Court Clerk II, Pat Schmidt, posted for and received the Judicial Assistant position.

Upon receiving notice of the County's action, the Union, on July 15, 2003, filed a grievance over the County's failure to post the Court Clerk II position before demoting Klarman into it. The County denied the grievance and the matter proceeded through the steps of the contractual grievance procedure without resolution, resulting in arbitration. Additional facts, will be referenced, as necessary, in the discussion section of this award.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union asserts that the posting language is a key element of the contract and is of great value to the bargaining unit because it provides opportunities for job mobility based upon seniority and qualification. By demoting Carol Klarman into a Court Clerk II position without posting, the County denied other more senior employees the opportunity to seek that position. By doing so, the County asserted authority to circumvent the posting procedure and place employees in positions without regard to seniority.

The Union does not dispute the County's right to demote employees, but it must do so according to the plain language of the contract, which requires posting. Had the County posted the Court Clerk position, Klarman could have signed it. She would have gotten preference over any less senior applicant or any applicant from outside the bargaining unit. The County clearly was not hampered by the hiring freeze, because it was able to post the Judicial Assistant position. Also, it cannot argue that the Court Clerk II position was not approved because Klarman was able to move into it. Thus, the hiring freeze does not supersede the contract posting language, nor does the County's power to demote employees.

#### **The County**

The County maintains that Article 25 does not require posting except where there is an approved vacancy. There was not an approved Court Clerk II vacancy when Klarman was demoted, so posting wasn't required. The County table of organization had an additional Court Clerk position available, but the Clerk of Courts had sufficient Court Clerks on staff at

the time and there was no plan to expand to an additional position. Under arbitral law, there is no requirement that an employer fill every possible vacancy. Elkouri and Elkouri, How Arbitration Works, 6<sup>th</sup> Edition, p. 720 (2004) Further, the County Board had imposed a hiring freeze which precluded adding a Court Clerk even if the Clerk of Courts desired to do so. Thus, to be an “approved” position, a waiver from the hiring freeze would need to have been obtained from the Law Committee and the Human Resources Committee, which was not done. To accept the Union’s position, therefore, would require ignoring the word “approved” in the contract language.

It is further argued that posting is inconsistent with the notion of a disciplinary demotion. Demotion is one of the disciplinary options open to the County under Article 3. To impose a posting requirement on the demotion process would render it a nullity and would remove from the County the possibility of demoting an employee with performance problems, forcing termination instead. Had posting been required here, before demoting Klarman, the County would have had to get approval to fill a Court Clerk II position from the committees, which might or might not have agreed. Had approval been given and the position been posted, another more senior employee could have successfully applied for it, leaving the County with too many Court Clerks and no resolution to the Judicial Assistant problem. Further, were the grievance to be granted, the only tenable remedy would be to re-establish the *status quo* before the demotion, resulting in a worse situation for both Klarman and the employee who replaced her.

### DISCUSSION

In this case, the Union does not contend that management cannot demote employees, as indeed it could not, given the clear language of Article 3. Rather, it is contending that management’s right to demote employees is limited by the posting language contained in Article 25. The logic underpinning this position is that, under Article 25, all approved vacancies must be posted, that the County had to create an approved Court Clerk vacancy in order to demote Carol Klarman into it and that, therefore, the vacancy should have been posted, notwithstanding that its only reason for existence was to facilitate Klarman’s demotion. This position poses a number of difficulties.

Demotion, as used in Article 3, and as exercised here, is a disciplinary action. Klarman was demoted specifically because she was not adequately performing her job duties as a Judicial Assistant. (County Ex. 2) 1/ Given that management has this express authority, it is difficult to see how it could be effectively used under the constraints sought by the Union. For example, in this case, had Klarman been forced to post for a Court Clerk position, she could have been pre-empted by a more senior employee. In such a case, it is conceivable that she would end up in an even lower position than management had intended. It is even conceivable, depending upon available vacancies and Klarman’s qualifications, that she might have no position to post into at all and the demotion could become a *de facto* termination. Such a result

would clearly thwart the intent of progressive discipline and would lead to an unreasonable and overly harsh result. Absent some clear indication that such was the parties' intent when they bargained the contract, I am disinclined to read these provisions as requiring such a result.

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*1/ There is no contention by the Union that the County lacked just cause in issuing the discipline to Klarman, nor in the degree of the discipline.*

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The second problem is in the posting language, itself. Article 25B specifically states that the posting provision only applies to approved vacancies. The Union argues that any vacancy to be filled is, by definition, approved because, if it were not it would not exist. I find that such a reading would make the word "approved" superfluous and, given the preference that all terms of a contract be given effect, I am again disinclined to give the language that meaning. Specifically, I find that this language must be read with reference to County Resolution 9 (2002/2003), which placed a freeze on filling vacancies through December 31, 2003, and required any waivers from the policy to be obtained only through the joint approval of the Personnel Committee and the Departmental Liaison Committee. (County Ex. 13) Thus, notwithstanding the departure of any employee for any reason, a vacancy does not become an approved vacancy, such that it must be posted, until committee action makes it so.

In this case, there was no committee action to create a vacancy for a Court Clerk II, even though the table of organization provided the possibility of an additional position beyond the current number. In fact, the County' purpose in proposing a position switch to the Union in April was to avoid committee action, because of the logistical problems involved with seeking committee approval to facilitate a disciplinary demotion. Thus, because the committees had not approved creating a vacancy for a Court Clerk II, there was not a contractual requirement to post the position. This was possible because the language of the enabling ordinance refers to limits on hiring to fill vacant positions. Because Klarman was not hired, but was demoted, there was no need to approve the vacancy. Klarman's demotion, however, did result in a vacancy for a Judicial Assistant, which the County did need committee approval to fill, which was ultimately obtained. Thus, the County did not need to post a Court Clerk position before demoting Klarman, because at the time, there was no approved vacancy as stipulated in the contract.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

**AWARD**

Sheboygan County was not required by the collective bargaining agreement to post a Court Clerk II position before demoting an employee from Judicial Assistant to Court Clerk II.

The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 10<sup>th</sup> day of February, 2005.

John R. Emery /s/

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John R. Emery, Arbitrator