BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE COUNTY OF KENOSHA

and

KENOSHA COUNTY LOCAL 990, AFSCME, AFL-CIO
(COURTHOUSE AND SOCIAL SERVICES CLERICAL)

Case 233
No. 64105
MA-12805

Appearances:

Thomas G. Berger, District Representative, AFSCME, Council 40, AFL-CIO, P.O. Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of the Union.

Frank Volpintesta, Kenosha County Corporation Counsel, Courthouse, 912 – 56th Street, Kenosha, Wisconsin 53140-3747, appearing on behalf of the County.

ARBITRATION AWARD

Kenosha County, hereafter County or Employer, and Kenosha County Local 990, AFSCME, AFL-CIO (Courthouse and Social Services Clerical), hereafter Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint one of four staff members as Arbitrator to hear and decide the instant grievance. The undersigned was so appointed on November 22, 2004. The hearing was held in Kenosha, Wisconsin on February 9, 2005. The hearing was not transcribed and the record was closed on February 9, 2005, following receipt of post-hearing oral argument.

ISSUES

The parties were unable to stipulate to a statement of the issue. At hearing, the Union framed the issue as follows:

> Did the County violate the labor agreement when, during the restructuring of the Economic Support workload, the County placed three union members without regard to the provisions of the labor agreement?

If so, what is the appropriate remedy?

The County left it to the arbitrator to frame the issue.

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

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Section 1.2 Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

. . .

ARTICLE VI – SENIORITY

. . .

Section 6.2 Seniority – Personnel Actions. The practice of following seniority in promotions, transfers, layoffs, recalls from layoffs, vacations and shift preference to fill vacancies shall be continued. Ability and efficiency shall be taken into consideration only when they substantially outweigh consideration of length of service or in cases where the employee who otherwise might be retained or promoted on the basis of such continuous service is unable to do the work required. Full-time employees shall receive preference over part-time employees. A transfer is the filling of a new or vacated position and shall be governed by job posting.

. . .

Section 6.4. Layoff.

1. If the County must reduce the number of employees within a classification or within a department, the employee with the least amount of bargaining unit seniority shall be selected for layoff. The employee so selected shall have the right to bump a less senior bargaining unit employee, in an equal or lower classification of the employee's own choosing in any department, provided such employee has more seniority than the employee being bumped, and provided further, that such employee meets the same minimum qualifications as would be expected of anyone obtaining the job through the normal job posting procedure. Departments are defined in section 2.3.

2. An employee who is bumped in accordance with Paragraph 1 shall be afforded the same bumping rights provided in Paragraph 1 above, but if such employee is unable to bump any other employee, such employee shall be placed on layoff.

3. Where two (2) or more employees have the right to bump, the above bumping rights shall be exercised by such employees in order of their bargaining unit seniority from most senior to least senior.

4. An employee bumping into a different position shall serve the normal probationary period for that position. An employee who proves unable to perform the work in the different position during the probationary period shall not be allowed to again exercise bumping rights, but shall be placed on layoff. During such probationary period, an employee may voluntarily choose to be placed on layoff, but shall not be allowed to again exercise bumping rights resulting from that layoff.

5. An employee who is bumped out of his/her position shall have the preferential rights to return to such position if, for any reason, it should become vacant within sixty (60) days from the time the employee is bumped from it.

6. Employees laid off in a reduction of force shall have their seniority status continue for a period equal to their seniority at the time of layoff, but in no case shall this period be less than three (3) years. While any employees hold layoff seniority status, they

shall be given the opportunity to be recalled and placed in vacant jobs by using the job posting procedure. Laid off employees holding seniority status shall be sent copies of all job postings as they occur. If an employee is the senior qualified applicant on a posting and declines to return to work when awarded the position, such employee forfeits all accumulated seniority rights. If no qualified applicant is awarded the position, and a laid off employee declines to be recalled to the position, such laid off employee shall forfeit all accumulated seniority rights.

7. In the event an employee does not pass probation, the employee shall have the right to grieve such action subject to the just cause provisions of this agreement.

ARTICLE VII – JOB POSTING

Sec. 7.1. Procedure. Notice of vacancies which are to be filled due to retirement, quitting, new positions, or for whatever reason, shall be posted on all bulletin boards within 5 (5) working days; and employees shall have a minimum of five (5) workdays (which overlap two (2) consecutive weeks) to bid on such posted job. The successful bidder shall be notified of his selection and his approximate starting date within five (5) workdays.

. . .

ARTICLE XXII – MAINTENANCE OF BENEFITS – SEPARABILITY

Section 22.1. Benefits. Any benefits received by the employees, but not referred to in this document, shall remain in effect for the life of this agreement.

Section 22.2 Separability. In the event any clause or portion of the Agreement shall be invalidated, the remainder of the Agreement shall remain in full force and effect. Negotiations shall be immediately instituted to adjust such invalidated clause or portion of the Agreement.

BACKGROUND

In June of 1998, the County created the Outstation Project with grant funding from the State. The grant funding ended in December, 2002 and the County decided to fund the Outstation Project through other sources.

In September of 2003, the Union and its affected bargaining unit employees received written notification that management was instituting certain changes in the Division of Workforce Development (DWD) in the County's Department of Human Services. Among the changes was the elimination of Medical Assistance (MA) outstationing in its current form.

Prior to the change, three Economic Support Specialists (ESS) performed MA outstationing work, *i.e.*, Marlene Cline, Jesse Noyola and Marlene Fredrick. In 2003, management decided that the three positions would be better utilized performing other work at the Kenosha County Center (KCC) and the Kenosha County Job Center (KCJC)

As a result of the change, Cline, who had worked at Aurora Medical and the Health Department, was moved to the KCC. Cline's MA cases, which had comprised the bulk of her caseload, were transferred to ESS workers at the KCJC. Cline was assigned significantly more Child Care and Food Stamp cases, as well as KCC Intake.

As a result of the change, all of Fredrick's cases were reassigned to other ESS staff at KCJC and Fredrick was temporarily assigned to a KCJC position that had been vacated by Nicole Tristano. Thereafter, Cline posted for the position vacated by Tristano. Fredrick was then assigned intake duties at KCC that consisted primarily of FPW, simple MA cases, and Food Stamp cases.

As a result of the change, Noyola's MA cases were transferred to ESS workers at KCJC excluding Pre Screeners and Noyola worked full-time at KCC. Noyola retained a number of his non-MA cases and was included in KCC Intakes.

On or about October 30, 2003, the Union filed a Step II grievance claiming that the County's reassignment of bargaining unit employees Marlene Cline, Marlene Fredrick, and Jesse Noyola without "affording them the contractual language of layoffs and bumping rights" violated certain provisions of the collective bargaining agreement and arbitration awards. The Union requested that these three employees "be afforded their bumping rights as stated in the layoff language and be made whole." (Jt. #2)

At the Step II Grievance meeting, the Union argued that the elimination of the outstation project constituted a layoff, which provided full-time employees with bumping rights. The Union also argued that positions should have been posted when management reassigned two of the outstation staff to KCC and the former outstation workers were given newly assigned duties. (U #3)

This grievance was processed through the grievance procedure and denied by the County at all steps of the grievance procedure. Thereafter, the grievance was submitted to arbitration.

POSITIONS OF THE PARTIES

Union

The County reduced the number of employees in a department or classification. Under Sec. 6.4 of the parties' collective bargaining agreement, the affected employees had a right to bump less senior employees in an equal or lower classification of the employee's choosing in any department or division.

The County exercised its Sec. 1.2 Management Rights in a discriminatory manner and ignored the seniority rights guaranteed in Sec. 6.2. The County violated Article 22, Maintenance of Benefits, when it refused bargaining unit employees their contractual rights.

In remedy of the County's contract violations, the Arbitrator should order the County to allow the Grievants to exercise their seniority rights so they will have a choice of where to work, as provided in the labor agreement. The Arbitrator also should order the County to post the positions created as specified in Sec. 7.1 of the labor agreement.

County

Under Sec. 7.1, the County is required to post vacancies. In the present case, there was no vacancy because the staffing level remained the same. For a variety of reasons, including financial, the County had a situation in which it needed to reassign work.

The Management Rights clause of the labor agreement provides the County with the right to decide the work to be done and the location at which that work will be performed. The County has not violated the collective bargaining agreement.

DISCUSSION

Issues

The Union's statement of the issue presupposes that there has been a placement in violation of the collective bargaining agreement. Thus, it is not appropriate.

In the grievance, as filed, the Union asserts that the changes to DWD involved the layoff of Cline, Fredrick and Noyola and that these three employees have a contractual right to bump. (Joint Exhibit #1) As the grievance was processed through the grievance procedure, the Union also asserted that, when the County reassigned Cline, Fredrick and Noyola, the County created new positions that were required to be posted. (Union Exhibit #3)

Given the issues raised and processed through the grievance procedure, the undersigned finds the appropriate statement of the issue to be:

> Did the County violate the collective bargaining agreement when, following the reassignments of Marlene Cline, Jesse Noyola and Marlene Fredrick in September, 2003, the County did not permit these three employees to bump and did not post their positions as new positions?
>
> If so, what is the appropriate remedy?

Merits

As the undersigned has discussed in a recent case involving these parties, bumping rights are afforded to employees who are laid off under Sec. 6.4 of the parties' collective bargaining agreement. As the undersigned also discussed, such layoffs are effectuated by the County reducing the number of employees within a classification or a department, as that term is used in Sec. 2.3 of the parties' collective bargaining agreement.

In 1996, the County eliminated the HMO enrollment specialist position occupied by Lauren Fox and afforded Fox bumping rights. At that time, Fox was the only employee in that classification. When the County eliminated Fox's position, the County reduced the number of employees in a classification. Fox was laid off under the plain language of Sec. 6.4 of the parties' collective bargaining agreement. Under the plain language of Sec. 6.4, Fox had the contractual right to bump.

The evidence of Fox's situation does not establish any practice, or mutual intent of the parties, to expand the definition of a Sec. 6.4 layoff to include any situation other than that reflected in its plain language, *i.e.*, the County reducing the number of employees within a classification or a department, as that term is used in Sec. 2.3 of the parties' collective bargaining agreement. Nor does the evidence of Fox's situation establish any practice, or mutual intent of the parties, to provide bumping rights to any employees other than those laid off under the plain language of Sec. 6.4 of the parties' collective bargaining agreement.

Prior to the changes in DWD, DWD employed 27 full-time and 4 part-time ESS employees. After the changes, DWD employed 28 full-time and 2 part-time ESS employees. (U# 4 and 5) According to Union Representative Hannes, no employee was deprived of work as a result of these changes. According to Supervisor Fox, two part-time employees posted out and their FTE's were converted to one full-time position.

It is evident that there was a reduction in the number of employees in the ESS classification. It is not evident, however, that this reduction resulted from a County decision to reduce the number of employees in the classification of Economic Support Specialist, rather than from the voluntary actions of employees, such as posting into other positions.

The record does not provide a reasonable basis to conclude that the County reduced the number of employees within a classification or a department, as that term is used in Sec. 2.3 of the parties' collective bargaining agreement. Accordingly, the undersigned rejects the Union's assertions that there has been a layoff or that any employee is entitled to Sec. 6.4 bumping rights.

The Union also argues that, following the changes at DWD, Cline, Frederick and Noyola occupied new positions that were required to be posted. Initially, Fredrick was temporarily assigned to fill a vacancy, which vacancy was permanently filled when Cline

posted into it. The record indicates that it was the subsequent permanent assignment of Fredrick that is at issue.

In support of this argument, the Union relies upon the August 8, 1997 Award of Arbitrator Paul Hahn, which interpreted the parties' collective bargaining agreement. In his Award, Arbitrator Hahn considered and applied Sections 1.2, 7.1 and 7.2, which are also relied upon by the parties in this case. The parties have not negotiated any significant change in this contract language since it was interpreted and applied by Arbitrator Hahn.

In his Award, Arbitrator Hahn was confronted with a situation in which a laid off employee had bumped into a position and, thereafter, the County changed the caseload of that position. Arbitrator Hahn concluded that, "until the parties agree or negotiate otherwise, when the County creates a new position, as in this case before the Arbitrator, by significantly changing the caseload to which the employee bid, the County must post the job and allow qualified bargaining unit employees an opportunity to bid."

County Assistant Personnel Director Yule asserts that the parties "agreed otherwise" when they entered into the subsequent settlement of the Nicole Harmon grievance. In making this assertion, Yule relies upon statements she recalls being made by a former Union Representative, while that Union Representative was in the County's caucus. Specifically, Yule recalls that this Union Representative recognized the right of the County to reassign duties within a classification.

The Nichole Harmon grievance was the subject of a Consent Award dated September 23, 2002. This Consent Award is as follows:

LETTER OF UNDERSTANDING
BETWEEN KENOSHA COUNTY
AND
LOCAL 990 CLERICAL

The following constitutes the full and complete settlement of the Legal Secretary Position Grievance; Grievance #01-990C-007.

1. In addition to all contract agreements and settlements reached between the parties, when a position is posted, if the duties or assignments of the position vary from the duties performed by the person vacating such position such changes in duties shall be so noted on the posting.

2. This agreement shall be prospective from September 16, 2002 but shall not prejudice either party to any rights they may possess nor shall this agreement in any matter by (sic) cited as evidence in the Kim Emery case.

By its terms, the Consent Award is the full and complete settlement of the Harmon grievance. Accordingly, the County may not rely upon oral statements made by any Union Representative to claim any right not reflected in the plain language of the Consent Award.

The plain language of the Consent Award recognizes the County's right to change the duties and assignments of a vacated position so long as the posting notes these changes. It does not address any right to change duties of a position after an employee has bid into that position. Thus, the Consent Award does not establish that the parties have agreed to, or negotiated any, change that affects the application of the Hahn Award to this grievance.

In summary, the Hahn Award interpreted Sections 1.2, 7.1 and 7.2 of the parties' collective bargaining agreement and is binding upon the parties until "the parties agree or negotiate otherwise." Neither the September 23, 2002 Consent Award, nor any other record evidence, has established that the parties "have agreed or negotiated otherwise." Thus, the undersigned must give effect to the Hahn Award.

Immediately prior to the changes that gave rise to this grievance, Cline, Frederick and Noyola occupied Economic Support Specialist positions that are referred to by the parties as "Outstation Workers." According to DWD Division Director Adelene Robinson, after grant funding was secured, two new "Outstation Worker" positions were created and posted in 1998, using Union Exhibit #2; a third "Outstation Worker" position was created in 1999 by reassigning a vacated ESS position; and Cline received the third "Outstation Worker" position in 1999 by posting into the position vacated by Linda Shepherd, which posting is County Exhibit #3. Presumably, therefore, Noyola and Fredrick occupied the two new positions that were posted in 1998 as Union Exhibit #2.

In his Award, Arbitrator Hahn found that, based upon the history of the parties, the caseload that was "bid" was that of the previous incumbent. As a review of Union Exhibit #2 reveals, there is no previous incumbent. Rather, the phrase "Vacated By:" is followed by this language: "New Position Funded by State and Federal Grants; Position/ Hours Based on Continued Grant funding." The remaining language of the posting, dealing with "Nature of Work" and "Qualifications" is virtually identical to other Economic Support Specialist postings. (See County Exhibit #1)

Inasmuch as there was no "incumbent" identified in Union Exhibit #2, the caseload that was "bid" is determined by other aspects of the posting. This posting specifically states that the "position" is based upon the grant funding. It follows, therefore, that the position, including the caseload assigned to that position, is not static, but rather, is subject to change as grant funding changes.

In the present case, the grant funding ceased. For a period of time, the County continued to fund the Outstation project from other sources. When the County decided that this was not the best use of its resources, it discontinued the Outstation project and changed the positions of the three Outstation workers. Prior to and after this change, the three employees continued to perform work in their Economic Support Specialist classification.

In summary, under the Hahn Award, the County is required to post a changed position as a new position if the County has significantly changed the caseload that was bid by the employee. In the present case, the County did not significantly change the caseload that was bid by Noyola and Fredrick because, as set forth in Union Exhibit #2, the caseload that was bid was not a static caseload, but rather, was subject to change as the grant funding changed.

Under the facts of this case, the County did not create a new position when it changed the caseload of the positions occupied by Fredrick and Noyola. Thus, under the Hahn Award, the County is not required to post these changed positions as "new positions."

In the present case, there was also a change in work location. Arbitrator Hahn's Award does not address changes in work location.

As the County argues, Sec. 1.2, Management Rights, provides the County with the right to decide the location of work. Union Ex. #2 does not specify a work site. One may reasonably conclude, therefore, that the right to change the position as the grant funding changed includes the right to change the work location.

As discussed above, Cline's "Outstation Worker" position was obtained when she posted into County Exhibit #3. This posting, unlike that of Union Exhibit #2, names an "incumbent," *i.e.*, Linda Shepherd. The record fails to establish either the caseload, or the work site, of this incumbent. It is not evident that Cline's reassignment involved either a significant change in the "bid" caseload, or a change in work location. Accordingly, the undersigned cannot reasonably conclude that Cline's reassignment created a "new position."

Arbitrator Hahn did not address Sec. 6.2 of the parties' collective bargaining agreement, which provision is also relied upon by the Union in the present case. Sec. 6.2 requires that the practice of seniority be continued in layoffs. It is not evident, however, that the parties have any "practice' with respect to layoffs, other than that which is reflected in the plain language of the agreement. As discussed above, under the plain language of Sec. 6.4, no layoff has been established. Thus, there are no layoff seniority rights to enforce under Sec. 6.2.

Sec. 6.2 has only one reference to posting. Specifically, it identifies a "transfer" as the filling of a new or vacated position and requires that such a transfer be governed by job posting. For the reasons discussed above, it is not evident that, following the County's reassignment of Fredrick, Cline and Noyola, these employees occupied a new or vacated position. Accordingly, there is no Sec. 6.2 requirement to post a job.

Article 22.1 requires the maintenance of any benefit received by the employees but not referred to in the labor agreement. It is not evident that either the posting rights claimed by the Union, or the bumping rights claimed by the Union, were ever a benefit received by the Union. Thus, the County's denial of such posting and bumping rights is not a violation of Article 22.1.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The County did not violate the collective bargaining agreement when, following the reassignments of Marlene Cline, Jesse Noyola and Marlene Fredrick in September, 2003, the County did not permit these three employees to bump and did not post their positions as new positions.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 9th day of May, 2005.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
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