

BEFORE THE ARBITRATOR

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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 232  
No. 64104  
MA-12804

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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 – 56<sup>th</sup> 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 23, 2005. The hearing was not transcribed and the record was closed on February 23, 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 collective bargaining agreement and previous settlements by utilizing a temporary employee in a position where a regular bargaining unit employee should have been?

The County framed the issue as follows:

- 1) Is the grievance timely?
- 2) Is the grievance moot?

## **RELEVANT CONTRACT LANGUAGE**

### **ARTICLE I – RECOGNITION**

Section 1.1. Bargaining Unit The County hereby recognizes the Union as the exclusive bargaining agent for Kenosha County Courthouse employees and Social Services Clerical employees, excluding elected officials, County Board appointed administrative officials, and building service employees for the purposes of bargaining on all matters pertaining to wages, hours and all other conditions of employment.

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### **ARTICLE III – GRIEVANCE PROCEDURE**

Section 3.1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement or a work practice which may arise between an employee or the Union covered by this agreement and the County concerning wages, hours, working conditions or other conditions of employment shall be handled and settled in accordance with the following procedure:

Step 1. Any employee who has a grievance shall first discuss it with the employee's immediate supervisor with or without the presence of the steward at the employee's option. The employee and the immediate supervisor shall both sign and retain a copy of a "Confirmation of Step 1 Grievance" form. The immediate supervisor shall provide a copy of said form to the Chief Steward of the local as well as the First Unit Chair of the unit. The immediate supervisor shall respond to the grievant and the union within 10 working days following the meeting.

Step 2. If the grievance is not resolved at Step 1, within 10 working days after the immediate supervisor's answer to the grievant, the Union shall request a meeting with the division director (if absent the department head); or if applicable the elected official; or in offices without a department head, a divisional director, or an elected official, the office head. The request shall take the form of a written grievance on a form provided by the Union, which shall be

in triplicate and attached to a copy of the "Confirmation of Step 1 Grievance" form. A copy of the written grievance shall be furnished by the Union to the County's Director of Personnel Services and to the Union's Council 40 Representative.

Step 3. The meeting with the division director (if absent the department head); or if applicable the elected official; or in offices without a department head, a divisional director, or an elected official, the office head, the aggrieved, the steward and/or other representatives of the Local shall be held within 10 working days of receipt of said grievance. The division director (if absent the department head); or if applicable the elected official; or in offices without a department head, a divisional director, or an elected official, the office head shall give an answer in writing to the Union Representative who signed such grievance within ten working days of this meeting.

Step 4. In the event the grievance is not satisfactorily adjusted in Step 3, the Union may appeal the grievance to the Administration Committee of the County Board by notifying the Administration Committee of the County Board in writing with a copy to the Division of Personnel Services within 10 working days of completion of Step 3. This appeal shall state the name of the aggrieved, the date of the grievance, the subject and the relief requested. The Administration Committee and the Union shall meet to discuss the grievance within ten working days of the written appeal. If the Administration Committee fails to give its disposition of the grievance in writing to the Union within ten working days after the date the parties have met to discuss the grievance, it shall be settled in favor of the grievant. The parties may mutually agree to extend the time limit at this step in accordance with Section 3.3.

Step 5. All grievances which cannot be adjusted in accord with the above procedure may be submitted for decision to an impartial arbitrator within ten (10) working days following receipt of the County's answer to Step 4 above. The arbitrator shall be selected by mutual agreement of the parties; or, if no such agreement can be reached within five (5) days after notice of appeal to arbitration, the Union or the employer may request two (2) panels of seven (7) arbitrators each from the Federal Mediation and Conciliation Service. The arbitrator shall be selected from the panel by each party alternatively striking a name from the panel until only one (1) name remains, the party desiring arbitration striking the first name. Expenses of the arbitrator shall be shared equally by the parties.

The authority of the arbitrator shall be limited to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract

from, alter or modify any of the terms of this Agreement. The decision of the arbitrator shall be final and binding upon the Union and the County.

Section 3.2. Time Limits – Appeal and Settlement. The parties agree to follow each of the foregoing steps in processing the grievance and if, in any step except Step 4, the County's representative fails to give his answer within the time limit therein set forth, the grievance is automatically appealed to the next step at the expiration of such time limit. Any grievance which is not appealed to the next step within the time limits provided herein shall be considered settled on the basis of the County's last answer.

Section 3.3. Extension of Time Limits. Additional days to settle or move a grievance may be extended by mutual agreement. No retroactive payments on grievances involving loss of pay shall be required of the County prior to ninety (90) calendar days before the date the grievance was first presented in writing.

Section 3.4. Time Limits for Filing Grievances. Any grievance shall be presented within ten (10) working days after the date of the event or occurrence or said grievance will be barred.

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### **POSITIONS OF THE PARTIES**

#### **Union**

In this case, the Union is not challenging the position of the new Office Manager in the Medical Examiner's Office. The Union's concern is about who has done, is doing and will be doing clerical work in an expanding department.

The assignment of Anita Aiello to the County's Medical Examiner's office demonstrates that the County continues to use temporary employees in an improper manner. The Union asks that the County cease and desist using temporary employees in an improper manner.

#### **County**

The Union's testimony establishes that the grievance was not timely filed. Director of Personnel Services, Bob Riedl, objected that the grievance was not timely filed. Inasmuch as Anita Aiello is not longer employed by the County, the grievance is also moot.

The collective bargaining agreement governs the use of temporary employees in bargaining unit positions. In the present case, there was no bargaining unit position.

There were significant and serious problems in the Medical Examiner's office which generated a need for an Office Manager to provide on-site supervision and budget oversight. There may be some overlap in duties, but as indicated by the difference in wages, there is a distinction between Office Manager and clerical employees.

The County has not violated the collective bargaining agreement or prior arbitration awards.

### **DISCUSSION**

In this grievance, the Union asserts that the County's employment of Anita Aiello as a temporary employee in the Office of Medical Examiner violates the August, 1994 Arbitration Award of Arbitrator Daniel Nielsen. The initial question to be determined is whether or not this grievance is timely.

Union Representative Janis Sepulveda recalls that, in January of 2003, she received a list from the County that indicated that Anita Aiello was working as a temporary employee in the Medical Examiner's Office and that, in 2003, she received this list on a monthly basis. Sepulveda also recalls that in late 2003, a bargaining unit employee asked Sepulveda to investigate the employment of Aiello and that, following an investigation, Sepulveda presented the Union's concerns regarding Aiello's employment at Step 1 of the grievance procedure. Sepulveda could not recall the date of this Step 1 meeting, other than that she met with management in December of 2003.

Under Section 3.1 of the grievance procedure, when a grievance is presented, the parties are required to sign and retain a "Confirmation of Step 1 Grievance" form. Neither party introduced such a form with respect to this grievance.

The Union filed the Step 2 grievance on March 4, 2004 and, thereafter, it was processed through the grievance procedure. (Joint Exhibit #1) According to Sepulveda, the County did not raise an issue of timeliness until the day of the arbitration hearing.

Director of Personnel Services Riedl was not present at the initial steps of the grievance procedure, but was present at the Administration Committee, which is Step 4 of the grievance procedure. Riedl recalls that the County raised the issue of timeliness at this meeting of the Administration Committee. The record provides no reasonable basis to conclude that Riedl's recollection is less accurate than Sepulveda's.

Under Section 3.4 of the parties' collective bargaining agreement, a grievance is barred unless presented within ten (10) working days after the date of the event or occurrence. As stated above, this grievance challenges Aiello's employment as a temporary employee in the

Office of Medical Examiner. The Union first received notice of this employment in January of 2003. Assuming *arguendo*, that the Union did not have a reasonable basis to challenge Aiello's employment until Sepulveda investigated the employee complaint received in "late 2003," the failure of the record to identify either the date of Sepulveda's investigation, or her presentation of the Step 1 grievance, precludes a finding that this grievance was presented within the ten (10) working days set forth in Section 3.4 of the parties' collective bargaining agreement.

Various provisions of the contractual grievance procedure provide the parties with the right to extend grievance time limits. It is not evident that any extension was requested, or granted in the present case. Nor is there any evidence of a practice of ignoring the time limits set forth in Section 3.4 of the parties' collective bargaining agreement.

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

**AWARD**

1. The grievance is not timely.
2. The grievance is dismissed.

Dated at Madison, Wisconsin, this 17<sup>th</sup> day of May, 2005.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator