

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SHEBOYGAN COUNTY HEALTH CARE FACILITIES EMPLOYEES,  
LOCAL 2427 AFSCME, AFL-CIO**

and

**SHEBOYGAN COUNTY**

Case 366  
No. 64395  
MA-12884

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**Appearances:**

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

**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 Health Care Facilities Employees, Local 2427, AFSCME, AFL-CIO (herein the Union) and Sheboygan County (herein the County) are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the appointment of a Commission staff arbitrator to hear and decide the instant grievance. Coleen A. Burns was so appointed on March 25, 2005. A hearing was conducted on April 11, 2005 in Sheboygan, Wisconsin. The hearing was not transcribed. The record was closed on June 3, 2005, following receipt of written briefs.

**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 filled the receptionist position with students?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Is this grievance timely?

If so, did the hiring of two student receptionists displace regular employees in violation of the collective bargaining agreement?

**PERTINENT CONTRACT LANGUAGE**

**ARTICLE 10**

**PROBATIONARY PERIOD, DEFINITIONS, AND GENERAL CONDITIONS**

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2. **Definitions**

The following definitions shall apply to this contract:

- a. Full-Time Employee is a person hired to fill a regular full-time position.
- b. Part-Time Employee is a person hired to fill a regular part-time position.
- c. Temporary Employee is a person hired for a specific period of time and who will be separated from the payroll at the end of such period. (This includes seasonal employees, i.e., those on the active payroll only during the season in which their services are required.)
- d. Student Employee is a person who is attending school and who works less than thirty (30) hours a week during the school year. The time limitations shall not apply during vacation periods, but student employees shall not be used to displace regular employees.

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## ARTICLE 29

### GRIEVANCE PROCEDURE

Any dispute between the Union and the County or between any employee and the County concerning the effect, interpretation, application or claim of breach or violation of this Agreement shall be termed a "Grievance". Any such grievance shall be handled according to the steps hereinafter set forth. However, the County shall not be required to process as a grievance a complaint which is based upon an occurrence more than thirty (30) days prior to the date of it being offered as a complaint or a complaint which is filed more than thirty (30) days after the Union knew or should have known of the existence of grounds for such complaint.

Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union shall be handled as follows; except that grievances filed in discharge cases shall go directly to the Personnel Committee.

1. Step One: The aggrieved employee, the Union Committee and/or the Union representative shall present the grievance to the Administrator.

2. Step Two: If a satisfactory settlement is not reached as outlined in Section One (1) within one (1) week, the Union Committee and/or the Union representative shall present the grievance to the Personnel Director. Such a meeting as outlined in this section shall be held within fourteen (14) days of receipt of the written request from the other party. The decision of the Personnel Director shall be made within ten (10) days after said meeting.

3. Step Three: If a satisfactory settlement is not reached as outlined in Step Two (2) within one (1) week, the Union Committee and/or the Union representative shall present the grievance to the Personnel Committee. Such a meeting as outlined in this section shall be held within fourteen (14) days of receipt of written request from the other party. The decision of the committee shall be made within ten (10) days after said meeting.

4. Step Four: If a satisfactory settlement is not reached as outlined in Step Three (3) and no later than forty-five (45) days after the written response required in Step Three (3), either party may request the other to submit the grievance to arbitration. The parties then shall by mutual written communication request the Wisconsin Employment Relations Commission to name an arbitrator from its staff. The arbitrator shall make a decision on the grievance which shall be final and binding on both parties.

5. Costs. The cost of the arbitrator and his/her expenses shall be shared equally by the parties.

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### **BACKGROUND**

On September 21, 2004, the Union presented a written grievance to Sunny Ridge Administrator Jeanne Stark, which includes the following:

On 9-13-04 the union discovered that students are being used to displace regular employees in the office. This is a contract violation, page 6, article 10, under definitions, section d. Please apply any other part of the contract that may support this grievance

The "Adjustment required" was: "Please give this job to a displaced employee. Please pay any lost wages. Please make whole. Please stop this practice in the future."

By letter dated September 27, 2004 and addressed to Union Representative Helen Isferding, Administrator Stark denied the grievance at Step 1 of the grievance procedure. By letter dated November 24, 2004, County Human Resources Director Michael Collard denied the grievance at Step 2 of the grievance procedure. This letter includes the following:

A meeting was held at Step 2 of the grievance procedure in this matter on November 19, 2004. In this grievance the union is claiming that the use of student employees as receptionists at Sunny Ridge displaces regular employees, in violation of article 10, section 2, paragraph d of the collective bargaining agreement, which states that: "student employees shall not be used to displace regular employees."

If a regular employee is "displaced" whenever a regular employee might be used in place of a student employee, then under the contract language student employees could almost never be used. Yet, it has long been the practice at both Sunny Ridge and Rocky Knoll to use student employees on a regular basis in a number of positions, including receptionist. The County and the union have long treated this language as meaning that no current regular employees could be laid off in favor of the student employees. In this case the regular receptionist had voluntarily resigned, and so no regular employee was laid off.

This grievance is also untimely. The student receptionist positions that the grievance is based on were posted on April 30, 2004. This posting was placed on bulletin boards that are regularly viewed by the union. Under article 29 of the collective bargaining agreement the County is not required to process a grievance any complaint based on an occurrence more than 30 days

prior to the complaint being filed, or any complaint filed more than 30 days after the union knew or should have known of the existence of grounds for the complaint.

For both of the foregoing reasons, the grievance is denied.

By letter dated December 22, 2004, this grievance was denied at Step 3. Thereafter, the grievance was submitted to arbitration.

### **POSITIONS OF THE PARTIES**

#### **The Union**

##### **Timeliness**

No issue of timeliness was raised until the Second Step of the grievance procedure, on November 24, 2004. At that time, the County used the posting date of April 30, 2004 as the start of the time limits. The posting was done when Tracy Blau was still working and did not reasonably indicate that the students were being hired to perform Blau's work. There was no change in the County's Table of Organization that would alert the Union.

On June 10, 2004, Administrator Stark may have threatened to use students, but Blau's position was still vacant. The Union objected to this threat. The Union is not required to file grievances over threats.

Although the County argues that the Union normally orients new employees, such as the student receptionists, the record does not establish that such orientation occurred in this case. The students were hired mid-summer, when employees are frequently on vacation. It was not a time at which the students would have stood out.

The grievance was filed on September 21, 2004, well within the date of September 13, 2004, when the Union became aware of students having been hired. The grievance is timely and properly before the Arbitrator.

##### **Merits**

Article 10, Section 2(d), defines "student employee" and places certain restrictions upon their employment. Giving the word "displace" its plain meaning leads to the conclusion that the County has displaced a benefited position with a student.

In the past, the County argued the importance of a position existing on the Table of Organization. This argument was accepted when the Table of Organization was held to dictate whether a position exists. SHEBOYGAN COUNTY, Case 360; No. 63617; MA-12646 In the instant case, the Table of Organization shows Sunny Ridge with two receptionist positions and no student positions; Rocky Knoll has Receptionist/Student Receptionist.

In SHEBOYGAN COUNTY, Case 336; No. 60125; MA-11258, Arbitrator Jones stated that “The only way a temporary position can become a permanent position (and an LTE become a regular employee) is if the County Board formally takes action doing that. It can not happen accidentally or by inaction.” Arbitrator Jones reinforced that County Board action is needed to add a position on the Table of Organization by stating “. . . when the County Board approved the creation of a new job...” The Union maintains that so also should the question of students at Sunny Ridge have gone through the Board.

The students displaced the part-time receptionist, who was a bargaining unit member. The students took away a work opportunity from senior employees who could have posted for the position, including one who was on layoff due to physical limitations.

As established in Joint Exhibit #10, the Union definitely informed the County, before the County acted, of the consequences. The County has disregarded the contract and its own Table of Organization.

The grievance should be sustained. The receptionist should be posted and all employees on the payroll as of the date of this grievance should be allowed to post.

## **The County**

### **Timeliness**

Although the grievance does not identify the employees allegedly displaced, at each step of the grievance procedure the Union has referred only to a receptionist position. Tracy Blau, a regular part-time receptionist, resigned her position effective June 13, 2004. Her departure was not a secret and a going away celebration, attended by many union employees, was held at Sunny Ridge.

The two student receptionists were hired in June, 2004 and began work on June 28, 2004. Prior to recruiting outside the bargaining unit, the positions were posted at Sunny Ridge and Rocky Knoll; on bulletin boards in employee break rooms where employee information is customarily posted. As part of the normal orientation process, new employees, such as the student receptionists, meet with a Union representative.

Article 29 of the collective bargaining agreement provides that “the County shall not be required to process as a grievance a complaint which is based upon an occurrence more than thirty (30) days prior to the date of it being offered as a complaint or a complaint which is filed more than thirty (30) days after the Union knew or should have known of the existence of grounds for such complaint.” This grievance was first presented to management on September 21, 2004. The events were known, or should have been known, to the Union no later than June 28, 2004.

Any doubt regarding the Union's knowledge is removed by evidence of a June 10, 2004 Step 2 grievance meeting involving this Union and a laid-off employee who contended that she should be allowed to bump into the vacant receptionist position. The Sunny Ridge Administrator noted that the regular receptionist position would not be filled and that two student receptionists were being hired. Union Representatives Helen Isferding responded that the Union objected to the use of student receptionists, particularly arguing that the student receptionists would displace regular employees. This grievance was not pursued past Step 3 of the grievance procedure.

The Union's knowledge, in June 2004, of not only the facts, but also the grounds for the grievance, has been established without contradiction. The County raised the timeliness issue at its Step 2 response, as well as prior to the arbitration hearing. Under Article 29, this grievance is not timely and the County is not obligated to process a grievance that is untimely presented.

### Merits

The collective bargaining agreement provides that student employees may not be used to displace regular employees. "Displace" is not defined by the agreement, but the parties have a long history under this language.

For many years, Rocky Knoll, another County facility with employees covered by the Union's collective bargaining agreement, has had one regular receptionist, who covers most hours during week days, and two student receptionists. The two student receptionists work on weekends and occasionally fill in during the week. The current reception staffing at Sunny Ridge is exactly the same.

The student receptionists at Sunny Ridge do not work the same hours as had been worked by Blau, before she voluntarily left her position. Before the change, the regular receptionists each worked every other weekend and had regular hours during week days. After the change, the regular receptionist works every week day and not on weekends. If this arrangement violates the collective bargaining agreement at Sunny Ridge, there has been a violation at Rocky Knoll for many years without objection from the Union.

If a regular employee is "displaced" whenever a student employee is used for work that could be done by a regular employee, the use of student employees would be virtually eliminated. For many years, Rocky Knoll and Sunny Ridge have used student employees to do the same food preparation duties of Union bargaining unit members, without challenge from the Union.

"Displace" as that term is used in the parties' collective bargaining agreement means to put a current regular employee out of a job. The term has the same meaning as in Article 30:

The County agrees not to subcontract work if it would result in the lay-off or reduction in hours of current employees. The County reserves the right to assign displaced employees to other work areas.

No employee has been displaced by the student receptionists. Their use is permissible under the labor agreement. The grievance should be dismissed.

## DISCUSSION

### Timeliness

In his November 24, 2004 Step 2 response to this grievance, Human Resources Director Collard stated that the grievance was not timely. Collard also raised the issue of timeliness at the start of the grievance arbitration hearing. The County has preserved its right to raise the issue of timeliness in this proceeding.

In arguing that the grievance is untimely, the County relies upon Article 29 of the parties' collective bargaining agreement. Under Article 29, the County is not required to process as a grievance a complaint "which is based upon an occurrence more than thirty (30) days prior to the date of it being offered as a complaint or a complaint which is filed more than thirty (30) days after the Union knew or should have known of the existence of grounds for such complaint." If the complaint cannot be processed as a grievance, then the grievance arbitration provisions of the collective bargaining agreement are not applicable to the complaint and, therefore, the arbitrator has no jurisdiction to decide the merits of the grievance.

It is undisputed that the grievance at issue was presented to the County on September 21, 2004 and that the Union's "complaint" is that the County's employment of two Part-time Student Receptionists at Sunny Ridge has violated the parties' collective bargaining agreement "by displacing regular employees." Thus, the "existence of grounds for such complaint" is the County's employment of these two Student Receptionists.

At all times material hereto, Kay Kelling has been the full-time receptionist at Sunny Ridge. Prior to her voluntary resignation from employment, Tracy Blau was the regular part-time receptionist at Sunny Ridge. Blau and Kelling worked alternate weekends. Kelling is a bargaining unit employee, as was Blau.

Blau's last day of employment was in May, 2004. The two Student Receptionists at issue, *i.e.*, Tegan Hemb and Holly Gooding, perform the alternate weekend receptionist work that previously had been performed by Kelling and Blau. They also fill in for Kelling when she is absent from work.

On or about April 30, 2004, the County posted a notice at Sunny Ridge and Rocky Knoll. This posting, which is on Sunny Ridge letterhead, states as follows:



The following position is available immediately:

2 Part-time Student Receptionists: Day Shift, 8:00 am to 4:30 pm; No Benefits.  
Every other weekend – includes holidays.

Previously, students had not performed receptionist work at Sunny Ridge, but had performed receptionist work at Rocky Knoll.

At Sunny Ridge, this notice was posted in the employee break room and on a bulletin board, where employee information is customarily posted. Union Chief Steward Scott Doro confirms that he and other bargaining unit members regularly review this bulletin board to check for job postings and that the Union would have knowledge of matters posted on this bulletin board. This notice was removed on or about May 4, 2004. At least two other Union Officers and/or Stewards work at Sunny Ridge.

As the Union argues, when the County first raised the issue of timeliness, the County referenced the April 30, 2004 posting. As the Union further argues, the posting does not mention Blau's position. Thus, the posting, on its face, does not provide the Union with notice that the posting involved Blau's receptionist duties.

Prior to Blau's departure in May of 2004, she was the recipient of a "pot luck" going-away celebration. This celebration was held at Sunny Ridge and attended by various management and bargaining unit employees. The record does not establish that any Union Officer or Steward attended the "pot luck."

By June 3, 2004, Tegan Hemb and Holly Gooding were each offered one of the "2 Part-time Student Receptionists" positions posted on April 30, 2004. On June 10, 2004, County Human Resources Director Michael Collard and Sunny Ridge Administrator Jeanne Stark met with Union Representative Helen Isferding, a Union Steward from Sunny Ridge, and Grievant Sharon Schultz for a Step 2 grievance meeting. At this meeting, the Union argued that this Grievant, who had been laid off due to a permanent medical restriction, should be allowed to bump into the receptionist position which had been vacated by Blau. During this meeting, Administrator Stark stated that Blau's receptionist position would not be filled and that two student receptionists would be hired to work weekends and holidays. Union Representative Isferding stated that the Union objected to that, on the grounds that they would displace regular employees. The Schultz grievance was not pursued past Step 3 of the grievance procedure.

It is not clear that, at the time of the June 10, 2004 meeting, either Union representative understood that the two Student Receptionists had been hired. Thus, as the Union argues, it may have been premature for the Union to have filed a grievance at that time.

Hemb and Gooding each started work at Sunny Ridge on June 28, 2004. Although the record establishes that it is customary for Union Stewards to orient new hires, the record does not establish that such orientation occurred in this case.

Consistent with the April 30, 2004 posting, Hemb and Gooding worked alternate weekends. Hemb and Gooding performed the weekend receptionist work that previously had been performed by Blau and Kelling. Kelling continued to work full-time, but now worked week days.

The Union argues that, during summer vacation time, student workers go unnoticed. Given the information contained on the April 30, 2004 posting; Blau's departure in May, 2004; the parties' discussion of June 10, 2004; the visibility of receptionists; the evidence that Sunny Ridge previously had not employed student receptionists; and the change in Kelling's work schedule, the Union's argument that the Student Receptionists' employment would have gone unnoticed is not persuasive.

### **Conclusion**

Although there are at least three Union Officers and/or Stewards working at Sunny Ridge, only Union Chief Steward Doro testified at hearing. Doro states that he first learned that two students were performing receptionist duties at Sunny Ridge when he attended a Union meeting in September of 2004. Doro's individual knowledge is not determinative.

At the time of the June 10, 2004 meeting, Union Representatives knew that Blau's receptionist position had been vacated. Additionally, they had been notified that Blau's receptionist position would not be filled and that the County would be hiring two Student Receptionists to work weekends and holidays. Within a few weeks of their June 28, 2004 start date, the Union knew, or should have known, that the two Student Receptionists who were the subject of the June 10, 2004 discussion had been hired and were performing the work claimed by the Union in its grievance of September 21, 2004.

The grievance was filed more than thirty (30) days after the Union knew or should have known of the "existence of grounds" for the complaint that is the subject of this grievance. Accordingly, the grievance is not timely under Article 29 of the parties' collective bargaining agreement. The undersigned does not have jurisdiction to decide the merits of the grievance and, therefore, the grievance has been dismissed.

Based upon the above, 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 22nd day of August, 2005.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

