

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

AFSCME LOCAL 990

Case 220
No. 62791
MA-12427

(Contract Agency Performing Barrier Screening Tool)

Appearances:

Frank Volpintesta, Corporation Counsel, Kenosha County, Kenosha County Courthouse, 912 -56th Street, Kenosha, Wisconsin 53140, appeared for the County.

Thomas Berger, Staff Representative, Wisconsin Council 40, AFSCME, P.O. Box 044635, Racine, Wisconsin 53404-7013, appeared for the Union.

ARBITRATION AWARD

On October 6, 2003 Kenosha County and Local 990, American Federation of State County, and Municipal Employees, AFL-CIO filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a dispute pending between the parties. A hearing was initially scheduled for January 14, 2004 but was indefinitely postponed. The matter was rescheduled, and a hearing was conducted on July 28, 2005, in Kenosha, Wisconsin. No transcript of the proceedings was taken. At the close of the evidentiary hearing the employer made oral argument. The Union submitted a post hearing brief, received on September 13, 2005.

This Award addresses the sub contracting of certain W-2 screening work.

BACKGROUND AND FACTS

Kenosha County and Local 990, AFSCME are signatories to a series of collective bargaining agreements dating back many years. Relevant provisions of the applicable contract

are set forth below. The parties have a long history of litigation over the topic of sub contracting, which has resulted in a number of Arbitration Awards. This dispute is a part of that continuum.

Kenosha County is a Wisconsin Works (W-2) Agency. On, or about March 6, 2003 the State of Wisconsin Department of Workforce Development directed W-2 Agencies, including Kenosha County, to implement a formal computer assisted assessment as to whether there are barriers/impediments to W-2 clients successfully finding work. This test, the Barrier Screening Tool (BST) was implemented by Kenosha County on July 2, 2003. A grievance was initiated on, or about June 17, in anticipation of the contracting out of the work.

The Barrier Screening Tool is a computer prompted series of questions designed to identify the existence of personal barriers to normal functioning in an employment setting. The screening device explores areas such as domestic abuse, ability to function in a work setting, daily living activities, mental health issues, learning needs, alcohol or drug abuse, and other potential impediments to success in the work place.

This screening device is administered by a person (i.e. it is not self administered). The County has contracted the administration of the BST to Professional Services Group, a private vendor. County employees, though qualified to do so, do not administer the BST. It is the contracting of this work that is the subject matter of this grievance.

Under the Wisconsin Works system, a Financial and Employment Planner (FEP) is:

A case manager employed or contracted for a W-2 agency who provides eligibility determination, job readiness screening, employability planning, financial and employment case management services, makes referrals to other public or private assistance programs or resources, and determines eligibility for supportive services such as food stamps, Medical Assistance, Job Access Loans, child care, and Emergency Assistance.

The Wisconsin Works Manual includes the following provisions:

Financial and Employment Planner (FEP)

Much of the success of Wisconsin Works (W-2) relies on the involvement of the Financial and Employment Planner (FEP), the case manager for participants in W-2 employment positions.

The FEP is a specially trained case manager who assists the W-2 participant establish a realistic and achievable goal plan to become employed. The FEP's role is to help participants understand the personal work habits and life skills necessary to secure and maintain employment and to help them take responsibility for the well-being and support of their families.

The FEP's proactively help participants reach a goal of self-sufficiency and economic independence. They use extensive knowledge of local community resources, as well as the many supportive services available under W-2, such as child care, food stamps, Medicaid, and Job Access Loans. FEP's are trained to help participants become self-reliant and resourceful in working through potential solutions to challenges.

W-2 participants who secure unsubsidized jobs retain the FEP as a valuable resource and job coach.

...

Major FEP responsibilities:

- Determine eligibility for W-2 and other assistance programs such as child care, food stamps, Medicaid, Emergency Assistance, Job Access Loans, ESAP, and other services.
- Perform job placement screening and assign job search activities.
- Determine placement in a W-2 employment and training position if barriers prevent securing unsubsidized employment.

...

1.6.1 FEP as Public Employee

Current federal regulations allow only for public employees to determine Medical Assistance and Food Stamp eligibility. That public employee may be either a FEP or a Supportive Service Planner (SSP). Eligibility determination includes the eligibility interview, verifying information, and entering information into CARES at application, when changes are reported, and at review.

...

1.6.3.4 Financial and Employment Planner (FEP)

The FEP is central to W-2 integrated case management and signifies the merger of the former economic support and Job Opportunities and Basic Skills (JOBS) case manager functions. This means that participants in W-2 employment positions will interact with only one worker for all matters that concern W-2 participation, payments, and supportive services.

...

5.1.0 ASSESSMENTS

There are three steps in determining an individual's eligibility for placement on the W-2 ladder (Unsubsidized Employment, Trial Job, Community Service Job, W-2 Transition). First the FEP must determine nonfinancial eligibility. . .To determine the most appropriate placement, the FEP must complete an assessment.

Under W-2, the assessment process is one in which a W-2 applicant or participant's potential employability is evaluated. . . The assessment process may also include screening for specific limitations or barriers as well as referrals for formal assessments by qualified assessing agencies or individuals.

...

5.1.1.1 Informal Assessment at Application

The FEP must conduct an informal assessment prior to placing an individual in a W-2 placement.

Testimony indicated that the public employee requirement applicable to Medical Assistance and Food Stamp eligibility is not applicable to W-2 screening.

The regulations envision the FEP as a person. At the time of the inception of W-2, Kenosha County had an integrated team approach, and a very successful job center model. That team concept was incorporated into its successful application to be a W-2 Agent. The team consists of:

- 6 Economic Support Specialists, who are County employees. One of the duties of the Economic Support Specialists is to discuss the W-2 BST with participants. Participants are not required to take the test.
- 2 Case Managers, who are contracted from Goodwill Industries. The Case Managers do a good deal of the scheduling of the clients that is required by the process.
- 1 Employment Specialist, a contracted Goodwill Industries employee.
- 1 Child Care Case Manager, a contracted Goodwill Industries employee.

This group carries out the FEP duties described above. The FEP handles a spectrum of service delivery broader than, but including, W-2. The BST is W-2 specific. The results of the test, i.e. identified barriers to employment, are passed to the group for a placement decision.

Claudia Volpentesta, an Economic Support Specialist, testified on behalf of the Union. She testified that she is the FEP. Her testimony reflected the W-2 manual references to FEP. It was her testimony that she has historically done client screening, assessments, determines W-2 eligibility, placement and referral to supportive services. She has been trained to administer the BST. She testified that the BST elicits the same information she does in an intake screening for placement purposes. She believes the BST constitutes an added step, and an inefficiency. It was her testimony that the test either replaces or duplicates work she has historically performed.

Ed Kamin, Economic Support Program Coordinator, testified on behalf of the County. It was his testimony that the BST replaced other screening tests for purposes of compliance with W-2 regulations. Kamin testified about the Self Assessment Index (SAI), a computer scored test designed to screen welfare recipients for alcohol and drug problems as well as work attitude/motivation and stress coping abilities. Kamin also testified about the Victim Index (VI) an assessment which targets domestic violence issues. Both tests were, and are, administered by PSG. Each addresses employment and training of welfare recipients. Kamin also testified that Case Managers (contracted employees) perform an informal assessment with recipients, which goes to their educational levels. Each of these assessments is made available to the FEP team.

Kamin testified that Claudia Volpentesta has 460 cases, 20 of which are W-2. He further testified that at the time of implementation of the BST no one was on layoff nor was anyone's hours reduced.

ISSUE

The parties could not stipulate to the issue.

The County believes the grievance is untimely.

The Union believes the issue to be:

Did the County violate the collective bargaining agreement, when it assigned the work of administering the assessment tool known as the Barrier Screening Tool to a subcontractor.

Both of these issues will be addressed in this award.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - RECOGNITION

...

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 goods 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 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.

...

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.

...

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.

POSITIONS OF THE PARTIES

It is the position of the County that the grievance was filed late. The Union has 10 days to file. The BST was implemented on July 2, with substantial notice to the Union. The grievance was filed on July 21, or so.

On the merits, the County contends that the BST is the successor to previous tests, performed by contractors, used to screen/assess applicants. At a minimum, administration of the test is not exclusively bargaining unit work. The County points to an Award by Arbitrator Burns, discussed below, in support of its position.

The employer notes the history of subcontracting this screening test without grievances. It notes that there were no layoffs at the time.

The Union contends that the work of screening applicants has historically been performed by ESS workers, like Ms. Volpentesta, and that the BST constitutes a contracting out of that work. By so doing, the County has denied these workers work opportunity and potential overtime. It is the view of the Union that the use of this test creates workplace inefficiency in that it requires ESS workers to gather necessary information from a variety of sources, instead of collecting the necessary information at the point of intake as had historically been done.

The Union cites a 1982 negotiated agreement between the parties, which is quoted as providing:

The Employer will not assign bargaining unit work on a continuous basis to non-bargaining unit person(s) and/or agency.

It is this agreement that has been the source of ongoing grievance litigation.

DISCUSSION

I believe the grievance is timely. The contract requires the Union to take grievances to a steward. That apparently occurred, but no witness could identify when. There is a letter from the Union indicating that the grievance was filed on June 17. There is to be a "Confirmation of Step 1 Grievance" form filled out and preserved. No such form was entered into the record. The supervisor has 10 working days to respond. The Union letter indicates that the supervisor responded on June 24. The Union has 10 working days from the date of the response to grieve. The grievance is dated July 21. The answer to the grievance, dated August 1, contains a lengthy denial on the merits. It does not raise the timeliness issue.

Section 3.2 commits the parties to follow the timelines or be bound by the Employer's last answer. Section 3.3 allows for extensions by mutual agreement. These parties scheduled this for hearing, and then postponed the hearing to allow a related matter to proceed to decision. It was anticipated that that Award, by Arbitrator Burns, would influence the outcome of this dispute.

The employer did not raise the issue of timeliness in the answer. The parties extended the hearing date for a period of two years. The timeliness defense was raised after a two-year delay. It appears that all parties focused on the merits, and that the employer was not misled into a belief that the matter was resolved. To sustain the defense of timeliness under these circumstances seems an ironic turn of events. I believe these parties, by their actions, extended the time limits of the Agreement, by mutual agreement.

These parties held this dispute in abeyance, awaiting the decision in an Arbitration they had pending before Arbitrator Coleen Burns. That decision was issued on June 2, 2004 (KENOSHA COUNTY, MA-12207, 6/2/04, Burns) and is relied upon by the County in this proceeding. Arbitrator Burns was asked to decide whether or not the County violated the subcontracting provision of the agreement, as interpreted by a number of prior awards and a settlement agreement, when it contracted certain “host services” work at the Kenosha County Job Center, including reception, telephone answering and miscellaneous office duties. Arbitrator Burns rejected the Union claim in that proceeding in significant part because the Union waited 7 years to raise its claim, and she concluded that “.. the parties, by their conduct, have demonstrated a mutual understanding that the County’s contract with Goodwill to perform the work in dispute does not violate the 1982 Settlement Agreement or the Awards of Arbitrators’ Kerkman and Krinsky.”

While I do not believe that the Burns Award controls the disposition of this matter, the factual patterns are similar, and the analysis persuasive. The Burns Award is a matter of record in this proceeding. The Settlement Agreement referenced in that Award is not, nor are numerous Arbitration Awards interpreting the subcontracting provision of the Agreement.

Section 1.2 of the Collective Bargaining Agreement allows the County to “contract for work, services, or materials...”. It goes on to restrict such contracting: “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.” Here, the record indicates that there has been no layoff of employees, nor has any employee suffered a reduction of regular hours worked. The Union contends that there is a loss of potential overtime. While that is true, the clause in question does not address overtime hours. All testimony is to the effect that bargaining unit employees are fully employed. The employer contends that existing employees lack the time to administer the BST. The union contends that savings from the contractor could fund additional bargaining unit positions. However, the contractual standard is “...reduction of regular hours worked...”

As noted, there is a settlement agreement, disposing of certain grievances, in effect between the parties. It has been in effect since December, 1982. As set forth in the Burns award, that agreement provides the following:

SETTLEMENT AGREEMENT

It is hereby agreed by and between the County of Kenosha and Local 990, Clerical, AFSCME, AFL-CIO, that the grievance filed in the above-noted matter is hereby withdrawn with prejudice and that the grievances under the jurisdiction of Arbitrator Gundermann relating to the layoffs of personnel in the clerical unit is also withdrawn with prejudice upon the following terms and conditions, and upon the conditions listed in Appendix “A.”

1. That the parties will incorporate into their collective bargaining agreement, the language set forth in Appendix "A", Section III;
2. That the Employer will not assign bargaining unit work on a continuous basis to non-bargaining unit person(s) and/or agency; and

. . .

Dated this 7th day of December, 1982, Kenosha, Wisconsin

The Union points to paragraph 2 of that Agreement and claims its work has been contracted away. That claim rests on the premise that the Barrier Screen Test is bargaining unit work. The contract does not define bargaining unit work. Volpentesta testified that this employment barrier screening work is of a kind and nature that she has historically performed. I have no doubt that this is true. However, Kamin testified, without contradiction, that the SAI and VI are computer-assisted, screening devices (tests) directed at many of the same employment barriers as is the BST. According to Kamin, the two predecessor screening tests were always contracted to PSG. He indicated that County employees had not administered those tests.

Under these circumstances, the BST cannot be regarded as bargaining unit work.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 19th day of October, 2005.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

