

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
OUTAGAMIE COUNTY PROFESSIONAL EMPLOYEES UNION
Local 2416, WCCME, AFSCME, AFL-CIO

and

OUTAGAMIE COUNTY

Case 277
No. 63899
~~MA-2385~~ MA-12743

(Posting Grievance)

Appearances:

Ms. Mary B. Schoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL CIO, 807 Saunders Road, Apt. 1, Kaukauna, Wisconsin, appearing on behalf of the Outagamie County Professional Employees Union, Local 2416, WCCME.

Mr. James R. Macy, Attorney, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin, appearing on behalf of Outagamie County.

ARBITRATION AWARD

Outagamie County Professional Employees Union, Local 2416, WCCME, AFSCME, AFL-CIO, hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the Outagamie County, hereinafter "County," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on February 9, 2005, in Appleton, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply-briefs, the last of which was received on May 31, 2005, at which time the record was closed. Based upon the evidence and arguments of the parties, the Undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree to the substantive issues.

The County frames the issues as:

Did the County violate the collective bargaining agreement when it reassigned without posting Social Worker Lynn Schroeder from foster care, respite care duties within Children, Youth and Families Division to intake investigation duties also within Children, Youth and Families Division? If so, what is the appropriate remedy?

The Union frames the issues as:

Did the County violate the collective bargaining agreement when it refused to post a job vacancy? If so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I accept the County's framing of the issues.

RELEVANT CONTRACT LANGUAGE

ARTICLE I – MANAGEMENT

1.01 – Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend or discharge or otherwise discipline for just cause, and the right to relieve employees from duty or to layoff employees, is vested exclusively in the Employer. In keeping with the above, the Employer shall adopt and publish reasonable rules which may be reasonably amended from time to time. The Employer and the Union will cooperate in the enforcement thereof.

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ARTICLE III – PROBATIONARY AND EMPLOYMENT STATUS

3.03 A permanent employee is hereby defined as a person hired to fill a full-time or part-time position in the Table of Organization.

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ARTICLE VI – GRIEVANCE PROCEDURE

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Step 4. If a satisfactory settlement is not reached at Step 3, the Union shall notify the Human Resources Director in writing of its intent to submit the grievance to arbitration within ten (10) working days of receipt of the Step 3 response or last date said response was due. The parties shall each select three (3) arbitrators from the Wisconsin Employment Relations Commission staff. From those six (6) arbitrators, five (5) names will be drawn. The parties shall then proceed to alternately strike names from that panel until an arbitrator is selected. The striking order shall be determined by a coin toss. Arbitration proceedings shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. The cost of the arbitrator shall be divided equally between the Union and the Employer. In rendering his or her decision, the Arbitrator shall neither add to, detract from nor modify any of the provisions of this Agreement. The arbitrator shall be requested to render his or her decision within thirty (30) days after close of hearing or receipt of briefs, whichever is later.

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ARTICLE XIX – JOB POSTING

19.01 – In the event a job vacancy or new position occurs, a notice of such vacancy or new position shall be posted on the employee's bulletin board for at least five (5) working days not including Saturdays, Sundays and holidays. Said notice shall contain the prerequisites for the position, rate of pay and general duties of the job. Interested employees shall apply for the posted position in the Human Resources Department. If no regular employee applies, or is accepted, the Employer may hire from outside the work force. During the probationary period as defined in Section 3.01, an employee may apply for a posted position, but such employee shall have no right to grieve the employee's non-selection for the position.

19.02 – Employees chosen must meet the requirements and qualifications as established in writing by the Employer.

19.03 – Employees meeting these requirements and qualifications shall be selected on a seniority basis from within the seniority group where the vacancy exists and shall serve a thirty (30) calendar day trial period. If the employee fails to qualify or wishes to return, he or she may return to his or her former position and status. This trial period may be extended by mutual consent of the Employer and the Union. If no employee from within the seniority group applies or is qualified, employees from the remaining seniority group meeting these requirements and qualifications shall be selected on a seniority basis and shall serve the same trial period as described above.

19.04 – If a vacancy is not filled within six (6) months, it shall be reposted before hiring from outside of the work force. The Employer shall notify the Union, with a copy of the job posting, upon selection of the successful bidder.

19.05 – The Employer may fill a position on a temporary basis to meet the needs of the department by mutual agreement between the employee and the supervisory personnel involved. In such case no employee shall take a loss in wages. If the employee is performing a higher rated job, he or she shall receive the higher rated pay.

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BACKGROUND AND FACTS

The County Health and Human Services Department was created in 1988. The Department is divided into three divisions; Mental Health, Aging and Long Term Support, and Children, Youth and Families. The Children, Youth and Families division is divided into four units; Child Protection Intake Unit I, Child Protection Intake Unit II, Child and Family Unit I, and Child and Family Unit II. The Children, Youth and Families division and the Aging and Long Term Support division employ social workers and all social workers share the same job description. Social Workers are designated I through V, depending on their years of experience and education. The job description for the position title, Social Workers I – V, reads as follows:

Purpose of Position:

Under general supervision of respective Unit Supervisor, Social Workers I-V provide professional social work services to

individuals and families, helping them overcome personal, family, health and economic problems.

Duties and Responsibilities:

The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned.

- Determines, through interviews, assessments, home visits, investigations, etc., the range of services needed by individuals and families, explaining the services and discussing the client's rights and responsibilities.
- Recommends services from other resources and agencies to meet the clients' needs.
- Provides counseling and protective and supportive services for clients who are in at risk situations.
- Maintains case histories, and completes appropriate paperwork according to department policy.
- Testifies in court as required.
- Maintains regular and predictable attendance, works overtime/extra hours as required.
- Performs other duties as assigned.

Determined by the worksite assignment or field of activity, a Social Worker I – V may be assigned to specific units including Child Protection Unit, Child and Family Unit I, Child and Family Unit II, Youth Social Work Services Unit I, Youth Social Work Services Unit II, and Adult Services Unit and may perform some or all of the following:

CHILD PROTECTION UNIT

- Investigates reports of alleged abuse or neglect to determine validity of the report and legal basis for involvement, observing and interviewing child(ren), family members, and collateral contacts.
- Assesses risk and ensures safety of children using Wisconsin Risk Management Services (WisRMS).
- Arranges or provides medical care, out-of-home placement, court referrals, individual and family counseling, information and referral services, etc. as necessary.

- Provides on-call services as assigned.

CHILD AND FAMILY UNIT I

- Completes family assessment, determining origin of problems.
- Provides programs of preventative and rehabilitative treatment, assisting clients in developing inner resources and achieving adjustments.
- Provides for safety of child through safety determination plans.
- Develops treatment plan, providing services and monitoring progress toward treatment goals.
- Provides counseling for parents on issues such as discipline, relationships, establishing limits for children, etc.
- Conducts step-parent adoption screenings, interviewing candidates, checking references, contacting collateral, etc.
- Monitors foster parents' response to child's presence in their home, sharing progress information and providing support.
- Coordinates activities of Home Consultants, volunteers, etc., acting as a case manager.
- Places child in out-of-home placement if necessary.
- Develops and distributes appropriate educational and resource materials.
- Carries out and monitors court ordered conditions.
- Provides court related services in accordance with the Children's Code (Chapter 48) as it pertains to children in need of protection and services.

CHILD AND FAMILY UNIT II

- Completes family assessment, determining origin of problems.
- Provides programs of preventative and rehabilitative treatment, assisting clients in developing inner resources and achieving adjustments.
- Provides for safety of child through safety determination plans.
- Develops treatment plan, providing services and monitoring progress toward treatment goals.

- Provides counseling for parents on issues such as discipline, relationships, establishing limits for children, etc.
- Coordinates activities of Home Consultants, volunteers, etc. acting as case manager.
- Places child in out-of-home placement if necessary.
- Recruits and conducts foster parent, respite care provider, and step-parent adoption screenings, interviewing candidates, checking references, contacting collateral, etc., recruiting individuals when necessary.
- Monitors foster parents' response to child's presence in their home, sharing progress information and providing support.
- Develops and distributes appropriate educational and resource materials.
- Ensures public awareness of Unit functions and services through newsletters, support groups, media, etc.
- Carries out and monitors court ordered conditions.
- Provides court related services in accordance with the Children's Code (Chapter 48) as it pertains to children in need of protection and services.
- Sets up group activities and training workshops/classes.
- Accepts placement/respite care referrals.

YOUTH SOCIAL WORK SERVICES UNIT I AND II

- Provides supervision services to families with adjudicated and alleged delinquents and youth in need of protection or services, in accordance with the Children's Code (Chapter 48) and Juvenile Justice Code (Chapter 938), related statutes and Division policy.
- Provides preventative and rehabilitative treatment with wraparound services that assure protection of the public, accountability for the youth and family, and development of competencies for youth to become successful citizens.
- Develops plans for youth, setting expectations for areas needing improvement, and developing and imposing meaningful consequences as part of an appropriate behavioral control plan.
- Coordinates out-of-home placements to assure that youth and family needs are met and that successful reintegration is timely.

- Meets with youth and parents to assist with a plan for restitution, determining restitution amounts, payment plans and appropriate work site. Addresses needs of victims and provides structure to assure victim is fully compensated on a timely basis.
- Oversees youth's placement and progress in a community work site and assures successful completion of obligation.
- Provides on-call service as assigned.
- Conducts mediation/reconciliation interviews and victim/offender meetings.
- Assesses risk and needs of clients using the Juvenile Delinquency Classification System and POSIT.
- Assists in the implementation of the Independent Living Program, and Transitional Living Services.
- Provides liaison with juvenile corrections facilities and programs, assuring that youth receive the most appropriate care.
- Provides public relations within community to recruit mentors.
- Trains mentors and supervises mentor matches.

ADULT SERVICE UNIT

- Provides assessment, case planning, case management, coordination, and monitoring of services in the Community Options Program (COP), Federal Medicaid Waiver Program (CIP II and COP-W), and Alzheimer's Family Caregiver Support Program.
- Provides programs of preventative and rehabilitative treatment, assisting clients in developing inner resources and achieving adjustments to avoid premature institutional placement.
- Investigates and provides service to allegedly abused or neglected elderly persons under the provision of Wisconsin Statute 46.90 (Elder Abuse Reporting System).
- Provides assessment, case planning, coordination, and case management services to elderly, developmentally disabled (sic), chronically mentally ill, or other individuals in need of protection and service under Wisconsin State Statute Chapter 55 (Adult Protective Services).
- Processes I.A.167 referrals as necessary.

- Provides unit intake responsibilities as assigned.

Minimum Training and Experience Required to Perform Essential Job Functions

Social Worker I-V must have a valid State of Wisconsin Social Worker Certification. In addition, they must also have:

Social Worker I	BSW degree;
Social Worker II	BSW degree, six months experience or 108 hours of staff development activities;
Social Worker III	BSW degree, three years experience, 2 graduate courses, 180 hours staff development activities
Social Worker IV	Master's degree in Social Work;
Social Worker V	Master's degree in Social Work, one year experience;

OR any combination of education and experiences that provides equivalent knowledge, skill, and abilities. Transportation required.

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The County experienced a reduction in Foster Care Homes from 110 in 2000 to 52 as of March 2004. During that same time period, the number of protective service investigations increased by 100. As a result of these changes, the County re-evaluated its staffing patterns and determined it was necessary to make changes. Both foster care work and protective service work are done by social workers in the Child, Youth and Families Division. The Division Manager, Michelle Weinberger-Burns, met with the staff, informed them of the workload changes and the need to reassign duties, and requested ideas as to how the duties should be reassigned. Weinberger-Burns ultimately concluded in February 2004 that she would reassign Lynn Schroeder from a Social Worker position assigned the worksite assignment, Foster Care Coordinator, to a Social Worker position with the worksite assignment, Intake Investigator, in the same division. In moving Schroeder, the County did not post a position. As a result of the move, Schroeder's supervisor changed although her compensation did not change.

On March 29, 2004 the Union filed a grievance alleging that the County had violated Article 19.01 when it created, but did not internally post, a Child Protection Intake position. The County denied the grievance at all steps placing it properly before the arbitrator.

Additional facts, as relevant, are included in the **DISCUSSION** section below.

POSITIONS OF THE PARTIES

The Union

The County violated the parties' labor agreement when it did not post the position of Child Protection Intake worker and when it involuntarily reassigned Lynn Schroeder to the position.

The clear and unambiguous language of Article XIX of the parties' agreement requires the County to post all vacancies it intends to fill. The County cannot simply "reassign" an employee into a vacant position; the vacancy must be posted to the bargaining unit. The most senior employee that meets the requirements and qualifications shall be selected. The plain intent of Article XIX is to allow employees to make informed choices when deciding whether to post for a given position.

The County has a practice of posting job vacancies since 1999. Job duties are different between social workers in the Child and Family Unit I and the Child and Family Unit II. Job Opening postings indicate the different duties and supervisor.

Positions are posted even if the pay is the same. The evidence establishes that the County has posted openings on a regular basis and the County's attempt to characterize this as a "reassignment" is an effort to water down the language of the parties' agreement.

The County's attempt at hearing to show instances where jobs were not posted was misleading. The positions the County listed were jobs that were affected by restructuring or changes in delivery method or paperwork flow. In all instances presented, the employees maintained their core duties.

The County cannot be allowed to ignore the posting language of the parties' labor agreement. To do so would negate the value of seniority. Moreover, it would deprive employees the right to make decisions about the kind of work that they want to do. A decision in favor of the County would allow the County to post a Social Worker I - V position and the employee signing the posting would have no idea what type of work or clientele he/she would be working with.

The County

The contract is clear and unambiguous and reserves to the County the right to make the assignment it did in this case. The management rights clause provides the County the express right to manage the work and direction of the working forces. There is no language in the labor agreement that limits this right.

Article XIX, Job Postings, applies in circumstances where there is a job vacancy or new position. It is not necessary or required for the County to post reassignments of work. The parties listed only two situations in the agreement where the posting procedure applies. By expressly listing the two, all others must be excluded.

In negotiations for the 2002-2003 bargaining agreement, the parties discussed one additional situation for posting. Those discussions resulted in the parties defining a transfer as that situation where a social worker would change duties from one division to another. A Memorandum of Understanding documents this posting requirement. The parties specifically excluded the posting requirement for social work assignments and reassignments in the same division.

The present case does not involve a new position or a job vacancy. The record establishes that a new position involves a situation where the administration makes a recommendation for a new position through the budget process and to the governing committee. The creation of a new position requires a vote by the governing body. It is undisputed that no such new position was involved in this case. The record further establishes that a job vacancy involves a situation where some leaves a position due to promotion or leaving employment and management elects to fill the position. No such situation occurred in this case.

Citing Elkouri & Elkouri, the County points out it is well recognized that contractual provisions dealing with posting of vacancies are narrowly construed. Management has the right to determine whether a vacancy exists and if it desires to fill that vacancy. Therefore, the Union's assertion of past practice fails not only because this is a reassignment rather than a vacancy, but also because the County has the right to decide if a vacancy will be posted.

The Union in Reply

The County's reliance on the Memorandum of Understanding is misplaced. The Memorandum addressed the workweek of a specific group of employees and is inapplicable to the Job Posting provisions of the labor agreement.

As to the County's assertion that the Management Rights clause grants the County the right to "reassign" employees the County is in error when it claims that "Job Openings" are not "assignments". A Job Opening is the form which contains the details of a position including the wages, duties, qualifications, normal hours, job status, job description, location for application and the deadline for application. Positions are posted in Job Openings.

The County's assertion that new positions, those newly created and approved by the County Board, are the only ones that need to be posted is not supported by the labor agreement. If that were the case, then the County would never need to post a position.

The County has not reassigned employees in the past. The changes identified in Exhibit 6 are the result of reorganization and restructuring and the Arbitrator should disregard this exhibit for purposes of this case.

For the reasons stated herein, the Union requests the Arbitrator to sustain the grievance and order the County to post the vacancy.

The County in Reply

The County maintains that the Union has not satisfied its burden of proof showing that the labor agreement has been violated.

The Union is basing its argument on positions that do not exist. The County has social worker positions. The County does not have Child Protection Intake positions nor does it have Foster Care Coordinator positions. These are descriptions of the functions that the individuals may perform, but no such positions exist in the table of positions in the parties' collective bargaining agreement.

The Union's argument that the language of the labor agreement is clear and unambiguous supports the County's position. There is no express language in the bargaining agreement restricting the County's right to transfer or reassign employees.

Past practice supports the fact that the County has made reassignments for many years without posting a position.

Finally, it would be absurd and nonsensical to accept the Union's position. It is a long-standing axiom of contract interpretations that an interpretation should not lead to a harsh, absurd or nonsensical result. The Union argues that any change in duties requires the position be posted. As with many positions duties can be different, but the employees all hold the same position.

For the reasons noted, the County maintains it did not violate the collective bargaining agreement and as such, the grievance should be denied.

DISCUSSION

The question presented in this case is whether the County has the contractual authority to reassign a social worker within the same division. I conclude that it does.

The Union contends that the County failed to post a position, therefore I look first to the language of Section 19.01 which states that:

In the event a job vacancy or new position occurs, a
notice of such vacancy or new position shall be posted. . .

This language is clear and unambiguous; “a notice ... shall be posted,” when a job vacancy or new position occurs. The parties’ labor agreement does not allow for temporary assignments, therefore if Schroeder was filling a job vacancy or new position, it should have been posted.

As to whether Schroeder was filling a job vacancy, the general view is that absent restricting language in the Agreement, the employer has the right to determine whether a vacancy exists. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6TH EDITION, P. 720 (2003). In those circumstances that job duties are re-assigned, the County’s decision is subject to greater scrutiny so as to ensure that the County did not reassign duties in order to intentionally avoid the contractual posting obligations. Id.

Looking to the parties’ labor agreement, the County has broad management authority and complete discretion in managing and directing its workforce. No clause of the agreement establishes the specific number of Social Workers that are to be assigned to work in each division and/or unit and no clause places restrictions on the County’s determination of vacancies. As such, the County had the right to determine whether a vacancy existed provided that decision was reasonable and justified.

In this instance, a vacancy did not exist. No social worker vacated a position. Rather, the County identified a change in the child investigation and foster home caseloads and due to that change, it removed duties from Schroeder and added or replaced those duties with other duties.¹ Although I have some suspicion regarding the extent of the changing caseloads, especially since it had started to occur in 2000 and the County did not reassign any work until 2004, there is no evidence that contradicts or challenges the factual basis for the County’s decision.

The parties’ bargaining history and manner of dealing supports the conclusion that no vacancy existed in these circumstances. In 2002, the parties entered into a Memorandum of Understanding that addressed the workweek for social workers and defined two instances in which posting for a vacancy was applicable:

¹ The record is void as to baseline case load data for each of these areas. It is possible that the increases and decreases are insignificant when compared to the total number of cases in each area, but there is no evidence that this is the case and given that the Union did not challenge the significance of the increases and decreases, I have no reason to doubt that the changes were substantial and justified.

. . .

5. Employees who post for and are chosen to fill a vacancy, whether by transfer, i.e. a lateral movement from one division to another within the same wage grade, or by promotion, i.e. movement into a higher wage grade, will begin working a 40 hour work week subject to the approval process described in #1. Note: "Promotion" is not intended to include the movement from one wage grade to another in instances of reclassification described in Section 20.01(c).

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This language supports the County's position that the County posting obligation applies to instances when an employee laterally moves from one division to another or when the employee moves to a higher wage grade. Schroeder moved from one unit in the division to another unit in the division. The bargaining history boosts the County's position.

The evidence does not support the Union's argument that the County has a history of posting positions when job duties change. The Union offered Job Opening forms for 16 Social Worker positions dating back to 1999. Nowhere on these job opening postings does it identify any position title other than Social Worker. Although the postings indicate the unit and the duties of the vacant social worker, they also specifically state that the successful candidate "may be assigned to any and all Social Work functions performed with the Division." Moreover, the County has a history of doing just that, reassigning individuals and duties when it deemed it necessary due to restructuring, reorganization and changing caseloads. The County offered an exhibit that identified more than 20 reassignments – duties and/or personnel – in the Children, Youth and Family Division since 1989. Two of these reassignments are significant to the issue in this case in as much as when faced with the elimination of job duties assigned to individuals, as was the situation in this case, the County reassigned the individuals to another unit with different duties. This occurred in 1989 when the Intensive In-Home Team was dissolved and three individuals were reassigned to ongoing child protection functions and in early 2004, the reassignment when a Social Worker with Child and Family Unit I duties was reassigned to perform Child Protective Intake Unit I duties.

The Union challenges the County's reassignment exhibit asserting that those were reassignments prompted by restructuring or changes in delivery

method/paperwork flow and in all instances presented, the employees maintained their core duties. There is no evidence in this record to support the conclusion that the affected employees maintained their core duties. Although it is likely that in some of the listed situations the change to the employee's job function was minimal, there are more instances in which it would appear that the changes made were substantial. Moreover, I am not persuaded that there is any difference between reassignments being made due to restructuring or changing delivery methods and reassignments made due to changing caseloads. Regardless of the reason for the reassignment, the County has consistently exercised its management right and has made these reassignments.

Moving to the second instance that requires posting, the Union argues that the worksite assignment, i.e. Foster Care Coordinator or Investigative Intake, that each individual social worker holds, constitutes a position and therefore Section 19.01 is applicable. In reaching this conclusion, the Union is combining the terms "new" and "position" so as to conclude that any combination of duties that were not previously being performed by an individual constitutes a "new position" which requires posting. This conclusion is inconsistent with the evidence in that the parties have not defined "position" in the manner the Union asserts.

Section 3.03 states that positions are delineated in the table of organization and the table of organization lists "Social Worker", but does not list any individual social worker job assignments. The Union's witness, Frances Mohr, explained that the Job Opening forms, ". . . would be a social worker position in Children, Youth and Family Division. Reading the description of duties, it would be an ongoing position. . . ." Tr.p. 25. Mohr's testimony establishes that the position which was vacant was first, a social worker position, and second, had the duties of an ongoing worker. Mohr testified similarly with other Job Opening forms.

As to what is "new," Rosemary Davis, County Human Services Department Director, testified that a new position is one that did not previously exist and is created by the County. Mohr confirmed that the Job Opening forms which indicated "new position" on them were newly created positions – positions that were an addition to the total number of approved social worker positions that existed previously in the department. Thus, although limited, the evidence establishes that "new position" has been limited to solely those instances where a position is created through the County governmental process which results in an increase in the total number of staff members.

In conclusion the County has been reassigning employees and duties for greater than 17 years. No evidence was offered to rebut that this has been the County's consistent practice and no challenge has arisen until this grievance. The language of

the parties' agreement grants the County broad management rights and does not preclude the reassignments. I therefore find that the County acted within its contractual rights in moving Schroeder from one Social Worker position to another in the same division.

AWARD

1. The County did not violate the collective bargaining agreement when it reassigned, without posting, a social worker, Lynn Schroeder, from Foster Care/Respite Care duties within the Children, Youth & Families Division to Intake/Investigation duties, also within the Children, Youth & Families Division.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 6th day of December, 2005.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

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