

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CLERICAL/FOOD SERVICE LOCAL 727-C,  
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

and

**THE SCHOOL DISTRICT OF THE MENOMONIE AREA**

Case 60  
No. 64848  
MA-13030

*(Posting Grievance)*

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**Appearances:**

**Steve Day**, Staff Representative, Wisconsin Council 40, AFSCME, 318 Hampton Court, Altoona, Wisconsin 54720, on behalf of the Union.

Weld, Riley, Prenz & Ricci, S.C., by **Attorney James M. Ward**, 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

**ARBITRATION AWARD**

At all times pertinent hereto, Clerical/Food Service Local 727-C, Wisconsin Council 40, AFSCME, AFL-CIO (herein the Union) and the School District of the Menomonie Area (herein the District) were parties to a collective bargaining agreement which provided for binding arbitration of certain disputes between the parties. On June 2, 2005, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement as a result of the District's alleged refusal to post the recently accreted position of Payroll Clerk, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on August 18, 2005. At the hearing, the parties agreed to submit the dispute on a stipulation of facts. The proceedings were not transcribed. The parties filed briefs by September 6, 2005, whereupon the record was closed.

## ISSUES

The parties stipulated to the following framing of the issues:

Did the District violate the Article VII of the collective bargaining agreement when it failed to post the Payroll Clerk position (formerly the Payroll Coordinator), occupied by Bridget Schroeder, when it was accreted to the bargaining unit on May 9, 2005?

If so, what is the appropriate remedy?

## PERTINENT CONTRACT PROVISIONS

### ARTICLE I - RECOGNITION

#### SECTION 1:

The Board recognizes the Union as the exclusive bargaining representative on wages, hours, and conditions of employment for all regular full-time and regular part-time clerical and food service, excluding all supervisors, managers.

#### SECTION 2:

The purpose of this Article is to recognize the right of the Union to represent the employees referred to in Section 1 as bargaining agent in negotiations with the Board, as provided in the Wisconsin Statutes; however, such recognition is not to be construed as obligating the Board in any way to continue any functions or policies in effect at the time of such recognition, and the board specifically reserves the right to create or eliminate any positions as is deemed necessary.

#### SECTION 3:

Unilateral rights claimed in this Agreement shall be consistent with those rights and responsibilities conferred upon the Board and the Union by applicable state and federal law. Nothing contained in this Agreement shall be interpreted as granting to either party, hereto, authority to unilaterally act upon or change anything contained herein.

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### ARTICLE VII - SENIORITY

#### SECTION 1 - Seniority Defined:

Seniority, for benefit purposes, is defined as the employee's original date of hire. Seniority, for purposes of posting and bumping, is defined as the employee's total paid hours of work, excluding overtime, but including temporary layoffs and properly approved absences. Seasonal layoffs shall not

be considered temporary layoffs. Employment, for the purposes of determining seniority, shall include time for vacations, leaves of absence properly applied for and granted, temporary layoffs due to lack of work, military service prescribed by law, illness or accident under the Sick Leave provisions hereinafter set forth, or by mutual agreement between the Board and the Union. The employer recognizes the principle of seniority and such principle shall predominate where applicable, provided that qualifications of employees involved in any decision to which the principle of seniority is applicable, meet any necessary qualifications. The provisions contained in this article are only applicable within each of the respective recognized work groups set forth in Article I, Section 1. Seniority rights may only be exercised and recognized intra the respective recognized work groups by mutual agreement of the Board and the Union.

**SECTION 2 – Probationary Period:**

Any new employees hired by the Board on or after the effective date of this Agreement shall be considered as probationary employees for a period of six (6) months from the date of hire. Upon completion of the six (6) month probationary period of employment, unless extended by mutual agreement of the Board and the Union, the employee shall be placed on the seniority roster and the date of the employee's seniority shall be his/her date of hire; provided, however, that during such six (6) month probationary period, hereinbefore referred to, the Board may terminate the employment of any such probationary employee at its option, without right of appeal by said probationary employee in any manner whatsoever. Probationary employees may not avail themselves of the job posting procedure.

**SECTION 3 – The period of seniority of an employee shall be forfeited if:**

1. The employee is absent for more than eighteen months after the employee became eligible for payments under the District's long-term disability insurance.
2. The employee is laid off and not re-employed in a one (1) year period from such layoff.
3. The employee leaves the employment of the Board of his/her own volition.
4. The employee fails to notify the Board that the employee will return to work within forty-eight (48) hours after the employee receives from the Board the delivery of a notice of work available to the employee; or fails to return to work within eighty-eight (88) hours after the delivery of such notice to the employee. Such notice shall be sufficient if sent by certified mail, return receipt requested, to

the address for the employee last known on the employer's record. A copy of such notice shall also be mailed to the Union for informational purposes.

**SECTION 4 – Postings:**

All new and vacated positions shall be posted at each school for a period of ten (10) working days. Such postings shall state the name and location of the job to be filled, the date the job is to be filled, hours of the job, qualifications of the job, and the rate of pay. The qualifications set forth therein shall be consistent with the job requirements of the position to be filled. The process for filling above positions shall be conducted per established round table Posting Meeting Procedure.

The Board may temporarily fill a vacancy, when necessary, while the posting procedure is carried out. Following are definitions for the three terms of new, vacant and displaced:

**New:** The following criteria is the only criteria for defining new:

1. An addition to the number of hours per day of forty-one percent (41%) or more.
2. A change in daily start time of two and one-half (2½) hours or more within the term of the current collective bargaining agreement.
3. A plus or minus three percent (3%) variance in the number of days per year is possible without posting or implementing bumping procedures.

**Vacant:** A position from which an employee leaves for any reason.

**Displaced:** No longer a position of work or a permanent reduction in the number of hours per day.

**SECTION 5 Transfer – Layoff – Recall – Bumping:**

1. Layoff: In the event it becomes necessary for the Board to lay off employees for any reason, employees shall be laid off in the inverse order of their seniority.

2. Recall: Employees shall be recalled from layoff according to their seniority. Recall rights shall end should an employee refuse recall to a position in the bargaining unit of equivalent, or more, hours of his/her former position. A full-time employee on layoff status may refuse recall offers of part-time, substitute, or other temporary employment without loss of rights to the next available full-time position for which the employee is qualified. Full-time

employees on layoff status shall not lose rights to a full-time position by virtue of accepting part-time or substitute appointments with the District. It is understood that the District considers all AFSCME employees working eight (8) hours per day as full-time employees.

3. Bumping: A displaced employee will have five (5) days to use seniority to bump less senior employees provided he/she is qualified to perform the work. An employee may elect to take the bump.

4. Transfer:

a. Filling of Postings: Vacancies shall be awarded to the most senior employee qualified to perform the work available. The qualifications of employees are matters of fact and include knowledge, skill, and efficiency.

b. Qualification Period: Employees who are not able to satisfactorily perform the work required by any position awarded pursuant to Section 5, of the Article, shall be returned to the former position held by such employee within a thirty (30) working-day qualification period. Employees shall be returned to their former positions should they request the same within thirty (30) working days. Employee's awarded positions after the school year ends shall begin their qualification period when Board of Education approved (school calendar) calendar begins.

Employees actively in a qualification period may not avail themselves of the job posting procedure. The original position will be filled by a substitute until the qualification period is over.

### **BACKGROUND**

Clerical/Food Service Local 727-C and the School District of the Menomonie Area have been in a collective bargaining relationship for many years. Prior to the year 2000, the bargaining unit had included a position of Payroll Clerk. In 2000, the position was retitled as Payroll Coordinator and removed from the bargaining unit pursuant to a unit clarification proceeding before the Wisconsin Employment Relations Commission. In early 2005, the Union commenced a unit clarification proceeding to have the position returned to the bargaining unit. As a result of negotiations between the parties, a stipulation was reached whereby the position was again retitled as Payroll Clerk and accreted back into the bargaining unit on May 9, 2005. However, the parties could not agree as to whether the District was required to post the Payroll Clerk position or whether it could continue to be filled by the incumbent. As a result, the Union filed a grievance on May 10, 2005. The grievance was processed through the contractual procedure, resulting in this arbitration.

The parties agreed to submit the grievance for arbitration upon the following stipulation of facts:

1. The incumbent Payroll Clerk is Bridget Schroeder, who was hired as Payroll Coordinator in June, 2000 and continues in the position.
2. In April, 2005, management stipulated to the return of the position to the bargaining unit.
3. When the position was returned to the bargaining unit, it was not posted and Bridget Schroeder remained in the position.
4. Bridget Schroeder was a member of the clerical bargaining unit at the time she was hired for the Payroll Coordinator position, and relinquished her seniority.
5. Diana Hatli was Payroll Clerk in 2000 and was promoted to a management position (Accounting Coordinator).
6. Bridget Schroeder was Accounts Payable Clerk in the bargaining unit at the time of her hire as Payroll Coordinator.
7. Bridget Schroeder's current pay rate was \$19.66 per hour at the time the position was accreted and was raised to \$20.65 on July 1, 2005.
8. The parties are currently bargaining over an appropriate wage rate for the position.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union asserts that the contract recognizes the Union as the exclusive bargaining agent for the unit and determines how positions are to be filled. The Contract does not apply to District employees who belong to other bargaining units or who are not represented.

The posting provisions in Article VII establish that this is both a new and a vacated position. It is new because it was added to the bargaining unit in May, 2005. This issue was addressed in WASHBURN COUNTY, DEC. NO. 28721-A (McLaughlin, 4/22/97). It is vacated because the position of Payroll Clerk was removed from the unit in 2000 and was, thus, vacant when it was accreted back into the unit in 2005. Bridget Schroeder gave up her bargaining unit seniority when she left the unit in 2000 and so when she returned in 2005 she had the same status as a newly hired employee and, under Article VII, Section 2, must serve a six month probationary period before she becomes eligible to accrue seniority.

Past practice also supports the Union's position. In 1992, the Payroll Clerk position was also removed from the Union. When it was returned to the unit in 1994 the position was posted. That same procedure should have been followed here.

The District should not be allowed to circumvent the posting and seniority provisions of the contract in order to place its hand picked employee in the job. If it can do so, there is nothing to stop it from using the same tactic in the future to get favored employees into Union positions.

### **The District**

The Union bases its argument on Article VII, dealing with seniority, and apparently contends that the position of Payroll Clerk should have been awarded to the most senior qualified employee. This presumes the existence of a vacancy, which is defined in Article VII, Sec. 4, as "...a position from which an employee leaves for any reason." There is, in fact, no vacancy because the incumbent has held it, and continues to hold it, without interruption, since 2000. Under the contract language, bargaining history and past practice of the parties, there is no basis for finding that the position has been vacated.

It is also not possible under the contract for the Union to argue that this is a new position. Article VII, Sec. 4, also specifies what constitutes a "new" position and sets forth three criteria which are the only bases for determining the existence of a new position. The position of Payroll Clerk meets none of the criteria. Since the position of Payroll Clerk is neither vacated nor new, it need not be posted under the contract. Article VII, Sec. 1, of the contract states that seniority "...shall predominate where applicable," but that general language cannot take precedence over the more specific language of Article VII, Sec. 4., otherwise any senior employee could bump any junior employee, which would lead to chaos.

Finally, the equities of the case should be considered. Bridget Schroeder has been doing the Payroll Coordinator (now Payroll Clerk) job for five years. There is no evidence that her work has been substandard or deficient. Nevertheless, under the Union's argument she now stands to lose her job simply because her position was added to the bargaining unit. This should only be allowed to occur if the contract language permits no other solution, which is not the case here.

### **DISCUSSION**

In this case, the Payroll Clerk position is one that has been in and out of the bargaining unit a number of times over the past several years. The Union is of the view that when it was most recently accreted back into the unit in May, 2005, it was a new and vacant position. Therefore, the District, if it wanted to fill the position, was required to post it and award it to the most senior qualified applicant under Article VII, Sec. 5(4)(a) of the contract. The District argues that the position is neither new nor vacant. It is not new because it does not meet the contractual definition of a new position and it is not vacant because the incumbent remains in

the position. It further argues that to require the District to post the position would work an injustice on the incumbent, who has performed satisfactorily for five years, but who would likely be bumped and lose her position to a more senior employee if the job were posted.

Article VII, Sec. 4, specifies the criteria for determining whether a position is a new position under the contract, as follows:

The following criteria is the only criteria for defining new:

1. An addition to the number of hours per day of forty-one percent (41%) or more.
2. A change in daily start time of two and one-half (2½) hours or more within the term of the current collective bargaining agreement.
3. A plus or minus three percent (3%) variance in the number of days per year is possible without posting or implementing bumping procedures.

(emphasis in original)

The District argues that unless a position meets one or more of these criteria it cannot be considered a “new” position under the contract and that none of these criteria apply to the payroll Clerk position. I disagree.

In my view there are two ways of analyzing the language, either of which would lead to the same conclusion in this case. Under one approach, this language only applies to already existing bargaining unit positions, which are significantly altered, and that the language sets out the parameters that determine at what point a position has been changed enough to qualify as a “new” position. Under this approach, the language does not apply to non-existent positions that are created and added to the unit, which are presumed to be new. Applying this logic, the Payroll Clerk position did not exist as a bargaining unit position prior to May 9, 2005 and when it was accreted on that date it became a new position, regardless of the language of Article VII, Sec. 5(4)(a).<sup>1</sup> At that point it became subject to the terms of the contract and the posting provisions of Article VII. The District argues forcefully, however, that this cannot be because the underscoring of the word “only” in Article VII, Sec. 4 clearly requires this language to apply to all positions.

The second approach to interpreting the language is that prior to May 9, 2005, the Payroll Clerk position had no status as a bargaining unit position and was a nullity. Therefore,

Page 9

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<sup>1</sup> Because the collective bargaining agreement, by definition, only addresses positions within the bargaining unit, its provisions have no applicability to non-represented positions or positions in other bargaining units. For the purposes of the collective bargaining agreement, therefore, prior to May 9, 2005, the Payroll Clerk position was non-existent.

at the time it was accreted to the unit it was, for the first time, accorded status as a position under the contract. Thus, prior to May 9, the position had no start time or assigned hours per day as those terms have meaning under the contract. After May 9, the workday parameters of the position were added to the contract for the first time and thus, by definition, exceeded the criteria set forth in Article VII, Sec. 4. Viewed in this way, the Payroll Clerk position also satisfies the criteria of the contract and qualifies as a new position.

Assuming, *arguendo*, that the District is right about the exclusivity of Article VII, Sec. 4, and that the Payroll Clerk position does not meet its criteria, it is not clear what status is to be accorded to the Payroll Clerk position. Is it somehow to be just summarily folded into the bargaining unit, along with the incumbent employee, as if it had always been there? If so, why are the parties negotiating over the appropriate wage rate for the position, as indicated in Stipulation #8? And why, if the incumbent is being added to the bargaining unit and is being allowed to retain the position, is she not given credit for her five years in the position for purposes of seniority and contract benefits such as vacation and longevity pay? These problems militate against any finding that the Payroll Clerk position, although non-existent as a bargaining unit construct prior to May 9, 2005, should be regarded as other than a new position after that date.

The language is clearly ambiguous, as evidenced by the fact that there are multiple plausible interpretations of it that could be applied to these circumstances. The typical recourse in such a case would be to refer to past practice or bargaining history for illumination as to the meaning the parties intended the language to have, but the record is devoid of any such. Nevertheless, it is a recognized precept of contract interpretation that contract language should not be interpreted in such a way as to lead to unreasonable results and, in my opinion, any interpretation that a position upon being added to the bargaining unit is anything other than “new” would be unreasonable. For example, suppose that there were no position to be accreted to the unit, but that the District created a previously non-existent position to fill a need and agreed to place it in the bargaining unit? Under the District’s interpretation of the meaning and scope of Article VII, Sec. 4, such a position would not qualify as “new” under the criteria any more than does the Payroll Clerk position here. Clearly, this would not make sense, and so the language of Article VII, Sec. 4 cannot be interpreted in that way. In my view, therefore, Article VII, Sec. 4 was not intended to apply to this situation and the Payroll Clerk position is, as of its addition to the bargaining unit, to be considered a new position.

The language of Article VII, Sec. 4 states, “All new and vacated positions shall be posted...” Clearly this language was intended to be read to include all positions that are either new or vacated, not both. Thus, if a position is new, or if it is vacated, and assuming the District intends to fill it, it is to be posted. Having determined that the Payroll Clerk position was new in May 2005, it is thus a moot point as to whether it also was vacated as that term is used in the contract. As a new position, the District was contractually obligated to post it and was not entitled to retain the incumbent in the position. By retaining Ms. Schroeder in the

position after it was accreted instead of posting it, the District violated Article VII, Sec. 4.<sup>2</sup> Ms. Schroeder has, however, been a member of the bargaining unit since the position was accreted and has been accruing seniority since that time.<sup>3</sup> Thus, she will have the right to post for the position herself and, should a more senior employee apply and succeed in obtaining the Payroll Clerk position, she will also have the right to post into any other vacant position for which she is qualified or bump any less senior employee whose position she is qualified to do.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

### AWARD

The District violated Article VII of the collective bargaining agreement when it failed to post the Payroll Clerk position (formerly the Payroll Coordinator), occupied by Bridget Schroeder, when it was accreted to the bargaining unit on May 9, 2005. The District is hereby ordered to post the Payroll Clerk position and fill it in accordance with Article VII, Sections 4 and 5, of the collective bargaining agreement. Should the filling of the position result in the loss of the position by the incumbent, Bridget Schroeder, she shall be entitled to post for any vacant position in the bargaining unit for which she is qualified or to bump any less senior employee in the unit whose position she is qualified to fill, in accordance with Article VII, Sec. 5.

The Arbitrator will retain jurisdiction of this award for a period of 60 days in order to address any issues that may arise in the implementation of this award.

Dated at Fond du Lac, Wisconsin this 20th day of January, 2006.

John R. Emery /s/

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John R. Emery, Arbitrator

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<sup>2</sup> The District argues forcefully that to uphold the grievance would be inequitable to Ms. Schroeder inasmuch as she has filled the position ably since 2000, but would likely lose it to a more senior qualified applicant and thereby be laid off. This, however, was the risk she ran when she took a position outside the bargaining unit and forfeited her seniority. Further, to allow her to retain the position without having to post would arguably be inequitable to the other bargaining unit members who have accrued seniority over the years in part to be able to take advantage of opportunities for advancement.

<sup>3</sup> Article VII, Sec. 1 and Sec. 2 specify that seniority begins to accrue from an employee's date of hire, which in this case would be the date Ms. Schroeder was returned to the bargaining unit, May 9, 2005, so long as they successfully complete a six-month probationary period, which in this case would have been November 9, 2005.