

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KEWAUNEE COUNTY

and

**KEWAUNEE COUNTY PROFESSIONALS UNION
LOCAL 2959A, AFSCME, AFL-CIO**

Case 67
No. 64210
MA-12840

(Seniority Date Grievance)

Appearances:

Elma E. Anderson, Corporation Counsel, Kewaunee County, 613 Dodge Street, Kewaunee, WI 54216, appeared on behalf of Kewaunee County.

Neil Rainford, Staff Representative, 1311 Michigan Avenue, Manitowoc, WI 54220, appeared on behalf of Local 2959A, AFSCME, AFL-CIO.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the County agreed that the Wisconsin Employment Relations Commission designate an Arbitrator to resolve a grievance filed on behalf of Michelle Dax (Dax or Grievant, herein). The Commission designated Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held at the Kewaunee County Courthouse on September 28, 2005. A transcript was prepared. The parties filed written briefs by December 13, 2005, closing the record.

ISSUES

The parties did not stipulate to the issue. The County states the issue as:

Did Kewaunee County violate any provision of the collective bargaining agreement by treating Michelle Dax as a newly hired employee when she was selected to fill the vacant Benefit Specialist position in November 2003?

The Union states the issue as:

Did the County violate the collective bargaining agreement when it refused to recognize Michelle Dax's date of hire with the County in calculation of her seniority, probationary status, and rate of pay? If so, what is the appropriate remedy?

The record best supports the selection of the County's statement of the issue, with the addition of the Union remedy issue should the Union prevail on the merits.

RELEVANT CONTRACT PROVISIONS

ARTICLE 4 PROBATIONARY PERIOD AND GENERAL DEFINITIONS

A. NEWLY HIRED EMPLOYEES

All newly hired employees shall be considered probationary for the first twelve (12) months of their employment. Probationary employees may be disciplined or discharged without recourse to the grievance procedure. Continued employment beyond the probationary period is hereby defined to be evidence of satisfactory completion of probation. Permanent Employees shall only be disciplined or discharged for just cause.

B. SENIORITY DATE

The seniority of an employee shall date from his or her original date of employment with Kewaunee County.

C. PERMANENT EMPLOYEE DEFINED

A permanent employee is hereby defined as an employee hired, and completes the probationary period to fill a regular position.

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ARTICLE 6 COMPENSATION

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B. WAGE RATES

Wage Scale #1 – Human Service Professionals

	2001	2002	2003
H.S. 3	19.89	21.08	22.13
H.S. 2	18.43	19.17	19.94
After 60 months			
After 48 months	17.24	17.76	18.29
After 36 months	16.55	17.05	17.56
After 24 months	16.07	16.55	17.05
After 12 months	15.45	15.91	16.39
H.S.1 - start	14.86	15.31	15.77

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C. PROMOTION OR RECLASSIFICATION

1. All employees shall begin county employment at the start rate of their respective Wage Scale and move to the next level on their anniversary date of employment unless one of the following factors apply.

2. For purposes of this contract the county and the union agree that there shall be not less than one Human Service Professional 3 position in each of the six service unit areas of: Juvenile Justice, Child Protective Services/Foster Care, AODA, Mental Health, Developmental Disabilities, and Long-Term Support. Any Human Service Professional 2 who has ten or more years comparable work experience of which five (5) years shall be with Kewaunee County employment may apply to the director to fill any open position in the service areas in which he or she is employed.

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ARTICLE 16 SENIORITY

A. SENIORITY DEFINED

Seniority shall mean the continuous length of service with the county from an employee's last date of hire. Also, in the case of any part-time county employee, seniority shall be determined according to the proportion of hours worked by such part-time county employee to the hours worked by a full-time county employee.

B. LOSS OF SENIORITY

Employees shall lose their seniority only for the following reasons: Retirement, resignation, discharge for just cause, or lay off for more than two (2) consecutive years.

C. APPLICATION

The principal of seniority shall prevail in the selection of vacations, promotions, lay-offs, and rehiring, that is the last person hired shall be the first laid off and the last person laid off shall be the first person rehired.

D. POSTING

1. The Board shall post any new or vacant position within the scope of the bargaining unit for a period of eight (8) calendar days. Any interested employee may apply for the position in writing to the County Administrator.

2. At the end of the eight (8) day posting period the applicants' qualifications shall be reviewed by the Department Head. The position will be filled by the County Administrator with the most senior of the qualified applicants.

E. TRIAL PERIOD

An employee who is promoted or transferred shall serve a 90 calendar day trial period. The trial period may be extended by mutual consent for up to an additional 30 calendar days. During the first 30 days of the trial period, the employee may return to his or her former position with seniority rights. The employee shall give notice of the desire to return in writing to the County Administrator and the President of the Union. The employer may return the employee to his or her former position during the trial period for just cause. The employer will furnish the employee and the Union with written notice and the reasons for the return. Service beyond the trial period (or extension thereof) shall be deemed evidence of satisfactory completion of the trial period. Upon promotion or transfer the employee shall move to the same pay step of the new classification as compared to the wage step received before the promotion.

BACKGROUND AND FACTS

At the hearing the parties stipulated to the following two paragraphs of facts:

In 1998 a separate collective bargaining unit for the professional employees of Kewaunee County was recognized by the WERC as AFSCME Local 2959A. Prior to that time, some of the professional employees had been part of the Courthouse unit, AFSCME Local 2959.

On January 1, 2002 the Kewaunee County Aging Unit was created within the Kewaunee County Department of Human Services. Prior to that time, it had existed as the Kewaunee Aging Resource Center, a free standing not-for-profit agency, with a director and two employees, a program assistant and a benefit specialist. When the Aging Resource Center became part of Kewaunee County Department of Human Services, the director position was included in Local 2959A and the two employee positions were placed in Local 2959. The director position was vacant at the time the Aging Resource Center became the Kewaunee County Aging Unit and was filled by a transfer from within Local 2959A. The two employee positions were occupied by incumbents who became Kewaunee County employees.

The issue in this case revolves around the benefit specialist position in the County aging Unit, which is now in the professional bargaining unit.

When the benefit specialist became a County position it was occupied by Cathy Ley. She had been in the benefits specialist position with the predecessor Kewaunee Aging Resource Center since July of 1999. When the position became a County position Ley was given credit for vacation and sick leave benefits back to 1999. Her seniority date with the County, however, was calculated as January 1, 2002. About a year and a half after this became a County position the County moved the benefits specialist position in to the professional bargaining unit on advice from the Wisconsin Department of Health and Family Services, considering the level of education required, standards of professional conduct, and other matters. Just prior to that Ley moved to a vacant Community Options Program (COP) position with the County, which is also in the professional bargaining unit. That vacancy had been posted in July of 2003 pursuant to the provisions of Article 16D of the Local 2959A agreement, and contained contract wage rates based on number of months. There were no applicants for transfer from within the professional unit. Ley, although qualified for the position, was not a member of the professional unit at that time and thus could not post for the transfer. Rather, she applied for the position when it was advertised to the general public. The notice for applications contained only a starting wage of \$15.77, which is the same start wage in the agreement. Ley went through the interview process and was hired to the COP position. During the interview process there was no discussion about a probationary period,

but Ley discussed her wages and benefits status for the new position. Up to that point her vacation and sick time had been figured from her July anniversary start date with the predecessor agency. In the COP position she would have benefits calculated for time prior to becoming a County employee based on the July date. That was retained by her in the COP position, her wages were set at \$16.39, the 12 month rate, and her anniversary date was changed to January 1. That gave her a step increase to the 24 month level on January 1, 2004. The wage rate was set by using the next rate on the professional unit scale that would result in an increase in pay from Ley's prior rate in the Courthouse unit. The increase in pay rate was consistent with a Carlson Dettman job study done for the Courthouse bargaining unit. These start and 24 month rates also correspond with her time as a County employee. This placement on the wage scale would not result in a decrease in pay as would be the case had the start rate been used.

After Ley left the benefits specialist position for the COP position she did actually complete a few remaining duties of the benefits specialist. She did not have an exit interview. There was no COBRA notice given, the Wisconsin Retirement system was not notified, the health insurance carrier was not notified and there were no letters sent concerning termination of employment. Ley has since taken employment outside of the County.

This filling of the COP position was the first known instance where a current County employee was hired into a different position in a different collective bargaining unit. When Local 2959A was formed, following an election, approximately 18 professionals from various departments of the County went directly into that bargaining unit. A first contract was bargained with the County and the employees retained their wage rates, seniority, benefits and start dates with County employment. They were placed on the wage scale based upon their years of service with the County. Four of those employees had been professional social workers in Local 2959, the Courthouse staff. Those four were the only ones out of the 18 who had previously been represented. None of the employees in the new Local 2959A went through a posting or an application/interview process.

When Ley left the benefits specialist position its vacancy was filled by the County in essentially the same way as the COP position. The benefits specialist position was posted under the provisions of Article 16D of the professionals agreement. The salary portion of the posting used the contract wage range for start through 36 months. At that time Michelle Dax was an economic support worker in the Human Services Department. She was a member of the Courthouse bargaining unit and had been employed by the County since October of 1992. No one from the professional unit posted into the position. Dax could not post into it because she was not in the professional unit. The position was then advertised to the general public with a starting wage of \$15.77 per hour. Dax and about 27 others applied. Dax went through the interview process, eventually was offered the job and accepted it. During the interview process there was no discussion about the specific wage rate or probation. There were discussions about benefits, such as vacation, and Dax was told that they would remain the same as they had been. Although not specifically discussed, her understanding, based in part on what

she understood the Ley arrangement was, was that her seniority with the County would continue to date from 1992 and that her wage would be based on her seniority. The County considered this a new hire, as it had for Ley. Dax started in the position on November 3, 2003, but continued to do some of the economic support duties for several weeks. Several days after she had started working in the benefits specialist position she received a memo stating her wage was \$16.39 per hour. This was the next wage level that would give her an increase from her previous wage in the Courthouse unit, but not as much as the 60 month wage rate in the professional unit, which would be the top at \$19.94.

Dax did not have an exit interview from her economic support position. There was no COBRA notice given, the Wisconsin Retirement system was not notified, the health insurance carrier was not notified and there were no letters sent concerning termination of employment.

When Dax saw that she was not being paid at the 60 month rate there began communications between Local 2959A and the County about this. Dax, and Ley, then became aware that the County considered them to be on probation and that their seniority would date from their hiring into the new positions, respectively. If the County had understood that Dax would be required to be paid at the 60 month rate the position would not have been offered to her for economic reasons. If Dax had understood that she would lose her seniority prior to taking the benefits specialist position she would not have taken it. The grievance resulting in this arbitration was then filed.

Vacation and sick leave is not cashed out by the County. By County policy when an employee moves from one position to another their vacation, which is based on years of service, is not taken away. Similarly, sick leave, holiday pay, health and dental insurance remain the same.

The collective bargaining agreement between the County and the Courthouse unit, Local 2959, in effect at the relevant times contains the following provisions:

ARTICLE 2: PROBATIONARY PERIOD AND GENERAL DEFINITIONS

. . .

B. SENIORITY DATE

The seniority of an employee who has satisfactorily completed probation shall date from his or her original date of employment in this bargaining unit and the employee shall then be entitled to all benefits accruing to permanent employees.

. . .

ARTICLE 14: SENIORITY

A. SENIORITY DEFINED

Seniority shall mean the continuous length of service with the county from an employees last date of hire in this bargaining unit. Also, in the case of any part-time county employee, seniority shall be determined according to the proportion of hours worked by such part-time county to the hours worked by a full-time county employee.

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Other matters appear as in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that Dax's seniority should be calculated from October 20, 1992. Articles 4 B and 16 A are clear, unambiguous and internally consistent. According to Article 4 B, seniority is calculated from the original date of employment with the County, and Article 16 A defines seniority as a continuous length of service with the County from the last date of hire. Dax has had continuous, uninterrupted service with the County with no separation from employment. Article 4 and Article 16 are consistent with each other. No event under Article 16 B has occurred which could cause her seniority to be lost, so her seniority must be calculated from her original date of employment with the County in October 1992.

The Union also argues that the longstanding and consistent practice of calculating seniority in the professional unit is based on years of service with the County. This is how years of service were counted when the professional unit was first formed, and is how Cathy Ley's seniority was calculated when she went into the professional unit from the Courthouse unit. To deny Dax seniority since 1992 violates the clear language of the agreement and the practice of applying the agreement, and would place Dax at a severe seniority disadvantage in the bargaining unit.

The Union argues that Dax's wages should be at the 60 month H.S. 2 Step based on Article 6 B wage rates and the promotion or reclassification provisions of Article 6 C based upon her approximately eleven years of County employment. The longstanding and consistent practice is to locate employees of the wage scale based on their years of service with the County, rather than on their years of service in the professional bargaining unit. Cathy Ley was so placed, and she was given one year credit for County employment, with a change in anniversary date. The Union argues that the County's suggestion that Ley's placement did not correspond to her years of service is not credible.

The Union further argues that Dax was not a new hire when she took the benefits specialist position because there was no break in her continuous length of service with the County. The concept of a newly hired employee who will be subject to a probationary period anticipates an employee not currently employed by the County. Dax did not retire, was not discharged, was not laid off longer than two years and did not resign from employment with the County. She had no break in continuous length of service. Articles 4 and 16 refer to service with the County, not merely within a position or bargaining unit, as the measure of seniority. Even if she had resigned from the economic support position – which she did not – she never resigned from the County. Therefore she cannot be considered newly hired. Further, arbitral precedent supports the Union's positions.

County

In summary, the County argues that Dax became a new employee of the County on November 2, 2003 when she was offered and accepted the benefits specialist position. She had applied for a job in the same way as 27 other applicants who saw the advertisement of an open position. The other candidates were not County employees. Dax had no right to seek transfer under the terms of Article 16 D of the agreement since she was not a member of that unit. No provision of the Courthouse unit agreement can be construed to permit inter-unit transfers. This must be considered a new hire.

The County argues that under Article 16 A Dax's seniority date is from her last date of hire. The County would have been acting in strict conformance with the collective bargaining agreement had it placed both Dax and Ley at the entry level pay grade. Since this would have resulted in a pay cut to both women, and probably their rejection of the job offer, the County implemented a solution that it has used before. If Dax had to be given credit for her seniority in another unit she would not have been offered the position due to the budget.

The County also argues that the provisions of the collective bargaining agreement are not contradictory. Article 4 deals with the probation of newly hired employees. Paragraph B relates the seniority of a newly hired employee to the date of hire, not the date of completion of the probationary period. Article 4 B was necessary to make clear that once the year of probation was completed, the seniority would date back to the beginning of her employment.

The County argues that the definition of seniority in Article 16 A is applicable to benefits. Dax's employment in another bargaining unit should have no more impact on her seniority than would a history of prior employment with another employer. The circumstance of a current employee applying for a new position, as distinguished from a transfer within a unit, was unknown prior to the situation with Ley and Dax. Dax has no more right to demand advanced placement in the pay scale than would any person who had never been employed by the County. These were both new hires with respect to the positions. Therefore, their last date of hire established their seniority which controls the level of benefits they are entitled to receive. The fact that the County did not strip them of the accrued benefits from their prior

employment with the County should not be relied upon to create an obligation to give them credit for seniority they were not entitled to. Beyond rate of pay, this would advance them over other employees in the professional unit. Had the County selected a different applicant for the benefit specialist position there would be no right to advance placement in the seniority rank in front of current employees. Dax was a newly hired employee as of November 3, 2003 and had no more right to advanced placement than any other newly hired employee.

DISCUSSION

At the outset it should be noted that this award concerns only Dax, and not Ley, who has left employment with the County. The original grievance and the arbitration petition did refer to two positions, and the Ley situation does have some bearing on the Dax situation. However, at the hearing both parties framed the issued in terms of the Dax situation and not Ley. The thrust of the evidence concerning Ley was used by both parties in addressing the matter of practice as it should – or should not – be applied to Dax. And, in the briefing of the case and requested relief both parties focused exclusively on the Dax position as the one at issue.

The issue to be decided requires a determination of whether the County violated any provision of the collective bargaining agreement by treating Dax as a newly hired employee when she was selected to fill the vacant benefits specialist position in November 2003. Of necessity this requires applying the language of the agreement to the facts. The agreement with the professionals unit sets out the seniority date in Article 4 B as:

The seniority of an employee shall date from his or her original date of employment with Kewaunee County.

That agreement also defines seniority in Article 16 A as:

Seniority shall mean the continuous length of service with the county from an employee's last date of hire. . . .

Both of these sections refer to service or employment with the County, not with that particular bargaining unit. Here, Dax's original date of hire with the County was in October of 1992. She in fact did have continuous length of service with the County which was not interrupted or broken by any of the events or circumstances specified in Article 16 B. Her last date of hire with the County was and is also her original date of hire in October of 1992. The language of the agreement is clear and not ambiguous. These seniority provisions are consistent with each other. She is now in a different position in a different bargaining unit, but she is still and always has been at all relevant times an employee of the County. Her continuous length of service with the County from her last date of hire is from her original date of employment with the County in 1992. Thus, her seniority is based on her length of service as an employee since

her original date of hire in 1992. Applying the wage scale to her, she should have been placed in the scale reflecting her employment after 60 months. All other provisions of seniority also follow.

The result would be different if the agreement contained language similar to that found in the Courthouse bargaining unit. In Article 2 B of that agreement seniority date is set out as:

The seniority of an employee who has satisfactorily completed probation shall date from his or her original date of employment in this bargaining unit and the employee shall then be entitled to all benefits accruing to permanent employees.

Similarly, Article 14 A of that agreement defines seniority as:

Seniority shall mean the continuous length of service with the county from an employees last date of hire in this bargaining unit. Also, in the case of any part-time county employee, seniority shall be determined according to the proportion of hours worked by such part-time county employee to the hours worked by a full-time county employee.

The clear and distinctive difference is the use of the words “in this bargaining unit” in the Courthouse agreement. That language limits seniority to the length of service in the Courthouse unit. Were there such language in the professionals unit agreement then Dax’s seniority would indeed be limited to her service in the professionals unit, which would be from November of 2003. However, that limiting language does not appear in the professionals unit agreement. The professionals unit agreement instead refers to “Kewaunee County” for seniority date. And, the professionals unit agreement seniority definition does not have the words “in this bargaining unit” in reference to the last date of hire, as it does in the Courthouse unit. Thus, in both clauses of the Courthouse unit seniority is limited to service in the Courthouse unit. But in the professionals unit the language does not limit seniority to the professionals unit, or any unit. The entity it referenced is to the County, not a unit.

Given Dax’s previous continuous employment with the County, applying the language of the agreement to her offer and acceptance of the benefits specialist position does not make her a new hire. She simply was not a new hire to the County. Nor was this a transfer. She did not have any separation of the employment relationship with the County as she moved to the new position. While it is true that the procedure or method which was used to fill the position was one that would allow for a new hire, in Dax’s situation (as well as Ley’s) she was different than the other applicants, including the first preference of the County, because she did have employment status with the County and she did not lose that status. She was not a new employee to the County like the other applicants would have been. This reality was actually recognized by the County as it set her wage at a level that would give her a raise over what she

had been making in the Courthouse unit. It is further supported by the fact that she retained her other benefits such as vacation and sick time, based upon her prior years of service to the County, as apparently the County recognizes for all other employees when they fill different positions.

The County's argument that the Article 4 B seniority date merely is a mechanism to relate seniority back to cover the time on probation is not persuasive. Again, it does not read in terms of the unit. Here, Dax was not a new hire, and she had previously completed a probationary period when she was originally employed with the County.

Agreements cannot be construed or interpreted to make language meaningless. To that end, the use of the words "last date of hire" in the definition of seniority is not rendered meaningless here. This phrase would apply in the event that a person had been previously employed by the County and that employment ended in the ways set out in the agreement or some other non-continuous length of service with the County. For example, if someone had been a County employee for a few years but resigned a decade ago, and then recently was offered and accepted employment in a new position, that would be a new hire with a new last date of hire under the language of the agreement. Thus, the phrase retains meaning.

While it is clear that the position would not have been offered to Dax if her wage were required to be at the top of the scale, and Dax would not have accepted the offer of the position if her seniority was not to put her at the top of the scale, this arbitration is not based on detrimental reliance or resolving the equities. The resolution of the issue is based on the language of the agreement. Certainly it would have been better for the parties to have specifically discussed the wage rate that would be used in the interview process or even after a tentative offer of the position were made. But that did not happen. Here, the advertised starting wage for the benefits specialist position was not used. Neither party relied upon the wage as advertised. Similarly, Dax correctly understood that the transfer by posting opportunity was not available to her, so neither party relied on the abbreviated wage scale set out in the posting. (The provisions of Article 16 D 2 and Article 16 E would seem to indicate that a transfer within the unit by one who was at the 60 month rate would have to be selected and maintained.) And Dax's understanding of what Ley's situation was is not a sufficient basis to attribute anything to the County. That is simply too tenuous to place weight on in interpreting the language of the agreement.

The Union argues its position is supported by a past practice of crediting all continuous employment with the County, as opposed to a bargaining unit, for seniority and wage purposes when a Courthouse unit employee moved into the professional unit. This award does not use or rely on past practice in interpreting and applying the language of the agreement. The language is clear and unambiguous so that there is no need to resort to past practice to interpret the agreement.

It is also not clear just what, if any, relevant past practice may have existed and what its scope may be. When the professionals unit was formed and the initial bargaining unit members were identified, it makes sense that there would be language in the agreement that

recognized their prior service with the County, some of which was in the Courthouse unit. But those circumstances are quite different than the situation here, where new vacancies were being filled. Even so, the parties did not change the language in their agreement to something like the Courthouse unit language limiting seniority to service in the particular unit. Similarly, the Ley situation was one incident where the outside application process was used. There is no record of what, if anything, the Union knew of that or how, if at all, it recognized that incident as a practice. Ley was even allowed to retain some benefits based on employment before she became a County employee. It is difficult to take a single incident and view it as a practice, especially where there are differences in the way Ley actually discussed her salary and her seniority date for wage purposes, which was then changed as a result of the discussions. It does appear that changing her anniversary date to January 1st would both provide a raise and also happens to coincide with her length of service with the County. Beyond that, the record does not support a conclusion that it was specifically her length of service with the County that drove the wage rate decision. So, although everyone in the professional unit, including Dax, would have seniority based upon service with the County, there has not been an actual past practice established on this record which demonstrates that as the way to calculate seniority.

The County argues that to recognize Dax's seniority back to 1992 would cause her to leap over or misplace others in the unit with more seniority in the unit. But seniority is defined in that unit by the language in that agreement, which bases seniority on service with the County, not the unit. If Dax's seniority is longer than other employees' seniority then that is just what it is. This is also true for those original employees in the professional unit who brought in their seniority with the County, in comparison to the four former Courthouse unit employees. Moreover, there was no record made in this case that demonstrates that granting Dax seniority from 1992 actually does operate to the detriment of any other specific employee. Even if it did, that would not determine what Dax's seniority date is.

Accordingly, based upon the evidence and arguments in this case, I issue the following:

AWARD

The grievance is sustained. Kewaunee County did violate the provisions of the collective bargaining agreement by treating Michelle Dax as a newly hired employee when she was selected to fill the vacant benefits specialist position in November 2003. Her seniority should date from October of 1992. As a remedy, the County shall recognize her seniority from October of 1992 and make her whole, accordingly.

Dated at Madison, Wisconsin this 9th day of February, 2006.

Paul Gordon /s/

Paul Gordon, Arbitrator

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