

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN FEDERATION OF NURSES
AND HEALTH PROFESSIONALS, LOCAL 5001**

and

MILWAUKEE COUNTY

Case 567
No. 64722
MA-12986

(Vesta Henry Grievance)

Appearances:

Hawks, Quindel, Ehlke & Perry, S.C., by **Attorney Jeffrey P. Sweetland**, 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, on behalf of the Union.

Attorney Timothy R. Schoewe, Milwaukee County Deputy Corporation Counsel, Milwaukee County Courthouse, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin 53233 on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, the Wisconsin Federation of Nurses and Health Professionals, Local 5001 (herein the Union) and Milwaukee County (herein the County) were parties to a collective bargaining agreement dated March 13, 2001 and covering the period January 1, 2001 to December 31, 2004, and providing for binding arbitration of certain disputes between the parties. On April 27, 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 County's assignment of two bargaining unit members to new duties without posting the positions within the bargaining unit, 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 23, 2005. The proceedings were not transcribed. The parties filed briefs by September 27, 2005 and reply briefs by November 16, 2005, whereupon the record was closed.

ISSUES

The parties could not stipulate to the framing of the issues:

The Union would frame the issues as follows:

Did the County violate Sec. 2.321 of the Contract when it relieved Tamara Richardson and Steve Zais of substantially all of the direct patient care management duties that they performed in common with employees classified as Registered Nurse II (Aging) on the Department on Aging's Care Management Organization and assigned them to contract specialist duties, without making those contract specialist duties available to the most senior employees as an Intra-Departmental transfer?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Did the County violate Secs. 2.32 and 2.321 of the Memorandum of Agreement when the Department of Aging assigned Registered Nurse II's Zais and Richardson to certain assessment duties within its CMO unit in early 2004?

The Arbitrator frames the issues as follows:

Did the County violate the contract when it assigned Registered Nurse II's Tamara Richardson and Steve Zais to new duties in the Department on Aging's Care Management Organization without first offering the assignments internally to the most senior bargaining unit members?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

1.05 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions, the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to transfer and assign employees, subject to existing practices and the

terms of this Agreement; the right, subject to civil service procedures and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action and the right to release employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, the means, and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions. In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Federation.

In the event a position is abolished as a result of contracting or subcontracting, the County will hold advance discussions with the Federation prior to letting the contract. The Federation's representatives will be advised of the nature, scope of the work to be performed, and the reasons why the County is contemplating contracting out work. Notification for advance discussions shall be in writing and delivered to the President of the Federation by certified mail.

2.32 FILLING VACANT POSITIONS

(1) Notification of Positions

Annually, in January of each year, the Department of Human Resources (DHR) shall provide FNHP with a listing of all job titles covered by the collective bargaining agreement. Monthly during the year, DHR shall provide FNHP with notification of all new positions, and all reclassifications, which require the appointee to be a Registered Nurse. DHR will provide FNHP with a copy of certification requests received from any appointing authority to fill vacant positions represented by FNHP.

(2) Definitions

(b) Intra-Departmental Transfer occurs when an employee transfers from one position to another under the same appointing authority. Each department head shall maintain a listing of all employees who wish to be considered for an

Intra-Departmental Transfer. A department head will place an employee on the Intra-Departmental transfer list if the position she holds has the same title code, job title and pay range as the position from which she wishes to transfer. An employee who holds a position with a different title code and job title, but in the same or higher pay range, will be placed on an Intra-Departmental Transfer list only after the Director of Human Resources has verified that the employee possesses the minimum qualifications for the position. An employee who is on the Intra-Departmental Transfer list for the job title being filled shall be considered in accordance with the procedures of that specific department.

2.321 RECRUITMENT/EXAMINATION/APPOINTMENT/
TRANSFER/PROMOTION/DEMOTION

(2) All positions in the bargaining unit shall be in the classified service of Milwaukee County and shall be filled in a manner consistent with the State Statutes and Civil Service Rules of Milwaukee County. To the extent possible, the Department of Human Resources shall conduct non-competitive examinations for the purpose of establishing lists of candidates eligible for appointment to a bargaining unit position.

(4) Intra-Departmental Transfer shall mean a transfer to another bargaining unit position authorized under the same appointing authority which is in the same classification and pay range as the position held by the employee who wishes to transfer. Each appointing authority shall maintain an intradepartmental transfer list for all bargaining unit classifications authorized in his/her department. As soon as administratively possible, employees shall be able to file an intra-departmental transfer request via the internet. When a vacancy is authorized to be filled, it shall be filled by the most senior candidate on the intra-departmental list who is not in the disciplinary process prior to being filled in any other manner.

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BACKGROUND

Milwaukee County has a long-standing collective bargaining relationship with the Wisconsin Federation of Nurses and Health Professionals, which represents registered nurses working for the County in a number of different departments and agencies, among which is the Department on Aging. The Department on Aging employs a number of registered nurses in its Care Management Organization to work with its clients who require the Department's assessment, referral and care services. By and large, these nurses, who are classified as Registered Nurse II in pay range 18N in the collective bargaining agreement, operate as members of interdisciplinary teams (IDTs) along with social workers and other professionals as needs dictate. Typically each Social Worker has an average of 40 clients and Registered

Nurse II in the Department is assigned to two Social Workers. Thus, the average Registered Nurse II is on approximately 80 IDTs at any given time. The specified duties of the Registered Nurse II within the Department of Aging are set forth in the position description as follows:

(% of 8-Hr. Day Freq) TIME **THE PURPOSE OF THIS POSITION IS TO** **REQUIRED KNOWLEDGE, SKILL, ABILITY TO PERFORM**
 & Provide geriatric nursing services to older adults within the context of an interdisciplinary team.

CONSEQUENCES OF POSITION REMOVAL ARE: The interdisciplinary team (IDT) would be without the expertise of a nurse with geriatric experience, which would lead to unsuccessful outcomes for at-risk elders and a non-holistic approach to service delivery in the CMQ. Out of compliance with state vs. contract.

DUTIES:

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|------------|--|--|
| 50% | 1. Conduct visits to assess the on-going health and long-term care needs of the participants across the spectrum of the health care/long-term care system. To deliver and manage nursing care to participants on an on-going basis. | 1. Physical assessments, ability to complete H & P, ability to manage chronic disorders, working technical knowledge of nursing procedures, team player. |
| 20% | 2. To work in collaboration with the interdisciplinary team to establish outcome for participants: to make service allocation/resource, decisions and to participate in a comprehensive care planning and management for the Care Management Organization. | 2. The ability to work on an IDT; to be an active listener; to share information/knowledge with others, to be outcome focused. |
| 5% | 3. To participate in Care Management Organization committees and research. | 3. The ability to make resource allocation decisions/participate in a managed care program. |
| 10% | 4. To adhere to documentation standards of the Care Management Organization. | 4. Geriatric nursing skills, H & P, physical assessment medication management, technical expertise with nursing procedures, outcome based approach, care management ability. |

10%	5. Participation in the 24 hours emergency program (after hours program).	5. The ability to work and plan access health care spectrum (i.e.: primary, secondary and tertiary health care settings).
5%	6. To perform other duties as assigned.	6. Ability to verbally communicate with others in a clear and organized way and knowledge of geriatric nursing.
		7. Ability to communicate accurately and clearly in a written format.
	ESSENTIAL OR NON-ESSENTIAL PHYSICAL OR MENTAL FUNCTIONS:	8. To provide health education and promotional activities.
	All functions are essential and require both mental and physical abilities. Home visits require persons who can climb stairs and travel in some fashion to homes in the community. Paperwork requires persons who can see and write. Communication requires the ability to hear and speak.	9. Ability to use a personal computer and related programs, such as word and excel.

Thus, the vast majority of an RN IIs typical job responsibilities involve direct patient care and assessment.

On May 14, 2004, due to the dramatic increase in the number of clients in recent years, the Department made a determination to assign RN IIs to assist in performing assessments of nursing homes and community-based residential facilities (CBRF) to determine if their facilities and services were adequate to the needs of the Department’s clients. These would be full-time assignments and would necessitate relieving the assigned RN IIs from individual caseload responsibilities. The duties were not posted as new positions, but were assigned to RN IIs Steven Zais and Tammy Richardson. Among the 9 RN IIs within the Department at the time, Zais and Richardson were, respectively, 8th and 9th in seniority. A number of the more senior RN IIs in the Department subsequently filed a grievance, contending that the County had violated the collective bargaining agreement by appointing Zais and Richardson to new positions within the Department without posting them internally for more senior employees. The grievances were processed through the steps of the contractual grievance procedure and were denied at each step, resulting in this arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

The Union

The Union contends that the County violated Sec. 2.321 of the contract by creating two new positions within the Department and assigning them to the two least senior RN IIs in the

Department without first offering them to the more senior employees. Sec. 2.321 defines an intra-departmental transfer as being “a transfer to another bargaining unit position authorized under the same appointing authority which is in the same classification and pay range as the position held by the employee who wishes to transfer.” The contract requires that such transfers be offered to the bargaining unit employees on the basis of seniority. The Union submits that the County’s reconfiguration of RN II duties constituted the creation of two new positions and that, therefore, the duties assigned to Zais and Richardson were subject to the transfer rules of Sec. 2.321.

RN II (Department on Aging) is a classification as set forth in Sec. 1.02 of the contract. Thus the Department has a number of RN II positions, but all the employees are within the RN II classification. Under the Civil Service Rules applied by the County, positions are defined by the “group of current duties and responsibilities assigned or delegated,” to the incumbent of the position. Prior to 2004, the current duties and responsibilities of all RN IIs in the Care Management Organization were to manage individual caseloads of up to 80 Family Care clients. In May 2004 the Department created an entirely new set of “current duties and responsibilities” and assigned them to Zais and Richardson, who were least in seniority within the unit. It defies logic to say these were not new positions.

By the definition adopted by the County, a “position” is defined by the characteristics of its duties and responsibilities. To determine if Zais and Richardson were given new positions, one must compare their current duties with their previous duties. If there has been a substantial change in duties, then they are occupying new positions. (citations omitted) There is no question that Zais and Richardson’s duties have substantially changed. Previously, they provided direct care to individuals, assessed their health care needs and developed care plans. Now, they evaluate care facilities and consult with them regarding the care needs of the clients. Clearly, the basic characteristics of their jobs have changed.

Both nurses were in bargaining unit positions, in the same classification, authorized by the same appointing authority, as the other more senior RN IIs employed by the Department. In truth, the County did not identify the positions as “vacancies” or authorize them to be filled, but that should not be a bar to the transfer provision, otherwise it would give the County license to circumvent the contract language whenever it wished to fill a position without consideration to seniority.

To comply with the contract, the County should have announced the two vacancies to all the RN IIs in the Department and then offered the positions to the most senior employees. Had the most senior nurses accepted the positions, their caseloads could have been redistributed to Zais and Richardson. The County argues that the duties are within the general job description of an RN II, but RN II is a classification, not a position. Positions exist within, and are subparts of, classifications. If a substantial change in duties creates a new position within a classification, the contractual transfer language should control.

The County

The County disputes the Union's contention that the assignment of new duties to Steven Zais and Tamara Richardson constituted the creation of two new positions which should have been filled on the basis of seniority. At the time of the assignments Zais had no caseload and Richardson had only half a normal caseload. This was not an unusual situation. In other cases in the past nurses with low caseloads have been given special assignments without objection by the Union.

Nothing in the contract guarantees a caseload, nor does the contract mandate that assignments be handed out by seniority. Grievant Heim conceded in her testimony that assignments were made by management and seniority only was a consideration in the initial unit assignments within the Department. She also conceded that the Union had never sought a reclassification under Sec. 2.40 of the contract. No one testified that Zais and Richardson's duties were not consistent with the duties of a Registered Nurse II.

Marjorie Gleeson also testified that assignments have never been made on the basis of seniority. She further testified that there were never any vacancies within the CMO unit, which is key because the language of Secs. 2.32 and 2.321 is triggered by the existence of a vacancy. Seniority only applies to filling vacancies and has no role in the assignment of work. There is no evidence to support the Union's assertion that new positions were created. Joint Exhibit 7 reveals that this matter was addressed by the Milwaukee County Civil Service Commission and was dismissed. The Union chose the forum, did not prevail and should be bound by its decision.

The Union in Reply

The County makes the error of interchanging the terms "classifications" and "positions." This grievance is about positions, not classifications. The County says the duties of Zais and Richardson are consistent with those of a Registered Nurse II, but RN II is a classification. Positions are within classifications and different positions may and do exist within common classifications.

In order to trigger Sec. 2.321, the position must be authorized by the same appointing authority and be in the same classification and pay range as the position held by the employee who seeks to transfer. Zais and Richardson's positions meet those criteria. Thus, while Zais and Richardson's duties are sufficiently alike to remain within the classification of RN II, they are sufficiently different to constitute separate positions.

Likewise, the County's argument regarding the Civil Service proceeding is beside the point. The evidence regarding that proceeding was sketchy, at best, and should be disregarded. The County suggests that the Union opted to submit this matter to the Civil Service Commission rather than an arbitrator, but the Commission does not adjudicate contract rights and this matter arises from a dispute over the interpretation of the contract.

There is also no past practice whereby the Union acquiesced in the County reconfiguring duties of less senior employees. The County's argument is based on the hiring of one individual in 2002 and the record in sketchy on the circumstances of that hire. Furthermore, regardless of the facts of the matter, one isolated incident does not constitute a binding practice between the parties. Also, whether the County in the past assigned "special projects" to RN IIs has no bearing here. Special projects exist outside regular job duties and are for a limited term. Zais and Richardson were assigned new, regular, full-time and permanent duties, which are new positions.

The County in Reply

The County declined to file a reply brief.

DISCUSSION

This dispute arises from a distinction drawn by the County and the Union between the assignment of job duties and the creation and filling of a position. The County asserts that Steven Zais and Tamara Richardson were assigned new job duties consistent with their classification as Registered Nurse IIs. It is the County's contention that this is a County prerogative under the Management Rights clause of the contract and, further, that the County has consistently assigned job duties in the past without consideration to seniority without objection by the Union. The Union claims, however, that Zais and Richardson were assigned to new, permanent full-time duties completely different than their previous duties and different from the duties of all other RN IIs in the Department, as well. The Union considers these new duties to be, in effect, new positions, which should have been offered to the most senior RN IIs under Sec. 2.321 of the contract.

The collective bargaining agreement between the County and the Union contains specific provisions governing the assignment of duties and the transfer of employees to different positions within classifications, both intra-departmentally and inter-departmentally. Under the Management Rights clause, contained in Sec. 1.05, the County has the reserved rights to direct the work force and the right to transfer and assign employees, "subject to existing practices and the terms of this Agreement." Sec. 2.321(4) addresses intra-departmental transfers to vacant positions and specifies that "(w)hen a vacancy is authorized to be filled, it shall be filled by the most senior candidate on the intra-departmental list who is not in the disciplinary process, prior to being filled in any other manner." Further, Sec. 2.321(2) specifies that filling of positions shall be in accordance with the Civil Service Rules of Milwaukee County. The Civil Service Rules (Union Exhibit #5) contain the following relevant definitions:

20. POSITION – shall mean a group of current duties and responsibilities assigned or delegated by competent authority, requiring the full-time or part-time employment of one person.

32. VACANCY – shall mean a position which has been newly established or which has been rendered vacant by the resignation, death or removal of the previous incumbent.
34. CLASSIFICATION – shall mean a group of positions which are sufficiently alike in general duties and responsibilities that they may be referred to by a common title and the same tests of fitness and aptitude may be applied to determine the qualifications of applicants for positions in the group.

The two employees in this matter, Steven Zais and Tamara Richardson, were, without dispute, the least senior bargaining unit employees in the Department. Nevertheless, when the decision was made to assign the facility assessment and liaison duties to RN IIs, the assignments went to Zais and Richardson. According to Marjorie Gleeson, Assistant Director for Long-Term Support for the Department, the selections were made because Zais and Richardson had the lowest caseloads in the Department. Zais had just returned from a medical leave and so had no active caseload. Richardson was working with only one Social Worker at the time and so had only approximately 40 cases, rather than the roughly 80 cases managed by the other RN IIs. After the assignment, Richardson's cases were redistributed among the other RN IIs.

The County's argument has two main prongs. First, it argues that according to the clear language of Sec. 2.321 the intra-departmental transfer procedure is only triggered when a vacancy has been authorized to be filled. Here, there was no such authorization, and thus no position, and so the County had no obligation to assign the duties on the basis of seniority. This line of argument is troublesome for two primary reasons. First, as the Union points out, it would appear to support the proposition that the County can avoid the requirements of Sec. 2.321 merely by never officially authorizing the filling of a new vacancy, but rather just assigning duties by fiat on the basis that they fall into the general description of the duties of an RN II. Put another way, if Sec. 2.321 is only triggered by the action of the County in authorizing a new position and the County never takes such action, what, if any, recourse does an employee have under the contract if they feel that the assignment of new duties in effect creates a new position, but for the fact that it has not been officially authorized? In my view, whether a combination of duties constitutes a distinct position cannot depend solely on whether the County chooses to denominate it as such. If such were the case, it would effectively nullify Sec. 2.321(4) and permit the County, in virtually every circumstance, to circumvent the seniority requirements of Sec. 2.321, which clearly cannot have been the intent of the parties in bargaining the language. In this regard, it is significant that the Civil Service Rules define a position as an assigned group of duties and responsibilities, without reference to any specific process for authorization.

The second problem is that both Zais and Richardson have job descriptions, apparently created after the new assignments, which, according to Gleeson, accurately reflect their current duties. (Union Exhibits #2 & #3) These descriptions are specific to Zais and Richardson and go into more detail than the general description the County promulgated for the RN II

classification. (Joint Exhibit #5) According to the Civil Service Rules, such descriptions are created by the incumbent of a position at the request of an appointing authority or department head. Further, according to Gleeson, Union Exhibit #4 is an excerpt from a proposal the County prepared for submission to the State in August or September of 2004. That document describes Zais' job as "Nursing home investigations and quality monitoring activities, consultant to care managers regarding Medicare stays in skilled nursing facilities, nursing home relocation consultant." It also describes Richardson's duties as: "Residential facility investigations and quality monitoring activities, consultant to care managers regarding permanent residential placement." The document also describes Zais and Richardson as having worked in the past as nurse case managers, presumably when they had direct caseload responsibility. These documents, apparently promulgated by or at the behest of the County, point to an understanding that Zais and Richardson had specific full-time duties that were separate and distinct from all the other RN IIs on the unit. This would be consistent with the accepted definition of a position set forth above.

The County's secondary argument, and the weaker one in my opinion, is that there is an accepted past practice of RN IIs being assigned duties by management without reference to seniority and without objection by the Union. The primary evidence supporting this contention is that in 2002 the County hired Marian Filo as an RN II without direct caseload responsibility without objection by the Union. As the Union points out, however, even if so this was an isolated incident which does not meet the criteria necessary to establish a clear and recognized long-standing practice accepted by both parties of permitting the County to assign permanent full-time duties without reference to the requirements of the contract or Civil Service Rules. Certainly the record on this individual case is not developed with enough clarity or detail to support such a finding. There was also testimony from Gleeson, as well as RN II Kathryn Heim, that the County does occasionally assign temporary duties or special assignments to RN IIs without reference to seniority. Here again, however, temporary duties or special assignments are, by definition, not intended to be permanent, full-time assignments. The Union's acquiescence in such assignments, therefore, cannot be construed as an acknowledgment that the County may ignore the provisions of Sec. 2.321 when assigning newly created permanent and full-time duties to bargaining unit members.

It is clear to me that the duties assigned to Zais and Richardson meet the criteria to be considered distinct positions under the County Civil Service Rules, which are incorporated by reference into the contract. As such, the County should have gone through the steps to have the positions classified and filled according to the terms of the contract. By not doing so, and by directly assigning the newly created duties to the least senior RN IIs, the County violated the contract.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The County violated the contract when it assigned Registered Nurse II's Tamara Richardson and Steve Zais to new duties in the Department on Aging's Care Management Organization without first offering the assignments internally to the most senior bargaining unit members.

The Arbitrator remands the matter to the parties to formulate a remedy consistent with this award and will retain jurisdiction for 60 days after the issuance of the award to resolve any disputes arising in the development of an appropriate remedy or its implementation.

Dated at Fond du Lac, Wisconsin, this 4th day of April, 2006.

John R. Emery /s/

John R. Emery, Arbitrator

