BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE COUNTY

and

LOCAL 2233, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Case 219
No. 65719
MA-13301

(Department on Aging Grievance)

Appearances:

Mr. Keith R. Zehms, Corporation Counsel, Eau Claire County, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin 54703, appeared on behalf of the County.

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appeared on behalf of the Union.

ARBITRATION AWARD

On March 20, 2006, Eau Claire County and Local 2233 of the American Federation of State, County and Municipal Employees, AFL-CIO submitted a request to the Wisconsin Employment Relations Commission, to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on July 11, 2006 in Eau Claire, Wisconsin. A transcript of the proceedings was taken and distributed on July 31, 2006. Post-hearing briefs were submitted and exchanged by September 5, 2006.

This Award addresses whether or not the County violated the Agreement when it modified the pay range of a vacated position.

BACKGROUND AND FACTS

The Union and the County have been signatories to a series of Collective Bargaining Agreements spanning several years. The relevant provisions of the current agreement are set

forth below. The facts giving rise to the grievance are straightforward and not in dispute. Donna Ress, a bargaining unit member, occupied a position, whose wage classification was OA 4, in the Department of Aging. She posted to another OA 4 position in the Sheriff's Department, was awarded that position on December 20, 2005, and began work in the new position on January 16, 2005.

Ms. Ress' transfer left the Department of Aging position vacant. Dorothy Moen, the Director of the Department of Aging reviewed the job duties of the vacated position and concluded that certain of the job duties historically assigned to the position were no longer performed by the position holder. Specifically, the task of scheduling and dispatching Meals on Wheels volunteers had been reassigned to another position paid at an OA 5 rate, which is higher than the OA 4 rate of pay. Additionally, the job description for the vacant position required the ability to interpret State and Federal Rules to ensure eligibility determinations. The position has never made eligibility determinations. Moen re-drafted the Position Description to reflect the modified duties.

The revised Position Description was forwarded to Heather Baker, the Personnel Director. Ms. Baker had been the Personnel Director since January, 2006, and was the acting Director before that. She routinely reviews vacancies. Ms. Baker's review suggested that the position was improperly classified, and so she referred the position to the Decision Band Method Committee (DBM) for review. The history and role of the DBM is set forth below. In reaction to the revised Job Description the DBM rated the position as an OA 2, which rate is below the OA 4 rate of pay.

In 1993, Ernst & Young did a reclassification study of the Eau Claire County Courthouse Clerical and Human Services Clerical Bargaining Units. All positions were ranked according to Class Specifications. Resulting job titles and pay ranges were implemented on January 1, 1994. The County subsequently created the Decision Band Method committee to review positions on an ongoing basis. The following outlines the process used by the DBM:

DECISION BAND METHOD PROCESS

The Decision Band Method ("DBM") Committee reviews positions when:

- Whenever there is a vacancy, if there are substantial changes, or a position appears to be rated incorrectly, the position is sent to DBM without recommendation by the Personnel Director.

- During a negotiations year, incumbents may request a review of their position.

- New positions are added to the AFSCME Clerical Units that require posting.

- Department reorganizations in which there are substantial changes in the duties, as determined by the Personnel Director.

The DBM process consists of:

- The Personnel Director makes a statement of the background of why the meeting has been called. This could be for one of three reasons:
    - The Employer requested the review during bargaining.
    - The Department Head requested the review.
    - There have been major changes in the position and the position is vacant so the DBM is asked to review the position.
- Review of the position information form completed by the supervisor.
- Presentation by the Department Head and Supervisor.
- DBM reaches consensus on the rating in closed session during the Decision Band Method rating charts.
- Rating approved in open session by majority vote.
- Employee members of the DBM do not participate in the closed session discussion, or vote in open session, on the rating of positions in their respective departments.

Under the terms of the collective bargaining agreement, the parties are to meet to bargain following decisions that potentially impact bargaining unit positions. The Union was notified of the DBM decision on January 4, 2006. The Union and the County met on January 11, to bargain the pay of the position, but failed to come to an agreement. On February 9, the Union filed the grievance that led to this proceeding. That grievance provides, "The union was notified on 2/3/06 that the County intends to unilaterally reduce the wages of the vacant department on Aging OA 4 position to the OA 2 wage rate." The grievance was denied that same day. On March 13, 2006, the Union moved the grievance to arbitration.

On February 21, 2006, the County Board abolished the OA 4 position and created an OA 2 position in the Department on Aging.

Prior to 1994 the parties bargained over reclassifications. There was no system. The parties agreed to a job study, and the Ernst & Young study was commissioned, administered, and implemented to existing positions. As to future positions, the County created the DBM committee. According to the uncontradicted testimony of Randy Etten, Union President, the

parties bargained an agreement that if a new position was created the parties would meet and negotiate. If there was no agreement the County would be free to implement. Language to that effect, C.O. 9B, was made a part of the contract. It was his further testimony that if the parties had a dispute over an existing position and reached impasse, there was to be no unilateral change.

Etten testified that the County subsequently changed pay rates for vacant positions, that the Union objected, and that the County withdrew those changes. It was his testimony that in the negotiations leading to a 2000-2001 contract the Union proposed language which would tighten the contract relative to reclassifications. It was the intent of the Union to prohibit the County from making unilateral changes to the wage rates of vacant positions. Specifically the Union proposed the language which became C.09 C. pars. 1 and 2, par. D, par. E, par. F, and par. G. of the contract. It was Ettens' testimony that the Union has never allowed the County to unilaterally change wage rates.

The parties have agreed to numerous wage rate changes during the term of the contract. They have met, bargained and entered into memos bringing about the changes. In the period January 1, 1994 – July 1, 2005 the DBM has analyzed 132 positions. Ratings for 50 have increased, 1 has decreased, and 81 have remained the same. More recently Ms. Baker has reviewed all vacant positions. During her tenure 20 bargaining unit positions have been reviewed. 3 have been referred to the DBM Committee. 1 remained the same. 1 was reduced, with the Union signing on for the change. This position is the third position referred.

ISSUE

The parties could not stipulate to an issue.

The Union regards the issue to be:

Did the County violate the contract when it unilaterally reduced the pay rate of the vacated OA 4 position in the Department on Aging?

If so, what is the appropriate remedy?

The County regards the issue to be:

Did the employer violated C.09 (D) of the collective bargaining agreement when it deleted by resolution of the County Board a vacant OA 4 position in the Department on Aging and created an OA 2 position?

If so, what is the appropriate remedy?

The County further contends that the grievance is not substantively arbitrable since effective February 21 there was no OA 4 position in the Department on Aging.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

1.06 The Employer shall have the right to:

A. Carry out the statutory mandate and goals assigned to the Employer utilizing personnel methods, and means in the most appropriate and efficient manner possible.

. . .

ARTICLE 2
GRIEVANCE PROCEDURE

2.01 A. Definition. A grievance shall mean a dispute concerning the interpretation or alleged violation of this Agreement or any matters involving working conditions.

. . .

Step D. ***Arbitration***. If the grievance is not settled at the above steps, it may be taken to arbitration by either party.

. . .

2. After the arbitrator has been selected, he shall hear the evidence of both parties and render a decision which shall be final and binding on both parties.

3. The arbitrator shall have no authority to add to or subtract from or modify this agreement in any way.

. . .

C.09 Wages

. . .

B. New Positions. The employer shall apply the Decision-Band Method criteria to determine the correct pay range for new positions. Such decisions will be made by the Decision-Band Method (DBM) Committee and shall be bargained with the union prior to the implementation of said position. In the event of impasse, the employer may implement said position at the disputed pay range.

C. Existing Positions. Reclassifications of current position titles may be requested only immediately prior to, or during, contract negotiations. Such reclassifications shall be effective January 1 of the first year of the next negotiated agreement. Position evaluation criteria used for the reclassification shall, upon request, be provided to the union.

1. The Union shall be notified in writing of all positions being submitted to the Personnel Director for review and those being reviewed by the Decision-Band Method Committee prior to such review taking place. The Union shall be provided, upon request, all materials pertaining to any position being submitted for review. The Union shall be notified in writing of all final decisions pertaining to reclassification requests.

2. Neither the Employer nor the Decision-Band Method Committee shall at any time engage in reclassification proceedings with individual employees without prior notice to and approval of the Union.

D. Vacated Positions. Reclassification of any vacated position must be bargained with the Union and any changes in pay rate must be determined before posting.

E. Department Reorganization of Positions. Upon mutual agreement between the Union and the Employer, positions resulting in a significant change of job duties due to a department reorganization may be reviewed for a reclassification at any time.

F. Any change in position wage rates shall be by mutual agreement between the Employer and the Union.

G. Any exceptions to the above guidelines shall be made only upon mutual agreement between the Union and the Employer.

POSITIONS OF THE PARTIES

It is the view of the Union that the position at issue was a vacated position. The parties have bargained specific contract language in regard to new positions, existing positions, vacated positions, and positions under reorganization. In the latter parts of the 1990's the County attempted to change the established rates of pay for vacated positions and when the Union threatened to file grievances, the County would retreat from such unilateral actions. The Union subsequently secured a series of changes to the contract, which restricted the County's right to unilaterally change the established wage rates of pay.

The Union points out that Sec. C.09 B allows the County to implement a wage rate for a new position under the circumstance where no rate had been established. It then points to Sec. C.09 C where the County is prohibited from reclassifying existing positions without Union approval. The Union compares the language of Sec. C.09 D with that of C.09 B and notes the contrast. For vacated positions any change in pay must be determined before posting. The Union notes that for these positions a wage rate exists. That is the factual underpinning of the difference between an existing and a new position. The Union contends that Sec. C.09 F reinforces its construction of the above provisions.

The Union contends that pay changes have always occurred by mutual agreement and memo. These memos constitute an interpretive practice that supports the Union claim in this matter. The union contends that the County's attempt to eliminate one position and recreate another makes no sense. If the County maintains that right under the contract it is free to ignore the wage provision of the contract. The Union believes the County should bring its wage concerns to the collective bargaining table.

It is the view of the County that the OA 2 is a new position in the department on Aging created by resolution of the County Board and therefore this grievance is not arbitrable. The County contends that there is no OA 4 position in existence to fight over.

Assuming the case to be arbitrable, the County contends that it adhered to the Agreement when it created the new OA 2 position. The OA 2 position conforms to the real duties of the job. Under the Management Rights provision of the Agreement the County is honoring the mandate to utilize personnel in the appropriate and efficient manner possible. The DBM committee applied the DBM criteria to determine the correct pay rate.

It is the view of the County that even if the OA 4 position is considered vacant the County complied with the relevant provisions of the Agreement. Art. 1.06 A gives the Employer the right to utilize personnel in the most efficient manner possible. The County created a job description that accurately reflected the job duties. The contract requires the parties to bargain, and they did so. Impasse was reached. The County contends that C.09 F does not apply since no position wage rate was changed. The OA 2 position was paid at the wage rate applicable to OA 2 positions. The change advocated by the Union seeks to have the Arbitrator amend the contract. The County contends that par D is clear and unambiguous, and that the Union's construction of par. C constitutes legislation.

The County contends that it was the Union that proposed the language in dispute, and so the language should be construed against the drafter if ambiguity is present. The County points to the list of positions that have been upgraded by the parties over the course of the years, and says the Union is bound to a duty of fair dealing under circumstances which indicate a downgrade is appropriate.

It is the view of the County that the Union could have grieved the decision of the DBM Committee, but chose not to. The County contends that the Union is free to bring its reclass

proposal to the collective bargaining table. Finally, the County contends that the Union request constitutes a penalty. This is alleged to be so due to the fact that the position is properly classed. The person who occupies it bid with knowledge of the rate. To award a higher rate simply penalizes the County.

DISCUSSION

This case is arbitrable. Article 2, Grievance Procedure, Sec.2.01 A. defines a grievance as "...a dispute concerning the interpretation or alleged violation of this Agreement or any matters involving working conditions." The grievance procedure goes on to establish a series of steps to attempt resolution of the grievance, and failing that, to appeal the matter. Article 2.02 Step D. provides that "...if the grievance is not settled at the above steps, it may be taken to arbitration by either party." This matter satisfies the definition of a grievance in that it raises a dispute relative to the interpretation of Appendix C.09 of the Agreement. The grievance filed alleges specific violations of the Agreement. The subject matter of this dispute concerns how much money a bargaining unit member will be paid, the most fundamental working condition. The grievance was not settled in the procedural steps. Under the specific provisions of Art. 2.02 Step D, the matter is arbitrable.

The heart of the County's substantive defense is that the position in question is a new position. That forms the underlying premise for the substantive arbitrability claim and also for the contention that this matter is controlled by Sec. C.09 B, which vests the County with the right to implement a pay rate. I disagree.

I do not regard the position as a new position within the meaning of the Collective Bargaining Agreement. The language of the Agreement was developed in the context of the Ernst & Young study. The core of C.09 B (New positions) was negotiated immediately following the implementation of the Ernst & Young study. New positions were treated differently from those then in existence. I read "new" positions to be those not then in existence. Positions created subsequent to the study would be "new" or original to the parties. As such they would not have been subjected to the Ernst & Young study. I regard this as the conventional use of the term "new". The agreement required the county to apply the Ernst & Young study to those positions, thereafter subject to bargaining. The County was vested the right to implement, if the bargain proved unsuccessful. This reflects an element of the practical. A "new" position would not otherwise have a wage rate attached to it. If the County lacked the ability to implement a wage rate, it could not post or fill the newly created position. This is in contrast to an existing position, which would have a wage rate, albeit one that one party may be dissatisfied with.

The parties did not treat this as a "new" position. The review of vacant positions is a part of the standard operating procedure of the Personnel Director. All vacant positions are reviewed. In this review the Supervisor noted a significant job content change. A part of that change had evolved over time. As a continuation of the standard review of a vacant position, the Decision Band Committee took review of the position because there was a vacancy, not

because a new position had been created. This is a classic example of a proposed reclassification of an existing position due to a change in job content. It is expressly anticipated by Par. C.09 C. The DBC acted on January 3, 2006. The unsuccessful negotiation occurred after that. The County Board did not act until February 21. The County Boards actions were an effort to overcome the unsuccessful negotiation. If this were legitimately a "new" position, one would anticipate a different sequence of events. The County Board would act first, not last, to create a position that was "new" or different from any existing position. It would then have to be run through the process, since there would be no contractual rate of pay.

The County contends that even if the position is considered vacant, it has complied with the Agreement. Specifically the County cites the Management Rights provision, as well as par. C.09 D. I read the contract differently. Article 1.06 A is a general provision setting forth the County's right to run the operation. It must be read in harmony with more specific provisions of the Agreement, and those rights reserved to management are subject to the duties and responsibilities set forth elsewhere in the Agreement. The County urges that I conclude that par. C.09 F is not applicable. However, it appears applicable on its face, and Article 2, Sec. 2.02 D.3 directs that I neither subtract from, nor modify the Agreement.

This dispute involves an existing position within the meaning of C.09 C. It appears that the Union was provided the notice called for in C.09 C. 1. There is no indication that individual bargaining occurred in derogation of par.2. The parties subsequently entered into bargaining, as called for in par. D. However, they did not come to an agreement. They did not determine a change in pay for the position.

Under par. D reclassifications must be mutually agreed upon. This is how the parties have interpreted the language in the past. The record is filled with instances of this mutual agreement to bring about reclassification. The record is silent as to the County unilaterally implementing such changes in the past. To the contrary, the record testimony is that the County has been challenged and stopped from so doing in the past.

This language stands in stark contrast to the language in C.09 B, where the County has specific authority to implement. Here, unlike a new position, there is an existing rate of pay. The County is free to post and fill the position. The County doesn't care for that option, because it regards the rate of pay as too high. Whatever the legitimacy of that concern, it doesn't amend the Agreement. This concern is an inherent element of any pay dispute. By definition, when the parties cannot agree on the rate of pay they are dissatisfied with one another's view. The contract was written to create a process to resolve those disputes.

Historically, the changes have been pay increases. More recently, the County has determined to review all vacated positions. 2 of the 3 positions referred have resulted in downgrades. It is in the context that the Union has balked. There is no agreement. The County points to the past, and demands that the Union be required to accept the adverse changes, just as it has gladly accepted the favorable reclasses. However, the history does not

create mutuality or agreement. The County claims it is right on the merits, and has acted in good faith. That contention is not for me to decide. The parties have chosen a vehicle for the resolution of this type dispute, and that is not this forum. For me to address the merits of the reclass would require me to disregard specific language in the agreement, and legislate a result. That too is unacceptable under Art. 2.02 D.3.

The County argues that par. F is not applicable. I disagree. It is both applicable and dispositive. This dispute involves a change in position wage rates. That said, par. F requires a mutual agreement between the parties. That agreement is not present, and so the provision is violated.

The County urges the application of the rules of construction. That is not necessary. The language of the Agreement is clear on its face. Interpretive rules make a contribution when there is ambiguity at play. They have no role here. Additionally, these parties have applied the words of the contract consistent with their plain meaning. If any interpretive aid were necessary, this is he most compelling. The County indicates that if the Union is dissatisfied with the pay rate, it is free to bring the matter to the bargaining table. In light of this Award the County may take comfort that it has the same right.

Finally, the County contends that the County Board has the statutory authority to abolish and create positions. It is free to leave vacant positions unfilled. This case involves the exercise of such rights. It is undisputed that the County posses such rights. However, the County is not free to exercise its statutory rights, or those incorporated into the Management Rights clause, to circumvent the Collective Bargaining Agreement. The County is a signatory to that Agreement, and has an obligation to honor its terms.

AWARD

The grievance is sustained.

REMEDY

The County is directed to reinstate the OA 4 wage rate to the Department of Aging position, retroactive to the date it was changed to an OA 2.

Dated at Madison, Wisconsin, this 30th day of October, 2006.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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