

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

**LOCAL 990, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, (AFSCME), AFL-CIO**

Case 229
No. 63696
MA-12679

Appearances:

Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

Frank Volpintesta, Corporation Counsel, Kenosha County, Kenosha County Courthouse, 912 -56th Street, Kenosha Wisconsin 53140, appeared on behalf of the County.

ARBITRATION AWARD

On May 26, 2004, Kenosha County and Local 990, American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO filed a request with the Wisconsin Employment Relations Commission to have William C. Houlihan, a member of its staff, appointed as Arbitrator to hear and decide a dispute pending between the parties. A hearing was conducted on September 21, 2004, in Kenosha, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were filed and exchanged by November 6, 2006.

This Award addresses the posting of a clerical position in the jail.

BACKGROUND AND FACTS

During the course of the hearing, the parties stipulated to the following:

1. The Office Associate position/vacancy was posted on 7-29-03, with a closing date of 8-4-03.

2. There were three applicants, two from the bargaining unit (Local 990-Clerical). The third applicant, Stacy Wade, was from Local 990-Jail, a separate bargaining unit. Both bargaining units are represented by AFSCME.
3. The two Local 990 – Clerical applicants withdrew their applications for the vacant position. The position was not filled until 2-6-04.
4. The position was filled by Stacy Wade, the Local 990 – Jail bargaining unit applicant.
5. The position was held open because the County anticipated the elimination of positions in Local 990 – Clerical and was concerned that a new hire could be bumped, and placed on layoff status, in the anticipated reduction in force.
6. Stacy Wade was tested for the vacant position on 12-16-03. She took a typing test shortly thereafter. She was interviewed for the position on 1-27-04, and offered the job at the interview. Her start date was 2-6-04.
7. During the period of job cuts, November, 2003, no one from the bargaining unit sought to bump into the position.
8. Had the County re-posted the position, at least one person in the bargaining unit (Heidi Barnett) would have signed the re-posting. Ms. Barnett did not see the original posting, and did not sign for it.
9. There was a temporary employee in the position from August 12, 2003 through February 5, 2004, which is not contested.

Diane Yule, Assistant Personnel Director testified, without contradiction, that she met with Local 990 – Clerical officers on, or about, September 4 and advised the Local Union officials that the Office Associate position, among others was vacant and potentially available to a displaced employee. She indicated that she advised the Union officials that the filling of the position would remain on hold pending the bumping of employees whose jobs were to be eliminated. Yule testified that she advised the Union officers that if the position ultimately became open, the County would proceed and give consideration to the Local 990-Jail applicant.

Ms. Yule and Kris Fox, Personnel Assistant, each testified that the County has not historically reposted positions in the face of the passage of time. According to both witnesses, re-posting has only occurred when the initial posting was incomplete or misleading. Under those circumstances, a re-posting to correct the original has occurred.

ISSUE

The parties stipulated to the following issue:

Did the County violate the collective bargaining agreement when it failed to re-post the position of Office Associate in the Sheriff's Department?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE III - GRIEVANCE PROCEDURE

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Section 3.4 Time Limits for Filing Grievances. Any grievance shall be presented within ten (10) working days after the date of the event or occurrence or said grievance will be barred.

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ARTICLE VI - SENIORITY

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Section 6.4. Layoff.

1. If the County must reduce the number of employees within a classification or within a department, the employee with the least amount of bargaining unit seniority shall be selected for layoff. The employee so selected shall have the right to bump a less senior bargaining unit employee in an equal or lower classification of the employee's own choosing in any department, provided such employee has more seniority than the employee being bumped, and provided further, that such employee meets the same minimum qualifications as would be expected of anyone obtaining the job through the normal job posting procedure. Departments are defined in section 2.3.
2. An employee who is bumped in accordance with Paragraph 1 above shall be afforded the same bumping rights provided in Paragraph 1 above, but if such employee is unable to bump any other employee, such employee shall be placed on layoff.
3. Where two (2) or more employees have the right to bump, the above bumping rights shall be exercised by such employees in order of their bargaining unit seniority from most senior to least senior.

4. An employee bumping into a different position shall serve the normal probationary period for that position. An employee who proves unable to perform the work in the different position during the probationary period shall not be allowed to again exercise bumping rights, but shall be placed on layoff. During such probationary period, an employee may voluntarily choose to be placed on layoff, but shall not be allowed to again exercise bumping rights resulting from that layoff.
5. An employee who is bumped out of his/her position shall have the preferential rights to return to such position if, for any reason, it should become vacant within sixty (60) days from the time the employee is bumped from it.
6. Employees laid off in a reduction of force shall have their seniority status continue for a period equal to their seniority at the time of layoff, but in no case shall this period be less than three (3) years. While any employees hold layoff seniority status, they shall be given the opportunity to be recalled and placed in vacant jobs using the job posting procedure. Laid off employees holding seniority status shall be sent copies of all job postings as they occur. If an employee is the senior qualified applicant on a posting and declines to return to work when awarded the position, such employee forfeits all accumulated seniority rights. If no qualified applicant is awarded the position, and a laid off employee declines to be recalled to the position, such laid off employee shall forfeit all accumulated seniority rights.
7. In the event an employee does not pass probation, the employee shall have the right to grieve such action subject to the just cause provisions of this agreement.

ARTICLE VII – JOB POSTING

Section 7.1. Procedure. Notice of vacancies which are to be filled due to retirement, quitting, new positions, or for whatever reason, shall be posted on all bulletin boards within five (5) working days; and employees shall have a minimum of five (5) workdays (which overlap two (2) consecutive weeks) to bid on such posted job. The successful bidder shall be notified of his selection and his approximate starting date within five (5) workdays.

. . .

Section 7.3. Seniority – Skill and Ability Factors. In filling a vacancy, the employee signing with the greatest seniority in the department shall be given first consideration except as provided for in section 7.4. below. Skill, ability

and efficiency shall be taken into consideration only when they substantially outweigh considerations of length of service. Departments are defined in section 2.3.

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Section 7.7 Failure to Qualify on New Job. An employee who fails to have the ability to handle a job obtained through job posting during his probationary period shall return to his former job. Where an employee for any reason fails to complete a satisfactory probationary period, no re-posting of the position will be required and the County shall proceed to fill the funded vacancy with the next most senior qualified applicant who is a regular employee and a member of the local union who signed the original posting. In the event there are no other qualified union applicants who have posted for the position, the County shall hire outside applicants for funded positions who shall become regular county employees and members of the local union.

Section 7.8 Notice of Postings. Copies of all postings with the names of all employees who posted for such a position shall be made available to a local union designee upon request and on a confidential basis. The local union shall notify the county with the name of the person who is to receive that information.

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POSITIONS OF THE PARTIES

It is the position of the County that the grievance was not filed timely. The County contends that the grievance was not presented within 10 working days of the date of the event. The County claims that it advised the Union in September, 2003 how it would fill the vacancy. The grievance was not filed until February, 2004.

As to the merits of the claim, the County contends that it followed the provisions of the contract in posting the job. When the two bargaining unit employees declined the posting the County followed its Fair Hiring Policy, and made a job offer to an employee of another bargaining unit. The delay in filling the vacant position occurred because of the potential for layoffs and bumping. Nothing in the contract requires the County to repost positions. The contractual obligation is to post vacant positions. What the Union is seeking is to have me insert a reposting provision into the Agreement.

It is the view of the Union that the County should have awarded the position to Ms. Wade in a timely fashion. The contract requires that the successful bidder be notified of his selection and his appropriate starting date within five workdays. That was not done, and the Union never agreed to hold the job open for Ms. Wade.

While the position was filled by a temporary employee, members of Local 990-C could have bumped into the position. When layoffs occurred, the County was required to post the position for laid off employees. (Sec. 6.4.6). Local 990-C employees, including Barnett, were then entitled to exercise their rights under the Posting and/or Layoff clauses. At the time of the initial posting, members of Local 990-C did not know that the position would not be filled immediately. Had the bargaining unit been advised of the planned delay, it is possible that more applications would have been filed.

DISCUSSION

The County contends the grievance is not timely. The grievance was filed on February 6, 2004 protesting Ms. Wade's appointment. She was interviewed on January 27 and started on February 6. I believe the event grieved was the filling of the position without reposting. It is true the County put the Union on notice of how it would proceed. It appears that the Union was content to allow the position to be filled by a temporary employee, in anticipation of the possibility that layoffs could lead to a bargaining unit employee bumping into the vacant slot. However, Section 3.4 calculates grievance time limits from events or occurrences, not from notice of those events.

There is nothing in Article 7 which addresses circumstances under which a job must be re-posted. The Union does not dispute the propriety of the initial posting. The County has proffered testimony, which I accept, that positions are not re-posted other than to cure flaws in initial postings. What has occurred here is that a bargaining unit employee didn't see the initial posting and didn't apply. All other internal candidates withdrew, essentially leaving the field clear for a single external candidate.

The position was held open for approximately six months. Testimony established that positions take anywhere from six weeks to a year, under unusual circumstances, to fill. The position was left unfilled for what appear to be legitimate reasons. There was concern that there be places for dislodged employees to bump. By remaining silent, the Union acknowledged as much.

The Union contends that the County could have awarded the job to Ms. Wade timely, but failed to notify her of her selection and starting date within five days. The record is silent as to what Ms. Wade was told. However, the Union has waived any claim it might make in this area. The Union was specifically put on notice in September, as to how the County planned to proceed, in the event the position was not filled through a bump and chose not to grieve.

It is the Union's claim that when layoffs occurred, the County was obligated to post the vacant position under Section 6.4.6. I disagree for two reasons. First, when layoffs occurred, the position had been held open and made available for bumps. Section 6.4 addresses the rights of employees subject to layoff. No one chose to bump into the job. This grievance has little, if anything, to do with the rights of employees displaced by layoff. Second, Sec. 6.4.6.

simply makes reference to the job posting procedure, which is defined elsewhere. It allows employees on layoffs to use the job posting procedure. They are to be sent job postings “. . .as they occur.” Nothing in this section requires a reposting of a vacant position.

The Union speculates that more applicants might have come forward had bargaining unit employees been advised that there would be a delay in filling the job. Though speculative, the Union may well be right that more people might have come forward if they were comfortable they would not be bumped out in the impending layoff. It does not appear that the Union brought that concern to the County in September of 2003. Furthermore, that does not change the provisions of the contract.

In essence, the Union contends that the passage of time triggers an obligation to re-post a vacant job. That is not apparent from the provisions of the Agreement. It is inconsistent with the practice of the parties. In the context of this dispute, the Union asks me to select a time and series of circumstances which trigger such an obligation. That is a task for the parties.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of November, 2006.

William C. Houlihan /s/

William C. Houlihan, Arbitrator