BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

AFSCME, LOCAL 990-C

Case 253
No. 65916
MA-13364

Appearances:

Ms. Lorette M. Pionke, Senior Assistant Corporation Counsel, Kenosha County, Kenosha County Courthouse, 912 – 56th Street, Kenosha, Wisconsin 53140, appeared on behalf of the County.

Mr. Thomas Berger, Staff Representative, Wisconsin Council 40, AFSCME, P.O. Box 044635, Racine, Wisconsin 53404-7013, appeared on behalf of the Union.

ARBITRATION AWARD

On May 22, 2006, Kenosha County and Local 990C of the American Federation of State, County, and Municipal Employees, AFL-CIO filed a request with the Wisconsin Employment Relations Commission, requesting the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following appointment, a hearing was conducted on August 16, 2006 in Kenosha, Wisconsin. The hearing was not transcribed. Post-hearing briefs were submitted and exchanged by October 19, 2006.

This dispute involves the temporary assignment of work.

BACKGROUND AND FACTS

This Award addresses the method by which Kenosha County filled a temporary vacancy, created by an eight week leave of absence. In early September, 2004 Sharon Davis, Senior Office Associate, who works in the reception area of the Director of Human Services of the Kenosha Department of Human Services took a medical leave of absence, anticipated to

last 6-8 weeks. Ms. Davis, a bargaining unit member, provided 2-3 days notice of her leave. Her position was filled by a combination of a half time contracted employee and a series of involuntary temporary assignments of senior staff. Both of those actions are the subject of this grievance.

Ms. Davis works in the Reception area of the Office of the Director. Dennis Schultz is the Director of Human Services for Kenosha County. Ms. Davis works for Schultz, and performs a variety of tasks, including greeting and directing visitors, opening mail, handling Schultz appointments, and other tasks as assigned. The Office of the Director is an oversight office for the seven Divisions that comprise the Department of Human Services. Each of the Divisions has specific line responsibilities.

It was determined that Ms. Davis position had to be filled during the period of her absence. Traditionally, what the County has done in these circumstances is to hire a temporary employee to fill in for the period of absence. There is a temporary list from which the County secures employees. Under certain circumstances, employees selected from that list are eligible for Union representation. The County is not required to hire from the temporary list, and record testimony is that the County determines who the temporary employee will be.

Dennis Schultz determined that the position was too critical to be filled by a temporary employee. He believed that the position requires a high degree of skill, ability, and experience such that a temporary employee would be inadequate to the task. In that context, Schultz asked Michelle Eisenhauer, Central Services Manager, to fill the vacancy with experienced appropriate staff.

Ms. Eisenhauer devised a plan for covering the position. Some of Ms. Davis' workload was assigned to other employees. This aspect of the plan is not a source of controversy in this proceeding. Dawn Mueller was contracted to work something less than four hours a day. Ms. Mueller is the Administrative Assistant for Workforce Development, employed by the AFL-CIO, and contracted to Kenosha County. She has worked in that capacity for years, works out of the Human Services Office, and is regarded as a good worker who is very familiar with the Human Services structure and operation.

To round out the vacant work day, Eisenhauer created a series of two hour slots around Ms. Mueller's schedule. Eisenhauer then approached the various Division Heads and had them identify senior staff who could be spared intermittently to fill the two hour slots. Senior staff were so identified, though the process had nothing to do with selection by seniority. Seven bargaining unit employees were identified and filled the slots. The employees were not volunteers and some were placed in the slots over objections and concerns that they would not be effective. Employees selected for this assignment were given the schedule and asked to sign for slots that were most convenient/least disruptive to their work schedules.

On, or about, October 15, 2004 a grievance was filed protesting the assignments.

The County was satisfied with the arrangement. The vacancy was covered. Employees who filled the two hour slots brought their own work and completed it. No overtime was generated. There were no complaints as to the quality of service.

The Union and some of the conscripted employees were dissatisfied. This was an unusual arrangement. Neither of the two employees who substituted and testified in this hearing had ever substituted for Ms. Davis. Neither had ever substituted outside their work area or Division. Both were concerned about their ability to do Davis' work well and to balance their own workloads. Ultimately, both employees testified that they were not particularly busy at the reception work station, that they had little public contact, few telephone calls, and that they brought and did their normal work.

ISSUE

The parties stipulated to the following:

Did the County violate the Labor Agreement when it temporarily assigned several different employees to fill in for an absent employee from a Department or Division not their own, and by assigning some of that work to a non bargaining unit employee?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I – RECOGNITION

Section 1.1. Bargaining Unit. The County hereby recognizes the Union as the exclusive bargaining agent for Kenosha County Courthouse employees and Social Services Clerical employees, excluding elected officials, County Board appointed administrative officials, and building service employees for the purposes of bargaining on all matters pertaining to wages, hours and all other conditions of employment.

Section 1.2. Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and

regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

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ARTICLE II – REPRESENTATION

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Section 2.3. Departments Defined. For purposes of defining "Department" pursuant to Sections 6.4(1) and 7.3 of the Collective Bargaining Agreement, "Department" shall be defined and separated as follows:

(a) Department of Administration
(b) Department of Human Services
(c) Department of Planning and Development
(d) Department of Public Works
(e) Clerk of Courts (including Circuit Court, the Chief of Justice, Branches 1-7)
(f) County Clerk's Office
(g) Juvenile Intake Office
(h) Treasurer's Office
(i) Register of Deed's Office
(j) Sheriff's Department
(k) District Attorney's Office
(l) Medical Examiner's Office
(m) Corporation Counsel's Office

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ARTICLE VI – SENIORITY

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Section 6.2. Seniority – Personnel Actions. The practice of following seniority in promotions, transfers, layoffs, recalls from layoffs, vacations and shift preference to fill vacancies shall be continued. Ability and efficiency shall be taken into consideration only when they substantially outweigh considerations of length of service or in cases where the employee who otherwise might be retained or promoted on the basis of such continuous service is unable to do the work required. Full-time employees shall receive preference over part-time employees. A transfer is the filling of a new or vacated position and shall be governed by job posting.

Section 6.3. Temporary Assignments. The County, in exercising its rights to assign employees, agrees that an employee has seniority in a job classification, but may be temporarily assigned to another job to fill a vacancy caused by a condition beyond the control of management. Any employee so temporarily assigned shall be returned to his regular job as soon as possible. Temporary assignments shall not be considered transfers. Temporary assignments shall not be extended beyond ninety (90) days.

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.

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ARTICLE XXII – MAINTENANCE OF BENEFITS – SEPARABILITY

Section 22.1. Benefits. Any benefits received by the employees, but not referred to in this document, shall remain in effect for the life of the agreement.

POSITIONS OF THE PARTIES

The Union points out that "Normally when an employee is absent for any reason the other employees in the department cover for the absent employee.", or that no one covers. Where no employee can be spared the County hires a temporary employee.

The Union objects to the use of Dawn Mueller because she is not a member of Local 990C. As such, she is alleged to be a non-Union employee who is not a temporary employee and who is not a bargaining unit employee.

In the Union's view the County should have exercised its rights under Article 6.3 to temporarily transfer a bargaining unit employee to cover the absence. The Union submitted a number of exhibits demonstrating that this has occurred frequently in the past, and contends that this constitutes an interpretation of Article 6.3 and a past practice. In this case, contrary to the contract and the practice, the employees assigned to the vacancy were required to do their own work while filling in for an absent colleague. The Union contends that employees were asked to perform 10 hours of work in an 8 hour day which both violates the Agreement and their right to reasonable working conditions.

The Union contends that the County violated Article 2 where seniority divisions are set. The County is alleged to have violated Article 6.2 where the spirit of seniority is set forth and Sec. 6.3 where the County is alleged to have violated the temporary assignment language and the past practice associated with that language. Finally, the Union contends that the County

has violated Art. 22, Maintenance of Benefits. The Union regards the temporary assignment and seniority as covered benefits.

The County points to Section 1.2 which permits it to contract out for work unless "…such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees."

The County believes its actions with respect to the reassigned bargaining unit employees is specifically governed by Sec. 6.3. Sec. 6.3 grants the County the right to assign employees temporarily to fill a vacancy caused by a condition beyond the control of Management. The provision does not limit the reassignment by seniority nor does it limit the reassignment to the Division or Department. The County contends that neither the contract nor its many interpretations, have been violated.

DISCUSSION

Assignment of Hours to Dawn Mueller

Sec. 1.2 permits the County "…to contract for work…". It goes on to define that right. The last sentence of Sec. 1.2 provides that "The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees." Here, the Employer contracted with Dawn Mueller to perform work. Given the nature of the vacancy, no employee was laid off nor was any employees regular hours reduced. On its face, the provision has been honored. However, this is an area of the Agreement that has been the subject of numerous Arbitration Awards and an applicable Settlement Agreement.

In 1982, the parties resolved certain grievances with a Settlement Agreement that included the following provision:

> "…2. That the Employer will not assign bargaining unit work on a continuous basis to non-bargaining unit person(s) and/or agency; and…"
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> . . .

The work that is the subject of this dispute is bargaining unit work. That raises the question of whether or not 8 weeks constitutes "a continuous basis". That answer is provided in a 1988 Arbitration Award, between these parties, by Arbitrator Kerkman, who concluded: " The Arbitrator finds that 90 days is the maximum amount of time that an assignment of bargaining unit work may be made to non-bargaining unit personnel before it becomes an assignment on a continuous basis."(KENOSHA COUNTY, Grievance No. 85-990-003, p.13) This assignment of work fell well within the 90 day standard.

The fact that Mueller is not a bargaining unit member is of no significance. Neither is the fact that she did not come from a temporary list. This provision authorizes the contracting of non bargaining unit entities. All testimony, including that of union witnesses is that the Employer selects the temporary employees.

Rotation of Bargaining Unit Employees Into Two Hour Slots

On its face, the assignment of bargaining unit employees to cover a work station would appear to be governed by Article I, Management Rights, "…the right to decide the work to be done and location of work;…" Similarly, Article 6.3 addresses temporary assignments. The parties disagree over the meaning of Art. 6.3.

The Union claims that normally this type of vacancy would be covered by a temporary employee, i.e. a bargaining unit employee relieved of other responsibilities to handle the absence. The Union contends that that is the meaning of Art. 6.3, and further contends that there exists an interpretive practice to support this claim. The real irritant in this case is that employees were not relieved of their own work, nor were they paid to fill in. It is the Union claim that employees were asked to do 10 hours of work in an 8 hour time frame for 8 hours of pay.

This portion of the case is much to do about nothing. It was the Employer testimony that the work involved is critical, demands high skills, is sensitive and cannot be entrusted to inexperienced and/or temporary employees. However, the employees who actually did the work testified that they were not trained, nor were they evaluated in this assignment. In a somewhat parallel effort at exaggeration the Union complains that employees were asked to more work than there were hours of the work day and subjected to unreasonable working conditions. The employees testified that they were told that if there was work they didn't know how to handle, they should call Ms. Eisenhauer. They also testified that the work station was slow. They indicated that they were not busy. They reported 1-2 public contacts, no major phone calls, and an occasional walk in. Both employees testified that they brought their regular work to the reception station, and completed it without falling behind.

Witnesses acknowledged that when an employee is absent co workers cover. It goes on all the time. The Union does not object to the initial redistribution of Davis' work to co workers in this proceeding. That is all that happened here. The grievants were asked to handle what proved to be a modest amount of their co workers work.

Much has been made about the fact that employees had to leave their Division. Evidently, that has not occurred in the past. The fact is the employees stayed in their Department. The Union claims a violation of Article II, based on the seniority distinctions drawn there. Article II sets the Department as the basis of seniority where that is applicable. There is no distinction drawn between Divisions. Article 1, Sec. 1.2 reserves to the Employer the right to "…decide the work to be done and location of the work."

Article 6.2 was not violated. The provision regulates transfers. Temporary assignments under Article 6.3 are specifically not to be considered transfers.

Article 6.3 does not prohibit the assignments that occurred. On its face, the Article appears to authorize the County to make temporary assignments to vacancies that arise due to conditions beyond the control of Management. That certainly is the case here. The Union contends there is an interpretive practice that restricts temporary assignments to within the Division; or, in the alternative bars the Employer from reassigning outside the Division. I disagree. The claimed practice refers to a non event, i.e. the fact that no one has been scheduled out of the Division. A practice would customarily involve a pattern of prior conduct, identifiable as such. Such conduct is repeated, acknowledged, and accepted. (See Mittenthal, Richard, "Past Practice and the Administration of Collective Bargaining Agreements", 59 Mich. L. Rev. 1017 (1961), cited in *The Common Law of the Workplace*, 2nd. Ed. BNA, 2005, p.89-90) It is difficult to analyze a non occurrence under these standards.

Such an analysis is also suspect under the circumstances giving rise to this dispute. Here, Article 1 gives the Employer the right to decide work location. Article 6.3 allows temporary assignment to another job. The claimed practice would run head first into these two provisions.

Given the foregoing, I do not believe an interpretive practice exists.

I do not believe that Article XXII is applicable to this dispute.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 2nd day of February, 2007.

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

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