BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OUTAGAMIE COUNTY PROFESSIONAL EMPLOYEES UNION, LOCAL 2416, AFSCME, AFL-CIO, and affiliated with the WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES

and

OUTAGAMIE COUNTY, WISCONSIN

Case 288
No. 66701
MA-13603

Appearances:

Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, with **Martha Merrill,** Research Analyst, for Outagamie County Professional Employees Union, Local 2416, AFSCME, AFL-CIO, and affiliated with the Wisconsin Council of County and Municipal Employees, which is referred to below as the Union.

James R. Macy, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Outagamie County, Wisconsin, referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the County 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 Employer and the Union jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as arbitrator to resolve Grievance 06-3, filed as a "class action" regarding whether the County should have posted a social work position. Hearing was held on June 15, 2007, in Appleton, Wisconsin. Prior to the opening of the hearing, the County asserted the grievance was not substantively arbitrable, and the parties agreed to have that assertion resolved before taking evidence or argument on the merits of the grievance. Connie L. Jacobs filed a transcript of the hearing with the Commission on June 26, 2007. The parties filed briefs and reply briefs by September 26, 2007.

ISSUES

The parties' briefs state the stipulated issue thus:

Is this grievance substantively arbitrable?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – MANAGEMENT

1.01 – Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer . . . is vested exclusively in the Employer. In keeping with the above, the Employer shall adopt and publish reasonable rules which may be reasonably amended from time to time. The Employer and the Union will cooperate in the enforcement thereof. . . .

ARTICLE VI – GRIEVANCE PROCEDURE

6.01 – The parties agree that only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

6.02 - . . .

Step 4. . . . Arbitration proceedings shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. . . . In rendering his or her decision, the Arbitrator shall neither add to, detract from nor modify any of the provisions of this Agreement. . . .

ARTICLE VII – WORKWEEK

7.01 – A) For all employees except those referred to in Section 7.01 (B) or (C), the normal workday shall be seven and one-half (7 ½) hours and the normal workweek shall be thirty-seven and one-half (37 ½) hours, Monday through Friday. . . .

C) For all employees hired into Local 2416 or who transfer or are promoted into any full time vacancy in this bargaining unit, the normal workday shall be eight (8) hours and the normal workweek shall be forty (40) hours, Monday through Friday. . . .

ARTICLE XIX – JOB POSTING

19.01 – In the event a job vacancy or new position occurs, a notice of such vacancy or new position shall be posted on the employee's bulletin board for at least five (5) working days not including Saturdays, Sundays and holidays. Said notice shall contain the prerequisites for the position, rate of pay and general duties of the job. . . .

BACKGROUND

The grievance form alleges,

> A position formed via vacancy was not posted, but rather reassigned within the Division. Only one individual was eligible for "reassignment." Management has not adopted or published reasonable rules regarding what constitutes a reassignment of duties.

The grievance form alleges that this violates Section 19.01 and Section 1.01, and seeks that "the open ongoing social work position should be posted as it was created initially due to a vacancy posted." At Steps 1 and 2, the County denied the grievance without elaboration. At Step 3, in a letter dated November 9, 2006, Robert Sunstrom, the County's Human Resources Director, answered the grievance thus,

> This is to respond to the grievance discussed at the November 9, 2006 grievance meeting . . . The County's handling of the posting and reassignments in this matter was in accordance with the Labor Agreement. The grievance is denied.

Sunstrom testified that Grievance 06-3 has roots tracing back to the 2002-04 labor agreement.

On March 18, 2002, the parties executed a Memorandum of Understanding, referred to below as the Memorandum, which states,

> The collective bargaining agreement for the time period from 2002 through 2004 between AFSCME Local 2416 and Outagamie County that is currently undergoing the ratification process will introduce a new Section 7.01(C) to read:
>
> > "C) For "Social Workers" and "Nutritionists", and employees from any division or unit covered by this collective bargaining unit who volunteer to do so, as well as all employees hired into Local 2416 or who transfer or are promoted into any vacancy in this bargaining unit on or after the date of ratification of this collective bargaining agreement by the County Board, the normal workday shall be eight (8) hours and the normal workweek shall be forty (40) hours, Monday through Friday. . . .

The parties agree that at such time as the agreement successfully completes the ratification process, the first sentence of the new Section 7.01(C) will be administered according the following parameters.

1. At present, Social Workers I – V and Professional Counselors IV – V work a standard 37½ hour work week (7½ hours per day). They are the sole individuals covered by the Local 2416 collective bargaining agreement who do not work a standard 40 hour work week (8 hours per day). A Social Worker I – IV or Professional Counselor IV – V may volunteer to work a 40 hour work week by:

   A. Contacting their direct supervisor in writing to make their wishes known. The employee's request to work a 40 hour work week is subject to the approval of the Deputy Director . . . or to the Court Services Supervisor . . .

. . .

4. Social Worker(s) I – V and Professional Counselors IV – V hired by Outagamie County after the day of ratification by the County Board will be assigned to work a 40 hour work week.
5. Employees who post for and are chosen to fill a vacancy, whether by transfer, i.e. a lateral movement from one division to another within the same wage grade, or by promotion, i.e. movement into a higher wage grade, will begin working a 40 hour work week subject to the approval process described in #1. Note: "Promotion" is not intended to include the movement from one wage grade to another in instances of reclassification described in Section 20.01(c).

. . .

Employees classified as Social Worker I through V are covered by one job description. Sunstrom interprets the Memorandum to grant the County the ability to assign duties, without a posting, to employees within the Social Worker I through V classification who work within the same division.

In March and April of 2004, the Union filed four grievances alleging contractual violations occurring on March 9, March 17 and March 29. The March 29 grievance alleged that the County had violated Section 19.01 when,

> Child Protection Intake position was created. The position was not posted internally, but was filled by a county employee.

One of the grievances challenging the events of March 17 alleges a violation of Section 19.01 concerning the assignment of duties "specific to court dispositional services" to an employee "hired . . . from outside the . . . bargaining unit." The other grievance challenging the events of March 17 does not specifically note Section 19.01, but alleges a violation of Section 7.01C) when a "Foster Care Worker was transferred to Child Protective Intake and maintained 37½ hr. work week." The March 9 grievance alleges a violation of Section 7.01C) when an employee "applied for a posted social worker vacancy with general duties focusing on juvenile restorative justice" but was advised that the employee would be reassigned to those duties without a change in "said employee's 37½ hour workweek." The parties processed each of these grievances to the arbitration step. Sunstrom testified that the parties then "decided to arbitrate one of the four and have that arbitration decision serve as precedent for the issue." (Transcript at 20).

The March 29 grievance was submitted to Arbitrator Lauri Millot, who resolved it in OUTAGAMIE COUNTY, DEC. NO. 6930, (MA-2385, 12/6/2005). Beyond the four grievances summarized above, the Union filed ten grievances during the period of time between the filing of the March 29 grievance and the issuance of DEC. NO. 6930. The parties discussed how to process each of these grievances. In an e-mail to Sunstrom dated August 27, 2004, Mary Scoon, the Union's Staff Representative stated,

> The Local is requesting to hold the grievance in abeyance pending the outcome of the arbitration. If this is o.k. there wouldn't be a need to meet with you either. However, as these similar circumstances come up, grievances will most likely be filed so we have a paper trail. . . .

Sunstrom agreed to hold each grievance in abeyance, pending the issuance of DEC. NO. 6930. Two of his e-mails note that the grievances involved "the same issues" or "the same subject". The Union did not process any of these grievances after the issuance of DEC. NO. 6930.

DEC. NO. 6930 states the following:

> **<u>ISSUES</u>**
>
> The parties stipulated that there were no procedural issues in dispute, but were unable to agree to the substantive issues.
>
> The County frames the issues as:
>
> Did the County violate the collective bargaining agreement when it reassigned without posting Social Worker Lynn Schroeder from foster care, respite care duties within Children, Youth and Families Division to intake investigation duties also within Children, Youth and Families Division? If so, what is the appropriate remedy?

The Union frames the issues as:

Did the County violate the collective bargaining agreement when it refused to post a job vacancy? If so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I accept the County's framing of the issues. . . .

BACKGROUND AND FACTS

. . .

The County experienced a reduction in Foster Care Homes from 110 in 2000 to 52 as of March 2004. During that same time period, the number of protective service investigations increased by 100. As a result of these changes, the County re-evaluated its staffing patterns and determined it was necessary to make changes. Both foster care work and protective service work are done by social workers in the Child, Youth and Families Division. The Division Manager, Michelle Weinberger-Burns, met with the staff, informed them of the workload changes and the need to reassign duties, and requested ideas as to how the duties should be reassigned. Weinberger-Burns ultimately concluded in February 2004 that she would reassign Lynn Schroeder from a Social Worker position assigned the worksite assignment, Foster Care Coordinator, to a Social Worker position with the worksite assignment, Intake Investigator, in the same division. In moving Schroeder, the County did not post a position. As a result of the move, Schroeder's supervisor changed although her compensation did not change. . . .

DISCUSSION

The question presented in this case is whether the County has the contractual authority to reassign a social worker within the same division. I conclude that it does. The Union contends that the County failed to post a position, therefore I look first to the language of Section 19.01 which states that:

> In the event a job vacancy or new position occurs, a notice of such vacancy or new position shall be posted. . .

This language is clear and unambiguous; "a notice … shall be posted," when a job vacancy or new position occurs. The parties' labor agreement does not allow for temporary assignments, therefore if Schroeder was filling a job vacancy or new position, it should have been posted. . . .

> In this instance, a vacancy did not exist. No social worker vacated a position. Rather, the County identified a change in the child investigation and foster home caseloads and due to that change, it removed duties from Schroeder and added or replaced those duties with other duties. . . Although I have some suspicion regarding the extent of the changing caseloads, especially since it had started to occur in 2000 and the County did not reassign any work until 2004, there is no evidence that contradicts or challenges the factual basis for the County's decision.

The decision notes that Paragraph 5 of the Memorandum,

> supports the County's position that the County posting obligation applies to instances when an employee laterally moves from one division to another or when the employee moves to a higher wage grade. Schroeder moved from one unit in the division to another unit in the division. DEC. NO. 6930 at 14.

The decision concludes thus:

> **AWARD**
>
> 1. The County did not violate the collective bargaining agreement when it reassigned, without posting, a social worker, Lynn Schroeder, from Foster Care/Respite Care duties within the Children, Youth & Families Division to Intake/Investigation duties, also within the Children, Youth & Families Division.
>
> 2. The grievance is dismissed. . . .

DEC. NO. 6930 AT 16.

Sunstrom testified that during the processing of Grievance 06-3, he informed Union representatives that he believed the Millot decision dictated that the grievance lacked merit. In his view, at least some of the grievances held in abeyance during the processing of DEC. NO. 6930 posed facts in which the County responded to an employee leaving a division by reassigning duties within the division prior to posting a vacancy. In his view, Grievance 06-3 poses the same issue. He acknowledged that the Union and the County did not produce a written agreement formalizing the precedential value of DEC. NO. 6930 on the grievances held in abeyance during its processing.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Employer's Brief

After a review of the evidence, the County contends that grievance 06-3 "lacks substantive arbitrability" and that this precludes hearing its merits. More specifically, the County argues that DEC. NO. 6930 resolved Grievance 06-3. Prior to the issuance of DEC. NO. 6930, the parties had processed fourteen grievances regarding the circumstances in which the County could not reassign duties, but had to post a position. They agreed to take one of those grievances to hearing, allowing the result in DEC. NO. 6930 to bind the thirteen pending grievances.

Examination of DEC. NO. 6930 establishes it "as precedent for the current grievance." The facts are essentially the same, paralleling fact patterns from the grievances the Union declined to process after the issuance of DEC. NO. 6930. That decision established the County's right "to assign social workers to duties within their division." Under Section 6.02, Step 4, DEC. NO. 6930 "decides this grievance and it should be dismissed as not substantively arbitrable."

Beyond this, the doctrines of collateral estoppel, issue preclusion, claim preclusion and Res Judicata "operate to bar this grievance." Citing precedent developed by Wisconsin courts, the County concludes that DEC. NO. 6930 should be considered the final adjudication "as to all matters that were, or could have been, litigated in the earlier proceeding." More specifically, Grievance 06-3 poses identical issues with DEC. NO. 6930. Since the same parties appear in both matters and since the parties agreed to grant precedential value to DEC. NO. 6930, there is no need to relitigate the matter. It follows that "this grievance should be denied."

The Union's Reply Brief

The Union acknowledges that the County's brief states the issue properly and that Section 6.02, Step 4 is relevant to its resolution. The County brief contains, however, "several significant omissions". More specifically, the Union argues that the stipulated issue cannot be resolved without the application of Section 6.01, which defines a grievance. Beyond this, the County's arguments ignore that the grievance questions the interpretation of Sections 19.01 and 1.01.

The County also fails to clarify the basis on which the determination of substantive arbitrability is to be made. Citing, *The Common Law of the Workplace*, St. Antoine, editor, (BNA, 2005) at Section 1.21, the Union defines substantive arbitrability as "whether a party has agreed to be bound by an arbitration decision concerning the subject matter of the case." JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 Wis.2D 94 (1977) states the elements of analysis that make this definition workable. Those elements demand a determination,

> (1) whether there is a construction of the arbitration clause that could cover the grievance 'on its face' and (2) whether any other provision of the contract specifically excludes arbitration of the underlying dispute.

These elements do not look to the merits of the grievance, but to whether "the parties should proceed to arbitration."

The County's arguments, including the "false claim" that the parties agreed that DEC. NO. 6930 would bind pending grievances, point to this grievance's merit rather than to its arbitrability. The assertion of the applicability of the doctrines of "of collateral estoppel and issue preclusion (res judicata), the practice of the parties, precedent, etc." is similarly nothing but an invitation to judge the grievance's merit. The Union "respectfully declines the invitation." It follows that the "grievance is arbitrable" and that "the Arbitrator should so find and . . . direct the parties to proceed to . . . a hearing on the merits of the grievance."

The Employer's Reply Brief

The Union's general statement of what constitutes substantive arbitrability "completely ignores the facts as they relate to the arbitrability portion of this case and the specific agreement between the parties regarding the issue of arbitrability as applied to this case." Under the Union's view of the case, either party could enter an agreement only to disavow it through an arbitrability argument.

The evidence establishes that the parties agreed that a series of grievances should be tied to the litigation of DEC. NO. 6930. The Union did not deny the existence of the agreement at hearing and did not produce evidence to support the bald assertion that there was no agreement. Arbitrator Millot addressed an issue that resolved all of the grievances that had, through mutual agreement, been held in abeyance pending the issuance of DEC. NO. 6930. That resolution binds not just the grievances held in abeyance, but also Grievance 06-3.

Union failure to rebut County assertion of judicial doctrine making DEC. NO. 6930 binding precedent constitutes a waiver of the right to challenge their application to this grievance. A series of e-mails between the County and the Union establish that DEC. NO. 6930 constitutes a binding resolution of "the County's ability to (re)assign an employee to another social worker position within the same division without posting the position." The e-mail trail starts in August of 2004 and continues through March of 2005. Those e-mails and the grievances they address constitute an agreement that DEC. NO. 6930 constitutes binding precedent over the issue raised by Grievance 06-3. Since "the current grievance is exactly the same as previous grievances held in abeyance" pending the issuance of DEC. NO. 6930, and since DEC. NO. 6930 resolved the issues posed by those grievances, it follows that "this grievance is not substantively arbitrable and must be dismissed."

DISCUSSION

The stipulated issue questions whether the grievance is substantively arbitrable. The standards governing the enforcement of an agreement to arbitrate date back to the *Steelworkers' Trilogy*, see UNITED STEELWORKERS V. AMERICAN MFG. CO., 363 US 564 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 US 574 (1960); UNITED STEELWORKERS V. ENTERPRISE WHEEL & CAR CORP., 363 US 593 (1960). The Wisconsin Supreme Court incorporated, from the *Trilogy*, the teaching of the limited function served by a court or an administrative body in addressing arbitrability issues, see DEHNART V. WAUKESHA BREWING CO., INC., 17 Wis.2D 44 (1962). The Court stated this "limited function" thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., 78 Wis.2D 94, 111 (1977).

The JEFFERSON Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable, *ibid. at 113*. The purpose underlying these considerations is to grant the widest scope possible to consensually set dispute resolution, without forcing a party to arbitrate matters it has never consented to arbitrate. The JEFFERSON Court emphasized "the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes", *ibid., at 112*.

These legal considerations set the governing background for addressing the stipulated issue. The two elements of the JEFFERSON analysis point toward arbitration. Section 6.01 broadly defines a grievance as a matter "involving the interpretation, application or enforcement of the terms of this Agreement". The grievance questions whether, "A position formed via vacancy" should have been posted and whether County failure to adopt a rule regarding "a reassignment of duties" violates the agreement. On its face, Section 19.01 demands the posting of a vacancy or a new position. On its face, Section 1.01 refers to County adoption of rules and the parties' mutual duty to cooperate in their enforcement. There is no persuasive basis to conclude that the grievance fails to state on its face an issue calling for the interpretation of the agreement as provided in Section 6.01. Nor is there any assertion of specific contract language barring the matters alleged by the grievance. Thus, each element of the JEFFERSON analysis is met here, and Union arguments that JEFFERSON requires arbitration of the grievance are well-founded.

Union arguments, however, understate the force of the County's position. The County asserts that the parties agreed to give binding force to the result of DEC. NO. 6930, and that this reflects mutual agreement to bar arbitration no less than contract language. That agreement, the County urges, whether enforced via doctrines regarding claim and issue preclusion or via the second element to the JEFFERSON analysis, must be enforced.

The force of the County's arguments is traceable, on a general level, to its assertion that the litigation of Grievance 06-3 undermines a prior agreement on the binding force of DEC. NO. 6930. The force of the argument as a general matter is, however, undermined by the evidence surrounding the asserted agreement.

Fundamental problems surround that proof. That the parties did not enter into a formal agreement prefaces these problems. The absence of a writing to establish the agreed-upon binding force of DEC. NO. 6930 is not fatal to the argument, but prefaces the need to examine the conduct manifesting the agreement. That conduct affords tenuous support for the County's general argument. The failure of the parties to stipulate an issue in DEC. NO. 6930 undercuts the force of the County's assertion regarding its precedential value. It is difficult to conclude the parties entered an agreement to bind a number of pending grievances, but could not agree on the issue the arbitrator was to address to bind them. The parties' conflicting statements of the issue highlight this. The County's issue offered a specific factual focus to the issue, in contrast to the Union's more general statement. It is difficult to square the factual focus of the County's statement of the issues with the assertion that it sought broad precedential force for the decision.

More significantly, County arguments pointed the arbitrator away from sweeping pronouncements. In her summary of the arguments, Millot noted that the County asserted, "The present case does not involve a new position or a job vacancy", DEC. NO. 6930 AT 11. This is significant here, since Grievance 06-3 alleges that it involves a vacancy. That Millot followed the narrow focus is manifested by her stating the conclusion,

> In this instance, a vacancy did not exist. No social worker vacated a position.

This narrowly stated conclusion is difficult to reconcile with the asserted breadth of DEC. NO. 6930.

Thus, the force of the County's assertion points to issues and fact patterns presented not by the March 29 grievance addressed by Millot in DEC. NO. 6930, but to issues and fact patterns contained in the grievances held in abeyance pending her decision. As Sunstrom's testimony and the e-mail trail noted above point out, there is proof that the parties did not want to litigate their differences any farther than necessary.

The difficulty with taking this proof as far as the County pushes is that it is not clear what the parties took from DEC. NO. 6930. It is possible to infer the Union took the decision to dispose of the pending grievances on their merit. It is no less possible to infer the Union determined to see how the County would implement its view of the Millot decision. In any event, the inference the County seeks rests on the allegations stated on the face of the dropped grievances. Those allegations fall short of proven fact. This is significant here, because what proof there is regarding the mandatory force of DEC. NO. 6930 on Grievance 06-3 turns on the existence, in the dropped grievances, of situations involving reassignments preceding the posting of a vacated position. It is difficult to infer the parties agreed to attribute binding force

to these allegations when the County argued, before Millot, that the March 29 grievance did not involve a new position or a job vacancy, but the County's authority to reassign duties.

In sum, the proof will not support the County's general assertion that the parties agreed, explicitly or implicitly through their handling of the pending grievances noted above, that DEC. NO. 6930 would have mandatory force over any subsequent grievance alleging a violation of Section 19.01 or 1.01 regarding County failure to post a vacated position. This is not to say that DEC. NO. 6930 or the parties' conduct regarding its litigation cannot be given persuasive force over the current grievance. This, however, begs a determination of the grievance's merit. The substantive arbitrability issue questions whether DEC. NO. 6930 must be given mandatory force over Grievance 06-3 without evidentiary hearing.

Thus, the Union has demonstrated that application of the JEFFERSON analysis demands arbitration of Grievance 06-3. Whatever doubt is traceable to the County arguments must be resolved in favor of the grievance's arbitrability. Application of the doctrines of issue or claim preclusion does not undercut this conclusion. Those doctrines are, in the first instance, better applied to transaction by transaction civil litigation than to an ongoing bargaining relationship. As part of the collective bargaining process, grievance arbitration serves the goal of dispute resolution within an ongoing relationship. The County's arguments have force regarding the need to keep parties to their agreements. However, use of the doctrines advanced by the County carry the risk of encouraging litigation by parties who fear failure to litigate every issue risks waiver of arguments not necessarily posed by a single grievance. Here, the evidence of the agreement the County asserts is not sufficiently strong to warrant that risk.

AWARD

The grievance is substantively arbitrable, and will be set for hearing on its merits.

Dated at Madison, Wisconsin, this 7th day of December, 2007.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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