BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WOOD COUNTY

and

WOOD COUNTY PARK & FORESTRY EMPLOYEES LOCAL 344, AFSCME, AFL-CIO

Case 176
No. 66929
MA-13687

(Gilson Posting Grievance)

Appearances:

Christopher M. Toner, Attorney, Ruder Ware, 500 First Street, Suite 8000, P.O. Box 8050, Wausau, Wisconsin 54402, on behalf of Wood County.

Houston Parrish, Staff Attorney, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, on behalf of Local 344 and Ron Gilson.

ARBITRATION AWARD

The County and the Union 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 Union requested that the Wisconsin Employment Relations Commission designate an Arbitrator to resolve a grievance filed by the Union on behalf of Ron Gilson (Gilson or Grievant, herein) concerning posting to a position. The Commission designated Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing was held on the matter on July 17, 2007 in Wisconsin Rapids, Wisconsin. No transcript was prepared. The Parties filed written briefs and the record was closed on August 23, 2007.

ISSUES

The Parties did not stipulate to a statement of the issues and each stated them somewhat differently at the hearing and in their briefs. The Union states the issues as:

> Did the Employer violate the collective bargaining agreement when it refused to consider Ron Gilson as an internal union applicant and then refused to hire him into the vacant maintenance worker position?
>
> If so, what is the remedy?

The County states the issues as:

Is the Grievance timely? And, if so did the Grievant pass his probationary period, as defined by Article 5.03 in the agreement, when he failed to work as a Camp Ranger from May until the end of October?

The record best reflects the issues to be:

Is the Grievance timely? If so, did the Grievant pass his discovery period, as defined by Article 5.03 in the agreement, when he did not work as a Camp Ranger from May until the end of October, so as to be considered an internal union applicant to post into and be selected for the maintenance worker position?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

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2.02 Without limiting the generality of the foregoing, this includes;

2.02.01 The management of the work and the direction and arrangement of the working forces, including the right to hire, discipline, suspend or discharge for just cause or transfer. The right to relieve employees from duty because of lack of work or for other legitimate reasons is left exclusively to the Employer, provided that this will not be used for purposes of discrimination against any member of the Union because of union activity.

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ARTILCLE 3 – EMPLOYEE STATUS

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3.04 Camprangers. Employees hired as Camprangers shall normally be employed by the County during the months of May through October. The County agrees to give first consideration for seasonal work to Campranger employees who shall, if employed for seasonal work, be compensated at the wage rate for seasonal employees who are returning for continued employment with the County.

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ARTICLE 4 – HOURS OF WORK

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4.07 Camprangers:

4.07.01 Hours: Camprangers shall, during the period of May 15 through September 15, normally work a weekly schedule of sixty (60) hours as determined by the Supervisor and posted at the beginning of the Campranger work year. A weekly schedule of up to eighty (80) hours may be required for the work weeks of opening weekend, Memorial Day, Fourth of July, Labor Day, and (at South Wood Park) water-ski weekend in July. Split shifts and other variations to the normal work schedules shall be by mutual agreement between the employee and Supervisor.

A weekly schedule of up to sixty (60) hours may be scheduled by mutual agreement during the periods of May 1 to May 15 and September 16 through October.

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ARTICLE 5 – DISCOVERY PERIOD

5.01 Regular Full-time Employees. All newly hired regular full-time employees shall serve a discovery period of one thousand forty (1,040) hours of work (including hours compensated through County payroll) or nine (9) months, whichever shall occur first, before being entitled to regular full-time employee status.

5.02 Regular Part-time Employees. All newly hired regular part-time employees shall serve a discovery period equal to one thousand forty (1,040) hours of work (including hours compensated through County payroll) or nine (9) months, whichever comes first, before being eligible for regular part-time employee status.

5.03 Camprangers. All newly hired employees in the classification of Campranger shall serve a discovery period of one work season of May through October with working a minimum of three (3) months during the season before attaining employee status as Campranger.

5.04 Extension and Discharge of Discovery Period employees. Discovery periods set forth herein may be extended upon mutual agreement of the Employer and the Union. During the discovery period set forth herein, or any extension thereof, the employee may be disciplined or discharged without recourse to the grievance procedure set forth in this Agreement.

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ARTICLE 7 – JOB POSTING

7.01 Vacancies, Applications, and Award. When the Employer deems it necessary to fill a vacancy or new position, the Employer shall post a notice of such vacancy or new position on the Wood County Park and Forestry Department bulletin board and on a bulletin board in each Wood County Park for five (5) working days overlapping two (2) consecutive weeks.

The job requirements, qualifications, and rate of pay shall be part of the posting, and sufficient space for interested parties to sign said posting.

7.02 In filling the vacancy or new position, qualifications, skill, seniority and ability of the internal applicants will be considered. When qualifications, skill and ability between two (2) internal candidates are relatively equal, seniority shall be the determining factor. If no internal candidate applies or is qualified, the County may advertise publicly for applicants to fill the position.

When an employee has been selected to fill a vacancy, notice of such choice shall be posted on the Wood County Park and Forestry Department bulletin board and on each bulletin board where the position was originally posted. The Employer shall provide the Union with a copy of the notice.

7.03 Trial Period, Retrocession, General Considerations. The employee who receives the posted position shall serve a forty-five (45) work day trial period.

In the event the employee chooses, within the trial period, not to remain in the position, or the Employer, within the trial period, determines the employee does not qualify for the position, the employee shall be returned to the position previously held with no loss in wages, benefits, or other rights. When such a situation occurs, the Employer shall then give the position to the next employee who can qualify based on qualification, skill, seniority and ability, who signed the postings outlined in Section 7.01 above. This procedure shall continue until the position is filled permanently.

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ARTICLE 8 – FAIR SHARE

8.01 Fair Share: The Employer agrees that it will deduct from the monthly earnings of all employees in the collective bargaining unit, the monthly dues certified by the Union as the current dues required of all bargaining unit members, and pay said amount to the treasurer of the Union on or before the end of the month in which such deduction was made. The dues shall be deducted on the second payday of each month.

Changes in the amount of dues shall be certified by the Union thirty (30) days before the effective date of the change.

As to the new employees, such deduction shall be made from the first paycheck following the completion of the discovery period.

The Employer will provide the Union with a list of employees from whom such deductions are made with each monthly remittance to the Union.

The Union, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, union and non-union, fairly and equally, and all employees in the unit will be required to pay, as provided in this Article, their proportionate share of the cost of representation by the Union. No employee shall be required to join the Union, but membership in the Union shall be made available to all employees who apply, consistent with the Union constitution and bylaws. No employee shall be denied Union membership because of race, creed, color, or sex.

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ARTICLE 10 – GRIEVANCE PROCEDURE

10.05 Procedural Steps: Grievances shall be processed and resolved in the following manner:

10.05.01 The term "days" as used in this procedure shall mean business days exclusive of Saturdays, Sundays and holidays.

10.05.02 Step 1. All grievances shall be verbally discussed between the grievant and/or Union and the immediate supervisor within five (5) days of the event giving rise to the grievance. Grievances not resolved in that discussion may be reduced to writing and presented to the Park Administrator within five (5) days of the initial meeting with the immediate supervisor. Failure to enter into verbal discussion within the first five (5) days shall not bar the filing of the written grievance within a total of ten (10) days from the date of the alleged violation of the Agreement. The Park Administrator shall respond in writing to the grievant and/or Union within five (5) days of receipt of the written grievance.

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10.08 Decision of the Arbitrator. The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract. The Arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

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ARTICLE 21 – ENTIRE MEMORANDUM OF AGREEMENT

21.01 This Agreement constitutes the entire agreement between the parties. Any amendment or Agreement supplemental hereto shall not be binding unless mutually agreed to in writing and signed by authorized representatives of the County and the Union.

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BACKGROUND AND FACTS

Wood County owns and operates a park, recreational and forestry system which contains campgrounds. The system is staffed by County Employees working in various positions that include Seasonal Maintenance Worker (Limited Term Employees), Campranger, and Park Maintenance Worker. Seasonal Maintenance Workers generally perform a variety of tasks in operating, maintaining, repairing, and construction in County Park and Forestry areas and facilities. Camprangers generally are assigned one of three County campgrounds to register campers, sell wood and ice, keep the campgrounds clean, enforce park ordinances, and perform necessary bookkeeping. Park Maintenance Workers generally perform construction, maintenance and repairs of the Wood County Park and Forestry facilities, recreational area and campgrounds. Some of the duties of these three positions sometimes overlap to varying degrees. The duties of a Seasonal Maintenance Worker are similar, but not as extensive, as a Park Maintenance Worker.

Camping is allowed in the parks normally from May 1st through October 31st . Prior to the formation of the Union that was also considered the Campranger season. From May 15th to September 15th is normally the busiest camping time. After the formation of the Union and the first contract, the Campranger work season had the hours of work differentiated for the dates between the May 15th weekend and the September 15th weekend. If there are campers before May 15th and after September 15, the full time Park Maintenance Workers generally take care of them. There has been occasion where a Campranger, usually the most senior, has worked through the end of October. Sometime after September 15th the County calls the Camprangers back to work as LTE seasonal workers to supplement the work schedule, as provided in the agreement. At least since the first contract there have been no Camprangers who have worked from May 1st through October 31st.

Grievant has worked for the County as a Seasonal Maintenance Worker at various times from September 4, 2001 through and after January 11, 2006. He received some positive comments from the County for his work during those times. He began work as a Campranger on May 11, 2006. By memo to all Camprangers of September 11, 2006, seasonal work after September 18, 2006 and to October 31, 2006 was offered to Grievant and other Camprangers to do general maintenance work. The memo also noted that performance reviews would be held on September 18, 2006. Grievant indicated his willingness to do the seasonal work and effective September 19, 2006 began performing the seasonal work.

As a Campranger in 2006 he worked 1,199.25 hours before beginning the seasonal work. His performance review as a Campranger was held on October 13, 2006. Out of the ten listed performance factors he had three indicating need some improvement to meet requirements, six indicating meets position requirements and occasionally exceeds, and one indicating usually exceeds position requirements. There were no indications of performance is unsatisfactory and must improve to remain in position, and none indicating consistently and substantially exceeds position requirements, or Demonstrates leadership skills in this area. He initially had some communication issues with some Camp Hosts, former Camprangers who are volunteers working at the camp grounds. Grievant's Lead Worker disputed, at the hearing, a statement in the evaluation that Grievant did not have good communication with the Lead Worker. The Lead Worker also testified that he had also recommended Grievance for a Maintenance Worker position. A performance improvement plan and goals for the following year were part of the evaluation. Grievant understood from statements of the Department Administrator during the evaluation that he would be invited back the following year. No one from the County told Grievant in September or October 2006 that he had passed or not passed the discovery or probationary period. The County Director of Human Relations testified, at the hearing, that this was a substandard evaluation.

Sometime in early October, 2006 the County posted a position for one Park Maintenance Worker position. It posted one for Union applicants and had an application process for non-Union or outside applicants. Grievant signed the Union posting, and was the only person to sign the Union posting. After doing so he was told by the Maintenance Program Supervisor and a secretary that they did not believe Grievant had passed his probation. He was not told he could not sign the Union posting or that such posting would not be considered. Grievant contacted the local Union and also made a non-Union application for the position. This was essentially contemporaneous with the Local Union sending an email on October 6, 2006 to the County Personnel Administrator stating:

> As you know there has been some question about the posting rights of one of our camp rangers, Ron Gilson. I had Ron sign the posting at North Park to preserve the union's rights until further review by our union rep. I believe Ron will also be turning in a public application. When we last talked I mentioned that this whole procedure should be as clean cut as possible so that when the new employee is put into place everyone is satisfied. Ron signing the posting is mainly a union action and was done by my suggestion. If it turns out that he does not have posting rights I would expect that his signing would not have a negative affect on his chances of getting the job through the public application. I will get back to you as soon as possible with the union's position.

The County interviewed several candidates through the public opening and not through the Union posting for the position. The County felt at that time that Grievant had not become

a Union member. By letter of November 14, 2006 and verbally that day Grievant was first notified by the County that someone else had been hired for the Park Maintenance Worker position. By memorandum of November 14, 2006 the County first notified the Union that:

> There were no union applicants who applied for the Park Maintenance Worker position in the Park and Forestry Department. Daniel Vollert was offered and accepted the position.

On November 16, 2006 the Union filed a grievance on behalf of Grievant and the Union alleging an infraction on 11/13/2006, stating the Employee was denied posting rights and contending a violation of Article 7 and any other relevant parts of the collective bargaining agreement. The grievance was denied by the County which led to this arbitration.

Grievant then worked through the anticipated ending date of the seasonal work, December 29, 2006. That was when the LTE work ended for the season. He was put on standby for additional work. The attending County Notice of Personnel Action form contains a preprinted question: Employee recommended for rehire:, which was filled in by the County as "Enthusiastically". Prior to the end of this work Grievant was offered and accepted work on an additional schedule of seasonal work through March 15, 2007.

No Union dues had been paid by Grievant through County payroll for any time he worked as a Campranger.

By letter of March 13, 2007 the County notified Grievant that:

> As a result of the performance review given to you on 10/13/06 we have determined that you did not satisfactorily complete your probationary period and will not be asking you to return as a Campranger in 2007.

The County explained, at the hearing, that the County had noted three sections of performance that needed improvement as the reason for not retaining Grievant as a Campranger for the following year. The Camprangers work with a great deal of independence and without day to day oversight and are evaluated over a full season. The County receives comments from the public after the season has been completed.

On October 18, 2000 the County had terminated the employment of a Campranger who at that time had worked for more than three months, indicating that that employee's job duties had not met the expectations of the department during his discovery period. That person did not want to return to County employment The Employee and the Union did not grieve that termination. Other than that person and the Grievant, the County is not aware of any person who has worked as a Campranger in excess of three months and was then denied a full time position.

There has been some bargaining history developed over the discovery period of a Campranger. The first contract was negotiated in 1995. An initial proposal from the Union was to have a probationary period for Camprangers of 1040 hours. County negotiator Dean Dietrich explained, at the hearing, that the County was concerned about the 1040 hour provision in view of Camprangers working some 60 hour weeks, and wanted the period to be for a full camping season as scheduled by the Parks Department, generally May through October. The Parties discussed possible scenarios where someone might be hired part way through the season. The County's position was that there had to be a minimum of three months in order for that season to count as a work season, with the probationary period being the full camping season from May to October. After further negotiations the parties reached a tentative agreement on the language as currently exists in the agreement at Sec. 5.03. Union negotiators David Urban and Scott Fox were on the bargaining team for the first contract and explained, at the hearing, that Sec. 5.03 of the contract was to mean that if a Campranger worked a minimum of three months then they had attained the status of employee and became a Union member.

In the 1997 bargaining sessions for the second contract the County proposed to modify Sec. 5.03 to read:

> Camprangers. All newly hired employees in the classification of Campranger shall serve a probationary period of generally one work season of May through October. If less than 3 months are worked, the time would continue to be earned if the employee returned for a 2nd consecutive season before attaining employee status as Campranger.

In those bargaining sessions the Union did not agree to this change and Sec. 5.03 remained the same.

Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

The Union

In summary, the Union argues that Grievant successfully completed the discovery period and he had the right to post into a position he was qualified for. The posting process first awards jobs to internal, union qualified candidates before hiring externals. The Union argues that the Maintenance Supervisor instead hired his friend and thus the County must contort the language of Grievant's posting rights.

The Union argues that a contract provision should not be interpreted to render it meaningless, and the County would have clear language ignored. Here, Grievant worked one work season and three months during the season, working the entire season. The County's

argument of May 1st to October 31st is not what the agreement says. Work season qualifies May through October, which is otherwise meaningless. The Parties could have said probation is May through October. If three months work is irrelevant then it is meaningless. "During" substantiates this. The Parties did not say the entire season. If the entire period were May through October, then "during" would be irrelevant. No qualifying language would be needed.

The Union contends there was undisputed evidence that the normal Campranger season is the middle of May through the middle of September, and the hours section of the agreement for Camprangers recognizes this. Normally the Campranger season is to the middle of September, as contemplated by Sec. 4.07.01. Camprangers never worked May 1 through October 31, yet other Camprangers have passed probation and are union members. It would be preposterous to establish a period that is unattainable.

The Union argues that an arbitrator under Article 12 cannot delete terms of the agreement and ignoring the three month minimum would effectively delete that term. The County's concerns at the initial bargaining do not override the language. The County's testimony is inconsistent in basing probation on 1040 hours. The regular employees work 9 months or 1040 hours, whichever comes first.

The Union also argues that the 1997 County bargaining proposal supports the Union's position, expressing the County's understanding that probation is a three month term. There, the County wanted to change the contract so that probation could extend into the next season until the employee's three months expired.

The Union further argues that the County's explanation of what Sec. 5.03 means is illogical and contrary to its testimony. It makes no sense to claim the three month minimum language was to ensure that a Campranger would not start in the middle of summer, complete a season in October, and then believe they had completed the probationary period. The County claims the three month minimum isn't really a three month minimum and the entire season must be worked. The County's testimony can only be interpreted to give validity to a three month minimum. It has no other rational purpose. The County's testimony was that a minimum of three months would have to be worked in order to count the time worked as a work season, and that was the County's testimony on the meaning of the three month minimum.

The Union contends the County's testimony acknowledged that is was the camping season, not the dates of May 1st through October 31st that were important. Section 5.03 refers to probation as one work season. The County's testimony acknowledged the three month minimum was an exception to working one work season. An employee can work part of a season so long as it is at least three months. Grievant worked the entire Campranger season and three months. The only way the County's argument could make sense is if, for some reason, the Campranger season was shorter than three months. Then, and only then, would a Campranger fail to make probation and yet still work the whole season.

The Union argues that the County failed to show a past practice. There was a single termination of a single employee that was mutual. There is no proof that the Union ever agree with the County on any probation issue there. The Union also argues that there is not flexibility in determining probation. Leaving notice for successful probation up to the employer is irrelevant and there is no proof the County had ever done that. Notice is not a requirement to passing probation, which is mathematical. The employer cannot add requirements at its convenience. And, the matter of foregoing dues is irrelevant and without penalty.

The Union contends the grievance was timely. To argue that the Union must put the employer on notice that it believes a new member is now covered by the collective bargaining agreement in order to pass probation is unsupported by the law or facts. Any uncertainty as to whether time limits have been met should be resolved against forfeiture. The agreement requires filing of a grievance within five days of the event giving rise to the grievance. The event giving rise to the grievance was the denial of the posting on or about November 14th. Until it denied the posting no event occurred. The secretary's and supervisor's statements, who are not Department or Human Resources Administrators, are indications or opinions, not events. The grievance was timely.

The County

In summary, the County argues that the contract language requires a probationary Campranger to complete an entire summer to complete his or her probationary period. Article 5.03 of the agreement requires that a Campranger complete a probationary period of a full season from May until October, and Grievant, who worked more than three months, did not work an entire season until the end of October. When he signed the posting in early October he had not completed his probationary period. He did not have any posting right to obtain the Park Maintenance Worker position. The County employs Camprangers after September 15th and the Union has failed to show the end of the work season is truly September 14th. Section 4.07.01 provides for Camprangers to work as Camprangers after September 15th. Grievant did not approach the County to continue as a Campranger after September 18th. The agreement cannot be rewritten by the Arbitrator. The plain language of Sec. 5.03 shows that the County did not intend to limit the probationary period to three months. The Union's interpretation of the agreement would nullify virtually all of the language in Sec. 5.03 and eliminate the language mandating that a Campranger's probationary period extends to the end of October. The County did not agree to a mere three month period. If it had it would have expressly stated that. Due to the level of independent responsibility and lack of continued supervision it was reasonable to use the entire season until the end of October to evaluate whether Grievant had passed the probationary period. The Union did not require Grievant to pay dues for August or September and has been inconsistent with its view of the probationary period.

The County also argues that if the contract language is ambiguous, the past practice and bargaining history favors the County's interpretation on the language. The County's intention

in drafting Sec. 5.03 was to ensure that the County had one full season to evaluate the performance of a Campranger. The Union offered a period of 1,040 hours that the County rejected. Camprangers work 60 hours per week pursuant to Sec. 4.07, which is roughly 17 weeks or four months. It is implausible that the County would negotiate a shorter time period. The period for other employees is 1,040 hours, generally entailing a 40 hour week, which is six months. A 1,040 hour period was rejected by the County as it would amount to only a four month probationary period for Camprangers. The intent of the language in Sec. 5.03 regarding a three month period was to avoid a situation where a Campranger started in the middle of the summer, worked to the end of October, and believed he or she had completed the probationary period. The Union negotiator, Wickland, indicated the employee did not need a letter indicating he had passed the probationary period. The Employer could let the employee know shortly after the work season. Thus, the Parties acknowledged some level of flexibility in determining the exact time when the County must decide whether the employee had completed the probationary period.

The County also contends it has administered Sec. 5.03 to mean that an employee does not complete his or her probationary period until the end of October. Probationary Campranger Koeth worked in excess of three months but was terminated prior to the end of October and the Union did not grieve the termination nor contend he was a member of the Union. The Grievant's matter is consistent with the application of Sec. 5.03 in the past. If there is ambiguity in Sec. 5.03 that ambiguity must be must be resolved in favor of the County.

The County argues the grievance is untimely as the Union knew or should have known that the County did not view Grievant as having completed his probationary period. Under the Union's three month theory Grievant would be a Union member on August 11, 2006. The Union failed to take dues for at least August and September, and waited until November 14, 2006 to file the grievance and claim Grievant had completed his probationary period. The Union waited roughly four months after Grievant purportedly passed the probationary period to file this grievance. It is untimely. If the Union fails to comply with the contractual requirement to file a grievance it should be dismissed on procedural grounds. Contractual limitations regarding timeliness are strictly enforced. The Union's explanation of why it gave new employees a break on dues is highly suspect and likely discriminatory. The Fair Share agreement in Article 8 requires the Union to notify the County of all bargaining unit members so the County can transfer dues, regardless of participation in the Union. There is no evidence that the Union ever contacted the County indicating Grievant was in the Union in August or September. The Union did not believe Grievant was in the Union or it was not diligent. As a result it cannot claim Grievant was in the Union beginning August 2006 when it filed its grievance in November 2006. The Union's claim that Grievant had a contractual right to the position is untimely and must be dismissed.

The County further argues that the Union offers no explanation for the remaining language in Sec. 5.03 which requires Camprangers to work a discovery period of one work season of May through October. The Union interpretation is for three months or a full season.

The County interprets Sec. 5.03 to be a full season from May through October and a minimum of three months. The agreement as a whole must be used to determine intent and meaning of a phrase. Here, a three month period would be the shortest for any employee under the agreement. The Union proposed 1,040 hours (approximately 4 months) and the County rejected that as too short. The intent of the Parties would not have been for a shorter period. The Union has no answer to that. The intent of the Parties was to allow for a full summer. The Union's interpretation of Sec. 5.03 would cause practical staffing problems. What happens to the County if it hires someone in May and determines that the employee is incapable of performing the job? Absent an expedited hiring and training schedule the County's only recourse would be to go without a Campranger during the remainder of the summer, including Labor Day. The County did not agree to be short staffed or to be rushed into a decision. And, the Union cannot re-write Sec. 5.03 to eliminate the word "October" and replace it with "September". The County bargained for language giving it until October to conduct a performance evaluation, compile comments from the public, and make a thoughtful determination regarding the employment status of probationary employees. This is what the County did. Camprangers have worked past the middle of September, which is irrelevant to this case. Whether Grievant was a good seasonal maintenance worker is irrelevant to the question of whether he passed probation as a Campranger. Grievant's evaluation shows he was not performing to the expected standards of the County as a Campranger.

DISCUSSION

The County has raised a timeliness issue as to the filing of the grievance. The grievance was filed November 16, 2006, two days after Grievant was notified by the County both verbally and in writing that the County had hired a different candidate. November 14th was the date that the Union was notified by the County in writing that there were no Union applicants and that Daniel Vollert was offered and accepted the position. The grievance alleges the date of the infraction was November 13, 2006 when Grievant was denied posting rights in violation of Article 7 and any other relevant parts of the collective bargaining agreement. The County argues that the Union knew or should have known the County did not view Grievant as having passed his probationary (discovery) period because, under the Union's theory of the case, the discovery period is only three months. That would make Grievant a Union member on August 11, 2006, requiring union dues be taken for at least August and September. The County contends that the Union waited roughly four months after Grievant purportedly passed his probationary period to file the grievance.

Article 10 of the Agreement provides in part:

> 10.01 Definition: A grievance is defined as an alleged violation of a specific written provision of this Agreement that has been violated by the Employer. Grievances shall be processed as set forth in the Article.
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> . . .

10.05 Procedural Steps: Grievances shall be processed and resolved in the following manner:

10.05.01 The term "days" as used in this procedure shall mean business days exclusive of Saturdays, Sundays and holidays.

10.05.02 Step 1. All grievances shall be verbally discussed between the grievant and/or Union and the immediate supervisor within five (5) days of the event giving rise to the grievance Grievances not resolved in that discussion may be reduced to writing and resented to the Park Administrator within five (5) days of the initial meeting with the immediate supervisor. Failure to enter into verbal discussion within the first five (5) days shall not bar the filing of the written grievance within a total of ten (10) days from the date of the alleged violation of the Agreement. The Park Administrator shall respond in writing to the grievant and/or Union within five (5) days of receipt of the written grievance.

. . .

Here, the grievance was filed on November 16, 2006, two days after the day Grievant and Union were given notice by the County that Grievant was not selected for the Park Maintenance position and the County did not consider a Union member to have signed a posting for the position. The Grievance alleged the employee was denied posting rights under Article 7 and other agreement provisions. The November 14th communications were the first time the County gave notice to Grievant and the Union that it did not apply Article 7 to the posting and that it did not consider Grievant to have been in the Union. Prior to that, the statements of the Maintenance Program Supervisor and the Secretary that they did not think Grievant had passed probation are not actions of the County and are not actions of the County as to selecting the candidate for the position or applying Article 7. They are mere opinions of what they might have thought the County's position might be on a matter affecting the posting, and there is no evidence these people are authorized to act for or speak for the County in a posting matter. It is the action of not selecting Grievant for the position under the Union posting provisions of the agreement which is the event giving rise to the grievance. Grievant had a very brief discussion with the County about the selection on November 14th, which the evidence indicates was little more than being told someone else got the job. The written grievance was filed within both five (5) and ten (10) days of that and is timely. The agreement allows for filing of a written grievance even if there is no verbal discussion.

It is true that whether Grievant was in the Union, and thus eligible to be considered under the Union posting, is a question that requires determining whether the probationary or discovery period ended on or about August 11, 2006. That is a time period beyond that required for a timely grievance filing. But Grievant's status as of August 11th is not the event. It is what the County does in relation to its understanding of Grievant's status which is the event here, and that was not considering him for the Union posting - a matter that occurred significantly after August 11th and within the period to file the grievance.

The County argues strenuously that it is the Union that must notify the County as to Union membership, and thus status for posting rights, and the Union did not do this within the grievance time limits after August 11th, the purported discovery period ending date. The County is required under the agreement to deduct Union dues under the Article 8 - Fair Share provisions of the Agreement. The Article provides for the County to take deductions for monthly dues certified by the Union as the current dues required of all bargaining unit members. As to new employees, such deduction shall be made from the first paycheck following the completion of the discovery period. Article 8 further provides that the Employer will provide the Union with a list of employees from whom such deductions are made with each monthly remittance to the Union. The County argues that when dues were not deducted from Grievant's paycheck after August 11th, the Union should have then known the County did not consider Grievant to have been in the Union or to have passed the discovery period. That is what makes the grievance untimely in November. However, Article 8 does not require the Union to notify the County as to who the Union members are. Dues are to be deducted for all employees in the bargaining unit and it is actually the County that is obligated to provide a list of employees from whom deductions are made with the monthly remittance. Whether dues were deducted or paid (or forgiven by the Union for that matter) is not determinative of whether Grievant passed the discovery period. And, although the posting right may depend on a status which either existed or didn't as of some time in the past, it is the failure to follow the Union posting which is the alleged event which occurred here. Before November 14th Grievant was not told by the County that he could not sign the Union posting or that he was not in the Union. This was so even after the early October email from the Union to the County that it advised Grievant to sign the Union posting. With the County's silence in the face of these circumstances it is not at all clear that at that point the County necessarily felt Grievant was not in the Union. Given the County's lack of clarity on the point at that time it is not persuasive to argue that at an even earlier time the Union should have been clear on this any more than the County was. The Union should not have known on or about August 11th that the County did not consider Grievant to be eligible to sign a Union posting.

The central issue on the merits is whether the collective bargaining agreement provides for a discovery period for Camprangers of three months or the period from May through October. Section 5.03 of the agreement states:

> 5.03 Camprangers. All newly hired employees in the classification of Campranger shall serve a discovery period of one work season of May through October with working a minimum of three (3) months during the season before attaining employee status as Campranger.

The County argues that May through October is the work season and that is what is required. The Union argues that the work season is modified by the phrase "working a minimum of three (3) months during the season" and only three months is required. Both Parties contend the language itself is clear and in their favor respectively. The probationary period can be read

in Sec. 5.03 as a work season of May through October and can also be read as a minimum of three months during the May through October work season. It is ambiguous. It is the responsibility of the arbitrator to interpret the collective bargaining agreement as it is written by the parties. Accordingly, if the language of a collective bargaining agreement is clear and unambiguous, the arbitrator must apply it as it was written by the parties. Language is ambiguous if it is fairly susceptible to more than one meaning. It is important to note that words are given their ordinary meanings unless they are technical. If they are technical, they are given their technical meaning. When language is ambiguous, it is the responsibility of the arbitrator to interpret the language, by looking at the context of its usage, the purpose of the provision, the usage of similar phrases in the agreement, the history of the language, and the "past practices" of the parties. Arbitrators also use the rules of contract construction ordinarily used by arbitrators and the courts. The Parties here have referred to several of these interpretive methods in their arguments in the event of an ambiguity.

The County points to past practice as supporting its position and cites the October 18, 2000 Koeth situation where a Campranger had worked more than three months and less than May through October and was discharged without Union objection or grievance, suggesting the entire May through October season is the discovery period. The County contends that Grievant's situation is similar. The evidence generally required to establish a binding past practice is discussed in *How Arbitration Works,* Elkouri & Elkouri, 6th Ed.

> When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Indeed, many arbitrators have recognized that, "In the absence of a written agreement, 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."
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> Another commonly used formulation requires "clarity, consistency, and acceptability." The term "clarity" embraces the element of uniformity. The term "consistency" involves the element of repetition, and "acceptability" speaks to "mutuality" in the custom or practice. However, the mutual acceptance may be tacit -- an implied mutual agreement arising by inference from the circumstances. While another factor sometimes considered is whether the activity was instituted by bilateral action or only by the action of one party, the lack of bilateral involvement should not necessarily be given controlling weight.
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> pp. 607-608 (citations omitted).

Here there is no binding past practice. There is the single incident of the Koeth termination. That matter was not grieved by the Union. There may be many reasons why a Party does not grieve or challenge an action of the other party. Failure to grieve does not mean there has been agreement to how a provision is to be interpreted. The record here is insufficient to

establish that the Union, by not grieving the Koeth matter, makes this a well established or readily ascertainable practice. It is a single incident, not something done over a reasonable period of time so as to become accepted by both parties as binding. The record does not establish a past practice that supports the County's interpretation of Sec. 5.03.

The parties differ in their positions on whether there have been Camprangers who have worked something less than an entire May through October season and still passed the discovery period. The testimony shows that there have been Camprangers who have worked past September 16th to the end of October, but the record is not clear if any such person also worked from May 1st or from some other starting date after May 1st. The evidence is insufficient to persuasively establish a binding practice of completing the discovery period in less than the entire May through October season.

The bargaining history of the provision is more helpful. Not surprisingly both parties presented evidence that the intent of Sec. 5.03 when initially negotiated supports their current view. There is no reason to doubt the credibility of the parties as to what they may have been seeking during those negotiations. More definitive is what they actually got into the language. The initial proposal of the Union was a period of 1,040 hours. The County objected to this as being too short a time period given the greater hours in the work week, independence and lack of close supervision of a Camranger. The language was modified after that to its current version. This shows some give and take in the negotiation process. The County points out that under Sec. 4.07 a Campranger is required to work 60 hours per week, roughly 17 weeks or almost four months, and that it is implausible the County would have then negotiated a lesser period than initially proposed by the Union. Yet other employees normally work a 40 hour week and that would result, as the County notes, in the May through October time period. The fact that the work weeks are longer for Camprangers than other employees suggests that those weeks should not be viewed the same. Section 5.03 can be seen as a compromise by the parties on this point through the use of a three month period rather than the lesser of 1040 hours or nine (9) months that the other employees have for a discovery period. Section 4.07.01 also provides for five stated potentially 80 hour weeks in addition to the other 60 hour weeks, and these appear to come in the earlier part of the season for the most part. If the full six months of May through October were viewed in terms of hours, this would be, assuming 4.3 weeks in a month, potentially 5 weeks at 80 hours and 25.8 weeks at 60 hours for a total of 1,648 hours. That is approximately 60% more than the 40 hour per week employees. A compromise with the inclusion of the three month language seems likely.

Additional bargaining history is helpful. At subsequent agreement negotiations the County made a proposal to modify Sec. 5.03 to state:

> Camprangers. All newly hired employees in the classification of Campranger shall serve a probationary period of generally one work season of May through October. If less than 3 months are worked, the time would continue to be earned if the employee returned for a 2nd consecutive season before attaining employee status as Campranger.

This was not agreed to by the Union. What is telling about the proposal is the reference to "If less than 3 months are worked". This implies the County viewed the discovery period as 3 months, and did so shortly after the original language had been agreed to. The County's current explanation of a Campranger being hired late in the season and then needing to go into the next year would actually result in a full May to October season in addition to whatever period short of 3 months were worked the season before. It is not likely that any Party here intended a probationary period to consist of May through October plus the previous time. And the Union's rejection of the proposal effectively also rejected the phrase that would have made the period generally one work season of May through October. Thus, it appears that the bargaining history for the first and subsequent agreements supports the use of a three month period as opposed to the entire May through October period.

Additional interpretation is helpful. In Sec. 5.03 the work season of May through October is modified in that sentence by "with working a minimum of three (3) months during the season before attaining employee status as Campranger". The Union is correct that this language not only modifies May through October, but the additional language would be meaningless if the season were intended to be completely May through October. Contract interpretation cannot render language meaningless, and the arbitration clause in the agreement prevents the arbitrator from deleting language. The County argues that the 3 month reference merely defines a minimum camping season. But the record simply does not support that argument. There is nothing in the record that suggests the camping season or work season in the campgrounds has ever been as short as three months or less. That interpretation would render meaningless the May through October language. It is possible to reconcile the provisions with the three months discovery period occurring between, or during, the period of May through October. This would allow for a Campranger hired sometime after May 1st to pass a discovery period.

Giving meaning to all of Sec. 5.03 without rendering any of it meaningless, reading it in conjunction and by contrast with Secs. 5.01 and 5.02, which provide a different measurement of the discovery period, and in view of Sec. 4.01 on hours, all suggest a three month discovery period for Camprangers, which is what the bargaining history indicates. The undersigned is persuaded that the discovery period in Sec. 5.03 is a three month period which must occur sometime between May and October, and it is not the full time period from May through October. Grievant worked as a Campranger from May 11th until after September 11th. This was in excess of three months between May and October. He completed his probationary period.

The County argues that it needs some flexibility to make its discovery period decision and the statement of the Union negotiator at the first contract was to the effect that the County could notify the employee or Union sometime after the discovery period does not alter the language in the agreement. Passing the discovery period is one thing. Notifying the Union or employee is a different matter and does not determine how long the discovery period is. It might be more convenient for the County to wait until after the entire camping season to make a decision, but that does not change the language. The County indicated that it sometimes gets

feedback from the public after the camping season is done. That could leave the discovery period wide open while waiting for pubic comment about a Campranger that might never come. In this case the County did not notify Grievant of its decision on his probationary period until the letter of March 13, 2007, more than four months after the close of the camping season. Yet, the County originally scheduled Grievant's evaluation for September 18th and actually held on October 13th. These dates are both short of the end of October. The fact that the County did the evaluations short of the entire May through October period is an indication that the entire May through October period was not being considered in evaluating performance. The County's argument is not persuasive and is not what the language says. It might be difficult for the County to recruit and train a new employee near the end of a season if a Campranger does not pass a three month probationary period, but that does not change the language.

With Grievant having passed the discovery period he attained employee status and was entitled to sign the Union posting. The Parties disagree on whether he was nevertheless qualified for the Maintenance Worker position. The County is correct in that what qualifications Grievant had as a Campranger is not determinative of whether he is qualified as a Maintenance Worker. But the Agreement gives preference to those employees who sign the Union posting. Grievant was the only Employee who actually signed the Union posting. His qualifications for that position should have been considered under Sec. 7.02, but were not. That Section provides:

> 7.02 In filling the vacancy or new position, qualifications, skill, seniority and ability of the internal applicants will be considered. When qualifications, skill and ability between two (2) internal candidates are relatively equal, seniority shall be the determining factor. If no internal candidate applies or is qualified, the County may advertise publicly for applicants to fill the position.
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> When an employee has been selected to fill a vacancy, notice of such choice shall be posted on the Wood County Park and Forestry Department bulletin board and on each bulletin board where the position was originally posted. The Employer shall provide the Union with a copy of the notice.

Given Grievant's prior work as a Seasonal Maintenance Worker and Limited Term Employee for the County and his work history and other information contained in his other application shows there are at least some indications of his qualifications for the County to consider as a Maintenance Worker. In determining whether he is actually qualified for the position and how that decision is made is also addressed in Article 7 of the agreement. Section 7.03 provides:

> 7.03 Trial Period, Retrocession, General Considerations. The employee who receives the posted position shall serve a forty-five (45) work day trial period.

> In the event the employee chooses, within the trial period, not to remain in the position, or the Employer, within the trial period, determines the employee does not qualify for the position, the employee shall be returned to the position previously held with no loss in wages, benefits, or other rights. When such a situation occurs, the Employer shall then give the position to the next employee who can qualify based on qualification, skill, seniority and ability, who signed the postings outlined in Section 7.01 above. This procedure shall continue until the position is filled permanently.

Thus, the County has a forty-five (45) work day trial period to determine if Grievant qualifies for the position. The County has not yet provided the forty-five (45) work day period and the determination if Grievant qualifies is yet to be made.

As to remedy, Grievant had completed his discovery period by September 11, 2006 and at that date he attained employee status. He continued to work for the County until well into 2007. However, had he been properly considered under the Union posting he would have had an opportunity to earn the wages and benefits of a Maintenance Worker, assuming he established his qualifications in the forty–five (45) day period. He was denied this opportunity as of the date Vollert began working. Had he been able to establish his qualifications in the forty-five working day period he would have continued to earn the wages and benefits of that position for the time Vollert has worked (assuming Vollert is still in the position, if not, then his successor, if any). Had Grievant not established those qualifications in that period then he would be entitled to return to the position of Campranger (or seasonal worker per Sec. 3.04). This presents some unknowns, none of which are Grievant's fault. However, Vollert has worked hours as a Maintenance Worker that Grievant should have had an opportunity to work, conditional as it may be, and Grievant has suffered a loss to that extent. It is also possible that he may not be able to establish his qualifications in a forty-five (45) work day period.

Grievant passed his discovery period so as to be entitled by the collective bargaining agreement to use the Union posting and have his qualifications considered for selection for the Maintenance Worker position. He was not afforded this posting right by the County in violation of the agreement. Accordingly based on the evidence and arguments in this case I issue the following

AWARD

1. The grievance is timely.

2. Grievant shall be considered an employee as of September 11, 2006 and shall be considered by the County under the Union posting in Sec. 7.01 for the position of Maintenance Worker and be afforded the forty-five (45) work day period to have his qualifications considered.

3. If Grievant successfully completes the forty-five (45) work day period the County shall also make Grievant whole for the difference in pay, benefits and seniority between what he would have earned as a Maintenance Worker and what he earned in his other employment from the County or other sources from the date Vollert began working. Grievant has a duty of mitigation of his losses as to this remedy.

4. The undersigned will retain jurisdiction for 45 days as to resolve any questions as to application of the remedy.

Dated at Madison, Wisconsin, this 18th day of December, 2007.

Paul Gordon /s/
Paul Gordon, Arbitrator

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