

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MONROE COUNTY HUMAN SERVICES PROFESSIONAL EMPLOYEES,
LOCAL 2470-A, AFSCME, AFL-CIO**

and

MONROE COUNTY

Case #197
No. 67025
MA-13716

(Kenyon Pay Rate Grievance)

Appearances:

Dan Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, WI 54656, appearing on behalf of Local 2470-A.

Ken Kittleson, Personnel Director, Monroe County, 14345 County Highway B, Room 3, Sparta, WI 54656, appearing on behalf of Monroe County.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, Monroe County (hereinafter referred to as either the County or the Employer) and AFSCME Local 2074-A (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the appropriate rate of pay for Social Worker Tanya Kenyon. The undersigned was so designated. A hearing was held on July 23, 2007 at the County's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. No stenographic record was made. The parties submitted briefs and the time for reply briefs expired on September 5, 2007, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Arbitration Award.

ISSUES

Each party submitted its own statement of the issue. Both versions are in essential agreement as to the underlying issues:

1. Did Monroe County violate the collective bargaining agreement when it did not assign the Grievant to a Master Social Worker position?
2. If so, what is the appropriate remedy?

The Union prefaces its statement of the issue with the question of whether the Department of Human Services even possesses the authority to reclassify the Grievant. This responds to the arguments made by the County in the processing of the grievance. In my view, that issue is part and parcel of the County's defense to the claim of a contract violation, rather than a separate contractual question.

RELEVANT CONTRACT LANGUAGE

ARTICLE V - MANAGEMENT RIGHTS

Section 1. The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, train, promote, transfer, schedule and assign employees to positions within the County;
- D. To suspend, discharge and take other disciplinary action against employees for just cause;
- E. To relieve employees from their duties because of lack of work or any other legitimate reason;
- F. To maintain efficiency of county government operations;
- G. To take whatever action is necessary to comply with state or federal law;
- H. To introduce new or improved methods or facilities;
- I. To change existing methods or facilities;
- J. To determine the kind and amount of service to be performed as pertains to county government operations; and the number and kinds of classifications to perform such services. In case of the creation of a new position or classification, the parties shall negotiate wages for the position or classification;
- K. To contract out for goods or services, provided that such contracting out for goods and services shall not result in layoffs of present employees;
- L. To determine the methods, means and personnel by which county operations are to be conducted.

The County's exercise of the foregoing functions shall be limited only by the express provisions of this Agreement. If the County exceeds this limitation, the matter shall be processed under the grievance procedure.

ARTICLE XVII - JOB POSTING

Section 1. All position openings shall be posted at the Union bulletin board for five (5) working days on a sheet of paper stating the job title, the job qualifications, job duties (consistent with actual duties performed), rate of pay, and the date the job is to be filled. Interested employees shall sign their names to this notice. Seniority and qualifications shall be considered in the selection of the applicant for the position opening; however if the qualifications are equal then seniority shall prevail. The posting must meet the terms of the delegation as granted by the State of Wisconsin to the County. If the County ever gives up state delegation, the State Merit System requirements would apply. Within five (5) working days after the posting is taken down, the County will inform those who posted that one of them is awarded the job or will inform them of what process is being followed to make a selection. The Director and the Union representative shall attempt to mutually agree on the nominee for the position. The County reserves the right to simultaneous job posting and advertising if it is determined that no one within the bargaining unit is qualified for the open position.

BACKGROUND

The County provides general governmental services, including social services. The Union is the exclusive bargaining representative for the professional employees of the County Human Services Department. The Grievant, Tonya Kenyon, is a Lead Social Worker in Adult Services for the County. Carl "Gene" Phillips is the County's Human Services Director.

In December 2006, the Grievant received her Master's Degree in Servant Leadership from Viterbo University. She submitted a request for advancement to the Master Social Worker pay level of the contract. Her request was denied by Phillips, who stated that there was no provision for automatic progression to Master Social Worker in the contract, and that he lacked authority to alter the Grievant's status. He recommended that the Union raise the issue in contract negotiations. The instant grievance was thereafter filed. It was not resolved in the lower stages of the grievance procedure, and was referred to arbitration.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that the County violated the collective bargaining agreement in two different ways. First, the County has essentially repudiated the Master Social Worker pay grade by the positions it has taken during the processing of the grievance. Second, and more narrowly, the County has violated the contract by refusing to reclassify this specific Grievant.

The repudiation of the contract takes two tacks. The Human Services Department has argued that any system for advancing to Master Social Worker must be negotiated. The County Personnel Department takes the position that a Masters Degree level position is a new and distinct position, and must be authorized by the County Board before anyone can be reclassified to Master Social Worker. Neither position can be accepted. The parties negotiated a wage rate for Master Social Worker. At the time it was negotiated, the Union asked how employees could progress to that rate, and the County's then Human Services Director responded that he didn't want a procedure in the contract, but would promulgate a policy. The resultant policy included a procedure whereby reclassifications would occur. The County now claims that policy was repealed or lapsed at some point, and there is no longer a procedure for moving to Master Social Worker. The current Director claims that, having been accused once in the past of a prohibited practice for changing a comp time policy, he fears now he will be accused of a prohibited practice if he proceeds without a negotiated reclassification procedure and thus lacks authority to make a decision. That, the Union contends, is disingenuous and itself smacks of illegal retaliation. It is also illogical, since the Director believes he can hire at the Masters level if he wishes. That would leave the Master Social Worker pay level open only to new employees, while more experienced, equally well educated veteran employees performing even more responsible jobs would be prevented from moving up.

The second prong of the repudiation is the Personnel Director's contention that the Master Social Worker is a distinct position, rather than a pay level, and that any new position must be authorized by the County Board, not by the Human Services Department, and then posted. That confuses the pay level earned by the employee, through their educational accomplishments and the work they are performing, and the County's right to decide how many positions it should create and maintain. The Union has exercised its right to negotiate a wage progression for its members, and the County cannot now unilaterally disown that progression, any more than a school district could announce that it would no longer allow teachers to reach the Masters level because it didn't need more teachers with Masters degrees. The reclassification system that implemented the negotiated wage progression specifically looked to the qualifications and duties of the employee as factors, not to the creation of some new position open for posting.

Turning to the specific claim of the Grievant, the Union notes that she holds a position previously filled by someone paid at the Master Social Worker level. She now holds a Masters degree, and she has testified that it is relevant to her duties and to the needs of the Department. These factors, and the professional achievements on behalf of the County and its clients, merit reclassification to the Master Social Worker pay grade.

The Position of the County

The County takes the position that there has been no contract violation. The Grievant first challenged her pay rate in 1991, when she complained that another employee, Barb Youngerman, was being paid at the Master Social Worker rate for performing substantially similar work to the Grievant. That grievance was resolved through a side letter of agreement;

LETTER OF AGREEMENT

Human Services Grievance (February 11, 1991) Agreement Conditions

- 1) Recognize the position in question currently as Social Worker – Class 1, at current pay rate effective January 14, 1991, \$12.42 per hour (Class 1, Step E) and retain this anniversary date for future movement in the step plan, with no loss of wages to Barb Youngerman.
- 2) At the point in time, that Ms. Youngerman attains the qualifications of Class 2, Social Worker, including a Master’s Degree; she would automatically be recognized as a Class 2 - Social Worker.
- 3) If Ms. Youngerman should be eligible and qualified for Class 1, step F, prior to qualifying for Class 2 she would be considered for that step increased at the proper time (January 14, 1992).
- 4) The Human Services Department retains the right to continue or assign duties as deemed necessary.
- 5) This Social Worker - Class 2 position would not be considered an open position, should another Social Worker - Class 1 obtain a Master’s Social Work degree before Ms. Youngerman does.
- 6) Openings in the future, for Class 2 - Social Worker positions will be determined by the Human Services Department, and there will not be an award based solely on a Class 1 person obtaining a Master’s Degree.
- 7) The grievance would be withdrawn by the Union.
- 8) There would be no recognized fault on the part of either party.
- 9) This agreement is a non-precedent setting and without prejudice.

In 2003, Youngerman received a Masters Degree in Servant Leadership from Viterbo University. Since the 1991 settlement did not specify a Masters in Social Work, or even that the Masters Degree had to be relevant to her job, the County honored the letter of the agreement, and moved her to the Master Social Worker pay level, where she remained until she left the County's employ in 2004.

The County takes the position that this side letter of agreement resolves the Grievant's case. Specifically, paragraph 6 states that "there will not be an award based solely on a Class 1 person obtaining a Master's Degree." Yet that is precisely what the Grievant is seeking. Her duties have not changed. Nor has she obtained an advanced degree that in some way adds to her value to the Department. Her claim for Master Social Worker pay hinges solely on the fact that she got a Master of Arts degree. The settlement agreement, which she signed, is squarely on point to her claim, and requires that it be denied.

DISCUSSION

The collective bargaining agreement contains a provision setting forth the pay for a Master Social Worker, but it says nothing about how an employee becomes a Master Social Worker. The provision was negotiated as part of a change in the overall pay structure to eliminate the positions of Social Worker I, II and III, and replace them with Class 1 - Social Worker and Class 2 - Master Social Worker. At the time of the negotiations, the Union asked how the progression to Master Social Worker rate would be defined, and the Department said it would promulgate a policy. The policy that followed was entitled "Policy on Classification System for Agency Staff." It was a Departmental policy, and was not specific to the progression from Social Worker to Master Social Worker, but it included a procedure whereby employees could seek reclassifications, subject to compliance with the County's Personnel Policies, and review and approval by the Human Services Board, the Personnel Office and a County Board Committee.

In this case, the Director of the Human Services Department explained his refusal to classify the Grievant as a Master Social Worker in part by noting that the former Departmental policy was no longer in effect, and that there was no longer any policy to govern movement from Social Worker to Master Social Worker. With all due respect to the Director, that is not a tenable explanation. The County possesses the management right to make reasonable rules and policies, and the implication is that it may also choose not to have rules and policies on some topics. However, the exercise of management rights is always subject to the general limitation that the rights be exercised in good faith and in a non-arbitrary manner. The Master Social Worker rate of pay is an enforceable provision of the collective bargaining agreement. The Department cannot write that provision out of the contract simply by eliminating the policy that facilitates movement to Master Social Worker. Whether it is set forth as a Departmental policy, an internal procedure, or an understood custom, the County has a good faith obligation to have some meaningful procedure whereby employees who otherwise qualify may seek to move to the Master Social Worker level.

While I conclude that the lack of a procedure is no defense in this case, I also conclude that there is no contract violation in that the Grievant is not qualified for the position of Master Social Worker. The Grievant earned a Master of Arts degree in Servant-Leadership. The mission description for the program describes it as “The MA in Servant-Leadership (MASL) provides an opportunity for individuals to deepen their vocation to engage in competent, creative, Christian leadership that works for the common good in a Catholic, Franciscan, ecumenical environment. This program, offered through the School of Letters and Sciences, brings together people who aspire to leadership positions in church, community, and business.” When the Grievant was asked at the hearing why she sought a MASL rather than a MSW, she explained that she had no interest in doing counseling work, but was interested in moving into management and felt the MASL would help her to pursue that goal. No doubt she finds the degree personally valuable, but it offers nothing of significant, identifiable value to the Department.¹

The 1991 settlement agreement provides, in part, that “there will not be an award based solely on a Class 1 person obtaining a Master’s Degree.”² In seeking to move to the Master Social Worker pay grade, the Grievant has not identified any basis for the move other than receiving the MASL Degree. Her claim is “based solely on ... obtaining a Master’s Degree” and the Counties denial of that claim is within the discretion it retained under the 1991 agreement to determine future openings in that position.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. Monroe County did not violate the collective bargaining agreement when it did not assign the Grievant to a Master Social Worker position.
2. The grievance is denied.

Dated at Racine, Wisconsin, this 31st day of January, 2008.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator

¹ Even the former Department policy cited by the Union conditioned recognition of degrees on their being “related to the particular classification an employee is in...”

² The 1991 agreement also stated that it was “non-precedent setting” and the Union argued that I should give it no weight. If by “non-precedent setting” the parties meant to limit the agreement to that single case, and prevent its provisions from having any future effect, the Union would be correct. However, giving it that meaning directly contradicts several of its remaining terms, including the express language of paragraph 6, where the parties explicitly contemplate how to handle openings in the future: “Openings in the future, for Class 2 - Social Worker positions will be determined by the Human Services Department, and there will not be an award based solely on a Class 1 person obtaining a Master’s Degree.” I conclude instead that the reference to “non-precedent setting” more likely means that the parties sought to prevent any expansion of their settlement to other subject areas. In any event, the vague reference to “non-precedent setting” cannot overcome the very clear language in other portions of the agreement which is plainly intended to have future application.