

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**OSHKOSH PUBLIC LIBRARY EMPLOYEES, LOCAL 796-A,  
AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

**OSHKOSH PUBLIC LIBRARY,  
OSHKOSH, WISCONSIN**

Case 366  
No. 67204  
MA-13800

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**Appearances:**

**Mary B. Scoon**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, for the Oshkosh Public Library Employees, Local 796-A, American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

**William G. Bracken**, Labor Relations Coordinator, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, for the Oshkosh Public Library, Oshkosh, Wisconsin, which is referred to below as the Library or as the Employer.

**ARBITRATION AWARD**

The Library and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this matter and which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to serve as Arbitrator to resolve Grievance 2007-4. Hearing was conducted in Oshkosh, Wisconsin on December 13, 2007. The hearing was not transcribed. The parties filed briefs and a waiver of reply briefs by January 9, 2008.

**ISSUES**

The parties did not stipulate the issues. The Union states the issues thus:

Did the employer violate the 2004-2006 Agreement when it did not post the vacancy created by Doris Thomas who retired, but instead, transferred Catherine Timar to the vacant position, thus promoting Timar?

If so, what is the appropriate remedy?

The Library states the issues thus:

Did the Library violate Article VIII, Promotions-Job Posting-Transfer Policy, Section 5. Transfer Policy, when it transferred the Grievant, Catherine Timar, from her Library Assistant I position to a Library Assistant II position in order to improve the operation of the Library by having a qualified employee to perform key functions in the Library's summer reading program?

If so, what is the remedy?

I have determined the record poses the following issues:

Did the Library violate the collective bargaining agreement by transferring Catherine Timar to the Library Assistant II position in the Children's and Family Outreach Services Department effective June 4, 2007?

If so, what is the appropriate remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### Article V – Grievance Procedure

. . .

Step 4. . . . The arbitrator shall have no power to add to, subtract from, modify or extend terms of this agreement. . . .

. . .

#### Article VII - Seniority - Lay Offs

Section 1. Seniority shall consist of the total calendar time elapsed since the date of employment and continuous employment. . . .

#### Article VIII - Promotions - Job Posting - Transfer Policy

Section 1. A vacancy shall be defined as a job opening not previously existing in the Table of Organization or a job opening created by the

termination, promotion or transfer of existing personnel when the job continues to exist in the Table of Organization.

Section 2. All non-supervisory vacancies not filled through the transfer policy shall be posted on the bulletin board for a period of seven (7) calendar days. Employees interested in such jobs shall sign the posted notices. . . .

Section 3. The employee shall be selected on the basis of seniority, work record, and qualifications. In the event an official training program has been conducted for a given position, successful completion of the program shall be the qualifying factor for promotion.

Section 4. Current employees who are promoted shall be required to serve a probationary period of ninety (90) calendar days. During the probationary period the employee may return to his former position without loss of seniority. Upon completion of the ninety (90) calendar day probationary period the employee shall either be classified as permanent or shall be returned to this former position. The probationary period may be extended by mutual agreement between the Library and the Union.

Section 5. Transfer Policy. Management reserves the right to make transfers within the Library system which in its opinion would expedite and improve the operation of the Library. The Union reserves the right to file a grievance on any transfer that is made for arbitrary or capricious reasons. . . .

. . .

#### Article XXX - Management Rights

The Union recognizes that, subject to the express provisions of this agreement, the supervision, management, and control of the Library's business, operation, and facilities are exclusively the function of Library Management.

. . .

#### **BACKGROUND**

The grievance, filed on May 22, 2007 (references to dates are to 2007, unless otherwise noted) challenges Timar's transfer from "a Library Assistant I position in circulation to a Library Assistant II in CFOS" because the "transfer was a promotion." The grievance form alleges the transfer violates Articles VII and VIII and seeks that the Library Assistant II position be posted.

At hearing, the parties entered the following Stipulation of Facts:

1. The grievance is properly before the Arbitrator for his resolution.
2. Catherine Timar was hired as a Page in the Library on August 16, 1989. On March 23, 1998, she was promoted to a Library Assistant II half-time position in the Children's and Family Outreach Services Department. On subsequent anniversary dates of her employment (August 16) she advanced successive steps on the salary schedule until August 16, 2005, when she was placed at the top step (Step 8) on the pay schedule.
3. On December 8, 2006, Jeff Gilderson-Duwe, Library Director, informed Timar that she would be laid off from her position as a Library Assistant II in the Library's Children's and Family Outreach Services Department effective January 28, 2007. As a result of the layoff, Timar exercised her seniority rights by bumping into the 3/5ths time Library Assistant I position in the Circulation Service Department.
4. On May 31, 2007, Doris Thomas retired from her Library Assistant II position in the Children's and Family Outreach Services Department.
5.
  - a. On May 21, 2007, Gilderson-Duwe informed all of the staff that, as a result of Doris Thomas' anticipated retirement, a number of changes would occur in the staffing of the Library.
  - b. Gilderson-Duwe transferred Timar back to the Children's and Family Outreach Services Department. This action created a vacancy for a 24-hour per week Library Assistant I position in the Circulation Services Department effective June 4, 2007. The position for the Library Assistant I position was posted May 21, 2007.

In April of 2006, Thomas transferred into the Library Assistant II position in the Library's Children's & Family Outreach Services Department (CFOS) from which she retired. Her transfer was part of a Library reorganization that avoided a layoff. Thomas' retirement was effective in May, but was common knowledge within the Library in April.

Thomas' retirement created a vacancy that posed issues regarding posting and recall. This led to a Union/Library meeting sometime on or about April 6. Gilderson-Duwe requested the meeting, which consisted of three Union representatives, including Joann Brewer, a Union Steward, and two Library representatives, including Gilderson-Duwe. Gilderson-Duwe had determined prior to the meeting that he would transfer Timar back to her former position of Library Assistant II in CFOS. He did not, however, mention this during the meeting, which he viewed as the opportunity to reach a consensus on the recall process. The parties did not reach an express understanding on

what position would be posted, but the Union voiced its opinion that the vacancy should produce a posting and Brewer left the meeting believing that the parties mutually understood that the Library Assistant II position would be posted.

Gilderson-Duwe issued a memo (the Memo) dated May 21 to state how the Library would implement the posting/recall process. The Memo states:

...

For the good of the Library, I have decided to transfer Cathy Timar back to the Children's and Family Outreach Services Department. This will create a vacancy for a 24 hour per week Library Assistant I in the Circulation Services Department effective Monday, June 4, 2007.

**Because we know in advance when the vacancy will be in effect, we will begin the process of posting the vacancy on Monday, May 21, 2007.** This will allow us to fill the Circulation vacancy as quickly as possible and to minimize problems with department scheduling.

The creation of a vacancy makes it likely that one of the employees laid off in January will be recalled to employment. With that expectation, Library Administration and officers of AFSCME Local 796-A have worked out a common understanding of the contract language pertaining to recall of laid off workers. Here are the main points of that understanding:

1. All vacancies not filled by transfer will be posted;
2. If all currently employed staff who sign the posting have less seniority than the most senior person currently on lay off, the laid off employee will be recalled to the vacant position.
3. If an offer of recall is extended to the most senior laid off employee, that person will be allowed three business days to consider whether to accept recall.
4. If the offer of recall is not accepted, the laid off employee's relationship with the Library is considered at an end.
5. If all currently employed staff who sign the posting have less seniority than the second most senior person currently on lay off, the laid off employee will be recalled to the vacant position. This process will continue until the vacancy is filled by the most senior signer of the posting or the most senior person on lay off.

...

The Memo noted that the Library Assistant II position in CFOS would be vacant as of June 1, and would be filled by Timar on June 4. The Memo noted that the Library Assistant I vacancy in the Circulation Services Department would be created on June 4 as a result of the transfer.

The Memo was the Union's first notice that the posted position would not be Library Assistant II in CFOS. Items 2 through 4 of the Memo reflect the understandings reached at the Library/Union meeting. There was no understanding regarding Item 1.

The balance of the evidence is best set forth as an overview of witness testimony.

**Joann Brewer**

Brewer, a Library Assistant II, has worked for the Library since September of 1969. The Union filed the grievance because the Library had not, until Timar's transfer, used the transfer process to promote. This reflects an understanding that promotions result from a posting, not a transfer. The April, 2006 reorganization was one of several in which positions were created or moved between departments to avoid layoff. No reorganization included a transfer of an employee to a higher rated position. Brewer acknowledged that the grievance could put Timar's current wage rate at risk.

**Jeff Gilderson-Duwe**

Gilderson-Duwe has served as Library Director since January of 2006. The April, 2006 reorganization permitted the Library not only to avoid layoff, but also to put Thomas in CFOS, an area in which she had demonstrated ability. Skill with children is essential to CFOS, which seeks to enhance literacy. The Union did not grieve the reorganization.

The April meeting addressed only recall issues. Items 2 through 5 of the Memo reflect the points on which consensus was reached. Item 1 reflects the Library's contractual rights. Gilderson-Duwe did not mention Timar's transfer because he did not want to risk building consensus on recall issues; did not want to risk that any employee other than Timar would get the position; and did not want to pick a fight with the Union. He did discuss filling a vacancy, but never discussed filling Thomas' vacancy. The Union never specifically requested the posting, but he was aware that they assumed the posting would be of Thomas' former position.

Timar's transfer was desirable because she had performed in the position for eight years prior to her layoff, and had demonstrated skill handling children. The summer reading program is well-known, and is extremely important to the Library and its users. The transfer was necessary because the limited time between the transfer and the initiation of the summer reading program precluded any chance of training another employee. He did not view the transfer to create precedent. Rather, the transfer process flexibly deploys employees and positions.

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

## **THE PARTIES' POSITIONS**

### **The Union's Brief**

After a review of the evidence, the Union argues that the grievance questions “whether the Library has the right to promote an employee to a vacant position through the Transfer Policy, thus bypassing the posting procedure.” The Union does not challenge Library authority to implement the transfer policy, but does challenge a transfer that works a promotion. Past use of the transfer policy to avoid layoff during reorganization is irrelevant to the grievance, since there “were no job postings involved and no employees were laid off.”

Timar avoided a layoff by bumping from Library Assistant II to Library Assistant I. Thomas retired in May, notifying the Library in April. The Union and Library met to discuss how to handle the recall process in light of the Library's decision to fill the vacancy. Gilderson-Duwe was silent when the Union noted that the vacancy created by the retirement had to be posted. In fact, he intended to transfer Timar rather than posting Thomas' position. His silence reflected his desire not to risk opening the position even though Timar might have been the successful bidder. Library desire to have the “right person” for the position cannot obscure that the summer reading program did not start until June. Nor can Gilderson-Duwe's desire not to “pick a fight with the union” obscure that his use of the transfer policy undercuts agreement provisions on promotion.

The Library has never “promoted an employee through the use of the Transfer Policy.” To permit them to do so ignores that “specific criteria must be met and followed in order for an employee to be promoted.” If the transfer is permitted and if Gilderson-Duwe's testimony that a similar situation might be handled differently in the future is credited, then Agreement provisions have been robbed of their integrity. The Union concludes by requesting that “the grievance be sustained” and that the Library be ordered “to cease and desist from promoting employees through the Transfer Policy and post said vacancies in the future.” The remedy should not involve any monetary loss on Timar's part.

### **The Library's Brief**

After a review of the evidence, the Library asserts that Article VIII, Section 5 grants the Library the authority to transfer if it improves the Library's operation. Thomas' retirement created an opening in the Library Assistant II position. That position handles the Library's summer reading program. That program “is very important and visible to the public” and thus not a suitable position for an inexperienced employee. Timar occupied the position prior to her layoff, and was clearly the best qualified person to fill the spot vacated by Thomas. Timar's transfer was effective the week before the summer reading program began, thus necessitating Gilderson-Duwe's prompt action.

Article VIII, Section 2 clearly and unambiguously makes the posting process secondary to Library use of the transfer process. This provision establishes that the “parties bargained

language that governs the exact outcome that occurred in this case.” Accepting the Union’s view ignores the clear language of Sections 2 and 5 of Article VIII and renders the reference “not filled through the transfer policy” meaningless. Under the terms of Article V, an arbitrator must enforce this language as written.

Article VIII, Section 5 permits the Library to transfer employees for a variety of reasons and contains no language that exempts promotion from the transfer process. Thomas’ transfer into the Library Assistant II position reinforces the Library’s position, since Thomas was transferred “because of her ability to work with children.” Article XXX, read with Article VIII, establishes that the agreement does not authorize the “promotion exception” argued by the Union.

The Union’s interpretation of the agreement leads to a “harsh and irrational” remedy and “should be avoided to maintain the integrity of the contract.” The Union’s labeling Timar’s transfer as a promotion ignores that the agreement does not define “promotion.” Doing so would ignore the incongruity of Timar’s “promotion” to a position she held “for eight years prior to being laid off.” The action resembles a “restoration” more than a “promotion.” Beyond this, strict application of Article VIII, Section 2 of the labor agreement would, under the Union’s theory, produce the nonsensical result of reducing Timar’s compensation by “about \$5,000 from what she was earning several months ago.” The harshness of this result points out how unpersuasive the Union’s reading of the contract is.

Because there “is no evidence whatsoever that the Library’s decision was for arbitrary or capricious reasons” the “Library’s transfer decision must stand” and the grievance must be dismissed in its entirety.

### DISCUSSION

My statement of the issues is broad enough to incorporate each party’s arguments. The parties pose their positions as a question, but each question presumes disputed facts.

The issue on the merits is broadly stated and thus demands focus. Article VIII governs promotions and transfers and thus governs the grievance. Sections 2 and 5 of Article VIII are the specific focus. The grievance cites Article VII, but its provisions serve as general background, defining seniority and establishing a lay off procedure. Section 3 of Article VIII specifically addresses seniority in the posting process. Article XXX generally states management rights, but serves as background given the specific coverage of Article VIII.

The interpretive dispute concerns the relationship of Sections 2 and 5 of Article VIII. The Library persuasively notes that Section 2 permits it to implement the transfer policy prior to a posting. The Union’s view of the provision reads the “not filled through the transfer policy” out of existence. Thomas’ retirement created the vacancy filled effective June 4. It was a “non-supervisory” vacancy within Section 2, which requires that “All” such vacancies “shall be posted”. The “not filled through the transfer policy” reference modifies “All non-



supervisory vacancies”, specifying the types of vacancies to be posted as those not filled via transfer. Read as a whole, the first sentence of Section 5 permits the Library to choose to fill Thomas’ vacancy through the transfer policy rather than through a posting.

The choice is not, however, unrestricted. The Union’s assertion that past practice restricts the Library is not, however, persuasive. No language in Article VIII exempts promotion from the transfer process. Nor is there proof of a binding past practice to create this exemption. The source of the binding force of past practice is the agreement manifested by the parties’ conduct. The evidence shows no examples of a promotion and no evidence of consistent conduct over time beyond Brewer’s testimony that prior postings did not move an employee to a higher rate. This testimony bears on the application of Article VIII, but does not establish Library conduct indicating agreement that a transfer cannot work a promotion.

Article VIII, Section 5 restricts the transfer process. Its second sentence permits the Union to grieve a transfer “made for arbitrary or capricious reasons.” The first sentence states the Library’s authority to “make transfers within the Library system which in its opinion would expedite and improve the operation of the Library.” Review of Timar’s transfer turns on the relationship of these two sentences.

The evidence affords no basis to doubt that Gilderson-Duwe believed Timar’s transfer returned her to a position that improved the operation of the CFSO at a time when the Library’s summer reading program needed a capable replacement for Thomas. This is well within the scope of discretion stated in the first sentence of Article VIII, Section 5.

The Library understates the force of the Union’s position under the second sentence of Section 5. Article VIII mentions promotion and makes seniority one of the criteria governing selection through the posting process. It also specifies a probation period for a promoted employee. Article XXX confirms that the Library cannot act to undercut the express provisions of the agreement. Thus, a transfer that undercut seniority or sought to evade the posting process rather than to improve Library operations could constitute conduct not meeting the “arbitrary or capricious” standard of Article VIII, Section 5.

This prefaces the examination of the Memo. Gilderson-Duwe did seek to shield Timar from the posting process. As noted above, however, he believed the transfer had a broader institutional purpose than personal favoritism. The first sentence of Section 5 demands no more than his opinion. The second sentence, however, demands that his opinion have a non-arbitrary and non-capricious basis. The record supports his opinion. Timar successfully performed the duties of that position for eight years and there is no dispute that she has the qualifications Gilderson-Duwe attributed to her. The Library is correct that her return to the same position and pay range that she occupied for eight years makes it difficult to consider the transfer a promotion. It ignores, however, that viewing the transfer as a “restoration” potentially pits transfer against recall. This prefaces that the transfer decision rests on a troublesome basis. Gilderson-Duwe’s opinion on the importance of the vacancy and on Timar’s qualifications to fill it has a sound footing. However, this can not obscure that

Gilderson-Duwe's desire to shield her from the posting process made the determination of her qualifications appear dubious, because that desire standing alone can be viewed as arbitrary or capricious. The Union is correct that shielding an employee from the posting process reads the role of seniority in a promotion out of existence.

More troubling than this, however, are the 5 Items listed in the Memo. The parties never agreed to Item 1. In spite of this, the Memo generally prefaces the 5 Items thus: "Library Administration and officers of AFSCME Local 796-A have worked out a common understanding of the contract language pertaining to recall of laid off workers." The Memo specifically prefaces the listed items thus: "Here are the main points of that understanding." The singular reference to "that" understanding affords no reason to believe that any of the following Items represent anything other than an "understanding." This mischaracterizes the meeting's results and is a troubling conclusion to a troubling meeting. Brewer left the meeting reasonably concluding that the position about to be posted was that vacated by Thomas.

There is no apparent basis for this manipulation of a process ostensibly called to yield consensus. Evidently, the consensus was not to be informed. Had Gilderson-Duwe noted his intent to transfer Timar, nothing would have changed in the contractual basis for the decision. Her transfer was not at significant risk given the strength of the Library's authority under Article VIII, Section 2. She may well have been able to post to the position. In any event, a grievance challenging the transfer announced by the Memo had little chance of being resolved, other than by a settlement agreement, at any time that could disrupt the summer reading program. This says nothing of the loss of the possibility of reaching an informed consensus regarding the transfer. Nor does it say anything of a writing that at best arbitrarily and at worst capriciously presents a bald statement of management right as a Library/Union "understanding." The Memo stands as evidence of arbitrary and capricious conduct.

The force of the Union's concern on the events summarized in the Memo does not, however, establish a violation of Article VIII. The grievance put the Union in the awkward posture of questioning Timar's transfer to a position that she formerly occupied, and did so in a way that risked a significant loss of pay. The Union's brief appropriately puts that issue aside, since there is no evidence to indicate the transfer undercut contractual seniority rights or conferred a personal benefit on Timar not warranted by broader and appropriate institutional considerations. The force of the Union's concern rests on the April meeting and the Memo. That concern focuses on the level of candor characterizing Library/Union discussion. However well founded that concern may be, it does not pose a basis to overturn Timar's transfer under Article VIII. To become well rooted in Article VIII, Section 5, the concern needed to be tied to the undercutting of Agreement provisions such as promotion, recall or seniority. The evidence does not establish such a tie on this record.

**AWARD**

The Library did not violate the collective bargaining agreement by transferring Catherine Timar to the Library Assistant II position in the Children's and Family Outreach Services Department effective June 4, 2007.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 24th day of March, 2008.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

