

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**POLK COUNTY GOLDEN AGE MANOR EMPLOYEES,
LOCAL 774-D, AFSCME, AFL-CIO**

and

POLK COUNTY

Case 116
No. 67239
MA-13811

Appearances:

Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, for Polk County Golden Age Manor Employees, Local 774-D, AFSCME, AFL-CIO, referred to below as the Union.

Malia Malone, Assistant Corporation Counsel, Polk County, 1005 West Main Street, Balsam Lake, Wisconsin 54810, for Polk County, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Tessa Raymond, who is referred to below as the Grievant. Hearing was held on December 19, 2007, in Balsam Lake, Wisconsin. The hearing was not transcribed. The parties filed a brief or a waiver of a brief by April 15, 2008.

ISSUES

The parties stipulated the following issues:

Did the Employer properly award the full-time position to a posting to the employee who had less bargaining unit seniority but greater departmental seniority?

RELEVANT CONTRACT PROVISIONS

**MASTER AGREEMENT
Between
POLK COUNTY WISCONSIN
And
POLK COUNTY JOINT COUNCIL
LOCAL 774
AFSCME, AFL-CIO
2004-2006**

ARTICLE V – SENIORITY

Section 5.01 Definition

Seniority shall consist of the total paid service of each employee of Polk County beginning with the starting date of employment. . . .

Section 5.02 Continuous Seniority/Seniority for Benefits

(REFER TO SUPPLEMENTAL AGREEMENTS)

. . .

ARTICLE VII – JOB POSTING

Section 7.01 Posting Groups

For purposes of job postings, the following posting groups will be recognized as constituting the groups of eligible employees covered by the provisions of this article:

- 1) Professional employees of the Human Services Chapter (Local 774C)
- 2) Employees of the Courthouse Chapter (Local 774B), non-professional employees of the Human Services Chapter (Local 774C), and clerical employees of the Highway Chapter (Local 774A)
- 3) Employees of the Highway Chapter (Local 774A) and employees of the Polk County Recycling Department.
- 4) All Golden Age Manor employees.

Employees of one posting group are not eligible to post into positions of another posting group, except that employees within Chapters shall be eligible to post into any position in that Chapter.

Section 7.02 Posting Procedures

When it becomes necessary to fill a job vacancy or new position, such vacancy or new position shall be posted within the facilities of the respective posting group . . . The posting award shall be made to the senior employee found qualified for the position. Seniority within a chapter shall prevail in cases where employees from both inside and outside the chapter have posted for a position.

. . .

SUPPLEMENTAL LABOR AGREEMENT

Between

POLK COUNTY WISCONSIN

And

POLK COUNTY

LOCAL 774D

GOLDEN AGE MANOR CHAPTER

AFSCME, AFL-CIO

2004-2006

ARTICLE 5D – SENIORITYSection 5D.02 Continuous Seniority/Seniority for Benefits

Seniority shall continue when an employee transfers continuous employment within the chapters set forth in this Agreement for the purposes of fringe benefits. An employee's seniority date for purposes of determining fringe benefit accrual rates shall be the employee's most recent date of hire. . . .

ARTICLE 7D – JOB POSTINGSection 7D.09 Departmental Preference

Within Golden Age Manor, first preference for a job posting shall be to applicants in the GAM department where the vacancy or new position exists. Then all other qualified nursing home employees will have preference. . . .

BACKGROUND

The grievance, dated December 6, 2006, alleges County violation of Section 7D.09 of the Supplemental Agreement by basing seniority on departmental date of hire, when "Seniority is date of hire within Chapter." GAM includes the following departments: Nursing; Activity; Social Services; Medical Records; Laundry; Maintenance; Housekeeping; Dietary; and Office.

Leann Martinson, Gary Taxdahl, the Grievant and Marian Posey testified. Martinson has been a GAM employee in the laundry since March of 1996. She posted for a full-time position in the laundry department and believed she received it ahead of the two other applicants because she had greater departmental seniority. To her knowledge, departmental seniority governs all postings. She recalled two incidents that manifest this, including a CNA position as well as the award of a full-time Treatment Aide position in August of 2005.

Taxdahl has served as GAM's Administrator for roughly twenty-two years. He noted that on two occasions GAM awarded a full-time Treatment Aide Position to an applicant with the greatest departmental seniority over the claim of another applicant with greater chapter seniority. One occasion was in August of 2005 and the second was in April of 2005. In July of 2000, GAM awarded a long-term, full-time substitute Treatment Aide position to an applicant with the greatest departmental seniority over the claim of another applicant with greater chapter seniority. Departmental seniority rosters track departmental date of hire rather than chapter date of hire. GAM has maintained an employee handbook throughout his tenure. He updated it after he arrived. At all times he is aware of, the handbook has stated,

For the purpose of calculating benefits which are contingent upon the period of time an employee has worked at Golden Age Manor, the employee's date of hire will be used as the basis for such calculations. However, within each department seniority will be determined by actual length of service in the department. Time worked by an employee in other departments will not be counted toward departmental seniority.

GAM has not negotiated with the Union concerning either the handbook or departmental seniority rosters. Taxdahl reversed the award of a posted position to Marilyn Zurcher. He did so because Joan Talmage had greater departmental seniority.

The Grievant noted that Taxdahl reversed the position award to Zurcher in response to the filing of the grievance. The Union has held the filing of another grievance in abeyance pending the issuance of this grievance arbitration award. Marian Posey has worked at the GAM since 1988 and serves as the Union's Vice-President. She affirmed the Grievant's testimony regarding the position awarded to and then taken from Zurcher, based on Talmage's greater departmental seniority. Taxdahl and Posey offered differing perspectives on the scarcity of examples of GAM preference for departmental seniority. In Taxdahl's view, the absence of examples reflects a chapter wide understanding that GAM prefers departmental over chapter seniority. In Posey's view, employees sign postings without regard to seniority issues to demonstrate and preserve their interest in a position. The absence of examples of conflict between departmental and chapter seniority reflects only coincidence.

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

THE PARTIES' POSITIONS

The Union's Arguments

At hearing, the Union noted that the grievance concerns two qualified employees seeking a single position. The County awarded the position to the senior employee, if "senior" means the employee with the greatest departmental seniority. If, however, "senior" means the employee with the greatest chapter seniority, then the County failed to award the position to the senior employee. The Grievant is the Union's President, and a long-term employee. County assertions of a consistent past practice cannot be tied to its unilaterally created handbook or to its unilaterally created seniority lists. In fact, few past postings can be found to establish the departmental preference the County seeks. Articles V and VII of the Master Agreement must be reconciled to Articles 5D and 7D of the Supplemental Agreement to resolve the grievance. Because that reconciliation must account for the conflicting demands of two qualified unit applicants, the Union's arguments focus on the quality of the evidence more than on the application of the contract to the evidence.

The County's Brief

Section 7D.09 modifies Section 5.01 "when it comes to filling vacancies through the posting process to allow the position to be awarded to the individual with the most departmental seniority." This reflects the axiom that the "specific governs the general in terms of contract interpretation" and reflects a consistent past practice.

Section 7.02 grants a posting to the senior qualified applicant, but that general grant cannot be read to render Section 7D.09 meaningless, and "'first preference' has been interpreted to mean the most senior within the Department." This reflects that departmental experience in GAM bears on qualifications for a vacancy. Departmental seniority also governs other contractual benefits such as vacation selection. Arbitral precedent demands that the provisions of the Master and the Supplemental Agreement be given meaning.

If there is any contractual ambiguity involved, past practice supports the County's interpretation. Testimony and documentation establish the practice. While the Grievant's testimony opposed the practice, that testimony lacks "any specific instance supporting her contention." Taxdahl's experience with prior postings stands in stark contrast. At least three prior postings illustrate "that the person with more departmental seniority was awarded a position rather than the person who had the most overall Chapter seniority." Viewing the record as a whole, the County concludes that "the grievance should be dismissed in its entirety."

DISCUSSION

The stipulated issue requires a contractual focus. Analysis must start with the Master Agreement, which, at Section 7.02, requires that a posting be awarded to "the senior employee found qualified for the position." There is no dispute that the Grievant is qualified for the

position, and thus the interpretive issue turns to seniority, which is defined at Section 5.01 of the Master Agreement to consist “of the total paid service . . . beginning with the starting date of employment.” Standing alone, this language favors the Grievant, who has greater total chapter service than the employee who received the position. However, Section 5.02, among a number of other agreement provisions, establishes that the Master Agreement does not stand alone and must be interpreted with reference to the Supplemental Agreement.

Articles 5D and 7D of the Supplemental Agreement bear on the grievance. Section 5D.02 does not afford any greater guidance than that provided by Section 5.01. Section 7D.09, however, bears directly on the grievance and makes the County’s reading of the agreement persuasive. That section grants “first preference for a job posting . . . to applicants in the GAM department where the vacancy or new position exists.” The County’s interpretation of this section is compatible with the general seniority preference of Section 5.01 and permits the specific Supplemental Agreement covering GAM to have meaning. The alternative reads the general preference of Section 5.01 to render the more specific reference of Section 7D.09 meaningless. As the County correctly notes, the goal of contract interpretation is to grant meaning to all agreement terms. If “first preference” is not taken to establish departmental seniority as superior to chapter seniority, it is not evident what the “first preference” means.

The GAM handbook and seniority rosters are consistent with this view. As the Union accurately points out, this evidence falls short of establishing a binding practice. The scarcity of past examples of the departmental seniority preference afford little assistance to the inference of a joint understanding by the parties of how seniority applies under Section 5.01 of the Master Agreement and Section 7D.09 of the Supplemental Agreement. As Posey’s and the Grievant’s testimony points out, coincidence is roughly as good an explanation of the few examples of specific posting awards as the assertion that employees generally understand that departmental seniority governs posting issues within GAM. The handbook and seniority rosters are, in my view, harder to view in that way. It is evident that the County unilaterally establishes them, but the absence of challenge over the extended period of their existence affords greater support for the County’s view than the grievance allows. That vacation and other benefits have followed departmental seniority for many years affords at least an arguable basis to infer agreement by conduct.

Ultimately, however, the existence of a past practice is not necessary to the persuasiveness of the County’s view, which has a solid basis in the language of Section 7D.09. Evidence of consistent administration of departmental seniority over time affords some support for the County’s view and none for the grievance. Thus, on balance, the record supports the County’s interpretation of Articles V, VII and 5D and 7D and thus the denial of the grievance.

AWARD

The Employer properly awarded the full-time position to a posting to the employee who had less bargaining unit seniority but greater departmental seniority.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 20th day of May, 2008.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

