

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY

and

**SHEBOYGAN COUNTY HIGHWAY DEPARTMENT EMPLOYEES
AFSCME LOCAL 1749, AFL-CIO**

Case 387
No. 67335
MA-13838

(Posting Grievance)

Appearances:

Mr. Michael Collard, Personnel Director, Sheboygan County, 508 New York Avenue, Sheboygan, Wisconsin 53081-4692, appeared on behalf of the County.

Mr. Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, appeared on behalf of the Union.

ARBITRATION AWARD

On October 8, 2007 Sheboygan County and the Sheboygan County Highway Department Employees, Local 1749, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of the Commission's staff to hear and decide a grievance pending between the parties. Following appointment, the matter was heard on December 13, 2007 in Sheboygan, Wisconsin. No formal record of the proceedings was made. Post-hearing briefs and reply briefs were filed and exchanged by February 18, 2008.

This Award addresses the County's obligation to post vacant positions.

BACKGROUND AND FACTS

Robert Ziegelbauer was hired by the Sheboygan County Highway Department in 1991, served in various positions until some time in 1997, when he posted for and received the

position of Shop Janitor. He was Shop Janitor until he posted for and received the position of Bridge Foreman in April of 2007. Ziegelbauer has been the Local Union President since May, 2000 and before that was a steward since 1993.

Greg Schnell has been Sheboygan County Highway Commissioner since October 6, 2006. When Ziegelbauer posted out of the Shop Janitor position Schnell determined not to fill the vacated position. His decision was based on his view of the financial pressures on the department. The Shop Janitor does not typically perform work that can be billed out to customers of the Highway Department. In tight financial times it was Schnell's decision to leave vacant a position that could not produce revenue, in favor of positions that could. The work of the Shop Janitor was spread among other employees. It appears that the bulk of the work was assigned to Ron Roethel, the Sign Painter. The janitorial work was assigned to Roethel in addition to his Sign Painting work. Other Highway Department employees were assigned Janitorial work. A minor amount of the work was contracted out. In essence, the work continued to be performed, and the position was left vacant.

On, or about June 20, 2007 a grievance was filed seeking to have the Shop Janitor position filled. It was ultimately denied by Michael Collard, Human Resources Director, on August 28, 2007.

The Collective Bargaining Agreement has a wage schedule, which is Appendix "A". It provides for five Classes of pay. The "Miscellaneous Rate Class" is the lowest rate of pay. "Rate Class One" is the second lowest rate of pay. "Rate Class Two", "Rate Class Three" and "Rate Class Four", provide for increasingly higher rates of pay. The position of Shop Janitor is in Rate Class Two. The Sign Painter is in Rate Class Three. It further appears that the other employees assigned to the Shop Janitor duties are at or above Rate Class Two.

It was the testimony of Mr. Ziegelbauer that all positions are posted, with the exception of County Maintenance (Rate Class One) which is regarded as entry level. It was his testimony that posting allows employees to move, to work from a fixed location, to work closer to home, to earn more money and to seek out more interesting and rewarding work. Ziegelbauer testified that the employer is free to assign work to anyone, so that there would be no real loss of efficiency had the County filled the Shop Janitor position and instead eliminated a County Maintenance position. It was Ziegelbauer's testimony that historically it was the Departmental practice to fill the higher rated position, and if necessary to eliminate a position, eliminate the entry level Maintenance position.

The Collective Bargaining Agreement provision which is at the center of this dispute is set forth below in its entirety. The relevant language has been in the parties contract since at least 1966.

There is a history of operating under the terms of the posting provision. The norm has been to post and fill vacancies which arise, consistent with the terms of Article 27. However, there are numerous variances from that norm. On June 21, 1978 the Union filed a grievance

seeking to have the County post and promptly fill vacancies. The resolution to the grievance provides: “ pending vacancies are being posted and will try to post vacancies with a reasonable time unless a position is discontinued.”

On September 8, 1982 then Personnel Director Peter Witt authored the following:

September 8, 1982

Mr. Jerome Thiel, President

. . .

Dear Mr. Thiel:

At the meeting of Wednesday, September 8, 1982, with the Sheboygan County Highway Commission and the representatives of Local 1749, Highway Employees, a discussion was held regarding the impact of the phasing out of the position of Shop Clerk, as occupied by Warren Kalmerton.

The following condition were agreed to at the meeting:

1. Effective September 13, 1982, Mr. Warren Kalmerton will become a County Maintenance Employee at the South Side Highway Maintenance Shed.
2. Mr. Kalmerton may be eligible to sign for any job posting which may become available.
3. The union will maintain bumping rights for any other highway union employee whose job may be eliminated in the future.
4. At any time in the future that Mr. Kalmerton signs through the job posting procedure, the Union representatives and the Highway Commission will discuss the waiver of the 2 year job holding provision of the contract.

Sincerely,

PETER J. WITT
Personnel Director

cc: Helen Isferding

On, or about September 18, 1984 the Sheboygan County Board eliminated 12 positions from the Sheboygan County Highway Department. The Department was reduced from 146 to 134 authorized positions. It appears that the number of Maintenance Workers remained at 18. It appears that the biggest area of reductions came from the Patrol Helpers class.

On, or about August 17, 1987 then-Highway Commissioner Roger Laning wrote the following:

TO: LOCAL 1749 AFSCME, AFL-CIO

SUBJECT: MOTOR SCRAPER POSITION ON GRADING CREW

This memo is written to clarify the position of the Highway Department in regards to the third motor scraper position for the grading crew. As you know, the past administration had chosen to not fill the position after the last individual, Tom Grunow, was released from employment. I believe that this position was taken because of the fact that the third scraper was now used sparingly on grading projects.

At this time, I am of the same opinion as the past administration on this matter. However, in order that the position not be lost in the make up of our workforce, I would like to be of a mutual understanding that should the workload increase for the grading crew to warrant the additional scraper operator that the position would then again be filled.

Should you have any further questions on this matter, please contact me anytime.

Sincerely,

SHEBOYGAN COUNTY HIGHWAY DEPARTMENT

Roger Laning
Highway Commissioner

On or about June 21, 1988 the Sheboygan County Board eliminated the position of Clerk-Shop, in order to create a position of Assistant Surveyor-Assistant Highway Engineer. It was the stated position of the County Board that one of the positions of Shop Clerk is no longer utilized and that there was a need for the new position. At the time there were 16 Maintenance Workers in the Organization chart.

On, or about September 22, 1992 the Sheboygan County Board eliminated seven positions from the Highway Department noting that they had been unfilled for a period of 12 months.

Sometime in the mid-1990's, the Highway Department combined the position of Tireman with that of Mechanic. The jobs were combined, evidently without a grievance.

AFSCME represents two other bargaining units of County employees. Local 2427 represents Health Care Facilities employees and Local 437 represents Health and Human services employees. Both Collective Bargaining Agreements have vacancy posting language which is either identical or strongly parallel to that of the Highway contract. Neither clause has ever been interpreted to mandate the result sought by this grievance.

ISSUE

The parties stipulated to the following issue:

Did Sheboygan County violate the collective bargaining agreement when it failed to post and refill a janitor position, which had become vacant?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified the employees shall receive all wages and benefits due him for such period of time involved in the matter.

The County Board and its Highway Committee shall have the sole right to contract for any work it chooses and direct its employees to perform such work wherever located subject only to the restrictions imposed by this agreement and the Wisconsin Statutes. But in the event the Employer desired to subcontract any work which will result in the layoff of any county employees, said matter shall first be reviewed with the Union.

Unless otherwise herein provided the Employer shall have the exclusive right to determine the hours of employment and the length of the work week, and to make such changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Highway Department. The Union agrees at all times, as far as it has within its powers, to further the interest of Sheboygan County.

...

ARTICLE 27

SENIORITY

It shall be the policy of the department to recognize seniority.

(a) Lay-Offs: If a reduction of employee personnel is necessary the last person hired shall be the first person laid off and the last person laid off shall be the first person recalled.

(b) Job Posting: Whenever a vacancy occurs due to a retirement, quit, new position, or for whatever reason, the job vacancy shall be posted within reason, the job vacancy shall be posted within twenty-one (21) days following the position becoming vacant. The vacancy shall be posted on all bulletin boards for a minimum of five (5) work days. The job requirements, qualifications, and experience shall be a part of the posting and sufficient space provided for interested parties to sign said posting.

DISCUSSION

Neither party to this proceeding argues for a literal reading of article 27 (b). The County contends that the Article is operative only after it determines that it will fill the vacancy. The Union acknowledges employer discretion in this area, but does not concede that the employer is free to exercise pure managerial discretion to decide which positions to fill. It is the view of the Union that in this instance the County has continued to perform the work of the Shop Janitor position, but rather than fill the still viable job, it has assigned its duties to others, while leaving lower grade positions filled.

In its post-hearing brief, the Union concedes that the employer is free to leave the position vacant “if the work truly does not exist”, or if “little or no work exists”. It is the view of the Union that the position must be filled “ when the employer intends to continue a substantial portion of the duties of the vacant position”. The Union argues that the employer must fill the position “ if the work is available”, if “ work continued to be done”, if a “ majority is still being done”, if there is “ enough work to justify a position...”.

There is no dispute that Article 27(b) does not require a posting of County maintenance positions though there exists a lower rate class.

The uncontradicted testimony is that the phrase “within reason”, which appears in the first sentence of Article 27(b) is a reference to the time frame in which a position is to be posted. It is not intended to address whether or not a position is to be posted.

The Union raises a bona fide concern in this proceeding. I agree with the Union’s core premise. The parties have negotiated a promotional system. Positions are posted and employees can bid into open positions. This is the system that allows employees to be paid more, to do more complex work or work they more enjoy. It may allow someone to work closer to home. The posting system has value to employees in a variety of ways. Article 27 represents a negotiated resolution between the employees’ desire for upward mobility, security and comfort and the employers’ efficiency needs. I would not lightly endorse the dismantling or re-titling of a job to unilaterally alter that bargain.

The parties in this dispute have not administered this provision in a fashion which required the County to post and fill all vacancies. The 1978 grievance answer includes the disclaimer “ unless a position is discontinued.” At a minimum, that appears to reflect the view of the then Highway Commissioner that he had such authority. As noted by the Union the underlying facts surrounding his statement are unexplained. That is to say, there is no record as to how little or much work would exist to justify the discontinuance. The Witt letter of 1982 is more analytical. It appears to be an agreement between the County and the Union. The position of Shop Clerk was phased out and the incumbent was made a Maintenance employee. The letter also makes reference to other jobs which may be eliminated in the future and to the bumping process. At a minimum, this is not a reference to the elimination of Maintenance positions. Once again, the record is silent as to the work available.

In 1984 the County Board eliminated 12 positions from the Highway Department organization chart. The Department went from 146 to 134 authorized positions. A number of Highway Helper positions and Gravel Pit positions were abolished. There were 15-18 Maintenance positions retained. Again, there is no record as to available work. Again, the County preserved maintenance positions while eliminating other scheduled positions.

In 1987 Commissioner Laning’s letter left the third scraper position unfilled, because it was used “sparingly”. There is no indication what “sparingly” means, nor is there any indication as to how many maintenance positions remained filled at the time. However ten months later the County abolished the Shop Clerk position to create the Assistant Highway Engineer position. The rationale was that the Shop Clerk was “no longer utilized”. At the time there were 16 Maintenance workers on the organization chart.

In 1992 the County Board eliminated seven Highway positions which had not been filled for more than 12 months. The record is again silent as to how much work remained. In the mid-1990’s, a Tireman position was merged with a Mechanic. This appears to have been

done in lieu of eliminating a Maintenance position and reassigning the hours of the Tireman and Mechanic.

I think the foregoing demonstrates that the County has exercised some discretion as to not filling or even eliminating Highway positions. Much of this has been accomplished while numerous Maintenance positions have been left filled. In some instances there is an indication that not much work remained. In most instances the record is silent. It is unclear whether positions were eliminated due to lack of work or lack of money.

There are two other AFSCME contracts in Sheboygan County. One contains the same sentence relative to posting vacancies. The other is similar. They have been administered by the same parties, at least at the level of the labor relations professionals. I agree that they are not dispositive of the interpretation of the words in the Highway contract. However, the negotiation of the provisions was common. The administration of those contracts supports the County position, and detracts from the claim of the Union.

The Union is asking me to articulate a standard not found in the collective bargaining agreement. In its brief, the Union advocates a number of standards or thresholds to support its position. Each standard put forth has differences. I think the difficulty confronting the Union is that neither the record nor the workplace present a clear standard which the Union can advance. The reality of the workplace does not always lend itself to a cut and dried analysis as to whether a substantial portion of a position's job content has ceased to exist. It is a concept not easily measurable. There is always work to be done.

The Union advances substantive concerns. It is concerned that the County can exercise its discretion to avoid paying the negotiated rate of pay. That is not present in this case. If anything, the employer is paying a higher rate of pay to get the work done. The Union voices concern that the employer could eliminate career paths for employees. This is a Rate Class 2 position. It is not one of the higher paying jobs in the unit. Neither is it a Patrolman position which commonly attracts bidders who want to work closer to home.

I believe the record establishes that the County has historically left positions unfilled while operating with a significant number of Maintenance Workers. The Union essentially argues that the only circumstance permitting that has been a lack of work. The record does not support that claim.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 15th day of September, 2008.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

