

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**OUTAGAMIE COUNTY PROFESSIONAL EMPLOYEES UNION,  
LOCAL 2416, AFSCME, AFL-CIO, and affiliated with the  
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES**

and

**OUTAGAMIE COUNTY, WISCONSIN**

Case 288  
No. 66701  
MA-13603

---

**Appearances:**

**Michael J. Wilson**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for Outagamie County Professional Employees Union, Local 2416, AFSCME, AFL-CIO, and affiliated with the Wisconsin Council of County and Municipal Employees, which is referred to below as the Union.

**James R. Macy**, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Outagamie County, Wisconsin, referred to below as the Employer or as the County.

**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 the final and binding arbitration of certain disputes. The Employer and the Union jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as arbitrator to resolve Grievance 06-3, filed as a “class action” regarding whether the County should have posted a social work position. Hearing was held on June 15, 2007, in Appleton, Wisconsin. Prior to the opening of the hearing, the County asserted the grievance was not substantively arbitrable, and the parties agreed to have that assertion resolved before taking evidence or argument on the merits of the grievance. Connie L. Jacobs filed a transcript of the hearing with the Commission on June 26, 2007. The parties filed briefs and reply briefs by September 26, 2007 and, on December 7, 2007, I issued DEC. NO. 7223, in which I determined, “The grievance is substantively arbitrable, and will be set for hearing on its merits.”

Hearing on the merits of the grievance was held on June 30, 2008, in Appleton, Wisconsin. Jessica Koepsell filed a transcript of the hearing with the Commission on July 16, 2008. At the hearing, the parties agreed to incorporate the exhibits and testimony from the June 15, 2007 hearing into this record. The parties filed briefs and reply briefs by September 2, 2008.

**ISSUE**

The parties were unable to stipulate the issue for decision. The Union states the issue thus:

Vacancy? (Was there a job vacancy to post?)

The County states the issue thus:

Did the County violate the Collective Bargaining Agreement when it re-assigned Social Worker I -V Ruth Holmes from restitution duties to disposition duties within the Youth and Family Services Division, and then posted for a Social Worker I -V position?

I view the County's statement of the issue as that appropriate to the record. The parties stipulated that the grievance, if sustained, poses no remedial issue.

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE I – MANAGEMENT**

1.01 – Except as herein otherwise provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer . . . is vested exclusively in the Employer. In keeping with the above, the Employer shall adopt and publish reasonable rules which may be reasonably amended from time to time. The Employer and the Union will cooperate in the enforcement thereof. . . .

. . .

**ARTICLE III – PROBATIONARY AND EMPLOYMENT STATUS**

. . .

3.03 - A permanent employee is hereby defined as a person hired to fill a full-time or part-time position in the Table of Organization. . . .

. . .

ARTICLE VI – GRIEVANCE PROCEDURE

6.01 – The parties agree that only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

6.02 - . . .

Step 4. . . . Arbitration proceedings shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. . . . In rendering his or her decision, the Arbitrator shall neither add to, detract from nor modify any of the provisions of this Agreement. . . .

ARTICLE VII – WORKWEEK

7.01 – A) For all employees except those referred to in Section 7.01 (B) or (C), the normal workday shall be seven and one-half (7 ½) hours and the normal workweek shall be thirty-seven and one-half (37½) hours, Monday through Friday. . . .

C) For all employees hired into Local 2416 or who transfer or are promoted into any full time vacancy in this bargaining unit, the normal workday shall be eight (8) hours and the normal workweek shall be forty (40) hours, Monday through Friday. For current “Social Workers I –V” and “Professional Counselors IV – V”, who currently work a thirty seven and one half (37½) hour work week who volunteer according to the process described below, the normal workday shall be eight (8) hours and the normal workweek shall be forty (40) hours, Monday through Friday.

Each calendar year, beginning with the ratification of the 2005-2007 collective bargaining agreement, and then effective the beginning of each new calendar year on dates that match the effective dates used on Appendix “A”, one full time employee who works a thirty seven and one half (37½) hour work week, and who is willing to do so, shall be given the opportunity to convert to a forty (40) hour work week. The full time employee shall, according to the seniority order of his or her seniority ranking from the seniority list . . .

. . .

ARTICLE XVII – SENIORITY

17.01 - Seniority shall consist of the total calendar time of continuous employment elapsed since the date of original employment with the Employer in this bargaining unit. . . .

17.02 – Each year, an up-to-date seniority list shall be posted on office bulletin boards. Such list will divide bargaining unit employees into two (2) seniority groups, defined as follows:

1. Department of Health and Human Services Department and Family Court.
2. Mental Health and Alcohol and Drug Abuse Division and Developmental Disabilities Unit of the Aging and Long Term Support Division of the Department of Health and Human Services.

Whenever an employee in this bargaining unit transfers into a position in a different seniority group, that employee's seniority date in the new seniority group will be his/her date of transfer into the new seniority group. . . .

. . .

#### ARTICLE XIX – JOB POSTING

19.01 – In the event a job vacancy or new position occurs, a notice of such vacancy or new position shall be posted on the employee's bulletin board for at least five (5) working days not including Saturdays, Sundays and holidays. Said notice shall contain the prerequisites for the position, rate of pay and general duties of the job. . . .

19.02 – Employees chosen must meet the requirements and qualifications as established in writing by the Employer.

19.03 – Employees meeting these requirements and qualifications shall be selected on a seniority basis from within the seniority group where the vacancy exists and shall serve a thirty (30) calendar day trial period. . . . If no employee from within the seniority group applies or is qualified, employees from the remaining seniority group meeting these requirements and qualifications shall be selected on a seniority basis and shall serve the same trial period as described above. . . .

. . .

#### ARTICLE XXVIII – CONDITIONS OF AGREEMENT

28.01 – This Agreement constitutes an entire agreement between the parties and no verbal statement shall supersede any of its provisions.

## BACKGROUND

### Background Common To DEC. NO. 7223 and DEC. NO. 7361

The parties stipulated that the evidentiary record developed for DEC. NO. 7223 should be considered part of the record for this decision. This portion of the background incorporates the bulk of the BACKGROUND section from DEC. NO. 7223.

The form initiating Grievance 06-3 alleges,

A position formed via vacancy was not posted, but rather reassigned within the Division. Only one individual was eligible for “reassignment.” Management has not adopted or published reasonable rules regarding what constitutes a reassignment of duties.

The grievance form alleges that this violates Section 19.01 and Section 1.01, and seeks that “the open ongoing social work position should be posted as it was created initially due to a vacancy posted.” At Steps 1 and 2, the County denied the grievance without elaboration. At Step 3, in a letter dated November 9, 2006, Robert Sunstrom, the County’s Human Resources Director, answered the grievance thus,

This is to respond to the grievance discussed at the November 9, 2006 grievance meeting . . . The County’s handling of the posting and reassignments in this matter was in accordance with the Labor Agreement. The grievance is denied.

Sunstrom testified that Grievance 06-3 has roots tracing back to the 2002-04 labor agreement.

On March 18, 2002, the parties executed a Memorandum of Understanding, referred to below as the Memorandum, which states,

The collective bargaining agreement for the time period from 2002 through 2004 between AFSCME Local 2416 and Outagamie County that is currently undergoing the ratification process will introduce a new Section 7.01(C) to read:

“C) For “Social Workers” and “Nutritionists”, and employees from any division or unit covered by this collective bargaining unit who volunteer to do so, as well as all employees hired into Local 2416 or who transfer or are promoted into any vacancy in this bargaining unit on or after the date of ratification of this collective bargaining agreement by the County Board, the normal workday shall be eight (8) hours and the normal workweek shall be forty (40) hours, Monday through Friday. . . .

The parties agree that at such time as the agreement successfully completes the ratification process, the first sentence of the new Section 7.01(C) will be administered according the following parameters.

1. At present, Social Workers I – V and Professional Counselors IV – V work a standard 37½ hour work week (7½ hours per day). They are the sole individuals covered by the Local 2416 collective bargaining agreement who do not work a standard 40 hour work week (8 hours per day). A Social Worker I – V or Professional Counselor IV – V may volunteer to work a 40 hour work week by:
  - A. Contacting their direct supervisor in writing to make their wishes known. The employee’s request to work a 40 hour work week is subject to the approval of the Deputy Director . . . or to the Court Services Supervisor . . .

. . .

4. Social Worker(s) I – V and Professional Counselors IV – V hired by Outagamie County after the day of ratification by the County Board will be assigned to work a 40 hour work week.
5. Employees who post for and are chosen to fill a vacancy, whether by transfer, i.e. a lateral movement from one division to another within the same wage grade, or by promotion, i.e. movement into a higher wage grade, will begin working a 40 hour work week subject to the approval process described in #1. Note: “Promotion” is not intended to include the movement from one wage grade to another in instances of reclassification described in Section 20.01(c).

. . .

Employees classified as Social Worker I through V are covered by one job description. Sunstrom interprets the Memorandum to grant the County the ability to assign duties, without a posting, to employees within the Social Worker I through V classification who work within the same division.

In March and April of 2004, the Union filed four grievances alleging contractual violations occurring on March 9, March 17 and March 29. The March 29 grievance alleged that the County had violated Section 19.01 when,

Child Protection Intake position was created. The position was not posted internally, but was filled by a county employee.

One of the grievances challenging the events of March 17 alleges a violation of Section 19.01 concerning the assignment of duties “specific to court dispositional services” to an employee “hired . . . from outside the . . . bargaining unit.” The other grievance challenging the events

of March 17 does not specifically note Section 19.01, but alleges a violation of Section 7.01C) when a “Foster Care Worker was transferred to Child Protective Intake and maintained 37½ hr. work week.” The March 9 grievance alleges a violation of Section 7.01C) when an employee “applied for a posted social worker vacancy with general duties focusing on juvenile restorative justice” but was advised that the employee would be reassigned to those duties without a change in “said employee’s 37½ hour workweek.” The parties processed each of these grievances to the arbitration step. Sunstrom testified that the parties then “decided to arbitrate one of the four and have that arbitration decision serve as precedent for the issue.” (Transcript at 20).

The March 29 grievance was submitted to Arbitrator Lauri Millot, who resolved it in OUTAGAMIE COUNTY, DEC. NO. 6930, (MA-2385, 12/6/2005). Beyond the four grievances summarized above, the Union filed ten grievances during the period of time between the filing of the March 29 grievance and the issuance of DEC. NO. 6930. The parties discussed how to process each of these grievances. In an e-mail to Sunstrom dated August 27, 2004, Mary Scoon, the Union’s Staff Representative, stated,

The Local is requesting to hold the grievance in abeyance pending the outcome of the arbitration. If this is o.k. there wouldn’t be a need to meet with you either. However, as these similar circumstances come up, grievances will most likely be filed so we have a paper trail. . . .

Sunstrom agreed to hold each grievance in abeyance, pending the issuance of DEC. NO. 6930. Two of his e-mails note that the grievances involved “the same issues” or “the same subject”. The Union did not process any of these grievances after the issuance of DEC. NO. 6930.

DEC. NO. 6930 states the following:

### ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree to the substantive issues.

The County frames the issues as:

Did the County violate the collective bargaining agreement when it reassigned without posting Social Worker Lynn Schroeder from foster care, respite care duties within Children, Youth and Families Division to intake investigation duties also within Children, Youth and Families Division? If so, what is the appropriate remedy?

The Union frames the issues as:

Did the County violate the collective bargaining agreement when it refused to post a job vacancy? If so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I accept the County's framing of the issues. . . .

### **BACKGROUND AND FACTS**

. . .

The County experienced a reduction in Foster Care Homes from 110 in 2000 to 52 as of March 2004. During that same time period, the number of protective service investigations increased by 100. As a result of these changes, the County re-evaluated its staffing patterns and determined it was necessary to make changes. Both foster care work and protective service work are done by social workers in the Child, Youth and Families Division. The Division Manager, Michelle Weinberger-Burns, met with the staff, informed them of the workload changes and the need to reassign duties, and requested ideas as to how the duties should be reassigned. Weinberger-Burns ultimately concluded in February 2004 that she would reassign Lynn Schroeder from a Social Worker position assigned the worksite assignment, Foster Care Coordinator, to a Social Worker position with the worksite assignment, Intake Investigator, in the same division. In moving Schroeder, the County did not post a position. As a result of the move, Schroeder's supervisor changed although her compensation did not change. . . .

### **DISCUSSION**

The question presented in this case is whether the County has the contractual authority to reassign a social worker within the same division. I conclude that it does. The Union contends that the County failed to post a position, therefore I look first to the language of Section 19.01 which states that:

In the event a job vacancy or new position occurs, a notice of such vacancy or new position shall be posted. . .

This language is clear and unambiguous; "a notice ... shall be posted," when a job vacancy or new position occurs. The parties' labor agreement does not allow for temporary assignments, therefore if Schroeder was filling a job vacancy or new position, it should have been posted. . . .

In this instance, a vacancy did not exist. No social worker vacated a position. Rather, the County identified a change in the child investigation and foster home caseloads and due to that change, it removed duties from Schroeder



and added or replaced those duties with other duties. . . Although I have some suspicion regarding the extent of the changing caseloads, especially since it had started to occur in 2000 and the County did not reassign any work until 2004, there is no evidence that contradicts or challenges the factual basis for the County's decision.

The decision notes that Paragraph 5 of the Memorandum,

supports the County's position that the County posting obligation applies to instances when an employee laterally moves from one division to another or when the employee moves to a higher wage grade. Schroeder moved from one unit in the division to another unit in the division. DEC. No. 6930 at 14.

The decision concludes thus:

#### **AWARD**

1. The County did not violate the collective bargaining agreement when it reassigned, without posting, a social worker, Lynn Schroeder, from Foster Care/Respite Care duties within the Children, Youth & Families Division to Intake/Investigation duties, also within the Children, Youth & Families Division.
2. The grievance is dismissed. . . .

DEC. NO. 6930 AT 16.

#### **The Record Developed At The June 30, 2008 Hearing**

The County's Department of Health and Human Services consists of six divisions: Aging & Long-Term Support; Child Support/Economic Support; Children, Youth, and Families; Mental Health & Alcohol & Drug Abuse; Public Health; and Youth & Family Services. Divisions are administratively subdivided into units. Mark Mertens is the Manager of the Youth & Family Services Division, which is referred to below as YFS. The County employs professional employees in each of these divisions, including certified social workers. At all times relevant here, a single Position Description has covered Social Workers I - V. This document spans five pay grades and a wide variety of duties within distinguishable service areas. At all times relevant here, the Position Description has included the following:

#### **Duties and Responsibilities**

**The following duties are normal for this position. These are not to be construed as exclusive or all-inclusive. Other duties may be required and assigned. . . . .**

**Determined by the worksite assignment or field of activity, a Social Worker I – V may be assigned to specific units including Child Protection Unit, Child and Family Unit I, Child and Family Unit II, Youth Social Work Services Unit I, Youth Social Work Services Unit II, and Adult Services Unit and may perform some or all of the following: . . .**

The County has for some time included the following on job postings;

This is the initial assignment. May be assigned to any and all Social Work functions performed within the Division.

Movement through the pay grades of Social Worker I through Social Worker V does not require a posting. The Department employs social workers in a non-numbered Social Worker classification.

The events underlying the grievance start with the resignation, effective August 25, 2006, of Tricia Telfer, who served as a part-time Social Worker, from an electronic monitoring position. Telfer was one of two YFS employees in the Social Worker classification. The other employee is full-time. Mertens posted Telfer's position. Kelly Imeson, a YFS Social Worker I – V, was the senior applicant who signed the posting. Prior to this, Imeson served as a full-time employee.

Mertens sent an e-mail, dated August 24, 2006, which was made available to YFS Division employees, and which states:

Kelly signed the posting for the 20 hr/wk Social Worker (HUMSVCS) assignment involving EM duties. She has accepted the offer and this change will become effective September 18. . . .

Anyone within YFS interested in a possible reassignment of Social Worker I to V duties left unassigned by this move should contact me to express interest by September 7, 2006.

Ruth Holmes-Zych is a Social Worker I - V, who served as the Restorative Justice Coordinator at the time Imeson successfully bid for the position vacated by Telfer's resignation. After reviewing the August 24, 2006 e-mail, Holmes-Zych contacted YFS supervisors to inquire whether Imes' former position would be posted and to indicate interest in response to the August 24, 2006 e-mail. Mertens issued an e-mail dated September 15, 2006 that summarized the County's response thus:

I'm pleased to announce the reassignment of disposition duties to Ruth Holmes, effective September 19.

After careful consideration, we have decided not to pursue reassignment of the restitution duties within the division. We will post a vacant Social Worker I – V position. This will occur the week of September 18 - 22. . . .

Jennifer La Count, a Social Worker I – V in the Children, Youth, and Families Division was the successful signer of this posting.

During the processing of Grievance 06-3, Paul Schroth, the Union’s President, issued a letter dated June 6, 2007 to Sunstrom seeking to determine the details of the reassignment/posting process summarized above. Sunstrom’s response, dated June 12, 2007, states:

Question 1: How many cases did Kelly Imeson have when she left her on-going position in September 2006?

Answer: There were approximately 25 pending cases assigned to Kelly Imeson at the time she left her full-time position as Social Worker I-V and accepted the part-time Social Worker (not numbered) position.

Question 2: What happened to those cases when she left her position and before her position was filled? . . .

Answer: Those approximate 25 cases were re-assigned to Social Worker I-V persons with the Youth and Family Services division with approximately 13 cases being assigned to Social Worker I-V Ruth Holmes; 2 assigned to Social Worker I-V Shawn Hacker; 1 assigned to Social Worker I-V Greg Otto; 2 assigned to Social Worker I-V Julee Ulrich; 4 assigned to Social Worker I-V Jamie Fish; 1 assigned to Social Worker I-V Mary Depies; 1 assigned to Social Worker I-V Elise Vanous; and 1 case was closed.

Question 3: How many cases did Ruth Holmes have the day she started in the ongoing position?

Answer: Ruth expressed an interest in a re-assignment to different Social Worker I-V duties and was assigned approximately 13 cases in her existing Social Worker I-V position performing dispositional services duties within the same Youth and Family Services division.

The balance of the **BACKGROUND** set forth to this point is essentially undisputed. The balance of the Background is best set forth as an overview of witness testimony.

**Richard Badger**

Badger, currently the Executive Director of Wisconsin Council 40, AFSCME, AFL-CIO, served as the Union's representative from the Spring of 1996 through the Spring of 2003. The Memorandum was part of Badger's final collective bargaining responsibility for the Union. The Memorandum is based on a County proposal that was not extensively modified during the bargaining process. Badger understood the County to be under significant financial pressure traceable in significant part to rising health insurance premium rates. The purpose of the proposal was to expand the number of 40 hour full-time equivalent positions to permit the County to spread its insurance costs over a greater number of hours of work. A significant portion of the unit then worked a thirty-seven and one-half hour work week and opposed being forced to increase their normal work week to forty hours. The parties did not address, during this round of bargaining, how, if at all, the Memorandum affected the posting process. The Union never agreed to modify Article 19 based on the Memorandum.

**Beth Reimer**

Reimer has worked for the County for roughly eighteen years as a Child Protection Social Worker, covered by the Social Worker I – V position description. During her tenure, she has filled two positions, one focusing on ongoing child protection and one focusing on child protection intake. The latter demands investigative duties regarding cases of alleged child abuse. The former involves referral of families to ongoing services ranging from alternative care to foster care. She has a strong preference for intake work, and successfully signed a posting to secure the work. She estimated it took about six months of training to make her proficient in intake-based duties. She has not been assigned to perform other than intake duties for the roughly sixteen years she has worked as an intake worker. In her experience as a County employee, the YFS Division has moved away from job postings and toward non-posting solicitations of interest in duties.

**Paul Schroth**

Schroth has worked for the County as a Social Worker IV since his date of hire on August 1, 2000. He started work as an intake/assessment worker in the Children, Family & Youth Division, then posted into a mediation/custody evaluation position in the Family Court Program, which is not a part of the Department of Health and Human Services. He has been covered by the Social Worker I -V position description throughout his employment.

Schroth has served in a variety of Union positions and currently serves as its President. He was on the Union's collective bargaining team for the negotiation of a 2005-2007 labor agreement and for a 2008-2010 labor agreement. In 2005, the parties negotiated an update to the Memorandum. The 2005 update continues into the current labor agreement. Roughly speaking, the 2005 update reflected a Union proposal to permit employees to select, on a seniority basis, to move from a thirty-seven and one-half hour to a forty hour normal work week. The parties did not address job posting during their bargaining for the 2005 update of the Memorandum.

**Ruth Holmes-Zych**

Holmes-Zych is the “Ruth Holmes” referred to throughout the record. She has worked for the County for fifteen years, within YFS for the past thirteen. During her tenure, she has changed position four times, twice through the posting process and twice through the reassignment process. Three of those positions are within YFS. Two of those were Ongoing Social Worker positions, which focus on the handling of juvenile cases, including case management and need assessments, to prevent subsequent referrals to juvenile court. The third position was Restorative Justice Coordinator. The transition between the positions took three to five months of training and hands-on work.

Her initial inquiry regarding the position at issue was to a supervisor to determine if the position would be posted, and if not, to state her interest in the duties formerly performed by Imes. Imes’ work was that of an Ongoing Social Worker, and Holmes-Zych thus had direct experience. Holmes-Zych has served in a variety of Union positions, and in her view, Imes’ former position should have been posted. Holmes-Zych grieved her receipt, through the reassignment process, of a position she had posted for. That grievance was among the grievances held in abeyance pending the issuance of DEC. NO. 6930.

**Steven Schotten**

Schotten has worked for the County for a little more than eleven years, all as a Clinical Therapist in the Mental Health Division. That division has five units encompassing a wide variety of duties ranging from protective placement to crisis intervention. He did not think he could function across units without significant training.

**Lori Hewitt**

Hewitt has worked for the County as a Social Worker I – V for almost sixteen years. She currently works in the Child Protection Unit, in the Parent Resource Program and the PALS Program. She posted into her present position, which involves work with clients who voluntarily seek assistance. She estimated it took her about one and one-half years to acquire the working knowledge needed to handle her current position proficiently. Her current position as well as the position she posted from is within YFS.

**Mark Mertens**

Mertens has served as YFS Manager for roughly four years. He described his ability to assign YFS Division Social Workers thus, “It’s my responsibility and my right as a manager to assign duties as I see appropriate.” (Transcript [Tr.] at 159-160). In his view, a posting is required when the underlying jobs “cross lines of number of hours worked” (Tr. at 161) or when the underlying jobs span separate divisions.

Mertens posted the position vacated by Telfer because there was no other part-time employee within YFS who could be reassigned the duties of her position. Imeson's moving from a full-time position to take that held by Telfer posed a distinguishable issue, since there were many full-time Social Workers I - V within the division who could assume part or all of the duties of Imeson's position. The possibility of reassignment prompted Mertens' August 24 e-mail, and led to Holmes-Zych's statement of interest.

Mertens reassigned Holmes-Zych from her restitution duties to the dispositional service duties formerly performed by Imeson. The Ongoing Social Worker duties reassigned to Holmes-Zych "are some of the most critical duties" (Tr. at 166) performed within YFS. Holmes-Zych had prior experience with Ongoing Social Worker duties, further underscoring the desirability of reassigning the duties and underscoring the reason for posting the position vacated by Holmes-Zych without further reassignments. The Social Workers who could have been assigned Holmes-Zych's restitution duties would have had to be pulled from Ongoing Social Worker positions.

### **Robert Sunstrom**

Sunstrom has served as Human Resources Director since 1991. Prior to hiring a Social Worker I - V, the County advises the prospective employee that it reserves the right to assign any duties within the position description. He stated his understanding of the County's right to assign Social Workers thus, "We are allowed to assign social worker duties to any social worker within a given division." (Tr. at 171) The County is required to post positions that constitute a promotion or that span separate divisions. There is no contractual bar to County exercise of its right to reassign duties prior to posting. The County has, in the past, frequently exercised that right. The Union has grieved some, but not all, of those instances. Several of the grievances held in abeyance pending DEC. NO. 6930 involved County reassignment of duties prior to a posting. The Union did not pursue any of those grievances after the issuance of DEC. NO. 6930.

Sunstrom serves as the County's Chief Spokesman during collective bargaining with its six bargaining units. AFSCME represents a Courthouse unit which has a labor agreement containing similar posting language to that at issue here. In that unit, the County has reassigned duties prior to a posting without any objection or any grievance from the bargaining representative. In the AFSCME represented unit at Brewster Village, however, the governing labor agreement contains language restricting County right to reassign the duties of a position without a posting. Such language is lacking in the labor agreement at issue here. Sunstrom is not aware of any budget requirement or any County enactment, including its Table of Organization, which limits the reassignment rights that the County asserts here.

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

## **THE PARTIES' POSITIONS**

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

The Union notes that the grievance cannot be resolved without reference to DEC. NO. 6930, "because both parties are expected to examine the Millot award extensively (and) will endorse . . . Millot's rationale." Contrary to the County's arguments, the Union does not seek "a second kick at the can". It does not seek to determine the County's Table of Organization, but does seek to determine "how employees are selected to fill vacancies" in a fashion consistent with DEC. NO. 6930.

That determination starts with the clear and unambiguous language of Section 19.01. Application of that provision to the evidence must recognize that the facts of this grievance are not the same as those underlying DEC. NO. 6930. In this grievance, Mertens specifically sought employee input regarding the reassignment of duties, while DEC. NO. 6930 focused on "a change in the child investigation and foster home caseloads". Millot specifically noted that duty reassignment cannot reasonably seek to "intentionally avoid the contractual posting obligations." This reference is crucial to this grievance, since the County sought to "pick and choose who would fill the vacancy left by Kelly (Imeson)." The contract violation is established by Mertens' solicitation of interest among Social Workers regarding Imeson's former duties; Mertens' acknowledgement that Imeson's duties were parsed out, with Holmes-Zych receiving the cases she desired; and by the County's posting of Holmes-Zych's position after Imeson's duties had been parsed out.

More specifically, Mertens' solicitation of interest is nothing but a deliberate evasion of the posting obligation. Rather than apply the standards of Article 19, Mertens' actions represent "an unbridled freedom of the management to choose." Article 19 also solicits employee interest in duties, but demands the application of unit-wide criteria in place of the unbridled exercise of authority the County seeks in the name of reassignment of duties. Factually, Mertens' testimony highlighting Homes' unique fit for Imes' former duties contradicts the County's assertion that duties can be assigned indiscriminately among employees classified as Social Worker I-V who work in the same division. Because no "reorganization, downsizing, layoff, reduction of work" or "changes in types of cases and number of cases to be serviced" is presented by this grievance, the result in DEC. NO. 6930 has no bearing on this grievance. The rationale, however, does. Millot's rationale demands that the evidence be carefully reviewed to determine whether the County sought to avoid its posting obligation under Section 19.01. Imeson posted into a vacancy, prompting Holmes-Zych to seek the duties formerly performed by Imeson. Holmes-Zych's position was itself posted. Sandwiched between these two legitimate exercises of the contract is Mertens' unilateral action to guide Imeson's duties to Holmes-Zych without the burden of a posting. The County cannot "have its cake and eat it too."

Because Imeson's posting into Telfer's position created a vacancy, the vacancy had to be posted under the terms of Section 19.01. This is consistent with DEC. NO. 6930 as well as with the labor agreement. No remedial issue is posed by the grievance, but the grievance demands that the County's overstepping of its authority be formally noted.

### **The Employer's Brief**

After an extensive review of the record, the County argues that DEC. NO. 6930 effectively resolved this grievance. More specifically, the County urges that it and the Union "agreed that of the 14 grievances filed regarding the same issue, one would be taken to hearing and the decision in that case would be binding on the other 13 pending grievances." That case was DEC. NO. 6930, since the underlying grievances are substantially similar. In fact, the grievances are "virtually identical."

Even ignoring the binding precedent established by DEC. NO. 6930, the language governing this grievance is "clear and unambiguous" and demands its denial. Section 19.01 requires a posting only after the occurrence of a vacancy or a new position. Neither is posed here. Beyond this, the section "does not require that a posting occur before a reassignment within the division." A standard axiom of contract interpretation demands that the parties' establishment of specific occurrences warranting a posting precludes arbitral expansion of the list. Examination of negotiations for a 2002-04 labor agreement as well as the creation of the Memorandum establish that the occurrence of a transfer requires a posting, but the same history distinguishes a transfer, which demands movement between divisions, from a reassignment of duties within the same division. The evidence establishes, then, that there is no creation of a new job or "a situation wherein someone left a position due to a promotion or leaving employment, and management has elected to fill the position."

Arbitral precedent establishes that "contractual provisions dealing with posting of vacancies have been narrowly construed" and that arbitrators are "reluctant to find that management's discretion regarding vacancies is restricted by an asserted past practice." Here, what evidence of practice exists shows only that "historically the County (h)as exercised its right to reassign work after someone left a position." The Union's assertion of practice shows only that a posting may follow "a situation where someone had left, or a new position was created through the budget approval process." Sections 28.01 and 6.02 underscore the significance of restricting arbitral review to the terms of the agreement.

The County's posting of Telfer's and Holmes-Zych's positions underscores that the County adhered to Section 19.01. Telfer's position could not be filled within the division, thus prompting the posting that Imeson successfully signed. Since Imeson and Holmes-Zych work within the same division, Mertens could contractually reassign Imeson's duties to her. Mertens' election not to reassign Holmes-Zych's duties thus demanded the posting of her position, since the County decided it was vacant. Any other conclusion would lead to harsh and illogical results since any assignment of duties would lead to an endless series of postings. Neither contract language nor language from DEC. NO. 6930 demands that a posting must precede the reassignment of duties.



The record, viewed as a whole, demands that “this grievance should be denied.”

### **The Union’s Reply Brief**

The County’s contention that the parties agreed to have this grievance bound by the litigation prompting DEC. NO. 6930 is belied by the terms of that decision as well as by the terms of DEC. NO. 7223. The County’s use of axioms of contract interpretation, much like its use of the prior decisions, is selective.

More specifically, the County “abandoned Millot” regarding the implications of Section 3.03, 19.02 and 19.03. County failure to cite these provisions in this case belies its contention that the Millot decision is binding precedent in this case. These omissions “are much more than mere oversight.” More specifically, they establish that the County fails to honor its own Table of Organization, no less than express contract language by turning contractual references to “seniority group” into “divisions.” The omitted contract provisions must, under applicable contract interpretation axioms, be interpreted as a whole, giving meaning to each provision. Appropriately interpreted, seniority rights are exercised within “seniority groups” not within “divisions.” The County’s misapplication of the axiom “to expressly include one or more of a class in a contract must be taken as an exclusion of all others” is evident.

Appropriately read, the labor agreement “divides the bargaining unit employees into two groups for job posting purposes.” There is no contractual support for the County’s assertion that the parties agreed to the creation of “three, five or six divisions.” The clarity of the underlying contract language stands in sharp contrast to the County’s assertion of the clear and unambiguous language pointing to reassignment within a division. In sum, Sections 17.02 and 19.03 “express the crystal clear intent of the authors of the CBA that posted positions shall be awarded to employee applicants on the basis of seniority within the group in which the vacancy exists, and if no qualified employee from that group applies then the next most senior employee, if qualified, from the other group shall be awarded the posted position.”

The record will not establish any Union waiver of the application of these clear rights. Section 28.01, although cited by the County, establishes the infirmity of its assertion that the labor agreement grants the County the sweeping “reassignment” rights it asserts here.

The County’s failure to cite Section 7.01C) highlights the weakness of its reading of the Memorandum. Section 7.01C) underlies the creation of the Memorandum, but the section governs the work week, not job posting. The application of the parties’ use of “transfer” in the Memorandum has no bearing on Article XIX. The County’s attempt to couple the Memorandum with the view that any duty within the Social Worker I-V classification can be assigned without fetter “is a stretch of epic magnitude.” The County seeks through arbitration what it never achieved in negotiation. Beyond this, the County’s view produces harsh and illogical results, since it defies rational belief that, “Professional employees voluntarily and knowingly bought into the blurring of their chosen career paths.” If the County can reassign duties at will, “How could any applicant know what the duties of the job vacancy were by a

definition that does not delineate duties”? The County’s case asserts “the job is whatever the County says it is.”

Although the Union has waived any remedial claim, this should not obscure that the County’s expansive view of the labor agreement must be reined in, “Management Rights are Titanic but they are not unbridled.” The grievance must be sustained.

### **The Employer’s Reply Brief**

The Union continues to ignore “the agreement they made regarding HOW the decision in (DEC. NO. 6930) would apply to other fact situations.” That there are fact variances among the grievances held in abeyance pending that decision cannot obscure that DEC. NO. 6930 “effectively resolves this grievance.” Examination of DEC. NO. 6930 establishes that “Arbitrator Millot found that the County had a greater than 17-year history of reassigning duties without posting.” She affirmed the contractual basis of this practice. It necessarily follows that if it has the right to reassign, it has the right to reassign prior to determining what, if any, position is left to post.

The Union’s arguments ignore that the County exercises discretion over whether a vacant position exists. Reassignment of duties is an integral part of that exercise of discretion. Section 19.01 mandates posting only after the County has determined that a vacancy exists. Arbitral precedent “supports the County’s right to reassign duties prior to posting.” Examination of the record establishes that the Union has shown no evidence that establishes the existence of an unposted vacancy; that a solicitation of employee interest in duties constitutes a posting; or that the County violated the agreement by exercising a fundamental management right. The redistribution of Imeson’s caseload among several employees establishes that her move to Telfer’s position did not leave a “vacant position.” The posting of Holmes-Zych’s and Telfer’s position does not establish a vacancy regarding Imeson’s. Rather, it shows the County determined that no reassignment would precede the posting. The assertion that Mertens’ solicitation of interest in the duties once performed by Imeson reflects a posting ignores that Mertens sought no more than employee input in his consideration of the reassignment of duties. The Union’s assertion that the County reassigned duties to Holmes-Zych to avoid posting ignores that the County has the contractual right to consider efficiency in the exercise of its management rights. The reassignment of duties posed here is a reasonable exercise of that management right, not an attempt to evade the posting requirement.

The grievance “should be denied.”

### **DISCUSSION**

The parties did not stipulate the issue on the merits. I have adopted the County’s, but view either party’s as appropriate. I adopted the County’s in part because the Union’s could be answered in the affirmative without granting the grievance. There was a vacant job posted. The grievance seeks something more than the posting of a vacancy. It asserts the posted

position should have been that vacated by Imeson. The County asserts that its obligation to post a vacant position arose only after it had exercised its right to reassign duties. Under its view, Imes' dispositional duties were reassigned to Holmes-Zych and others, leaving the position vacated by Holmes-Zych to be posted once it determined not to reassign her former restitution duties. Beyond this, the County's issue is more focused factually, which is significant to the resolution of the interpretive issue.

The parties make a series of broad arguments covering a number of agreement provisions. This poses the need for a contractual focus beyond the factual focus provided by the County's statement of the issue. The parties' positions focus on Section 19.01. The Union's proposed statement of the issue reflects that the parties dispute the "job vacancy" portion of the Section 19.01 posting mandate. The posting mandate is unambiguous. The interpretive dispute focuses on how, if at all, the County can reassign duties prior to a posting.

Section 19.01 does not unambiguously govern this. The first sentence uses the passive voice to mandate a posting "in the event a job vacancy . . . occurs." Against this background, Imes' leaving her position to assume that left by Telfer is as much an occurrence as the reassignment process. Nor should the strength of the Union's position be understated. In DEC. NO. 6930, Arbitrator Millot noted,

In this instance, a vacancy did not exist. No social worker vacated a position.  
DEC. NO. 6930 AT 13.

The contrast to the situation regarding Imes' movement to Telfer's former position is evident. In any event, each party states a plausible view of Section 19.01, thus making it ambiguous.

The interpretive difficulty is to reconcile this ambiguity with the clarity of the posting mandate. Each party resolves the difficulty in a sweeping fashion. Mertens' and Sunstrom's view of the County's reassignment authority is unlimited, asserting it can reassign duties in any fashion it chooses, leaving behind whatever number of full and part-time positions that the Table of Organization authorizes and the County chooses to fill. Under this view, nothing beyond a County decision to fill a position defines the occurrence of a "job vacancy". The Union's view of the posting mandate is also broad. Once the County assigns a group of duties on an ongoing basis to a position that the Table of Organization authorizes, anytime an employee leaves a position is an occurrence of a "job vacancy." As a practical matter, the sweeping views have difficulty standing on their own. It would be impossible to hire enough supervisors to manage a work place with the fluidity of duty assignments possible under the County's view. It is no less difficult to imagine a workplace where duty assignments are as tightly wed to positions as the Union asserts. It is, at a minimum, difficult to see how the County could lay off employees in response to revenue or workload considerations, or how the County could respond to changing service needs.

The issue here is not, however, one of management policy. Rather, it is an issue of contract interpretation, demanding that arbitral authority turn on specific contract language.

The difficulty of the interpretive issue is reflected by the weakness of the link between the parties' sweeping conclusions and the authorizing contract language, whether or not that language is supplemented by evidence of past practice and bargaining history. Whatever is said of the bargaining history evidence, none establishes that the parties addressed how the County can reassign prior to a posting. County use of the bargaining history surrounding the creation of Section 7.01C) and the Memorandum offers limited support for its view of reassignment rights against the factual context posed by the grievance. Neither the Memorandum's language nor its bargaining context affords any reason to believe the parties understood the document or its upgrade to specify the impact of reassignment rights on the posting obligation. Nothing in the Memorandum's language or its bargaining context indicates that the parties addressed any issue beyond movement to a forty-hour work week.

Use of other agreement provisions affords no clearer guidance. Whatever Section 28.01 may say of the significance of the labor agreement's express terms, neither party seeks to undercut those terms with a verbal agreement. Section 3.03 defines "permanent employee", but has no evident relationship to the facts posed here. It is as applicable to Section 19.01 as is Section 7.01C), since the first sentence of Section 19.01 refers the posting obligation to positions rather than to employees. Each section must be read consistent with Section 19.01, but this restates rather than resolves the interpretive difficulty. The Union cites a variety of other agreement provisions, including Sections 17.02 and 19.03, but they also restate rather than resolve the interpretive difficulty. The Union is correct that the seniority rights they refer to are crucial to the operation of Section 19.01, but the difficulty is not the application of seniority once a position is posted, but the application of County assignment rights prior to that posting. On this crucial point, the cited provisions are silent. County reliance on Section 1.01 is something less than dispositive. There is no dispute the County has the right to the "direction of the working forces" including the right to "promote" and to "transfer". Absent from that provision is any express mention of "assign" or "reassign", much less any reference to whether such a right can be exercised prior to a posting. This does not mean these provisions are irrelevant. Rather, it underscores that the guidance they offer is less than clear.

Resolution of the grievance must start with the fact it is not written on a clean slate. Rather, it must move from what is established through the litigation of DEC. NO. 6930. This does not mean the parties agreed to be bound by that decision. As noted in DEC. NO. 7223, no such agreement has been proven. This cannot obscure that the parties expected DEC. NO. 6930 to have an impact on the issues posed by the grievances they held in abeyance. Otherwise, the agreed upon action to hold them in abeyance has no meaning.

Resolution of the grievance must start with isolating how DEC. NO. 6930 applies to it. In my view, that decision is not binding precedent on this grievance, because it did not involve a vacant position. Rather, DEC. NO. 6930 constitutes persuasive authority to establish the framework for reconciling Section 19.01 to other agreement provisions.

DEC. NO. 6930 precludes adoption of either party's sweeping reading of the labor agreement. The "DISCUSSION" section of the decision starts by noting,

The question presented in this case is whether the County has the contractual authority to reassign a social worker within the same division. I conclude that it does. DEC. NO. 6930 AT 12.

This makes tenuous the Union's broad assertion that Imes' former position had to be posted as she left it. Little is left of the broad assertion after this reference:

In conclusion the County has been reassigning employees and duties for greater than 17 years. No evidence was offered to rebut that this has been the County's consistent practice and no challenge has arisen until this grievance. The language of the parties' agreement grants the County broad management rights and does not preclude the reassignments. DEC. NO. 6930 AT 16.

DEC. NO. 6930 also affirms that the County "has the right to determine whether a vacancy exists" (AT 13). Against this background, the Union's broad attempt to assert Section 19.01 as a bar to County reassignment rights or their exercise prior to a posting is unpersuasive.

DEC. NO. 6930 is, however, no more hospitable to County assertion of unfettered reassignment rights:

In those circumstances that job duties are re-assigned, the County's decision is subject to greater scrutiny so as to ensure that the County did not reassign duties in order to intentionally avoid the contractual posting obligations. DEC. NO. 6930 AT 13.

That Millot had "some suspicion" regarding the basis for the reassignments that prompted the grievance underlying DEC. NO. 6930 establishes that she did not read Article 1.01 rights to overwhelm the posting duty and the seniority rights incorporated into Article XIX.

In sum, DEC. NO. 6930 establishes that the sweeping readings of Section 1.01 and Section 19.01 offered by the parties do not afford a persuasive basis to reconcile the various contract provisions surrounding the posting process. That decision points out the way to do so, by noting that the County has "the right to determine whether a vacancy existed provided that decision was reasonable and justified." DEC. NO. 6930 AT 13. Thus, reconciliation of Section 19.01 to other agreement provisions demands that County action to reassign prior to a posting must be examined to determine whether the reassignments had a justified basis and whether they can reasonably be reconciled to other agreement provisions.

That application is more fact-driven than the parties' arguments acknowledge. The Union's contention that "job vacancy" can be defined in the abstract, whether through the Table of Organization or through some pattern of past practice, can ignore County rights under Section 1.01. The County's assertion that it can reassign without restriction prior to determining the existence of a "job vacancy" under Section 19.01 can ignore seniority rights under Articles XVII and XIX.

Here, the agreement is broad enough to authorize the County to consider Imes' position vacant as she vacated it or not vacant subject to the reassignment process. Mertens' solicitation of interest is not new to the bargaining relationship and not, in itself, a "smoking gun" indicating a contract violation. Rather, it is the preface to County determination of whether to reassign. Here, Holmes-Zych indicated her interest in Ongoing Social Worker duties that neither party disputes is central to YFS service delivery. She has demonstrated skill, experience and interest in those duties. Thus, the evidence establishes a justifiable management interest in reassigning her. This does not preclude further inquiry. The job-based qualifications the County acted on in this case were personal to Holmes-Zych. This does not imply that if Mertens favored Holmes-Zych to any other employee for personal reasons not traceable to job-based qualifications, then the result would be the same. Beyond this, if Mertens reassigned Holmes-Zych to defeat the seniority rights of another employee, the grievance would stand on sound footing. Here, the evidence does not demonstrate Mertens acted for other than job-based reasons or to undermine another employee's seniority rights.

The Union's arguments focus on the implications of recognizing unfettered County reassignment rights. The check on the abuse of County authority cannot, however, be found in an abstract definition of "job vacancy." Rather, it must be found in the case-by-case reconciliation of Sections 1.01 and 19.01 to other agreement provisions. Because the evidence establishes that the County had a reasonable basis to reassign the disposition duties once performed by Imes to Holmes-Zych prior to posting Holmes-Zych's former restitution duties, the grievance must be denied. The County reasonably concluded that the vacant position subject to posting under Section 19.01 was that vacated by Holmes-Zych, not by Imes.

Before closing, it is appropriate to touch on some of the arguments raised by the parties and not addressed above. The large number of grievances held in abeyance is not, in my view, an indication of the Union's failure to be bound by an agreement. Rather, it reflects the impact of the County's sweeping view of its reassignment rights colliding with the Union's sweeping view of the County's posting obligation. DEC. NO. 6930 does not vindicate either sweeping view. Rather, it points out that the interpretive dilemma is not over broad abstract rights but on the specific exercise of those rights and their impact on the agreement as a whole. The reasonableness standard set out in that decision demands case-by-case application. Even the County's assertion of an "intra-divisional" reassignment right has dubious value as a guide to future cases. As the Union points out, the divisional grouping does not follow the contractual seniority grouping. Beyond this, the number of divisions has changed since the issuance of DEC. NO. 6930, and it is less than evident that a consistent practice can be grounded on administrative boundaries that are subject to unilateral change over time.

The impact of the other AFSCME contracts with the County on the conclusions stated above should not be overstated. The Union is correct that this unit is not bound by the language of other agreements. The other agreements do, however, have a bearing on the grievance. They underscore that the grievance in this case seeks too much from ambiguous language. What evidence there is to resolve the ambiguity will not support the broad conclusion that the County lacks the right to reassign prior to a posting. The evidence is not

sufficiently strong to support the County's broad view, but this underscores the need to address the ambiguous language of Section 19.01 on the case-by-case reconciliation of the County's reassignment rights under Section 1.01 with other agreement provisions.

The case-by-case approach does not offer either party the broad vindication each seeks. However, it reflects the record. Section 1.01 permits a more broad based approach via "reasonable rules." The grievance cites this provision, but the parties have not put it in play. Thus, this decision does not reach it. Whether the ambiguity posed here can better be addressed in bargaining or through the rule making process is for the parties. This Award resolves the interpretive issue posed by an individual grievance. In my view, Union challenge to County exercise of its reassignment rights prior to a posting turns on specific proof that the exercise unreasonably impacts other agreement provisions. The weakness in this grievance is that it turns not on such specific proof but on the broad implications of unfettered County exercise of its authority to reassign duties. As significant as those implications are, they must be posed by specific evidence of unreasonable County action to warrant the exercise of arbitral authority. That evidence is lacking on the facts posed by Grievance 06-3.

#### **AWARD**

The County did not violate the Collective Bargaining Agreement when it re-assigned Social Worker I -V Ruth Holmes from restitution duties to disposition duties within the Youth and Family Services Division, and then posted for a Social Worker I -V position.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of October, 2008.

Richard B. McLaughlin /s/

---

Richard B. McLaughlin, Arbitrator