

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**LINCOLN COUNTY COURTHOUSE EMPLOYEES
LOCAL 33-A, AFSCME, AFL-CIO**

and

LINCOLN COUNTY

Case 260
No. 68661
MA-14301

(Zoning Secretarial Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 1105 East Ninth Street, Merrill, Wisconsin, appearing on behalf of Local 33-A.

Mr. John Mulder, Administrative Coordinator, Lincoln County, 1104 East First Street, Merrill, Wisconsin, appearing on behalf of Lincoln County.

ARBITRATION AWARD

Lincoln County Courthouse Employees Local 33-A hereinafter "Union," and Lincoln County, hereinafter "County," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on May 13, 2009, in Merrill, Wisconsin. The hearing was not transcribed. At hearing, the parties offered closing arguments and the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The County challenges the timeliness of the grievance and framed the substantive issues as follows:

Did the County violate the collective bargaining agreement when it reassigned Kim Wichman from the Register of Deeds Office to the Zoning Office? If so, what is the appropriate remedy?

The Union framed the substantive issues as follows:

Did the County violate the collective bargaining agreement when it combined the secretarial duties in both the Register of Deeds Office and Zoning Office? If so, what is the appropriate remedy?

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

REVELANT CONTRACT LANGUAGE

ARTICLE 2 – MANAGEMENT RIGHTS

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

A. To direct all operations of the County;

...

C. To hire, train, promote, transfer, assign and retrain employees;

...

F. To maintain efficiency of department operations entrusted to it;

...

ARTICLE 5 – GRIEVANCE PROCEDURE

5.01 Definition and Procedure: A grievance is a dispute between the Employer and the Union, an employee, or a group of employees concerning the interpretation or application of the provisions of this Collective Bargaining Agreement between the County and the Union.

Grievances shall be handled and settled in accordance with the following procedure:

Step 1: An employee covered by this Agreement who has a grievance is urged to discuss his/her grievance with his/her immediate supervisor/department head as soon as he/she is aware that he/she may have a grievance. In the event of a grievance, the employee shall continue to perform the assigned task and grieve the complaint later. Within ten (10) working days after the employee knew or should have know of the event giving rise to the grievance, the employee shall set forth the grievance in writing, date it, sign it, and give it to the immediate supervisor/department head for consideration.

Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and the position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated, if any, the signature of the grievant and the date.

The immediate supervisor/department head shall investigate the grievance and discuss the matter with the employee and the Union, if the employee so desires, and provide a written answer to the grievance within five (5) working days.

Step 2: In the event the grievance is not satisfactorily settled in Step 1, the grievant may appeal in writing to the department head within ten (10) working days of the disposition by the supervisor. The department head shall investigate the dispute and shall provide a written answer to the grievance within ten (10) working days. Step 2 shall not be followed if the department head is involved in Step 1 of the procedure.

Step 3: In the event the grievance is not satisfactorily settled in Step 2, the grievant may appeal to the County Administrative Coordinator, in writing, within five (5) working days of the disposition by the department head. The Administrative Coordinator shall conduct a meeting within fifteen (15) working days at a time mutually agreeable between the grievant, Union representatives, and the Administrative Coordinator to discuss the grievance and respond in writing within ten (10) working days following the meeting.

Step 4: In the event a satisfactory settlement is not reached with the Administrative Coordinator, the grievant may appeal to the Personnel Committee of the Lincoln County Board in writing within ten (10) working days of the date the answer is received from the Administrative Coordinator. The Personnel Committee shall conduct a meeting at the next regularly scheduled committee meeting at a time mutually agreeable between the grievant, Union representatives and the committee, and shall respond in writing to the grievant and Union representative within ten (10) working days following the meeting.

...

5.02 Arbitration:

...

6. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the terms of the Agreement.

5.03 General Provisions

1. Time Limits: The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a settlement of the grievance. The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacation, etc., these limits may be extended by mutual consent in writing.

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ARTICLE 11 – JOB POSTING – TRANSFERS AND PROMOTIONS

- 11.01 A vacancy shall be defined as a job opening not previously existing or a job created by termination of employment, promotion, or transfer of existing personnel.

- 11.02 Posting Vacancy: In the event a permanent job vacancy occurs, notice of such vacancy shall be posted for five (5) working days, not counting the first day. During this time, employees may bid for such job by signing the job posting. Employees may sign the job posting at the Administrative Coordinator's office instead of signing the job posting.

...

- 11.06 The Employer may make immediate temporary assignments to fill any vacancy or new position until the procedures outlined herein have been complied with, but, not to exceed 90 days.

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BACKGROUND AND FACTS

Union member Kim Wichman was hired by the County in November of 2005 to a position in the Register of Deeds office. Wichman came to the County with experience having worked for a title agency. Wichman worked 37.25 hours per week, Monday through Friday.

During August 2008, rumors circulated regarding lay offs in the Register of Deeds office. When Wichman heard the rumor, she approached Register of Deeds, Sarah Koss, and asked if the rumor was true. Koss confirmed that due to the economy and the reduction in the number of recorded documents, she believed someone in the office would be reduced to part time. Koss did not identify which employee in the office would be affected by the reduction in hours. Wichman was not the least senior member of the Union.

In early September, Rebecca Hehling, vacated the position of Secretary in the Zoning Department Secretary by posting into a position in the District Attorney's office. Following Hehling's departure, Zoning Director, Dan Miller, met with County Administrative Coordinator, John Mulder, to discuss posting the position. At about the same time, Koss approached Mulder inquiring as to the process for laying off an employee in her office due to a reduction in the amount of work.

On September 10, 2008, Miller, Mulder and Koss met to discuss the vacancy in the Zoning Department, the over staffing in the Register of Deeds Office, and the County's budgetary shortfall. As a result of their meeting, Mulder directed the following email to John Spiegelhoff, Staff Representative, AFSCME, Council 40:

John,

As we have been preparing the 2009 budget we have been anticipating the possibility of a reduction in workforce. We are attempting to do so without laying anyone off.

We have decided to re-assign Kim Wichman from the Register of Deeds office to the Zoning Dept. This will have no impact on her hourly rate and/or fringe benefits. She will be assigned work in the Zoning office that was previously done by the Admin Sec (which was the same rate of pay). She will also assist the Register of Deeds as needed during times of vacations, other paid time off, and/or peak demand times. She will increase her hours from 36.25 per week to 40 hours per week. This change will happen within the next two weeks or so depending on the needs and moving schedule of the departments to the new government services building.

We do this at this time in order to avoid a lay off in the Register of Deeds office either later this year or beginning on January 1, 2009.

We are unsure at this time what, if any, other changes in positions may be needed as we attempt to finalize the 2009 budget.

John Mulder
Lincoln County
Administrative Coordinator

Spiegelhoff received Mulder's email and forwarded it the following day to Debbie Rauchle, Local 33-A President/Steward.

Wichman trained for four hours in the Zoning Department on September 15, 2008.

The Union filed a grievance on October 8, 2008.

DISCUSSION

This grievance was filed by Local 33-A asserting that the County had violated the labor agreement when it failed to post the vacant Zoning Department Administrative Secretary position. The County maintains that no vacancy was created which would require that the position be posted, and further, that the grievance is untimely.

Is the Grievance Timely?

The County challenges the timeliness of the grievance arguing that the Union knew Wichman was going to be reassigned on September 10, 2008 and therefore the tolling of the 10 working day window began on that date. The Union disagrees asserting that the date in which Wichman began working in the Zoning Office is relevant and therefore, the Union's grievance is timely.

There is no question that the actual date in which Wichman began working full-time in the Zoning Office was September 29, 2008. Consistent with a traditional computation of time, this would be the triggering event and the 10 day tolling time period would be calculated from this date. The County challenges this date as the triggering event asserting that the Union "knew or should have know of the event giving rise to the grievance" on September 10.

In looking to Mulder's email of September 10, he does not state a date specific when Wichman would move to Zoning. Instead, the email states that the movement will occur "within the next two weeks or so" and that it was dependent on the "moving schedule". The fact that no date was specified in the email is relevant. The County's reliance on the September 10 email is misplaced.

The Union argues that it didn't know if the reassignment was temporary or permanent and that the onus was on the County to inform the Union of the actual circumstances. I disagree. Once the Union became aware of the County's intent to move Wichman, it was incumbent upon it to ask questions to determine the scope of the County's action. It is not the County's obligation, once it has offered what it believed was sufficient information to explain an employment action, to anticipate the Union's questions or seek out the Union to find out if it has any questions. Discussion and continued communication between unions and employers is essential to a positive working relationship. Both sides share the responsibility to communicate. The Union failed in this regard.

Finally, the County maintains that the Union should be held accountable for its inaction. Essentially, the County is arguing the doctrine of laches. The doctrine bars claim a claim when a party has sufficient knowledge of the events and unreasonably delays filing an action thereby prejudicing the other party. *YOUCHERER V. FARMERS INSURANCE EXCHANGE*, 252 Wis.2d 114, 130, (2002) The County must show that it was prejudiced by the delay. Id. While I agree with the County that the Union failed to react reasonably given the circumstances, I do not find that the County was prejudiced by the delay. Regardless of whether the County was presented with the grievance on September 24 or October 8, the County had already made a decision, that was approved by the County committee of jurisdiction, and there is no reason to believe that the County's decision would have changed as a result of knowing 16 days earlier that the Union was challenging the reassignment. As such, I find the grievance timely.

Did the County violate the collective bargaining agreement?

I now move to the County's decision to "reassign" Wichman. I start by pointing out that the County's reason for moving Wichman, rather than laying her or another employee off, is recognized. But, that admirable motive does not negate the fact that the County violated the collective bargaining agreement.

Article 11.01 provides that, "[a] vacancy shall be defined as a job opening not previously existing or a job created by termination of employment, promotion, or transfer of existing personnel." County Zoning Director Dan Miller testified that the position Wichman was reassigned to was "new" and a "hybrid" position. The Union maintains that it is two jobs combined into one. The facts establish that other than covering approximately 2½ hours in the Register of Deeds Office, Wichman is performing the vacated administrative secretary position in the Zoning Department. Regardless of whether I determine that the position Wichman is performing is a position that did not previously exist or one created by transfer is irrelevant since both are defined as a vacancy.

Moving to 11.02, permanent vacancies must be posted.¹ Since the position Wichman moved to was a vacancy, the labor agreement requires that it be posted. The County did not post the position and, therefore, it violated the parties' collective bargaining agreement when it failed to post the position.

The County argues that there was not a job opening. I am not persuaded. In order for Wichman to be reassigned to the zoning position, the position need not only to have existed, but it had to be unfilled. Mulder testified that vacancies needed County Board approval to be filled and the minutes from Administrative and Legislative Committee discussed replacing the vacancy in the Zoning Department. With the departure of Hehling, the department's desire to post the position, the County's committee of jurisdiction discussion, and the reassignment of Wichman to the position, I conclude that the position was open and therefore there was a job opening.

The County next argues that it has the management right to fill positions, create positions and assign employees. I concur that the County has the broad management right to fulfill these functions, except in those instances when a specific term of the labor agreement limits that right. Article 11 limited the County's rights and it was obligated to follow the language of the agreement.

As to remedy, the only reasonable and appropriate remedy I have available to me is to order the County to post the position. In viewing this situation and these facts, it is unfortunate that the Union did not choose to communicate with the County in September 2008. Had that occurred, there were at a minimum, two possible scenarios. In one scenario, the Union would have communicated to the County that it believed the position needed to be posted consistent with the labor agreement and while this could have resulted in lay offs, the parties' would have agreed to follow the bargained for language. A second scenario would find the Union and County talking and creating a plan to avoid the possibility of a lay off. Regardless of whether these or some other scenario had been followed, it likely would have resulted in less disruption to the workforce than that which I must award.

AWARD

1. The grievance is timely.
2. The County violated the collective bargaining agreement when it re-assigned Kim Wichman from the Register of Deeds Office to the Zoning Department.

¹ The Union argued that it was not sure whether the position Wichman moved to was a temporary or permanent position. The County never asserted the position was a temporary therefore do not address this issue.

3. The appropriate remedy is to post the Zoning/Register of Deeds Administrative Secretary position.

Dated at Rhinelander, Wisconsin, this 26th day of June, 2009.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator