

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY

and

WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES' UNION,  
LOCAL 1903, AFSCME, AFL-CIO

Case 443  
No. 71550  
MA-15163

(Stellmacher Grievance)

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**Appearances:**

**John A. Bodnar**, Corporation Counsel for Winnebago County, 448 Algoma Boulevard, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, appearing on behalf of Winnebago County.

**Mary Scoon**, Staff Representative, Council 40, AFSCME, W5670 Macky Drive, Appleton, Wisconsin 54915 appearing on behalf of Winnebago County Highway Department Employees' Union, Local 1903, AFSCME, AFL-CIO.

**ARBITRATION AWARD**

Winnebago County (County) and Winnebago County Highway Department Employees' Union, Local 1903, AFSCME, AFL-CIO (Union) are parties to a collective bargaining agreement (Contract) providing for final and binding arbitration of grievances arising under the Contract. On March 5, 2012, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission). At the request of the parties, the undersigned was assigned to serve as arbitrator. Hearing was held on the grievance on May 15, 2012 in Oshkosh, Wisconsin and was transcribed by a court reporter. The parties submitted post-hearing written arguments in support of their positions, the last of which was received on August 13, 2012, closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following award.

## ISSUES

At the hearing, the parties were unable to agree on a statement of the issues to be decided and stipulated that I may frame the issues in the award.

In its brief, the Union proposes the issues as:

Whether the Employer violated the Collective Bargaining Agreement and/or a County Policy when it refused to accept the grievant's request to rescind his resignation while he was still employed by Winnebago County?

If so, what is the appropriate remedy?

In its brief, the County proposes the issues as:

1. Does the Arbitrator have substantive jurisdiction as to this grievance?
2. If the Arbitrator does have substantive jurisdiction, did the employer violate the collective bargaining agreement by failing to allow the Grievant to rescind his resignation. If so, what is the appropriate remedy?

I frame the issues as follows:

Is the grievance substantively arbitrable?

If so, did the County violate the Contract when it did not grant grievant's request to rescind his resignation?

If so, what is the appropriate remedy?

## RELEVANT CONTRACTUAL PROVISIONS

### ARTICLE 1 MANAGEMENT RIGHTS

The management of the Winnebago County Highway, Solid Waste, Airport, and Parks Departments and the direction of the employees in the bargaining unit, including, but not limited to,

1. the right to hire,
2. the right to assign employees to jobs and equipment in accordance with the provisions of this Agreement,

3. the right to assign overtime work,
4. the right to relieve employees from duty because of lack of work or for other legitimate reasons, shall be vested exclusively in the County.

...

The Union recognizes the exclusive right of the County to establish work rules.

...

ARTICLE 6  
SENIORITY

The County recognizes seniority. Seniority is defined as the length of County service as it is measured from the last date the employee was hired by the County and continuing until he quits or is discharged.

...

ARTICLE 9  
GRIEVANCE PROCEDURE

The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Only matters involving the interpretation, application or enforcement of the terms of this agreement shall constitute a grievance under the provisions as set forth below.

All such grievance shall be processed as follows:

...

Step 4. If the employee's grievance is not settled at Step 3, the Union may submit said grievance to arbitration by giving notice in writing to the Director of Human Resources within fifteen (15) working days after the receipt of the decision of the Director of Human Resources at Step 3.

...

The decision of the arbitrator shall be final and binding on the parties to this Agreement.

ARTICLE 10  
JOB POSTING

A job vacancy is defined as a position not previously existing in the job classification plan attached to and made part of this Agreement or a vacancy in a position in the said job classification plan due to termination of employment, promotion, demotion, or transfer death or disability of existing personnel, and in the judgment of the County the need to fill such a job vacancy continues to exist. In the event the County determines not to fill any job vacancy in the job classification plan, the County agrees to post a notice of job discontinuance for a period of five (5) working days in the department within which the vacancy occurs.

Any such vacancy aforementioned shall be posted for a minimum of five (5) working days on the Union bulletin board in each department.

...

ARTICLE 13  
VACATIONS

...

Any employee who terminates his employment or has his employment terminated for any reason shall be compensated for all earned time unused as of the date of termination.

...

ARTICLE 14  
SICK LEAVE WITH PAY

...

Upon voluntary termination, a non-probationary employee shall be eligible for a payout of thirty-five percent (35%) of his accumulated unused sick leave at his rate of pay in effect at the time of voluntary termination.

...

ARTICLE 16  
LEAVES OF ABSENCE WITHOUT PAY

...

Any employee who does not report back to work by the expiration date as set for the in his leave of absence, or does not receive an approved extension or who accepts other employment while on leave from the County, will be considered to have terminated his employment with the County.

## **RELEVANT WORK RULE PROVISIONS**

### **HANDBOOK OF EMPLOYMENT POLICIES COVERING REPRESENTED EMPLOYEES OF WINNEBAGO COUNTY (Revised March, 2005)**

#### **1. PURPOSE AND SCOPE**

. . .

Certain benefits and information are covered by collective bargaining agreements. Where there is a difference between the provisions of this handbook and the contract concerning your positions, the labor agreement shall govern. This handbook does not constitute an employment contract; however, the information contained within it should be considered work rules.

. . .

#### **2. EMPLOYMENT TERMINATION**

##### **SECTION A**

PURPOSE. This chapter sets forth policies governing employment terminations of all types.

. . .

##### **SECTION C**

QUIT WITH PROPER NOTICE. Employees who quit with proper notice for reasons other than retirement or dismissal by Winnebago County will be considered to have voluntarily terminated their employment. As such, they shall be considered to have voluntarily terminated in good standing and shall be eligible for termination benefits.

. . .

## SECTION G

PROPER NOTICE. Employees planning to voluntarily terminate their employment with Winnebago County are to notify their immediate supervisor as far in advance as possible. It is expected that terminating employees will be on the job, at a minimum, during the last two weeks of their termination notice period unless excused by their department head or by the Director of Human Resources.

...

Voluntarily terminating employees are required to provide two weeks' notice of termination prior to their last day on the job.

...

## BACKGROUND

After working for the County's highway department for 15 ½ years, Grievant submitted his written resignation on June 27, 2011, effective July 7, 2011. At the time he submitted his resignation, Grievant's wife had obtained employment in Portland, Oregon, had moved there, and had worked in her job for a few months. Because he missed her and she seemed to be settled in her job enough for Grievant to join her, he submitted his voluntary resignation to the County with the intent to join her in Portland. At the time of his resignation, Grievant was an employee in good standing with the County.

On the evening of June 28, 2011, the day after he submitted his resignation to the County, Grievant's wife contacted him and let him know that she was likely to be laid off from her job in Portland and that he should not resign from his job with the County. On the morning of June 29, 2011, Grievant sought to rescind his resignation. Although highway department management was open to allowing Grievant rescind the resignation and continue working for the County, the County's Human Resources Director denied the request, citing County policy. Grievant's last day with the County was July 7, 2011.

On June 30, 2011, the County posted Grievant's position as being available and it was subsequently filled by an internal County employee.

The Union filed a grievance contending that Grievant should have been allowed to rescind his resignation and continue working for the County. The County denied the grievance at the earlier steps of the grievance procedure, resulting in these proceedings.

## DISCUSSION

### Is the Grievance Substantively Arbitrable?

The County argues that the grievance is not arbitrable because the allegations of the grievance fall outside the scope of the Contract's grievance procedure and, further, points out that the grievance does not cite any provision of the Contract that was allegedly violated. For the following reasons, I conclude that the grievance alleges "matters involving the interpretation, application, or enforcement of the terms of this Agreement" within the meaning of the Article 9 grievance procedure and is therefore substantively arbitrable.

It is true that the Contract does not specifically address rescission of voluntary resignations. However, the Contract does incorporate references to resignations and the management rights provision found in Article 1 of the Contract specifically authorizes the County to "establish work rules." Chapter 1 of the County's Handbook of Employment Policies (Handbook) states that "the information contained within it [the Handbook] should be considered work rules." The grievance in turn cites Chapter 22 of the Handbook regarding employment termination and further states that HR informed the Grievant that "County Policy" was the reason that the County would not honor Grievant's rescission of his resignation. Therefore, I conclude that the grievance challenged the propriety of the County's exercise of discretion under work rules referenced in the Article 1 management rights clause of the Contract. As such, the grievance raises an issue regarding "interpretation, application or enforcement of the terms of this agreement" and therefore is arbitrable under Article 9 of the Contract.

Having concluded that the grievance is arbitrable, I proceed to the merits of the grievance.

### Did the County Violate the Contract?

When an employer acts pursuant to its management rights such "managerial discretion must be exercised reasonably and discretionary management decisions will be reviewed to determine if they were arbitrary, capricious, or discriminatory." Elkouri and Elkouri, *How Arbitration Works*, 6th Edition at page 480 (citations omitted). For the following reasons I conclude that the County did not act in an arbitrary, capricious, or discriminatory manner when it refused to accept Grievant's request to rescind his resignation.

Karon Kraft, the County's HR Director at the time of the incidents at issue in this grievance, testified that her predecessor instituted a policy or practice forbidding rescission of resignations<sup>1</sup> because of one employee who repeatedly resigned and then came in the next day

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<sup>1</sup> Kraft testified that her understanding was that the policy was issued in the form of a written memorandum to employees. Any such memorandum could not be found and was not introduced at hearing. However, whether the policy was written or not does not affect my conclusion on the merits of the grievance because the evidence establishes a consistent County practice.

to rescind the resignation. Since 2007, the start of Kraft's tenure as HR Director, the County has consistently and uniformly denied employee requests to rescind resignations for the purpose of returning to active employment with the County. The County produced evidence of four instances when it has not allowed an employee to rescind their voluntary resignations.<sup>2</sup> In one of those instances, pursuant to a consent arbitration award, an employee's resignation was changed to retirement. In none of the instances was the employee allowed to rescind a resignation and maintain employment status with the County as if the resignation did not occur. In the absence of any evidence contradicting this consistent practice, I conclude that the County did not act discriminatorily in denying Grievant's request to rescind his resignation.

Kraft also testified that the County places a premium on the administrative certainty of relying on written submissions from employees and that with the large number of County employees, it would be burdensome to keep track of submissions and rescissions. Further, she testified that, in the case of resignations the County must act immediately to start the recruitment process to fill positions and to make timely job postings pursuant to contractual provisions.

The Union argues that there would have been no harm to the County in allowing Grievant to rescind his resignation and points to the fact that his attempt to rescind occurred less than 48 hours after he submitted his resignation and the position had yet to be posted. However, County administration decided that maintaining uniformity and consistency in refusing to accept Grievant's rescission of resignation was more important than retaining a long-term employee with a good work record. It is not within my jurisdiction to rule on the wisdom of that choice. Instead, I must determine whether the decision was arbitrary or capricious. I conclude that the County's decision to refuse to accept Grievant's resignation rescission for reasons of administrative efficiency and consistency was not made arbitrarily or capriciously.

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<sup>2</sup> Although it refers to its denial of resignation rescissions as a "long-standing practice" in its initial brief, I do not take it that the County makes a "past practice" argument in its traditional arbitral sense. I therefore do not make any conclusion as to the existence of any relevant "past practice." The instances of the County not accepting resignation rescissions are discussed here for the sole purpose of supporting the conclusion that the County did not act in a discriminatory manner in refusing to accept Grievant's rescission.



CONCLUSION

I therefore conclude that the County did not violate the Contract when it exercised its discretion not to accept Grievant's rescission of his resignation because it did not act in an arbitrary, capricious, or discriminatory manner. The grievance is denied.

Dated this 10<sup>th</sup> day of December, 2012.

Matthew Greer /s/

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Matthew Greer, Arbitrator