

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LANGLADE COUNTY PUBLIC EMPLOYEES' UNION (COURTHOUSE),  
LOCAL 36-A, AFSCME, AFL-CIO**

and

**LANGLADE COUNTY**

Case 120  
No. 71726  
MA-15199

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**Appearances:**

**Mr. John Spiegelhoff**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East 9<sup>th</sup> Street, Merrill, Wisconsin 54452, on behalf of the Union.

Phillips Borowski, S.C., by **Attorney Patrick C. Henneger**, 10140 North Port Washington Road, Mequon, Wisconsin 53092, on behalf of the County.

**ARBITRATION AWARD**

Langlade County Employees' Union (Courthouse), Local 36-A, AFSCME, AFL-CIO (herein the Union) and Langlade County (herein the County) were, at all relevant times, parties to a collective bargaining agreement dated June 7, 2011 and covering the period from January 1, 2011 to December 31, 2012. On August 23, 2012, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the County's use of casual employees to fill to vacant clerical bargaining unit positions. The undersigned was selected from a panel of WERC staff members to hear the dispute and a hearing was conducted on January 3, 2013. The proceedings were not transcribed. The parties filed initial briefs by February 1, 2013, and reply briefs by February 15, 2013, whereupon the record was closed.

**ISSUES**

The parties did not stipulate to a statement of the issues. The Union would frame the issues as follows:

Did the County violate the collective bargaining agreement when it failed to pay the contractual wages and benefits of the Secretary/Bookkeeper in the Health Department and the Secretary – Extension Office (4-H) positions?

If so, what is the appropriate remedy?

The County would frame the issues as follows:

Was the grievance untimely filed and therefore not arbitrable?

If not, is the grievance moot and therefore not arbitrable?

If not, did the County violate the collective bargaining agreement when it used temporary employees in the UW Extension Office and Health Department?

If so, what is the appropriate remedy?

The Arbitrator adopts the issues as framed by the County.

### **PERTINENT CONTRACT LANGUAGE**

#### **ARTICLE 1 – RECOGNITION**

The County recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time non-professional employees of the Courthouse and Courthouse Annexes, Health Service Center, Forestry Department, Highway, Social Services and Sheriff's Department for the purposes of conferences and negotiations with respect to wages, hours, and conditions of employment. Excluded from the bargaining unit are confidential, supervisory and managerial employees, non-clerical employees of the Highway Department, sworn Deputies in the Sheriff's Department and elected officials.

#### **ARTICLE 2 – MANAGEMENT RIGHTS**

The County possesses the sole right to operate the departments and all management rights repose in it, subject only to other provisions of this contract and applicable laws. These rights include, but are not limited to, the following:

1. To direct all operations of the County;

...

3. To hire, promote, transfer, assign and retain employees;

...

6. To maintain efficiency of Department operations entrusted to it;

...

9. To manage and direct the work force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;

...

11. To determine the methods, means and personnel by which operations are to be conducted;

...

13. To utilize temporary, part-time or seasonal employees when deemed necessary provided such employees shall not be used to eliminate full-time positions.

...

#### **ARTICLE 5 – JOB POSTING**

- A. Posting: When the County deems it necessary to fill a vacancy, or a new position is created in the bargaining unit, the County shall post such position on a bulletin board for a period of five (5) working days to overlap two consecutive work weeks. Each employee interested in applying for the job shall sign the posting notice in the space provided. The notice shall contain the date, title of the position, rate of pay, and qualifications necessary for the position. Employees on a leave of absence shall be mailed, by certified mail to the last known address, a copy of any job posting. Employees shall keep County [sic] informed as to their last known address. At the end of the posting period, the notice shall be removed and the position shall be filled within a reasonable period, not to exceed ten (10) working days, unless no qualified employees apply for the position posted.

...

- E. Temporary Assignments: Temporary assignments shall not exceed ninety (90) days except when a job vacancy has been created due to

illness. Temporary assignments may be made to fill any vacancy or new position until the procedures in this Article are complied with.

. . .

### **ARTICLE 7 – GRIEVANCE PROCEDURE**

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#### **B. Steps**

Step 1: The employee alone or with is representative, shall orally explain his grievance to the Department Head no later than ten (10) working days after the event giving rise to the grievance.

. . .

- E. Time Limits: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing. Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied. Dissatisfaction is implied in resource [sic] from one step to the next.

### **BACKGROUND**

The Union represents a large segment of the regular full-time and part-time employees of Langlade County, as identified in the Recognition Clause of the parties' collective bargaining agreement. Among the positions included in the bargaining unit under the contract were the Secretary – Extension Office (4H) and the Secretary/Bookkeeper (Health). Prior to 2010, the incumbents of those positions were members of the bargaining unit and were accorded the wages and benefits specified in the contract. In February 2010, the Secretary/Bookkeeper (Health) left her position, followed in March 2010 by the Secretary – Extension Office (4H).

Following the departures of the employees, the County Board began considering a reorganization of its clerical services in these departments. Accordingly, the Board passed resolutions authorizing the Department heads to hire casual employees to fill the vacant positions for the balance of 2010. Carrie Zelazoski and Karalee DuFour-Brock were hired to fill the Health Department and Extension positions, respectively, at wages and benefit levels below what were provided for the positions in the contract and remained the incumbents at the time of the arbitration hearing. The Board later reauthorized the continuation of the positions for 2011 and 2012. The Union was not initially informed about the creation of the casual positions, but became aware of them when they were reauthorized for 2011. The Union

initially raised concerns about the status of the positions, but did not file grievances, electing instead to await the County's decision about making the positions permanent. No decision was immediately forthcoming and the Union took no more immediate action. Finally, on April 9, 2011, the Union filed a petition for unit clarification with the Wisconsin Employment Relations Commission, and included the clerical positions in the petition, seeking to have them accreted to the bargaining unit. Ultimately, through a process of mediation, the Union agreed to withdraw the positions from the position and, on July 18, 2012, filed a grievance seeking to have the positions recognized as being within the unit, and to have the incumbents made whole for wages and benefits according to the contract. Subsequently, the County Board took action to make the positions permanent and within the bargaining unit as of January 1, 2013. The County denied the grievance and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the DISCUSSION section of the award.

### POSITIONS OF THE PARTIES

#### The Union

The Union notes that the County has raised issues of timeliness and mootness into the arbitration, which it considers meritless. As to timeliness, the Union asserts that the grievance concerns a continuing violation of the contract by the County. In such cases, the Grievant may present the grievance at any time because each day the violation continues constitutes a new event that can be grieved. Further, the Union considers that the triggering event giving rise to the grievance was its withdrawal of the positions from its unit clarification petition and that the grievance was filed within ten working days from that event. In either case, the grievance is timely. As to mootness, the County's position is that since the incumbents were ultimately added to the bargaining unit, the claim is no longer actionable. The Union maintains, however, that there is still a claim for past wages and benefits due to the Grievants from the time they were regarded as temporary or casual employees.

On the merits, the Union claims that the contract is clear that the County may only use temporary employees subject to contractual limitations. The management rights clause only allows use of temporary employees to the extent they are not used to eliminate bargaining unit positions. Further, Article 5, Section E. limits temporary assignment to 90 days while the contractual posting procedure is implemented. Here, the County hired employees to fill the two clerical positions in early 2010 and reevaluated the positions annually. Ultimately, the incumbents were awarded the positions permanently in late 2012, more than two years after they were hired. The fact that these employees worked for over two years without interruption establishes that the employees were not temporary or casual by the definitions the WERC applies to those terms and should have been placed in the unit and compensated accordingly from the outset. The fact that they were not is due to a combination of factors. First, when the Union learned that the employees had been hired as temporary employees it took a wait and see attitude to give the County opportunity to determine its needs and, if it decided to make the hires permanent, to negotiate their ultimate placement. Thereafter, the Union lost track of the matter and did not take action until it filed its unit clarification petition in April 2012. This

situation was exacerbated by the fact that the County never engaged the Union in negotiating the positions, but worked through committees and resolutions, with variable timetables, to make it difficult for the Union to address the issue.

### The County

The County argues that the grievance is untimely and should be dismissed. Article 7 is clear that grievances must be filed within ten working days of the triggering event to be considered timely. Here, the Union was aware of the County's actions in early 2010, but did not file its grievance until July 2012. This gap of over two years is unreasonable and does not comport with the contract requirements. The County maintains that this is not a case of continuing violation, but even if so the Union is not excused for its delay in filing given the passage of so much time.

The grievance is also moot. The grievance takes issue with the County's alleged misuse of temporary employees. Once the County stopped using temporary employees and made the positions permanent, the basis for the grievance ceased to exist. Since there is no longer a dispute, there is nothing for the arbitrator to decide. There is no basis for a claim of back benefits because there is no contract language requiring that temporary employees receive contractual benefits.

The use of temporary employees also did not violate the contract. Article 2 gives the County the absolute right to use temporary employees so long as they are not used to eliminate bargaining unit positions. Here, the positions were not eliminated. The County did not immediately fill the positions for legitimate business reasons, which it had the right to do under Article 2. Further, there is no language in the contract entitling temporary employees to be placed in the unit or to receive contractual wages and benefits. To prevail, the Union must show that the employees were awarded permanent positions before January 2013, but were denied contractual wages and benefits, which is not the case. Prior to January 2013, the positions were treated as temporary, which is established by numerous resolutions that were entered as exhibits and were paid accordingly. In sum, the Union has failed to meet its burden and the grievances must be dismissed.

### DISCUSSION

At the outset, the arbitrator is faced with the question of procedural arbitrability, based on the County's claim that the grievance herein was not timely filed. The facts on this issue are not seriously in dispute. The previous incumbents in the positions in question left their employment early in 2010. Shortly thereafter, albeit for different reasons, the County determined that it did not wish to immediately fill the positions while it considered its financial posture and future staffing needs, so it determined to hire casual employees under its existing policy to fill the positions until permanent decisions were made. These decisions were codified in County Board Resolutions 19-2010 and 34-2010. Subsequently, Carrie Zelazoski and Karalee DuFour-Brock were hired to fill the positions as casual employees for the balance of

2010. The positions were renewed from time to time and Zelazoski and DuFour-Brock continued to work in those positions until they were made permanent employees at the beginning of 2013. The Union was aware of the County's action, but did not grieve it immediately, deciding instead to take a wait and see attitude. Thereafter, by the admission of Union President Chet Haatvedt, the matter fell off the Union's radar and no further action was taken. In April 2012, the Union filed a unit clarification petition concerning positions in the Land Records Department and included the two clerical positions. Subsequently, the Union amended its petition to withdraw the clerical positions and shortly thereafter filed the instant grievance. The Union argues in the alternative, first that the County's action constituted a continuing violation, making the timelines inapplicable, and second that the precipitating event was its withdrawal of the positions from the unit clarification and that the grievances were timely filed based on that time period.

The County argues persuasively that the arbitrator is bound to honor the terms of the contract, which clearly establishes time limits for the filing of grievances and further specifies the means and circumstances by which they may be extended. I agree. Time limits are bargained by parties specifically to expedite the resolution of disputes and to prevent stale claims or claims which are brought long after memories have faded or after important evidence or witnesses may no longer be available. I also note, however, that the continuing violation doctrine has been applied in arbitration in circumstances where the asserted violation is based on the continuing, paycheck by paycheck implementation of the Employer's original underlying act. Suring Public School District, MA-9916 (McLaughlin, 9/97). That appears to be the case here, inasmuch as the grievance claims that "Langlade County violated the collective bargaining agreement when it did not pay the contractual wages and fringe benefits for the bargaining unit positions of UW Extension clerical and Health Department clerical positions." As Arbitrator McLaughlin noted in Suring Public School District, this does not nullify the contractual time limits, but does mean they cannot be tolled from the employer's original action. Rather, the effect is to limit the remedy to the time period after the grievance was filed.

As to the County's mootness argument, I find no merit in the contention that the County's action of making the positions permanent in 2013 had the effect of eliminating the basis for the grievance. As the Union notes, the Grievants continued to work for several months as casual employees after the grievance was filed before they were made permanent employees. Should the grievance be found to be meritorious, they would still arguably be entitled to contractual wages and benefits for that period of time and to that extent the grievance remained viable.

As to the merits, the County asserts that it has unrestricted authority under the management rights clause to use temporary employees, making the grievance meritless. The Union observes, to the contrary, that the power to hire temporary employees is restricted to the extent that such employees may not be used as a means to eliminate permanent positions,

which it contends was done here. The Union also asserts that the County's power is also limited by Article 5, which limits temporary assignments to 90 days while the job posting process is being implemented.

The Union's point about the restrictions on use of temporary employees is well taken, but in this case it is unpersuasive. In the first place, the County has a Casual Employment Policy, which was adopted in 2006, and which was applied here. The policy permits the hiring of "casual employees" on a year to year basis, subject to restrictions having to do with the nature, expected duration and schedule of the work. So far as this record shows, this policy has never been challenged. This is a significant point, because Article 5, on which the Union relies, limits the use of temporary assignments during the posting process for filling vacant positions to 90 days. On this point, I concur with the County's position that there is a qualitative difference between a temporary position and a temporary assignment. I view a temporary position as referring to a new hire, whereas a temporary assignment refers to an assignment of new, but temporary, duties to an existing employee, after the employer has determined to fill a vacant position and is in the process of doing so. Here, the County had made no decision about filling the positions and did not assignment the duties of the former employees to other existing employees, so I find the language of Article 5 to be inapplicable.

When the casual positions were created, the implementing resolutions made it clear that the positions were specifically intended to fulfill duties of vacant bargaining unit positions while the County evaluated its future staffing needs, which would be based on workload and financial considerations. There is nothing in the resolutions, nor the subsequent reauthorizations, to suggest that the casual positions were intended to replace bargaining unit positions. I do not find, therefore, that the use of "temporary employees" here was intended to replace bargaining unit positions. The fact that the positions were ultimately made permanent also establishes that the temporary employees did not have the effect of eliminating bargaining unit positions, whatever the intent may have been.

The Union asserts that the County's action, if permitted, would have the effect of allowing the County to continue to use temporary employees *ad infinitum* to avoid filling permanent positions, effectively eliminating them. This is a valid concern, because theoretically the County could keep a position "on the books," without ever intending to fill it, and use temporary employees in the position, all the while arguing that the position had not been technically eliminated. but it did not happen in this case. Now, it may be that the Union's action of filing a grievance may have had the effect of expediting the County's decision to make the positions permanent, but the record is silent on this point. If so, the grievance process functioned properly to shed light on a dispute and bring about resolution. Ultimately, the facts are that the positions were not eliminated and were made permanent, whatever the County's motivation. This establishes that the County did not eliminate the positions, and so did not violate the contract. The Grievants worked as temporary employees until their positions were made permanent, at which time they became eligible for contractual wages and benefits, but not before. Had the positions remained temporary the outcome may have been different, but that is not the case. For the reasons set forth above, therefore, and based on the record as a whole, I hereby enter the following



AWARD

The grievance was not untimely filed and was not moot. However, the County did not violate the collective bargaining agreement when it used temporary employees in the UW Extension Office and Health Department. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 11th day of July, 2013.

John R. Emery /s/

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John R. Emery, Arbitrator