

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEBOYGAN COUNTY FEDERATION of
NURSES and HEALTH PROFESSIONALS,
LOCAL 5011, AFT, AFL-CIO

and

SHEBOYGAN COUNTY

Case 129
No. 44232
MA-6217

Appearances:

Wisconsin Federation of Nurses and Health Professionals, 7700 West Bluemound Rd, Milwaukee, WI 53213, by Mr. Robert Russell, Field Representative, appearing on behalf of Local 5011.

Mr. John Bower, Personnel Director, 615 North 6th Street, Sheboygan, WI 53081, appearing on behalf of Sheboygan County.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, Sheboygan County (hereinafter referred to as the County) and Local 5011, Sheboygan Federation of Nurses and Health Professionals (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as arbitrator of a dispute over hiring rates. The undersigned was so designated. A hearing was held on October 2, 1990 at the Law Enforcement Center in Sheboygan, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. Post hearing briefs were submitted, which were exchanged through the undersigned on November 11, 1990, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties agreed that the following issue was to be determined herein:

"Did the County violate the collective bargaining agreement when it

hired a new Chronic Care Outreach Worker at a rate in excess of the start rate? If so, what is the appropriate remedy?"

PERTINENT CONTRACT LANGUAGE

**II
RECOGNITION**

The Employer recognizes the Union as the exclusive bargaining representative for all Public Health Nurses and Registered Nurses employed by the Sheboygan County in the Sheboygan County Nurses Office, excluding the director and all other employees of the Employer for the purpose of conferences and negotiations on all questions of wages, hours and conditions of employment.

**ARTICLE III
MANAGEMENT RIGHTS RESERVED**

Except as otherwise herein provided, the management of the work and the direction of the personnel, including the right to hire, promote, demote, suspend or otherwise discharge for proper cause, the right to relieve employees from duties because of lack of work or other legitimate reason is vested exclusively in the Employer. Except as otherwise herein provided, the Employer shall have the exclusive right to determine the hours of employment, the length of the work week and to make such changes in the details of employment as may be necessary for the efficient operation of the department.

The Employer recognizes the professional nature of the employment and the dedication of the employees to improving health care practice and public health in Sheboygan County and accordingly recognizes their professional responsibility to discuss and provide suggestions with regard to these matters and this right and responsibility involving the goals of the profession in public health and professional nursing shall not be impaired.

**ARTICLE X
SENIORITY, LAYOFFS, POSTING**

Seniority shall mean the length of employment with Sheboygan County within this bargaining unit.

C. Job Posting

Whenever a vacancy occurs due to retirement, termination or the establishment of a new position, the department shall post this position for a period of ten (10) days before the date the vacancy is to be filled.

The posting shall state the position classification, qualifications and its salary. The employee, if interested in applying for such vacant position, shall make application to the Director of Nursing.

The Director shall have sole discretion in filling all vacancies. In the exercise of this discretion, the Director shall weigh the qualifications of all applicants. In the event that one or more of the applicants are equally qualified, the Director shall give consideration to the length of service with the department in making a selection. The grievance procedures shall not apply to this decision. Employees not selected to fill the position may request reasons in writing.

(EXHIBIT "B")

POSITION	START	6	12	24	36	48
		MONTHS	MONTHS	MONTHS	MONTHS	MONTHS

CHRONIC CARE OUTREACH WORKER						
\$15,870-\$21,008	\$7.63	\$7.93	\$8.25	\$8.82	\$9.45	\$10.10

Wage Rates - Effective 1/1/89 - 12/31/89

BACKGROUND

There is virtually no factual dispute in this case. The County is a municipality providing general governmental services to the people in Sheboygan County in eastern Wisconsin. The Union is the exclusive bargaining representative for non-supervisory nurses in the County Nurse's Office. Among the positions in the bargaining unit is the Chronic Care Outreach Worker.

In December of 1989, the County posted an opening for Chronic Care Outreach Worker:

"JOB POSTING

December 8, 1989

CHRONIC CARE OUTREACH WORKER

The Division of Community Programs has an opening for a Chronic Care Outreach Worker. This full time, 40 hour per week position provides evaluation and treatment services to chronic alcohol abusers. We offer a starting salary of \$7.63 per hour. Applications will be accepted thru 5:00 pm on Monday, December 18, 1989."

The job description for the position listed the following qualifications for the position:

"REQUIRED KNOWLEDGE, SKILLS AND ABILITIES:

Good knowledge and understanding of the problems and programs associated with chronic alcohol abuse and of effective ways of counseling chronic alcohol abusers; ability to relate and communicate effectively with clients, staff, other agencies, and the general public; demonstrates reliability, resourcefulness, and good professional judgment.

"ACCEPTABLE EXPERIENCE AND TRAINING Some experience in working with chronic alcohol abusers and completion of a standard high school course preferably supplemented by formalized training in an alcohol treatment facility; or any equivalent combination of experience or training which provides the required knowledge, skills and abilities. The experience gained in working with Alcoholics Anonymous or a self-help organization is considered appropriate."

No internal candidates applied for the job, and the County went through the process of screening and interviewing outside candidates. It selected Ms. Kathleen A. Hausknecht, who had not previously worked for the County. Hausknecht held a Masters Degree in Social Work, and had previously worked as a social worker in a battered women's program and as Social Services Director for an area nursing center. In her interview, she expressed dissatisfaction with the starting rate for the position, which she felt did not credit her credentials. The County's Human Services Director raised this question with the County's Personnel Committee, and asked that they approve hiring at the 6 month rate (\$7.93 per hour) rather than the starting rate (\$7.63 per hour). The Personnel Committee gave its approval, and Hausknecht was hired at the higher rate.

The instant grievance was thereafter filed, alleging a violation of the wage schedule and asking that the County refrain from hiring above the start rate. The County denied the grievance,

contending that the Management Rights Clause gave it the right to hire above the minimum. The issue was not resolved in the lower levels of the grievance procedure and was referred to arbitration. Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the contract is clear and unambiguous in establishing a start rate of \$7.63 per hour for the Chronic Care Outreach Worker. Nothing in the language of the contract allows for a deviation from the negotiated wage grid. While educational requirements are a factor in establishing wages, they were considered and incorporated by the bargainers when the classifications were established and have no relationship with the wage progression within the classification.

The Union notes that the bargaining unit was established after the City of Sheboygan shut down its public health office and the County assumed those responsibilities. At the time of the first negotiations, the County refused to recognize prior work experience with the City, and it should not now be allowed to recognize prior experience and/or education on an ad hoc basis. No such exceptions have been allowed in the Nursing Home unit, which has an identical wage structure, after which this wage grid was patterned.

While the County claims that the higher rate was justified by Hausknecht's greater educational achievements, the Union notes that the job description does not require a Master's Degree, nor even a Bachelor's Degree. Furthermore, Hausknecht's prior experience was not in the field of alcohol and drug counseling, and thus was not relevant to the job. The County's witnesses admitted that they were anxious to hire Hausknecht because they considered her a good candidate for different positions in the future. Thus the decision to hire above the contractual rate was based on consideration wholly unrelated to the job.

The Union argues that the County's action amounts to a unilateral change in wages, without first bargaining with the Union as required by law and contract. When the County sought the ability to hire above the starting rate in the nurse's unit at the County institutions, it first bargained with the Union and made concessions to obtain that right. It cannot be allowed to achieve the same end in this unit without engaging in bargaining.

For all of the foregoing reasons, the Union asks that the grievance be sustained. As a remedy, the Union asks that the County be directed to refrain from hiring above the starting rate in all future cases.

The Position of the County

The County takes the position that it has the right, under the Management Rights Clause, to exercise control over the personnel function "Except as herein otherwise qualified..." There is no qualifying language in contract restricting the right to hire within the negotiated wage range. The County is merely exercising its right to offer the wage necessary to obtain the best qualified applicant for the position. This is a legitimate concern of management, and is sound public policy. Hausknecht exceeded the educational and experience requirements for the job, and thus could command a higher wage. A contrary interpretation would limit the County to hiring minimally qualified persons.

The County points to the language of the job posting provision, Article X(C)3, which gives the Director sole discretion in filling vacancies. Logically the discretion in hiring internally must extend to external hires as well.

For the foregoing reasons, the County asks that the grievance be dismissed.

DISCUSSION

The County relies upon the broad reservation of management rights in Article III for its claim of authority to vary the hiring rate within the negotiated pay range: "Except as otherwise herein provided, the management of the work and the direction of the personnel, including the right to hire ... is vested exclusively in the Employer." If, as asserted, there is no qualification of the right to set wages contained elsewhere in the contract, the County is correct. There are, however, significant qualifications of Management's Rights in the contract.

The negotiated wage grid includes two elements for determining the appropriate rate of pay for a given employee -- the employee's classification and length of service. The setting of a classification's pay range includes the duties of the job and the required skills, ability and qualifications for performing the job. To the extent that the County sought to reward Hausknecht for her educational attainments by moving her up to the "6 MONTHS" step of the grid, it utilized the wrong device. There is no rational connection between her degree and the contract's specification of a higher rate for six months of experience in the job.

It is somewhat closer question whether the County could seek to reward Hausknecht for prior experience by moving her up the length of service component of the wage schedule. Both at least relate to time spent performing the duties required in the job. This turns on what the parties meant by the terms "Start", "6 Months", "12 months" and so on, in the wage schedule. Contrary to the claims of the Union, these terms are ambiguous in the sense that they do not directly indicate whether they measure time in the profession, the work force or the job. Ambiguity invites interpretation, and applying the principles of contract interpretation to the language in issue yields a result in favor of the Union.

Two of the more persuasive tools for determining the intent of ambiguous language are

negotiating history and past practice. The uncontradicted testimony of Union negotiators was that experience on the wage schedule referred to experience working for Sheboygan County, and that this understanding was communicated during bargaining. The same witnesses also testified, again without contradiction, that education and prior experience outside the County work force had never been used to place a new employee above the hiring rate in the past. Thus the practice of the parties confirms the testimony concerning bargaining history.

The County seeks support for its claim of discretion to set wage rates by referring to the Job Posting provisions, which give the Director sole discretion to fill positions. The County's reliance on this provision is misplaced. The discretion granted the Director is the discretion to select among competing candidates. Nothing in Article X can be interpreted as granting the Director the right to unilaterally establish wages. The Recognition Clause reserves that determination to the joint efforts of the County and the Union. While the undersigned agrees, in the abstract, with the County's complaint that this interpretation restricts its ability to hire the candidates it feels will best serve the public interest, the answer to that concern is to either alter the classification system to allow for gradations in the experience and education of applicants for Chronic Care Outreach Worker, or negotiate with the Union for the right to hire outside applicants at rates higher than the start rate. The contract as presently written does not allow the County to take the type of unilateral action attempted in this case.

The undersigned has concluded that the County violated the wage schedule of the contract when it hired Hausknecht at the "6 Month" rate rather than the "Start" rate. The language of the agreement, the history of the parties' negotiations over this provisions, and the manner in which the wage schedule has been applied in the past all indicate that the experience gradients within the schedule do not allow for credit for experience and training external to the County's workforce. The Union seeks only a prospective remedy, in the form of an order prohibiting the County from unilaterally hiring above the Start Rate in future cases. On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The County violated the collective bargaining agreement when it hired a new Chronic Care Outreach Worker at a rate in excess of the start rate. The appropriate remedy is an order directing the County to refrain from hiring outside applicants at a rate above the Start Rate of the wage schedule unless the Union gives its consent to a higher rate. This order is effective with the date of this Award.

Signed this 29th day of January, 1991 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator