

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DOUGLAS COUNTY (HUMAN SERVICES)

and

DOUGLAS COUNTY PROFESSIONAL HUMAN
SERVICES EMPLOYEES LOCAL UNION
NO. 2375, AFSCME, AFL-CIO

Case 215
No. 52288
MA-8900

Appearances:

Mr. John Mulder, Personnel Director, Douglas County, 1313 Belknap Street, Room 204,
Superior, WI 54880-2730, appearing on behalf of the County.

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
1701 East Seventh Street, Superior, WI 54880, appearing on behalf of the Union.

ARBITRATION AWARD

Douglas County Professional Human Services Employees Local Union No. 2375, AFSCME, AFL-CIO, hereafter Union, and Douglas County (Human Services), hereafter County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a staff member as single, impartial arbitrator to hear and decide the instant grievance. Hearing was held in Superior, Wisconsin on May 9, 1995. The hearing was not transcribed and the record was closed on July 24, 1995, upon receipt of post-hearing written argument.

ISSUE:

The Union frames the issue as follows:

Did the Employer violate the terms of the collective bargaining agreement and past practice by denying the Grievant a vacant position and awarding the position to a less senior employe?

If so, the appropriate remedy is to award the position to the Grievant who is the most senior and qualified.

The County frames the issue as follows:

Did the County violate the contract or an established past practice when it interviewed applicants for the position of Social Worker in the area of mental health and developmental disability?

If so, what is the appropriate remedy?

The undersigned adopts the County's statement of the issue.

RELEVANT CONTRACT LANGUAGE

ARTICLE 2

MANAGEMENT RIGHTS

The county board possesses the sole right to operate the county and all management rights repose in it unless otherwise limited in the collective bargaining agreement or applicable Federal or State laws.

. . .

- G. To introduce new or improved methods or facilities;
- H. To change existing methods or facilities;
- I. To determine the methods, means and personnel by which Departmental operations are to be conducted;

. . .

ARTICLE 6

GRIEVANCE PROCEDURE

Section 1. Should differences arise between the Employer and the Union as to the meaning and the application of the provisions of this Agreement or as to any questions relating to the wages, hours of work or other conditions of employment, an earnest

effort shall be made to settle them promptly under the provisions of this Article.

- A. Between the aggrieved employee and/or a member or members of the Grievance Committee designated by the Union and the department head. The Union and Employer representatives and/or department supervisors may be in attendance at this meeting or any subsequent meeting if they so desire. The County shall respond in writing to the aggrieved employee and the Union representative within ten (10) days after the grievance is filed.
- B. If, as a result of this effort, a satisfactory settlement is not reached then the Union Grievance Committee and/or Union representative may within fourteen (14) days appeal the grievance to the Personnel Director and to the appropriate committee of the Douglas County Board. A meeting between the parties shall be arranged at a mutually agreeable time and place within fourteen (14) days of the appeal. No later than fourteen (14) days after said meeting, the Personnel Director shall respond in writing to the aggrieved employee and the Union.
- C. If, as a result of action taken above, the grievance still remains unresolved, the dispute shall be submitted to a staff member of the Wisconsin Employment Relations Commission (WERC). The cost of the WERC filing fee shall be shared by both parties. The arbitrator, after hearing both sides of the controversy, shall hand down the decision in writing to both parties. The decision of the arbitrator shall be final and binding.

Section 2. The Employer agrees that the time spent in the processing of grievances or negotiation meetings shall not be deducted from the pay of the employee when the time and date are agreeable to the Employer.

Section 3. The Arbitrator shall not add to, subtract from, or vary the terms of this Agreement. All decisions must be rendered in accordance with the language of this Agreement or the written interpretations pertaining thereto signed by the parties to this Agreement or their representatives.

Section 4. To be considered under this Article grievances must be filed within thirty (30) days of the pay period in which the alleged violation occurred.

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ARTICLE 12

PROMOTIONS AND VACANCIES

Section 1. In the event a job vacancy or new position occurs, a notice of the vacancy or new position shall be posted on the employees' bulletin board for at least five (5) days. Said notice shall contain the prerequisites for the position and said prerequisites shall be consistent with the requirements for the position. Those employee within the bargaining unit who meet the prerequisites may apply and they will be considered in the following order:

- A. First, those employees who have applied from within the Department in which the vacancy occurred will be considered in order of their seniority rights, provided that they are able to perform the duties required by the job.
- B. Where there are no qualified applicants from within the Department in which the vacancy occurred, consideration will be given to other qualified employees in the bargaining unit, according to their unit-wide seniority.
- C. In the event none of the applicants qualify for the position, the Employer may then advertise publicly to fill the position.

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BACKGROUND

On December 14, 1994, the County posted a position for a Social Worker in the area of mental health and developmental disability. On December 19, 1994, the Grievant, Rhoda Nagorski, a Social Worker III, applied for this position. One other employe, Social Worker I Christine Jasmin, applied for the position. The Grievant has a seniority date of July 5, 1977, and Jasmin has a seniority date of March 4, 1994.

On January 20, 1995, Steve Koszarek issued the following memo to the Grievant:

There is an interview scheduled for Monday, January 23, 1995 at 1:00 p.m. in the Human Service's meeting room for you in regard to the opening in 51.42.

On or about January 25, 1995, the Grievant, filed a written grievance. The body of the grievance is entitled "**Statement of the Grievance**" and is divided into three sections.

In the first section, "(Circumstances of Facts):(Briefly, what happened)," the Grievant responded with the following:

On 12/19/94 I formally applied for a posted lateral transfer as a social worker. On the morning of 1/23/95 I was notified of an interview scheduled for the same day. In my 17 1/2 years of employment the lateral transfer of social workers has always been based on seniority and never involved any type of interview. Implicit in the job description of social worker is the concept of transferable skills. This also reflects past practice.

In the second section, "(The contention-what did management do wrong?) (Article or Section of the contract which was violated if any)," the Grievant responded with the following:

I was notified the day of the interview in a public meeting with my peers with who I had not discussed my application for the position. This was a blatant violation of my privacy. I was not notified of the policy change which necessitated the interview and was given no opportunity to prepare for an interview.

In the third section, "(The Request for Settlement or corrective action desired)," the Grievant responded with the following: "past policy of lateral transfer to job openings be based on seniority was violated - lateral transfers which will require an interview should be stated as policy. (prior to the opening being posted)."

On January 26, 1995, Chet Seacotte, the Director of the County's Department of Human Services, issued the following memo to Jim Borgeson, the Local Union President:

Re: Grievance of 1/25/95

The grievance filed on behalf of Rhoda Nagorski has been reviewed by the administration. Since management has the right to place any social worker in any social work position as management determines to be in the best interest of the agency, there has been no violation of the contract and the grievance is therefore denied.

Management retains the right to use whatever method they deem appropriate to determine job placement.

A copy of this memo was distributed to the Grievant and John Mulder, the County's Director of Personnel. On February 3, 1995, the County awarded the posted position to Jasmin.

On February 13, 1995, Mulder issued the following memo to Borgeson:

In response to your request to submit the grievance of January 25, 1995 to the Personnel Director and County Board, I am scheduling the grievance for consideration by the Personnel Committee on Tuesday, February 21, 1995. The Committee will meet at 4:00 p.m. and will review the grievance in closed session. I will provide a copy of the agenda to you when it is prepared later this week. If you are unable to attend please notify me as soon as possible.

On February 22, 1995, Mulder issued the following memo to Borgeson:

The purpose of this memo is to inform you that the Personnel Committee denied the grievance filed by Rhoda Nagorski at its meeting on February 21, 1995. The Personnel Committee took action on the grievance in your absence based on the conversation between you and I earlier in the afternoon that it was acceptable to you for the Committee to act without your presence. I notified you of the meeting by memo of February 13, 1995, and also hand delivered an agenda to you on either Thursday or Friday (Feb. 16 or 17). In response to your request to re-submit the grievance to the Personnel Committee, the County has met its obligations in the grievance procedure and, therefore, your request is denied.

The grievance was, thereafter, submitted to arbitration.

Union

The written grievance includes the following statements: "In my 17 1/2 years of employment the lateral transfer of Social Workers has always been based on seniority and has never involved any type of interview. Implicit in the job description of Social Worker is the

concept of transferable skills. This also reflects past practice." The request for settlement or corrective action desired includes the following statement: "Past policy of lateral transfer to job openings be based on seniority was violated."

The issue submitted by the Union is an issue raised in the grievance. The grievance is timely.

The County has not challenged the Union's assertion that the Grievant is the senior qualified employe. The County violated Article 12, Section 1, and a long standing practice when it failed to select the most senior and qualified employe who posted for the position.

The County's confusion as to the issue in this case stems from the County's failure to make scheduling adjustments and meet with the Grievant and her Steward to discuss the issue, as is intended by Article 6, Grievance Procedure. Had the County followed the appropriate steps and met with the Grievant and the Union Steward, the County would have understood the issue and perhaps this matter would never have proceeded to arbitration.

Perhaps the County's confusion is an attempt to avoid a decision on the merits. In any event, the County's confusion as to the issue does not abrogate the Grievant's contractual rights.

The County's decision to interview the Grievant was a radical departure from the practice governing lateral transfers. The interview was conducted on the same day as the Grievant was notified of the interview. The Grievant received notice of the interview at a meeting in which co-workers were present. The County's conduct was unprofessional and caused embarrassment to the Grievant.

The County's decision to interview is a secondary issue in this grievance. There is no past practice to support the interview and the County has not approached the Union to negotiate such a procedure. If the County wishes to change the longstanding practice of not interviewing, then the County should negotiate such a change.

The decision in the arbitration award relied upon by the County is not relevant to this case because it involved the County's right to make involuntary transfers. The issue in this case is the voluntary transfer rights of senior qualified employe.

If the Grievant had been awarded the position, the job change would have been a lateral transfer in that the Grievant would have retained her position as a Social Worker III and would have received the same rate of pay. The fact that the Grievant may not have had an economic reason for seeking the position is irrelevant to the determination of whether or not the Grievant had a seniority right to the position.

The County's management rights does not allow the County to abrogate the Grievant's seniority rights. The Arbitrator should sustain the grievance and award the position to the

Grievant, the most senior and qualified employe who posted for the position.

County

The written grievance was filed on January 25, 1995. The written grievance, on its face, raises only one issue, i.e., the right of the County to interview.

The date of the appointment of Christine Jasmin is February 3, 1995. The written grievance could not, and did not, challenge the County's decision to award the posted position to Christine Jasmin, rather than to the Grievant.

As Union President Jim Borgeson testified at hearing, on the day of the Personnel Committee meeting, he understood that the grievance was over the decision to interview and not who was given the position. It was not until the arbitration hearing of May 9, 1995, that the Union made the assertion that the grievance was about who received the position.

The written grievance does not raise the issue submitted by the Union and the County objects to the innuendo that the County deliberately confused the issue. If the Grievant and the Union wished to grieve the selection of Christine Jasmin, then they were obligated to file such a grievance within the contractual time limits. Since they failed to do so, the Arbitrator does not have jurisdiction to decide the issue submitted by the Union.

If the Arbitrator were to reach the merits of the issue submitted by the Union, she would have to conclude that the Union's position is without merit. The Grievant maintains that the position involved a lateral transfer, with no change in pay or title. Article 2, B, provides the County with the right to "assign employee in positions within the Department."

In a prior arbitration case, it was made clear that the County has the right to make involuntary transfers and to prevent employes from posting back into a position which had been vacated by the involuntary transfer. The employe's right to post for vacancies should not circumvent management's right to make assignments for the good of the agency, particularly where there is no economic impact on the employe.

Article 12 of the contract says employe "will be considered in order of their seniority rights," the contract does not say "will be selected." The language should not be construed as obligating the County to select the most senior person. Moreover, as the Deputy Director of the Department testified at hearing, he has restructured and changed assignments in the past.

Interviewing applicants is a method of operation used to determine qualifications. The collective bargaining agreement expressly provides the County with the management right "to introduce new or improved methods," "to change existing methods," and "to determine methods, means and personnel by which Departmental operations are to be conducted." The County does

not have any obligation to bargain a right which is already granted to the County under the management rights clause.

It is not evident that the County was unwilling to meet with the Union to discuss the grievance. If the Union desired such a meeting, then it was incumbent upon the Union to request such a meeting. Union President Borgeson did not object to the County taking action in his absence.

The issue raised in the grievance is the issue submitted by the County. The County did not violate the contract or an established past practice when it interviewed applicants for the position of Social Worker in the area of mental health and developmental disability. The grievance must be denied.

DISCUSSION

Issue

The Union argues that the issue submitted by the County is a secondary issue and that the primary issue is the issue submitted by the Union. The County asserts that the issue submitted by the Union was raised for the first time at the arbitration hearing and, therefore, the issue is not the subject of a timely filed grievance. Given this disagreement between the parties, the initial question to be answered is whether or not the issue submitted by the Union is arbitrable.

The written grievance was filed prior to the time that the County had announced its decision to award the position to Jasmin. Given the timing of the written grievance; the fact that the vast majority of the statements in the written grievance reference the interview procedure; and the fact that the requested settlement is that "lateral transfers which will require an interview should be stated as policy. (prior to the opening being posted)," the undersigned is persuaded that the written grievance challenges the interview process.

Neither the language of the written grievance relied upon by the Union, nor any other language of the written grievance, can be reasonably construed to grieve the County's decision to deny the Grievant a vacant position and award the position to a less senior employe, which is the issue submitted by the Union. The undersigned turns to the question of whether or not there has been a timely modification of the written grievance to include the issue submitted by the Union.

On or about January 25, 1995, the Grievant had a discussion with her supervisor, Steve Koszarek, Deputy Director of the County's Department of Human Services. It is unclear whether this discussion was in response to the written grievance or was simply a discussion between a supervisor and his employe. 1/ It is evident, however, that the Grievant's discussion with

1/ The County's representative in the first step of the grievance procedure is the Department Head. Koszarek is not the Department Head.

Koszarek occurred prior to the time that the County announced its decision to award the posted position to Jasmin.

As Koszarek recalls the discussion, the Grievant stated that the District had the right to assign duties to a position, but when the County posted a position, then the County had to follow the contractual hiring process; that the interview process was not legitimate; that the County viewed the Grievant in a negative light; and that the only reason for the interview was that the County wanted to have the opportunity to deny the Grievant the position.

The Grievant agrees with Koszarek's account of their discussion. The Grievant, however, recalls that she also (1) referenced Article 12; (2) stated that she believed that she was minimally qualified, experienced and senior; and (3) stated that she had concerns with the notice of the interview in that it did not provide her with sufficient time to prepare for the interview and was provided to the Grievant in a public forum.

As in the written grievance, the Grievant's statements to Koszarek focused on the interview process. It is not evident that the County's decision to award the position to Jasmin, rather than to the Grievant, was a subject of discussion. Assuming arguendo, that the discussion between Koszarek and the Grievant occurred after the filing of the written grievance, it would not be reasonable to construe the discussion as placing Koszarek on notice that the grievance raised any issue other than the validity of the interview process.

After the written grievance was filed, Koszarek discussed the grievance with Chet Seacotte, Director of the County's Department of Human Services. Koszarek believes that Seacotte then discussed the written grievance with the Personnel Department and, thereafter, issued the January 26, 1995, memo to Jim Borgeson, AFSCME President.

The Grievant, who received a copy of the January 26, 1995 memo, understood that this was a denial of her grievance; that the Department Head did not want to meet to discuss the grievance; and that the grievance would proceed to the next step. It is not evident that the Grievant, or the Union, objected to the manner in which the County had processed the grievance at the first step.

Following receipt of the January 26, 1995 memo, Borgeson requested that the grievance be processed to the second step of the grievance procedure. The second step is a meeting between a representative of the Union, the Personnel Director, and the appropriate committee of the County Board.

By letter dated February 13, 1995, County Personnel Director Mulder notified Borgeson that the grievance would be considered by the Personnel Committee on February 21, 1995 and requested that Borgeson advise Mulder, as soon as possible, if he would be unable to attend the meeting. Borgeson, who assumes that he received the letter of February 13, 1995, on that date, contacted Mulder on the morning of February 21, 1995 to advise Mulder that Borgeson had not been able to contact the Grievant about the meeting with the Personnel Committee and that

Borgeson was not able to attend the meeting with the Personnel Committee.

Mulder recalls that, during the conversation on the morning of February 21, 1995, Mulder asked if the Personnel Committee could proceed on the grievance without Borgeson and that Borgeson told Mulder "to go ahead." 2/ Borgeson, who was unable to recall the specifics of this conversation, agreed that it was likely that he told Mulder to proceed with the Personnel Committee meeting. 3/

Mulder recalls that, during the week before the Personnel Committee meeting of February 21, 1995, Mulder and Borgeson had their one and only discussion concerning the substance of the grievance. Mulder's uncontradicted testimony establishes that Mulder told Borgeson that he did not understand why the County could not interview and Borgeson responded by saying that the Union "had to do what it had to do."

Borgeson acknowledges that, from the time that the written grievance was filed until the time that the written grievance was considered by the Personnel Committee, the Union did not indicate that the grievance involved any issue other than that which was stated in the written grievance. Borgeson further acknowledges, that, at the time that the grievance was considered by the Personnel Committee, Borgeson understood that the grievance was on the interview.

Summary

The timing of the written grievance and the statements contained in the written grievance support the conclusion that the issue raised in the grievance is the validity of the interview procedure, and not the County's decision to deny the Grievant a vacant position and award the position to a less senior employe. This conclusion is further supported by the fact that, at the time that the grievance was processed to the second step of the grievance procedure, which is the last step prior to arbitration, the Union and the County representatives had the same understanding of the written grievance, i.e., that the grievance challenged the County's right to interview.

2/ Unlike the first step of the grievance procedure, the language of the second step of the grievance does not recognize the aggrieved employe as a participant in the second step grievance meeting.

3/ Mulder and the Personnel Committee met on the evening of February 21, 1995 and issued the second step response to the grievance on February 22, 1995.

It is not evident that, between the time that the Grievant filed the written grievance and the time that the County issued the second step response denying the written grievance, the Grievant or any Union representative, made any statement to County representatives which could be reasonably construed to place the County on notice that the grievance involved any issue other than the validity of the interview procedure.

Koszarek and Mulder, the only two County representatives to testify at hearing, both state that, until the day of the arbitration hearing, the County understood that the grievance raised only one issue, i.e., the interview. While the Union finds this "understanding" to be suspect, the record demonstrates that the County had a reasonable basis for this understanding.

The issue submitted by the Union at hearing is not the issue raised in the written grievance. Nor has there been a timely modification of the written grievance to include the issue submitted by the Union.

Article 6, Section 4, states "That to be considered under this Article grievances must be filed within thirty (30) days of the pay period in which the alleged violation occurred." The issue submitted by the Union was not grieved in a timely manner and, thus, is not arbitrable. 4/

The appropriate issue is that which has been submitted by the County. Thus, the undersigned turns of the question of "Did the County violate the contract or an established past practice when it interviewed applicants for the position of Social Worker in the area of mental health and developmental disability?"

Merits

In the present case, the County declared a vacancy in the position of Social Worker in the area of mental health and developmental disability. Having declared a vacancy, the County was obligated to fill the vacancy in accordance with the procedures set forth in Article 12, Promotions

4/ Despite the Union's assertion's to the contrary, it is not evident that the County's conduct prevented the Grievant and the Union from meeting with the County at the first step of the grievance procedure, or that the County's conduct prevented the Union from meeting with the County at the second step of the grievance procedure, as contemplated by the language of Article 6. To be sure, after the County met and decided the second step grievance, the Union asked that the grievance be resubmitted at the second step. Given the evidence that the Union had waived its right to participate in the second step grievance meeting, the County's refusal to permit the Union to resubmit the grievance at the second step is reasonable. It is not evident that the County prevented the Grievant, or the Union, from filing a timely grievance on the issue submitted by the Union.

and Vacancies. 5/

As a review of Article 12 discloses, this provision is not limited to promotions. Thus, the fact that the position involved the same pay and classification as the Grievant's current position does not render the provisions of Article 12 inapplicable.

Article 12, Section 1, A, governs applications from within the Department, which is the factual situation presented in this case. This provision states as follows:

First, those employes who have applied from within the Department in which the vacancy occurred will be considered in order of their seniority, provided that they are able to perform the duties required by the job.

The language does not require the County to fill vacancies on the basis of seniority. Thus, the fact that the Grievant is the most senior employe within the Department to apply for the vacancy is not sufficient to provide the Grievant with a contractual right to the position. Rather, the Grievant's seniority is a factor only if she is able to perform the duties required by the job.

Among the tools used by employers to determine if an applicant employe is able to perform the duties required by a job is to interview the employe. Thus, it is not unreasonable, per se, for the County to interview employe applicants.

As the County argues, the County's right to determine the methods by which Department operations are to be conducted, as well as the County's right to change existing methods of Department operations, is expressly recognized in Article 2, Management Rights. As the County further argues, the decision to interview, or to not interview, employe applicants is a decision on the appropriate method of conducting Department operations.

In summary, the fact that the County may not have previously interviewed employe applicants who posted for a vacancy does not establish a binding past practice which prohibits the County from interviewing such employe applicants. Under Article 2, the County reserves the right to determine whether or not it will use the interview tool to determine the qualifications of

5/ It may be that the County could have filled the position by transferring an employe into the position, or that the County could have reorganized and reassigned the duties of the position without posting a vacancy. These issues, however, are not before the arbitrator and the arbitrator makes no determination with respect to these issues. As the Union argues, the arbitration award relied upon by the County presents a factual situation which is not present in this case.

employe applicants, such as the Grievant. Having reserved this right, the County is not required to negotiate with the Union prior to exercising this right.

According to Koszarek, the interview was conducted because the two supervisors of the posted position had concerns about obtaining a qualified individual and the interview process gave the two supervisors an opportunity to determine the qualifications of the applicants. 6/ While the Grievant believes that the interview was concocted for the purpose of "getting" the Grievant, the record does not provide any basis for discrediting Koszarek's testimony that the purpose of the interview was to ascertain applicant qualifications.

It is true that the Grievant did not learn of the interview until, January 23, 1995, the day of the interview. The County, however, had issued a written notice of the interview on January 20, 1995, the same day that an interview notice was issued to the other employe applicant, Jasmin. The Grievant's failure to receive the more timely notice was due to the fact that the Grievant was out of the office on sick leave.

The County's conduct in revealing that the Grievant had applied for the posted position by announcing her interview schedule at a meeting attended by fellow employes was inconsiderate. However, neither this conduct, nor any other conduct of the County in scheduling the Grievant's interview, violated the collective bargaining agreement.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The issue of whether or not the Employer violated the terms of the collective bargaining agreement and past practice by denying the Grievant a vacant position and awarding the position to a less senior employe was not grieved in a timely manner and, thus, is not arbitrable.

2. The County did not violate the contract or an established past practice when it interviewed applicants for the position of Social Worker in the area of mental health and developmental disability.

3. The grievance is denied and dismissed.

6/ It is not claimed, and the record does not demonstrate, that the interview conducted by the County was not reasonably related to the determination of whether or not the Grievant was "able to perform the duties required by the job."

Dated at Madison, Wisconsin, this 20th day of October, 1995.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator