

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

PIERCE COUNTY HUMAN SERVICES  
DEPARTMENT PROFESSIONAL EMPLOYEES  
BARGAINING UNIT

and

PIERCE COUNTY

Case 107  
No. 52694  
MA-9076

Appearances:

Ms. Christel Jorgensen, Business Agent, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by Mr. Stephen L. Weld and Ms. Victoria L. Seltun,  
on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on July 13, 1995, in Ellsworth, Wisconsin. The hearing was not transcribed and the parties thereafter filed briefs which were received by August 15, 1995.

Based upon the record, I issue the following Award.

ISSUE

The parties at hearing stipulated to the following issue:

Did the County violate the contract when it denied grievant Kathryn Spence's request for reclassification from Social Worker II to Social Worker III and, if so, what is the appropriate remedy?

## DISCUSSION

Grievant Spence holds a bachelor's degree in Special Education/Elementary Education and has been directly employed by the County since 1982, 1/ during which time she progressed from Coordinator of Educational Services, Social Worker I and Social Worker II in 1991. On January 10, 1995, 2/ she requested that she be reclassified to a Social Worker III pursuant to Exhibit "B" of the contract, entitled "Social Worker Reclassification". At that time, she was working with developmentally disabled adults in the Department's Long-Term Support program. Human Services Director Dale C. Melstrom denied her request via a March 9 letter which stated:

. . .

Your request for a reclassification is denied. This does not reflect in any way on your performance but is strictly for financial reasons.

Our 1994 deficit hasn't been calculated yet because our books for 1994 haven't been closed. We estimate that deficit to be in excess of \$100,000. The situation will be worse in 1995 because state and federal increases were so low. For 1996 we anticipate a two and one-half percent reduction in funds and for 1997 a ten percent reduction in funds.

. . .

Spence then filed the instant grievance on March 24. Melstrom by letter dated April 10 denied the grievance on the ground that:

Since I acted on your initial request for a reclassification I am forwarding your grievance directly to the Personnel Commission.

However, a thorough review of your training hours shows that of 121.79 hours I only approved 62.75. However, I would have approved of an additional 27.40 hours which would give you 90.15 approved hours.

I would not approve the training on stress (3 hours) or WordPerfect

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1/ Spence also worked as a Caseworker for the County's Unified Service Board from 1976-1982.

2/ Unless otherwise stated, all dates hereinafter refer to 1995.

(18 hours). That training is not related to your position nor does it enhance your professional development. I also would not approve the ETN courses on genetics because they have little or no value to your position.

. . .

Melstrom explained at the hearing that he did not want to create another Social Worker III in the adult section of the department because there was a greater need for a slot in Child Protection, a place where he has had difficulty in retaining personnel.

At that time, there were three full-time Social Worker IIIs in the Department. In addition, Social Worker III's Diane Keikhofer and Julie Raethke were each working 50 percent pursuant to their Position Share Agreement with the County. Altogether, then, there were four full-time equivalent Social Worker III's. Prior thereto, it appears that there were five Social Worker III's in the Department from 1989 onward.

Raethke testified about the 1989 bargaining history surrounding Exhibit "B" of the contract which deals with the reclassification and number of Social Workers. She stated that the Union then wanted three (3) Social Worker IIs to be upgraded to Social Worker IIIs; that the County only agreed to upgrade two of them; and that the parties then orally agreed that there would be at least five Social Worker IIIs in the Department, provided that they were qualified.

Business Agent Christel Jorgensen sat in on those negotiations and corroborated Raethke's testimony. Jorgensen added that the Union on April 25, 1989, agreed to the use of the word "may" in Exhibit "B" of the contract in response to the County's expressed concern that it should not be required to have five Social Worker IIIs if there were a reduction in force or if there were not enough qualified employees to fill that position. That is why, she stated, the Union's proposal in effect meant that "if there are qualified people, there will be five (5) SW III's." Her contemporaneous bargaining notes of that session state: "Shall be not less than five (5) SW III provided qualified." Jorgensen further testified that the County then countered with a proposal on the pre-existing condition issue of health insurance and, in the words of her bargaining notes, "everything else as proposed by the Union."

For his part, Melstrom testified "I can't tell you too much about the dialogue" which went on at the bargaining table regarding this issue, except to say that "I be allowed to approve the training" and that there be up to five Social Worker IIIs.

In support of the grievance, the Union mainly argues that the County is required to have five full-time Social Worker III's; that Spence is qualified to be a Social Worker III because she has taken the required training courses; and that the County does not have the right to refuse to promote Spence merely because of any purported fiscal problems. As a remedy, the Union asks

for a make-whole order consisting of Spence's appointment as a Social Worker III and back pay for any money she lost as a result of not being reclassified to that position.

The County, in turn, contends that its conduct here "was consistent with its contractually reserved rights because the contract is clear and unambiguous" and because it is improper to consider any parol evidence relating to bargaining history. The County also asserts that its decision not to reclassify the grievant was based upon legitimate reasons and was neither arbitrary nor capricious because it was "warranted by budgetary concerns". It also argues that there was no vacancy necessitating a reclassification; that the "grievant does not meet the technical eligibility requirements for reclassification to a Social Worker III"; and that some of Spence's training courses were not personally approved by Director Melstrom and hence do not count towards Spence's eligibility requirements.

In resolving this issue, I find that Spence did meet the technical requirements for reclassification set forth in Exhibit "B" since the record shows that she has been a Social Worker II for over three years and that she has amassed over 100 training hours, as is required under that language.

The County challenges some of those training hours on the ground that they did not increase Spence's proficiency as a Social Worker III and because Melstrom never personally approved those courses under Exhibit "B" of the contract which states: "The Director, at his/her discretion, shall provide such time as he/she deems necessary to be made available to the employee in order to complete the training requirements. Such time off and training itself shall be with the prior approval of the Director." The County therefore maintains that Spence has only 90.15 hours of approved training.

The problem with this claim is that Spence's supervisors approved all of the courses when Spence first asked permission to take them. Furthermore, Melstrom admitted that he never stated before the filing of the instant grievance that training courses would count for promotional purposes only if he personally approved them. That being so, Spence and other bargaining unit personnel could reasonably assume that Melstrom had delegated course approval to supervisors and that all such training hours counted once they were approved by their supervisors and paid by the County.

The County is on stronger ground when it points out that it has the right under Article 3 of the contract, entitled "Management Rights", to promote employees and to determine the "number and kind of classifications to perform such services" and that its decision not to promote Spence was neither arbitrary nor capricious because it was based on legitimate economic considerations which caused it to not fill another Social Worker III position. In this connection, Melstrom testified that his Department has run on a deficit for three of the last four years and that it recently has experienced a \$121,396 deficit.

The County's good faith, however, is not sufficient to carry the day if, in fact, the contract elsewhere requires the County to fill that slot since Article 3 also states that the management rights stated therein are to prevail "except as expressly modified by other provisions of the contract. . ."

This case therefore turns on Exhibit "B" of the contract which states in pertinent part:

Employees shall be reclassified from Social Worker I to Social Worker II to Social Worker III as follows:

1. There shall be no limit on the number of Social Worker II positions in the Department.
2. A Social Worker I may apply in writing to the Director of the Human Services Department for reclassification to a Social Worker II, upon technical eligibility for the position. Technical eligibility consists of:
  - A. One (1) year of experience performing the specific duties of a Social Worker.
  - B. A Social Worker I shall be required to complete the core courses for Social Worker II or equivalent in-service training. All training and courses shall be subject to the approval of the Director to be eligible for credit under this provision. The Social Worker shall then be given credit for courses previously taken and documented in their personnel file, provided such courses were directly related to basic social work practice, and the employee's position with the County.
3. There may be up to five (5) Social Worker III positions in the Department. In the event that there are more qualified applicants than openings, seniority shall prevail. (Emphasis added).
4. A Social Worker II may apply in writing to the Director of the Human Services Department for reclassification to a Social Worker III, upon technical eligibility for the position. Technical eligibility consists of:
  - A. Three (3) years of experience performing the specific

duties of a Social Worker II.

- B. The Social Worker II shall be required to complete 100 additional hours of in-service training related to his/her job (beyond the core courses required for level II) or graduate courses in social work or related fields, as approved by the Director.
5. The Director, at his/her discretion, shall provide such time as he/she deems necessary to be make [sic] available to the employee in order to complete the training requirements. Such time off and the training itself shall be with the prior approval of the Director.
6. Training expenses will be paid for by the Department.
7. Upon request for reclassification by a Social Worker, the Director shall respond in the affirmative or deny the request within sixty (60) days of its submission. Consideration shall be given to education, work experience, work history and performance as documented in performance evaluations. The Social Worker shall receive a written report from the Director setting forth the basis for such denial. (Emphasis added).
8. The reclassifications shall become effective upon final approval.

Part of this language supports the County's position since it states in pertinent part: "There may be up to five (5) Social Worker III positions in the Department. In the event that there are more qualified applicants than openings, seniority shall prevail."

The County thus argues, "The contract does not state that there shall be 5, or there shall be 6, it states there may be up to 5."

The County also cites considerable arbitral authority for its claim that this language is clear and unambiguous, including my decision in Pierce County (Sheriff's Department), Case 106, No. 52299, MA-8904 (7/17/95), which centered on whether the County provided an "equivalent" schedule when it changed the prior schedule to a 7-3, 7-3, 6-2 8-hour per day schedule. I ruled that the new schedule was not "equivalent" because it required Jailers/Dispatchers to work an additional 17.39 hours a year with no extra pay and because it reduced vacation and holiday hours. In doing so, I found that while the union's brief to Arbitrator Joe Kerkman stated that the County

could change the work schedule if it did not "significantly increase" hours, said representation was superseded by the clear and unambiguous contract language which stated that the County had to maintain an "equivalent" schedule. The County in this proceeding thus argues that any parol evidence and bargaining history surrounding the use of the words "may" and "shall" in Exhibit "B" must be disregarded and that I am bound by the express terms incorporated into the written contract.

This language, however, does not stand alone. It also must be considered with the remainder of Exhibit "B" which provides that after employees meet the training and work requirements needed to be a Social Worker III and then request reclassification, "Consideration shall be given to education, work experience, work history and performance as documented in performance evaluations." Noticeably absent from this language is any proviso to the effect that otherwise qualified employees can be turned down because of any financial difficulties experienced by the County. Hence, this language indicates that qualified Social Worker IIs must be promoted to Social Worker IIIs if they meet all of the four criteria set forth therein.

Read in that way, it appears that all such reclassification requests must be granted until there are "up to" five Social Worker IIIs. This interpretation harmonizes these two provisions in Exhibit "B" and therefore gives meaning to the entire agreement - which is one of the key principles in arbitral law. 3/

But, even if this interpretation were rejected, the most that could be said about Exhibit "B" when it is read in its entirety, is that it is ambiguous on its face as to whether all qualified Social Worker IIs must be reclassified until there are "up to" five Social Worker IIIs.

That ambiguity, in turn, can be resolved through bargaining history. As to that, I credit the combined testimony of Jorgensen and Raethke who testified that the County agreed in the 1989 negotiations to have at least five Social Worker IIIs, with the only caveat being that there be enough qualified employees to fill those slots.

The County challenges their testimony by asserting that it never agreed in those negotiations to the Union's interpretation and that it hence must be disregarded because there is no evidence that mediator Richard McLaughlin ever made any statements regarding that issue and because "There was no testimony regarding any statements against interest made by the County's spokesperson or members of the County's bargaining team."

That is true. However, the fact remains that both Jorgensen and Raethke credibly testified that such an agreement was reached at that time and Jorgensen added that this specific

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3/ See Elkouri and Elkouri, How Arbitration Works, p. 352-353 (BNA, Fourth Edition, 1989).

understanding was discussed at the end of negotiations in a joint meeting attended by County representatives. I credit Jorgensen's testimony on this issue and therefore find that County representatives at that time acceded to the Union's interpretation and that, it thus is now estopped from challenging the mutual understanding which was reached at that time.

As a consequence, the County was required under Exhibit "B" to reclassify Spence to a Social Worker III since she met all of the training and other criteria spelled out therein and since that language states that there shall be "up to" five Social Worker IIIs. As a remedy, the County is required to immediately promote Spence to a Social Worker III and to make her whole for the loss of any wages and other benefits that she may have lost as a result of the County's refusal to reclassify her to that position from March 9, 1995, to the present. 4/

In light of the above, it is my

AWARD

1. That the County violated the contract when it denied grievant Kathryn Spence's request for reclassification from Social Worker II to Social Worker III.
2. That the County shall rectify that violation by immediately reclassifying Spence to a Social Worker III and by making her whole in the fashion stated above.
3. That to resolve any questions which may arise over application of this Award, I shall retain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin, this 14th day of November, 1995.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator

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4/ March 9, 1995 is the cutoff point for back pay purposes because that is the day that Melstrom denied her reclassification request.