

IN THE MATTER OF THE  
VOLUNTARY ARBITRATION  
BETWEEN

THE [REDACTED] OF  
[REDACTED] COUNTY,

Employer,

Log No: A21371 [REDACTED]-09

-and-

Gr: [REDACTED] Work Transfer

MICHIGAN AFSCME COUNCIL 25,  
LOCAL [REDACTED]

Union.

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ARBITRATION OPINION AND AWARD

APPEARANCES

[REDACTED]  
[REDACTED] & [REDACTED] PLLC  
[REDACTED] Ste. [REDACTED]  
[REDACTED] MI [REDACTED]

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RECEIVED IN  
ARBITRATION DEPT.

JUL 12 2010

**ISSUE**

**WAS THE GRIEVANT IMPROPERLY TRANSFERRED  
TO AVOID WORKING UNDER THE  
SUPERVISION OF HIS BROTHER, AND IF SO,  
WHAT SHOULD BE THE REMEDY?**

The Union contends in its grievance dated April 29, 2009, that it was unfair and contrary to a past practice to transfer ██████████ out of his service center and job because his brother was his supervisor. The grievance said:

**STATEMENT OF GRIEVANCE**

List applicable violation: On 4-20-2009 Mr. ██████████ was informed through memo per ██████████ (Personnel Dir) that he was being transferred out of the Sign Shop because of ██████████ Policy 411 - Employment of Relatives. We feel this to be unfair and unjust because of years of past practice between ██████████ and Local ██████████

Adjustment required: For Mr. ██████████ to be reinstated to the Sign Shop and to be made whole again.

An arbitration hearing was held on February 4, 2010. Testifying for the Union were: ██████████ ██████████ Union President and ██████████ ██████████ Grievant. Testifying for the Employer was ██████████ ██████████ Personnel Director. Comprehensive post-hearing briefs were submitted by the parties.

**BACKGROUND**

Policy 411 of the Road Commission, which was adopted on December 13, 2007, prohibits employees from working for an relative in a department. It says:

<b>POLICY #</b>	<b>PREPARING DEPT</b>	<b>EFFECTIVE DATE</b>	<b>SUPERSEDES</b>	<b>PAGE</b>
411	Personnel	4/17/2008	410 12/13/2007	1 of 1

**EMPLOYMENT OF RELATIVES**

The ██████████ of ██████████ County has adopted the following policy pertaining to employment of relatives.

As detailed in the Road Commission's Equal Employment Opportunity policy, employment decisions are made based on qualifications, skills and abilities and without regard to membership in a protected class. As such, no preference exists nor will a preference be exercised in hiring and employment decisions for relatives of current or former employees or elected or appointed officials.

In the event relatives are employed by the Road Commission, direct reporting relationships between relatives, whether the relationship is established through blood, adoption, marriage or other legal arrangement, are strictly prohibited.

"Relative" includes spouse, parent (or step-parent), child (or step-child), sibling, aunt, uncle, niece, nephew, cousin, grandparent, grandchild or in-laws, and any of these as established through blood, adoption, marriage or other legal arrangement.

NO person shall continue to be an employee in a department after he or she becomes the spouse of, or a relative to, the Department Head, Assistant Department Head or an immediate Supervisor.

Amended and adopted by the Board of County Road Commissioners December 13~2007. Renumbered and adopted by the Board of County Road Commissioners April 17, 2008

This policy superseded a similar rule from 1984, which said in Section VI:

SECTION VI:

Prohibitions of Continued Employment of Employees who are Relatives of Persons Promoted or Appointed to Position of Department Head, Assistant Department Head or Division Head where Employed.

- A. All lower ranking employees in the department or division who are relatives of the newly appointed Department Head or Division Head shall be transferred to another Department or Division where they will not be supervised by a relative.
- B. This policy shall not affect any employee's present position prior to Board adoption.

*Approved and Adopted by the Board December 11, 1984*

On April 20, 2009 [REDACTED] was transferred from the Sign Department at the [REDACTED] Service Center because he was working for his brother. The transfer memorandum said:

**MEMORANDUM**

TO: [REDACTED]  
FROM: [REDACTED] Personnel Director  
DATE: April 20, 2009  
RE: Classification Transfer

Please consider this memorandum as official notification of your transfer from the Sign Department to the [REDACTED] Service Center as of Monday, April 27, 2009. Your classification will remain a Equipment Operator B. This transfer is being made due to the fact that you currently work for Assistant Foreman [REDACTED] who is your brother. This is strictly prohibited in [REDACTED] Policy 411-Employment of Relatives. I apologize for any inconvenience this causes you.

[REDACTED] testified that he began working in the Sign Shop in 2001. His brother became his supervisor in 2006 or 2007.

The grievant said that he was offered the opportunity to transfer to another location in his Operator B position, but he chose to remain at his service center in a lower rated job. The Grievant would have retained his pay and position had he accepted the transfer.

[REDACTED] the Local president, testified that previously, [REDACTED] bid on an assistant foreman's position at the [REDACTED] Service Center, but that he didn't get the promotion because his wife was the clerk at [REDACTED]. Mr. [REDACTED] feels that the Employer did the right thing in that case by requiring the promoted employee to move in order to avoid working with a relative.

Mr. [REDACTED] further testified that in the case of the [REDACTED] the Employer also required the promoted employee to move in order, to avoid two relatives working together, where one was a supervisor.

[REDACTED] the personnel director, testified that the Grievant's transfer was required after a complaint was made involving two relatives who working in a supervisor/employee relationship. The relatives had different last names, and the Employer was apparently unaware that they were related.

Once the nepotism policy was enforced against these two employees, Mr. [REDACTED] said that to be fair, he enforced it against the Grievant and other employees.

Mr. [REDACTED] said that the policy against employees supervising relatives was enforced in the [REDACTED] and [REDACTED] cases in the past.

## **PERTINENT CONTRACT PROVISIONS**

### **ARTICLE 26 - Bidding Procedure, Training and Promotions**

- A. Job vacancies as well as anticipated, job vacancies will be posted for a period of seven (7) calendar days on the bulletin board in each work area. Bid information shall reflect the Service Center, position, and if applicable, the type and number of equipment. Every effort will be made to provide as much lead time as possible preparatory to awarding bid opportunities. The job shall not be considered filled until the training and trial period of the successful bidder has been satisfactorily completed or, when invoked, the provisions of Paragraph D hereinafter set forth have been exhausted. Interested Employees shall be required to submit bids within the seven (7) day posting period.

## **POSITION OF THE UNION**

It is asserted that employees were permitted to work under relatives subsequent to the December, 2007 policy, notwithstanding the policy that prohibited that conduct. Therefore, it is argued that there is a binding past practice that permits relatives to work under other relatives. Further, it is maintained that there is a practice of requiring the promoted relative to move, if there is a conflict.

The Union additionally argues that employees bid on a location under Article 26. This is said to prohibit the involuntary transfer of an employee because he/she is working under a relative.

## **POSITION OF THE EMPLOYER**

The Road Commission denies that the Grievant's brother should have been transferred rather than himself. It is maintained that there was insufficient proof of the circumstances involving the [REDACTED] and [REDACTED] situations.

The policy, by its language, is argued to require that the lower level relative be moved when there is nepotism.

The delay in enforcing the policy against the Grievant is argued to be irrelevant, because there was no prejudice to the Grievant.

## **DISCUSSION**

The Union initially argues that there is an applicable past practice that prohibited Mr. [REDACTED] transfer to avoid him working under his brother. For a past practice to be enforceable, there must be mutual acceptability, clarity and consistency, and repetition and longevity. See Mittenthal, "Past Practice and the Administration of Agreements", (Zack, *Arbitration in Practice*, ILR Press.)

President ██████ cited two cases where he notes that relatives were not permitted to work under each other's supervision. These are the ██████ and ██████ cases. Insofar as there are at least two cases where the Employer has admittedly enforced the nepotism policy, the evidence of a past practice, allowing use of nepotism, is absent. That is because a practice of allowing employees to work under the supervision of their relatives has not been consistent, insofar in at least two cases, the ██████ and ██████ cases, employees were not permitted to work under their relatives.

The Union further argues that there is a practice of requiring the higher ranking employee to move rather than the lower ranking employee. The Employer disputes that there is enough information about the ██████ and ██████ cases to conclude that the promoted employee was required to move rather than the lower ranking employee.

In any case, two events, under a policy that has been in effect since 1984, would not constitute a past practice. The required elements of longevity and repetition, and clarity and consistency have not been met. Also, as noted, the exact circumstances of the cases have not been proven.

There is insufficient proof of a binding past practice requiring the granting of the grievance.

The Union also argues that Article 26 was violated by the Employer's action. It is noted that bids include a service location and the nature of the equipment. The Union asserts that the Grievant was improperly, involuntarily transferred out of the service location where he had bid, and removed and the equipment that he had sought to utilize.

However, the Management Rights clause permits the Employer to transfer employees under appropriate circumstances. It says:

Article 12 - Management Rights

The UNION recognizes that management of the [REDACTED] of [REDACTED] County is vested exclusively in the Commission. As such, the Commission shall continue to have all rights customarily reserved to Management, including the right to hire, **transfer** and determine how many Employees it will employ or retain in various capacities.

\* \* \* \*

The nepotism policy has been in effect for many years, along with the transfer language of the Management Rights clause. This suggests that the parties understood that a transfer could be initiated to avoid a nepotism situation. Importantly, the transfer language of the Management Rights clause would permit the transfer in this case because it was reasonable.

Arbitrators have upheld the prohibition against relatives supervising other relatives. The thought is that such a situation could lead to charges of favoritism, based upon the perception of employees. It has not been suggested that it would be a good idea to allow a brother to supervise his brother, and arbitrators would uphold a prohibition against such a situation.

The [REDACTED] Commission's nepotism policy has been on the books for many years, without an apparent challenge by the Union. Mr. [REDACTED] was transferred to a similar position at the same pay, to avoid having him work under his brother's supervision. This would seem to be reasonable under the language of the policy.

As noted, an enforceable past practice of requiring the promoted employee to transfer rather than the lower ranking employee has not been established. Accordingly, it was reasonable to require the supervised employee, [REDACTED] to move rather than his brother. There was no showing that [REDACTED] lost any pay as the result of the transfer, and it was his choice to seek a lower position.



Finally, the Grievant was not grandfathered by the policy. Grandfathering only occurred for employees who were working at the time of the 1984 policy. There was no grandfathering under the present policy.

I understand that the Grievant would have preferred to continue working at his service center on his regular job. However, the policy of preventing brothers and other relatives from supervising each other is reasonable, and can be applied as it was in this case. Therefore, the grievance should be denied.

#### **AWARD**

For the foregoing reasons, the grievance is denied.

  
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Mark J. Glazer  
Arbitrator

July 9, 2010