

IN THE MATTER OF THE
VOLUNTARY ARBITRATION
BETWEEN

██████████ COUNTY,

Employer,

-and-

Log #: A22277-████-10
Local Ref.# UP 8 12 09
GR: Union Policy/Work Assignment

MICHIGAN AFSCME COUNCIL 25,
LOCAL ██████

Union.

ARBITRATION OPINION AND AWARD

APPEARANCES

██████████ ██████████ Analyst
Labor Relations Division
Department of Personnel/Human Resources
██████████ ██████████
██████████ ██████████ Floor
██████████, MI ██████████

William L. Harper, Staff Specialist
Michigan AFSCME Council 25
600 West Lafayette
Detroit, MI 48226

ISSUE

WAS A POSTING REQUIRED, AND IF SO, WHAT SHOULD BE THE REMEDY?

This case arose when two environmentalists named [REDACTED] and [REDACTED] were each assigned 20 hours a week to work on a Lead Grant. This was in addition to 20 hours they were working in the Food program. The Lead Grant was to last for two years. The Local, in its grievance of July 30, 2009 contends that there should have been a posting of the Lead job and shift under Articles 2, 17.01, and the Civil Service Rules to allow the senior employees to receive the job. The County contends that, "since these assignment changes were not made as result of a vacancy, there is no contractual bidding requirement under Article 17."

An arbitration hearing was held on April 14, 2010. Testifying for the Union were:

[REDACTED] Local President and [REDACTED] Steward. Testifying for the County were: [REDACTED] Acting Director and [REDACTED] Director. Comprehensive post-hearing briefs were submitted.

BACKGROUND

The County received a grant for a Lead program, which required 1.5 FTEs. [REDACTED] and [REDACTED] were assigned to the Lead program for 20 hours each along with another employee, who was already under the grant. The grant positions were not posted, leading to the present grievance.

[REDACTED], the Acting Director of Environmental Health, testified that she did not post the positions, because no vacancy existed. She added that in her department Environmentalists work in various programs, and she notes that the job description for the position includes other duties as assigned.

Ms. [REDACTED] said that the grant was time-specific, and that posting would have created difficulties. She selected the candidates herself and sent them for five days of training. The Director additionally stated that she has never previously posted for a change in assignments. She agrees that lead certification enhances the skill-set of the selected employees.

[REDACTED] the Local President, testified that in the 1995 to 2001 period, job and shift assignments in the lead program were posted. This was to allow high seniority employees to bid on the lead job. Ms. [REDACTED] says that in the past there have been other postings for jobs and shifts. She added that it was advantageous for employees to learn lead work in their quest for future advancement. Ms. [REDACTED] said that in 1996, there was an informal meeting to decide who would fill in for an absent employee, and that the decision was based upon seniority.

The Union contends that the decision on the lead assignment should also have been made based upon seniority. Ms. [REDACTED] that after 1996, there was one occasion where an informal posting process was used to fill an assignment, and the most senior employee received the position. She contends that an informal posting should have occurred in this matter, and not a formal one.

Ms. [REDACTED] says that under the Civil Service rules, a position can be full or part-time. She notes that the Civil Service rules are incorporated into the contract. The Local President asserts that there is a budgeted, unoccupied position at issue under the contract.

[REDACTED] the steward, testified that a grievance was filed because there was neither an informal nor a formal posting for the lead position. He added that informal postings used to occur all of the time, and that they last occurred in 2000, when septic and food were split-up.

[REDACTED] has been in Environmental Health for 12 years. She said that she is familiar with postings in the department, having transferred two times. Ms. [REDACTED] states that she

has never seen an informal posting for a position. She adds that there is not a specific position number for the lead job, which distinguishes it as a separate position within the department. Ms. [REDACTED] states that she has had different assignments, and that she has moved from inspecting food to handling rabies, without a posting. She adds that in the past, she received a 5 to 10 hour grant position, and that there was no posting. Further, Ms. [REDACTED] states that she was not the most senior person, when she received the grant hours. Ms. [REDACTED] contends that she has never seen a position, such as the one in this case, posted.

PERTINENT CONTRACT PROVISIONS

ARTICLE 17—FILLING OF VACANCIES

17.01 Vacancies

A vacancy shall be defined as a budgeted unoccupied position. A vacancy can be the result of the creation of a new position, a transfer, a resignation, a termination, a retirement or other means which leaves a budgeted position unoccupied...

Whenever a vacancy is filled, it shall be filled in accordance with this Article...

POSITION OF THE UNION

It is argued that seniority should have been a factor in the selection of employees for the Lead Program. The Union maintains, that at a minimum, there should have been an informal polling of employees, as in the past. A past practice of informal pollings is argued to have occurred, as evidenced by postings from 1997, 2000, 2001 and 2002.

The Union contends that the Civil Service Rules, which are incorporated into the contract, would require a posting of the assignment in this matter.

POSITION OF THE EMPLOYER

It is maintained that the Lead Grant assignment, was no different than other job assignments in the past, and did not require a posting under Article 17, insofar as a vacancy was not involved. The management rights clause, it is argued, permits the County to make the assignments in this case, without a posting.

The 20 hours a week of Lead Grant work does not represent a seniority position, according to the Employer. It is noted that there is no position number for the Lead Grant work. Further, the County denies that the Civil Service definitions would support the Union's case.

The Employer argues that in this case, existing employees received new work through the Lead Grant, but were not placed in an unoccupied position, which required a posting. The Union exhibits, which were introduced to show a practice, are argued to represent newly created positions and not the situation presented by this case.

A past practice is denied. It is maintained that a practice, that last allegedly occurred in 2000 as testified to by Union witnesses, would not be currently viable.

DISCUSSION

The focus of the Union's testimony, appears to be that there should have been an informal posting, as in the past, and that the senior employees should have been selected for the Lead Grant 20 hour positions. There is nothing in the contract requiring an informal posting. However, additions

to the contract can occur through the operation of a past practice.

For a past practice to be enforceable, there must be mutual acceptability of the practice, clarity and consistency of the practice, and longevity and repetition of the practice. See Mittenthal, "Past Practice and the Administration of Agreements" (*Arbitration in Practice*, BNA, 1983). Here, there is a disagreement as to whether a practice of informal postings occurred. Ms. [REDACTED] and Mr. [REDACTED] of the Union state that there were informal postings; however, Ms. [REDACTED] of the County states that she is unaware of a practice of informal postings. Therefore, clear evidence of mutual acceptability is absent.

More importantly, the last instance of the practice was in 2000 or 2001. As noted, for a practice to be enforceable, there must be longevity and repetition of the practice, and clarity and consistency. The Grievance was in 2009. The absence of examples of a practice for eight or nine years would not support the required elements of a past practice. As a result, a binding past practice, requiring an informal posting, and the selection of the senior applicant, was not established.

The next question is whether there is a violation of Article 17.01, with the understanding that the Union President focused her challenge on the lack of an informal posting pursuant to a past practice. This article defines a vacancy, which requires a posting, as, in part, "the result of the creation of a new position." At issue is the 20 hour Lead Grant job, which would last for two years.

I am unpersuaded that the time-limited Lead Grant work represents a new position, as opposed to a 20 hour a week to assignment, which had a duration of two years. The Lead Grant assignees were already in the position of environmentalist. There wasn't a new position when they undertook the lead grant work; rather, they undertook a new assignment as part of their work as an environmentalist. Consideration of the applicable Civil Service Rules also leads to the conclusion

that the assignments in this case would not require a posting.

Finally, the Union's assertion of a past practice of informal postings belies a requirement for formal postings under either Article 17 or the Civil Service Rules. If these provisions indeed require formal postings, it would be expected that the Union would have insisted on formal postings in the 90s and in 2000, rather than the informal ones it states occurred. Moreover, if formal postings were required, it would be expected that the Union would have grieved when Ms. [REDACTED] received grant assignments and other job changes in the past.

AWARD

For the foregoing reasons, the grievance is denied.



Mark J. Glazer, Arbitrator

August 17, 2010