

**IN THE MATTER OF ARBITRATION
BETWEEN**

AITKIN COUNTY

Employer,

and

**ARBITRATION DECISION
AND AWARD,**

(Contract Interpretation)

**AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
(ASFCME) Council No. 65, AFL-CIO**

Union.

Arbitrator:

Andrea Mitau Kircher

Date and Place of Hearing:

July 17, 2013
Aitkin County Offices
Aitkin, Minnesota

Date Record Closed:

September 4, 2013

Date of Award:

October 4, 2013

APPEARANCES

For the Union:

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For the Employer:

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INTRODUCTION

AFSCME Council 65 (“Union”) and the County of Aitkin (“Employer” or “County”) are signatories to a Collective Bargaining Agreement (“CBA” or “Contract”), Joint Exhibit 1, effective January 1, 2011 through December 31, 2012.

The Union filed a grievance on May 23, 2012 about the meaning of the Contract as applied to the Employer's decision to convert a full time job into two part-time jobs. The Employer denied the grievance and the parties eventually decided to arbitrate the unresolved dispute. Neither party claims a violation of procedural due process.

On July 17, 2013, I convened a hearing at the Aitkin County Courthouse, Aitkin, Minnesota. During the hearing, I accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file simultaneous briefs by mail and the Arbitrator received the last brief on September 4, 2013, whereupon the record closed.

ISSUES

1. Is Aitkin County's decision to hire two part-time Maintenance Custodians in the bargaining unit instead of one full-time Maintenance Custodian in the bargaining unit substantively arbitrable?
2. Did the Employer violate the Collective Bargaining Agreement when it posted an open full-time Maintenance Custodial position as two part-time Maintenance Custodial positions, then hired two part-time employees instead of a full-time employee in May 2012?

FACTS

Most of the facts underlying this case are not disputed:

The parties have a CBA that was in effect at the time this dispute arose, and no relevant language has changed in several years. Union Exhibit 1 and Joint Exhibit 1. Prior to 2010, the County employed a number of full-time Maintenance Custodians to clean its three buildings. When these custodians were absent due to vacation, illness or other reasons, the County filled in with substitute custodians. Sometimes it was hard to find substitute custodians when needed. They usually had other regular employment and

might be unavailable. Also, they might not know the job duties or understand potential safety issues involved. In 2010, one of the full-time custodians was promoted, creating a job opening. Patrick Wussow, the County Administrator, decided it might be more efficient to hire two permanent part-time employees to fill the open position, one who would work two nights a week and one who would work three nights. The County Board approved this decision, and Mr. Wussow advised then-union president, Cathy Buhlmann, of the change.¹

The same job description applies to both the part-time custodians and the full-time custodians. Part-time custodians are included in the bargaining unit, and they are paid in accordance with the same wage schedule attached as an appendix to the CBA. Joint Ex. 1. They accrue seniority and receive benefits *pro rata* in accordance with Articles 19, which provides, among other things, that eligibility for group insurance applies to part-time employees who work 30 hours or more per week. The part-time custodians were hired in jobs scheduled for less than 30 hours per week.

The County found the change made in 2010 from one full-time custodian to two permanent part-time custodians resulted in greater efficiency, less cost, and better coverage to complete the required work.² In March 2012 another full-time Maintenance Custodian, Mike Bauer, resigned. Human Resources Manager, Bobbie Danielson, then recommended to the County Board personnel committee by a memo dated April 25, 2012, that it approve another change, filling Mike Bauer's full time position with two additional permanent part-time employees. Ms. Danielson emailed AFSCME Staff Representative Ginger Thrasher about the recommendation April 30, 2012. The

¹ See further discussion at page 9 below.

² Testimony of H.R. Manager, Bobbie Danielson and County Administrator, Patrick Wussow.

personnel committee approved the change, and the Board as a whole approved it on May 1, 2012. Two part-time custodial positions were posted May 2, 2012 and filled effective June 12, 2012. The Union filed a timely grievance on May 23, 2012 alleging that the Employer violated Article 2, Recognition, “and all other applicable Articles of the Collective Bargaining Agreement when Employer unilaterally changed a fulltime custodial position to two part-time positions.” Union Ex. 2.

RELEVANT CONTRACT PROVISIONS

ARTICLE 1. PURPOSE

It is the intent and purpose of the parties hereto that this Agreement shall promote and ensure a spirit of confidence and cooperation between the Board and its employees, set forth the general policy of the Board on personnel and procedure, establish uniform and equitable rates of pay and hours of work and provide a method for the redress of any grievances the employees may have by virtue of this Agreement or otherwise.

ARTICLE 2 RECOGNITION

Section A. The Board hereby recognizes Local No. 667, AFSCME, AFL-CIO, as the exclusive bargaining agent of the employees of the Aitkin County Courthouse who are employed for more than sixty-seven (67) days per year and fourteen (14) hours per week or thirty-five percent (35%) of the normal week, whichever is the lesser, excluding employees of the Health & Human Services Department, County Extension Educators, supervisor and confidential employees.

...

ARTICLE 5 MANAGEMENT RIGHTS

Section A. The Employer retains the full, unrestricted right to operate and manage all manpower, facilities and equipment; to establish functions and programs;...to establish and modify organizational structure; to select direct and determine the number of personnel; to establish work schedules, and to perform any inherent managerial functions not specifically limited by this Agreement.

Section B. Any term or condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.

ARTICLE 6

HOURS OF WORK

Section A. Courthouse Employees:

The normal hours of work for all Courthouse employees shall be eight (8) hours per day and forty (40) hours per week... Flexible work schedules may be established with approval of the Department Head. Under management rights, the County Board, at any time, can define the working hours of departments.

ARTICLE 13

SENIORITY

...

Section C. ...In the event of a layoff, a reduction in force or the elimination of a position, a senior laid off employee may exert seniority preference over the least senior employee in any lateral or lower job classification...

...

ARTICLE 15

GRIEVANCE PROCEDURE

Section A. Definition of a Grievance: A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this Agreement.

UNION POSITION

The Union argues that the Employer violated the CBA when it changed a full-time custodial position into two part-time positions. The Union claims that in the past, the County recognized its duty to bargain with the Union about such a change, but failed to do so in 2012. The Union argues that as the exclusive representative of the bargaining unit and employees covered by it, the Union is entitled to negotiate with the County the wages, hours and working conditions of employees in the bargaining unit, and that includes negotiating over whether certain kinds of work will be done by full-time or by part-time employees. The Union believes that the County recognized the need to secure the consent of the Union to undertake such a change in 2010, when the County Administrator discussed the change with the Union President, and so, it was obligated to do so again when the same situation arose in 2012. Changing jobs from full-time to part-

time work is a serious erosion of bargaining unit work, the union argues, and such changes must be negotiated rather than instituted as a unilateral change.

EMPLOYER POSITION

The Employer claims that the question of whether it may unilaterally change a full-time bargaining unit position to two part-time positions is not substantively arbitrable; and it is not a grievance as defined by Article 15 of the CBA. The Employer argues that no clause cited by the Union prevents the Employer from changing one full-time position to two part-time positions. The Employer points out that the parties have only granted the arbitrator authority to interpret and apply express terms of the contract to disputes, not add new language to it. Because no contract clause prohibits the Employer from unilaterally making the change it did, the Employer requests that the arbitrator dismiss this grievance for lack of subject matter jurisdiction.

The Employer contends further that there is no provision in the CBA addressing conversion of a full-time bargaining unit position into two part-time bargaining unit positions, and it need not negotiate such a change with the Union. The Employer argues that it is reasonable to assume that it has authority to divide one full-time position into two part-time positions because of its managerial right to “operate and manage all manpower,...to establish and modify organizational structure,... to select, direct and determine the number of personnel; to establish work schedules, and to perform any inherent managerial functions not specifically limited by this Agreement.” Article 5. For these reasons, the Employer claims that the grievance must be denied.

DISCUSSION AND DECISION

Issue 1. Is the County's decision arbitrable?

The County argues that this case should be summarily dismissed on the grounds that the arbitrator has no authority to decide the merits of the Union's claim. The reasoning is that the Union's complaint has no basis in contract and thus, is not a matter the parties have agreed to arbitrate. The CBA defines a "grievance" as a disagreement about the interpretation or application of its specific terms and conditions. The County challenges the Union to name the contract provision the Union alleges that the County violated, and the Union cites several clauses, none of which explicitly addresses the Employer's authority to change one full-time position into two part-time positions. The threshold question is whether this dispute is one that can be resolved by an arbitrator.

Commentators on the issue of substantive arbitrability have concluded that there is a strong presumption in favor of substantive arbitrability, and doubts about arbitrability are to be resolved in favor of coverage.³ In this case the Union argues that the Employer's actions have violated Articles 1, 2, 6, and 13 C, (see above), claiming that the Employer has an obligation to seek the Union's consent before turning full-time positions into part-time positions. (Union's post-hearing brief at 5.) In light of the strong presumption in favor of arbitrability, there is a colorable argument that these provisions might prohibit the action taken by the Employer, sufficient to consider this matter a grievance. Changing a full time bargaining unit position eligible for insurance into two part-time positions, neither of which is eligible for insurance, and changing a position from a 40-hour a week position to part-time raises a legitimate question under the broad

³ *The Common Law of the Workplace*, National Academy of Arbitrators, Theodore J. St. Antoine, Ed., BNA, (1999) at 87. See, *How Arbitration Works*, Elkouri & Elkouri, BNA, 7th Ed. 2012 13.2.A.i.f.

umbrella of Article 1 (The purpose of the CBA is to “provide a method for the redress of any grievances the employees may have by virtue of this Agreement or otherwise” [emphasis provided]) or Article 6, Hours of Work, or Article 5, setting out the Employer’s reserved rights to make unilateral change. Because of the strong presumption referred to above, doubts are resolved in favor of arbitrability. If the Employer’s actions violate the Contract, an arbitrator has authority to redress the grievance.

Issue 2. Did the Employer violate the Collective Bargaining Agreement when it posted an open full-time Maintenance Custodial position as two part-time Maintenance Custodial positions, then hired two part-time employees instead of a full-time employee in May 2012?

In Article 5, the management rights clause, the parties agree that the County retains its authority to, “to operate and manage all manpower...establish and modify organizational structure,... to select direct and determine the number of personnel; to establish work schedules, and to perform any inherent managerial functions not specifically limited by this Agreement.” The disputed actions are squarely within the realm of management unless specifically prohibited or limited. No specific language in the CBA limits or prohibits the County from changing a full-time job into two part-time jobs. Nonetheless, the Union argues the County’s actions adversely impact the compensation of the members of the bargaining unit. This is true as a matter of logic, but standing alone, it does not establish a Contract violation. First, the full time position the Employer divided into two parts was vacant, so no individual employee was adversely impacted. Second, the parties previously bargained for benefits for part-time employees and had agreed upon the provisions of Article 19. So the impact of changing bargaining unit compensation by changing a full-time position to two part-time positions had already

been discussed and agreed upon. A part time employee who works less than 30 hours a week is entitled to certain pro-rata benefits, but not insurance. The County exercised its retained authority and did not violate the CBA by its disputed action. Although the Union raises legitimate arguments, as discussed below, it has failed to establish a violation of the CBA.

The Union argues, essentially, that based on an alleged past practice, the County owed it a duty to negotiate or confer before changing the custodial position to two part-time positions. The Union points to two events to support this argument:

- 1) In 2010, when the Employer changed a previous custodial position to part-time, Union witnesses Roy Egstad and Ginger Thrasher testified that they believed County Administrator Wussow contacted then Union President Buhlmann and asked for her agreement prior to making the change. Mr. Wussow denies that assertion, stating that he told Ms. Buhlmann about the change after it was made, not before. Because neither Mr. Egstad nor Ms. Thrasher were involved in that discussion, and because Ms. Buhlmann, although still employed by the County, did not testify, I conclude that Mr. Wussow's recollection is more likely correct. That is, Mr. Wussow did not seek the Union's consent, but merely advised the Union about the permanent part-time positions in 2010 after the decision was made. These facts do not support a conclusion that in the past, the Employer negotiated or conferred with the Union before it changed a full-time position to two part-time positions.

2) The second incident raised by the Union to try to establish a past practice concerns another employee, Marcia Hills. Ms. Hills worked full time for the County and had some major health issues. She explored the possibility of working part-time with Bobbie Danielson, the H.R. Director. Ms. Hills was concerned about her medical insurance if she changed to part-time work. In a memo from Ms. Danielson responding to Ms. Hills, dated August 2, 2010, Ms. Danielson stated in pertinent part:

Finally, if interested, the county is considering filling the recently vacated full-time Clerk position in the Assessor's office as a Job Share position (two part-time employees, 20-29 hours per week each)...Working part-time, there would be no health insurance benefits, however, we are open to discussing a higher rate of pay, around \$16.43/hour, as well as waiving the 3 month trial period, contingent upon agreement with the union where needed.

Union Exhibit 2 (emphasis provided.)

The Union argues that the last phrase means that the County understands its obligation to confer with the Union and obtain its agreement before changing a full-time position to two part-time ("Job Share") positions. But the Employer explains the underlined phrase in the memo as meaning that before increasing the rate of pay for the job and before waiving the trial period, it wished to discuss these topics with the Union. Changing the Assessor's job from full time to a job share position was discussed but the idea was dropped, so no negotiating or conferring took place about creating a Job Share position in the Assessor's office. This incident cannot be relied upon to create an obligation for the Employer to confer with the Union about dividing one full-time job into two part-time jobs.

The Union also argues that the Employer's actions violate Article 2, the recognition clause. The purpose of a recognition clause is to confirm that employees who

do a certain kind of work are to be covered by the bargaining unit and represented by the Union. The Union cites with approval “recognition clause” cases where grievances were sustained when the Employer assigned work to outside contractors and employees not in the bargaining unit. Although these cases are similar in that both seek to protect the work that Union members do, they differ in an important way. In these cases, bargaining unit work is being sent to outside contractors or supervisors, and the argument is that by doing so, the Employer violates the recognition clause. In this case, however, Article 2, defining the bargaining unit, recognizes that both the custodians from whom the work is transferred and the custodians to whom the work is transferred are in the bargaining unit and are represented by the Union. So unlike the cases cited, when the Employer transferred the work, it did not violate the Union’s Article 2 right to represent custodians.

The Union argues that by its actions the Employer violated Article 6, Section A that provides:

The normal hours of work for all Courthouse employees shall be eight (8) hours per day and forty (40) hours per week... Flexible work schedules may be established with approval of the Department Head. Under management rights, the County Board, at any time, can define the working hours of departments.”

Joint Exhibit 1.

This section provides that full-time employees will have forty hours of work per week. But the CBA also recognizes part-time employees and provides certain pro-rata benefits for them in Article 19. This undermines the argument that by creating part-time jobs the County violated Article 6. Additionally, Article 6 A. provides that the County can define the work hours of departments, which, it could be argued, it did in this matter. The Employer did not violate Article 6 by its actions.

CONCLUSION

The County's decision to convert a vacant full-time Maintenance Custodian position in the bargaining unit to two part-time Maintenance Custodian positions in the bargaining unit is arbitrable.

The Employer did not violate the Collective Bargaining Agreement when it converted an open full-time Maintenance Custodial position to two part-time Maintenance Custodial positions in May 2012.

AWARD

The Grievance is sustained as to arbitrability, but denied on the merits.

Dated: October 4, 2013

Andrea Mitau Kircher
Arbitrator