BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WOOD COUNTY COURTHOUSE EMPLOYEES LOCAL 2486, AFSCME, AFL-CIO	Case 116 No. 48387 MA-7586
and	
WOOD COUNTY	

Appearances:
Mr. Sam Froiland, District Representative, appearing on behalf of the Union.
Mr. Douglass F. Maurer, Personnel Director, appearing on behalf of the County

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-94 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve the grievance of Lola Wilson, concerning layoff and bumping.

The undersigned was appointed and held a hearing on February 18, 1993, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on March 31, 1993.

ISSUES:

The Union proposes the following:

1. Did the County violate the collective bargaining agreement when it did not allow Lola Wilson to bump from her position as a Home and Financial Specialist II to the positions of Social Services Aide III or II?

2. If so, what is the appropriate remedy?

The Employer's version is:

1. Is the grievance arbitrable?

2. Did the County violate the collective bargaining agreement when it did not allow Lola Wilson to bump from her position as a Home and Financial Specialist II to the position of Social Services Aide II?

3. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

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Article 4 - Promotions/Vacancies/New Positions

4.01 When vacancies occur or new positions are created, the Employer shall post a notice of such vacancy or new position on the bulletin board for a period of five (45) working days. The posting shall contain the title of the position, duties and wage. Any employee interested in the position shall apply in writing to the Personnel Department and shall be considered an applicant. The Employer shall give first consideration in filling the position, as outlined below, to an employee from within the department where the opening exists, if one applies, then employees from other departments within the bargaining unit before new personnel is hired. The Employer agrees to make promotions and to fill vacancies in compliance with the criteria contained in Section 4.02.

4.02 Qualifications for a job shall be determined on the basis of ability, efficiency, experience and physical fitness of the employee in accordance with standards established by the Employer. These standards shall be fair to all applicants and be applied uniformly in all departments. Where qualifications of the applicants are relatively equal, seniority shall be the determining factor.

In regard to any disputes which arise from this section, the burden of proof regarding candidate qualifications rests with the Employer.

Qualifications (i.e., ability, efficiency, experience and physical fitness) shall commensurate with job descriptions and work to be performed.

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4.04 An employee who is promoted or transferred (except in transfers when it is found an employee is not qualified for work in one department, but could possibly qualify in another department) shall be given a training and qualifying period to determine whether or not the employee can meet the job requirements. Such training and qualifying period to be dependent upon the classification into which the employee is transferred or promoted.

Group I	30 Days
Group II	45 Days
Group III	60 Days
Group IV or Above	75 Days

If at the end of this period, the employee fails to

qualify or the job is discontinued, the employee shall be allowed to return to his/her former position. If employees are placed in their former position, the Employer must be able to demonstrate through evaluations or other means that the employee could not satisfactorily perform in the new position. If at the end of this period, an employee does not like the requirements of the new job, such employee shall be allowed to return to his/her former position without loss of seniority.

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Article 6 - Layoffs

6.01 If the Employer finds it necessary to reduce the number of employees, employees will be laid off by department and aptitude, ability, and seniority shall be the basis for selecting those to be laid off. Where the first two (2) qualifications are equal and employees can perform the remaining work available, seniority shall become the determining factor.

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Article 15 - Work Day and Work Week

15.01 Courthouse, Social Services, and Unified Services: The normal work day for regular full-time employees shall be seven and three fourths (7-3/4) hours, 8 a.m. to 12 Noon and 1 p.m. to 4:45 p.m. The normal work week for regular full-time employees shall consist of five (5) work days, Monday through Friday, and shall normally be of thirty-eight and three-fourths (38-3/4) hours duration. This section shall not be construed as, and is not a guarantee of, any number of hours of work per day or per week.

The hours of work of individual employees may be varied by mutual agreement of the employee, the department head, and the Union. The Union will not unreasonably withhold mutual agreement to schedule variances.

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FACTS:

Initially, I note that the parties requested a bench decision on arbitrability; this Award merely confirms that the decision was that the grievance was found arbitrable, for reasons explained at the hearing.

Grievant Lola Wilson was employed for about 18 years in the classification of Homemaker before this classification was redefined as Home and Financial Specialist on January 1, 1992. Both classification names relate to a job in which the grievant represented "difficult" people to agencies and programs, also teaching child care, money management and household management to families in need, juveniles and the elderly. The grievant, at the time the

grievance arose, was the junior of two Home and Financial Specialists employed by the Department, and was the sole one assigned to the Wisconsin Rapids office.

On or about July 29, 1992, the grievant was handling a case load of eight clients, noticeably down from the usual ten to fifteen clients which make up a full-time workload. Her supervisor, Bruce Zanow, then informed her that as the junior Home and Financial Specialist in the Department's employ, her hours were being reduced due to lack of work. For the following three weeks, the grievant's hours were reduced from 38 3/4 hours per week to 20; for another three weeks her hours were 27 per week. After that, a rise in the case load caused her to be returned to full-time. The initial reduction in hours took effect August 3.

On August 5, the grievant requested to bump into the Social Services Aide position, identifying the positions held by Terri Conrad, Jackie Fuller and Donna Hahn as the positions she wished to be considered for. All three are junior to the grievant, but a typographical error in the grievant's letter identified Fuller and Hahn as Aide II's, where as their actual classification was the (higher) III level. Social Services Aide II's were, at the time, paid at the same rate as Home and Financial Specialist II's.

The grievant's request was denied, and the subsequent grievance alleged that the County had improperly failed to take into account the grievant's ability, aptitude and seniority. Deputy Director Gary Van Lysal replied to the grievance to the effect that "there are no other positions where work could be performed without additional training and orientation." Van Lysal maintained that the Department was not obligated to engage in additional training in a bumping situation.

During the grievant's testimony, she was questioned by the County on a list of items which the County considered key to an understanding of the Social Services Aide II position. The grievant gave correct answers to some of the questions, but missed others; Van Lysal testified that a Social Services Aide II would have answered all of these questions correctly. The grievant testified that after the County more recently moved toward a merging of positions and began to cross-train employes, she was used to train other employes in the "homemaker" aspects of what was now a single job classification of Social Worker Assistant. Van Lysal testified that the grievant was, in turn, being trained in aspects of the job formerly assigned to Social Service Aides. The parties presented performance evaluations for the grievant covering 1990 and 1991, and for Terri Wood [now Conrad] for 1989 and 1991-92. The grievant testified that her 1991 evaluation, which listed her in the "requires improvement" level (#2 of five levels) in five of 22 specified items, was excessively influenced by a single incident for which she received a three-day suspension in that year. The grievant did not grieve the suspension, but testified that she considered the ethics allegation involved to be settled as of the date at which a potential discharge was resolved, and that it was improper to emphasize it in her evaluation some months later. Her 1990 review, however, listed the grievant at the medium "3" level of five in all but one of ten items included in that form; the tenth was at the below-standard "2" level. Wood, meanwhile, was at the medium level or above in all items on both evaluations.

In a 1988 arbitration award, Arbitrator William C. Houlihan determined that the same contract language required the Employer to demonstrate that there was an inequality of aptitude and/or ability between two employes when the Employer wished to lay off the senior of the two. In the particular case then under discussion, Arbitrator Houlihan found that the Employer had met that burden, relying primarily on the relative evaluations of the employes involved.

In 1991 contract negotiations, the Union proposed to replace the applicable section of the Agreement with the following language:

> U4. Section 3.02, Seniority - Change as follows:
> Seniority, if aptitude and ability are equal, shall govern in promotions, transfers, filling vacancies, new jobs, layoffs, and recalls after layoffs.
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> U5. Section 3.04, Layoffs/Reductions in Work Force:
> In the event of a reduction in the work force, there shall be two (2) seniority groups - regular full-time employees and regular part-time employees, who shall be retained on the basis of the oldest in post of service in their respective groups if they are qualified to perform the available work.
> All regular part-time employees shall be laid off first.
> Employees on layoff shall be returned to work in reverse order of being laid off. No new employee shall be hired until all qualified employees on layoff are returned to work.
> Laid off employees shall have the right to bump employees within the bargaining unit who have less seniority, provided that laid off employees have the ability and skills to perform the job. The bumping process shall then continue until the least senior employees are laid off. Senior employees may elect to be laid off first.
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> . . .

The Union was not successful in this attempt, and the contract language remained as it was.

THE UNION'S POSITION:

The Union contends first that the reduction in hours constitutes a layoff under both generally accepted principles and the Employer's prior stipulation in the Houlihan award. The Union argues that even in the absence of specific bumping language, an implied right to bump can be inferred from the nature of the layoff language referring to remaining employes having the ability to do the work. The Union argues that if the County's argument that this was not a layoff as accepted, the fact that the Union negotiated in the second paragraph of Article 15, creating an obligation on the County's part to negotiate changes in hours of work of individual employes, would then control.

The Union argues that the County has taken no action to advise the grievant of any general performance problems, and notes that Van Lysal testified that his own supervisors had failed to do so. The Union argues that Van Lysal's testimony that it takes three to four months to train someone for the Social Services Aide work is undercut by the experience of Peg Oberbeck, an employe who was trained in a new job to an adequate level within a few weeks according to supervisor John Klonsinski's testimony. The Union cites Arbitrator Paul Prasow in Shore Medal Products Company 1/ as showing that there

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is a distinction between a training period and a breaking-in or familiarization period, finding in that case that a two or three day familiarization period was reasonable. The Union cites Arbitrator Prasow as stating that arbitrators ".... hold the view that the ability is essentially aptitude or natural capacity, faculties and talent". The Union further argues that there is a high degree of correlation between the grievant's Home and Financial Specialist work and the Social Services Aide work, justifying a conclusion that the grievant's seniority should prevail. The Union requests a remedy amounting to backpay for the hours lost before the grievant was returned to full-time status.

THE EMPLOYER'S POSITION

The Employer contends that the key language is whether "employees can perform the remaining work available" in Article 6.01. The Employer argues that the evidence as to the grievant's performance in her current job, her community efforts and her character were "diversionary tactics" by the Union which do not relate to the fundamental question of whether the grievant could perform the remaining work available. The Employer points to testimony by John Klonsinski to the effect that the grievant's answer to some basic questions posed of her at the hearing demonstrated a weakness of understanding of key elements of the Social Service Aide position. The Employer contends that to equate the grievant's level of understanding to the incumbent's would require allowing for a period of training not required by the collective bargaining agreement, and would be an imposition of the Department. The County notes that the Union proposed a change in contract language which would have that effect, but was not successful.

DISCUSSION:

First, though the Agreement does not explicitly refer to bumping, the contractual specification that "where the first two qualifications are equal and employees can perform the remaining work available, seniority shall become the determining factor" could impliedly allow for some kind of bumping. I agree with the Union that a reduction in hours of this type, at least under this contract, is clearly cognizable as a layoff. If there were any doubt, the fact that the language has remained unchanged since a prior arbitrator so ruled, in a case involving exactly the same type of hours reduction, would demonstrate that stability of interpretation is served by continuing the same view. I note also that the Employer somewhat misreads that Article by assuming that the key phrase requires that the employe under discussion can perform the remaining work available. The language, however, is in the plural, which may imply some reassignment of duties. But that has its limitations, for the reasons that follow.

It is clear that the Union has failed in an attempt to redefine the contractual standard as one focusing primarily on seniority. Under Article 6.01, aptitude and ability are the first two qualifications evaluated in a layoff or bumping situation, and seniority determines only where these two qualifications are equal. Like Arbitrator Houlihan before me, I agree with the Union that determinations of aptitude and ability are somewhat imprecise, and that the Employer as the party which made the decision has the obligation to establish that a noticeable difference exists.

But I note that the Houlihan award found aptitude and ability of the junior employe superior even where the senior employe was in the same classification, based on differences in work performance. Here, the differences in work performance between the grievant and Conrad are visible based on the evaluations, even if for purposes of argument I were to discount the suspension given the grievant in 1991. Furthermore, here the grievant clearly does not have the same training and experience as the employe she

wishes to "bump". While not all of the questions posed to the grievant by the County might be considered free from ambiguity, and while some of the grievant's answers were adequate in the circumstances, I will summarize my impression of her testimony by saying that at the conclusion of the grievant's testimony concerning the Social Services Aide job, I lacked confidence that the grievant could perform that job adequately within a short familiarization period, without constant supervision. This is distinct from saying that the grievant had performance deficiencies: The Employer is not obligated to show that the grievant was deficient in her position to maintain that she was not entitled to bump.

In a contract where aptitude and ability are both listed, Arbitrator Prasow's equation between these two terms is less persuasive than an interpretation which implies that "ability" has some independent meaning, and is not mere surplus language. To find that "ability" as used in Article 6.01 refers to present ability, and not potential at some unspecified future date, would answer that concern. In this connection I note that the training and qualifying period, specified in this Agreement at 30 to 75 days depending on the position involved, occurs under Article 4, a clause of the Agreement clearly tied to promotions, vacancies and transfers. There is no reference to layoffs or bumping anywhere in this clause, and general labor relations practice supports the distinction, because it is uncommon for employes who wish to bump another employe to be allowed a training or qualifying period of such length unless the contract involved specifically provides for one.

The Prasow award cited by the Union identifies good reasons for presuming that some short period of familiarization must be inferred in bumping situations; otherwise, a right to bump where ability is considered equal would be a nullity, since many jobs differ slightly. But Arbitrator Prasow's "two or possibly three days at most" seems an appropriate length of familiarization time. This distinguishes that concept from the clearly-delineated and much longer training time specified in Article 4. In this instance, I conclude that the Employer has sustained its burden of demonstrating that the differences between the grievant's Home and Financial Specialist position and the Social Services Aide position were sufficient, prior to the Department's reorganization, that a two-or three-day familiarization period would have still left the Employer having to provide substantial extra time in the form of close supervision in order to ensure that the grievant could perform this position adequately. This is particularly true where, as here, the position the grievant sought to bump into is one requiring some degree of knowledge of a large number of programs and state policies, using confusing terminology. 2/ I therefore conclude that the grievant's ability to perform the job was not equal to that of the incumbent.

For the foregoing reasons, and based on the record as a whole, it is my decision and

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2/ I note that the Employer has to some degree addressed the unlikelihood that bumping could have been successfully accomplished by other employes in similar situations in this Department, by beginning to cross-train employes under a single job classification.

AWARD

1. That the grievance is arbitrable.

2. That the County did not violate the collective bargaining agreement by denying Lola Wilson's request to bump a Social Services Aide.

3. That the grievance is denied.

Dated at Madison, Wisconsin this 19th day of May, 1993.

By _____
Christopher Honeyman, Arbitrator