BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between ADAMS COUNTY COURTHOUSE EMPLOYEES UNION LOCAL 1168 and ADAMS COUNTY	Case 74 No. 48966 MA-7776
In the Matter of the Arbitration of a Dispute Between ADAMS COUNTY COURTHOUSE EMPLOYEES UNION LOCAL 1168 and ADAMS COUNTY	Case 75 No. 48967 MA-7777

Appearances:

Mr. Sam Froiland, District Representative, appearing on behalf of the Union.

Mr. Michael J. McKenna, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1991-92 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve two grievances filed by Joanne Sumpter, one concerning bumping and the other concerning the hiring of an on-call employe after her working hours had been reduced.

The undersigned was appointed and held a hearing on May 5, 1993 in Friendship, Wisconsin, 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 July 8, 1993.

ISSUES:

The Union proposes the following:

1. Did the County violate the collective

bargaining agreement when it reduced the
hours of Joanne Sumpter's position

effective January 1, 1993 and then refused to allow her to bump into another position?

2. If so, what is the appropriate remedy?

3. Did the County violate the collective bargaining agreement by reducing the hours of a full-time employe and then hiring another person to perform work previously performed by that employe?

4. If so, what is the appropriate remedy?

The County defines the issues as follows:

1. Does the regular seasonal reduction of grievant's hours in a regular part-time status entitle her to bump into a different position pursuant to Article 2, Section 2.06, subsection (b) of the collective bargaining agreement?

2. Does the Employer's use of on-call employes in the absence of departmental employes violate Article 2, Section 2.07 of the collective bargaining agreement?

RELEVANT CONTRACTUAL PROVISIONS:

Article 2 - Probation and Seniority

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2.06 The employer recognizes the principle of seniority.

(a) Seniority of an employee shall be based upon the employee's last date of hire and shall not be lost or changed due to time off with pay, layoffs, or other unpaid time off authorized by the Employer. Written notice of layoff shall be provided to the employee at least ten (10) working days prior to the effective date of the layoff. Notice of recall shall be by certified mail, to the employee's last known address; such recall notice shall be given at least ten (10) working days prior to the date of recall. Date of recall notice shall be the date of first attempted delivery by

certified mail. It is the employee's responsibility to inform the employer of any address change.

(b) The Employer shall have the right to reduce the number of jobs in any classification for lack of work or other justifiable economic reasons. Employees whose jobs have been eliminated shall have the right to bump any junior employee in any equal or lower classification, providing they are qualified to do the junior employee's job. Such junior employees who have lost their position as the result of a bump shall have the right to exercise their seniority in the same manner as if their job had been eliminated. Employees who have lost their positions as the result of a bump or a reduction in the number of positions shall have the option to accept the layoff and may decline to exercise their bumping rights, if any. Laid off employees shall have recall rights as provided hereinafter.

. . .

<u>Article 14 - Hours of Work</u>

14.06 Part-time employees shall have a regular work schedule and be entitled to all benefits on a prorata basis, except that an employee working eighty-five (85) hours per month or more shall receive insurance (subject to approval of insurance carrier) coverage on the same basis as full-time employee.

<u>FACTS</u>:

Grievant Joanne Sumpter was first hired by the County as a Clerk Typist in the County Extension Office. After fourteen months' employment there, she bid for and received the position of part-time Secretary/Receptionist in the Planning and Zoning Office. Sumpter testified without contradiction that at the time, in 1990, she asked the then Director of the office what her hours would be, and was told that they would be five days a week in summer and four in winter. Sumpter testified that she specifically asked whether she would receive full benefits and was

specifically told she would receive benefits year-round, and told Director Rogers that she could not take the job without health benefits. Sumpter also discussed the matter with the incumbent employe in the position and confirmed that the job did carry benefits.

In the fall of 1992, two contradictory events occurred, according to undisputed evidence in the record. On the one hand, the department's new Director, Bob Youngman, caused a motion to be brought by the Planning and Zoning Committee to the County Board to increase Sumpter's position to full-time. This motion was defeated on November 10, 1992. During the same period, the Planning and Zoning Committee discussed the possible <u>reduction</u> of that position to a level at which it would no longer carry health benefits, i.e., below 85 hours per month. Also in November, the Committee directed Youngman to cut the hours of the position, and he did so by memo to the grievant. The cut was to take effect January 1, 1993.

The grievant testified that from January 1, 1993 through February, she was scheduled to work for 11 days per month, totalling 82.5 hours. Sumpter testified that she was scheduled to work Monday, Tuesday and Wednesday of each of the first three weeks of the month, Monday and Tuesday of the fourth week, and not at all if there was a fifth week. On December 14, 1992, however, the grievant formally requested by letter to Youngman to bump another employe. On the following day, by letter to the Director of the County's Unified Board, the grievant identified the Clerk/Receptionist position in the Unified Board Office as the position she wished to bump into. This request was denied on December 30, 1992 by Corporation Counsel McKenna, stating that "the language is clear that bumping is only available to employes whose jobs have been eliminated. Your position was not eliminated. It has been and continues to be a part-time position." The grievant then filed the first grievance which gave rise to this proceeding.

The Planning and Zoning Department also employs a full-time secretary, who in the fall of 1992 was known to be in need of surgery which would keep her from work for a period of weeks. Youngman asked the Planning and Zoning Committee for authority to hire an on-call employe to replace that secretary during her absence, and was granted that authority. But when the new on-call secretary was retained, Youngman testified, she required training, and therefore began to work prior to any absence of the full-time secretary. Starting in approximately the middle of February, the on-call secretary was scheduled to work every Thursday and Friday. The grievant then filed the second grievance in this proceeding. By March 1st, the Planning and Zoning Committee directed Youngman to return the grievant to her previously scheduled hours.

Both the grievant and, significantly, Youngman testified that the workload in the department had continuously increased in recent years. While both conceded that there was less work in the winter than in the summer, both averred that there was more work than had previously been the case, and that there was no reduction in the workload in winter compared to previous winters. Youngman testified to the effect that he had recommended against the hours cut on grounds of workload, and had been overruled. Youngman testified that the Committee's decision to cut the hours was "strictly a budgetary decision". 1/

Ed Szczesny, a County Board member and member of the Planning and Zoning Committee, testified that the Committee told Youngman to develop one or more on-call employes because they knew about the upcoming absence of the full-time secretary. He denied any

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1/ Transcript p. 44.

intention on the part of the Committee to use the on-call employe to deprive a Union employe of benefits, and stated that he personally just wanted to get the part-time position back to what it used to be. Szczesny stated that in his opinion the department had (under a previous director) been guilty of allowing employes to slack off on duty, and that he believed that not all of the work done by the clerical employes was of a nature such that it could not be allowed to build up during busy periods. Szczesny further stated that he felt that when Youngman proposed making the grievant's position full-time, Youngman was acting out of concern for the grievant rather than because the workload really justified it.

THE UNION'S POSITION:

The Union contends that the County's decision to cut the grievant's hours below the minimum required for health benefits was unfair because the grievant had a reasonable expectation of continuing to receive health benefits based on her pre-transfer interview, and because of the incongruity between Youngman's testimony as to the increase in workload, the simultaneous request for an increase in the position, and the Planning and Zoning Committee's decision to reduce the position's hours. The Union argues that this incongruity in particular demonstrates that the decision to limit the grievant's hours was made on a strictly budgetary basis. The Union contends that if the County is found to have the right to cut the hours, the grievant clearly should have been allowed to bump another employe, because the job as she understood it to be was eliminated and because prior arbitration decisions have upheld the treatment of both part- and full-time employes' working hours as a past practice, such that in two cited cases the employers involved were not permitted to cut those hours without prior bargaining with the union. The Union further argues that the use of the on-call employe in a scheduled fashion is a contradiction in terms and demonstrates that the workload continued to exist. The Union requests that the grievant be made whole for all wages and benefits lost.

THE EMPLOYER'S POSITION:

The Employer contends that bumping rights under Article 2.06(b) occur only when a position is "eliminated", and that the position here at issue continues to exist. The County cites an arbitration award stating that a reduction of an employe's work week from 40 to 20 hours per week due to lower demand for the work did not constitute a layoff or allow the employe to bump a less senior employe. The County points to Szczesny's testimony that the use of the on-call employe was not intended to deprive the grievant of her benefits, and that on-call employes have been used in other departments routinely to ensure that work flow continues

when employes are absent. The County argues that economic necessity mandated lower part-time hours for the grievant, and that the County has authority to employ an on-call employe. The County requests that both grievances be denied.

DISCUSSION:

On review of the record, I find that the issues in this matter can be most clearly stated as follows:

1. Did the County violate the collective bargaining agreement when it reduced the hours of Joanne Sumpter's position effective January 1, 1993?

2. Did the County violate the collective bargaining agreement when it refused to allow the grievant to bump into another position?

3. Did the County violate the collective bargaining agreement when it hired an employe described as on-call to perform work in the grievant's department?

4. If the answer to any of the above is yes, what remedy is appropriate?

I am prepared to accept, based on this record, that the Employer did not originally intend to engage in a subterfuge when it first contemplated hiring the on-call employe. Both Youngman's and Szczesny's testimony agree that the fundamental purpose of that employe's hire was to provide coverage for the full-time secretary's work when she became unavailable. There is some logic in the Employer's contention that before this state of affairs came to pass, it was desirable to give the on-call employe some familiarization with the work of the department. But the fact that the employe in question was hired to work two days a week on days when the grievant's employment had just been eliminated strongly suggests that the overall workload did in fact justify the presence of that employe. This combines with the grievant's testimony, but particularly with Director Youngman's testimony, to the effect that there was not in fact any lack of work. Meanwhile, there is no evidence that the Employer even considered raising the grievant's hours to the equivalent of full-time for the purpose of filling in the time that would be needed to cover for the absent full-timer. There is nothing in the record to demonstrate that the County could not have given the grievant first priority for additional work, and hired the on-call employe later for training by the grievant if necessary.

The consequence is that I find that the Union prevails on the first issue as stated above, because of the clear language of Article 2.06(b). In stating that "the Employer shall have the right to reduce the number of jobs in any classification for lack of work or other justifiable economic reasons" the County has agreed to be bound by a standard of evaluation for such decisions that requires "justifiable economic reasons". While cases go both ways as to whether reduction of hours is a layoff per se, the concept of reduction in the number of jobs must inherently include some recognition of reduction in the extent of those jobs, or else an employer signatory to this type of language could bypass the restrictions of the collective bargaining agreement by such tactics as reducing an employe from 40 hours per week to one hour per week. And while I agree with the County's contention that the grievant's job was not "eliminated", that standard applies to the right to bump, not to the question of whether the reduction was for "justifiable economic reasons" in the first place.

Here, the evidence demonstrates that there was work for a part-time secretary and for an "on-call" secretary -- scheduled for two days per week, and thus effectively a regular part-time employe. Thus for the period of time covered by the grievance, before the Employer thought better of it, the net effect was to replace the grievant with another employe for part of her time. The express purpose of making the initial reduction, conceded by the County and visible in the minutes of the Planning and Zoning Committee which are in the record, was to save the cost of employe

benefits. While the County may have economic reasons for cutting employes' hours to the extent that such benefits are saved, that does not justify the chain of events which occurred here. Youngman's assessment as Director of the quantum of work which needed to be performed in this department is more persuasive than Szczesny's inevitably more casual and second-hand assessment. While the County has every right to decide that the public interest will be served if certain work is not performed, hiring the on-call employe to work as a scheduled employe in the grievant's absence demonstrates that there was at least sufficient work to justify maintenance of the grievant's original hours. And where a contract guarantees to employes a certain level of benefits, it is clearly not a "justifiable" economic reason when the employer cuts an employe's hours for the purpose of saving money by getting below the cutoff for fringe benefits, but then awards those hours to an employe not in the bargaining unit. Economic the Employer's reasons may be, but justifiable within the terms of Article 2.06(b) they were not.

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

AWARD

1. That the County violated Article 2.06(b) of the collective bargaining agreement by reducing the grievant's hours without justifiable economic reasons.

2. That as remedy, the Employer shall, forthwith upon receipt of a copy of this Award, make the grievant whole for losses suffered during the period her hours were cut, by payment to her of a sum of money equal to the wages and benefits lost as a result of such reduction. Said amounts shall be calculated so as to include out-of-pocket medical expenses suffered by the grievant during said period, for which she timely provides evidence in writing to the Employer following receipt of a copy of this Award.

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3. That the remaining issues are moot.

2/ The grievant testified that during the two months she was ineligible for health insurance, she had accumulated approximately $150 per month in out-of-pocket medical expenses which would have been reimbursed by the policy. The standard remedy in a case of improper withholding of health insurance is that the employer involved stands in the shoes of the insurance company and is liable for the losses that would have been covered by the insurance. Moreover, in this instance it appears both more practicable and less costly for the Employer to repay those costs directly rather than to try to seek to reinstate the grievant's eligibility for health insurance retroactively.

4. That the undersigned reserves jurisdiction for at least sixty (60) days from the date of this Award, in the event of a dispute concerning the application of this Award.

Dated at Madison, Wisconsin this 9th day of September, 1993.

By Christopher Honeyman /s/

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