

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 LOCAL 2717, AFSCME, AFL-CIO : Case 96  
 : No. 48918  
 and : MA-7760  
 :  
 JACKSON COUNTY :  
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Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40,  
 appearing on behalf of the Union.  
Mr. James Michael DeGracie, Corporation Counsel/Personnel Director,  
 Jackson County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to resolve a grievance regarding the rights of an employee removed from her job by an elected official. A hearing was held in Black River Falls on June 30, 1993, at which time the parties were given full opportunity to present their evidence and arguments. The parties completed filing briefs on August 30, 1993.

ISSUE:

The issue to be decided is this:

Did the County violate the collective bargaining agreement by refusing to allow the Grievant, Gloria Everson, the opportunity to bump a less senior employee when she was removed from the deputy register of deeds position? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE 3 - MANAGEMENT RIGHTS

SECTION 1. The County possesses the sole right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the provisions of this contract. These rights, which are normally exercised by the Employer, include, but are not limited to, the following:

- A. To direct all operations of County government.
- B. To establish reasonable work rules and reasonable schedules of work.

- C. To hire, promote, transfer, schedule and assign employees in positions within the County.
- D. To suspend, demote, discharge and take other disciplinary action against employees for just cause.
- E. To relieve employees of their duties because of lack of work or for other legitimate reasons.
- F. To maintain efficiency of County government operations entrusted to it.
- G. To introduce new or improved methods or facilities.
- H. To change existing methods or facilities.
- I. To determine the kinds and amounts of services to be performed as pertains to County operations and the number of positions and kinds of classifications to perform such services.
- J. To contract out for goods and services, except that such actions shall not result in the lay-off of employees in the bargaining unit.
- K. To determine the methods, means and personnel by which such operations are to be conducted.
- L. To take necessary actions to carry out the functions of the County in situations of emergency.
- M. To take necessary action to comply with the state or federal law.

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ARTICLE 7 - SENIORITY - PROBATION - LAYOFF

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SECTION 2. Loss of Seniority: An employee shall lose all seniority rights and his/her employment relationship shall be considered terminated for any of the following reasons:

1. If he/she quits;
2. If he/she is discharged;
3. If he/she is absent from work in excess of three consecutive work days without notifying the County, unless he/she has a valid excuse. The employee is expected to report his absence promptly;
4. If he/she is laid off for a period of more than two (2) years;
5. If he/she retires or is retired;
6. If he/she fails to report to work upon termination of a leave of absence unless emergency circumstances prevent him/her from doing so. If an emergency circumstance exists, the employee shall notify the employer of the emergency circumstance within three (3) work days of the termination of a leave of absence.

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SECTION 5. Layoff Procedure: The County shall have the sole right to determine the position or positions to be eliminated. The selection of employees to be laid off shall be made according to the following

procedures: volunteers shall be considered first, then temporary employees, then probationary employees in the classification and then the employee with the least seniority within the classification containing the positions being eliminated providing the remaining employees are qualified to perform the remaining work.

An employee being laid off shall be afforded the opportunity to replace an employee with less seniority in a pay grade equal to or less than the pay grade of the affected position. However, no employee may bump into any of the following positions: Deputy Clerk of Court, Deputy Register of Deeds, Deputy Treasurer and the Deputy County Clerk. Part-time employees may not bump a full time employee.

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ARTICLE 8 - JOB POSTING

SECTION 1. When it becomes necessary to fill vacancies or new positions within the bargaining unit, the Employer will post such vacancies or new positions for five (5) working days, during which time interested employees may apply by signing the posting. Job postings shall state the job to be filled, qualifications for the job and the rate of pay. Posted positions shall be awarded as promptly as possible following a posting to be qualified applicant. Seniority and qualifications will be considered. When the qualifications of two or more bargaining unit employees are relatively equal, seniority shall be the determining factor. Regular employee applicants within the bargaining unit shall be considered first in filling vacancies for new positions. Vacancies in the position of Deputy Clerk of Court, Deputy Register of Deeds, Deputy Treasurer and Deputy County Clerk shall be posted according to the above provisions, but may be filled at the discretion of the elected official in the department without adherence to the selection procedures contained above or the recall procedures in Article 7, Section 6.

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EXHIBIT A  
CLASSIFICATIONS

<u>GRADE</u>	<u>(POSITION TITLES)</u>
1	Maintenance Worker I
2	Account Clerk I Secretary I Maintenance Leadworker
3	Account Clerk II Deputy Clerk of Courts Deputy County Clerk Deputy Register of Deeds Deputy Treasurer

- Tax Lister
- Administrative Assistant I
- Forestry Technician I
- Secretary II
  
- 4           Administrative Assistant II
  
- 5           Computer Systems Operator
- Register in Probate/Probate Registrar
- Legal Secretary

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BACKGROUND:

This grievance is about the rights of an employee to a position once that employee has been removed by an elected official from an appointed position, pursuant to Crawford County v. WERC, No. 92-0906, (Ct.App.IV, 1993). The Crawford County case held that the Clerk of Courts and Register of Deeds have the statutory power to appoint and discharge their deputies.

Gloria Everson became a full time employee of the County on June 5, 1989. She had worked as a part-time secretary for the previous five years. When Everson became full time, she was in a Grade 2 position until she became the Deputy Register of Deeds, which is a Grade 3 position. When former Register of Deeds Lyle Larson died, his Deputy Register of Deeds was Kenlynn McCormick. Mary Woods was appointed as Register of Deeds to succeed Larson, and she appointed Everson to the deputy position, displacing McCormick. Everson remained as Deputy Register of Deeds between March 17, 1992 and January 4, 1993. In November of 1992, Shari Marg was elected Register of Deeds. Former Corporation Counsel/Personnel Director Kerry Sullivan-Flock notified Everson that she could not continue in her position as Deputy Register of Deeds. Sullivan-Flock sent the following letter to Everson on November 16, 1992:

This letter will serve to confirm our conversation on Friday, November 13, 1992. The newly elected Register of Deeds has advised me that she does not wish to deputize you; you will therefore not be able to act as Deputy Register of Deeds under her. As you know, you do have certain rights under the union contract. You do have the right to bump into any position that is currently a Grade 3 and which is currently occupied by an individual with less seniority than you. My office can provide you with a list of these positions. Ms. Marg has advised that she wishes to deputize Bonnie Comstock, which will leave the Auxiliary Secretary position vacant as of January 4, 1993. You are in no way obligated to move to this position; however, it is an option.

You have until January 3, 1993 to advise my office what your intentions are.

Everson planned on taking the vacant Auxiliary Secretary position until she learned through a newspaper report in December of 1992 that a County committee was considering cutting that position to a part-time job. So Everson decided to bump another employee in order to keep a full-time position. Her position as Deputy Register of Deeds was a Grade 3 position. On December 21, 1992, Everson notified Sullivan-Flock that she decided to bump Genell Severson, who was a Secretary II (and Grade 3) in the District Attorney's office.

However, Sullivan-Flock notified Everson that the Personnel Committee

decided that she should take the vacant position of Auxiliary Secretary, which was vacant because the employee holding that job, Bonnie Comstock, became the new Deputy Register of Deeds. The Auxiliary Secretary position was a Grade 2 level. Everson filed a grievance on December 14, 1992, seeking to retain the position as Deputy Register of Deeds. 1/ On January 4, 1993, Sullivan-Flock responded to Everson's grievance as follows:

Please be advised that the Personnel Committee, at their meeting on January 4, 1993, did discuss the situation with the new Register of Deeds and deputization. The Personnel Committee has decided to support the newly elected Register of Deeds in her choice to deputize Bonnie Comstock. We will process the grievance accordingly pursuant to the collective bargaining agreement.

In the interim, while the grievance is being processed, the Committee has determined that it is not in the best interests of any county office that any position bumping take place. Therefore, they are opting to exercise their management rights prescribed under Article 3, Section 1 of the Collective Bargaining Agreement and are indicating to you that you must accept the vacant position of Auxiliary Secretary. This is effective January 4, 1993. This is necessary for the effective management control and efficient staffing of the courthouse offices. The committee realizes that this situation will need to be addressed again at such time as an arbitration is reached that is not favorable to the county. In the meantime, your cooperation is appreciated.

On January 12, 1993, the Union filed a class action grievance to get the County to recognize bumping rights pursuant to Article 7. Everson is currently a Secretary I in the U-W extension office, a Grade 2 position.

On January 14, 1993, Sullivan-Flock responded to the grievance and advised the Union that it was the County's position that Article 7 of the collective bargaining agreement had no application due to the fact that there had been no "lay-off" and Article 7 would only apply when a lay-off occurred.

The parties stipulated that a bumping procedure may have an adverse impact on the County's operations that can affect more than one person in more than one office. For example, if the Deputy Treasurer were to bump an employee with less seniority, it is possible that almost every employee in the bargaining unit could be affected by continuous bumping. This could also happen every election.

#### THE PARTIES' POSITIONS:

The Union argues that the County reneged on its promise as first given by Sullivan-Flock, to the detriment of Everson, by requiring her to work in a Grade 2 position when she was promised that she could bump into a Grade 3 position. While the Union believes Sullivan-Flock's letter of November 16,

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1/ This grievance was eventually withdrawn by the Union.

1992, should be dispositive of the issue, it also wants an interpretation based on contractual language, as the issue is likely to arise again.

The Union asserts that the County's position violates Article 8, which calls for vacancies to be posted and filled according to seniority and qualifications. The County cannot assign employees into vacant positions, such as the vacant one here, due to the rights of more senior employees who may want the vacant position. Moreover, the County's requirement that Everson take the Auxiliary Secretary position resulted in a demotion for Everson. Signing a posting is optional under Article 8, and if Everson refused to sign a posting for the Auxiliary Secretary position, the solution becomes a lay off in which layoff procedures apply.

The Union further contends that Article 7, Section 5, was violated, as Everson was eliminated from the position of Deputy Register of Deeds. While the newly appointed Deputy also came from the bargaining unit, the Union points out that if the Register of Deeds selected someone who was not a bargaining unit member, the affected employee would be unemployed while less senior employees are working. This would result in a constructive discharge in violation of the just cause standard.

The County asserts that the collective bargaining agreement addresses the issue of bumping only when there is a layoff. The County argues that no lay off occurred here, where Everson lost no work as a result of the decision of the newly elected Register of Deeds to appoint a different deputy. A lay off in the bargaining agreement is contemplated when a position is eliminated, under Article 7, Section 5.

The County contends that since Everson was not laid off, she had no right to bump an employee with less seniority in a pay grade equal to her's or less. The County was within its management rights in offering her the position of Auxiliary Secretary. The County notes that the Wisconsin Supreme Court has stated that a layoff implies a temporary separation from employment rather than a permanent termination of employment. While the Union contends that a reduction in a pay grade is a constructive layoff, the contract only contemplates a layoff when a position is eliminated.

The County points out that arbitrators have found that teachers whose full-time jobs were reduced to part-time jobs were not laid off, due to the distinction that goes with separation from employment in a layoff situation. The County argues that it was within its management rights in this case and asks that the grievance be denied.

#### DISCUSSION:

The position of Deputy Register of Deeds, as well as the other deputy positions, is included in the bargaining unit. Accordingly, the employee holding a deputy position retains certain rights accorded to bargaining unit members. The parties have recognized that elected officials have certain powers pertaining to these deputy positions, and dealt with that in their collective bargaining agreement.

Under Article 3, Section M, of the management rights clause, the County is obligated to comply with state law. It has done this by complying with an elected official's decision to appoint her own deputy, as state law requires (Crawford County, as noted previously). Under Section E of Article 3, the County may relieve employees of their duties because of lack of work or for other legitimate reasons. Everson was relieved of her duties for a legitimate reason -- the newly elected official had the power to name her own deputy, per Crawford County.

The parties recognized the statutory powers of the elected officials and

specifically stated in the bargaining agreement that bargaining unit members could not bump the deputies: ". . .no employee may bump into any of the following positions: Deputy Clerk of Court, Deputy Register of Deeds, Deputy Treasurer and the Deputy County Clerk." If the parties had intended that deputies who were not reappointed would not have the right to bump other bargaining unit members, they could have stated so.

When Everson was told that she could not retain the position of Deputy Register of Deeds because the new Register of Deeds was picking a different person as deputy, Everson was being laid off from the position of Deputy Register of Deeds. Although the position remained in effect and another person was appointed to it, Everson's status would have to be considered to be laid off. The other choice is that she was discharged, and the County does not claim that she was discharged. If the County had no openings in the bargaining unit at the time of Everson's displacement from her job, she would have to be accorded lay off status.

Therefore, Everson has the rights under the bargaining agreement accorded to an employee who is laid off. She retained her seniority in the bargaining unit, because under Article 7, Section 2, she would lose seniority rights for one of six reasons. None of the six reasons for loss of seniority applies in this case. Everson did not quit, she was not discharged, she was not absent without notice, she was not laid off more than two years, she did not retire, she did not fail to report to work following a leave of absence.

The County simply wishes to make things simple and efficient. The County had an opening, and thought it would be least disruptive to place Everson in that opening. The Union agrees that a bumping procedure can be very disruptive to many employees and many County offices. However, the County cannot place Everson in any position it wishes, which could result in a demotion, because of Article 7:

An employee being laid off shall be afforded the opportunity to replace an employee with less seniority in a pay grade equal to or less than the pay grade of the affected position.

If the County had an opening in a Grade 1 position, it would be violating the language regarding an pay grade equal to or less than the pay grade of the affected position. The "affected position" was the position from which Everson was removed, the Deputy Register of Deeds. Since this was a Grade 3 position, Everson was entitled under Article 7 to bump into a Grade 3 or lesser position if she had more seniority than the person holding the position. The parties recognized in their contract that an employee could not bump into the four deputy positions; they did not provide for the converse. This reinforces the interpretation that they intended the displaced deputies to be accorded the same status as any other employee being laid off and to be accorded the same rights.

Somewhat troubling is the fact that the bumping procedure allows for the following inequity. Everson held a Grade 2 position before being appointed the Deputy Register of Deeds. She did not attain a Grade 3 position through a posting or by qualifying either through her abilities or seniority. Everson got a Grade 3 position by the appointment of an elected official. She now has

the opportunity, via Article 7, to bump a Grade 3 employee even though she had not attained such a grade before her appointment. The inequity might be worse if an elected official took the opportunity to elevate lower grade employees through short term appointments and then removed them, allowing them to bump higher grade employees. However, the language calls for the bumping into the pay grade or less of the "affected position," and the affected position is the deputy Grade 3 position. If the parties wish to rectify the potential inequity in the future, they may do so by bargaining different language.



AWARD

The grievance is sustained.

The County violated the collective bargaining agreement by refusing to allow the Grievant, Gloria Everson, the opportunity to bump a less senior employee when she was removed from the Deputy Register of Deeds position.

The County is ordered to give Everson the opportunity to bump a less senior employee in a pay grade equal to or less than the pay grade of the Deputy Register of Deeds. The County is further ordered to make Everson whole by paying to her any monetary losses suffered due to the refusal to allow her to bump another employee.  
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The Arbitrator will retain jurisdiction over this matter until January 14, 1994, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered.

Signed this 10th day of November, 1993, at Elkhorn, Wisconsin.

By Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator

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2/ At the hearing, Everson expressed satisfaction with the Grade 2 position she was holding and appeared to have no desire to bump someone else. If Everson chooses not to bump into a Grade 3 position, she is not entitled to any back pay for the difference between a Grade 3 and a Grade 2 position.