BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TAYLOR COUNTY COURTHOUSE &
HUMAN SERVICES DEPARTMENT EMPLOYEES
LOCAL 3679, AFSCME, AFL-CIO

and

TAYLOR COUNTY

Case 80
No. 57221
MA-10554

(Ed Lukaszewicz Grievance)

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, for Taylor County Courthouse & Human Services Department Employees, Local 3679, AFSCME, AFL-CIO, referred to below as the Union.

Mr. John J. Prentice, Prentice & Phillips, Attorneys at Law, 611 North Broadway, Suite 220, Milwaukee, Wisconsin 53202-5004, and **Mr. James M. Arkens**, Human Resources Manager, Taylor County, 224 South Second Street, Medford, Wisconsin 54451-1899, for Taylor County, referred to below as the Employer, or as the County.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute filed on behalf of Ed Lukaszewicz, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 31, 1999, in Medford, Wisconsin. The hearing was not transcribed. The parties filed briefs and a waiver of reply briefs by July 6, 1999. In a fax filed with the Commission on July 7, 1999, the County requested that "the Arbitrator strike" certain portions of the Union's reply brief. The

Union responded in a letter filed with the Commission on July 12, 1999. The County ultimately withdrew its request, and I confirmed that the record was closed in a letter sent to the parties on July 12, 1999.

ISSUES

The parties stipulated the following issues for decision:

Was the grievance timely filed?

Did the Employer violate the collective bargaining agreement and the mutually agreed upon departure from the collective bargaining agreement?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

Article 6 – Grievance Procedure and Arbitration

Section 1 – Grievance: A grievance is defined to be a controversy between the Union and the Employer or between any employee or employees and the Employer as to a matter involving the interpretation or application of this Agreement.

Section 2 – Grievance:

Step 1: The employee shall take up the grievance in writing with the employee's immediate supervisor within ten (10) days of the grievance. The supervisor shall attempt to make a mutually satisfactory adjustment and, in any event, shall be required to give written answer within ten (10) days of when written notice was received by the supervisor, a copy of which will be sent to the Union and the county Personnel Committee.

. . .

Section 4 – Time:

The time limits set forth in the foregoing steps may be extended by mutual agreement, in writing. All reference to days in this article shall mean "working days".

Article 7 – Seniority

Seniority is defined as the length of time an employee has been hired as a regular full time or regular part-time employee, computed from his/her most recent hiring date. . . .

Loss of Seniority: Seniority and the employment relationship shall be broken and terminated if an employee:

A. Quits
B. Is discharged
C. Is on leave of absence for personal or health reasons and accepts other regular employment without permission.
D. Is retired
E. Fails to notify the County within one (1) week of receipt of notice of recall, sent certified mail, return-receipt-requested, and does not report for work within two (2) weeks of receipt of such notice, unless an extension is requested in writing and approved by the personnel coordinator.

. . .

Article 29 – Amendments

This Agreement may be amended any time during its life upon the mutual consent of the parties. Any amendment supplemental to this Agreement shall not be binding upon either party unless executed in writing by the authorized representatives of the Union and Employer.

BACKGROUND

The Grievant signed the grievance and filed it on December 4, 1998. The grievance form states the "Circumstances of Facts" thus:

> Employee worked for nearly ten years for County. Resigned on 9/25/98. After 10 days he called sheriff to ask to return to work. Sheriff, Personnel Director, Union Official (Vice President) agreed to him returning to work as if his service was uninterrupted. After resignation (Retirement) of Personnel Director, County withdrew from agreement and placed Grievant at 6-month seniority status.

The form states the "Article or Section of contract which was violated if any" thus:

> Contract was violated because grievant took prompt and timely steps to rescind his resignation from employment. He relied on representations that had been made by legally appropriate representatives of both the County and Union that his seniority would be intact. He made decisions based on those representations. Now they have refused to honor their agreement.

The form states the desired remedy thus: "Make grievant whole for all losses incurred as a result of this violation."

The bulk of the factual background is not in dispute. The Grievant worked for the County as a Jailer/Dispatcher from April of 1989 until his resignation in September of 1998 (references to dates are to 1998 unless otherwise noted). In a form signed by the Grievant on September 17, he noted that "I plan on terminating my employment with Taylor County, effective 9-25 1998." The form notes September 24 was to be "(m)y last day of work." The form also includes the following entries:

Health Insurance	Delete/continue	Effective date _____
Dental Insurance	Delete/continue	Effective date _____
Life Insurance	Delete/continue	Effective date _____
Income Insurance	Delete/continue	

You are eligible to continue your Health & Dental Insurance for _____.
Life Insurance terminates 30 days after employment termination.

The "Income Insurance" line was handwritten on the form submitted by the Grievant. The "Delete" entry was circled for Health, Dental and Income Insurance on the form submitted by the Grievant. There was no selection for "Delete/continue" for the Life Insurance line. In the space following the "Effective date" entry for Health and Dental Insurance, appears a "10-01-98" entry. In the same blank for Life insurance, a handwritten notation of "10-01-98" has been deleted and replaced by a handwritten notation "11-01-98." Immediately below that notation, apparently on the line for Income Insurance, appears the notation "10-01-98." The then-incumbent Sheriff, William K. Breneman, signed a payroll form, dated September 22, 1998, which states the Grievant's termination as a "Resignation" effective September 25, 1998.

The County Board's Personnel Committee met on September 22, and among other business, approved additional Jailer/Dispatcher positions. The minutes of that meeting state:

> Bruce Daniels submitted information to support a Sheriff's Department request for an additional 4.5 Jailer/Dispatchers. Included was information showing the growth in jail confinements and the ratio of Jailers to inmates. Daniels

> emphasized that with jail staff spread so thin, and with the overcrowding in the jail, the County is in a precarious liability position, as well as not meeting state jail requirements for occupancy and safety, both for inmates and jail staff. . . . It was noted that the Law Enforcement Committee had approved the request. The motion was unanimously approved. The request will be considered by the Finance Committee.

Also at this meeting, James Arkens was introduced to the Personnel Committee as the County's new Personnel Director. His predecessor, Charles Rude, also appeared at the meeting. Rude had resigned, but remained with the County on a day-to-day basis from January through September as the County recruited, then oriented, his successor.

The Grievant resigned to move to Arizona. He moved, but found that the move provoked problems within his family. He decided the move might prove harmful to his family, and called Breneman on the morning of October 5 to determine if he could rescind his resignation. Breneman informed the Grievant that the County was having difficulty filling Jailer/Dispatcher positions, and he would be willing to take him back but would have to check further to determine if and how it would be possible to do so.

Breneman testified that he considered the Grievant a good employe, and that he was having to fill Jailer/Dispatcher vacancies through the use of overtime. Thus, he believed taking the Grievant back would be of benefit to the County and to the Grievant. After receiving the Grievant's call, he went with his Chief Deputy, Bruce Daniels, to discuss the matter with Rude. Arkens was at a conference that day. Breneman testified that Rude agreed that he had no objection to the County taking the Grievant back as if he had not resigned, but that Breneman should discuss the matter with the Union. Breneman was not able to locate the Union's President, but did contact the Union's Vice President, Carol Roush, who stated no objection to rehiring the Grievant as if he had not left. During the afternoon of October 5, Breneman phoned the Grievant in Arizona to advise him that he could return to County employment as if he had never resigned. The Grievant responded he would leave as soon as possible.

The Grievant made arrangements to leave Arizona and return to Wisconsin. He bought airline tickets for his family, contracted with movers and lost a number of deposits he had to make to arrange a residence and utilities in Arizona. The Grievant testified that his next-door neighbor in Arizona had previously informed the Grievant that he knew the police chief, and that the Grievant could interview for a position on October 7. After hearing from Breneman on the afternoon of October 5, the Grievant decided to decline the interview. He testified he lost roughly $5,500 in reliance on Breneman's representation that the Union and the County had agreed to return him to work as if he had never resigned.

On October 6, the Union's President, Julie Scott, learned of Breneman's desire to rehire the Grievant as if he had not resigned. Breneman testified that Scott seemed more reserved on the point than Roush had. Scott noted her concerns in a memo to Arkens, dated October 8, which states:

> Sheriff Bill Breneman informed me on Tuesday, October 6, 1998 that he was rehiring (the Grievant), who had quit on September 25, 1998. I asked him if the Jail Sergeant or any of the other jailer-dispatchers had any problems with this and he stated that they did not.
>
> This morning I was contacted by union members who are concerned that (the Grievant) will be rehired without any break in seniority.
>
> This is a clear cut violation in our union contract, Article 7 - Seniority. Loss of seniority and the employment relationship shall be broken and terminated if an employee quits.
>
> While the complaint is only concerned with seniority, I cannot see how wage rates and all other benefits can be unaffected.
>
> If (the Grievant) is rehired without any break in seniority and/or benefits this will certainly start a precedence for other employees who decide to quit and want to return.
>
> Please contact me for further discussion on this issue.

Scott and Arkens met to discuss the point. Scott summarized the results of the meeting in a memo dated October 8, which states:

> The following is my perception of the agreement made between the county and union this morning regarding the rehiring of (the Grievant).
>
> 1) (The Grievant) will be rehired by Taylor County as a jailer-dispatcher.
> 2) (The Grievant's) seniority ranking will begin on his actual rehire date.
> 3) (The Grievant's) vacation, sick leave, and other benefits will begin with his new rehire date.
> 4) (The Grievant) will be given the benefit of rehire without a six month probationary period. His starting wage will be $10.96 (6 month rate of pay).

5) (The Grievant) will be given the benefit of maintaining his health insurance, dental insurance, life insurance, and income continuation insurance without a lapse in coverage, however he will be responsible for the cost of the health insurance and income continuation insurance for the approximate 15 days off from employment.
6) (The Grievant) will be reinstated into Local 3679 as of his start date without any probationary period.

Arkens responded in a memo to Scott, dated October 8, which states:

> As per our conversation this morning, the county will abide by the union contract in the area of seniority when rehiring (the Grievant). It is our intention of having him begin without a probationary period and at the 6 month pay rate with his health insurance minus approximately 15 days he was gone. If this is acceptable to the bargaining unit we will proceed as we discussed. Please contact me as soon as possible so as to avoid any further problems with this issue.

At roughly 1:30 p.m. on October 8, Daniels and the Grievant had a phone conversation concerning the events surrounding his re-employment. That conversation took place on a recorded line from the Sheriff's Department. The conversation between Daniels (BD) and the Grievant (EL) covered the following points:

BL: Well, we're running into some snags up here and I just wanted to call you and fill you in on it.
EL: Ok
BL: I called over to Personnel . . . the Personnel Director's office this morning. But apparently somebody from within the Union is, is, they wrote a letter to the Personnel Director telling him that they are disagreeing with you being reinstated with full seniority and that basically that they'll grieve it if it happens.
EL: Well, don't you think we can do it by saying that hey, he was on a leave of absence?
BL: Well, that was what the sheriff said. Um, of course we had to do the you know the paperwork ah . . . saying you know that you had resigned and there's a specific clause in the contract "loss of seniority and the employment relationship shall be broken and terminated when an employee quits".
EL: Mm hmm

BL: What the Personnel Director was proposing and I'm just telling you this is what they're saying at this point, it's not a problem to get you the job back. What they're saying though is that you'd ah, basically that you would start at the six month rate, like if you'd never been here at all.
EL: Oh man
BL: So no probation or anything like that, um . . . but then along with that goes no seniority and you'd be at that wage. Then the other issue that they said was the health insurance, since it was terminated, that you were out of it for 15 days so in order to reinstate it that you'd actually have to pay for 50% of it.
EL: For the first . . .
BL: For that first month
EL: Ok, well that's no problem.
BL: That's $261 and the income continuation would be like four bucks. Now, I called the Sheriff and told him about this and his response was "we need to fight for (your) rights"
EL: Aw, thank you
BL: Ah, so that, you know, I don't know exactly what that means. We're going to meet, what we're going to do is, we've got a law enforcement committee meeting tomorrow**,** Bill will be in for that.
EL: Ok
BL: Then we're supposed to meet with personnel right after that.
EL: Ok

After this exchange, their conversation addressed whether there was precedent for returning a resigned employe as if the resignation had not occurred, the Grievant's pay rate, and whether the Union could bring a meaningful grievance on the issue. Daniels and the Grievant then discussed the following points:

EL: I think that, that ah, well hopefully you guys will be able to present this properly . . . um, yeah, that is a major kick in the butt . . . I mean . . . well, yeah of course there was the resignation, there's no doubt about that. But then there's the extension of vacation.
BL: That you're not paid for yet.
EL: Right, that I haven't been paid for. In a sense that kind of keeps the threat going if you will you know.
BL: Well that's what I'm kind of thinking you know. When she told you . . . you know if you get a leave . . . didn't she tell you if you get a leave of absence that . . .
EL: I couldn't get my check

BL: That you couldn't get you . . . paid off your vacation
EL: Right, otherwise I would have.
BL: . . . let me grab your file . . . you said you were resigning your position and that your last day of work would be so you're still on vacation for all practical purposes, right?
EL: Yeah, yeah. And I would have gone for the leave of absence, I'm not that stupid. But she said no we won't pay you your vacation. And I thought well I'm going to need that money to get started down here. . . . You know, so otherwise if I'd have been able to get the leave of absence I would have taken that. . . . So that kind of pushed me you know.

After this exchange, Daniels recommended that the Grievant document his conversations with the personnel department prior to his resignation, and noted his view that the problem was coming from a small number of employes. The Grievant then stated:

> Yeah, well, again, I think that's a legitimate argument. The thread was never actually finally terminated, that I was still collecting vacation, I was still, for in some intents a member of the department and therefore . . . plus the fact that I didn't really have the option of the leave of absence, you know, cuz I needed the money. And I don't think that's really fair to hold that against somebody.

The Grievant returned to Taylor County to work as a Jailer Dispatcher. He reported for work in uniform, but was informed by Breneman that Arkens had informed Breneman that he could not work until appropriate Board action was taken to authorize his employment.

On October 15, a joint meeting of the Board's Personnel and Law Enforcement Committees met to consider the Grievant's situation. County Board ordinances require applicants for law enforcement positions to achieve a passing score on a written examination, then complete "an oral examination by a panel consisting of the Law Enforcement Committee, the Sheriff (or his designee) and the County Personnel Director." Applicant scores on these examinations are then used to create an eligibility list. By ordinance, the Sheriff "may hire an individual who ranks either Number 1, Number 2, or Number 3 on the appropriate eligibility list." The relationship of these ordinances to Breneman's actions, among other points, was discussed at the October 15 meeting. Breneman advocated for County approval of returning the Grievant to work as if he had never resigned. The Personnel and Law Enforcement Committee, however, voted only to move the Grievant to the top of the eligibility list. Breneman felt the Committee's action "broke my word."

The matter continued to prove a divisive issue within the Union. On November 3, the Union membership voted to reject the tentative agreement negotiated by Scott and Arkens, and to have the grievant return to employment "as a newly hired employe." The County, however, provided the Grievant's health insurance benefit as if the agreement had been ratified. The dispute continued to prove divisive. In late November, the Union held another membership meeting. This one included the Union's Business Representative, Phil Salamone. At that meeting, for the first time, Roush advised Salamone that she had indicated to Breneman that she did not see any Union objection to returning the Grievant to work as if he had never resigned. The Union determined the issue needed to be researched further. Among other things, Salamone sought legal advice from the Union's attorney and clarification from Rude concerning his role in the process.

Rude responded in a letter dated November 25, which states:

. . .

> On Monday, October 5, 1998, at the beginning of my last week in Taylor County, at sometime during the morning, I was visited in the office by Sheriff Bill Breneman and Chief Deputy Bruce Daniels. . . . The Sheriff advised that he had been contacted by (the Grievant), who asked if he could return to Taylor County employment . . . The Sheriff noted that (the Grievant) had performed very satisfactorily as a jailer/dispatcher for a number of years, had been off the jailer/dispatcher work schedule for only a short time, and particularly noted that significant amounts of overtime were being required, and worked, in order to maintain at least minimum staff, and asked if the individudal could be returned to the County's employ, as though he had not left. I told the Sheriff and Chief Deputy that, taking these factors into consideration, and particularly in view of the shortage of staff and the additional overtime expenses being encountered, that I had no objection to bringing him back without any change in his status, provided that the union had no objection, since this was outside the normal contract provisions. The Sheriff called me later to indicate that he had planned to talk to the Local 3679 President, but found she was off work that day, and, as a result talked to the Vice President, who registered no objection to (the Grievant) returning with uninterrupted service to County employment. The Sheriff, in good faith following his conversation with myself and the union local's Vice-President, advised (the Grievant) of the decision, and welcomed him to return.

> Having been involved with Taylor County Labor Relations for nearly sixteen years, and having had to make many decisions on various personnel matters during that time without the opportunity to meet with the Personnel Committee, there was no question in my mind that I was authorized to make such a decision.
>
> . . .

In a letter dated December 1, the Union's attorney advised the Union that "it is my opinion that (the Grievant) has a legal right to continue his employment as a Jailer/Dispatcher . . . as though he had not ever left that employment."

The Union then determined not to vote again on the agreement reached between Scott and Arkens, and to support a grievance. Salamone testified that the County did not object to the timeliness of the grievance until roughly one month after its filing.

Testimony at hearing covered the points noted above as well as past practice. Breneman testified that the County had treated three other employes, Rhonda Grauman, Daniels and Amy Bolz, as he proposed to treat the Grievant. Kathleen Pernsteiner is the County's Payroll Benefits Coordinator. She testified that Grauman submitted paperwork indicating her desire to resign. Before the effective date of her resignation, however, she reconsidered her decision and the County permitted her to rescind the resignation. Daniels testified that he resigned from County employment to become a Cadet with the Wisconsin State Patrol. After the effective date of his resignation, he decided he wanted to return to the County. The County permitted his return, under the conditions set forth in a letter from Rude to the then-incumbent Sheriff, dated August 15, 1989, which states:

> In view of the short time which Bruce Daniels was away from Taylor County employment, I do not feel that it is necessary to require him to serve another one year probationary period, particularly since he remained in law enforcement when he left here. However, since this is a situation we have not previously encountered, and what we do may well be a guideline if a similar circumstance occurs in the future, I feel that we should establish some probationary period, and suggest that ninety days would be appropriate.
>
> Insofar as the sick leave matter is concerned, I do not feel that he should retain any, but rather should begin a new accumulation.
>
> . . .
>
> The basis for reinstatement, then, would be as follows:

1. His seniority date will be new, and will be the date he is rehired by Taylor County. He would be on probation for a period of ninety days.
2. His rate of pay will be the rate he was receiving at the time of termination.
3. To determine vacation eligibility, his first date of hire will control.
4. All other benefit eligibility will be on the basis of his new date of hire.

. . .

Daniels testified that his return to work was submitted to the law enforcement bargaining unit for a vote. Daniels also testified that before he became Chief Deputy, Amy Bolz got upset on the job and turned in her resignation. He talked her out of the decision, and the County permitted her to rescind the resignation. He estimated the entire process took from one to three days.

Jim Metz is the Chairman of the Law Enforcement Committee, and testified that neither Rude nor Breneman consulted the Committee before Breneman informed the Grievant he could return to County service. He stated that neither is authorized to hire for the County. Tim Peterson is the Chairman of the Personnel Committee, and agreed with Metz' testimony. Peterson added that even though Arkens was, in his view, the County's Personnel Director in October, Arkens had no more authority to hire than did Rude or Breneman.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union contends that the grievance must be considered timely. Article 6, Sections 1 and 3 demand that a grievance allege a violation of the labor agreement, and the Union contends that in this case "investigation" and "legal research" were necessary to determine the existence of a contract violation. The Union contends that it filed the grievance within one day of the time "it discovered that there was joint agreement to restore the grievant to uninterrupted service, and that this was legally appropriate." Even if Union officials may have known of the County's agreement to rehire the Grievant prior to the filing of the grievance, the complex nature of the grievance precludes holding this against the Union. Beyond this, the Union argues that "it should be recognized that the refusal of the County to apply the greivant's seniority amounts to a continuing violation of the labor agreement." The County's assertion of the timeliness issue, in any event, "reeks of bad faith," and "should be rejected by the Arbitrator."

The Union then contends that a "reasonable interpretation of Article 29 would allow the parties to mutually agree to waive or amend portions of the collective bargaining agreement." This is consistent with the terms of Article 29 and with the fact that "(u)ntil this dispute, the parties have historically . . . (handled) matters of common interest . . . which arise during the term of the contract on a relatively informal basis."

Beyond this, the Union argues that the language of Article 29 is ambiguous, but "has been defined again and again by a consistent and unrefuted past practice of the parties." That the parties "have regularly entered into informal waivers of specific contract language when it was in their mutual interest" is, according to the Union, undisputed and traceable to "the previously referenced positive working relationship." That no agreement was put into writing is not significant, since the second sentence of Article 29 demands only that amendments "supplemental to this Agreement" be so executed.

Even if Article 29 is inapplicable, the Union argues that strong past practice "could reasonably stand alone to govern the outcome of this dispute." Since arbitral authority establishes that benefits can be established by practice, the Union concludes that the agreement governing the Grievant's return should be enforced.

The doctrine of promissory estoppel establishes another basis to enforce the agreement concerning the Grievant's returning to work as if he had not retired. More specifically, the Union argues that the evidence establishes Breneman made a promise to the Grievant upon which the Grievant reasonably relied, to his detriment. Arbitral authority supports enforcing Breneman's promise, particularly since failing to do so would work an evident injustice.

That the County did not enforce a three month waiting period regarding the Grievant's health insurance establishes that the County understood it had entered into an enforceable agreement. It is, the Union contends, impossible to distinguish the agreement to return the Grievant to work with full benefits generally from the acknowledged agreement to specifically waive the three month waiting period.

That the labor agreement increases wages and benefits in response to length of service establishes that the parties intended "that service time be recognized and rewarded." The benefit to the Grievant is apparent, but the benefit to the County is no less apparent: "the employer now benefits from the training and experience of the grievant." To ignore the clear intent of the labor agreement produces an "unjust" and "inappropriate" result.

The Union concludes thus:

> (T)he instant grievance should be sustained and the grievant be made whole for all losses incurred. In addition, considering the bad faith exhibited by the employer in this matter, the Union asks that he retain jurisdiction in the event a remedy is applied.

The Employer's Initial Brief

After a review of the evidentiary background, the County argues that "(t)he grievance is not timely." Step 1 of Article 4 demands that the grievance be filed within ten days of the event being grieved, and the contract does not permit modification of grievance timelines absent "mutual agreement . . . in writing." In spite of this, the Union waited fifty days to file the grievance. Neither the facts nor relevant arbitral precedent warrants such an extension. That Union representatives attended the October 15 meeting of the Law Enforcement at which the County rehired the Grievant should preclude finding the grievance timely filed in December. Beyond this, the County urges that "there is no merit to the Greivant's contention that each day he was denied seniority status constituted an 'ongoing' (continuing) violation." To reach this conclusion demands reading any procedural time limit out of existence.

The County then contends that the grievance fails to cite any agreement provision violated by its actions. This is, according to the County, because "(t)here was no violation of the collective bargaining agreement." The "only collective bargaining provision that could possibly relate . . . is Article 7" which governs loss of seniority. Since the Grievant voluntarily quit; since he "cannot unilaterally rescind a resignation that is freely given"; since the County is "free to determine the terms of the grievant's return to work within the contours of the collective bargaining relationship"; and since neither Breneman nor Rude had the authority "to bind the County in this matter", no violation of Article 7 exists. An examination of relevant provisions of Chapter 59 only confirms these contentions. In fact, the evidence demonstrates that the Union and the County never in fact reached an enforceable agreement and that what evidence of practice there is indicates rehired employes forfeit seniority.

The County then contends that the grievance puts it "in an impossible situation." No matter what action it took regarding the Grievant's reemployment, "the County's action would have been grieved." The Union "originally raised objections to rehiring the Grievant" and now embroils the County "in litigation because it did not reemploy the Grievant with full seniority and full benefits." This indicates the County faced litigation no matter what it did, and arbitral precedent precludes rewarding a Union "for creating this quagmire."

The County concludes that the grievance says more about "internal union politics" than about the labor agreement, and should be dismissed.

The Union's Reply Brief

The Union contends initially that it did not delay fifty days to file the grievance. Rather, it was actively investigating the claim and negotiating with the County to determine if the matter could be resolved informally. To fault the Union for not filing prior to December 4 encourages the Union to abandon negotiations and turn to litigation to resolve disputes. The Union adds that "it now seems that these negotiations may have been merely a ploy by the employer to delay the Union's filing of a grievance beyond the contractual time limits." The Union concludes such ploys should not be rewarded.

Among the challenges raised by the County to the enforceability of the agreement between the Grievant and Breneman is the "lame duck" status of its former Personnel Director. The Union contends that however Rude's status is characterized, he had the authority to act on the County's behalf. Beyond this, the Union contends that the County's attempt to impeach his written statement has no evidentiary support and flies in the face of his established reputation.

The Union then asserts that the County has no basis to support its assertion that "the Union objected to the return of the Grievant to uninterrupted service." That Scott and Arkens unsuccessfully attempted to create an alternative to the agreement reached by Breneman and the Grievant has no bearing on the grievance, since that attempt was "rejected by the Union." Any other conclusion mistakenly makes the informal views of individual unit members Union policy.

Nor can the County's assertion that the grievance lacks support in the contract be accepted. The stipulated issue is broader than the County acknowledges, and the record leaves no doubt that "there **was** a mutually agreed upon departure from the terms and conditions of the collective bargaining agreement to facilitate the re-hire of the grievant."

That an employe cannot unilaterally rescind a resignation that is freely given has no bearing on this case, since there was an agreement to rehire the Grievant. In fact, the only "mutual agreement between the parties which was not effectively rejected or withdrawn later, was the initial agreement."

To assert that Rude and Breneman cannot bind the County "approaches the realm of bizarre." Each acted as the County's agent. Arbitral precedent and evidence establishes that they were authorized to bind the County. The attempt to assert Rude lacked this authority ignores the absence of evidence to support this. Nor can the County's assertion that the grievance put it in a no-win situation be accepted. Informal comments made by individual unit members cannot be made into Union policy, and all the grievance asks the County to do is "honor its original agreement with the Union." Nor can the assertion obscure that the County did not act in accord with the results of the Union vote, since the Grievant was credited with six months of service and was not required to wait three months for health insurance.

The County's assertion that it could have avoided this litigation by not rehiring the Grievant states the obvious, but nothing that has any bearing on resolving the grievance. What the County did wrong "is that essentially they double-crossed the grievant."

The Employer's Reply Brief

After prefatory remarks, the County argues that the grievance cannot be considered timely. An examination of the evidence demonstrates actual knowledge of the events prompting the grievance well before its filing in December. Nor can it plausibly be asserted that investigating a grievance or seeking outside legal assistance "somehow tolls the time limits for filing a grievance." In any event, the Union could have simply requested to extend the grievance procedure's time limits. Their failure to do so cannot obscure that the contractual time limit "is a provision the Arbitrator cannot ignore." Nor can it be seriously contended that the grievance poses a continuing violation. To do so would render contractual time limits meaningless.

The County then contends that "there is no credible evidence in the record that the parties regularly entered into unwritten waivers." Rude's statement cannot be construed as broadly as the Union contends, and lacks the detail necessary to overcome the clear language of Article 29. Arbitral and judicial precedent underscore that "custom and past practice are only used to establish the intent of contract provisions which are so ambiguous or so general as to be capable of different reasonable interpretations." Because Article 29 "is clear and unambiguous," evidence of practice is irrelevant. That language demands that waivers of contract provisions must be executed in writing.

Even if practice could be considered to interpret the provisions of Article 29, no binding practice has been proven in this case. More specifically, the County argues that the scope of the practice and its parameters "are anything but readily ascertainable . . . (w)e simply have no idea as to the nature or kinds of provisions waived or the circumstances involved in the alleged waivers." Nor is there evidence demonstrating County awareness or acceptance of the alleged practice. Beyond this, the Union improperly seeks to assert a practice which contradicts clear contract language.

Even though arbitrators "have applied the fundamental underlying theories of estoppel in appropriate cases," the Union has failed to show the grievance poses such a case. The union asserts promissory estoppel in this case. That doctrine is inapplicable, since the Grievant did not rely on any County promise in deciding to move from Arizona back to Taylor County. Even if it could be concluded the County made the Grievant any promise, his reliance on it was unreasonable since "the Grievant knew the ramifications of his resignation before he even left for Arizona." Beyond this, the County argues that County waiver of the health insurance waiting period shows no more than that the Union never challenged the County's action and that the decision "was made by the appropriate authority – the Taylor County Law Enforcement

Committee." That the Grievant lost

the benefit of his years of service, or that the County gained the benefit of those years of service, is traceable not to County action but to "the Grievant's decision to quit his employment and move his family to Arizona." The County puts the point thus: "Experience may help get an applicant a job, but it does not necessarily bestow better benefits."

Viewing the record as a whole, the County concludes that the grievance must be denied.

DISCUSSION

The issues are stipulated, and pose a threshold issue of timeliness. That issue, however, is inextricably intertwined with the issue on the merits. That link precludes finding the grievance untimely. This point requires, however, some discussion, because the evidence supporting finding the grievance untimely is forceful.

As preface to this discussion, it must be noted that the parties did not execute a written extension of the timelines under Section 4 of Article 6. Thus, the issue is whether the grievance can be considered timely filed under the terms of Article 6, Section 2, Step 1, and Article 6, Section 4, which require that the "employee shall take up the grievance in writing with the employee's immediate supervisor" within ten working days "of the grievance."

"The grievance" is the County's refusal to treat the Grievant's return to employment as if he never resigned. Both the contract and the evidence make the "ownership" of the grievance less than clear. Article 6, Sections 1 and 2 permit an individual employe as well as the Union to submit a grievance. Section 1 provides that a "grievance" can be "a controversy between the Union and the Employer" or "between any employee . . . and the Employer." Section 2 underscores this by authorizing a meeting between the "employee" and the "employee's immediate supervisor" but requiring the written response resulting from that meeting to be submitted "to the Union." Thus, the grievance can be considered the Grievant's, the Union's, or both regarding the application of grievance timelines.

This ambiguity makes it difficult to accept the County's view of the timeliness issue. The force of the evidence supporting that view should not be understated. The "grievance" challenges the County's refusal to reinstate the Grievant as if he had never resigned. The evidence establishes that the Grievant was aware of this refusal well before December 4. The Grievant testified that he was aware of the refusal as of the October 15 joint committee meeting and with the receipt of his first paycheck. He noted he did not file a grievance because he thought the terms of his employment "were still negotiable." He added that he thought the County needed to go through further committee meetings before coming to the result he hoped it would reach. The evidence is silent on the existence of any committee meetings scheduled or held after October 15.

Both in testimony and in the grievance form, the Grievant acknowledged he was aware of the County's action as of October 15. The form notes the "Date of the alleged infraction" thus: "Circa. 10/15/98 > Present > Ongoing." This acknowledges the Grievant's awareness of the County's action, but asserts that the grievance states an ongoing violation. To establish an ongoing violation, however, it is vital that some basis be shown to distinguish the "continuing" violation from a "one time only" violation. Put another way, it is vital to show how the continuing violation can be found without reading the timelines of the grievance procedure out of existence. In this case, the County's refusal to ignore the contractual effect of the resignation was openly announced to the Union and to the Grievant. It is difficult to understand how this violation can be treated as anything but a single occurrence.

The Union's knowledge of the grievance poses the more difficult factual issue. The Union asserts that the matter was actively being investigated and negotiated until its filing in December. That it was investigating the grievance provides no basis to ignore the requirements of Article 6. The processing of the grievance is itself a form of investigating its merit, and it is unlikely the Union would tolerate County delay of the procedure to seek outside counsel.

While the evidence on how actively the grievance was being negotiated is debatable, it is sufficient to preclude finding a Union waiver of a determination of the merits of the grievance. Initially, it must be noted that Salamone testified, without rebuttal, that the County did not object to the timeliness of the grievance until well after its filing. This makes strict enforcement of those timelines at the arbitration level debatable. More significantly, Salamone's testimony establishes that the Union was considering, in late November, taking another vote on the tentative agreement reached by Arkens and Scott. His testimony further establishes that Rude's letter, dated November 25, played a significant role in the Union's decision not to take the second vote. There was no point to the second vote if the issue regarding the Grievant's situation was not an open issue. This means that the issue was still actively being considered sometime after November 25, which is within the ten working day time limit of Article 6, Sections 1 and 4.

This conclusion, however, ties directly into the Union's assertion of promissory estoppel. That point remains to be addressed. More to the point here, the conclusion establishes the need to address the grievance on its merit.

The Union's arguments lack contractual force outside the assertion of promissory estoppel. Article 7 unambiguously establishes that "(s)eniority and the employment relationship shall be broken and terminated if an employee . . . (q)uits." Beyond this, Article 7 clearly establishes that seniority is "computed from his . . . most recent hiring date." There is no doubt the Grievant quit as of September 25. He affirmed this in his October 8 conversation with Daniels. Nor is there any doubt that his "most recent hiring date" would have come in October of 1998. Under Article

7, then, the Grievant has no claim to unbroken seniority.

Nor can the "leave of absence" Daniels and the Grievant considered during their phone conversation be considered a significant issue under Article 7. Section C of Article 7 would not appear to extend a leave of absence to an employe search for other employment. This is what led the Grievant to Arizona. The assertion of promissory estoppel presumes that the Grievant's declining a job interview in Arizona is a basis to enforce Breneman's offer on benefits. This assertion, however, forecloses the use of Article 7 as a contractual basis to ignore the impact of the Grievant's resignation on his wage and benefit package as a returning employe.

Even if the provisions of Article 7 could be considered ambiguous, there is no persuasive evidence of past practice to support ignoring the Grievant's initial resignation. None of the three examples mentioned by Breneman are applicable to the Grievant. Grauman and Bolz rescinded their resignation prior to its effective date. Nor can Daniels' situation be considered comparable to the Grievant's. Rude's letter of August 15, 1989 establishes that no practice existed as of that date, and further sets forth in writing that Daniels did not return to employment as if he had never resigned. Rather, he lost seniority, had to undergo a probationary period and had all contractual benefits, except vacation, set "on the basis of his new date of hire." The evidence establishes that the County treats employe attempts to return to work after a resignation on a case by case basis. Beyond this, the evidence undercuts the assertion that the County verbally waives clear contract language.

This poses the Union's assertion of promissory estoppel and its basis in Article 29. As the Union asserts, the strength of its argument is that the first sentence of Article 29 permits the amendment of the agreement "upon the mutual consent of the parties." The second sentence demands that benefits beyond those stated in the contract be stated in writing, not based on practice or informal agreements. Since there was no writing executed in this case, the sole support for the Union's position lies in the first sentence of Article 29 and promissory estoppel. The Union's argument is essentially two-fold. The first is that the parties mutually agreed to return the Grievant to work as if he had never resigned. The second is that the County must be estopped from asserting that Breneman was unauthorized to commit the County.

Of these arguments, the assertion of promissory estoppel has the most force. The assertion that the parties mutually agreed to Breneman's response to the Grievant's October 5 phone call ignores that both parties dispute the "agreement." Scott and Roush did not share a common view of the agreement any more than Rude and Arkens did. The Union's rank and file did not consider the matter until the vote of November 3, and then apparently split with Roush and Scott. The Law Enforcement and Personnel Committees were not even consulted. Even ignoring any potential legal issue on who holds the statutory authority to commit the County, it is not clear what the parties agreed to.

The significance of this point should not be obscured. The asserted agreement overturned clear contract language. Such a result should not be based on weak evidence. If, for example, the seniority rights argued about turned on the return to unit status of a supervisor who left the unit to become a supervisor, would clear contract language precluding such a result be waivable solely through the conversation of one supervisor with one union official? Even if this conclusion could be reached, how could it stand against evidence that another union official and the rank and file rejected the waiver?

Thus, the strength of the Union's case turns on the doctrine of promissory estoppel. Under this view, the harm done the Grievant by the County's actions precludes its assertion that Breneman was unauthorized to offer the Grievant anything.

Promissory estoppel is a doctrine imported from the law of contracts into labor arbitration. Applied to this grievance, the doctrine demands that the Union meet the following elements of proof: (1) The Employer made a promise to the Grievant which it could reasonably expect to induce action or forbearance on the Grievant's part; (2) the Grievant, in reasonable reliance on the promise, acted or refrained from acting to his detriment; and (3) the injustice suffered by the Grievant can be avoided only by enforcing the promise.

This is the most troublesome aspect of the case, but the evidence will not support applying this doctrine to the Grievant. Initially, it must be noted that the "promise" asserted is Breneman's offer to the Grievant of a return to County employment as if he had never resigned. Only with difficulty can this offer be taken as a promise. Initially, it must be noted that the Grievant initiated the "promise" by calling Breneman to find out if he could return to work as if he had never left. This was an offer not from the County, but from the Grievant. In effect, he asked Breneman to act on his behalf in bargaining his return to County employment. Breneman willingly and forcefully did so. It strains the evidence, however, to see Breneman's conduct as something other than bargaining. The Grievant's conduct confirms this. The October 8 conversation establishes that the Grievant treated Daniels' phone call not as the withdrawal of a promise, but as the basis for further bargaining. Thus, he and Daniels did not discuss promises, but whether the hoped for result could be achieved by a different bargaining tactic, such as characterizing his absence as a vacation or as a leave of absence.

Even if Breneman's offer could be characterized as a promise, the evidence fails to establish the County could have expected the Grievant to act based on the promise. As noted above, the Grievant had decided to return to Wisconsin, and called Breneman to secure the most advantageous route back. Breneman's offer did not cause the Grievant to leave Arizona or to decline a job interview there. At no point in his conversation with Breneman or with Daniels did

the Grievant intimate he would remain in Arizona unless he received the wages and benefits he earned prior to his resignation. Rather, he attempted from the October 5 conversation through the processing of

the grievance to bargain higher wages and benefits. This is not "action or forebearance" based on a promise. He was, understandably, attempting to return to work on the most favorable terms possible. However, this action did not follow, but preceded, Breneman's offer.

Nor can the final element of promissory estoppel be considered proven. If it is injustice for an employe, having voluntarily resigned, to return to work with less than his former wages and benefits, then the provisions of Article 7 stand as an injustice. The first sentence of that article dates seniority from the "most recent hiring date." It is not apparent how enforcing that negotiated provision can be characterized as an injustice. Nor is it immediately apparent how it becomes justice to suspend the operation of a negotiated provision. To exemplify the point, it is not apparent how enforcing a similar provision against Daniels, but suspending its operation against the Grievant, can be characterized as justice.

In sum, the terms of the labor agreement do not support the Grievant's claim. Since the claim cannot be considered to warrant the application of promissory estoppel, the grievance must be denied.

This conclusion can be stated simply, but the record upon which it is based is not simple. For this reason, it is necessary to tie the conclusion more closely to the parties' arguments. The Union's citation of BARRON COUNTY, MA-9867 (GRECO, 7/97) is forceful, but does not govern this grievance. That decision supplements a bench award, so the facts of the underlying grievance are not clear. Nevertheless, the facts cited in the written award establish that it is distinguishable from this case. In BARRON COUNTY, the employer acted to prevent an employe from pursuing employment with another county. Initially, the Barron County's Salary and Personnel Committee voted to offer to increase the greivant's hours and wages. Barron County did so by proposing a side letter to that effect to the union representing the grievant. The union accepted the offer, and the grievant, relying on the offer, cancelled a previously scheduled job interview.

BARRON COUNTY and this case share little in common beyond the superficial similarity that in each case an employe declined a job interview with another employer. Unlike this case, Barron County initiated the offer deliberately to prevent the employe from leaving county employment. In this case, the County accepted the Grievant's voluntary resignation, then responded to his offer to return. In BARRON COUNTY, the employer made its offer through a County Board committee to the Union, which accepted the offer. In marked contrast to this case, the Barron County's "Salary and Personnel Committee knew . . . that the Union had accepted the offer" (MA-9867 AT 2). In fact, the County Board Chairman was chair of that committee. Thus, in BARRON COUNTY, the named parties to the labor agreement agreed in writing to a departure from it. There was, then, no doubt concerning what was agreed to or the authority of the bargaining parties to enter into at least

a tentative agreement. Beyond this, relevant County Board committees and the County Board Chair

were fully aware of the tentative agreement. In this grievance, governing County Board Committees were kept out of the process. The October 8 conversation between the Grievant and Daniels treats the Union and Board Committees less as parties to an agreement than as nuisances to be avoided to the fullest extent possible. Thus, BARRON COUNTY posed issues of "fair dealing" [MA-9867 at 3] not posed here. There is no doubt that parties authorized to negotiate struck a deal in BARRON COUNTY, while this grievance poses a significant dispute on the authority of the negotiating parties. More significantly, Barron County acted to change the grievant's behavior. In this case, the County agreed to permit the Grievant to return to work. The sole dispute was his wage and benefit package. The County did not seek to secure the Grievant's return through Breneman, nor did the Grievant demand adherence to Breneman's offer as the price of his return.

Breneman testified that the County broke his word, and his concern on this point is understandable. The evidence falls short of establishing, however, that the Grievant sought a promise of full benefits to return to Wisconsin. Rather, his role in the October 8 conversation establishes that he sought to enlist Breneman's efforts to secure the best wage and benefit package he could. Breneman was true to his word, and lobbied hard to secure County assent to the wages and benefits the Grievant would have earned if he had not resigned. From Breneman's and the Grievant's perspective, the County betrayed an offer. From the County Board's perspective, however, Breneman exceeded his authority by orchestrating a commitment without Board involvement.

The Union forcefully questions the County's unwillingness to honor the understanding orchestrated by Breneman through Rude and Roush. The Union's contention that the bargaining relationship has deteriorated cannot be ignored, but offers limited assistance in interpreting the labor agreement. The evidence indicates that Breneman conferred with employes he expected to be favorable to his point of view. He does not appear to have asked either Rude or Roush what the contract permitted. Rather, he sought their agreement to an offer he had already responded favorably to. He did not pursue Scott's concerns when she reacted less than favorably the following day. On the County's part, Scott and Arkens appear to have behaved in a similar fashion when they negotiated a conflicting agreement. It affords no contractual clarity to attempt to sort through who was authorized to act for the Union or for the County. Relevant agreement provisions are clear. Waiver of those provisions cannot rest on the uncertain basis posed here.

Most significantly, the doctrine of promissory estoppel cannot persuasively be applied to the grievance. If the Grievant had changed his position in reliance on Breneman's offer, the Union's case would be strengthened. The Grievant's testimony establishes, however, that his decision to return to Wisconsin had been made before Breneman's offer. His reaction to Daniels'

October 8 phone call confirms this. Thus, the Union's assertion that the Grievant had been "double-crossed" accurately states the emotional depth of the case, but fails to accurately portray the evidence.

The parties have not stipulated that I should address statutory issues. Thus, whether Breneman was authorized under Chapter 59 to make the offer to the Grievant plays no role in the conclusions stated above. In the absence of the parties' stipulation, arbitral interpretation of statute is as likely to raise as to resolve issues.

The stipulated issue poses both contractual issues and the "agreed upon departure" from the labor agreement. This does not favor either party's view of the merits of the grievance. The Union views the departure from the agreement to be Breneman's October 5 offer to the Grievant, while the County views the departure to be the agreement negotiated between Scott and Arkens. The County has implemented that agreement, at least in part. That the County implemented part of the agreement even after the Union voted to reject it does not establish a promise, as asserted by the Union. As noted above, the Grievant sought to negotiate from the County the most favorable possible terms of reemployment. The County's implementation of the rejected tentative agreement manifests no more than its treatment of Daniels in 1989. In each case, it treated the matter as one requiring a case by case evaluation. Here, the Arkens/Scott agreement was one proposal among others. It reflects less the enforceability of Breneman's offer as a promise than how confused this situation became. The Union's attempt to isolate the Breneman offer as the only enforceable part of this convoluted series of negotiations would make it hard to distinguish an enforceable promise from individual bargaining. The Grievant waited until the filing of the grievance to seek direct Union involvement. This cannot be dismissed as an insignificant point, since the grievance asserts rights acquired through collective bargaining. His conduct reflects the bargaining reality he perceived. He did not involve the Union until it was clear Breneman's efforts on his behalf were going to fall short.

The Grievant seeks to enforce the Breneman offer and uses the County's implementation of part of the offer as a basis to do so. The Award entered below denies the grievance. This cannot be read as a basis to take away any benefit already afforded the grievant. The parties agree that the Grievant is entitled to what he has received. The grievance questions whether he is entitled to more. The Award addresses only that narrow dispute.

Finally, the venom underlying the parties' arguments is difficult to ignore. The emotional pitch to the dispute is troublesome. I offer the conclusions stated above to resolve the stipulated issue, not to further fuel the parties' difficulties. To exemplify this difficulty, I note that I had the pleasure to work with Charles Rude while he served this, and other, municipal employers. I hold a high opinion of his reputation and his ability. That opinion cannot, however, bear on this dispute any more than the personal feelings of other participants in this proceeding acquire,

standing alone, contractual significance. Whether I personally approve the course this dispute has taken cannot add to or subtract from what the contract and the evidence permit.

AWARD

The grievance was timely filed on the Union's part.

The Employer did not violate the collective bargaining agreement and the mutually agreed upon departure from the collective bargaining agreement.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of September, 1999.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
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