BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SHEBOYGAN COUNTY**

and

**SHEBOYGAN COUNTY HEALTH CARE FACILITIES EMPLOYEES, LOCAL 2427, AFSCME, AFL-CIO**

Case 324
No. 58595
MA-11006

(Maurer Grievance)

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Appearances:

**Ms. Helen Isferding**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, on behalf of Local 2427.

**Ms. Louella Conway**, Personnel Director, Sheboygan County, 615 North Sixth Street, Sheboygan, Wisconsin 53081, on behalf of the County.

## ARBITRATION AWARD

According to the terms of the 1997-98 collective bargaining agreement between Sheboygan County (County) and Sheboygan County Health Care Facilities Employees, Local 2427, AFSCME, AFL-CIO (Union), the parties requested that Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the employment status of Christine Maurer. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was held at Sheboygan, Wisconsin, on April 26, 2000. No stenographic transcript of the proceedings was made. At the hearing, the parties agreed that they would file their initial briefs on June 2, 2000, and they reserved the right to file reply briefs within ten working days after the Arbitrator exchanged the initial briefs for them. All briefs were received and the record was closed on June 27, 2000.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

## ISSUES

The parties were unable to stipulate to an issue or issues for determination herein. The Union suggested the following issues:

> Did the Employer have just cause to terminate Christine Maurer? If not, what is the appropriate remedy?

The County suggested the following issues for determination:

> Did the Employer violate the layoff provision of the labor agreement in the layoff and separation from employment of Christine Maurer? If so, what is the appropriate remedy?

The parties stipulated to allow the Arbitrator to frame the issues based upon the relevant evidence and argument in this case as well as the parties suggested issues. The Arbitrator, having considered all of the relevant evidence and argument and the suggestions of the parties finds that the more reasonable of the two issues is the Union's.

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 27

### SENIORITY

It shall be the policy of the institutions to recognize seniority. (As used herein the term "seniority" shall mean the period of continuous employment from the last date of hiring.)

1. Lay-Offs: If a reduction of employee personnel is necessary, the last person hired shall be the first person laid off and the last person laid off shall be the first person recalled. The employee(s) exercising a bump must be capable of performing the job without retraining and only with familiarization.

### ARTICLE 31

### TERMINATION

Termination reports shall be in triplicate and signed by the Employer when an employee is separated from the institution for any reason except sick leave, vacation or other legitimate leave. One (1) copy shall be retained by the Employer, one (1) filed with the Union and one (1) given to the terminated

employee. Any employee leaving the Department, except for legitimate reason such as sickness, vacation, or granted personal leave, shall be considered a terminated employee. Any unexplained absences from work for more than three (3) days shall be construed as voluntary termination from employment. It is however understood, that if on any work day any employee is unable to perform his/her duties, he/she shall advise his/her supervisor or administrator prior to the commencement of said workday, if possible.

## BACKGROUND

The County operates three health care facilities: Rocky Knoll, Sunny Ridge and Comprehensive Health Center. The County experienced its first layoffs in these institutions in 1983. The 1983 layoffs occurred for the most part at Rocky Knoll and employes from Rocky Knoll then either bumped into positions at the Comprehensive Health Center (CHC), posted into positions at CHC or were offered vacant positions, thereafter, following their choice to accept voluntary layoffs.

Prior to the 1983 layoffs, the County put together a memo which it apparently distributed to employes after holding discussions with the Union dealing with the procedure for layoffs. That memo read in relevant part as follows:

> During the last week many of you have had questions or concerns regarding the impending lay-offs. In an effort to properly address these concerns members of the Rocky Knoll Administrative Team, the county Personnel Director and officials representing AFSCME met on both January 20th and January 24th to discuss many of the issues involved with the lay-offs. In addressing all issues the emphasis was placed on conducting the lay-offs in a fair, smooth and efficient manner.
>
> The following is a summary of the county's position regarding the key issues discussed. AFSCME concurred with many of the positions taken by the county. Specifics regarding the AFSCME position should be obtained from an AFSCME official.
>
> I. Question: How will the lay-offs be arranged:
>
> Answer:
>
> A. The Rocky Knoll Administrative team has determined that certain positions will be eliminated.
>
> B. Individuals who volunteer to be layed-off [sic] will be layed-off [sic] first.
>
> C. Any individuals affected by the positional eliminations, who do not choose a lay-off may, depending on their seniority status, have the right to bump into another position.

II. Question: Is an individual's seniority status confined to the facility in which they work?

Answer: No. An individual's seniority status is applicable throughout all three institutions.

III. Question: Can a part-time employee bump a full-time employee?

Answer: Yes. Providing that they are willing to assume the hours of the full-time employee.

IV. Question: Can a regular part-time or full-time employee bump a student?

Answer: Yes. The pay will be equivalent to the lowest paying position in the department concerned, other than students pay.

V. Question: How many times can an individual bump?

Answer: Once.

VI. Question: When bumping either a student or another employee who works different hours than you are currently working must you assume the actual hours that the employee who you bumped was working?

Answer: Yes. When you bump into a position you are accepting the schedule of the individual currently in the position.

VII. Question: Can an L.P.N. bump a nurses aide?

Answer: Yes. The L.P.N. will then become a nurses aide and receive a nurses aide salary.

VIII. Question: When you bump into a position, what salary do you receive?

Answer: Other than in the case of student, you would receive the rate of pay of the position which you bump into.

IX. Question: If you bump another employee, and later your position becomes available, do you automatically get that position back?

Answer: No. All open vacancies must be posted per the union contract.

X. Question: If a position becomes open, for any reason, will it simply be offered to a layed-off [sic] employee or will it be posted?

Answer: All vacancies will be posted. If no one from the three institutions signs the posting, the position will then be offered to the most senior layed-off [sic] employee.

XI. Question: Do employees have a trial period when they bump into a position?

Answer: Individuals who bump into a position will be given a one week trial period. Employees must have demonstrated proficiency to do that job within this period of time.

. . .

XIII. Question: If employees were hired on the same day, how will seniority be determined?

Answer: AFSCME is developing a process to determine seniority in these instances.

. . .

After 1983, the County conducted layoffs at its Institutions in 1989, 1992, 1997 and 1999. The layoffs in 1997 occurred at Sunny Ridge, but the layoffs in 1999 occurred at all facilities. As a general rule, the County has followed the above-quoted 1983 memo in conducting layoffs that have occurred since 1983. Generally, notice is given to employes who are going to be laid off and options are given to them so that they may choose either a voluntary layoff or to exercise their bumping right. This notice is given in writing. Laid off employes have never been given the opportunity to take vacancies before such vacancies were posted internally. When employes choose a voluntary layoff, sometimes they return to work with temporary hours and then sign a posting in order to get a permanent position; or laid off employes can take an open position after it has been posted and no one signs for it. However, it is clear that laid off employes do not automatically get their former positions back because openings must first be posted to employes who are allowed to sign and take the openings on a seniority basis prior to anyone on layoff being offered the opening. In addition, it is clear that once an employe takes a voluntary layoff he/she cannot exercise their bumping right—employes must choose one mechanism or the other.

The County submitted only one example, that of Ann Schultz, who was terminated in 1983 apparently due to her refusal to return to work following her voluntary layoff in April, 1983. The letter the County wrote to Schultz regarding this matter read in relevant part as follows:

. . .

The following is a summary of our April 8th telephone conversation:

I. I indicated that there are currently nurses aide vacancies at Rocky Knoll Health Care Facility.

II. I offered you a choice of any of the available positions. (Positions were available on both the day shift and the P.M. shift.)

III. You indicated that you did not wish to return to work.

IV. I indicated that if you did not accept a position your lay-off would be turned into a termination and you would no longer have any of the rights which were outlined in my lay-off letters. (i.e. the right to bump into another position after six months of lay-off)

V. You indicated that you understood that you were terminating your employment.

. . .

No witnesses testified regarding the particulars of Schultz's situation as none had first-hand knowledge thereof.

## FACTS

The Grievant, Christine Maurer, was hired in December, 1983, by the County as a part-time second shift Nursing Assistant at Rocky Knoll. The Grievant then posted into a part-time Nursing Assistant position on the second shift at Comprehensive Health Center in 1984. The Grievant remained employed at the CHC until August of 1990 when she voluntarily quit her employment to care for her children. Between 1984, when she went to the CHC, and 1990 when she quit, the Grievant filled Nursing Assistant positions, either part-time or full-time, on the second or third shift. The Grievant was rehired in August, 1991, at the CHC as a part-time Attendant on the second shift. The Grievant remained an Attendant at the CHC in various part-time positions on either the first or second shift until November, 1997 when she took a part-time Ward Clerk position on the first shift at the CHC.

On January 27, 1999, Ms. Maurer was bumped out of her part-time Ward Clerk position on the first shift by a more senior employe, Annette Feldmann, who had been laid off from Rocky Knoll. In the January 27, 1999 written notification, the County indicated that Feldmann would be assuming Maurer's hours effective February 4, 1999. The remainder of the notification read as follows:

. . .

You may also have the opportunity to replace an employee with less seniority at Comprehensive Health Center, Rocky Knoll Health Care Center or Sunny Ridge by exercising your "bumping" rights, or may post into an open position if there

> are any available which you qualify for. Please review your options with your union representative and notify Angie Iserloth, Administrative Secretary at Rocky Knoll, as well your Supervisor, of your decision within seven (7) days of this letter, which is February 3, 1999.
>
> . . .

On February 4, 1999, Maurer received and signed the following letter regarding her bumping rights, stating that she had been informed of her options of employment with the County and had chosen to be placed on layoff status:

> . . .
>
> Your options of "bumping" rights have been discussed with you for the positions which are currently available at the other two facilities. This letter will serve as confirmation of your decision to be placed on lay-off status from Sheboygan County Comprehensive Health Center effective February 4, 1999. We will keep you informed of any available positions within the County. Please acknowledge your decision to be placed on a lay-off status below by signing and dating both copies of this letter. Keep one copy for yourself and return the other copy in the enclosed self addressed, stamped envelope.
>
> You will be receiving information in the mail regarding continuation of your health care benefits. If you should have any questions, please contact the Personnel Department at 459-3105
>
> . . .

On February 18, 1999, the County sent Maurer a certified letter notifying her of open positions which read in relevant part as follows:

> . . .
>
> This letter is to confirm that on February 17, 1999, I spoke with you personally about the following open positions at Comprehensive Health Center. I will be notifying you on a weekly basis of any open positions at Comprehensive Health Center.
>
> | | | |
> |---|---|---|
> | | 2 PT Attendants 2nd Shift | B |
> | | 2 PT Attendants 3rd Shift | B |
> | no | 1 PT LPN All Shifts as needed | B |

no 1 PT Food Svc Wkr I Varied Hours B

no 4 Student Food Svc Wkrs Varied Hours NO

The following positions are open at Rocky Knoll and Sunny Ridge. If you are interested and qualified or have any questions, please contact Angie Iserloth, Administrative Secretary at Rocky Knoll or Bonnie Farrell, Administrative Assistant at Sunny Ridge.

| Rocky Knoll Health Care Facility | | Sunny Ridge | |
|---|---|---|---|
| no 1 PT CNA 1st Shift, 20+hrs | B | 1 FT Billing Clerk (test required) 8am – 4:30 pm | B |
| no 1 Casual CNA, 2 wknd/month | NO | 1 PT FSW I Varied Hrs 5:00/6:00/ 8:00am – 1:30/3:30/4:30pm | B |
| no 1 PT CNA 2nd Shift, 20+hrs. | B | no 1 PT FSW I No Benefits 4:30 pm – 8:00 pm | NO |
| 1 PT CNA, 2nd Shift | B | no 2 PT Housekeeper I No Benefits 1:00 pm-8:30 pm | NO |
| no 1 PT CNA, 3rd Shift, 20+hrs. | B | | |

I have enclosed the position description for the Billing Clerk position available at Sunny Ridge. There is a test requirement for that position.

Also, prior to any new position being posted, you will be notified of this position so you may have the opportunity to accept or decline. You will be notified of all Health Care Center position openings. 1/

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***1/ The "no" on the left of the listed jobs indicates that Maurer believed these jobs had no benefits. The "NO" on the right of the listed jobs indicates that the County in fact offered no benefits with these jobs and the "B" on the right of the listed jobs indicates available jobs with benefits.***

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. . .

On February 24, 1999, the County sent Maurer the following letter by certified mail:

. . .

This letter is to confirm our telephone conversation of this morning. I called to ask you if you were interested in any of the Health Care Center positions

offered to you in my letter of February 18, 1999. You indicated to me that you were not interested in the Billing Clerk position, as you did not feel you were qualified. You have declined all positions offered to you.

Please contact Bonnie Farrell, Administrative Assistant, Sunny Ridge; Angie Iserloth, Administrative Secretary, Rocky Knoll or myself if you have any questions or concerns. Thank you.

. . .

On March 4, 1999, the County sent Maurer another notification of an open position by certified mail which read as follows:

. . .

The open positions in the letter of March 1, 1999 are still available to you. This letter is to notify you of another open position at the Comprehensive Health Center.

1 Food Service Worker I: Various Hours

Please be advised again that you need to notify us by March 8, 1999 to accept or decline these positions.

If you decline these positions or we do not hear from you by March 8, 1999 you will be considered self-terminated.

If you have any questions or concerns regarding these issues, please contact the Personnel Department, 459-3105. Thank you.

. . .

On March 10, 1999, the County sent Maurer the following letter by certified mail:

. . .

I am sending this letter to confirm our telephone conversation of yesterday, March 9, 1999. Based upon your decision to decline any of the positions offered, Sheboygan County considers you self-terminated.

If you have any questions or concerns, please call Louella Conway at Sheboygan County Personnel Department, 459-3105.

. . .

When Maurer received the written notification that she was being bumped by Ms. Feldmann, she was counseled regarding whether she should choose a layoff or choose to use her bumping rights. At that time, Maurer found that there was only one employe at Sunny Ridge with less seniority than she had holding a Ward Clerk position. 2/ Maurer decided that since Sunny Ridge was far from her home and she had responsibilities with her children (aged 6, 11 and 12) she would take a layoff rather than bump the Sunny Ridge Ward Clerk.

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***2/ It appears that this employe was Marilyn Free who was employed at Sunny Ridge as a Ward Clerk full-time on the first shift.***

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Later, when the County offered Maurer the Billing Clerk position, referenced above, she spoke with former Administrator Linda Martin about the qualifications for that position. As a result of her discussion with Martin, Maurer concluded that the job would require her to get daycare during the week for at least one of her children and in the Summer for all three; that the job would require her to be away from home between 6:45 a.m. and 5:00 p.m.; and that she did not have the qualifications to perform the job, as she did not have an accounting degree and had never performed any billing work for the County. Based upon her conversation with Martin and her family obligations, Maurer decided not to test for the Billing Clerk position. In regard to the Housekeeping position and Food Service positions, Maurer stated that these had no benefits and that she had no experience in performing these jobs, so she declined those positions.

Maurer stated that on March 9, 1999, she had a conversation with Pat Green of the County in which Green told her that she would be considered "self-terminated" because she had not accepted any of the positions offered to her since her layoff in January, 1999. At that time, Maurer stated she was concerned that she would lose her eligibility to get her old job back if she posted into another position. 3/

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***3/ In 1995, Maurer was suffering from a condition known as Lymphedemia which involved vascular difficulties in one of her legs. Maurer had surgery to correct this problem in April, 1995, and was off work until approximately February, 1996, when she was released to return to work with no limitations. In March of 1997, Maurer was again released to return to work with no limitations for Lymphedemia.***

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## POSITIONS OF THE PARTIES

### County

The County argued that the contract language has remained the same since the initial contract between the parties in 1967; that no grievances have been filed and that no changes have been suggested by the Union regarding the layoff/recall sections of the contract. The

County also noted that it laid off employes in 1983, 1992, 1997 and 1999 and the Union accepted these layoffs without filing any grievances or suggesting changes in the relevant contract language. The County urged that the case of Ann Schultz which occurred in April, 1983, supported the County's argument that a past practice has been in place since 1983 which demonstrates that employes who refuse to return to work after being offered employment following a layoff may be discharged or considered self-terminated.

The County observed that the Grievant could have bumped another less senior employe at the time that she was displaced from her Ward Clerk position or she could have taken one of several vacant positions when the County offered her those. Instead, the Grievant chose not to bump and not to take any of the vacant positions offered to her by the County.

The County contended that the Grievant was fully released to work as a Nurses Aide after her surgery in 1995 such that her claim that she could not take an Attendant position was unfounded. The County noted that the Grievant's resume and her testimony showed that she had the basic qualifications for the Billing Clerk job yet she refused to take the test and asserted that she did not have the necessary degree. The County argued that the Grievant's claims were groundless because a specific degree was merely desirable and for the Billing Clerk position. The Grievant could have qualified for the Billing Clerk position yet she choose not to. In the County's view, the fact that the Grievant declined positions offered by the County because of her family situation and personal reasons as well as the traveling distance from her home did not constitute appropriate reasons to exempt her from accepting offered work. As the Grievant refused numerous offers of work and the right to bump less senior employes, she showed no interest in continuing employment with the County. Therefore, the County urged that Maurer should be deemed to have voluntarily quit County employment. The County noted that arbitrators have held the employes who fail to respond to recall letters are deemed to have voluntarily quit; that the failure to respond to a recall letter has justified discharge in prior cases. The County urged that if an employe refuses an offer of work, the employe should have no expectation of continued employment. Based on the above, the County urged that it followed the contract as well as past practice and that the grievance should be denied and dismissed in its entirety.

**Union**

The Union argued that no contract language exists to support the Employers position. In addition, the Union noted that the Employer never advised the Grievant that her failure to take any vacant position would cause self-termination. In this regard, the Union asserted that where the contract is silent an employe should be able to elect whether to remain laid off rather than take a demotion or different position which the employe perceives as less beneficial. As the contract contains no language indicating that an employe must take any position available or be discharged, the Union asserted that the Arbitrator should sustain the grievance.

The contract provides that employes should use their seniority in gaining their positions. The Union asserted that terms and conditions of employment were very important to

the Grievant in obtaining her prior position. In this regard, the Grievant did not have to work weekends or holidays and was working first shift on a part-time basis and received full benefits for her Ward Clerk position. The Union argued that for the Grievant to take any of the offered positions in Food Service or Housekeeping would have constituted a demotion. In addition, the nursing jobs offered to the Grievant were vastly different from the Ward Clerk position she was laid off from in February, 1999. In regard to the Billing Clerk position, the Union contended that it was unsure whether the Grievant could have passed the test for the job but that it was unfair for the County to use the offer of that position in order to terminate the Grievant when it was unclear whether the Grievant could have performed that job.

The Union argued that cases indicate that employes do not have to accept recall to perform a job different from the one they held previous to their layoff; and that the cases also show that if nothing in the contract states to the contrary, employes can refuse recall to a lower-rated job (a demotion).

The Union urged that no past practice was proven to support the Employer's position in this case. In this regard, the Union noted that the Employer failed to prove that employes have been terminated because they refused to take jobs different from the ones from which they had been laid off, as is the case with the Grievant. In regard to the Schultz matter, the Union asserted that Schultz must have refused recall to the same job from which she had been laid off thus explaining why she was terminated by the County. In any event, the Union argued that Ms. Farrel's testimony indicated that she had no personal knowledge of Ann Schultz's situation. None of the other witnesses who testified in this case had personal knowledge of the Schultz case and this evidence should be disregarded.

In regard to various documents the County placed into evidence, the Union noted that the 1983 layoff procedures memo specifically states that it is a County position letter. The Union also noted that the Schultz termination letter in fact conflicts with the County's 1983 layoff policy memo submitted in evidence herein. 4/

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***4/ In this regard, the Union pointed out that the Schultz letter indicates that an employe can bump a second time after six months of layoff. The Grievant was never offered this option.***

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The Union asserted that the Employer's interpretation of the contract would lead to illogical and unfair results. Employes would have to take different jobs outside of their expertise and this would be quite unsettling at the Institutions. Finally, the Union noted that the Grievant was in fact terminated by the County; that she was not terminated for just cause as required by the contract. The Union noted that the Employer never warned the Grievant that she would be terminated if she did not accept any available work; that she had no notice of anything that she had done wrong and that no progressive discipline was applied to her. The Union asserted that self-termination only occurs under Article 31 of the contract when an

employe is absent without explanation for more than three days. In this case, the Grievant was not absent for more than three days per Article 31 and, therefore, the Union urged that the grievance must be sustained and the Grievant be placed back on the recall list and given her full seniority credit under the contract.

**Reply Briefs**

**County**

The County argued that the Grievant was fully aware that if she failed to select an open position offered to her by the County by March 8, 1999, that the County would consider her "self-terminated." The Grievant called the County on March 9th and declined the offered positions. The County noted that the contract is silent regarding the time during which an employe may remain on layoff and retain the right to recall. The County urged that because no changes have been made to the contract since the inception of the parties' collective bargaining relationship, because the Union has never sought to negotiate the point, and because there have been several layoffs since 1983, an inference should arise against the Union that it essentially agreed to whatever procedure for layoffs the County had used in the past. Indeed, the County contended that the Arbitrator is not at liberty to essentially write contract language in this case, as a ruling in favor of the Union herein would require. Rather, the County asserted that it has the authority under the Management Rights clause to act as it did in this case.

Because the contract states that employes who bump into positions must be able to perform the job without re-training, with only familiarization, one could infer that employes must be capable of performing jobs and, therefore, they must take jobs that are offered to them under the contract. The County urged that if the Arbitrator rules in favor of the Union in this case, this would leave the door open for employes to remain on layoff until their former positions became available.

The County urged that the just cause provision does not apply to this case. Here, Maurer chose not to take any of the offered positions and she, therefore, showed no interest in continued employment by her choice. In any event, Maurer would not have made a great deal less in the offered positions, as the Union claimed. For all of these reasons, the County urged that the grievance should be denied and dismissed in its entirety.

**Union**

The Union noted that the Grievant was never offered a higher paying position—that the Billing Clerk position required a test and qualifications and the Grievant was not offered that position outright, contrary to the County's claim. The Union urged that one example (Ann Schultz) does not establish a past practice. In any event, the County failed to prove that

she was offered after her layoff. Therefore, given the lack of evidence regarding Schultz's circumstances, the Arbitrator should not analogize between the Schultz case and the instant case to find an appropriate outcome here.

The Union observed that the County argued in its initial briefs that the Grievant should have bumped into a job held by a less senior employe rather than take a layoff. In this regard, the Union noted that one of the available jobs was a full-time Ward Clerk at a different facility, and the other job was actually that of a part-time volunteer coordinator, not a part-time Ward Clerk as listed on one of the County's documents. Therefore, both jobs were different form Maurer's position before her layoff.

In addition, the Union urged that the cases cited by the County were inapposite. In this regard, the Union noted that the employes who were terminated had failed to comply with the contractually specific timelines for acceptance of recall. Such an issue is not raised in this case.

Therefore, because there was no just cause to terminate Ms. Maurer, because no past practice was proven that Maurer had to take a demotion, work different hours and shifts or a different job with different work days and because there is no contract language to support the County's position herein, the Union urged that the grievance should be sustained.

## DISCUSSION

The effective labor agreement is silent on the specific question before me. No reference is made in the contract to "self-termination" and the employes' rights to recall are not restricted except pursuant to Article 27, which provides that the last employe laid off must be the first recalled. There is one reference in Article 31 to "voluntary termination." But such "voluntary termination" occurs only for unexplained absences from work of more than three days. Thus, I note that the contract fails to provide for automatic termination without regard for just cause which could be applied to the circumstances here.

The question arises whether past practice or bargaining history evidence has been proven to fill in the contractual blanks in this case. Regarding bargaining history, the parties submitted no evidence on this point. Rather, the parties stipulated that the issue of the length of time employes may enjoy the right to recall has never been discussed or contemplated by the parties.

In addition, the evidence in this case was insufficient to prove that any past practice regarding recall or self-termination exists. In this regard, I note that none of the witnesses who testified were aware of the specifics surrounding the Ann Schultz termination. In any event, the Schultz termination letter recounts that Schultz refused to return to work, making the Schultz case distinguishable from the instant case.

Furthermore, the 1983 layoff memo submitted by the County, which has been in existence for 17 years without objection from the Union, does not address the length of time an employe may remain in layoff status. Nor does, that memo address the issue whether a laid off employe must accept or apply for any open position at the County's institutions. In these circumstances, whether the Union approved of or was, in fact, aware of the contents of the 1983 layoff memo is, therefore, not particularly relevant here because the 1983 memo does not address any of the issues in this case.

The facts of this case show that a short period of time elapsed between Maurer's receipt of notice that she was being bumped (January 27, 1999), Maurer's choice to take a layoff (February 4, 1999) and the County's first notice of openings to Maurer (February 18, 1999)—wherein the County stated it would notify Maurer on a weekly basis of any and all open positions at CHC and that Maurer would be notified of any new positions prior to their being posted. By letter dated February 24, 1999, the County confirmed that Maurer had declined all open positions, yet the County did not warn her that she was at risk for having her recall rights extinguished in that letter. On March 4, 1999, approximately one month after Maurer agreed to take a layoff, the County apparently changed its tune and stated that it would consider Maurer self-terminated if she declined a position listed by the County or if she failed to call in by March 8th to notify the County regarding her choice. Maurer called the County on March 9, 1999, and again indicated that she did not wish to take any of the offered positions. On March 10, the County notified Maurer that it considered her self-terminated because she had declined all open positions.

The County has argued that Maurer should have exercised her bumping rights. Maurer admittedly could have done this. But the contract does not require employes to exercise their bumping rights. Rather, the contract gives employes the choice of accepting a voluntary layoff or exercising the right to bump. Thus, the Grievant's failure to bump, no matter what her reasons may have been, therefor, cannot be used as a basis for extinguishing her right to recall.

The County argued extensively that Maurer could have qualified for any of the open positions of which it notified Maurer. The County essentially contended that the only impediments to Maurer's taking any of the open positions were Maurer's own desires to accommodate her family by working only on a certain shift, for certain hours and days and only at CHC. Why Maurer chose not to take the offered positions (none of which was a Ward Clerk position) is not particularly relevant here.

In this regard, I noted that the contract does not require employes to take any offered position. In addition, the contract fails to state what job(s) laid off employes must be recalled to. Certainly, the County should have offered Maurer jobs in her pay range for which she could qualify without training. The record evidence failed to show whether the job from which Maurer was laid off ever opened up. And, apparently at the time of her layoff, the County never asked Maurer whether she was interested in taking any positions other than the Ward Clerk position form which she had been laid off. Thus, in virtually every major area of

concern on the subject of recall rights, the contract is silent and the parties have failed to flesh out employe/employer rights through past practice or negotiation.



I disagree with the County's assertion that Maurer's failure to accept any of the open positions evidenced a lack of interest in continued employment with the County. This is not a case like those cited by the County where the laid off employe fails to timely respond to a recall letter. Maurer did respond to the County's notices and no claim was ever made by the County that she failed to so in a timely fashion. Rather, this case hinges upon whether the County could reasonably and justifiably extinguish Maurer's recall rights approximately one month after her choice to take a voluntary layoff.

The Union has argued that the County terminated Maurer without just cause. I agree. Here, the record facts showed that Maurer engaged in no misconduct prior to her termination by the County. Nowhere in the labor agreement does it state that the County may terminate a laid off employe who refuses to accept an open position. In the circumstances of this case, given the lack of evidence of bargaining history and past practice and given the silence of the contract, I find that the County essentially terminated Maurer without just cause by unreasonably extinguishing Maurer's recall rights after only one month's time.

Many contracts contain one or two year reservations of employe recall rights following a layoff; some contracts provide for even longer periods. To extinguish an employe's recall rights so quickly (after one month) and without any express contractual basis therefor, is an extremely harsh step, which the County should not have taken lightly. On the other hand, it would be unreasonable to allow recall rights to go on indefinitely.

The only clue we have regarding what the parties believed to be a reasonable period for recall is found in the Schultz termination letter which refers to a six month period (albeit in a different context). Therefore, where the contract is silent, as it is here, I find it would have been reasonable for the County to recognize Maurer's recall rights for six months after she took the layoff from her Ward Clerk position at CHC. As the County unreasonably failed to do this, I will order that for five months 5/ after the issuance of this award, the County will notify Maurer in writing of all open positions (as it did before her termination). In fairness, Maurer must give these openings her full consideration. If, at the end of this period, Maurer has refused all openings, then the County may terminate her employment with impunity. Based upon the above analysis as well as all of the relevant evidence and argument in this case, I issue the following

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***5/ I have ordered a five month period because the County recognized Maurer's recall rights for one month after her layoff.***

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## AWARD

The Employer did not have just cause to terminate Christine Maurer. The County

unreasonably extinguished Maurer's recall rights one month after her layoff. The County shall, therefore, place Maurer's name back on its recall list and maintain her name on that list from the date of this Award for a five month period. During this period, the County must notify Maurer in writing of all open positions, including new positions, as it did prior to her March 10, 1999, termination.

Dated at Oshkosh, Wisconsin, this 21st day of July, 2000.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

SAG/ans

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