BEFORE THE ARBITRATOR

CALUMET COUNTY (HIGHWAY DEPARTMENT)

and

AFSCME, LOCAL 1362, AFL-CIO

Case 117
No. 60367
MA-11591

(Victor Brault - Layoff Grievance)

Appearances:

Ms. Melody Buchinger, Corporation Counsel, 206 Court Street, Chilton, Wisconsin 53014, appearing on behalf of Calumet County.

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

ARBITRATION AWARD

Pursuant to a joint request for the appointment of a staff arbitrator, the undersigned, Steve Morrison, was designated by the WERC as arbitrator to hear and to decide the instant dispute between the Union and the County in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. A hearing was held before the undersigned on November 30, 2001. The hearing was not transcribed. Post hearing briefs and reply briefs were exchanged by March 5, 2002, marking the close of the hearing. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues and have left it to the Arbitrator to frame the issues to be decided.

The County would frame the issues as follows:

Was the County required to expand its staffing levels by adding another position upon the reinstatement of Christopher Fritsch?

If so, what amount of compensation will make the Grievant whole?

The Union would frame the issue as follows:

Did the Employer violate the contract when it lay-off [sic] Victor Brault on July, 2001? [sic] If so, what is the appropriate remedy?

The Arbitrator states the issue as follows:

Did the Employer violate the collective bargaining agreement when it laid off Victor Brault on July 20, 2001, and failed to offer him the opportunity to fill an available position in the Parks Department? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE IV – SENIORITY

4.01 Application – In General

A. Seniority shall mean the continuous length of service with the County from an employee's last date of hire.

B. Employees shall lose their seniority only for the following reasons: Retirement, resignation, or discharge, if not reversed through the Grievance Procedure.

4.02 Layoffs

A. Whenever it becomes necessary to layoff employees due to shortage of work or lack of funds, employees shall be laid off in inverse order to their length of service on either the Highway Department seniority list or the Parks Department seniority list, providing the remaining employees in the affected department (Parks or Highway) are qualified to perform the Employer's work in the Department (Parks or Highway) where the layoff occurs. Whenever so laid off, employees shall possess reemployment rights as hereinafter defined.

B. In the event of a layoff, employees to be laid off may bump laterally within a classification or to a lower classification for which they are qualified providing it is still within the affected department (Parks or Highway).

C. No regular full-time employee will be laid off as long as a probationary, part-time, temporary, or seasonal employee is still working in either the Parks or Highway department, providing the regular full-time employee is qualified to perform the available work.

4.03 Rehire

A. Whenever it becomes necessary to employ additional workers, either in vacancies or in new positions subject to the provisions of this Agreement, former employees who were laid off within two (2) years prior thereto, shall be entitled to be re-employed in such vacancies or new positions in preference to all other persons, provided, however, that the employee(s) to be returned to work is qualified to perform the available work. Employees who voluntarily lay off shall be deemed to have lost all seniority rights. On rehire, laid-off employees will be recalled by seniority within the department (Parks or Highway) from which they were laid off, provided the full-time employee is qualified to perform the available work. If no one is laid off or if no one is qualified to perform the available work, then the employer shall recall any laid off employees in the remaining department (Parks or Highway) qualified to perform the available work before hiring from outside the bargaining unit.

. . .

ARTICLE V – PROBATIONARY PERIOD AND SUMMER HELP

. . .

Summer Help – Seasonal summer help shall be employed from June 1st to September 1st but can be extended for thirty (30) day periods by mutual agreement between the Employer and the Union.

ARTICLE VI – GRIEVANCE PROCEDURE

. . .

6.06 The arbitrator shall not have the power to add to, subtract from, or alter the Agreement.

. . .

ARTICLE VII – MANAGEMENT RIGHTS RESERVED

7.01 Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him for such period of time involved in the matter.

. . .

BACKGROUND

The facts giving rise to this grievance are not in dispute. The County hired the Grievant to work in the Highway Department as a truck driver on March 27, 2000. In June of 2001, the undersigned issued an award which caused the Employer to reinstate a former employee, Christopher Fritsch. This reinstatement caused the County to demote the employee who had stepped into Fritsch's mechanic position to the position of truck driver which, in turn, caused the Grievant's removal from the truck driver position. More importantly, Fritsch's reinstatement increased the staffing level of the department beyond its budgeted level by one employee – the Grievant.

On July 17, 2001, the Salary and Personnel Committee met to consider expanding its staffing level. The Committee decided against the expansion and to lay off the Grievant. On the following day, July 18, 2001, the Grievant was placed on notice of his lay-off status to become effective at the end of his workday on July 20, 2001. This grievance followed.

POSITIONS OF THE PARTIES

The Union

The Union first argues that the Grievant was laid off because the Union refused to agree to the addition of a "General Worker" classification for him. The Union says that under the terms of the contract, the layoff must be due to "lack of work" or "lack of money" and neither is cited as the reason for the layoff in the notice of layoff letter received by the Grievant. The Union accuses the County of threatening the Union with the Grievant's layoff if it failed to accept the "General Worker" classification and points to the July 18, 2001 letter from Human Resource Director Patrick W. Glynn (Joint Exhibit 8) as evidence thereof.

The Union next argues that the Grievant should not have been laid off because "there were probationary, part-time, temporary of seasonal employees still working in the parks department." In support of this argument, the Union relies upon the contractual language found in Article IV, Section 4.02 C, set forth above. The Union maintains that the Grievant was qualified to perform the available work being done by the part-time, temporary or seasonal employees in the Parks Department and consequently should not have been laid off. Specifically, it says that the Grievant "could have done that work."

The Union urges the Arbitrator not to separate the Parks and Highway Departments when interpreting the contract language under Section 4.02 C, of the contract. It says that the Grievant, regardless of the fact that he worked for the Highway Department, should be able to move into a Parks Department part-time, seasonal or temporary job in lieu of layoff.

Finally, the Union argues that the prior grievance involving David Dill should have no bearing on this grievance and that the Arbitrator should not rely upon that settlement as determinative of any of the issues in this case.

The County

The County argues that the layoff of the Grievant was justified in three respects. First, it points to Article VII, Section 7.01 (Management Rights Reserved), set forth above, and takes the position that the layoff was done for "other legitimate reasons" as set forth in that Article. It posits that because the contract fails to define the term "other legitimate reasons" this failure makes the term ambiguous. Being ambiguous, it reasons, it becomes the Arbitrator's task to ascertain the true meaning of the parties when they negotiated the language. To do so, the Arbitrator must look to past grievances and their terms of settlement. The County suggests that the David Dill Grievance, having contained facts "identical" to those found here, would allow the Arbitrator to determine the meaning of the phrase "other legitimate reasons" with absolute certainty. Second, the County says the layoff was justified due to "lack of funds" which reason is set forth in Article IV, Section 4.02 A (see above). Because the reinstatement of Christopher Fritsch caused the Highway Department staffing level to be exceeded by one, says the County, and because there were no budgeted funds to pay for this position, it was justified in laying off the Grievant. Third, the County justifies the layoff due to the asserted fact of "lack of work," also found in Article IV, Section 4.02 A. It argues that over the years it has reduced the staff by roughly 50% and that it no longer does the same type of work it had done in the past. For example, it no longer builds roads; it does not crush its own gravel; it does not own a gravel pit or an asphalt plant and that these jobs are all bid out on contract to private companies now. The County asserts that but for the need to keep employees for the winter season, when more employees are needed for snow removal, the summer staffing levels would be even lower than they are now.

Regarding staffing, the County asserts that the right to manage the work and determine staffing levels is a management right clearly reserved to the County under Article VII, Section 7.01 (see above). It argues that the Arbitrator, by virtue of Article VI, Section 6.06 (above), may not increase that staffing level.

The County further argues that the Grievant does not have a right to "bump" from the Highway Department to the Parks Department. The County maintains that that language in Section 4.02 C, refers to "probationary, part-time, temporary, or seasonal" employees in the department from which he was laid off, i.e. the Highway Department, and because these positions were located in the Parks Department, and because the departments "are completely separate" then Section 4.02 C, should have no application to this matter. Even if it were to apply to the facts here, argues the County, the available positions at the Parks Department were non-benefited and the most the Grievant could have earned would have been $9.02 per hour as a Ranger/Maintenance Worker – Seasonal. The County seems to suggest that the Grievant would not have accepted such employment if offered. In any event, says the County, he never asked for one of those jobs nor did the Union on his behalf. The Union's only request was that the Grievant be restored to his prior position at the Highway Department at the same level of pay and at the same level of benefits. The County admits that if the probationary, part-time, temporary or seasonal employees had been employed by the Highway Department at the time of the Grievant's layoff, they would have been laid off before the Grievant.

Finally, the County points to the testimony of Parks Superintendent Frank Wasdovitch who testified that the Union Representative inquired about placing David Dill at the Parks Department in lieu of his layoff from the Highway Department. He testified that the Union declined to do so on the grounds that the Parks Department did not pay enough. It maintains that if the Grievant here had been placed in the employ of the Parks Department in lieu of his layoff he would have only been able to earn $360.80 per week for the four remaining weeks of the part-time Ranger/Maintenance Worker – Seasonal position. Since the Grievant collected $312.92 per week in Unemployment Compensation during that period of time the County argues that the most it would owe him would be the difference between the Unemployment Compensation and the salary of the Ranger/Maintenance Worker – Seasonal, or $47.88 per week for four weeks for a total of $191.52.

DISCUSSION

The threshold question to be answered here is whether the County had sufficient justification to lay off the Grievant. There is no question that the reinstatement of Christopher Fritsch increased the staffing level of the Highway Department beyond its limit by one employee. There is no question that the Grievant, as the least senior employee in the Department, became a potential subject of layoff due to that increase in staffing level. It is at this point that the parties split company. The core issue surrounds the meaning of Article IV,

Section 4.02 C. The Union says the County could not lay him off because of the language contained in that article which reads as follows:

> No regular full-time employee will be laid off as long as a probationary, part-time, temporary, or seasonal employee is still working in either the Parks or Highway department, providing the regular full-time employee is qualified to perform the available work.

The Union's position is simple: if either department employs people in the categories listed in Section 4.02 C, then the County is prohibited from laying off any full-time employees in either department. The Union does not suggest that the employee to be laid off should be given the option to fill the probationary, part-time, temporary, or seasonal positions. It only argues that he or she may not be laid off. The Union does not give the Arbitrator any guidance as to what it would have the County do with that employee other than to suggest that it increase the staffing level to accommodate him/her. The Arbitrator is not empowered to accommodate that request.

The County, on the other hand, says that Section 4.02 C should be read in conjunction with Sections 4.02 A and B, both of which clearly provide that the two departments are to be treated separately for the purposes of layoffs. Each department has a separate seniority list for that purpose which is created by the language of Section 4.02 A and the language of Section 4.02 B, prevents an employee of one department from "bumping" into the other department in the event of layoff. Thus, according to the County, Section 4.02 C, must also be presumed to incorporate the separation of the departments concept so as to be interpreted to mean that an employee of one department may not be laid off if it employed the categories of employees mentioned therein but could be laid off if the other department employed them. In other words, the existence of probationary, part-time, temporary, or seasonal employees in one department would not prevent the layoff of an employee in the other.

The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions, RILEY STOKER CORP., 7 LA 764, 767 (PLATT, 1947). To the greatest extent possible, the Arbitrator must ascertain and give effect to the parties' mutual intent. That intent is expressed in the contractual language, and the disputed portions must be read in light of the entire agreement. HEMLOCK PUB. SCH., 83 LA 474, 477 (DOBRY, 1984). Reading Sections A and B together, it is clear to the undersigned that the parties intended to separate the two departments work forces on the grounds of inter-departmental seniority and that the parties intended that, in the event of layoffs, the departments would remain separate and that employees of one would not need to be concerned about being bumped by employees laid off from the other. This is clear because the parties, in drafting the document, went to great pains to specifically refer to this

separation in the language they used. In Section 4.02 A, the parties refer to " . . either the Highway Department seniority list or the Parks Department seniority list, providing the remaining employees *in the affected department (Parks or Highway)* are qualified to perform the Employer's work *in the Department (Parks or Highway) where the layoff occurs . . .*" (Emphasis added.) Likewise, in Section 4.02 B, the parties take pains to set forth their intention that the departments are separate for the purposes of layoffs by saying "In the event of layoff, employees to be laid off may bump laterally within a classification or to a lower classification for which they are qualified *providing it is still within the affected department (Parks or Highway).*" (Emphasis added.) The general presumption in contract construction is that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect. See JOHN DEERE TRACTOR CO., 5 LA 631, 632 (UPDEGRAFF, 1946).

Turning now to the language of Section 4.02 C, I find no such care in the wording of this paragraph such as I found in A and B. Clearly then, the parties did not intend that the separation between the two departments, which they so carefully crafted in the language of the two previous paragraphs, be incorporated into this paragraph. If that had been their intent, they could have easily indicated so by using the same or similar language. They did not do so and they thus demonstrated their intent that this paragraph encompass both departments. And this makes sense given the topic of Article IV, Section 4.02: Layoff. Section 4.02 C, is a clear expression by the parties that a full time employee in the Highway or the Parks Department will be given preference over all probationary, part-time, temporary, or seasonal employees regardless of which department employs them. As the Union argued, " . . . no bargaining unit wants employees laid off when probationary or non-bargaining unit employees are working anyplace." By adding the language ". . . providing the regular full-time employee is qualified to perform the available work" to Section 4.02 C, the parties expressed their intent that the employee to be laid off may "bump" the probationary, part-time, temporary, or seasonal employee in either department *provided he or she is qualified to perform the available work.* This is entirely consistent with the Union's desire and with the language in Section 4.02 B, which establishes the fact that an employee from one department may not bump an employee from the other. Under Section 4.02 C, the regular full-time employee subject to layoff may only "bump" a probationary, part-time, temporary, or seasonal employee, not a regular full-time employee, thus insuring that bargaining unit employees will not be laid off as long as "probationary or non-bargaining unit employees are working anyplace."

By reason of the foregoing, I embrace the Union's argument that Section 4.02 C, prevents the County from laying off regular full time employees when probationary, part-time, temporary, or seasonal employees are employed. I embrace this argument subject to my rejection of the Union's argument that these employees are department specific and subject to my rejection of the County's argument that the employee facing layoff may not bump probationary, part-time, temporary, or seasonal employees employed by the other department. The right of a regular full-time employee faced with layoff to bump a probationary, part-time, temporary, or seasonal employee, whether employed by the Highway or the Parks Department,

is a right afforded by the contract under Article IV, Section 4.02 C, and, the arguments of the County to the contrary notwithstanding, need not be specifically requested by the employee subject to lay off but must be offered to him/her at the time.

I now consider the question whether the County had a legitimate reason to lay the Grievant off under these facts. Article VII – MANAGEMENT RIGHTS RESERVED provides that management may "relieve employees from duty because of lack of work or other legitimate reason." The record is replete with evidence supporting the County's claim of lack of work. The unrebutted testimony of John Keuler, the Calumet County Administrator since June, 2000, shows that the County reduced the staffing levels over the past years due to the fact that it no longer does its own stone crushing or black topping; that it no longer does road construction; and that it has no gravel pit operations or runs an asphalt plant. These operations are contracted out to private industry. The County introduced its Exhibit 4, a group exhibit consisting of ten pages which was accepted without objection and which documents the jobs the County Highway Department employees do for other governmental entities and for private concerns to keep them busy during the summer months. Keuler testified this was necessary in order for the County to maintain a sufficient full time crew to conduct snow removal operations over the winter months. The fact that the Grievant was laid off because of lack of work is supported by the evidence. Hence, it is not necessary to address the remaining questions as to whether the County's assertion that he was laid off due to "lack of funds" or due to "other legitimate" reasons is true. Suffice it to say that the record would also support the layoff on the basis of "lack of funds." The County was justified in the lay off on the basis of lack of work alone but failed to offer the Grievant an available position in the Parks Department consistent with Section 4.02 C.

A brief word must be said regarding the Union's contention that the Grievant was laid off because the Union refused to agree to the "General Worker" classification. It argues that the County threatened the Union with the layoff if the Union failed to come to terms with it on the new classification, and that the layoff was punitive because it did not. The undersigned listened quite carefully to all of the testimony on this point and has read and re-read Joint Exhibit 8, the July 18, 2001 letter touted by the Union as proof positive of the County's alleged subversion. I do not agree with the Union. The County has every right to pursue such a classification and the Union has every right to oppose it. The fact that the County suggested to the Union that the new classification might be a way around the layoff of the Grievant and suggested that it would undertake to jump through all of the administrative hoops to accomplish the task does not equate to subversive behavior nor does it render the layoff punitive in nature. As shown above, the County had sufficient reason to layoff this employee and an attempt to work out a solution to avoid it cannot be held against the County.

The remaining question, then, is what is the appropriate remedy? In this regard, I adopt the County's suggestion as set forth in the last paragraph of its position statement and the monetary amounts set forth therein.

In light of the above, it is my

AWARD

That the County was justified in laying off the Grievant on July 20, 2001, but that it violated the collective bargaining agreement when it failed to offer him the opportunity to fill an available position in the Parks Department. To rectify this contract violation, the County shall pay the Grievant the sum of $191.52 which represents the maximum amount the Grievant would have made if he had filled the best available position in the Parks Department less the amount he received in Unemployment Compensation during the same period of time.

Dated at Wausau, Wisconsin, this 24th day of May, 2002.

Steve Morrison /s/
Steve Morrison, Arbitrator

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