

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
COUNTY PROFESSIONAL EMPLOYEES LOCAL 1323-A, AFSCME, AFL-CIO
and
DODGE COUNTY

Case 219
No. 62158
MA-12182

(Professional Unit layoff grievance, No. 02-12-10-02)

Appearances:

Mr. Lee Gierke, Business Representative, AFSCME Council 40, P.O. Box 727, Thiensville, WI 53092, appearing on behalf of the Union.

Ms. Nancy L. Pirkey, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Milwaukee, WI 53202-6613, and **Mr. Joseph Rains**, Dodge County Personnel Director, 127 East Oak Street, Juneau WI 53039-1329, appearing on behalf of the County.

ARBITRATION AWARD

At the joint request of the Union and County, above, the Wisconsin Employment Relations Commission (WERC) designated the undersigned, Marshall L. Gratz, as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' 2001-02 Professional Unit Agreement (Agreement).

The Arbitrator heard the dispute on April 23, 2003, at the County Administration Building in Juneau, Wisconsin. Following preparation and distribution of a transcript, the parties summed up their positions in post-hearing briefs and reply briefs, the last of which were exchanged by the Arbitrator on June 28, 2003, marking the close of the hearing.

ISSUES

At the hearing, the parties were unable to agree on a statement of the issues, but they authorized the Arbitrator to formulate the issues. The Union proposed that the issues be framed as follows:

1. Did the County violate the Labor Agreement when it laid off full-time employee Jeremy Klug in December of 2002?
2. If so, what shall the remedy be?

The Employer proposed that the issues be framed as follows:

1. Did the County violate Section 15.8 of the Professional Unit Agreement when it laid off full-time employee Jeremy Klug in December of 2002?
2. If so, what shall the remedy be?

For reasons noted at the outset of the DISCUSSION, below, the Arbitrator has framed the issues as follows:

1. Did the County violate Section 15.8 of the Professional Unit Agreement in connection with its lay off of full-time employee Jeremy Klug in December of 2002?
2. If so, what shall the remedy be?

PORTIONS OF THE AGREEMENT

ARTICLE II RECOGNITION AND FAIR SHARE AGREEMENT

2.1 It is hereby agreed that the [Union] has been selected by a majority of the eligible Employees of the Dodge County Professional Employees of Dodge County, Wisconsin, as the exclusive bargaining agent for all regular full time and regular part-time Employees of the bargaining unit, except for supervisory employees. . . .

. . .

ARTICLE III - MANAGEMENT RIGHTS

Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed, the duties of each of these Employees, the nature and place of work and all other matters

pertaining to the management and operations of the County, including the hiring, promoting, transferring, demoting, suspending or discharging for cause of any Employee. This shall include the right to assign and direct Employees, to schedule work and to pass upon the efficiency and capabilities of the Employees and the Employer may establish and enforce reasonable work rules and regulations. Further to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer. However, the provisions of this Section shall not be used for the purpose of undermining the Union or discriminating against any of its members.

ARTICLE XV - SENIORITY RIGHTS

15.1 It shall be the policy of the Employer to recognize seniority.

15.2 Seniority shall be defined for the purposes of the Agreement as the net credited service of the Employee. Net credited service shall mean continuous employment in the County, beginning with the date on which the Employee began to work after last being hired. However, it is understood that job posting preference shall be given first to department seniority and then to County seniority. The department seniority shall be defined as net credited service within the department. Department and County seniority shall not include unpaid leaves of absence.

15.3 Regular part-time Employees shall attain seniority in relationship to time paid. For the purpose of computing seniority, 173.3 hours shall be considered one (1) month.

15.4 In the event that a temporary, seasonal employee (etc.) is placed in a regular full time or regular part-time position, said Employee shall be credited with one (1) month of seniority for each 173.3 hours paid. Seniority shall be computed from the most recent date of employment on an uninterrupted basis. No fringe benefits are to be given retroactively.

15.5 There shall be two (2) groups of Employees and seniority: full time Employees and regular part-time Employees.

15.6 Seniority shall apply in promotions, transfers, layoffs, recall from layoff and vacation selection as herein provided.

15.7 **Job posting.** Whenever a vacancy occurs or it is known that a new job will be created, the following procedures shall apply:

15.71 The job vacancy shall be posted on union bulletin boards for a period of five (5) workdays and Employees may apply for such positions during this period.

15.72 Selection of applicants to fill job vacancies shall be determined by the Employee's skill, ability and seniority. where all factors are relatively equal, the Employee with the greatest seniority shall be entitled to preference.

15.73 When objections are made by the Employer regarding the qualifications of an Employee to fill a position, such objections shall be presented to the Union Committee for consideration. If there is any difference of opinion regarding the qualifications of an Employee, the Union may take the matter up for adjustment under the grievance procedure contained in Article XVI of this Agreement.

15.74 The County Personnel Director may make temporary appointments to the position until any dispute with respect to those positions is resolved.

15.8 Layoff and Recall. In the event the Employer reduces its work force, the following procedure shall apply:

15.81 Temporary, seasonal, then regular part-time Employees shall be laid off before regular full time Employees are laid off.

15.82 The Employee with the least seniority shall be laid off first, providing that the remaining Employees are qualified to carry on the Employer's usual operation.

15.83 In re-employing, Employees with the greatest length of service shall be called back first, provided that they are qualified to perform the work required.

15.84 Employees laid off under this Section shall retain all seniority rights for a period of one (1) year, provided that they respond to any request to return to work made during that time, by registered receipt mail.

15.85 The County will notify the Union as soon as an upcoming layoff is known.

. . .

ARTICLE XVI
GRIEVANCE PROCEDURE

. . .

16.3 . . . In rendering the arbitrator's decision, the arbitrator shall neither add to, detract from, nor modify any of the provisions of this Agreement. . . .

. . .

ARTICLE XVIII - MISCELLANEOUS

. . .

18.2 Part-time Employee Benefits.

18.21 A regular part-time Employee is hereby defined as an Employee regularly scheduled to work at least forty (40) hours in a two (2) week period or one thousand forty (1,040) hours per year.

18.22 Regular part-time Employees shall receive the rates of pay listed in Appendixes A and B based according to their seniority for paid hours computed at the rate of 173.3 hours for each month of seniority.

18.23 Regular part-time employees shall be entitled to prorated holiday, vacation, sick leave, insurance, longevity and retirement benefits.

18.24 Part-time and temporary Employees, etc. shall be paid the prevailing hire in rates of the Wage Appendix.

[There is no section numbered 18.3.]

18.4 A temporary or seasonal Employee is hereby defined as an Employee hired by the County for a period of time not to exceed ninety (90) days and paid at lowest entrance rate.

. . .

BACKGROUND

At all material times prior to his being laid off in December of 2002, Jeremy Klug was a member of the Professional Unit employed as a regular full-time Land Surveyor II.

The County and AFSCME locals have been parties to collective bargaining agreements covering the Professional Unit since 1977. Prior to 1989, those agreements covered a combined unit of non-supervisory regular full-time and regular part-time "Court House, Office Building and Library Employees" of the County, represented by Local 1323-G. In 1989, the parties split the Professional Unit now represented by Local 1323-A into a separate unit from what then became the Technical and Support Unit represented by Local 1323-G. The latest agreements covering both units were reached in mid-October of 2000, at which time the parties agreed on the terms both of a 2001-02 agreement and to a 2003-04 agreement, for each of the units. The instant dispute arises under the 2001-02 Professional Unit agreement (Agreement).

The class action grievance giving rise to this arbitration was filed on December 10, 2002. That grievance reads, in pertinent part, as follows:

The County did not layoff all temporary, seasonal, then regular part-time employees in the County before laying off full-time employees. In addition the County is trying to manipulate the contract language by how they have handled layoffs.

. . . Under Section 15.8 and all other applicable sections of the Labor Agreement, all temporary, seasonal, and regular part-time employees need to be laid off before full-time employees. The County is manipulating the contract by doing a layoff and recalling immediately. In addition, the County did not lay off all part-time, seasonal, and temporary employees before laying off full-time employees.

(The Request for Settlement or corrective action desired): (1) Recall all full-time employees if there are any part-time positions still existing within the County. (2) Make all affected employees, and the Union, whole for any losses.

The County variously denied the grievance on the basis that "[t]he procedure used by the County was not in violation of the labor agreement."

The grievance was ultimately submitted for arbitration along with a similar grievance arising in the Technical and Support Unit, for a consolidated hearing and issuance of separate awards by the same arbitrator. At the arbitration hearing, the Union presented testimony by James Heinbuch, Ann Clark, John Hartman, Neil Whiting, Harvey Zeman and Brian Drumm and rested. The County presented testimony by Joseph Rains and Sarah Eske and rested.

The record establishes that the pertinent language of the initial 1977 agreement closely corresponds with provisions contained the Agreement. However, it can be noted that, unlike Agreement Sec. 15.81, the comparable 1977 Sec. 3.81 includes "part-time," between "[t]emporary," and "seasonal," 1/ and there appears to be no 1977 agreement definition of

"temporary or seasonal Employee" paralleling that contained in Agreement Sec. 18.4. On the other hand, 1977 Secs. 13.13, 13.32 and 13.34 are, respectively, identical to the "regular part-time Employee" definition in Agreement Sec. 18.21, the provision concerning rates of pay for regular part-time employees in Agreement Sec. 18.22, and the provision limiting "[p]art-time and temporary Employees" to the "hire in rates of the Wage Appendix."

1/ The 1989 Professional Unit agreement and the 2001-02 Technical and Support Unit agreement, in Sec. 15.81, also both include "part-time," between "[t]emporary," and "seasonal." The absence of that term from the 2001-02 Professional Unit Agreement Sec. 15.81 is not addressed or explained in the record.

The record also establishes that in September, 2002, County Personnel Director Joseph Rains contacted the Locals and advised them that layoffs would likely become necessary at the end of the calendar year as a result of County Board actions to reduce the budget. Beginning on October 28, 2002, after the parties' protracted general contract negotiations were finally resolved earlier that month, the parties' representatives met, initially at request of the County, and on numerous occasions, to discuss the process to be used for the anticipated layoffs. During the course of those discussions, the Union rejected County proposals that the Union waive the requirements of Sec. 15.81 and that the parties adopt layoff and recall language that differed in certain respects from that contained in the Agreement. Also during the course of those discussions, the County rejected various Union proposals and contentions, including the idea that full-time employees otherwise facing layoff should be offered full-time employment consisting of combinations of available part-time duties.

Those discussions did not result in an agreement concerning how the anticipated layoffs would be implemented. On December 4, 2002, Rains issued a memorandum by e-mail to the Locals outlining the procedure that the County would be following, unless the parties met further and agreed otherwise. That County memorandum, which the County ultimately followed in implementing the layoffs, read as follows:

The following is what the County is advising our Department Heads as to the procedure to follow regarding positions eliminated or reduced in hours, and the layoff of part-time employees:

1. Full-time employees whose jobs are eliminated will be advised they will be given an opportunity to bump into a position which they are qualified to perform if they have more seniority than the person in that position and have the qualifications to perform the job.
2. The supervisor will make the determination as to whether the employee requesting to bump meets the qualifications for the position.

3. A full-time employee who cannot or chooses not to bump will be placed on layoff. Last day of work will be December 20, 2002.

4. In accordance with the language in the Professional Union and Technical and Support Union contracts, all part-time employees who are in part-time union positions, or part-time positions that would be in the union if they were full-time, will also be notified that they are being placed on layoff. Their last day of work will also be December 20, 2002.

5. Union employees will be recalled from layoff by seniority. A person who is recalled from layoff who meets the qualifications for the position must either return to work or lose all seniority, i.e., terminate. Once notified by registered letter, an employee will have two days to contact the supervisor to advise whether the employee will be returning to work, and will have five days from the notice to return to work. The recall, however, may designate a later starting date. If it is undetermined whether the person on layoff meets the qualifications for the position, the employee will be instructed to contact the supervisor within two days to discuss the matter and may be asked to meet with the supervisor. Once the supervisor advises the employee that he/she is considered qualified, the employee must return to work within five days (or a later date designated by the supervisor.) Full-time employees may be by-passed on recall to part-time jobs if they so request, and similarly part-time employees may be by-passed for full-time jobs.

6. All union part-time positions that are vacated as a result of the layoffs will be posted on or about December 5 and will remain posted for five work days. There will be one posting which lists all Technical and Support positions, and another posting which lists Professional positions.

7. Both employees who sign the posting and those who will be on layoff will be given equal consideration for the position. The most senior employee who meets the qualifications will be offered the position. Employees being recalled from layoff will return to work no earlier than December 26.

8. Employees may request payout of vacation or compensatory time at the time of layoff, and any such hours paid will be allocated for specific weeks. Since these employees are being laid off and are not being terminated, there will be no payout of any other benefits, i.e., sick leave, until such time as it would be appropriate to do so.

Also on December 4, 2002, the County began issuing notices to affected Professional Unit employees that they would be laid off at the end of the work day on December 20, 2002. The list of positions to be eliminated or reduced in hours had been provided to the Union in

November. Within the Professional Unit, in addition to eliminating a vacant part-time Adult Services position, the budget eliminated a full-time Land Surveyor II and a Mental Health Intake position; reduced to half-time a full-time DD Case Manager position; and reduced the hours of a part-time Victim Witness Coordinator position.

The first employees issued layoff notices were the only two part-time employees then in the Professional Unit, Amy Nehls, a part-time IBM Systems Analyst, and Peggy Goodman, a part-time Victim Witness Coordinator. Those two part-time employees were not given the opportunity to bump a less senior employee to avoid layoff. Two full-time employees were notified that their full-time positions had been eliminated: Jeremy Klug, a Land Surveyor II, and Steve Packee, a Mental Health Intake Worker. Another full-time employee, Michelle Vaillancourt-Pulver was notified that her DD Case Manager position was being reduced to part-time. Those three full-time employees were also notified that they had the opportunity to bump a less senior employee, if they were qualified for the new position. Two of the three were ultimately allowed to bump into a full-time position, and another round of layoff notices was issued.

The County denied Klug's request to bump into a full-time GIS/CAD Specialist position on the grounds that he was not qualified for that position. A separate grievance was filed challenging that denial. Klug was not offered an opportunity to bump into full-time work consisting of a combination of the available part-time work, and he did not attempt to bump into any one of the available part-time positions. He was laid off at the end of the work day on December 20, 2002.

Packee chose to bump into the full-time Counselor-Mental Health position held by Mark Bunkowski. Bunkowski then chose to bump into the full-time DD Case Manager position held by Chris Shanahan. Shanahan chose to bump into the newly-reduced-to-part-time DD Case Manager position held by Michelle Vaillancourt-Pulver. Vaillancourt-Pulver chose to bump into a full-time Social Work Ongoing Juvenile Delinquency position held as a job share by Debra Wolfram and Heidi Villwock (a/k/a Bartelt). Wolfram and Villwock bumped as a job share into an open full-time Social Worker position.

On December 5, 2003, the County posted the three available part-time positions and the one vacant full-time Social Worker positions for five days, offering to give equal consideration to employees on layoff and other employees signing the posting. The part-time DD Case Manager and full-time Social Worker positions were filled by bumping by full-time employees as noted above. When the posting period ended on December 10, the only employees who had signed the postings for the remaining two part-time positions — the IBM Systems Analyst and Victim Witness Coordinator — were the former incumbents of those positions. Because they were laid off, they did not need to sign the posting in order to be considered for the positions under the procedure outlined in Rains' December 4, 2002 e-mail quoted above.

On December 17, 2002, the County Board passed a resolution to pay employees who were to be laid off on December 20, for the Christmas Eve and Christmas Day holidays.

Then, on December 18, the County notified Nehls and Goodman that they were being recalled to work as of December 26, 2002, in the available part-time positions from which they had respectively been laid off. That left Klug as the only Professional Unit employee who had been placed on layoff and who did not bump into another position. As of the date of the hearing, Klug had not been recalled from layoff. In contrast, Nehls and Goodman lost only one day of pay before they returned to regular part-time work on December 26.

Additional factual background is noted in the DISCUSSION, below.

DISCUSSION

At issue is whether the County violated Sec. 15.8 of the Professional Unit Agreement in connection with its lay off of full-time employee Jeremy Klug in December of 2002, and, if so, what the remedy shall be.

In so framing the issues, the Arbitrator finds appropriate the County's proposed focus on Sec. 15.8 of the Professional Unit Agreement because this is a dispute about whether the County violated the layoff and recall procedure contained in that section of that agreement. In this case, a specific reference to that section does not preclude consideration of other Agreement provisions to properly interpret Sec. 15.8 and its various subsections. However, the Arbitrator has also broadened ISSUE 1 somewhat, by use of the term "in connection with," because — as the wording of the grievance indicates — the dispute does not center solely on the initial layoff of Klug in December, 2002. It also centers on the fact that Klug remained laid off while regular part-time Professional Unit employees were recalled and actively employed by the County on a part-time basis.

The Union contends that the Agreement, particularly Sec. 15.81, clearly, unequivocally and absolutely precludes the County from actively employing any temporary, seasonal or regular part-time employee (as those employee groups are defined in Art. 18) while any regular full-time employee is laid off. The Union asserts that although temporary and seasonal employees are outside of the bargaining unit defined in Sec. 2.1, the references to them in Sec. 15.81 must be given effect. The Union argues that the County violated the Agreement by keeping Jeremy Klug laid off while recalling and actively employing regular part-time Professional Unit employees. The Union bases its case on the language of Sec. 15.81 in the context of the Agreement as a whole, and on past practice and bargaining history evidence, as well. The Union argues that its interpretation of Sec. 15.81 does not impose an unrealistic burden on the functioning of the County and does not produce a nonsensical or harsh result, because the County could have avoided the violation in various ways, including by offering to employ laid off full-time employees in a full-time combination of available part-time duties. The Union argues that the County rejected that and other approaches to avoiding the violation that were suggested by the Union during the discussions that preceded the implementation of the layoffs. By way of remedy, the Union requests an order that Jeremy Klug be immediately recalled and made whole for all losses.

The County contends that Sec. 15.8 does not limit the County's absolute Art. III rights to determine the number of full-time and part-time positions that it will maintain at any given time. The County argues that Sec. 15.8 addresses only which employees will be impacted by the County's exercise of its Art. III rights, not which positions may or may not be eliminated or reduced in hours. The County asserts that it fully complied with all Sec. 15.8 requirements by: placing all part-time employees on layoff prior to any full-time employee being placed on layoff; offering all available Professional Unit work to those employees who were qualified to perform it, by seniority beginning with the full-time employees; and then recalling qualified employees by seniority to perform the work that remained available. The County asserts that it included posting as part of its layoff and recall implementation at the Union's request and that bumping was included by agreement with the Union even though it is not expressly called for in Sec. 15.8. The County asserts that it had no contractual obligation: to eliminate non-Union job positions; or to lay off non-Union employees instead of Union positions or Union employees; or to combine part-time positions into full-time positions. The County argues that while the layoff notices issued to part-time employees may have gone out after the layoff notices to full-time employees, the part-time employees were still laid off before full-time employees. The County argues that the Agreement does not preclude it from recalling part-time employees to available part-time work even though a full-time employee remains laid off, where, as here, each full-time employee whose job was reduced or eliminated, or who was bumped by another full-time employee, was given the opportunity to exercise seniority to obtain any available full-time or part-time position for which he or she was qualified. The County argues that the Union's reliance on past practice and bargaining history must be rejected because the clarity of the contract language involved makes resort to such evidence inappropriate and because, in any event, none of the Union's evidence constitutes a persuasive basis on which to interpret the contract provisions at issue.

In the Arbitrator's opinion, the record establishes that the County violated Agreement Sec. 15.81 in connection with its lay off of Jeremy Klug in December of 2002 by failing to determine whether there was a full-time combination of available part-time Professional Unit work for which Klug was qualified. However, the extent to which Klug is entitled to the reinstatement and make whole relief ordered in this Award is a matter left in the first instance to the parties, with jurisdiction retained in case a dispute arises in that regard.

The rights reserved to the County in Art. III, on which the County relies in this case, are expressly made subject to other provisions of the Agreement, and Section 15.81 constitutes such an explicitly limiting provision.

Section 15.81 provides that all temporary, seasonal and regular part-time employees shall be laid off before any regular full-time bargaining unit employees are laid off. Read in the context of Secs. 2.1, 18.2 and 18.4, the Sec. 15.81 references to "temporary" and "seasonal" employees refer only to such employees who perform Professional Unit work, but not to other non-Union temporary or seasonal employees. Similarly, read in the context of Secs. 2.1 and 18.4, the Sec. 15.81 reference to "regular part-time employees" refers only to

regular part-time employees who perform Professional Unit work, not to other regular part-time employees. The County's contention that the Agreement can have no impact on the County's treatment of any work being performed by any persons outside the bargaining unit defined in Sec. 2.1 is untenable. "Temporary" and "Seasonal" employees are clearly outside the bargaining unit defined in the Sec. 2.1 Recognition language, but the Sec. 15.81 references to them just as clearly must be given some effect rather than treated as meaningless.

Both logic and common usage of the term "laid off" lead the Arbitrator to conclude that the language of Sec. 15.81 means more than the County asserts it means. The County would have that provision interpreted to mean that all temporary, seasonal and regular part-time employees must be initially laid off before a regular full-time employee can be initially laid off, but that there is no requirement of any kind that temporary, seasonal and regular part-time employees must also continue to "be laid off" before any regular full-time employees continue to be "laid off." The Arbitrator rejects that County interpretation of Sec. 15.81 because it requires the Arbitrator to violate Sec. 16.3 by adding the word "initially" before "laid off" in the two places those words appear in Sec. 15.81. In that way, the County's interpretation would have the term "laid off" given a meaning that is far narrower than its ordinary usage in labor relations connotes. "A 'layoff' is usually defined as the placing of an employee 'on leave' together with the employee's severance from the payroll." Hill and Sinicropi, Management Rights, 370-71 (BNA, 1986).

None of the bargaining history or past practice evidence supports the unusual interpretation urged by the County, and some of it persuasively undercuts that proposed interpretation. Specifically, the Union presented testimony of Harvey Zeman and related documentation to the effect that — under contract language very similar to Agreement Sec. 15.8 — Zeman was given notice on December 4, 1986 that he would be laid off from his regular full-time employment as a second shift Custodian; that prior to the layoff taking place the Union objected to the layoff based on the layoff language of the contract; and that the County rescinded Zeman's layoff on December 10, 1986. The Union presented related newspaper articles and testimony by Neil Whiting, the AFSCME local president in 1986, which, taken together, were to the effect that the County announced layoffs of full-time employees, but not of all part-time employees; that the Union objected based on the language of the 1986 agreement corresponding to Agreement Sec. 15.81, and that the County backed off on the layoffs of the full-time employees because of the Union's denial of a request from the County to waive that provision.

The County argues that those 1986 developments should have no bearing on the instant case because, unlike the 2002 situation, the County did not lay off part-time employees before implementing layoffs of full-time personnel and the County ultimately rescinded the disputed layoff notices. The County also emphasizes that the Union and County entered into a settlement of the layoff grievance in 1986 that the Union ultimately agreed was withdrawn "without precedent and without prejudice."

The Arbitrator finds those County's contentions unpersuasive for two reasons. First, it seems reasonable to conclude that if the County had thought the applicable agreement permitted it to do in 1986 what it did in 2002, it would have done so. Second, the 1986 layoff grievance asserting that "Dodge County has given formal notice of layoff but have not followed contract language as to procedure" bears a date of December 22, 1986, which was after the County's decision to rescind full-time layoff notices that was reported in the news accounts dated December 6, 1986 and reflected in the County's December 10, 1986 notice to Zeman that his layoff notice was rescinded. Moreover, the settlement agreement terms related only to the work that would be assigned going forward to employees Daniel Higgins, Lois Tesch and Joan Vick. Thus, County's rescinding of the layoff notice to Zeman does not appear to have been an element of the settlement that the Union was agreeing would be without precedent and without prejudice. 2/

2/ In contrast, the Arbitrator finds unpersuasive the Union's reliance on bargaining history in 1976 and 2002 and on a 1987 grievance settlement. The Union's evidence regarding the 1976 negotiations lacks the sort of specificity about what was said by whom at the bargaining table that would be needed to lend meaningful support to the absolute nature of the interpretation of Sec. 15.81 proposed by the Union in this case. The 2002 discussions were highly laudable efforts to avoid later disputes (like the instant grievance) about how the layoffs should have been implemented. The Arbitrator, therefore, finds it inappropriate to prejudice the position of the County in this case for its unsuccessful efforts to obtain Union waiver or modification of Sec. 15.81 or to prejudice the position of the Union in this case for its unsuccessful efforts to persuade the County to offer laid off full-time employees full-time combinations of available part-time duties. The 1987 grievance settlement agreement which provided in part that Daniel Higgins would be assigned a full-time position combining "10 hours per week in the Service Department on mail delivery" with "30 hours per week in the Aging Department" appears to have been covered by the Union's agreement "to withdraw this grievance without precedent and without prejudice," persuasively precluding the Union from citing it as a precedent in this case.

Finally, Sec. 15.81, both as written and as applied in 1986, places a strong emphasis on protecting the job security of full-time employees not only in employment generally, but also in full-time employment. The County's proposed interpretation gives no protection whatsoever to full-time employees' interests in full-time employment. Rather, taken to its logical extreme, it would authorize the County to reduce all full-time positions to part-time, to initially lay off all bargaining unit personnel, and then to recall them all to part-time employment in seniority order, beginning with the laid off full-time employees.

Thus, based on the language of the Agreement alone, and in the context of the 1986 developments noted above, the Arbitrator concludes that the language of Sec. 15.81 means — within limits discussed below — that all temporary, seasonal and regular part-time employees must not only be initially laid off before a regular full-time employee can be initially laid off, but they must also continue to "be laid off" both before any regular full-time employees are initially laid off and before any regular full-time employees continue to be "laid off."

The Arbitrator rejects the Union's contention that Sec. 15.81's requirement in that regard is absolute, however. Rather, Sec. 15.81 must read together with the general Art. III County rights to determine what work will and will not be performed and the express requirements in Secs. 15.82 and 15.83 that both layoffs and recalls be conducted so that the remaining workforce is qualified to perform the available work. When read together with those other provisions, Sec. 15.81 cannot and does not preclude the County either from determining what work will and will not be performed or from refusing to assign work to employees who are not qualified to perform it. In other words, the Arbitrator concludes that the Agreement as a whole requires the County to determine whether laid off full-time Professional Unit employees are qualified to perform any full-time combinations of available part-time Professional Unit duties as a condition precedent to having any such duties performed by regular part-time employees while one or more full-time Professional Unit employees remain laid off. While combining some regular part-time positions into regular full-time positions to avoid the continued lay off of full-time personnel qualified to perform the combined duties might be viewed by the County as unfair to affected part-time personnel or as otherwise undesirable, it is nonetheless a step that Sec. 15.81 requires the County to take in an effort to avoid keeping full-time employees laid off while regular part-time employees are working.

It is undisputed that the County has actively employed regular part-time Professional Unit employees while Klug continued to be "laid off" from full-time Professional Unit employment. It is also undisputed that in the discussions between the Union and the County that preceded the implementation of the County's layoff and recall actions, the County refused to agree to the Union's proposed concept of offering a full-time combination of available part-time work to laid off full-time employees. As a result, the County denied Klug any consideration for possible full-time Professional Unit employment doing a combination of available part-time Professional Unit work, and thereby violated Sec. 15.8 of the Agreement.

The question of whether Klug was qualified for any such full-time combination of available part-time Professional Unit work was not a central focus of the evidence and arguments presented to date in this case. The County argues generally in its brief (at p.19) that Klug was not qualified for any of the vacated part-time positions, and it argues more specifically in its reply brief (at p.9) that ". . . the County determined that Jeremy Klug was not qualified for the part-time positions of IBM [Systems] Analyst and Victim Witness Coordinator . . .", citing the transcript at page 128. However, the testimony at page 128 relates only to Klug's qualifications for the IBM System Analyst position. The Union's post-hearing arguments do not take a position one way or the other regarding whether Klug was qualified for any such full-time combination of available part-time work. In those circumstances, the Arbitrator is not in a position to determine the answer to that question at this point in the proceedings. The Arbitrator leaves that issue to the parties to resolve in the first instance, with jurisdiction retained to resolve it if necessary.

By way of remedy, the Arbitrator has fashioned reinstatement and make whole orders designed to put Klug in the circumstances he would have been in had the County not committed the limited violation found above. The reinstatement order is intended to require reinstatement only if there is a full-time combination of available part-time Professional Unit work which Klug is qualified to perform. The make whole order is intended to require make whole relief only if — in December of 2002 or during the one-year period following the date he was initially laid off — there was a full-time combination of available Professional Unit part-time work which Klug was qualified to perform.

The Arbitrator has expressly retained jurisdiction for a period of time to resolve any disputes that may arise concerning the meaning and application of the remedy.

DECISION AND AWARD

For the foregoing reasons, and based on the record as a whole, it is the DECISION AND AWARD of the Arbitrator on the ISSUES noted above that

1. Yes. The County did violate Sec. 15.8 of the Professional Unit Agreement in connection with its lay off of full-time employee Jeremy Klug in December of 2002. Specifically, the County violated Sec. 15.81 when it actively employed regular part-time Professional Unit employees while Jeremy Klug was laid off from full-time Professional Unit employment, without determining whether there was a full-time combination of available part-time Professional Unit work for which Klug was qualified.

2. Unless the Union and County agree otherwise, the remedy for the violation noted in 1, above, shall be that the County shall immediately:

a. reinstate Klug to full-time Professional Unit employment unless either (1) all temporary, seasonal and regular part-time employees are initially laid off and continue to be laid off, or (2) Klug is not qualified to perform any full-time combination of available part-time Professional Unit work. If there is no full-time combination of available part-time Professional Unit work which Klug is qualified to perform, then Klug is not entitled to reinstatement.

b. make Klug whole (without interest) for losses of pay, benefits, or status, that he suffered, if any, as a result of the County's violation noted in 1, above. In doing so, the County shall have the right to set off earnings received by Klug, if any, that he would not have received had he not been laid off by the County beginning in December, 2002. If Klug was not qualified for any full-time combination of part-time Professional Unit work available during

the one-year period following his being laid off in December of 2002, then Klug would not have suffered any losses as a result of the County's violation noted in 1, above.

c. As used in 2.a., above, the terms "temporary, seasonal and regular part-time employees," refer to such employees who are members of the Professional bargaining unit or who would be members of the Professional bargaining unit if they worked full-time.

3. The Arbitrator reserves jurisdiction for a period of 60 calendar days from the date of this award, to resolve, at the request of the Union or the County, any dispute that may arise as to the meaning and application of the remedy ordered in 2., above.

Dated at Shorewood, Wisconsin, this 5th day of February, 2004.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator