BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**RICHLAND COUNTY EMPLOYEES' UNION LOCAL 2085, WCCME, DISTRICT COUNCIL #40, AFSCME, AFL-CIO**

and

**RICHLAND COUNTY**

Case 149
No. 62365
MA-12254

---

Appearances:

**David White**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Lafollette, Godfrey & Kahn, Attorneys at Law, by **Attorney Jon E. Anderson**, One East Main Street, P. O. Box 2719, Madison, Wisconsin 53701-2719, appearing on behalf of the County.

## ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement that provides for final and binding arbitration. Pursuant thereto, the parties jointly selected Dennis P. McGilligan from a panel of randomly-selected Wisconsin Employment Relations Commission-employed arbitrators to hear and decide a dispute as set forth below. By letter dated July 14, 2003, the Commission appointed the undersigned as the arbitrator in the matter. Hearing was held on September 22, 2003. The hearing was not transcribed and the parties completed their briefing schedule on December 26, 2003.

After considering the entire record, I issue the following decision and Award.

## STIPULATED ISSUES

1. Did the Employer violate the collective bargaining agreement when it did not post the 17.5 hour Clerical Assistant II position in the Child Support Agency?

2. Did the Employer violate the collective bargaining agreement when it denied Becky Dalberg bumping rights under the collective bargaining agreement?

3. If the answer to either of the above questions is in the affirmative, what is the appropriate remedy?

## FACTUAL BACKGROUND

Becky Dalberg ("Grievant") began her employment with Richland County ("County" or " Employer") in the Clerk of Courts office in 1985. In January, 1999, her position was moved to the Child Support Agency where she has worked to the present day. From her hire date, until the circumstances giving rise to this grievance, the Grievant has been employed full time, 35 hours per week. At all times relevant to this proceeding, the Grievant's classification was that of Clerical Assistant II ("CA II").

On October 30, 2002, while she was driving to work, the Grievant heard a report on radio station WRCO regarding the previous night's meeting of the County Board. According to the Grievant, the report indicated that a "full time position was being eliminated and a part time position was being created in the Child Support Agency." The report did not specify whose position was involved.

The Director of the Child Support Agency, Diane Treis Rusk, also heard a WRCO news report at her home, before she left for work. According to the report, County Board Supervisor Fred Clary stated: "reducing a child support agency staff person to half time was needed for budgetary reasons within the Child Support Agency." While Treis Rusk had been considering this matter for some time, this was not the way she intended to break the news to her staff. When she arrived at work, she called an emergency staff meeting. In attendance was the entire agency staff: Treis Rusk, Child Support Worker Kathy Sutton, Clerical Assistant I Connie Frye and the Grievant. At the meeting, Treis Rusk stated that the position to be affected would be either the Grievant's or her own position. She told the Grievant to check with the Union and the Union contract about bumping.

The Grievant was devastated. On the previous day her divorce had become final and she was looking forward to a "whole new day." She was happy and felt a sense of security

because she had a "stable job." When she found out that her sense of security was misplaced, she felt like "the rug had been pulled out from under her." Following the meeting, the Grievant went home sick.

On November 15, 2002, the Grievant sent an e-mail message to Treis Rusk asking if there were any updates: "is it [my position] still being eliminated on December 31st? Or have you thought of another scenerio (sic)?" On November 17, 2002 Treis Rusk (identifying herself as "D Treis") wrote back stating that the Personnel Committee had yet to weigh in on the matter, and likely would not do so until after the Child Support Committee issued its recommendation at its meeting on December 4, 2002. Treis Rusk advised that she would recommend to the Child Support Committee that no change be implemented before March 2003. In this message she stated that:

> I have examined several scenarios myself, with the committee, and with a couple members of the Personnel Committee. Based on workload and child support program requirements, yours is the position at risk. A reduction to half time is the best estimate I can give you at this time. . . .
>
> After speaking to a few officials, I feel rather confident to say that a reposting of your position will not be required as the job duties are not changing, just the amount of time needed to perform the duties. I do not think this will effect your bumping rights. You will need to decide whether you will accept a lay off w/unemployment or practice your bumping rights. Your union contract has the time lines within it. You will need to provide notice w/in a certain number of days of the date you are formally noticed of you (sic) lay-off date. You will receive a written notice.

Treis Rusk, along with the Child Support Committee, ultimately determined that the Grievant's CA II position would be reduced from 35 hours per week to 17.5 hours per week. The responsibilities of the reduced position would remain the same; the job duties would be completed in fewer hours. The County Personnel Committee supported this recommendation. The County Board of Supervisors approved the recommendation as Resolution No. 2003-12 on January 21, 2003:

> WHEREAS the Child Support Committee and the Director of the Child Support Agency, Ms. Diane Treis Rusk, have recommended to the Personnel Committee that, due to the current budget expenditure and revenue situation as well as the reduction and elimination of certain financial functions, the full-time position of Clerical Assistant II in the Child Support Agency be reduced from full-time to half-time, and

> WHEREAS the Personnel Committee has carefully considered this proposal and is now presenting this Resolution to the County Board for its consideration.
>
> NOW THEREFORE BE IT FURTHER RESOLVED by the Richland County Board of Supervisors that the full-time, union position of Clerical Assistant II in the Child Support Agency, a position currently held by Ms. Becky Dalberg, shall be reduced from 35.0 hours to 17.5 hours per week, and
>
> BE IT FURTHER RESOLVED that this Resolution shall be effective as of March 1, 2003.

On January 22, 2003, County Clerk Victor Vlasak sent the Grievant a copy of the County Board Resolution that approved the recommendation to reduce her weekly hours.

By letter dated January 27, 2003, the Grievant advised the Chairperson of the County Board of Supervisors, Ann M. Greenheck, as follows:

> Please be advised that this letter is my written notice to you the employer that I wish to exercise my rights under Article 10, Section 10.03 of the Collective Bargaining Agreement between Richland County and Richland County Employees' Union Local 2085.
>
> Please be advised that I wish to bump into the Clerical Asst II position in the Richland County Health and Human Services Department, presently held by Darin Steinmetz.
>
> My full-time position will be part time as of March 1, 2003, and that would or could be the date of the change of personnel.
>
> Please let me know when, where and to whom I should report to in my new position.

On a "Post-It" note dated January 29, 2003, Treis Rusk wrote to the Grievant:

> If you think it would be helpful to practice in CARES an hour or so each day so as to practice for your new position – that's fine with me.

County Board Chairperson Greenheck responded to the Grievant's request to bump by letter dated February 13, 2003. She stated:

> I am in receipt of your letter of January 28, 2003. In your letter you advise of your intent to exercise rights, under Article 10, to bump into another position. After careful consideration and following a review of the labor contract, your request to bump is denied.
>
> Bumping into another position is a matter that is regulated by the labor contract. The labor contract permits bumping only in the limited instance of a layoff. You have not been laid off. You have had your hours in your current position reduced. Your position was not eliminated, nor were the number of jobs reduced. Bumping is not permitted under such circumstances.
>
> The decision to deny you the right to bump is premised on the language of the collective bargaining agreement. I hope you understand the position of the County is (sic) this matter.

On February 13, 2003, the Grievant filed a grievance alleging that the County "eliminated the grievant's full-time position, and has not permitted her to exercise her rights under Section 10.01." On the same day, Sharon Pasold, President of the Union, filed a grievance alleging that the County had created a part time position in the Child Support Office and had failed to post the position.

On February 13, 2003, Union President Pasold and the Grievant met with Treis Rusk regarding these grievances. During the meeting, Treis Rusk stated that she did not have the authority to determine the bumping grievance, but that the part time position would be posted.

Each of the grievances were denied by letters dated February 18, 2003. They were further timely appealed and denied, through the contractual grievance procedure. Each grievance was appealed to arbitration and the parties agreed that they would be consolidated before a single arbitrator for resolution.

## PERTINENT CONTRACTUAL PROVISIONS

### ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The management of Richland County and the direction of the working forces shall be vested exclusively in the Employer. Such management and direction shall include all rights inherent in the authority of the Employer, including, but not limited to the right to hire, recall, transfer, and promote. The Employer shall have the right to suspend, demote, discharge and otherwise discipline employees subject to the provisions of Article 6 hereof and to relieve employees from duty because of lack of

work or for any other legitimate reason. Further, the Employer shall have exclusive prerogatives with respect to assignments of work, including temporary assignment, scheduling of hours including overtime, to create new, or to change or modify, operational methods or controls, and to pass upon the efficiency and capabilities of the employees. The Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not granted to the Union or employees by this Agreement, such rights are retained by the Employer except as limited by the terms of this Agreement. The Employer agrees to exercise these rights in a fair and reasonable manner, and shall not exercise these rights with the intent or effect of discriminating against the Union or any of its members.

. . .

## ARTICLE 9 – VACANCIES

9.01 **Definition:** A vacancy shall be defined as a job opening not previously existing or a job created by the termination of employment, promotion, or the transfer of existing personnel, when the need for such job continues to exist.

9.02 **Job Postings:** The Employer shall post for five (5) work days, in overlapping workweeks, all permanent vacancies which occur in the bargaining unit. The posting shall include the job title, job description, and salary classification. Vacancies shall be posted on the same bulletin boards as Union notices under Section 3.04.

. . .

## ARTICLE 10 - LAYOFF

10.01 **Layoff:** The Employer shall have the right to reduce the number of jobs in any classification. In the event of a lay off, the least senior employee(s) within the classification selected for layoff shall be laid off, provided the more senior employees are qualified to perform the remaining work. Employees who have been laid off shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified. Such junior employee(s) who have lost their position(s) as a result of a bump shall have the right to exercise their

seniority in the same manner as if they had been laid off. Employee(s) who are without job(s) as a result of a bump or a reduction in the number of positions shall have the option to accept layoff and may decline to exercise bumping rights, if any. Laid off employees shall have recall rights as provided in this agreement.

. . .

## POSITIONS OF THE PARTIES

### Union's Position

The Union initially argues that the County is obligated to post a part time position created when a full time position performing the same duties is cut in half.

The Union next argues that, since the Grievant's position was eliminated, she must be afforded the rights under Article 10 to displace a junior employee in an equal or lower classification, provided she is qualified to do that junior employee's job.

The Union requests that the grievance be sustained and that the Grievant be made whole for all losses that she has suffered as a result of the County's refusal to permit her to bump. The Union also asks that the Arbitrator order the County to immediately post the part-time position consistent with the terms of the agreement. In addition, the Union asks that the Arbitrator order additional remedy as appropriate.

### County's Position

The County first argues that it has reserved the right to direct the workforce and to determine the number of hours of service needed from employees.

The County next argues that the Grievant was not laid off so she is not entitled to bump.

The County further argues that its actions with respect to the Grievant have not created a vacancy that must be posted.

For a remedy, the County requests that the Arbitrator find:

1. That the County did not violate the agreement by not permitting the Grievant to bump; and

2. That the County did not violate the agreement by not posting a job under the circumstances of this case.

Upon such findings, the County asks that the Arbitrator deny each of the grievances involved in this proceeding.

## DISCUSSION

### Posting

The first question before the Arbitrator is whether the Employer violated the collective bargaining agreement when it did not post the 17.5 hour CA II position in the Child Support Agency.

It is generally recognized that, in the absence of a contract provision limiting management's rights to fill vacancies, such as, for example, a clear requirement to maintain a certain number of employees on a particular job, it is management's right to determine whether a vacancy exists and whether and when it should be filled. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 720.

In Article 2 – Management Rights (Section 2.01), the parties recognize that the "management of Richland County and the direction of the working forces shall be vested exclusively in the Employer." The contract provision provides that the Employer shall have the right to hire employees. It also provides that the Employer shall have the right to "relieve employees from duty because of lack of work or for any other legitimate reason." (Emphasis in the Original). It further provides that the Employer shall have exclusive prerogatives with respect to "scheduling of hours including overtime." (Emphasis in the Original). The aforesaid contract language supports the County's view that it acted properly herein when it reduced the Grievant's hours from full time to part time in response to reduced workload and budgetary concerns but failed to post her part time position.

Contractual restrictions on the County's right to fill vacancies are found in Article 9. Section 9.02 details the parties' specific agreement regarding posting as follows: "9.02 **Job Postings:** The Employer shall post for five (5) work days, in overlapping workweeks, all permanent vacancies which occur in the bargaining unit." (Emphasis in the Original). This posting requirement clearly applies only to "all permanent vacancies which occur in the bargaining unit."

In Section 9.01, the parties define the types of vacancies that the County is required to post under Section 9.02. Section 9.01 provides as follows:

9.01 **Definition:** A vacancy shall be defined as a job opening not previously existing or a job created by the termination of employment, promotion, or the transfer of existing personnel, when the need for such job continues to exist. (Emphasis in the Original).

Thus, under the specific language of Section 9.01, a vacancy is defined as:

(1) A job opening not previously existing; or

(2) A job created by (a) termination of employment, (b) promotion or (c) the transfer of existing personnel, (and then only when the need for such a job continues to exist).

The question arises whether the actions with respect to the Grievant have created a vacancy that must be posted pursuant to Article 9.

The record is clear that within the Child Support Agency, there was a CA II position prior to March 1, 2003 and that a CA II position also existed after March 1, 2003, the effective date of the County Board Resolution to reduce the number of hours that the Grievant would be employed.

As pointed out by the County, its action did not create a "job opening not previously existing" under the first prong of the Section 9.01 definition. The Grievant was in the aforesaid CA II position at the end of February, 2003 and remained in the job following implementation of the County Board Resolution on March 1, 2003. There was no job opening that did not previously exist.

The Union contends that the County's argument "that the part-time position is not a vacancy because it does not involve 'an opening'" elevates form over substance. The Union submits that a "similar argument could be made at any time someone vacates a position, or a new position is created, if the County simply transfers an employee into a position. That position is then no longer 'open,' so it need not be posted. This is sheer nonsense."

The parties, however, clearly defined "vacancy" in Section 9.01 of the collective bargaining agreement. Specifically, the contract defines a vacancy as"

- A job opening not previously existing;
- A job created by the termination of employment;

- A job created by a promotion; or

- A job created by the transfer of existing personnel. (Emphasis in the Original).

When interpreting contract language, arbitrators use the ordinary and popular meaning of words, unless there is an indication that the parties intended a special meaning. *The Common Law of the Workplace, The Views of Arbitrators*, National Academy of Arbitrators, Theodore J. St. Antoine, Editor, Chapter 2, "Contract Interpretation", Carlton J. Snow, Chapter Editor, s. 2.5 Ordinary and Popular Meaning of Words, p. 69 (1998). The word "opening" is defined as "an unfilled job or position; vacancy." (Emphasis Added); *The American Heritage Dictionary of the English Language, New College Edition*, 10th Ed. 1981) p. 920. There is no evidence that the parties intended a different meaning. Thus, the word "opening", as used in Section 9.01, clearly means an unfilled job or vacant position as submitted by the County. It is undisputed that at all times material herein the Grievant filled or occupied the CA II position in the Child Support Agency. There was no vacant or open CA II position to fill in the Agency.

Article 2 – Management Rights explicitly provides that the County has the right to "transfer" employees. However, the Article also clearly states that the County agrees to exercise this right "in a fair and reasonable manner, and shall not exercise" this right "with the intent or effect of discriminating against the Union or any of its members." Therefore, the County cannot abuse this right, as alleged by the Union, by transferring an employee into a position simply to thwart the posting requirements of Article 9 – Vacancies. However, a specific issue concerning the potential conflict between the County's right to transfer employees pursuant to the management rights clause vis-à-vis its obligation to post vacancies under Article 9 is not before the Arbitrator. Therefore, the Arbitrator declines to address the matter further.

The Union also argues that it is not true, as submitted by the County, that a part time position is the same as a full time position where, as here, the duties remain the same. The Union explains:

> Obviously, a full-time position and a part-time position are quite different animals. A part-time position may be desirable to someone whose life circumstances require something less than a full time commitment to a job. A full-time position may be desirable to someone who needs the income generated by the hours worked each week. The fact of the matter is that a part-time employment opportunity has been created in this bargaining unit, and has not been made available to employees in the bargaining unit, but rather, has been unilaterally assigned to the grievant.

The Union is correct regarding the differing natures of a part time position and a full time position. However, the contract defines a vacancy as a "job opening not previously existing" not as an opportunity for part time employment or a position that has had its hours reduced. As noted above, there was no opening or vacancy. Therefore, the posting provisions of Article 9 are not applicable.

The Union further argues that the procedure used in the instant case to reduce the Grievant's hours was *identical to the procedure used to create and eliminate positions*. (Emphasis in the Original). The Union submits that this fact strongly supports its view that, pursuant to the terms of the collective bargaining agreement, Resolution 2003-12 constitutes the elimination of a full-time position (affording the incumbent contractual bumping rights) "and the creation of a new part-time position (requiring the posting and filling of the position in accordance with Article 9 of the contract)."

County jobs are created through the committee structure. (Testimony of Randy Jacquet, Director, Health and Human Services Department). In the case of Health and Human Services positions, the matter is first considered by the HHS Board, and if approved, goes to the Personnel Committee. Id. If the Personnel Committee likewise approves the creation of a new position, the matter is taken before the full County Board in the form of a County Board Resolution. Id. County Exhibit No. 2 is an excerpt of the minutes of a meeting of the County Board during which four positions were created in the Health and Human Services Department. The Union notes that to the extent these were union positions, it is understood that they were posted and filled in accordance with the procedures of the appropriate labor agreement.

The aforesaid County Board Resolution expressly created "4 New Positions in The Family Care Maintenance Organization Of The Department of Health And Human Services." (Emphasis added). (County Exhibit No. 2). Those 4 new positions were described in the Resolution and new job descriptions were approved. Id.

In the instant case, the County Board Resolution in question did not create a new position or an opening. (Joint Exhibit No. 8). The Resolution only changed the CA II position from full time to part time. Id. The scope and duties remained the same; there was just less time to do them. (Testimony of Treis Rusk, Union Exhibit No. 2). Adoption of a County resolution reducing a position from 35.0 hours to 17.5 hours without a change in duties does not trigger the posting requirements of the collective bargaining agreement. The part time CA II position in the Child Support Agency is not a new position as set forth in County Exhibit No. 2. (Emphasis added).

The Union argues that additional support for its position is found in the actions of the parties in the recent past. In this regard, the Union claims:

> On August 20, 2002, the Richland County Board adopted Resolution 2002-86, which eliminated a vacant full-time Nutrition Coordinator position in the Health and Human Services department, and increased a half-time Assistant Benefit Specialist position in that department to full-time. Union Exhibit 4. The significant data provided by this exhibit relates to the Assistant Benefit Specialist position. Prior to the effective date of the resolution, the Assistant Benefit Specialist position was a half time position, held by Ms. Linda Rohn. After the adoption of Resolution 2002-86, the new full-time position was posted. Ms. Rohn posted on, and received the full-time position. As Mr. Jacquet confirmed, nothing changed in Rohn's position except that she went from half-time to full time.
>
> The case of the Assistant Benefit Specialist is exactly the inverse of the instant case. In both cases, the positions had an incumbent prior to the personnel change. In the case of the Assistant Benefit Specialist, the position was posted and filled in accordance with the procedures of Article 9; in the instant case the County has refused to post. Yet there is no real difference between the two situations.

The Union is correct that there is no real difference between the two situations. (Union Exhibit No. 4, Testimony of Jacquet). If the County properly posted the full time the Assistant Benefit Specialist position in the Health and Human Services Department, it should have posted the part time CA II position in the Child Support Agency. However, one example of a different approach to posting by the County does not constitute a past practice that is binding on the parties.

The Union also is correct when it states: "creation and abolition of positions is only done through action of the County Board." (Testimony of Treis Rusk and Jacquet). The County Board did "mimic" this procedure when it adopted Resolution No. 2003-12. However, it did not replicate the procedure because it did not create or abolish a position. More importantly, it did not create "a job opening not previously existing." As noted above, the County Board simply reduced the hours of the CA II position in the Child Support Agency.

The Union further argues that the County's position that it has no obligation to post the part time job "flies in the face of the obvious purposes of job postings under the contract." According to the Union, that purpose is as follows:

> Under the labor agreement, all bargaining unit employees are permitted an opportunity to bid on any and all bargaining unit positions. The successful bidder is the senior qualified applicant. As a result of the personnel actions taken by the County Board in Resolution 2003-12, there exists a part-time

position in the Child Support Agency upon which no employee in the unit has had the opportunity to bid. This is contractually not permitted.

The Union's view again ignores the clear contract language that provides for job postings only for "all permanent vacancies which occur in the bargaining unit." (Emphasis Added). The term "vacancies" is expressly defined first as "A job opening not previously existing." (Emphasis in the Original). There is no such job "opening" herein. In addition, the record does not indicate that a job was created by the "termination of employment, promotion or the transfer of existing personnel." None of these events occurred. No one was terminated, promoted or transferred. The only action that occurred here was that the number of hours authorized in a particular position within the Child Support Agency was reduced.

Based on all of the above, the Arbitrator finds that the Employer did not violate the collective bargaining agreement when it did not post the 17.5 hour Clerical Assistant II position in the Child Support Agency.

**Bumping**

The next question before the Arbitrator is whether the Employer violated the collective bargaining agreement when it denied the Grievant bumping rights.

Article 10 – Layoff, Section 10.01 of the contract states that the Employer has "the right to reduce the number of jobs in any classification." The contractual provision goes on to state: "In the event of a lay off, the least senior employee(s) within the classification selected for layoff shall be laid off, provided the more senior employees are qualified to perform the remaining work." It adds: "Employees who have been laid off shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified."

The layoff language clearly provides the County with the right to reduce the number of jobs in any classification. However, the language does not provide any broader definition as to what is meant by the term layoff. It makes no reference to a "reduction in hours" or a "reduced workload." It makes no reference to a change from a full time job to a part time job. Instead, it clearly refers to layoff in the context of a reduction in "the number of jobs in any classification." (Emphasis added). This language expressly defines the term layoff to include only reductions in the number of jobs in any classification.

There were two CA II jobs in the County on February 28, 2003 and, on March 1, 2003, there remained two CA II jobs within the County. (Testimony of Treis Rusk). Likewise, there was one CA II position in the Child Support Agency before and after March 1, 2003. It is clear that the County has not reduced the number of jobs in the CA II classification.

The Union argues to the contrary: "it cannot be seriously disputed that the number of jobs in the Child Support Agency changed between February 28, 2003 and March 1, 2003." "On the former date, there was one full-time Director, one full-time Child Support Worker, one full-time Clerical Assistant II, and one full-time Clerical Assistant I." On the latter date, "there remained one full-time Director, one full-time Child Support Worker, and one full-time Clerical Assistant I. Yet there was exactly zero full-time Clerical Assistant II's and there was one half-time Clerical Assistant II." (Emphasis added) "To say that a reduction in the number of jobs has not occurred effective March 1, 2003 is to ignore the plain facts."

The Union is correct in pointing out that the CA II position in the Child Support Agency changed from full time to part time during the aforesaid time period. However, the plain fact is that on February 28, 2003 there were four jobs in the Child Support Agency and on March 1, 2003 there were four jobs in the Agency. The Agency did not lose any "jobs" as a result of the change made by Resolution 2003-12 although the nature of CA II position did change.

The Union also argues:

> Secondly, the notion that an employer can target a full-time position to half time without invoking contractual job protection rights (such as bumping rights) is such an affront to those job protection rights as to render them devoid of any real meaning. If the bumping procedures of the contract can be avoided by making sure that the the employee in question is not completely separated from employment, does it not follow that there is no lower limit at all to the number of hours an employer can offer to avoid these bumping procedures?

The Union again ignores the clear contract language. Layoff is not defined in Article 10 as a "reduction" in hours or workload. Article 10 does not reference a partial layoff. It does not just use the word layoff. It specifically defines layoff in the context of the County's "right to reduce the number of jobs in any classification." (Emphasis added).

The Union is concerned about the possible abuse of this procedure. However, as noted above, the County must exercise its management "rights in a fair and reasonable manner, and shall not exercise these rights with the intent or effect of discriminating against the Union or any of its members." *Unilaterally* cutting a bargaining unit employee's income in half for no contractually acceptable reason would run afoul of this requirement. (Emphasis in the Original).

The Union takes issue with the County's argument that in order for a layoff to have occurred, there must be "a complete separation, suspension or break from employment." The Union states: "There are numerous cases in which an employer laid off employees for a day or

part of a week, and the layoff provisions still applied." The Union goes on to cite "a sampling of these cases." However, for the reasons discussed below, they are distinguishable from the instant dispute.

In WAYNE STATE UNIVERSITY, 76 LA 368 (Cole, 1981), the arbitrator found that a one-day per week reduction in hours was treated as a layoff. In that case the employer unilaterally instituted a "Days Without Pay Program" that required each represented non-academic employee to take one day off without pay in 10 specified service periods. The arbitrator concluded: "the days off without pay mandated by the Days Without Pay Program must be viewed as days of work force reduction and layoff within the meaning of Article 14 of the Local 1979 Agreement and Article 18 of the Local 2071 Agreement." The arbitrator reasoned:

> An initial indicator of the correctness of this conclusion appears from a literal reading of the language of these contract articles. The references to reductions in "the number of Employees in the bargaining unit" (Local 1979 Agreement) and "the number of Employees" (Local 2071 Agreement), considered in context, are references to reductions in the number of bargaining unit employees for whom work is available. Clearly, the University would make work available for fewer bargaining unit employees on mandated off days under the Days Without Pay Program than on regular days. Further, unlike the language of many collective bargaining contracts, the language of these contract articles does not distinguish between work force reductions of different durations. It does not express any exception for work force reductions which may last for only one day. Any such exception would have to rest upon an inference. The arbitrator does not see adequate grounds for such an inference. WAYNE STATE UNIVERSITY, supra, p. 371.

Furthermore, the arbitrator found that such a conclusion was buttressed by the fact that the employer had made a previous, unsuccessful attempt to require that all employees in the bargaining units take one day off without pay every month for a certain time period. WAYNE STATE UNIVERSITY, supra, p. 372. The arbitrator concluded that the failed effort "amounted to a clear and open concession that the collective bargaining contracts in these bargaining units barred unilateral institution of a days off without pay program such as the one at issue in the instant grievances." Id. The arbitrator added that the parties' negotiation of subsequent contracts did not result in significant change in the applicable contract language. Id.

In the instant case, the applicable layoff language refers to a reduction in "the number of jobs in any classification" not a work force reduction or a "reduction in the number of employees" phrase upon which arbitrator Cole based his analysis. Also unlike WAYNE STATE UNIVERSITY, supra, there is no past practice and/or bargaining history that supports the

Union's position in the instant dispute. Therefore, the Arbitrator rejects the Union's reliance on WAYNE STATE UNIVERSITY.

In PEPSI-COLA PORTSMOUTH BOTTLING CO., 95 LA 1024 (Modjeska, 1990), the arbitrator found that a one-day shutdown in one production line constituted a layoff, despite the fact that the company had the right to schedule the work force. According to the arbitrator, the company did not have a right, "under the guise of 'scheduling,' [to] eliminate the work of senior employees while permitting junior employees to work. Such a situation is precisely what seniority is all about ensuring that whatever work is available goes to the senior employees first." PEPSI-COLA PORTSMOUTH BOTTLING CO., supra, p. 1026

In reaching the above conclusions, the arbitrator interpreted the following contract language: "In case of a layoff or other reduction of employees in a classification that results in a displacement, departmental seniority shall prevail, provided the employees remaining in the classification are qualified to perform the required work." PEPSI-COLA PORTSMOUTH BOTTLING CO., supra, p. 1025. The aforesaid contract language is much broader than the disputed contract language which defines layoff strictly in terms of a reduction in "the number of jobs in any classification." (Emphasis added). In PEPSI-COLA PORTSMOUTH BOTTLING CO., supra, p. 1026, "the company clearly did reduce its work force when it shut down an entire line, leaving the Grievant and an indeterminate number of other employees without work (and pay)." (Emphasis added). In the instant case, the County did not reduce the number of jobs in the CA II classification. Based on the foregoing, the Arbitrator also rejects the Union's reliance on PEPSI-COLA PORTSMOUTH BOTTLING CO.

In CALIFORNIA OFFSET PRINTERS, 96 LA 117 (Kauffman, 1990), the arbitrator found that cancellation of one shift for one day because of a lack of work nonetheless constituted a layoff notwithstanding the employer's right to schedule employees and the lack of a guaranteed work week. In reaching his conclusion, the arbitrator interpreted the following contract language: "reductions in the work force shall be made on the basis of departmental seniority." CALIFORNIA OFFSET PRINTERS, supra, p. 118. The arbitrator concluded that the contract language did not make a distinction between "temporary" and "permanent" layoff. CALIFORNIA OFFSET PRINTERS, supra, p. 120.

Again, the contract defines layoff as a reduction in "the number of jobs in any classification," not as a "reduction in the work force." (Emphasis added). The Grievant still had a CA II job in the Child Support Agency. Therefore, Arbitrator also rejects the Union's reliance on this case.

The Union also takes issue with the County's reliance on MID-STATE TECHNICAL COLLEGE, Case 74, No. 56695, MA-10383 (Jones, 9/99) noting that there are numerous cases in which a layoff provision is interpreted to mean something other than a complete separation,

suspension or break from employment. The Union is correct. Arbitrators have ruled that the term "layoff" must be interpreted to include any suspension from employment arising out of a reduction in the work force, and that the scheduling of employees not to work or the use of the term "not scheduled" by management does not make the occurrence any less a "layoff." Elkouri and Elkouri, supra, p. 770. However, one arbitrator defined "layoff" in the context of a particular clause, as in "actual severance from the Company's payroll, and a break in continuous service. Id. Other cases cited by the County support its contention that a reduction in work hours does not constitute a layoff. Disputes often turn on the specific contract language used. Here, Article 10 defines the term "layoff" as the County's "right to reduce the number of jobs in any classification." The County has not reduced any CA II jobs. Therefore, there is no contract violation.

In MID-STATE TECHNICAL COLLEGE, supra, p. 21, Arbitrator Jones stated: "One thing that is common to all these dictionary definitions is that a "layoff" involves a complete separation, suspension, or break from employment." Arbitrator Jones then went on to review "the language contained in the layoff provision to determine if it supports the dictionary meaning or has a different meaning." Id. The contract language provided thus: "Whenever the District decides to reduce staff . . . the selection of employees to be laid off shall be according to the following procedure." Id. Arbitrator Jones found that "like the word 'layoff', the phrase 'reduction in staff' contemplates a separation or break from employment." Id. Arbitrator Jones added:

> The conclusion that the contract language supports the previously-noted dictionary definition is buttressed by the absence of any contract language indicating that a layoff could occur with anything less than a total break from employment. It is specifically noted in this regard that the CBA never mentions a reduction in hours, nor does it speak in terms of a "partial layoff." MID-STATE TECHNICAL COLLEGE, supra, p. 22.

Here, the contract speaks of layoff in terms of a reduction in "the number of jobs in any classification." (Emphasis added). Unlike MID-STATE TECHNICAL COLLEGE, it does not talk about reducing staff. Nor does the contract as a whole infer that a reduction in hours assigned to a job or a change from a full time to a part time status is considered a layoff. There is no past practice or bargaining history that would lead to an opposite conclusion.

Finally, the Union contends that the procedure for the elimination of positions provides support for upholding the bumping grievance. The Union cites the elimination of the Production Manager position in the Health and Human Services Department. The Union claims that while the position "was vacant at the time, it is reasonable to assume that the County acknowledges that were the position not vacant, the incumbent would be permitted bumping rights."

The Union's reliance on the County's conduct in eliminating the aforesaid position is misplaced. The County specifically "eliminated" the position of Production Manager in the Health and Human Services Department when it adopted Resolution No. 2002-38. (County Exhibit No. 3). The County did not "eliminate" a position in the instant case. It reduced hours but retained the previously existing CA II position.

It is true that if a person is laid off after a position is "eliminated" that person would be entitled to exercise bumping rights pursuant to Article 10. However, no one was laid off when the Production Manager position was eliminated. (County Exhibit No. 3). Since a position/job was not "eliminated" herein, and no one was laid off within the meaning of the contract, the bumping procedure is not applicable to the instant dispute.

The Union is asking, in essence, that the Arbitrator determine that what happened here was a layoff, justifying the right of the Grievant to bump. To accept the Union's argument, and to rule in its favor, would require the Arbitrator to amend the clear contract language so as to read as follows:

> 10.01 **Layoff**: The employer shall have the right to reduce the number of jobs in any classification or the number of hours in any job. In the event of a layoff, the least senior employee(s) within the classification selected for layoff or reduction in hours shall be laid off, provided the more senior employees are qualified to perform remaining work. Employees who have been laid off, or who have had their hours reduced, shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified. (Emphasis in the Original).

Or the contract language would be amended in the following manner:

> 10.01 **Layoff:** The employer shall have the right to reduce or eliminate bargaining unit jobs in any classification. In the event of a layoff, the least senior employee(s) within the classification selected for reduction or elimination shall be laid off, provided the more senior employees are qualified to perform the remaining work. Employees whose jobs have been reduced or eliminated, shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified. (Emphasis added).

The Arbitrator's role and function is to interpret the agreement that the parties have made. The Arbitrator has no authority to modify the agreement of the parties concerning their definition of layoff and the circumstances under which a bump must be permitted to occur.

The collective bargaining agreement provides as follows with respect to bumping:

> . . . Employees who have been laid off shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified.

Thus, under the terms of the parties' agreement, only those employees who have been laid off have the right to bump junior employees. (Emphasis in the Original). Absent a layoff, an employee has no right to bump.

Since the Grievant was not laid off, she is not entitled to exercise the bumping rights that follow a layoff. Therefore, the County acted appropriately when it denied her request to "bump into the Clerical Asst II position in the Richland County Health and Human Services Department, presently held by Darin Steinmetz."

Based on all of the foregoing, the Arbitrator finds that the Employer did not violate the collective bargaining agreement when it denied Becky Dalberg bumping rights under the agreement.

In reaching the above conclusion, the Arbitrator does not disagree with the Union's contention that it is a "harsh" reality for an employee of nearly twenty years of service with the County to have "had her status unilaterally cut in half." The Arbitrator also is of the opinion that it was extremely unprofessional and insensitive that the Grievant had to first learn on the radio of the possibility that her position might be cut. The timing of the event was particularly unfortunate. However, the Grievant's right to bump is solely a creature of the collective bargaining agreement and for the reasons discussed above the Arbitrator finds that bumping is not permitted.

In light of all of the above, it is my

## AWARD

The grievances filed in the instant matter are denied and the matters are dismissed.

Dated at Madison, Wisconsin, this 24th day of February, 2004.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

DPM/gjc
6646