BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY

and

WISCONSIN FEDERATION OF NURSES AND HEALTH CARE PROFESSIONALS LOCAL 5001, AFT, AFL-CIO

Case 544
No. 63302
MA-12540

(Solicitation of Volunteers for Layoff Grievance)

Appearances:

Troy Hamblin, Director of Labor Relations, Milwaukee County, 901 North 9th Street, Room 302, Milwaukee, WI 53233, on behalf of Milwaukee County.

Jeffrey T. Sweetland, Schneidman, Hawks & Ehlke, S.C., Attorneys at Law, 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, WI 53201-0442, on behalf of Wisconsin Federation of Nurses and Health Care Professionals Local 5001, AFT, AFL-CIO.

ARBITRATION AWARD

According to the terms of the 2001-04 Memorandum of Agreement between Wisconsin Federation of Nurses and Health Professionals Local 5001, AFT, AFL-CIO (hereafter Union) and the County of Milwaukee (hereafter the County), the parties requested that the Wisconsin Employment Relations Commission appoint an impartial arbitrator to hear and resolve a dispute between them regarding the interpretation and application of certain provisions of the Agreement as they pertain to proper processing of grievances and solicitation of volunteers for layoff. The Commission appointed the undersigned, Commission Chair Judith Neumann, to hear and resolve the dispute. A hearing in the matter took place on Tuesday, March 24, 2004. The County submitted an oral argument at the conclusion of the hearing. The Union filed a written argument on April 6, 2004, at which time the record was closed.

ISSUES

The City has raised a preliminary procedural issue, which the parties agreed to frame as follows:

> Did the Union violate Sec. 4.02(7)(c) when it filed its request to initiate grievance arbitration on January 30, 2004 with the WERC, with a copy to the County's Director of Labor Relations, but did not sign or return the County's December 18, 2003 third step disposition?

The Union submitted the following statement of the substantive issue in this case:

> Did the County violate Section 3.09 of the 2001-2004 Memorandum of Agreement by failing to solicit volunteers for layoffs in the bargaining unit prior to implementing compulsory layoffs on or about September 12, 2003? If so, what is the appropriate remedy?

The County's statement of the substantive issue was the same as that proposed by the Union, except that the County would refer more narrowly to "Section 3.09(2)" of the Agreement.

I will adopt the Union's proposed statement of the substantive issue. While the County is correct that the central dispute lies in subsection (2) of Section 3.09, I agree with the Union that the construction of that subsection is at least somewhat interdependent with other language in Section 3.09, in particular subsection (1). I also note that the Union's grievance as originally filed referred generally to Section 3.09 and not merely to subsection (2).

RELEVANT CONTRACT PROVISIONS

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3.09 LAYOFF AND RECALL

(1) The Department of Human Resources will make every reasonable effort to place employes who would be affected by a layoff in order of their seniority into vacancies which have been approved for filling. Employes will be required to accept such placement.

(2) In the event there are insufficient vacancies approved for filling and that it becomes necessary to layoff bargaining unit employes, volunteers will be given first consideration, based on total Countywide seniority, in order to avoid compulsory layoffs. Employes who volunteer for layoff shall be placed on the layoff/recall list for the classification from which layoff occurred for three years and one day from the date of layoff.

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4.02 GRIEVANCE PROCEDURE

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(5) SETTLEMENT OF GRIEVANCES

Any grievance shall be considered settled at the completion of any step in the procedure if the president of the Federation or designee and the director of Labor Relations, and the appointing authority or their designee are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

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(7) STEPS IN THE PROCEDURE

* * *

(c) STEP 3

1. The Director of Labor Relations or designee shall attempt to resolve all grievances timely appealed to the third step. The Director of Labor Relations or his/her designee shall respond in writing to the union within 45 calendar days from the date of receipt by the Director of Labor Relations of the second step appeal.

2. In the event the Director of Labor Relations or designee and the President or designee of the Federation mutually agree to a resolve of the dispute it shall be reduced to writing and binding upon all parties and shall serve as a bar to further appeal. The President, or his/her designee of the union shall mail, with the appropriate union signature to the Director of Labor Relations'

office, the Director's disposition indicating the union's approval or disapproval of said third step disposition. The union shall return the third step disposition within 45 calendar days of the third step decision. Failure of the union to respond shall mean the grievance is withdrawn and it is null and void and will not be processed further.

(d) STEP 4

1. If the grievance is not settled at Step 3, the Federation may refer such grievance to arbitration. Such reference shall be made within 45 days from the date of the conclusion of Step 3.

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4.03 SELECTION OF ARBITRATOR

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(4) ARBITRATOR'S AUTHORITY

The arbitrator in all proceedings outlined above shall neither add to detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this Agreement. The arbitrator shall confine himself/herself to the precise issue submitted.

FACTS

The Union has long represented a bargaining unit currently comprising approximately 330 Registered Nurses (RN's) and approximately 24 Occupational Therapists (OT's) employed by the County. The current language of Section 3.09 (1) and (2), set forth above, has been in the successive Agreements between the Union and the County since at least some time in the 1970's. In 1982 and again in 1983, faced with the possibility of several layoffs, the Union and the County negotiated "collateral agreements" promising certain benefits to unit members who voluntarily reduced their hours or took leaves of absence; this mechanism (VTO's or voluntary

time off) induced enough cost savings to avoid involuntary layoffs. Eventually the parties negotiated a procedure governing VTO's for incorporation into the Agreement as Section 3.06. In implementing VTO's, which can affect day to day scheduling, the County and its floor supervisors have taken the initiative to solicit volunteers and otherwise manage the process. 1/

1/ The parties agree that the instant dispute involves the VLO (voluntary layoff) language in Sectio 3.09 and that the provisions of Section 3.06 are not in play.

The parties have had few experiences with VLO's (voluntary layoffs). The only substantial experience occurred in connection with the closing of the County's John L. Doyne Hospital in the latter part of 1995, which necessitated a reduction of some 500 bargaining unit positions. Through a cooperative effort to encourage retirement and VLO's during the several months prior to the closing, the parties avoided any involuntary layoffs as a result of the hospital closing. The procedures included a collateral agreement waiving and modifying certain aspects of the parties' collective bargaining agreement pertaining to seniority, bumping, and tuition reimbursements, negotiating certain benefits and incentives for those who chose to voluntarily resign or retire, and conducting a comprehensive three-day job fair in which bargaining unit members could bid by seniority for vacancies. Initially, the County's then Labor Relations Director Dobbert expressed to other managers a preference for the Union soliciting volunteers under the Section 3.09 (2) procedure. Nonetheless, from early on in the process the County accepted responsibility for polling or otherwise proactively determining which unit members would be willing to volunteer for layoff pursuant to Section 3.09 (2), thus creating vacancies for placement pursuant to Section 3.09 (1). During the process, Dobbert stated to Union President Owley that "We [the County] are required to solicit volunteers." During the latter part of October and early part of November 1995, the County communicated by letter with all bargaining unit members inviting them to volunteer for layoff and providing them with a form to accomplish such. The voluntary layoff forms were also made available at the various work sites of bargaining unit members.

About a year before the Doyne Hospital closing, the County eliminated the employment of an entire classification of bargaining unit members, i.e., the Nurse Practioners. All of those laid off were able to find other jobs and none grieved any violation of the Agreement. Volunteers for layoff pursuant to Section 3.09(2) were not solicited. At the time, Nurse Practitioners had no contractual right to displace RN's or other employees in different classifications.

In early 2001, the County downsized its Children Adolescent Treatment Center and another mental health unit, resulting in three unit members receiving notice of being at risk for layoff. All three were placed in vacancies pursuant to Section 3.09(1). Volunteers were not solicited pursuant to Section 3.09 (2). No grievance resulted from this situation.

The instant case arose when the County experienced substantial budgetary reductions at the outset of the 2003-04 fiscal year. As a result, County officials discussed on several occasions with the various unions representing County employees the possibility of across the board furloughs or work week reductions as well as layoffs and other budget balancing alternatives. The Union urged County managers to implement a VTO system rather than any involuntary furloughs or layoffs. During these discussions, the County gave no indication that layoffs were likely in the instant bargaining unit, which in fact had been experiencing staff shortages in many key areas. The County ultimately concluded that the deficit was too large to address through VTO's and in mid-August communicated with all County employees and with the leadership of the various unions stating that layoffs and other reductions would be implemented. The leadership of the Union (WFNHP) immediately requested specific information about the likelihood of layoffs within its bargaining unit and reminded County management of the VLO language in Section 3.09 (2). Without responding to the Union's requests to discuss the specific impact on its unit, and without any other prior notice, the County advised the Union by letter dated August 25, 2003 that it would be implementing the layoffs of several enumerated bargaining unit positions as of September 12, 2003. The August 25 letter stated:

> "Pursuant to section 3.09 (2) of the current Memorandum of Agreement, volunteers will be given first consideration, based on total Countywide seniority, to accept a layoff in order to avoid compulsory layoffs. If the union does not contact me by September 2, 2003, I will assume there are no volunteers willing to accept a layoff for an unspecified period of time."

By two letters dated August 27, 2003, addressed to County managers, the Union protested the County's failure to meet and confer over methods to avoid involuntary layoffs and failure to have solicited volunteers for layoff. County labor relations officials did not respond to those letters, did not solicit volunteers for layoff in any way, and on September 12 laid off the unit members designated in the County's August 25 letter. All those laid off were recalled or rehired by early January 2004.

The County's fiscal crisis and the possibility of reductions or layoffs were discussed at Union meetings during the months leading up to the County's August 25, 2004 layoff notice. During those discussions, the Union leadership mentioned the VLO provision in

Section 3.09 (2). However, at that time the possibility of layoffs and thus the notion of volunteering was only preliminary and general and the Union did not consider actively soliciting volunteers. After the layoff notices were sent, one unit member asked her supervisor whether she (the unit member) could volunteer for layoff and thus avoid a co-worker's being laid off; the supervisor denied that such a voluntary layoff opportunity was available. The Union did not take steps to solicit volunteers. None of the other County collective bargaining agreements contained a provision similar to the Section 3.09 (2).

The Union initiated a timely grievance challenging the County's failure to solicit volunteers prior to laying off unit employees. The grievance was denied at Steps 1 and 2 of the grievance procedure and the parties met on December 10, 2003 for a hearing at Step 3. At that time, the parties discussed a resolution as follows:

> It was agreed by the parties that the Director of Labor Relations would meet with the union to discuss the intent and implementation procedures of this section of the Memorandum of Agreement. There is no guarantee that an agreement will be reached between the parties as a result of the meeting. **Grievance Resolved.**

(Emphasis in original). By letter dated December 18, 2003, this proposed disposition was conveyed to the Union with the request that the union circle either "approved" or "NOT approved," sign, date and return the original letter to the County. The Union did not follow those instructions, but instead on January 30, 2004 filed a Request to Initiate Grievance Arbitration with the Commission, sending a copy to the County.

Section 4.02 (7) (c) (2) has been in the parties' contractual grievance procedure for many years. The Union's practice consistently has been to sign and return the disposition document only when the Union had decided to accept or "approve" the proposed disposition. When the Union did not agree with the proposed disposition, as in the instant case, its consistent practice has been to refer the grievance directly to arbitration, with a copy to the County. Until the day of the hearing in the instant case, the County has never objected to the Union's practice in this regard or claimed that the practice violated Section 4.02 (7) (c) (2) of the Agreement. The County follows an internal practice of forwarding files from the office of Labor Relations to the office of Corporation Counsel upon notice that a grievance has not been resolved and will be proceeding to arbitration.

DISCUSSION

The County initially asserts that the grievance is procedurally defective because the Union failed to comply with what the County sees as clear and unambiguous language in 4.02(7)(c)(2) requiring the Union to indicate approval or disapproval on the third step disposition document, sign the document, and return it to the County within 45 calendar days.

The County notes that the provision in question specifically states that the Union's failure to respond makes the grievance null and void.

The Union counters that the language is not so clear, given that it is immediately followed by language requiring the Union to refer a grievance to arbitration within 45 days after the conclusion of Step 3, which, if the County's interpretation prevailed, would establish a 90 day time frame for submissions to arbitration that seems contrary to the parties' intent. Further, the Union notes that earlier language in the grievance procedure (4.02(5)) clearly states that "Dissatisfaction [with the disposition of a grievance] is implied in recourse from one step to the next." Hence, according to the Union, the parties' consistent practice actually accords with the grievance procedure. Alternatively, says the Union, even if the language clearly required the intervening technicality of returning a signed form stating "disapproved," the County's consistent and longstanding failure to enforce this requirement creates a duty to notify the Union of an intent to insist upon compliance before raising the issue as an impediment to arbitration.

The Union's interpretation of Section 4.02(7)(c)(2) is more reasonable. Absent any other contract language, the County might be correct in reading that provision clearly to require the union to indicate either approval or disapproval on the disposition document and return it to the County. The County has suggested that the procedure is not a mere technicality, but plays a role in the way files are managed administratively by the County. However, other provisions in the grievance procedure create ambiguity in subsection (7)(c)(2) and demand a more flexible construction. In particular, the 45 day time frame that applies to requests for arbitration (Step 4) is not reasonably interpreted to begin only after the Union has declined the County's proposed Step 3 disposition. It would be counterintuitive to conclude that the parties intended a potentially 90-day time frame within which to invoke arbitration, after the conclusion of the Step 3 hearing, when the specific arbitration clause (subsection (7)(d)(1)) sets forth a 45 day window. Moreover, a request for arbitration within 45 days, with a copy to the County, would seem to suffice for the County's internal file management purposes as well as to give notice that the Union did not approve the proposed Step 3 resolution. The Union persuasively points out that the parties have agreed in Section 4.02(5) that moving a grievance to the next step adequately expresses disapproval of the County's disposition at the previous step. Finally the long and consistent practice reflected in this record is for the Union to express its disapproval by advancing the grievance to arbitration. Accordingly, I construe the phrase "Failure of the union to respond" in Section 4.02 (7)(c)(2) to mean failure either to sign and return an approval of the proposed disposition or failure to invoke arbitration. Hence, the grievance is arbitrable.

On the merits, the Union notes that Section 3.09(2) does not specifically address how volunteers are to be found, which, as the Union sees it, creates an ambiguity in the language. To clarify the ambiguity, the Union points to past practice which, while singular in number regarding VLO's (only the Doyne Hospital closing in 1995) is pronounced in significance,

since the County not only acted consistently with the Union's interpretation by soliciting volunteers, but expressly stated its belief that the contract so required. The Union relies further upon the County's practice in VTO situations, where the County has undertaken extensive and successful affirmative efforts to solicit and coordinate voluntary leave in order to avoid layoffs. The Union also contends that Section 3.09 as a whole places an implicit obligation on the County, based on the language of subsection (1) (requiring the County to "make every reasonable effort" to place at risk employees into vacancies) together with the language of subsection (2) (If there are insufficient vacancies, then volunteers will be considered, "in order to avoid compulsory layoff").

The County, for its part, relies upon the plain language of Section 3.09(2), which does not expressly place a duty of any kind upon the County except to consider volunteers if there are any. The County contends that it complied with that duty by offering to consider volunteers in its letter of August 25, 2003. The County argues that the arbitrator lacks authority to add language to the contract creating an affirmative duty where none is stated, and adds that, since the provision benefits employees, the Union should bear the primary burden of seeking volunteers. Finally, the County believes that the Doyne Hospital situation was far from analogous to the instant situation and was handled differently in numerous respects. According to the County, the Union has not raised the issue of volunteers in previous layoff situations that are more akin to the case at hand.

It is true that the language does not specify the mechanism by which volunteers for layoff are to be determined. However, the provision necessarily implies that some kind of process should occur, unless the parties are deemed to have intended the provision to apply only in the unlikely ad hoc situations where unit members themselves, with no prompting, take the initiative to volunteer. 2/ Such a passive intent is not only unlikely but emphatically inconsistent with the clear overall purpose of subsections 1 and 2, i.e., to minimize involuntary layoffs. Since Section 3.09 (2) is more reasonably read to contemplate a process of some kind to identify volunteers, and yet no process is specified, I see the language as inherently ambiguous on an essential element, rather than clearly relieving the County of any affirmative duty.

2/ The County's proposed interpretation of this provision is somewhat belied by the fact that one such instance of an ad hoc employee inquiry about volunteering occurred and was singular and ***rebuffed by a supervisor.***

Because the language is ambiguous, the parties' prior actions can shed light upon their understanding of its meaning. The Doyne Hospital closing in 1995, while hence less than definitive, is instructive. However, as the County points out, there are differences in the two situations. The relative enormity of the Doyne situation, coupled with the fact that the

effects were not County-wide but focused to a great extent upon the instant bargaining unit, lent itself to a more measured approach and greater opportunity to develop mutually satisfactory procedures. In contrast, the County-wide financial crisis that produced the instant case permitted less focus on the provisions of any particular collective bargaining agreement and also less time to seek and respond to input from any particular union or negotiate ameliorative measures. Nonetheless, while the County's more abrupt action in the instant situation is understandable, the Union did try unsuccessfully to find out in advance whether its unit would experience layoffs and to generate discussion about handling such layoffs, including the voluntary layoff problem. While the specific process employed in the Doyne closing is not necessarily imported wholesale into Section 3.09(2), because the situation and hence the appropriate processes were both more complex there and more specific to the health care bargaining unit, the Doyne closing procedures do show that the County saw itself as having an obligation to develop some kind of process for soliciting volunteers prior to involuntarily laying off unit members. On this point, the County's practices regarding VTO situations, while not strictly analogous or strictly binding as to specifics, similarly convey a sense that the County sees itself as taking some initiative in obtaining volunteers. 3/ As to the County's argument that the provision benefits employees and therefore no affirmative duty on the County's part should be implied, I note that most provisions in a collective bargaining agreement involve benefits to bargaining unit members. That fact alone does not relieve the County of whatever practical but unwritten responsibilities may be necessary to administer the benefits.

3/ Contrary to the County's argument, there are no previous incidents that would support its view of the contract language. The layoff of Nurse Practitioners that occurred prior to the Doyne closing did not result in a grievance because the highly skilled employees were all successful in finding other jobs; there was no need to invoke the VLO provisions of 3.09(2) (although I am not necessarily persuaded by the Union's argument that VLO was unavailable because the Nurse Practitioners lacked bumping rights into RN positions at that time). By the same token, a potential layoff situation that arose in 2001, in which all three at risk individuals were placed in vacancies without resorting to soliciting volunteers, does not suggest anything about how the parties see their obligations under 3.09(2).

Therefore I conclude that Section 3.09(2) requires the County to be proactive in developing an effective process for seeking volunteers for layoff. While the process itself could be adapted to the complexity and urgency of any particular situation, and need not necessarily preclude the Union from assuming a role, the County has a duty to take initiative and cannot simply abdicate responsibility for the process. Therefore, by unilaterally throwing the burden on the Union, with virtually no time for the Union to develop or implement an effective process, the County violated its implicit duty to ensure that volunteers were sought before implementing involuntary layoffs.

REMEDY

The Union argues that the County's failure to fulfill its obligation regarding volunteers makes it impossible to devise any remedy other than making the laid off (or terminated and then rehired probationary) employees whole for their lost wages and benefits during the period of their layoffs. According to the Union, it is impossible to reconstruct what would have occurred if the County had sought volunteers, because the impetus to volunteer was lost once the laid off employees left work. The County, on the other hand, points out that the Union has not identified a single person who would have accepted layoff in lieu of those involuntarily laid off. If there were such individuals, nothing would have prevented them from coming forward even after the fact to replace their colleagues on layoff. Indeed, the Union had a duty to mitigate its damages by seeking such volunteers, according to the County.

There is some merit to the County's argument that the Union could have tried to minimize its damages by seeking volunteers. However, under the circumstances present here, I decline to hold the Union to that standard. Given the short time frame involved (August 25 to September 12, with an intervening holiday weekend) – a time frame for which the County was responsible despite repeated Union requests for prior information and opportunity to discuss the situation – I cannot fault the Union for failing to develop and implement a system to solicit volunteers. Once the layoffs were a fait accompli, a situation created by the County, it became impracticable to unravel how the process would have played out if there had been volunteers. Instead, I am faced with a choice between all (a complete make whole remedy based on an assumption that the County created the problem) or nothing (based on an assumption the Union could have mitigated the problem).

Under the circumstances present here, awarding the Union the standard layoff make-whole remedy is more reasonable than depriving the Union of any monetary remedy at all. The County is more culpable than the Union for the uncertainty that exists about what would have happened had volunteers been sought. I note that the Union did not wait passively for its damages to accumulate, but instead immediately notified the County, by letter dated August 27, that the County had failed to seek volunteers or otherwise work cooperatively with the Union. The County chose not to respond. The Union put the County promptly on notice of conditions it could still meet to alleviate a potential contract problem. The County failed to take advantage of that opportunity. The County's inaction occurred at a time when the ultimate layoffs and demotions could have been altered. The County, as the employer in control of the work sites, had the greater wherewithal to contact employees and solicit volunteers. All these factors make it difficult for the County to successfully advance an argument that the Union should bear the burden for its asserted inaction. Perhaps most troubling about the County's proposed remedy is that the deprivation would fall upon the employees who were laid off in violation of the contract, who were not themselves in any way at fault for the failure to seek volunteers.

Accordingly, I will issue the customary order in cases involving wrongful layoff and order the County to make whole all bargaining unit members who lost wages and/or benefits as a result of the layoff implemented on September 12, 2003, including any probationary employees who were members of the bargaining unit at the time of the layoffs and whose positions were eliminated or terminated as a result of the reduction in force.

AWARD

The County violated Section 3.09 by involuntarily laying off bargaining unit members without first initiating a process to determine whether there were volunteers for layoff. The remedy for this violation shall be as described in the preceding section of this decision.

Dated at Madison, Wisconsin, this 29th day of June, 2004.

Judith M. Neumann /s/
Judith M. Neumann, Arbitrator

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