BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

COLUMBIA COUNTY COURTHOUSE EMPLOYEES, LOCAL 2698-B, WCCME, AFSCME, AFL-CIO

and

COLUMBIA COUNTY

Case 220
No. 61710
MA-12040

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing for Columbia County Courthouse Employees, Local 2698-B, WCCME, AFSCME, AFL-CIO, referred to below as the Union.

Mr. James R. Macy, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing for Columbia County, referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement, which provides for the final and binding arbitration of certain disputes. On October 21, 2002, the Union filed a request that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Patricia Blum, who is referred to below as the Grievant. The County agreed, and the Commission appointed Paul A. Hahn as Arbitrator. Between October 30, 2002 and March 6, 2003, Arbitrator Hahn mailed correspondence to the parties seeking hearing dates. In a letter filed with the Commission on April 1, 2003, the County stated:

> This letter is in response to your letter requesting available dates for hearing in the above-noted matter. I(t) was our understanding that this matter was resolved

> in that the Union had elected not to proceed with this matter. Please note that the County would reserve the arguments of laches and/or waiver to the degree that this matter proceeds to hearing. . . .

Hahn responded in a letter dated April 1, 2003 that noted that his last day of work "will be April 25, 2003" and that he "was going to have this file reassigned to one of our staff members."

In a letter to the parties dated April 11, 2003, I noted the Commission's assignment of the file to me to serve as Arbitrator, and asked the parties to "(p)lease contact me regarding hearing dates." Hearing was initially set for July 30, 2003, but due to a family illness, I had to postpone the hearing, which was rescheduled to September 26, 2003. Hearing on the grievance was conducted on that date in Portage, Wisconsin. Heidi L. Davis filed a transcript of the hearing with the Commission on October 10, 2003. The County filed its initial brief on November 10, 2003. In a letter filed with the Commission on December 12, 2003, the County stated "the deadline for filing briefs in this matter was November 7, 2003" and requested that I "render (a) decision in this matter." In a letter dated December 16, 2003, I asked the Union to "file, as soon as possible, any response to (the County's) letter of December 12, 2003, by January 2, 2004." In an e-mail dated December 23, 2003, the Union sent a digital copy of its brief to the County and to me. In an e-mail dated December 24, 2003, the County suggested that reply briefs "be extended until January 9, 2004." The Union, in an e-mail dated December 25, 2004, agreed. The County filed a reply brief with the Commission on January 8, 2004. In an e-mail to the parties dated January 22, 2004, I stated:

> . . . Mr. Macy filed his reply brief on January 8, 2004. I have not received a reply from Mr. White, and thus was prepared to close the record. I note, however, that I still have the hard copy of Mr. Macy's initial brief. If Mr. White has not received a soft copy of the initial brief, then I may have created a problem by not mailing the hard copy of the County's brief.
>
> Please let me know what action is necessary on my part. I will send out a copy of the County's initial brief to Mr. White. If the Union will not be filing a reply, I will send a copy of the County's reply brief. Please let me know your understanding of the state of the record. . . .

I mailed a copy of the County's initial brief to the Union on January 23, 2004. In an e-mail to the parties dated February 12, 2004, I stated:

> I mailed a copy of the County's brief on January 23, 2004 . . . I have a copy of the County's reply brief. I presume the Union will not be filing a reply. Am I correct? If so, I will mail the County's reply. If not, when will the reply be filed?

In a letter to the parties dated March 9, 2004, I stated:

> I have received no response to my e-mail of February 12, 2004. Thus, I enclose a copy of Mr. Macy's reply brief for Mr. White and note the close of the record.

ISSUES

The parties stipulated the following issues for determination:

1. Whether or not the grievance is timely and/or arbitrable.

2. If the grievance is arbitrable, did the County violate the collective bargaining agreement when it terminated the Grievant, Patricia Blum, on September 17, 2001?

3. If the grievance is arbitrable and the County violated the collective bargaining agreement, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

AGREEMENT

This Collective Bargaining Agreement is entered into, by and between Columbia County, hereinafter referred to as the "Employer", and . . . the "Union".

ARTICLE 5 - GRIEVANCE AND ARBITRATION PROCEDURE

5.3 Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacation, etc., these limits may be extended by mutual consent in writing.

. . .

5.6 Arbitration.

(1) Time Limit. If a satisfactory settlement is not reached in Step 3, the Union must notify the Human Resources Committee in writing within (10) calendar days that they intend to process the grievance to arbitration.

(2) Selection of an Arbitrator. The Union shall thereafter request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. . . .

ARTICLE 6 - PROBATIONARY PERIOD

6.1 All newly hired employees shall serve a six (6) month probationary period. The Employer and employee may agree in writing to an extension of the probationary period for an additional three (3) months. During said probationary period, they shall not attain any seniority rights and shall be subject to dismissal without prior notice or recourse to the grievance procedure.

. . .

ARTICLE 7 - SENIORITY RIGHTS

. . .

7.9 Layoff and Recall. In the event the Employer reduces its work force for lack of work or other legitimate economic reasons, the following procedures shall apply:

. . .

B) The employee with the least seniority shall be laid off first, provided that the remaining employees are qualified to do the remaining work. . . .

ARTICLE 15 - MANAGEMENT RIGHTS

15.1 The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

. . .

D) To . . . discharge . . . employees for cause, and subject to the procedure of Article 5 of this contract . . .

BACKGROUND

The Grievance And Its Processing To Arbitration

The grievance form, dated October 15, 2001, states the "Circumstances of Facts" thus:

> (The Grievant) was relieved of her position as a Judicial Assistant on or about September 17, 2001. Shortly thereafter and within the time limitations contained in the contract, (the Grievant) advised the County Personnel Office in writing that she desired to exercise her rights under Section 7.9(b) of the Labor Contract. In a letter dated October 4, 2001, Personnel Director Miller advised Union Staff Representative White that (the Grievant's) probationary period had been extended, and therefore (the Grievant) was terminated in her probationary period.

The form alleges that the Grievant was discharged without just cause in violation of Section 15.1(D); did not have her probation period properly extended in violation of Section 6.1; and was improperly denied rights under Section 7.9(B). The parties started processing the grievance at Step 3.

On November 7, 2001, the County Human Resources Committee (HRC) met to consider the grievance. The HRC voted to deny the grievance because "employee was in a probationary status when released, (citing) grievant was given a written evaluation signed by the Judge on August 1, 2001 extending the probationary period for 90 days." Sometime during the course of this meeting, the Union requested a copy of the Grievant's personnel file, which contained the evaluation form. Brent Miller, the County's Human Resources Director, supplied the personnel file sometime after this meeting but before the Union filed the December 3, 2001 letter stating its intent to appeal the grievance to arbitration. The HRC minutes have to go through an approval process, and Miller noted that he did not know when the HRC minutes were delivered to the Union.

The Union formally requested arbitration in a letter to the Commission dated October 18, 2002. Miller received a copy of this letter on October 22. In a letter to White dated October 24, Miller stated:

> . . . While the Union last indicated that it was going to file for arbitration pursuant to its letter of December 3, 2001, the Union did not file at that time, and subsequently, we have considered the matter closed.
>
> Please note that it is the County's position that this grievance is now untimely and that the ability to proceed further with this grievance has been waived. We do not believe that the grievance is arbitrable since it has been over 10 months since we have heard from the Union or grievant on this matter.

The background following this exchange of correspondence is stated in the **ARBITRATION AWARD** section above.

The Grievant's Tenure In The Judicial Secretarial Assistant Position

The Position Description states the "Essential Duties and Responsibilities" of the position thus:

1. Type opinions, correspondence and decisions and prepare reports, dispositions, memoranda, agendas, jury instructions, orders and notices
2. Assist with calendar management including: scheduling of court hearings, juvenile hearings, trials, conferences, legal appointments, meetings and activities of the judge; and holding scheduling conferences.
3. Assist with file and record acquisitions
4. Organize and maintain judge's files and records
5. Post court calendar daily, update weekly calendar
6. Maintain judge's law library
7. Act as receptionist in answering telephone, handling visitors and processing mail
8. Requisition office supplies
9. Contact attorneys and parties concerning court dates, appointments and cancellations

The County hired the Grievant into this position effective February 2, 2001. The letter of hire, dated January 31, 2001, notes that the position "is an 'at-will' non-union position under the supervision of the Judge Daniel George" and that it was subject to "a 6 month probationary period". Prior to accepting this position, the Grievant had served in a non-unit, limited term Legal Secretary position in the office of the District Attorney.

Shortly before the expiration of the Grievant's probationary period, Miller sent George a "Columbia County Probationary Evaluation" form. The form contained ten criteria to be given a numerical score from 1 to 5, and sought a "Recommendation" from one of three entries: Retain; Extended Probation; or Release. George met with the Grievant on August 1, 2001 to discuss the evaluation. He completed the form, giving the Grievant an average score of 2.6 on the ten stated criteria. The form details the scoring level thus:

> 2.5-3.49 ---- Average employee. Retain. Meets expectations for permanent employer, but continue training.

George circled the "Extended Probation" entry, adding "90 days" beneath it. He gave the form to Miller, who placed it in the Grievant's personnel file. George was not convinced the extended probation period had the impact he hoped for. He was scheduled to take vacation in mid-September, and decided he did not want to leave the office under her direction. On September 17, 2001, he called her into his office and discharged her from the Judicial

Secretarial Assistant position. The termination form states "Did not pass probationary period."

The Grievant, after the termination, filed a letter with Miller seeking to exercise bumping rights. Miller advised White in a letter dated October 4, 2001 that because she failed her probation period, she had no rights to exercise. He spoke to George prior to issuing this letter. George issued a letter to Miller dated October 5, 2001, detailing the information that they had discussed regarding the discharge. The letter states:

> Please be advised that at the end of (the Grievant's) six month probationary period, I met with her and discussed the fact that she was still making far too many mistakes on her job despite the lengthy training time. She was advised that significant improvement was necessary in order to maintain her position and that I wanted to extend her probation for an additional three months. (The Grievant) expressed no objection to this and acknowledged that errors were continuing and that improvement was needed. Thereafter, I notified your office of this extension.
>
> During the extended probationary period, (the Grievant's performance did not improve and on September 17, 2001, she was notified that she was being terminated. (The Grievant's) job performance demonstrated a significant lack of competence with many mistakes being repeated irrespective of efforts by myself and court staff to explain proper procedures. It was readily apparent that continued efforts to train were not going to be successful and the decision to terminate her appointment was made. . . .

The balance of the background is best set forth as an overview of witness testimony.

Daniel George

George has been a Circuit Judge for twelve years. George did not feel the Grievant showed the secretarial skills necessary to the position. He thought that correspondence had too many typing errors and that she lacked solid grammatical skills. He also felt she repeated the same type of errors. He stated that her performance generated from one to three complaints per month from co-workers and from practitioners, including one from Mary Saunders, the Administrator of the County Child Support Department. George would periodically inform the Grievant of complaints and would return work to her with necessary corrections noted. He did not formally document these instances and did not discipline her.

On August 1, 2001, he approached the Grievant in her office to discuss the evaluation form Miller had sent him. He did not specifically review the form with her. Rather, he

informed her that he wanted to extend her probation to address her performance problems. He informed her the alternative was termination. She agreed to the extension. He testified that "to the best of my knowledge, I would believe I had given (the evaluation form) to her" (Tr. at 22). He acknowledged, however, that it was possible that he did not do so.

The problems persisted. Because he was to leave on vacation September 18, 2001, he determined to discharge her "because I did not want her there while I was gone during the next couple of week period . . . (b)ecause I didn't feel confident that she would be able to do what needed to be done to take care of the office during that period of time" (Tr. at 24). At the discharge meeting at the close of the business day on September 17, the Grievant did not claim to be other than a probationary employee.

Brent Miller

George contacted Miller toward the end of the Grievant's six month probation period, and discussed his problems with her. He was concerned that he did not want to have to train another employee, and hoped to address the problems by extending the probation period. Miller generally recommends termination in such a matter, but leaves the decision to County department heads. George delivered a copy of the evaluation form to the Human Resources Department on August 1, and informed Miller that he had given the Grievant a copy. Miller, on the same day, informed the Union President of the extension. Miller understood her position to be that the extension was preferable to a termination and that she was surprised that George was willing to continue to work with the Grievant. Miller continued to receive complaints concerning the Grievant's work performance during the time the probation period was extended.

Miller discussed the grievance with White after its filing in October of 2001. He informed White that the County had a document stating the extension of the probation period, and understood White's position to be that the Union might drop the grievance because he did not see any basis for the Grievant to challenge the discharge or the denial of bumping rights. The document was the evaluation form completed by George on August 1, 2001.

Miller researched County records, and found that on two prior occasions it had extended probation periods based on the filing of the evaluation form. One occurred in 1989 or 1990 and the other occurred in 1996 or 1998. Neither action produced a grievance. The County does not issue a copy of evaluation forms to the Union.

The Grievant

The Grievant testified her working relationship with George was "(v)ery good" (Tr. at 69). George did not discipline her, and was not confrontational with her. She felt that she

responded to each problem he brought her, and gradually improved as she learned the job. The Grievant had no experience with the procedures in a judge's office, and relied heavily on Susan Raimer, the Clerk of Courts for assistance. Each of the County's Judicial Secretarial Assistants did so. Raimer assisted her in addressing Saunders' complaint.

On August 1, 2001, George came to her office, and informed her that he was going to extend her probation because of problems in her work. The Grievant said "okay" (Tr. at 81). She felt it was good that he was giving her a second chance, and she agreed to the extension. She did not know of her rights under the labor agreement and had not had any contact with the Union. George did not detail the reasons for the extension, and the meeting lasted less than five minutes. He had not disciplined her or given her any formal notice of job deficiencies prior to the meeting. He came into the meeting with a stack of files and did not give her a copy of the evaluation form.

Between the August meeting and her termination on September 17, George did not complain about her performance. With five minutes left in the work day on September 17, George summoned her to a meeting in his office with Raimer. She had no idea what the meeting would cover. George informed her that he did not find her work acceptable, and that although he found her a fine person, her services were no longer needed. The Grievant did not voice any objection. George did not identify any specific problem with her performance.

Sometime after the August 1 meeting, perhaps as soon as August 2, the Grievant reviewed the labor agreement. She became convinced that George had not issued the writing demanded by the labor agreement to extend a probation period. She did not, however, inform anyone and did not mention it at the September 17 meeting.

David White

White testified that when the Union learned that the County was creating full-time Judicial Secretarial Assistant positions, it filed a unit clarification petition. The petition included other positions the Union felt should be included in the Courthouse bargaining unit. On March 27, 2001, the Union and County agreed to include the Judicial Secretarial Assistant positions in the unit, under terms including the following:

> 2. The 2000-2001 collective bargaining agreement shall be amended to include the following provision:
>
> To the extent that judicial secretaries are subject to appointment pursuant to the inherent powers of a circuit court judge, the posting and selection provisions of Sections 7.5 and 7.6 of this agreement shall not apply to said positions. Further, to the extent that judicial secretaries are subject

> to removal pursuant to the inherent powers of a circuit court judge, no employee shall have the power to bump into a judicial secretary position under Section 7.9 of this Agreement.
>
> 3. The parties shall immediately commence collective bargaining negotiations regarding the applicability of all other . . . terms of the 2000-2001 collective bargaining agreement to these employees . . .

The parties did not agree on the wages appropriate to the positions until August 6, 2002.

White did not understand that Miller believed the evaluation document was the written extension of the Grievant's probation period until Miller gave him a copy of the document in October of 2002, and stated that it was the writing that he had referred to during the processing of the grievance. Because White did not agree that the evaluation document could be the writing demanded by Section 6.1, he filed the request for arbitration. He had assumed that the document Miller had referred to was a specific document, signed by George and the Grievant, extending the probation period.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The County's Initial Brief

After a review of the record, the County asserts that "Section 5.6(2) of the Labor Agreement specifically places the burden upon the Union to request that the WERC appoint an arbitrator from its staff." The contract places no requirement on the County. Although the agreement places no specific time limit on the Union, it cannot reasonably be interpreted to permit the Union to act whenever it chooses. The one-year delay resulting from the Union's "mis, mal or nonfeasance" should make the grievance not arbitrable. Any other conclusion frustrates the purpose of the grievance procedure, which is to produce "a quick and timely resolution to labor disputes."

The assertion that the Union was waiting for a document from the County for roughly eleven months "is neither credible nor reasonable". George and the Grievant agreed to extend the probation period, and the Union and Grievant in all probability received the document doing so. Even if they did not, they could have requested it, since it was part of her personnel file. An examination of the Grievant's testimony establishes that she "does not have clean hands" since she never informed anyone that she believed the County had failed to supply her an appropriate extension of the probation period.

Beyond this, the doctrine of *laches* precludes consideration of the grievance. As a matter of arbitral and judicial precedent, the County has proven the elements necessary to trigger the application of *laches*: the Union's eleven month delay seeking arbitration was unreasonable; the Union had independent knowledge of the basis for the alleged contract violation; and the delay prejudiced the County.

Even if considered timely, the grievance "has no merit." The ninety day extension of her probation period was proper under the agreement. Section 6.1 authorizes the "Employer and employee" to agree in writing to an extension of the probation period. The Grievant's six-month probation period ended August 2, 2001. George formally evaluated her prior to the end of the probation period, and the two of them agreed, as part of that process, to extend the probation period. The Union President acknowledged the agreement and the Grievant does not deny it. Rather, she asserts she read the labor agreement and became convinced she had not received appropriate notice. She neglected, however, to tell anyone prior to the arbitration hearing. The technicality she seeks to create to preserve her rights should not be enforced in arbitration.

Since the County has extended a probation period on two prior occasions through an evaluation document, and since neither action was grieved, the evaluation document here should be considered the writing required by Section 6.1. The agreement does not require individual signatures, and no such requirement should be implied.

The Grievant's termination on August 17, 2001 was appropriate because she was an at-will employee. The County concludes that whether viewed procedurally or substantively, the grievance must be denied.

The Union's Brief

After a review of the evidence, the Union asserts that "there is no procedural bar to a decision on the merits of the grievance." There is no dispute the grievance was timely and appropriately filed at Step 3. Thus, the dispute focuses on the delay between "the period of time between the appeal of the grievance to arbitration and the actual filing of the paperwork with the Wisconsin Employment Relations Commission." That delay is traceable to Miller's assertion to White that the County "was in possession of a document which was a written agreement between the grievant and the Employer that the grievant's probationary period had been extended." White and Miller had agreed that if such a document existed, the grievance would not be pursued. Once the Union was aware that the County sought to assert the evaluation document as the writing required by Section 6.1, the Union decided to arbitrate the matter.

Although "it may well have been the case that the grievant and the Judge both understood that, at the conclusion of the August 1, 2001 meeting, the grievant's probationary period had been extended," this is not sufficient to satisfy Section 6.1. At most, George indicated in writing his desire to extend the probation period.

The Union does not challenge George's authority to remove the Grievant as his assistant. However, if she was not probationary, she was entitled to the bumping rights of Section 7.9. Even if she lacked the seniority to bump another employee, the contract grants her the right to be considered a laid off employee.

If the Grievant is considered non-probationary, the County cannot reasonably claim to have had cause to discharge her. To do so, the County would have to show that it put her on notice of its disciplinary interest in her work performance, and that discharge reasonably reflected that interest. The Grievant effectively refuted each of the deficiencies asserted by George. At most, George showed no more than "the typical problems anyone would experience with a new secretary." Beyond the August 1, 2001 evaluation, George made no attempt to communicate performance deficiencies to the Grievant. He neither documented such concerns nor disciplined her in any way. In any event, the minor errors cited by George fall short of establishing that discharge was a reasonable response.

The Union concludes by asking "that the Arbitrator answer the first two questions in the statement of issues in the affirmative, and order as remedy that the grievant be made whole for all losses that she has suffered as a result of the County's violations."

The County's Reply Brief

The County contends that the Union's initial brief was untimely and should not be considered. Any other conclusion makes a briefing schedule a matter of convenience and "would mock the system and the grievance arbitration process would become uncontrollable and would be maintained at the whim of the Union."

Noting the irony of claiming the grievance is timely after the submission of an untimely brief, the County adds that the Union seems to be "making some type of estoppel argument by stating that it relied on some type of misrepresentation by the County regarding written documentation to extend the probationary term of the Grievant's employment." No County promise has been proven and the Union had eleven months to request the document it now claims it was waiting for. The County has consistently believed that the Grievant had a copy of the evaluation document which extended the probation period.

The Union cannot cite a contractual basis for the assertion that Section 6.1 demands a document individually signed by George and the Grievant. The County notified the Grievant

and the Union President of the extension on the same day. No one disputes that the probation period was extended. The evaluation document was the sole required writing. Since the Grievant testified that she had reservations about the writing after she read the labor agreement, she was under a duty to tell someone. She should not be permitted "to take advantage of the Judge, someone who had agreed, with her, to give her another chance." Because she was probationary, she has no right to the grievance procedure or other contractual benefits, such as just cause. Even if she had such rights, the evidence shows George had just cause to terminate her.

The Union should not be permitted to file a reply brief. An examination of its initial brief establishes that it used the County's brief to prepare its brief. Since the Union combined its initial brief with a reply, it should not be permitted further argument.

The County concludes that whether viewed as a matter of process or of substance, "the grievance must be denied."

DISCUSSION

The first issue concerns the timeliness of the grievance. Stating the record on this point is enough to highlight the proposition that bad facts make bad law. Fortunately, there is no law to be made in this case. Unfortunately, the contract must be applied to the facts.

The timeliness issue concerns the Union's delay between the December 3, 2001 letter appealing the HRC decision to arbitration, and the Union's October 18, 2002 letter asking the Commission to appoint an arbitrator. Section 5.6(1) states a time limit for the Union's appeal of the HRC decision. Section 5.6(2) does not, however, specifically state a time limit on the next step, stating that the "Union shall thereafter" request the appointment of a Commission arbitrator. Miller's testimony establishes that the HRC denial cannot be dated with sufficient certainty to question the December 3, 2001 letter under Section 5.6(1). Thus the issue focuses on Section 5.6(2). Because the contract does not specify a time limit, the County contends that the grievance is barred by the doctrine of *laches*.

While the County's arguments have greater force than the Union's on this point, I believe the record is better served by finding the grievance arbitrable, permitting Section 6.1 to addressed on its merits. In a sense, this conclusion is pragmatic, reflecting that the parties have gone to a great deal of time and expense to pose the issue on its merits. However, the conclusion is faithful to the facts posed by this grievance, and does not damage the language of the agreement.

The application of the *laches* doctrine could create a time limit where the contract states none. Its rote application also obscures that a problem of delay is not exclusively addressed by

waiver of the grievance. For example, the wrongful placement of an employee on a salary schedule does not necessarily doom the employee to a perpetually erroneous placement, if the grievance timelines are not met from the time of the initial placement. The procedural error can be addressed substantively as a remedial matter, by limiting the amount of backpay to that available through a timely filed grievance.

More specifically applied to this grievance, the application of *laches* is not fully persuasive. The County's arguments are persuasive regarding the first two elements stated in YOCHERER V. FARMERS INS. EXCH., 252 WIS. 2D 114, 130 (2002), but not fully persuasive regarding the third. The prejudice pointed to by the County surrounds the effect of the delay on George's recall. I am not convinced the delay has that effect. His uncertainty over whether he gave the Grievant a copy of the evaluation form is not, standing alone, damaging to his credibility. Nor did the delay somehow enhance the Grievant's. Her certainty that he did not give her the form may reflect that the passage of time permitted her interest to affect her recall. The staleness of the litigation disadvantages the process, and each party to it. This does not, however, establish the type of prejudice warranting the waiver of a determination on the merits. The matter would be different if the County had lost access to necessary testimony due to the delay.

Concerns more closely tied to the processing of this case also indicate the record is better served by addressing the merits of the grievance. Even though the Union's arguments do not give any recognition of the problem caused by the delay, the issues do not pose an evident ongoing liability. Such issues can, in any event, be addressed as a matter of remedy. The nature of the issue may have prodded a tacit understanding that the interpretive issue could be put on hold in light of other issues. The delay was also compounded by each arbitrator's handling of the matter. Hahn, in a letter dated December 6, 2002, noted that "I understand this is the Union's grievance and I will await your call to again start the scheduling". My handling of the submission of briefs is similar. I view the filing of briefs as a matter best left to the parties, and routinely permit briefing schedules to be consensually modified by the parties without my involvement. My uncertainty in closing the record reflects my uncertainty on whether the parties had consensually altered the schedule. At least in my view, Hahn's and my approach permit the maximum latitude for the parties to present their case however they think best. This deference proved unhelpful to this litigation.

Beyond this, Miller's and White's confusion over the "writing" that established the extension of the probation period is understandable. Miller knew the writing was the August 1 evaluation form. White assumed until he received the form with Miller's express statement that it was the writing, that the form was a separately executed document signed by George and the Grievant. While the County is correct that the Union could have discovered this point sooner, and that the County should not be prejudiced by the delay, I do not believe that the record is best served by the application of *laches*.

This poses the second stipulated issue. The issue broadly questions the contractual propriety of the termination, but the interpretive focus is Section 6.1. As the processing of the grievance manifests, the strength of the Union's case turns on whether the Grievant's probation period was extended.

The County's reading of Section 6.1 is persuasive. The language does not require a document mutually signed by a supervisor and an employee. Rather, it demands that the Employer and employee may agree "in writing" to an extension. There are no express conditions set to the type of writing required. The requirement that the "Employer and employee" agree confirms that in the absence of such agreement, the extension would be futile. The "writing" codifies the understanding necessary to make the extension potentially productive and presumably avoids misunderstanding. The "writing" codifies the agreement of the "Employer and employee."

In this case, there is no dispute that George and the Grievant agreed to the extension. The Union challenges the absence of the Grievant's signature and whether she ever received the form. The record is less than precise on whether George gave her the evaluation form, but the weight of the evidence indicates he did. George thought he did, but was not certain. Miller was certain that George informed him that he had given the Grievant a copy. The Grievant testified that George did not give her the copy.

Her testimony does not, however, turn the grievance into a credibility dispute. Even if George did not give the Grievant a copy, there is no dispute that George proposed and the Grievant accepted the extension. Whether or not the Grievant got the copy of the form on August 1, the writing was in her personnel file from the following day. She or the Union could have asked for it at anytime. This does not pose the same issue raised by the procedural arguments on delay. Section 6.1 does not require that the writing be given to the Grievant. Had she received the copy and misplaced it, the issue remains the same, and that is whether the evaluation form can be a "writing". It can, and its storage in her personnel file is sufficient to meet the requirements of Section 6.1.

Accepting the Union's arguments would unduly complicate Section 6.1. The section does not state the level of detail the Union seeks from "writing". The processing of the grievance undercuts the assertion that the parties give narrow and technical reading to the contract. The Union's assertion that the term "thereafter" in Section 5.6(2) should be read pragmatically is difficult to square with its technical reading of "writing" in Section 6.1. More significantly, its reading complicates the section. George is not the Grievant's "Employer". The "AGREEMENT" provision of the contract states that the County is the "Employer". Thus, Section 6.1 cannot persuasively be read to demand George's signature. That his signature appears on a County form that demands input from the Human Resources Director creates the necessary involvement of the "Employer" in the "writing" demanded by

Section 6.1. To conclude otherwise would promote individual bargaining. In the absence of broader County involvement, it is not evident that a document signed by George and the Grievant would mean anything beyond a potential issue of individual bargaining.

That Miller informed the Union President of the extension further underscores the appropriateness of the "writing" under Section 6.1. This involvement, not strictly required by Section 6.1, precludes any issue regarding individual bargaining. In sum, the August 1, 2001 evaluation form was sufficient to establish "in writing" the agreement between "the Employer and employee" required by Section 6.1. Thus, the Grievant was a probationary employee on September 17, 2001. As a probationary employee, she lacks the contractual rights the Union seeks to enforce by the grievance.

This conclusion cuts off much of the argument underlying this matter. The Union's and the Grievant's concerns with the propriety of the Grievant's training are understandable. Her frustration with the extension of her probation and with her termination is evident. That does not, however, bring those concerns into the arbitration process. The second sentence of Section 6.1 places those concerns outside of the grievance process.

AWARD

The grievance is arbitrable.

The County did not violate the collective bargaining agreement when it terminated the Grievant, Patricia Blum, on September 17, 2001.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 30th day of June, 2004.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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