

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**INTERNATIONAL ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS, DISTRICT 10, AFL-CIO**

and

RACINE COUNTY

Case 201
No. 63622
MA-19649

(Detention Center Clerical Layoffs)

Appearances:

Matt Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, for the labor organization.

Victor J. Long, Long & Halsey Associates, Inc., 8330 Corporate Drive, Racine, Wisconsin 53406, for the municipal employer.

ARBITRATION AWARD

International Association of Machinists & Aerospace Workers, District 10, AFL-CIO (“the Union”) and Racine County (“the County”) are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to layoffs. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Racine, Wisconsin on July 19; it was not stenographically recorded. The parties filed written arguments by August 19, and waived the filing of replies.

ISSUE

The parties stipulated to the following issue:

“Did Racine County violate the collective bargaining agreement by laying off more senior clerks and retaining less senior clerks in the December 2003 layoff? If so, what is the remedy?”

RELEVANT CONTRACTUAL LANGUAGE

**ARTICLE IV
MANAGEMENT**

4.01 Except as otherwise provided herein, the management of the operations and the direction of the working forces, including the right to ... relieve employees from duty because of lack of work or other legitimate reasons ... is vested in the County, together with all other functions of management, with the understanding that such rights of management will not be used for the purpose of discrimination against any employee. This article is subject to the provisions of this Agreement.

**ARTICLE V
SENIORITY**

...

5.02 In matters involving lay offs or recalls or regular full time employees, seniority, skill, and ability within an organizational unit will be given consideration, but wherever practical, the last person hired shall be the first employee laid off. Organizational units shall be defined as follows:

Unit #1	Social Workers/Case Managers
Unit #2	Economic Support Specialists
Unit #3	Financial Employment Planners
Unit #4	Service Coordinators
Unit #5	Clerks
Unit #6	Detention Workers

...

BACKGROUND

In June 2003, Racine County faced a dire economic situation – a projected \$3.3 million deficit in its Human Services Department budget, due primarily to the very high number of juveniles being sentenced and committed to out-of-county facilities. After a hiring freeze and early retirement proved insufficient, County Executive William McReynolds decided to impose a countywide layoff, affecting both represented and unrepresented employees. Due to mandated standards and/or concerns about public health and safety, the County exempted certain jobs from the layoff list, including juvenile detention center workers, dispatchers, jail cooks and corrections officers. McReynolds also volunteered to return to the County the equivalent of one week's salary (and forego unemployment compensation), and asked other elected officials to do likewise.

Certain unions agreed to the layoffs, including Local 130, AFSCME; Teamsters Local Union No. 43; the Attorneys' Association; the Sheriff's Department Command Staff Association, and the Deputy Sheriff's Association. The employees represented by these unions were given certain considerations as to the timing and other aspects of their layoff. The two units represented by the International Association of Machinists and Aerospace Workers (Courthouse and Office Employees and Human Service Department Employees) did not agree to the layoffs, which were thereupon imposed without the offer of those same considerations.

Pursuant to the collective bargaining agreement between the County and Services Department Employees Unit Belle City Lodge No. 437, District 10, International Association of Machinists and Aerospace Workers Unit II, The Human Services Department employees are organized into the following separate units:

Unit #1	Social Workers/Case Managers
Unit #2	Economic Support Specialists
Unit #3	Financial Employment Planners
Unit #4	Service Coordinators
Unit #5	Clerks
Unit #6	Detention Workers

The record does not reflect the total number of employees in the union. As of the time period in question, the Human Services Department seniority list (Jt. 5) listed approximately 215 names, including 37 clerks, 70 social worker/case managers, 24 detention workers, and various other represented and unrepresented employees.

The employees in unit #5 serve as clerks in each of the other units, while remaining members of unit #5. There are two HSD clerks, Gina Applin and Cathy Christman, who are assigned to the Detention Center. There are six HSD clerks who are more senior to Christman,

four of whom are also senior to Applin. The HSD seniority list does not distinguish in any way, other than name of supervisor, between these two and the other clerks; they all are identified as having the position of "clerk."

On or about September 9, 2003, the County posted on its intranet website a document entitled "Information Concerning Lay Offs Necessary to Address the 2003 Budget Deficit." This memorandum addressed the way the various identifiable groups would handle the layoffs.

The section pertinent to this union read as follows:

1. Juvenile detention workers will not be included in the layoff because of state mandates in regard to the operation of Juvenile Detention.
2. During the week of October 13-17, 2003, the lowest one-third (1/3) of all employees, based on seniority, from each classification identified in the collective bargaining agreement shall be laid off for one week.
3. On December 22, 23, 26, 29 and 30, 2003, approximately 102 social workers, SSC's, economic support specialists, financial employment planners and clerks will be laid off.
4. Holidays and vacation will not be prorated due to the layoff. All other benefits such as health insurance shall continue during the layoff period.
5. Employees who are laid off will be eligible to apply for unemployment compensation.
6. Employees who are laid off during a week in which a holiday falls will not be required to be in a paid status the day before and the day after the holiday in order to receive holiday pay. However, employees cannot count a paid holiday as one of their layoff days.
7. No additional vacation requests will be granted for the lay off periods within this union.

In October 2003, the County provided to the Union leadership a document (Employer Exhibit 2) listing approximately 150 names in two columns, in no discernible order other than a notation at the top of the respective columns that one was the list of employees to be laid off the week of October 13, the other the list of employees to be laid off for five days between December 22 and December 30. The list was not in alphabetical order, and did not include any designation as to position or unit. The list did not note that some HSD employees were in

each column, some were in only one, and that some – Applin and Christman -- were not included at all.

At no time prior to the layoffs did the County evaluate whether any of the six clerks who were laid off were capable of performing the duties of the Detention Center clerks.

On January 6, 2004, the six clerks who were senior to Christman filed a timely grievance, claiming the County violated Section 5.02 of the collective bargaining agreement by not following seniority within organizational units in implementing the layoffs.

On February 2, 2004, County Special Counsel Victor J. Long responded to the grievance as follows:

The Union is grieving that two clerical employees in the Detention Center were not laid off for one week in 2003 as was required for other employees.

Management responds that the Detention Center was to be excluded from the one-week layoffs because of the necessity of maintaining appropriate staffing levels. The clerical employees were included in that exception. In reviewing the Union arguments, management recognizes that there may be a valid case that these employees should have been laid off. However, management also feels that there is some responsibility for the Union for not pointing out this issue when they received the layoff lists in October, 2003. While management may agree that these two employees should have taken the one-week layoff in 2003, it is not appropriate to force them to comply in 2004.

The Union is taking the position that the remedy must be to provide the six grievants for the one-week layoff, or as an alternative, giving each of the six grievants three comp days. Management rejects this remedy and indicates that if the Union wants the situation to be equitably resolved, the two employees could now be required to take the one-week layoff.

Management acknowledges that there is some validity to the grievance but there is substantial disagreement over the remedy. As a result, the grievance is denied.

The County Human Resources/Finance Committee responded to the grievance in a similar fashion on April 9, 2004 as follows:

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The Union is taking the position that the remedy must be to provide the six grievants with three comp days. Management rejects this remedy and indicates that if the Union wants the situation to be equitably resolved, the two employees could now be required to take the one-week layoff.

The primary disagreement with this grievance is over the remedy and the Committee believes that management had the right to exclude all positions in the Detention Center. Even if there were agreement on the necessity to lay off these two employees, the Union position on the remedy is unreasonable. As a result, the grievance is denied.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

The contractual lay off language is a "sufficient ability" clause, providing that a junior employee should be retained and a senior employee laid off only when there is a practical reason for doing so. It is well-settled that the employer in such a case has the burden of establishing that the more senior employee cannot perform the required job functions. Here, the employer has presented no such evidence that the six senior employees who were passed over by two junior employees could not perform the necessary tasks.

Essentially admitting that it has violated the agreement, the County says first there should be no remedy, and second that it was the union's fault by failing to ensure the County did the layoffs properly.

But it is not the Union's obligation to ensure that the employer complies with the agreement; the Union's obligation is to grieve if and when a violation occurs.

Moreover, the evidence does not show that the Union was aware of the violation, in that the chair of the clerical unit committee did not receive the layoff list until the afternoon the layoffs were to occur. Further, the list was merely alphabetical, and did not list employees by unit or seniority. The Union was under no obligation to sort through all the names to see if the correct employees were being laid off; that is the employer's obligation.

Because Applin was allowed to work out of seniority and Christman was allowed to take paid vacation, there are ten total days of compensation that would have been available to the senior employees had the employer not violated the agreement. Rather than reward the employer by allowing it to now lay off Applin and Christman, the remedy should be to distribute the ten days among the six grieving employees. The most economic and equitable way to do this would be through compensatory time, except any employee who has retired should receive instead one-sixth of the ten days' wages. In the alternative, the comp time (or back pay) should be awarded to the two most senior employees.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The County Executive had the authority to exempt the Detention facility employees, including the two clerks, from the countywide layoff. Further, because none of the more senior clerks had specifically performed these duties, the Union could not offer any specific examples to support its contention that the senior clerks had the skill and ability to perform the clerical duties in the Detention Facility. The need to provide a secure and smooth running juvenile detention facility required that the permanent clerical staff continue during the layoffs.

Further, the Union failed to provide management with the required notice that the senior employees intended to bump the junior clerks, which was their duty. Whether or not the Union received notification that the layoff list did not include the two clerical employees in the Detention Center, the Union was not precluded from asserting contractual bumping rights. Such an assertion would have fulfilled the obligation to notify management of the desire for the senior employees to bump.

But given the volume of information provided by management, it is inconceivable that at least some union committee members did not know of the exemption from layoff for the Detention Center clerks. The obligation thus fell on the Union and the senior employees to assert the bumping rights. Because they did not do so, they forfeit any such bumping rights.

Finally, as to remedy, the only fair and appropriate remedy is for each of the two clerical employees to be laid off for one week each. This may not seem fair to the employees, but it recreates the status that would have existed had the employees not been exempted from the layoff requirements.

In summary, the County Executive had the authority to exempt the entire Detention Center from layoff, so the County could reasonably retain operations and procedures necessary to protect the interests of juveniles in the facility. Even if the Union somehow did not receive a list of inclusions and exemptions from the layoff, the Union still had the ability and requirement to assert the desire for the senior employees to bump any less senior clerical employee not being laid off. And even if the grievance is found to have merit, the only fair and equitable result is for the two clerical employees in the Detention Center to now be laid off, resulting in all clerical employees being treated equitably.

DISCUSSION

At the outset, it is important to note that this grievance is not about the County's decision to impose broad layoffs last summer, or its decision to exempt certain positions from that action. Article IV of the collective bargaining agreement gives the county the right to impose layoffs "because of lack of work or other legitimate reasons." The Union does not here challenge either the imposition of the layoffs or the exemption of certain positions from it. Instead, the grievance addresses only the manner in which that exemption was implemented and the individuals saved from layoff identified.

Section 5.02 of the collective bargaining agreement provides:

In matters involving lay offs or recalls or regular full time employees, seniority, skill, and ability within an organizational unit will be given consideration, but wherever practical, the last person hired shall be the first employee laid off.

Under this language, once it determined to retain any positions during the layoffs, the County was required to consider the skill and ability of the employees in order of seniority, and, wherever practical, implement the layoffs in inverse seniority.

That is, the County had the right to exempt the *position* of Detention Center clerk from the layoffs. But it did not have the right to exempt the *incumbents* in that position from layoff without first applying the terms of Section 5.02, to see if any of the more senior clerks had the skill and ability to perform the necessary duties.

This it did not do.

The County acknowledges as much, maintaining as its defense that there was no such requirement (a) because the proper functioning of the Center precluded the possibility that any other clerks could perform the tasks, and (b) because the union through inaction waived its right to grieve.

Certainly, the County is correct that the Detention Center required two clerks to function properly. And I am sure that there are certain practices and procedures that are particular to the operation of the detention center, just as there are to all offices. But there is nothing in the record to suggest, much less prove, that these tasks are so distinct and difficult that another more senior clerk would not be able to perform them, especially if management staggered the two layoffs over separate weeks, so a permanent detention center clerk worked alongside a more senior colleague temporarily assigned to the facility. Without evaluating them individually, the County cannot assert that none of the six grievants had the skill and ability to perform the tasks of Detention Center clerk.

The County relies heavily on the notion that the Union has somehow waived its right to challenge the way layoffs were implemented because it did not alert management to its concerns prior to the layoffs. In certain circumstances, of course, employee and/or Union inaction could thwart a subsequent grievance. But for that to happen, the waiver must be clear and informed, neither of which condition applies here. If the County had provided the Union and employees in unit #6 with actual notice that the clerk positions in the Detention Center were being exempted from the layoff, and that the incumbents were being retained while six other, more senior clerks were being laid off, and the Union led the County to reasonably believe that it endorsed such a course, the County's argument as to waiver would be on much firmer ground. But that is not what happened.

The County cites three items in the record as establishing the Union's knowledge of its plan. None accomplish that task.

The County Executive met with the union on August 18, 2003, and noted that the Detention Workers were being exempted from the layoffs. However, there is no evidence in the record to establish that he further explained this exemption applied to the clerks working in the center as well as the detention workers themselves.

The first written notice the County provided was the September 9, 2003 posting on its intranet website. I commend the County for this timely communication, well in advance of the layoffs.

I also commend the County for the clear manner the important, and occasionally technical, information is presented. The explanation has separate sections addressed to employees in all employment groups, including non-represented, elected officials, employees

in the unions that have agreed to the layoffs, and employees from the two IAMAW units. The sections (other than for the electeds) detail the way each group will be laid off, the timing of the layoff, eligibility for unemployment compensation, treatment of holiday and vacation, and so on. The memorandum uses precise and specific terms to describe precise and specific situations.

The very first point in the analysis particular to this unit is that “juvenile detention workers will not be included in the layoff because of state mandates in regard to the operation of Juvenile Detention.” The County says that this is notice to the Union and the employees that the two clerks working in the detention facility were being held exempt from the layoffs. I don’t believe it does.

As noted above, all clerks, wherever they are assigned, are in unit #5. Detention workers are in a separate unit, #6. The clerks *assigned* to Juvenile Detention are *not* juvenile detention workers. The Union can presume that the County used terms in this memo accurately. Stating that “juvenile detention workers will not be included in the layoff” is not that same as stating that “juvenile detention workers and clerks assigned to the detention facility will not be included in the layoff,” and simply does not inform the Union or the unit #5 clerks that two less senior #5 clerks are being exempt from layoff.

The County contends also that Employer Exhibit 2, the comprehensive list of bargaining employees to be laid off, provided notice that the two clerks assigned to the Detention Center were not being laid off. But it really didn’t. Having previously informed the Union that all its members, other than “juvenile detention workers” were being laid off, the County through this exhibit provided a list that had 150 or more names, was in no discernible order, and omitted any identifying data as to position or seniority, other than identifying which employees would be laid off in October, and which would be laid off in December. The County cannot reasonably believe it was the Union’s job to work with this document to see who *wasn’t* on it.

Certainly, the two junior clerks assigned to the detention center knew they weren’t being laid off, but whether Applin and Christman shared their good fortune with their more senior colleagues who were being laid off is unknown. There is no evidence in the record that they informed the Union of this fact.

The County also states that the union shouldn’t be allowed to challenge the layoffs because it didn’t “provide the proper notification to Management regarding the exercise of bumping rights.” This assertion also falls before the weight of the evidence.

First, I’m not sure what bumping rights the County is referring to. Such rights may exist, but the County has not cited any provision of the collective bargaining agreement which

provides for them. There do not appear to be any such provisions in Article V, which defines seniority (5.01), sets a process for layoff and recall (5.02), defines the rights of certain limited term employees (5.03), defines the rights of certain part time employees (5.04), describes how an employee loses seniority (5.05), elaborates on recall (5.06) and directs the County to maintain a master seniority list (5.07). Certainly, there is nothing in the agreement which defines a time limit for an employee to assert bumping rights.

Further, it is especially noteworthy that Employer Exhibit 1, the intranet posting, specifically informs members of the *other* IAMAW unit (courthouse and office employees) that “bumping will be allowed pursuant to the collective bargaining agreement,” but has *no* reference to bumping for this unit.

The absence of any language in the collective bargaining agreement identifying the process for asserting bumping rights, and the omission from the September 9, 2003 memo of any reference to such rights, leads me to conclude that the Union’s failure to assert bumping rights prior to the implementation of the layoffs does not preclude the union from pursuing this grievance.

Faced with a serious budget deficit last summer, the County made an informed decision to undergo extensive layoffs. The County Executive made a further, entirely reasonable, decision to exempt the employees at the juvenile detention center (along with other employees not at issue here), as was her right. The County was also within its rights to include the two clerk positions assigned to the facility in the group of exempt employees.

But while the County was within its rights to exclude the *positions* from the layoffs, it the County was not within its rights to automatically exclude the *incumbents is those positions*. Instead, under Section 5.02, the County was required to give consideration to the skill and ability of the more senior employees; only when it had determined that there were no clerks with greater seniority who were capable of performing the duties of the position for one week could it exempt the more junior employees.

But the County at no time understood that obligation or undertook that analysis. The County essentially admits as much.

As to remedy, the County suggests that ordering the layoff of the two detention center clerks would “recreat(e) the status” that would have existed had the County not included them in the layoff exemption of the detention workers last December.

The County does not explain, however, how the detention center would operate in their absence. Certainly, the facility cannot operate without these positions – otherwise, they would not have been exempted from the layoffs to begin with. Could the County possibly be

suggesting that their tasks would be performed by some of the same, more senior clerks whom it has already stated were not qualified to do so?

I will not force the County to face that situation, however, because it is not the appropriate remedy. Whatever further personnel decisions the county may seek to take, the appropriate remedy to this grievance is to order the County to make whole those employees whose contractual rights it violated. There are 80 hours of compensation at issue – the 40 that Applin was allowed to work out of seniority and the 40 that Christman, unlike the other clerks, was allowed to take in paid vacation.

The Union has suggested alternate ways of making the grievants whole – compensatory time or back pay, either to all six senior employees laid off, or just to the two most senior grieving employees.

I agree with the Union that valuing the award in terms of compensatory time will be the least costly to the employer (by not increasing employee income, it does not raise the employer's payroll tax, and leaves to management the determination whether or not to replace the hours lost).

I do not however, agree that distributing the benefits of this award to all six grievants is appropriate. The County's compliance with Section 5.02 would still have led to the layoff of at least four of them; the only clerks who would have been exempted would have been the most senior two, if any, who had the skill and ability to perform the clerk tasks in the detention facility.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That the grievance is sustained.

2. As remedy, the County shall provide 40 hours of compensatory time each to the two most senior grievants, if any, with the skill and ability to perform the tasks of a clerk in the detention facility. Scheduling of the compensatory time shall be subject to the efficient administration of the Human Services Department.

3. To resolve any disputes that may arise over the implementation of this award, I shall retain jurisdiction for sixty (60) days, unless jointly released by the parties prior to that time.

Dated at Madison, Wisconsin, this 15th day of November, 2004.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

