

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**HUMAN SERVICES EMPLOYEES OF FOREST, ONEIDA AND VILAS COUNTIES,
LOCAL 79-A, AFSCME, AFL-CIO**

and

HUMAN SERVICES BOARD OF FOREST, ONEIDA AND VILAS COUNTIES

Case 16
No. 63208
MA-12523

(Linda Carriere Grievance)

Appearances:

Mr. Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54501, on behalf of the Union.

Ruder, Ware & Michler, L.L.S.C., by **Attorney Dean R. Dietrich**, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the Board.

ARBITRATION AWARD

The Human Services Employees of Forest, Oneida and Vilas Counties, Local 79-A, AFSCME, AFL-CIO (herein the Union) and the Human Services Board of Forest, Oneida and Vilas Counties (herein the Board) have been parties to a collective bargaining relationship for many years. At the time of the events at issue herein, the collective bargaining agreement covering the period January 1, 2002, to December 31, 2002, had expired and negotiations for the successor agreement had not yet been completed. On January 12, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement in its refusal to allow Linda Carriere (herein the Grievant), to bump into a position following layoff, while simultaneously pursuing a grievance over the Board's refusal to allow her to bump into another position. The Union requested a panel of the WERC staff from which to select an arbitrator to decide the issue. The undersigned was selected to hear the dispute and a hearing was conducted on June 7, 2004. The proceedings were not transcribed. The parties filed initial briefs by July 27, 2004, and reply briefs by August 23, 2004, whereupon the record was closed.

ISSUES

The Union would frame the issues as follows:

Did the Employer violate the Collective Bargaining Agreement when it denied the Grievant the right to bump into the Woman's Client Assistant position?

If so, what is the remedy?

The Board would frame the issues as follows:

Did the Employer violate the Collective Bargaining Agreement by denying the Grievant's request to bump into the Woman's Client Assistant position and also maintain a grievance challenging the Employer's denial of the Grievant's request to bump into the Mental Health Case manage position?

If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

Did the Employer violate the Collective Bargaining Agreement by refusing to allow the Grievant to simultaneously bump into the Woman's Program Client Assistant position and grieve the Employer's denial of her request to bump into the Mental Health Case manage position?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 2- MANAGEMENT RIGHTS

The Board possesses the sole right to operate the Human Services Organization and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the Organization.
- B. To establish reasonable work rules.
- C. To hire, train, promote, transfer, assign and retain employees.

- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause.
- E. To relieve employees from their duties because of lack of work or any other legitimate cause in accordance with the terms of this Agreement.
- F. To maintain efficiency of organization operations entrusted to it.
- G. To take whatever actions are necessary to comply with State or Federal law.
- H. To introduce new or improved methods or facilities.
- I. To change existing methods or facilities.
- J. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of work force, to determine the work to be performed by employees, to determine the competence and qualifications of employees, and to evaluate the performance of employees.
- K. To utilize temporary, part-time or seasonal employees when deemed necessary provided the use of such employees shall not result in the layoff of existing employees.
- L. To determine the methods, means and personnel by which operations are to be conducted.

Any dispute with respect to the improper application of said management rights contrary to language contained in this Agreement may be processed through the Grievance and Arbitration procedure contained herein; however, the pendency of any grievance shall not interfere with the right of the Board to continue to exercise these management rights.

ARTICLE 5 – SENIORITY/PROBATIONARY PERIOD

- D. Layoff: In the event of a reduction in the work force, probationary employees in the affected job classification shall be laid off first and then employees with the least seniority within the classification shall be selected for layoff, provided the remaining employees in each classification are capable and qualified, in the judgment of the Director, to perform the remaining work. Employees selected for layoff shall have the right to replace less senior employees in the same or lower rated classification in a position provided the employee is capable and qualified to perform the work of the position.

BACKGROUND

Linda Carriere, the Grievant herein, has been an employee of the Board and a member of the bargaining unit for many years. From November, 1991, until March 1, 2003, she worked as a Social Worker/manager at the Board's Koinonia Residential AODA Center in Rhinelander. On February 11, 2003, the Board decided to eliminate Carriere's position and she was so informed on February 12. On February 19, 2003, Carriere informed her supervisor that she was exercising her bumping rights under Article 5 of the collective bargaining agreement and bumping into the position of Mental Health Case Manager. The Board made a determination that Carriere was not qualified for the position and refused her request, which Carriere indicated she would grieve. The Board advised Carriere that she could bump into another position, but could not do so and simultaneously grieve the original denial. On February 25, 2003, Carriere informed her supervisor that she intended to bump into the position of Woman's Program Client Assistant. The Board refused to allow Carriere to bump into the second position while advancing her grievance regarding the Mental Health Case Manager position. Carriere, therefore, chose to pursue her original grievance, did not bump into the Woman's Program Client Assistant position and was laid off on March 1, 2003.

On March 7, 2003, Carriere grieved the Board's refusal to allow her to bump into the Woman's Program Client Assistant position while maintaining her grievance over the denial of her bumping request as to the Mental Health Case Manager position. It is this second grievance that is at issue here. The Board denied the grievance and it advanced through the steps of the contractual grievance procedure without resolution, resulting in this arbitration. On October 6, 2003, Carriere was recalled by the Board to fill a vacancy as Woman's Program Client Assistant at Koinonia. She seeks to be made whole for economic loss during the intervening period between her layoff and recall.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the Board violated the clear language of the contract when it denied the Grievant the right to bump into the Woman's Program Client Assistant position. The contract requires that in order to bump, an employee must be selected for layoff, must seek to bump into a position at the same or a lower level, must be more senior than the person they seek to bump and must be qualified for the position into which they wish to bump. The Grievant met all these criteria and yet the Board refused to let her bump into the position. The language of Article 5 is not ambiguous and should have mandated the Grievant's right to bump into the position.

Reading the contract as a whole further supports the Union's position. Management is granted broad authority under Article 2, but the provision clearly states that any dispute over management's exercise of those powers may be grieved and arbitrated. Management exercised its rights under Article 2, Section J, when it denied the Grievant's request to bump into the

Mental Health Case Manager position, which she grieved according to the contractual procedure. Nothing in the contract required her to surrender any other contract rights in order to do so. Nevertheless, the Board maintained that in order to pursue her grievance she had to give up the right to bump into a different position. The Board asserts that the Grievant was attempting to bump into two positions at the same time, which the contract does not allow for, to which the Union responds that the Grievant did not, in fact, attempt to bump into two positions at once. Further, using that logic, nothing in the contract supports the Board's position that an employee may not both bump and grieve at the same time, either.

A basic rule of contract construction is that language should be interpreted so as not to achieve harsh, absurd, or nonsensical results. Here, the Board's interpretation denied bumping rights to an employee with more than 25 years' service, resulting in her layoff, notwithstanding that she met the contractual requirements to bump. The Board was within its rights to make the initial determination whether the Grievant was qualified for the Mental Health position, even if the determination was incorrect. It did not have the right, however, to force her to choose between grieving the decision and bumping into another position. By doing so, it forced her to accept layoff, which was a harsh and inappropriate result.

The Board

The Board observes at the outset that under established arbitral law bumping rights must be clearly spelled out in the contract. KAISER FLUID TECHNOLOGIES, 114 LA 262 (HOFFMAN, 2000); SUB-ZERO FREEZER COMPANY, INC., A-4682, (GRECO, 1991); MADISON AREA TECHNICAL COLLEGE, A/P M-93-42 (VERNON, 1994) Thus, the bumping rights of the Grievant here must be determined by reference to the clear language of the contract. Nothing in this agreement provides employees with the right to simultaneously bump into two positions. In fact, Article 5, Section D, casts the bumping language in the singular, so the inference, if any, to be drawn is that an employee designated for layoff is not entitled to multiple bumps. Nothing in the contract contradicts this interpretation.

It is also to be noted that the Boards' interpretation is in keeping with the established purpose of bumping clauses, in general. In MADISON AREA TECHNICAL COLLEGE, the Arbitrator stated:

The Union's position is also inconsistent with the generally recognized purpose of bumping clauses that require the bumping of the least senior employee. The purpose of such clauses is to eliminate multiple bumping and the disruption that it causes. (emphasis added)

Granting the Grievant's request would subvert this purpose and would create additional problems. It would necessitate training for the Grievant for the Woman's Program position and additional training for the Mental Health position if she were successful in her grievance. Meanwhile, a valuable employee in the Woman's Program position would be lost, but would

again have to be replaced if the Grievant eventually moves into the Mental Health position, which would, in turn, require additional training for the replacement. The Board never intended such a result and it should not be awarded without clear language to that effect.

The Union in Reply

The Board misperceives the primary purpose of bumping clauses if it does not recognize the principal that qualified senior employees should be able to maintain employment in the face of layoff ahead of less senior employees. Further, the Board incorrectly states that the Grievant was attempting to bump into two positions at the same time. The Grievant was trying to bump into one position while grieving the denial of her request to bump into another. Whatever the merits of the original grievance, she should not have been denied her right to bump into the second position. Up until the point that the Grievant indicated her intention to bump into the Woman's Program position during the pendency of her first grievance, the contractual procedures for bumping and grieving were operating as intended. It is only the Board's mischaracterization of the Grievant's actions after that point that resulted in a problem and to sustain the Board's position would do an injustice to the Grievant.

The Board cites authority to the effect that seniority and layoff rights "must be clearly spelled out in the contract." It is true, as the Board asserts that the contract does not provide for bumping into two positions at the same time, but it is also true that the contract does not require an employee to waive his or her grievance rights in order to maintain employment. The cases cited by the Board are not on point. One dealt with regular employees bumping probationary employees, one dealt with bumping between shifts and one dealt with a teacher attempting to bump into a full-time position on a course by course basis. This case can be decided strictly by reference to the contract language, which clearly provides that a qualified senior employee facing layoff can bump a junior employee in an equal or lower position. In the event of a dispute, the parties can refer to the grievance process with minimal disruption to the agency. As it was, the only disruption in this case was a significant one to the Grievant, who lost her employment due to the employer's actions.

Contrary to the Board's assertion, its interpretation of the bumping language is not consistent with the purpose of such clauses. The contract language does not refer to concepts such as "least senior employee" or "significant disruptions to the employer's business," as the Board argues, and the Arbitrator is without authority to modify the contract. Further, contrary to the Board's argument, there would not have a significant disruption of business had the Grievant been allowed to bump into the Woman's Program position. The Board's assertions of potential disruption are specious. The Grievant assumed the Woman's Program position in October, 2003, and needed no extra training. Were she to prevail on her initial grievance, the Union would assume she would be qualified for the Mental Health position and would only need a reasonable orientation period. If she prevails, no "good and valuable employee" would be lost because she is already working in the Woman's Program position. The contract language is clear and should have been followed to allow the Grievant to bump into the Woman's Program position while advancing her original grievance.

The Board in Reply

The Union's position places an unreasonable burden on the Board which should not occur absent explicit language in the contract. The Union argues that the Grievant was denied the right to bump into a position for which she was qualified and that she should be able to simultaneously pursue her grievance over the Mental Health position while bumping into the Woman's Program position because each is a separate right under the agreement. Contrary to the Union's argument, however, it is not the Board's position, but the Union's which would lead to a harsh, absurd, nonsensical and unreasonable result.

The Grievant's desire to bump into the Woman's Program position must be viewed in the context of her attempt to obtain the Mental Health position through the grievance process at the same time. The Woman's Program position is a stopgap and if she prevails in the grievance she will leave it for the Mental Health position, which will result in more bumping as a Mental Health employee is dislocated, causing disruption in the agency. It should not be assumed that the Board intended such an outcome absent clear contract language to that effect. Such disruption would be exacerbated by the need to retrain each employee taking a new position and the loss of a good employee in the Woman's Program. Thus, it is necessary to view the Grievant's actions in the larger context in order to avoid an unreasonable result.

It would also be unreasonable to view the matter from the Union's perspective that all the Grievant is doing is attempting to exercise two unrelated contract rights by bumping while simultaneously grieving the denial of a previous bump. The Board agrees that the Grievant has a right to grieve the Board's decision regarding her desire to bump into the Mental Health position. Further, the Grievant does have specified bumping rights under the contract. However, what she is attempting to do is, in effect, to exercise multiple bumps, for which the contract does not provide. As afore stated, the purpose of bumping clauses is to prevent multiple bumping and the disruption it causes. The Arbitrator must view the matter in the larger context and deny the grievance to prevent an unreasonable result.

DISCUSSION

The relevant contract language in this case, contained in Article 5, Section D, states: "Employees selected for layoff shall have the right to replace less senior employees in the same or lower rated classification in a position provided the employee is capable and qualified to perform the work of the position." Further, Article 2, Section J, specifying management's rights provides: "To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, to determine the competence and qualifications of employees, and to evaluate the performance of employees." And further: "Any dispute with respect to the improper application of said management rights contrary to language contained in this agreement may be processed through the Grievance and Arbitration procedure contained herein . . ." The Grievance procedure itself, in Article 4, Section B, paragraph 5 states: The authority of the

arbitrator shall be limited to the interpretation of the Agreement in the area where the alleged breach occurred and the Arbitrator shall have no authority to modify, add to or delete from the express terms of the agreement.” (Jt. Ex. 1)

According to the process set out in Article 5D, when the Grievant was initially given notice of layoff, she properly exercised her bumping rights by notifying management she wished to bump into the Mental Health Case Manager position. At that point, it behooved management, under Article 2J, to determine whether the Grievant was qualified for that position. It did so and concluded that she was not so qualified. Article 2, however, also permits the employee to grieve such a determination, which the Grievant did. At or near the same time, however, the Grievant also identified the Woman’s Program Client Assistant position as one into which she wished to bump. The question is whether she can exercise her bumping rights as to this second position while, at the same, time pursuing her grievance over management’s denial of her first bumping request. Under the controlling contract language, I find that she can.

The Board would have me interpret the contract in such a fashion as to require the Grievant, in the face of the denial of her first bumping request, to elect between grieving the denial and bumping into another position. The Board concedes that there is no specific contract language stating this, but it would have me infer this from the fact that Article 5 only refers to bumping in the singular, from the fact that to hold otherwise, would lead to an unreasonable result in that it would disrupt the agency’s operations and from the general principle that bumping clauses are intended to facilitate downsizing in the workforce without the disrupting effect of multiple bumps. For the reasons set forth below, I do not agree.

In the first place, I do not regard this as a case where the Grievant has sought to simultaneously bump into two positions, as the Board has characterized the matter. I regard this as a case where the Grievant has elected to exercise two separate contract rights that may or may not conflict with one another. As set forth above, the contract provides for both bumping and grieving a refusal of a bumping request. So, there can be no question that the Grievant was within her rights to grieve the denial of her request for the Mental Health position. The Board further concedes that, had she elected to not grieve the refusal, she could have bumped into the Woman’s Program position. (Jt. Ex. 6) The contract language, however, does not require her to make such an election. It may be that when the parties bargained the language in Articles 2 and 5 that they did not consider the implications of the refusal of a bumping request on both grievance rights and additional bumping rights, but there is no bargaining history to provide guidance and the language as it is expressed gives no indication that there was an expectation that either bumping or grievance rights were intended to be restricted in this way. On its face, therefore, the contract does not require the Grievant to waive her bumping rights in order to grieve the Board’s action, or vice versa.

The Board’s reliance on the use of the term “position” in Article 5 to indicate that the parties intended the singular rather than the plural, I find unpersuasive. If that is truly what was intended, it would mean that an employee faced with the denial of a bumping request

would not be able to request another bump, but could only grieve the denial, because the language restricts bumping to only “a position.” Clearly, this is not what was intended, however, as demonstrated by the Board’s own acknowledgement that under that language, the Grievant could have bumped into the second position had she foregone her original grievance. While I would agree that the language of Article 5D does require an employee to identify a position into which he or she wishes to bump, therefore, I do not concur that the language was clearly intended to permit one bump and one bump only under all circumstances. So, the Grievant would not be able to request to bump into both the Mental Health and Woman’s Program positions at the same time, but she could request to bump into one and then the other if the first request was denied, as she did here. As I have stated, however, such action does not affect her right to grieve the denial.

Finally, I am not persuaded that the policy arguments raised by the Board are dispositive in this case. I do not see this scenario as being one that will lead to burdensome multiple bumping as was the case in the awards cited by the Board. KAISER FLUID TECHNOLOGIES was decided based on the language of the contract in question which specifically limited the bumping rights of employees and is distinguishable on its facts. SUB-ZERO FREEZER COMPANY dealt with bumping rights in the context of shift preference where there was a wage differential between shifts. The ability of employees to bump the least senior employee on a preferred shift was perceived by the arbitrator to have chaotic potential and to lead to an increase in bumping. There is not similar potential here. MADISON AREA TECHNICAL COLLEGE involved a teacher who attempted to bump less senior teachers a course at a time in order to patch together a full-time position and the arbitrator saw such as disruptive and outside the scheme of the language that called for the bumping of the least senior employee whom the senior employee was qualified to replace. It was in that context that Arbitrator Vernon observed that “the purpose of . . . clauses [requiring the bumping of the least senior employee] is to eliminate multiple bumping and the disruption that it causes.” No such language exists here. Here, the language permits the Grievant to bump any less senior employee she is qualified to replace, which could well lead to multiple bumping as each bumped employee, in turn, exercises his or her contractual rights over less senior employees. If that is the scheme to which the parties have agreed, it should not be second guessed by an arbitrator based on general policy considerations of whether it is the most efficient way to do business. I note, too, that while the Board is concerned that the Grievant’s action would lead to the loss of another employee, that is the inevitable consequence of layoff and bumping.

For the foregoing reasons, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The Employer violated the Collective Bargaining Agreement by refusing to allow the Grievant to simultaneously bump into the Woman’s Program Client Assistant position and grieve the Employer’s denial of her request to bump into the Mental Health Case Manager

position. The Employer shall make the Grievant whole by paying her backpay at the Woman's Program Client Assistant pay rate, along with any additional contractual benefits to which she was entitled, for the period between March 1, 2003, and October 6, 2003, less any compensation derived from other employment during that period.

The Arbitrator will retain jurisdiction for a period of thirty (30) days in order to address any issues arising in the implementation of this award.

Dated at Fond du Lac, Wisconsin, this 10th day of February, 2005.

John R. Emery /s/

John R. Emery, Arbitrator