

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE COUNTY OF KENOSHA

and

**KENOSHA COUNTY LOCAL 990, AFSCME, AFL-CIO
(COURTHOUSE AND SOCIAL SERVICES CLERICAL)**

Case 213
No. 62235
MA-12208

Appearances:

Frank Volpintesta, Kenosha County Corporation Counsel, Courthouse, 912 – 56th Street, Kenosha, Wisconsin 53140-3747, appearing on behalf of the County.

Shneidman, Hawks & Ehlke, S.C., 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, by **Aaron N. Halstead**, appearing on behalf of the Union.

ARBITRATION AWARD

Kenosha County, hereafter County or Employer, and Kenosha County Local 990, AFSCME, AFL-CIO (Courthouse and Social Services Clerical), hereafter Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint Coleen A. Burns, a member of its staff, to hear and decide the instant grievance. The appointment was on October 14, 2004 and the hearing was held in Kenosha, Wisconsin on December 1, 2004. The hearing was not transcribed and the record was closed on January 19, 2005, following receipt of post-hearing written argument.

ISSUES

The parties were unable to stipulate to a statement of the issue. At hearing, the Union framed the issue as follows:

Did the County violate Sec. 6.4, or any provision of the collective bargaining agreement, when it laid off Kimberly Emery by its letter dated November 18, 2002?

If so, what is the appropriate remedy?

The County left it to the arbitrator to frame the issue.

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

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Section 1.2 Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

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ARTICLE II – REPRESENTATION

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Section 2.3. Departments Defined. For purposes of defining “Department” pursuant to Sections 6.4(1) and 7.3 of the Collective Bargaining Agreement, “Department” shall be defined and separated as follows:

- (a) Department of Administration
- (b) Department of Human Services
- (c) Department of Planning and Development
- (d) Department of Public Works
- (e) Clerk of Courts (including Circuit Court, the Chief Justice, Branches 1-7)
- (f) County Clerk’s Office

- (g) Juvenile Intake Office
- (h) Treasurer's Office
- (i) Register of Deeds Office
- (j) Sheriff's Department
- (k) District Attorney's Office
- (l) Medical Examiner's Office
- (m) Corporation Counsel's Office

ARTICLE VI - SENIORITY

Section 6.2 Seniority – Personnel Actions. The practice of following seniority in promotions, transfers, layoffs, recalls from layoffs, vacations and shift preference to fill vacancies shall be continued. Ability and efficiency shall be taken into consideration only when they substantially outweigh consideration of length of service or in cases where the employee who otherwise might be retained or promoted on the basis of such continuous service is unable to do the work required. Full-time employees shall receive preference over part-time employees. A transfer is the filling of a new or vacated position and shall be governed by job posting.

. . .

Section 6.4. Layoff.

1. If the County must reduce the number of employees within a classification or within a department, the employee with the least amount of bargaining unit seniority shall be selected for layoff. The employee so selected shall have the right to bump a less senior bargaining unit employee, in an equal or lower classification of the employee's own choosing in any department, provided such employee has more seniority than the employee being bumped, and provided further, that such employee meets the same minimum qualifications as would be expected of anyone obtaining the job through the normal job posting procedure. Departments are defined in section 2.3.
2. An employee who is bumped in accordance with Paragraph 1 shall be afforded the same bumping rights provided in Paragraph 1 above, but if such employee is unable to bump any other employee, such employee shall be placed on layoff.

. . .

4. An employee bumping into a different position shall serve the normal probationary period for that position. An employee who proves unable to perform the work in the different position during the probationary period shall not be allowed to again exercise bumping rights, but shall be placed on layoff. During such probationary period, an employee may voluntarily choose to be placed on layoff, but shall not be allowed to again exercise bumping rights resulting from that layoff.
5. An employee who is bumped out of his/her position shall have the preferential rights to return to such position if, for any reason, it should become vacant within sixty (60) days from the time the employee is bumped from it.

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7. In the event an employee does not pass probation, the employee shall have the right to grieve such action subject to the just cause provisions of this agreement.

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ARTICLE VII – JOB POSTING

Sec. 7.1. Procedure. Notice of vacancies which are to be filled due to retirement, quitting, new positions, or for whatever reason, shall be posted on all bulletin boards within 5 (5) working days; and employees shall have a minimum of five (5) workdays (which overlap two (2) consecutive weeks) to bid on such posted job. The successful bidder shall be notified of his selection and his approximate starting date within five (5) workdays.

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Section 7.3. Seniority – Skill and Ability Factors. In filling a vacancy, the employee signing with the greatest seniority in the department shall be given first consideration except as provided for in section 7.4 below. Skill, ability and efficiency shall be taken into consideration only when they substantially outweigh considerations of length of service. Departments are defined in section 2.3.

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BACKGROUND

Kimberly Emery, hereafter Grievant, was hired by the County on May 18, 1992. In approximately 1996, the Grievant was reclassified from a Clerk Typist III to a Senior Office Associate. On November 18, 2002, County management called the Grievant into a meeting and presented her with a letter signed by County Assistant Personnel Director Diane Yule that states as follows:

As you are aware, your position of Senior Office Associate in the Department of Human Services has been eliminated in the County's budget for calendar year 2003. Therefore, you will be laid off effective the end of your shift on December 31, 2002.

As a member of Local 990-Clerical, you have layoff/bumping rights which are outlined in Section 6.4 of the labor agreement. A copy of this section is attached. You must bump a less senior bargaining unit employee who holds a position for which you are currently qualified. Please notify the Division of Personnel of your bumping decision no later than Friday, November 22, 2002.

If I can be of further assistance, please let me know.

Subsequently, Yule amended the date of November 22, 2002 to December 2, 2002.

At the meeting of November 18, 2002, Yule gave the Grievant the Local 990 seniority list; advised the Grievant regarding her bumping rights; and told the Grievant that the Grievant could meet and interview with Division Heads regarding Senior Office Associate positions held by less senior employees. The Grievant understood that she could bump into one of three Senior Office Associate positions and met with managers/supervisors of these Senior Office Associates to discuss these positions. For a variety of reasons, the Grievant did not make a request to bump into any of these three positions, but rather, accepted a lower classification position that was vacant, *i.e.*, Office Associate position. The Grievant moved from her Senior Office Associate position to her Office Associate position without any break in employment with the County, or with the Department of Human Services.

On November 19, 2002, the Union initiated a grievance which challenged the layoff of the Grievant. This grievance was processed through the grievance procedure; denied by the County at all steps of the grievance procedure and, thereafter, submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Union

In November of 2002, there was a reduction in both the number of employees within the Senior Office Associate classification and, as it pertains to that classification, within the Department of Human Services. By the admission of County management, the County decided to layoff the Grievant because it did not need a third Senior Office Associate in the Department's Division of Children & Family Services.

Unlike other provisions of the contract, Sec. 6.4(1) was not renegotiated when the County reorganized in 1996. It is clear, therefore, that the parties intended the newly created Department of Human Services to fall within the coverage of Sec. 6.4(1) layoff language. The language of Article VII, Section 6.4(1), clearly mandates the layoff of April Nakata, the employee with the least amount of seniority among Senior Office Associates within the Department of Human Services.

Inconvenience is not a defense to a breach of contract. Moreover, the County's claim that, under the Union's position, it would have had to eliminate all Senior Office Associate positions within the Department of Human Services in order to eliminate a single Division of Children and Family Services Senior Office Associate position is greatly exaggerated.

Under the contract, the County should have laid off Nakata, thereby opening up a vacancy for a Senior Office Associate position within the Division of Disability Services, where Nakata worked. Second, under Article VI, Section 6.2, and Article VII, Section 7.3, the County would be required to fill that vacant Senior Office Associate position from within the County; giving each of the remaining fourteen Senior Officer Associates within the Department the opportunity to post into that vacant position, by seniority. If none of the Senior Office Associates in the Division of Children and Family Services posted into the Division of Disability Services position made vacant by Nakata's layoff, another Senior Office Associate may have posted into the vacant Division of Disability Services position, creating another vacancy that may have been attractive to one of the three Division of Children and Family Services employees in question.

Article I, Section 1.2 provides the County with a right to "transfer" and "decide the work to be done and location of work." This would seem to include the County's right to transfer an employee, within her job classification, to a position she is capable of performing, after all other contractually-established bumping and posting procedures have been exhausted. Thus, if after all the employee transfers under the contractual posting and bumping provisions had occurred and the three employees still remained within the Division of Children and Family Services, presumably the County would have the right to assign the Grievant to whatever divisional Senior Office Associate position remained vacant.

The County violated the collective bargaining agreement when it laid off the Grievant. The appropriate remedy for this breach of contract is to restore the *status quo ante*.

As a result of the County's breach of contract, the Grievant suffered the loss of her Senior Office Associate position. The Grievant should be made whole for her loss of wages and all benefits, with interest. The County should be required to layoff the most junior Senior Office Associate, allowing the Grievant and all other bargaining unit members to exercise their contractual bumping rights under the contract.

County

In November of 2002, the County eliminated a number of positions due to budget constraints, including that held by the Grievant. To interpret the contract as the Union suggests, would mean that the County could not abolish the job of the Grievant; but rather, would have to layoff April Nakata and hope that the Grievant would post for that position, or layoff the Grievant and everyone under her and then recall all but one and allow each recalled employee to post for all positions. The resulting "musical chairs" would be untenable and unworkable.

Construing Sec. 6.4(1) in harmony with Sec. 1.2 does not preclude layoff or job elimination of the least senior employee in a Division. Sec. 6.4(1) does not say "the employee with the least amount of bargaining unit seniority in a Department shall be selected for layoff," or that the "most recently hired person in that classification, regardless of which Department the employee works in" must be laid off. Rather, the language is silent and without guidelines or restraints and, thus, the County's management right to decide to eliminate a job in a Division would survive. The contract language is ambiguous and may reasonably be construed to allow for an interpretation that permits the County to layoff within a Division, when a Division is a component part of a Department.

The County has the right to eliminate jobs for budgetary or other practical reasons. Given the passage of time; the obvious disruption to the work environment; the lack of malice upon the part of the County; and the fact that the Grievant declined to exercise her bumping rights, a cease and desist order and a suggestion that the parties go back to the bargaining table is an appropriate remedy for any breach of contract. Inasmuch as the Grievant declined to exercise her bumping rights, back pay is not an appropriate remedy.

DISCUSSION

Issues

The parties did not stipulate to a statement of the issues. The Union's statement of the issue is consistent with that raised in the initial grievance and processed through the grievance procedure. Accordingly, it has been adopted by the undersigned.

Merits

In November of 2002, the County advised the Grievant that she would be laid off from her position of Senior Office Associate effective December 31, 2002. At that time, the Grievant was employed in the Division of Children and Family Services, which is within the Department of Human Services.

The County argues that it has the contractual right to layoff the Grievant because she was the least senior Senior Office Associate in her Division. The Union does not deny that the County had the right to layoff an employee, but asserts that the contract does not provide for layoff on the basis of Divisional seniority.

The parties' 1990-92 collective bargaining agreement contained the following language:

Section 6.4. Layoff.

1. If the County must reduce the number of employees within a classification or within a department, the employee with the least amount of bargaining unit seniority shall be selected for layoff. The employee so selected shall have the right to bump a less senior bargaining unit employee, in an equal or lower classification of the employee's own choosing in any department, provided such employee has more seniority than the employee being bumped, and provided further, that such employee meets the same minimum qualifications as would be expected of anyone obtaining the job through the normal job posting procedure.

At the time of this agreement, the County had numerous Departments. In 1995-96, the County reorganized, with the effect that many of these Departments were recreated as Divisions within other Departments, such as Administration, Public Works, Planning and Development, and Human Services.

During the negotiation of the parties' 2001-03 agreement, the parties modified Sec. 6.4(1) by adding a last sentence, *i.e.*, "Departments are defined in section 2.3." Section 2.3 of this same agreement contained the following:

Section 2.3. Departments Defined. For purposes of defining "Department" pursuant to Sections 6.4(1) and 7.3 of the Collective Bargaining Agreement, "Department" shall be defined and separated as follows:

- (a) Department of Administration
- (b) Department of Human Services
- (c) Department of Planning and Development
- (d) Department of Public Works

- (e) Clerk of Courts (including Circuit Court, the Chief Justice, Branches 1-7)
- (f) County Clerk's Office
- (g) Juvenile Intake Office
- (h) Treasurer's Office
- (i) Register of Deeds Office
- (j) Sheriff's Department
- (k) District Attorney's Office
- (l) Medical Examiner's Office
- (m) Corporation Counsel's Office

The parties have not offered any evidence of past practice. The bargaining history does not establish that the parties had any agreement with respect to layoffs other than that which is reflected in the plain language of the agreement.

The plain language of Sections 6.4(1) and 2.3 establishes that the parties mutually understood and agreed that, for the purposes of Sec. 6.4(1), the word "department" is defined in Sec. 2.3. Contrary to the argument of the County, there is no ambiguity in the language of Sec. 6.4 that would allow the word "department" to be reasonably construed to mean the Division of Children and Family Services, or any other entity not listed in Sec. 2.3.

Under the plain language of Sec. 6.4., layoffs are effectuated by reducing the number of employees within a classification or a department, as that term is defined in Sec. 2.3, and the employees selected for layoff must be those with the least amount of bargaining unit seniority within that classification or department. At the time of her layoff, the Grievant did not have the least amount of bargaining unit seniority within her classification or her department. Accordingly, the County violated the collective bargaining agreement when it laid off the Grievant in 2002.

The Union asserts that the County had the right to lay off the least senior employee in the Senior Office Associate classification, *i.e.*, April Nakata. Such a layoff would have been consistent with the requirements of Sec. 6.4 because, at the time of the Grievant's layoff, Nakata had the least bargaining unit seniority in the Senior Office Associate classification.

Had the County selected Nakata for layoff, she would have been entitled to bump in accordance with Sec. 6.4 of the collective bargaining agreement. No other Senior Office Associate, including the Grievant, would have been laid off and, thus, contrary to the argument of the Union, none of the remaining Senior Office Associates would have had any bumping rights by virtue of Nakata's layoff.

The Union argues that the layoff of Nakata would have created a vacancy required to be posted under Article VII. Sec. 7.1 requires the posting of vacancies "due to retirement, quitting, new positions, or for whatever reason." Nakata's layoff would not be a retirement, a quit, and would not create a new position.

Sec. 7.1 does not refer to layoffs. Nor does Sec. 6.4, which governs layoff, express or imply that a layoff creates a vacancy that is required to be posted. As stated above, under the terms of the parties' agreement, a layoff is a reduction in the number of employees. A reduction in a number of employees does not create a vacancy as that word is commonly understood.

Giving effect to the plain language of the agreement, it would not be reasonable to conclude that the term "for whatever reason", as that term is used in Sec. 7.1, includes a layoff. Nor would it be reasonable to conclude that the layoff of Nakata would create a "vacated position", required to be posted under the transfer language of Sec. 6.2.

In summary, Nakata's layoff would not have created a vacancy that would be required to be posted. In accordance with the rights granted to the County under Section 1.2 of the collective bargaining agreement, any work that had been performed by Nakata could have been reassigned to remaining Senior Office Associates, including the Grievant.

At the time of the Grievant's layoff, the Grievant understood that she had bumping rights to three Senior Office Associate positions that were occupied by junior employees. According to the Grievant, she was discouraged from taking one of the positions because she would have to be appointed by the Judge; she was intimidated from taking one position because the Department Head had asked her if she took shorthand, which she did not; and she was discouraged by the nature of the job duties of the third position.

The record provides no reasonable basis to conclude that the Grievant would not have been able to bump into one of these three Senior Office Associate positions if she had notified the County's Division of Personnel that she wished to exercise her bumping rights under the contract, as required by Yule's letters of November 18 and 21, 2002. Thus, it is the Grievant's conduct in accepting a position with a lower classification, *i.e.*, Office Associate, rather than the County's conduct in laying off the Grievant, which caused the loss of wages and benefits that the Union seeks to have restored herein. Accordingly, it is not an appropriate remedy to require the County to make the Grievant whole for such losses.

The County's contract violation deprived the Grievant of her contractual right to occupy her former position of Senior Office Associate in the Division of Children and Family Services. Thus, the appropriate remedy for the County's contract violation is to provide the Grievant with the right to return to her former position of Senior Office Associate in the Division of Children and Family Services. If the Grievant exercises this right, it is the County's right to determine whether or not it wishes to layoff another employee consistent with the terms and conditions of the parties' collective bargaining agreement. Accordingly, the undersigned declines to order the layoff of any other employee.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The County violated Sec. 6.4 of the parties' collective bargaining agreement when it laid off Kimberly Emery by its letter dated November 18, 2002.

2. In remedy of this contract violation, Kimberly Emery has the right to return to her former position of Senior Office Associate in the Division of Children and Family Services.

3. Unless the Union and the County agree otherwise, within two weeks of the date of this Award, Kimberly Emery is to notify the County's Division of Personnel of her decision to return, or to not return, to her former position of Senior Office Associate in the Division of Children and Family Services.

4. Unless the Union and the County agree otherwise, within two weeks of the County's Division of Personnel being informed of her decision to return to her former position of Senior Office Associate in the Division of Children and Family Services, the County is to return Kimberly Emery to this former position

5. The undersigned will retain jurisdiction for forty-five days from the date of this Award for the sole purpose of resolving disputes regarding the remedy due Kimberly Emery.

Dated at Madison, Wisconsin, this 18th day of April, 2005.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

