BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LANGLADE COUNTY PUBLIC EMPLOYEES, LOCAL 36-A, AFSCME, AFL-CIO

and

LANGLADE COUNTY

Case 101
No. 63162
MA-12509

(Gerald Nonnenmacher Grievance)

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Case 102
No. 63163
MA-12510

(Amy Wegner Grievance)

Appearances:

Mr. Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, WI 55401, on behalf of the Union.

Ruder Ware, **by Attorney Jeffrey T. Jones,** 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, on behalf of the County.

ARBITRATION AWARD

Langlade County Public Employees, Local 36-A, AFSCME, AFL-CIO (herein the Union) and Langlade County (herein the County) are parties to a collective bargaining relationship. At all times pertinent hereto, a collective bargaining agreement was in effect, covering the period January 1, 2001 - December 31, 2003, which provided for binding arbitration of certain disputes between the parties. On January 2, 2004, the Union filed requests with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the layoffs of Gerald Nonnenmacher and Amy Wegner (herein the Grievants). The Undersigned was appointed to hear the disputes. A hearing was scheduled to take place on April 14, 2004, in Antigo, Wisconsin. On that date, the parties resolved the particular grievances of Nonnenmacher and Wegner, but requested that the Arbitrator retain jurisdiction pending resolution of outstanding contract language issues. On July 1, 2004, the parties notified the Arbitrator that they were unable to resolve the language dispute and requested that the matter be submitted to arbitration according to a procedure to be agreed between the parties. On September 2, 2004, the parties advised the Arbitrator that they had agreed to a procedure and timetable for the submission of exhibits, arguments and proposed remedies. Thereafter, the parties filed and exchanged proposals and documents according to the schedule. The County's brief and exhibits were filed on January 11, 2005, without objection from the Union. The Union's brief and exhibits were filed on January 28, 2005. On February 3, 2005, the County notified the Arbitrator that it had no objection to the Union's submissions, whereupon the record was closed.

ISSUE

The parties did not agree to a statement of the issue.

The Arbitrator frames the issue as follows:

What should the layoff/bumping provision be in the parties' collective bargaining agreement?

PERTINENT CONTRACT LANGUAGE

ARTICLE 6 – SENIORITY RIGHTS AND LAYOFF

. . .

D. Layoff: The County shall have the sole right to determine the position or positions to be eliminated. The selection of employees to be laid off shall be

made according to the following procedures; volunteers shall be considered first, then temporary employees, then probationary employees and then the employee with the least seniority within the classification containing the position(s) being eliminated provided the remaining employees are capable and qualified to perform the available work.

Any employee laid off shall be afforded the opportunity to replace an employee with less seniority in any position within the department where the layoff occurred and with a pay grade equal to or less than the pay grade of the position(s) being eliminated; provided the employee is capable and qualified to perform the work of that position. Employees in the classifications of Clerk, Typist and Secretary in Range I and Range II shall be afforded the opportunity to replace an employee with less seniority in any position within the department where the layoff occurred with a pay grade equal to the pay grade of the position being eliminated or a position within the bargaining unit with a pay grade less than the pay grade of the position being eliminated, provided the employee is capable and qualified to perform the work of that position. Departments, for purpose of this section, shall be the Social Services Department, Courthouse (including Highway, Health, Forestry, and Extension Offices), and Sheriff's Department.

No employee may replace an employee in the positions of Deputy County Clerk Deputy Clerk of Courts, Deputy Register of Deeds, Deputy Treasurer, and Probate Registrar.

. . .

BACKGROUND

On October 14, 2003, Gerald Nonnenmacher, a member of Langlade County Public Employees, Local 36-A, AFSCME, AFL-CIO, filed a grievance with Langlade County, alleging that the County had violated Article 6, Section D, of the parties' collective bargaining agreement when it laid him off while the County still employed Limited Term Employees (LTEs). On October 17, 2003, Amy Wegner, also a member of Local 36-A, filed a separate grievance alleging a similar violation in her own layoff.

The County denied both grievances. The parties attempted to resolve the disputes without success and the matters proceeded to arbitration. The parties subsequently reached agreement on the remedial issues concerning the individual Grievants, but were unable to successfully negotiate a resolution of the contract language dispute, which was subsequently submitted to the Arbitrator for decision.

POSITIONS OF THE PARTIES

The County

The County proposes to amend the contract language by replacing Article 6, Section D, with the following:

. . .

D. Layoff: The County shall have the sole right to determine the position(s) to be eliminated. The County shall determine whether a volunteer, temporary, and/or probationary employee is performing substantially the same work as the position being eliminated. The County shall also determine whether a bargaining unit employee is capable and qualified to perform available work. The County's determination in this regard are subject to the grievance procedure.

The selection of employees being laid off shall be made according to the following procedures: volunteers performing substantially the same work as the position being eliminated shall be considered first; then temporary employees (such as Limited Term Employees (LTEs)) performing substantially the same work as the position being eliminated; and then the bargaining unit employee with the least seniority within the classification containing the position(s) being eliminated, provided the remaining employees are capable and qualified to perform the available work.

. . .

In addition, the County would add a new Section E, as follows:

. . .

E. Bumping: Any employee laid off shall be afforded the opportunity to replace (i.e., "bump") an employee with less seniority in a position in any department with a pay grade equal to or less than the pay grade of the "bumping" employee's position, provided the employee at the time of "bumping" is capable and qualified to perform the work of the second position.

If a bargaining unit employee is laid off, the bargaining unit employee may "bump" into a temporary position, such as a Limited Term Employee (LTE), if the bargaining unit employee is capable and qualified to perform

> the work of the temporary position at the time of the bumping. If a bargaining unit employee is on layoff and a temporary position, such as a Limited Term Employee (LTE) position, should become available, the bargaining unit employee may apply for the position and will be awarded the position if the bargaining unit employee: (1) timely applied for the position; and (2) is capable and qualified to perform the work of the position at the time. If a bargaining unit employee is awarded a temporary position, he or she shall be a temporary employee (i.e., a LTE) while working in that position and shall receive only the rights, wages, working conditions, and fringe benefits that pertain to the temporary employee (e.g., the bargaining unit employee has the same status as a temporary employee while working in the temporary position). However, while working in the temporary position, the bargaining unit employee shall retain the right to recall to a vacant bargaining unit position (if any) as noted below in Paragraph F and for the time period noted therein.
>
> Notwithstanding the above, no employee may replace (i.e., "bump") an employee in the positions of Deputy County Clerk, Deputy Clerk of Courts, Deputy Register of Deeds, Deputy Treasurer, and Probate Registrar.
>
> . . .

Current Section E – Recall would then become Section F.

The County asserts that its proposed language is the most reasonable resolution of the dispute. Prior to arbitration, the parties agreed that resolution of the dispute would be in accordance with the factors set forth in Sec. 111.70(4)(cm)7, 7g and 7r that are ordinarily applied in interest arbitration cases. The only applicable factor here is subp. j of Sec. 111.70(4)(cm)7r, which states:

> Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration, or otherwise between the parties, in the public service or in private employment. (Emphasis added.)

In prior negotiations between the parties, the Union agreed to the language as proposed by the County, but later withdrew its agreement. Arbitrators have held that there is a presumption of reasonableness which may be ascribed to proposals that were previously tentatively agreed upon. [Cf. CITY OF WAUWATOSA (FIRE), DEC. NO. 27869-A (FLATEN, 8/94); DOUGLAS COUNTY (HIGHWAY), DEC. NO. 28215-A (MALAMUD, 3/95)]

The Union proposes to maintain the *status quo* and retain the existing language in Article 6, Section D. It asserts that to change the contract language as proposed by the County would be unreasonable. Yet, in negotiations during the grievance proceeding, the Union agreed with the County that the language of Article 6(D) needed clarification and initially agreed to principles for amending the language, which it now repudiates. This was a binding agreement between the parties and should be given greater weight than a tentative agreement.

On April 14, 2004, the parties agreed to the principles for revision of the language set forth in County Exhibits 4, 5 and 12, as follows:

1. Volunteers, temporary employees (including LTEs), and probationary employees are to be laid off before bargaining unit employees only if these employees are performing substantially the same work as the employee to be laid off. Whether an employee is performing substantially the same work as the employee being laid off is to be determined by the County subject to the grievance procedure.

2. A bargaining unit employee subject to layoff may "bump" into a bargaining unit position within any department with a pay grade equal to or less than that of the employee <u>if</u> the bumping employee is capable and qualified at the time of the layoff to perform the job duties of the position. Whether the bumping employee is capable and qualified at the time of the layoff to perform the job duties of the position that the employee wishes to bump into is to be determined by the County subject to the grievance procedure.

3. If a temporary employee position (including an LTE position) is available and timely applied for by a bargaining unit employee who has been laid off, the bargaining unit employee will be awarded the temporary employee position if the bargaining unit employee is, at the time, capable and qualified to perform the temporary employee work. If a bargaining unit employee is awarded a vacant temporary employee position, the bargaining unit employee will be a temporary employee, will have the status of a temporary employee, and will be paid the temporary employee's wages and fringe benefits, and will be subject to the working conditions of the temporary employee. A bargaining unit employee awarded a temporary employee position shall retain his/her recall rights to a permanent County position.

The County's proposed revised language incorporates the principles set forth above. The County's proposal also gives the employees greater protection than under current Article 6(D). Under the proposal, laid off employees may bump into any position for which they are qualified and capable within a pay grade equal to or less than their former position. Under the

current language, employees are only able to bump within their department and into a position within their pay range. Under the new language, laid off employees have first opportunity to be awarded vacant LTE positions which is not the case under the current language. The County also agreed to make decisions over whether employees are capable and qualified for a position subject to the grievance procedure and did not insist on an arbitrary, capricious and/or discriminatory standard.

The Union's proposal is contrary to the agreed upon principles and should be rejected. By seeking to retain the *status quo* language of the contract, the Union has repudiated all the agreed upon principles. Maintaining the current language will lead to further grievances in the future because the Union will insist that the County must layoff temporary employees, including LTEs, before bargaining unit employees can be laid off. Anticipated State imposed spending restrictions will make future layoffs likely and so more disputes like this are also to be expected. The County's proposal would avoid a recurrence of this situation, whereas the Union's would not.

The County also paid out the settlement sums to the Grievants in good faith despite the fact that this issue remained unresolved. The Union thereby received benefits for its members, but has refused to alter its position as to Article 6(D). The Union has thus obtained the benefit of the bargain and the County cannot now recoup the payments despite the Union's repudiation of the agreed upon principles. Further, the Union's proposal lacks merit. The Union sought to have the County agree to place laid off employees in LTE positions, but to maintain their pay and benefits. This would result in the employees receiving pay at a rate beyond the level of work and would negate most of the cost savings to the County, which is the main reason for layoffs. To generate the same savings, therefore, the County will have to lay off more employees. The County has conceded that laid off employees may bump into LTE positions, so the only difference between the County's proposal and the Union's former offer is the level of compensation for the laid off worker. The Union's position is unreasonable because it would require the County to lay off all LTEs in all departments, where there may be substantial LTE work to do, before it can lay off a bargaining unit employee in an area where there may be a lack of work. The County's proposal is more reasonable because it requires the layoff of LTEs when they are performing substantially the same work as bargaining unit employees who are subject to layoff.

The Union

The Union asserts that the County's proposal disrupts the *status quo* to the detriment of the Union. The *status quo* represents a point at which the parties have previously reached agreement. As such, it deserves great deference absent a compelling rationale for change.

The Union's intent in negotiating over the layoff and bumping language was to clean up contradictions in the contract language over the rights of senior employees to bump into other positions in the bargaining unit when facing layoff. Clearly, the County is instead seeking significant changes in the language without having to bargain it. That *status quo* is that when a layoff situation arises, the County first seeks volunteers, then proceeds to layoff temporary and probationary employees and, finally, bargaining unit employees in the position to be eliminated in reverse order of seniority, provided the remaining employees are capable of performing the work. The County seeks to add the concept of "substantially the same work" and to reserve to itself the discretion to determine whether a volunteer, temporary and/or probationary employee is doing substantially the same work.

According to the factors listed in Sec. 111.70, Wis. Stats., the ones relevant to the matter here are found in subsecs. 7r c (interest and welfare of the public), d (comparison of wages, hours and conditions/similar service), e (comparison of wages hours and conditions/same community and comparable communities) and j (other factors). As to criterion c., it will undermine the morale of the bargaining unit if the County is simply able to replace bargaining unit employees with LTEs, as happened in the Wegner case. Thus, the Union sought protections such that the County would not replace bargaining unit employees with LTEs, to which the County would not agree. Union Exhibits A-H (external comparables) and I-L (internal comparables) show no support for the County's position under criteria d. and e. Rather, they support the Union's position, which also has support in arbitral authority. UNIVERSAL ATLAS CEMENT CO., 17 LA 755 (GELLHORN, 1951); CESNA AIRCRAFT CO., 80 LA 257 (CANTOR, 1983)

As to criterion j., the Union asserts that the matter is best left referred to bargaining. Arbitrators have held that to achieve a change in the *status quo*, a party must demonstrate that a problem exists, that its proposal addresses the problem and that a *quid pro quo* has been offered for the change. Here, there is no demonstration of a problem. Layoffs have heretofore been rare in the County. In the negotiations leading to the current contract, the County made no proposals to change the layoff language. Finally, there is no indication of any *quid pro quo* for the change in the County's offer. In this case, the *status quo* is the most reasonable resolution of the dispute and the County offer should be rejected.

DISCUSSION

The language at issue provides, in pertinent part:

> D. Layoff: The County shall have the sole right to determine the position or positions to be eliminated. The selection of employees to be laid off shall be made according to the following procedures: volunteers shall be considered first, then temporary employees, then probationary employees

> and then the employee with the least seniority within the classification containing the position(s) being eliminated provided the remaining employees are capable and qualified to perform the work.

The grievances were initially filed over the layoffs of two bargaining unit members while the County continued to employ Limited Term Employees (LTEs), which the Union contends violated Article 6D of the collective bargaining agreement. Although the grievances were settled to the satisfaction of the individual Grievants, the Union and County remained at odds about the proper interpretation of the applicable contract language. The Union contended that the language required the County to terminate all temporary and LTE employees before bargaining unit employees could be laid off. The County took the position that temporary and LTE employees need only be let go first if they were performing similar work to the position being eliminated. (County Ex. 1)

On its face, the language permits either inference and is, thus, ambiguous. The parties further concede that there is no evidence of past practice or bargaining history to guide the Arbitrator. Thus, they requested the Arbitrator to retain jurisdiction while they attempted to negotiate a resolution to the language issue, which they were unable to do. They requested, therefore, that the Arbitrator exercise his jurisdiction and resolve the dispute. Rather than have him construe the language, however, they adopted the somewhat unusual expedient of agreeing to submit proposals for revisions of the language to the Arbitrator and have him select the most reasonable, similar to the process employed in interest arbitration.

At the arbitration hearing on April 14, 2004, the parties agreed in principle to certain guidelines upon which the negotiated language would be based. These guiding principles were articulated at the settlement conference by the County's counsel and may be recapitulated as follows:

1. Where there is to be a reduction in force, the County will first lay off volunteers, temporary employees and LTEs, if they are doing substantially the same work as the position subject to lay off. The County would reserve the right to determine whether the employee is performing substantially the same work, subject to an arbitrary, capricious and discriminatory standard. The determination would be subject to the grievance procedure.

2. Bargaining unit members subject to lay off would be able to bump into any bargaining unit position at an equal or lower pay grade, provided they are capable and qualified to perform the work. The County would reserve the right to determine whether the employee is capable and qualified to perform the work of the position into which he/she wishes to bump. The determination would be subject to the grievance procedure.

3. Laid off bargaining unit members will be awarded vacant temporary and LTE positions if they apply for them in a timely manner and if they are capable and qualified to perform the work. Such employees would be considered LTE employees and would receive LTE wages and benefits.

County Ex. 5

Ultimately, the County developed a settlement proposal, purportedly based upon the above principles. The Union was unwilling to agree, however, resulting in the resort to arbitration.

The County's proposal is to replace the existing language of Article 6D**,** add a new section denominated Article 6E and revise and redesignate current Article 6E as Article 6F, as set forth in its position above. The Union's proposal is to continue with the *status quo* and retain the language currently in Article 6D.

The County asserts that its language proposal is in accord with the guiding principles adopted by the parties on April 14, which it characterizes as a "tentative agreement." As such, it argues that its proposal is entitled to additional weight. It further asserts that the language it proposes clarifies the lay off process, which will lead to fewer grievances in the future, and it extends greater protections to bargaining unit members by expanding their bumping rights throughout the bargaining unit and providing them the opportunity to fill vacant temporary and LTE positions.

The Union, on the other hand, believes that the County's proposal impairs bargaining unit protections and expands the County's authority to manipulate the workforce. It contends that adopting the "substantially the same work" standard and leaving that determination in the County's discretion impairs seniority rights and creates the possibility that the County will use the layoff procedure to eliminate bargaining unit positions and replace them with LTEs. It maintains that such drastic changes require a *quid pro quo* and that the County's proposal contains none. It further asserts that its position of retaining the *status quo* is more in keeping with the contract language of internally and externally comparable bargaining units. It contends that language changes such as that proposed here are best left for the bargaining table.

With respect to the Union's last point, whatever the merits of having language changes determined through collective bargaining, and all would concede that such is the preferred method where possible, that is not the procedure the parties agreed to here. They expressly agreed to submit to the decision of the Arbitrator in selecting the most reasonable contract language alternative and now must live with their decision. Indeed, this matter is before me <u>because</u> the parties were unable to successfully negotiate revised language. My determination, therefore, will not be based upon any presumptions concerning the relative merits of bargaining versus arbitration, but upon the relative reasonableness of the parties' proposals.

Having previously stated that the existing language is ambiguous, one of the advantages of the County's proposal is that it would bring greater clarity to lay off procedures. It expressly ties the determination of whether voluntary, temporary, or LTE employees are to be terminated first to whether they are performing substantially the same type of work as the position the County seeks to eliminate. Concededly, this modification would result in the language agreeing with the position that the County took in the grievances here, but it would, in fact, reduce confusion about what is meant by voluntary, temporary and LTE employees. On the other hand, there may be, as the Union points out, more disputes over the meaning of the term "substantially the same." However, determinations over whether the work of different employees is substantially the same are usually within the employer's prerogatives, at least initially, subject to the Union's right to grieve, which the County's proposal provides. Further, the County's proposal is, in my view, consistent with the guiding principles agreed between the parties on April 14.

I would also note, contrary to the Union's position, that the County's proposal does offer a *quid pro quo* after a fashion. While it does adopt a more restricted definition of temporary and LTE employees subject to reduction prior to lay offs, it also expands the rights of laid off bargaining unit members in several ways. First, it allows for unit wide bumping in contrast to bumping only within the laid off employee's department, which the current language specifies. Further, it allows laid off employees to bump temporary or LTE employees, provided they are capable and qualified to perform the work. Finally, it provides that laid off employees will be offered any vacant temporary or LTE positions, again subject to capability and qualification.

The Union cites statutory factors in Sec. 111.70(4)(cm)7r, Wis. Stats., in support of its position. Factor c. is "The interests and welfare of the public . . . ," which the Union argues would be impaired due to reduced morale in the bargaining unit if the County's proposal is adopted because there is a legitimate fear that the County will use the language to shift bargaining unit work to LTE employees. I find this fear to be unfounded. There is no evidence in the record that the County has any such plans. Further, under the County's proposal, all LTEs performing similar work must be laid off before bargaining unit members. The Union's position, by contrast, that under current language all temporary employees and LTEs employed by the County must be laid off before any bargaining unit employee may be laid off, is inherently unreasonable. Logically, it could require employees doing necessary work to be let go, regardless if there were a bargaining unit member capable of doing their work, before a bargaining unit member could be laid off due to lack of work at that position. This would be inefficient and disruptive to the County's operations.

Factors d. and e. focus on external and internal comparability and the Union offers layoff language from units in nearby counties, as well as other Langlade County units, as evidence that the current language is more consistent with that applying to comparable units. Union Exhibits A-H represent layoff language from the following external bargaining units:

Oneida County Courthouse Employees, Lincoln County Courthouse Employees, Marathon County Professional Employees (Courthouse and Affiliated Departments), Marathon County Office and Technical Employees, Shawano County Courthouse Employees (Professionals), Shawano County Courthouse Employees (Paraprofessionals), Forest County Courthouse Employees and Oconto County Courthouse Employees. Of these, the contracts in Shawano County, Forest County and Oconto County have language similar to that here, which requires temporary employees to be laid off before bargaining unit employees, without qualification. The Marathon County and Lincoln County contracts have language similar to that proposed by the County, which require temporary employees in the affected department to be laid off before bargaining unit employees. The Oneida County contract does not require lay off of temporary employees before bargaining unit members. Of those contracts arguably in line with Langlade County with respect to layoff, Shawano County permits bumping within the section of the laid off employee, subject to qualification, Oconto County permits bumping unit wide, subject to qualification, and Forest County does not provide for bumping under any circumstances.

Based on the foregoing, I do not find consistency among the external comparables with respect to the interplay between layoffs, bumping rights and the employer's obligations with respect to temporary employees. Comparability is made more difficult by the fact that the exhibits do not include the recognition clauses for the respective units. The Langlade County contract covers ". . . all regular full-time and regular part-time non-professional employees of the Courthouse and Courthouse Annexes, Health Services Center, Extension, Forestry, Highway, Social Services, and Sheriff's Department . . ." According to the Wage and Classification Appendix, the unit encompasses such diverse positions as Clerk, Typist, Bookkeeper, Building Maintenance Worker, Judicial Assistant, Economic Support Specialist, Printer, Forestry Technician, Child Support Specialist and Probate Registrar. It is unknown what classifications of employees are encompassed by the other contracts. Obviously, this is a significant consideration when attempting to assess the potential impact of language that requires all of an employer's LTE employees to be laid off before any bargaining unit member. Identical language will have entirely different consequences in a contract that covers only a handful of similar classifications than it will in one as comprehensive and diverse as that at issue here. I do not find, therefore, the evidence of external comparability to be compelling or controlling.

Union Exhibits J-L2 represent layoff language from the following internal bargaining units: Langlade County Public Employees (Professionals), Langlade County Highway Employees (Non-clericals), Langlade County Corrections Officers/Dispatchers and Langlade County Law Enforcement Association. Of these, the Courthouse (Professionals) and Corrections/Dispatchers contracts have language that is virtually identical to that here. By comparison, the Highway Employees and Law Enforcement contracts do not require the lay off of temporary and LTE employees prior to bargaining unit members and do not provide for bumping. Thus, even within the Langlade County units there is not a consistent pattern with

respect to the relationship between lay offs, bumping rights and the status of temporary and LTE employees. Consequently, I do not find the Union's arguments under Sec. 111.70(4)(cm)7r, Wis. Stats., to be persuasive.

In sum, my analysis proceeds from the assumption that the parties were at one time in agreement that the current language in Article 6D of the contract is inadequate. This is reflected in the fact that they initially adopted jointly developed principles for the revision of the language and then, when negotiations were unsuccessful, they sought a third party determination. The Union has apparently reconsidered its position and now proposes to leave the contract as is and to bargain over the issue. Nevertheless, as stated before, it was the parties' choice to present this issue to an arbitrator for resolution, thus the only decision before me is not whether this issue should be bargained, but whether, under all the facts and circumstances, the County's proposed contract language is more reasonable than the *status quo*. I find that it is.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The County's proposed contract language regarding layoff and bumping rights is more reasonable than the current contract language. Therefore, the parties' collective bargaining agreement shall be amended to replace Article 6D "Layoff," create a new Article 6E "Bumping" and redesignate and revise current Article 6E "Recall" as Article 6F, in accordance with the County's proposal.

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

Dated at Fond du Lac, Wisconsin, this 28th day of April, 2005.

John R. Emery /s/
John R. Emery, Arbitrator

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