

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**DISTRICT NO. 10, INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS**

and

**MILWAUKEE COUNTY**

Case 547

No. 63542

MA-12621

*(Grievance of Daniel Gregory)*

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**Appearances:**

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Nathan D. Eisenberg**, on behalf of District No. 10, International Association of Machinists and Aerospace Workers.

**Timothy R. Schoewe**, Deputy Corporation Counsel, Milwaukee County, on behalf of Milwaukee County.

**ARBITRATION AWARD**

District No. 10, International Association of Machinists and Aerospace Workers, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Milwaukee County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on October 28, 2004, in

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1 The parties agreed to waive the time limit for issuing an award in this matter.

Milwaukee, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by December 6, 2004. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

### ISSUES

There were no procedural issues raised and the parties could not agree on a statement of the substantive issue, but agreed the Arbitrator will frame the issue.

The Union would frame the issues as follows:

Did the County violate the Collective Bargaining Agreement when it appointed Mr. Reyes to a machinist classification out of order of seniority? If so, what is the remedy?

The County would frame the issue as being:

Did Milwaukee County violate the Memorandum of Agreement when it appointed Jesus Reyes to the Machinist Locksmith position at the House of Correction? If so, what is the remedy?

The Arbitrator adopts the Union's statement of the issue.

### CONTRACT PROVISIONS

#### 1.05 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, resolutions and executive orders. Included in this responsibility, but not limited thereto, is the . . . right to establish qualifications for hire, to test and to hire, promote and retain employees; . . . the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

. . .

These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement.

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#### 2.29 LAYOFF AND RECALL

(1) The Department of Human Resources will make every reasonable effort to place employees who would be affected by a layoff in order of their seniority into comparable positions where vacancies exist. Where such vacancies exist, employees will be required to accept such placement.

(2) The classifications of Machinist and Machinist Lead shall be considered a single classification for purposes of layoff. Layoffs shall be made on a county-wide basis in the inverse order of total county-wide seniority.

(3) Employees on emergency or temporary appointment in the affected classifications shall be terminated prior to the layoff of employees on regular appointment.

(4) Employees on layoff shall be recalled to vacancies in the classification previously held in the inverse order of layoff.

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#### 5.04 COLLATERAL AGREEMENTS

From time to time it may be necessary to vary from the terms of this Agreement in order to take into account changing circumstances. When the Union and the Employer determine that a modification should be made, the parties agree to do so in writing and in compliance with this Section of the Agreement.

Agreements of this type will be entered into only by the President of the Union. The signature of the President on any document reflecting an agreement with the County shall be binding. The same presumption shall apply to the signature of the County official with whom the understanding has been negotiated.

All collateral agreements shall be executed by the appropriate County official and authorized and signed by the Director of Labor Relations.

### **BACKGROUND**

This case involves two employees in the Machinist classification who were on layoff at the time (December, 2003) a vacancy occurred in the Machinist classification at the County's House of Corrections (HOC), the Grievant, Daniel Gregory, and Jesus Reyes. The vacancy occurred due to the death of the incumbent in the position, Kenneth Schofield. Schofield had performed locksmith duties at the HOC. HOC is the largest county jail in Wisconsin, housing from 1000 - 2000 misdemeanants and felons. The Grievant has more seniority than Reyes, however, Reyes was appointed to the vacancy. According to the County, this was based upon Reyes' qualifications to perform locksmith work.

The 1998 "Interim Position Description" for the then-Carpenter (Locksmith) position at HOC stated the purpose of the position is "TO MAINTAIN SECURITY AT THE MILWAUKEE HOUSE OF CORRECTION THROUGH THE INSTALLATION, REPAIR AND MAINTENANCE OF LOCKS AND LOCKING MECHANISMS AND RELATED EQUIPMENT."

The position description stated the following as to what was required to perform the position's duties:

EXPERIENCE OF 2  
YEARS IN LOCKSMITHING

COMPLETION OF A  
FORMAL LOCKSMITH  
APPRENTICESHIP OR  
SCHOOLING

SKILL IN THE USE &  
OPERATION OF RELATED  
HAND TOOLS & POWER  
EQUIPMENT; ABILITY TO:  
MAINTAIN & REPAIR A  
VARIETY OF LOCKS &  
EQUIPMENT; WORK  
EFFECTIVELY &  
HARMONIOUSLY WITH  
OTHERS

County witness Minnie Lanyear, from the County's Human Resources Department, testified that the working title of the position at the HOC is "locksmith", even though it is classified as a Machinist, and that the duties are more complicated than regular locksmith duties. She also testified that the duties set forth in the 1998 position description have not changed, but the equipment has become more complicated.

Union Steward, Russell Weber, testified that Machinists in the bargaining unit repair and fabricate parts, do welding on secured doors, perform preventative maintenance on sliding doors with locks and locking mechanisms at the County's Criminal Justice Facility and perform Machinist work at the Safety Building, Courthouse, the County grounds, and HOC, all of which have secured areas. Weber also testified that he had worked at the HOC helping with locksmith work approximately five years ago when Schofield had been laid off from the then-Carpenter position. He worked there for six weeks; the first thirty days to see if he would want the job and an additional two weeks to help out with lock problems. According to Weber, he had no special training beyond being a Machinist. Weber conceded that this work was at the old HOC, not the new facility. Weber also testified he and the Grievant had previously worked on locks and secure entrances when they were both employed at Milwaukee Metropolitan Sewerage District and at the Jail.

Both the Grievant and Reyes were interviewed for the vacancy. The Grievant was interviewed in person and Reyes by telephone by Donald Pierzchala, Staffing Manager in the County's Human Resources Department. Pierzchala testified that the Grievant told him that he had minimum working experience and no formal training as a locksmith and had no certifications as a locksmith. Sean Moore, a Human Resources Analyst in the County's Employment and Staffing Division, testified that he was also at the interview with the Grievant, and that the Grievant said his locksmith experience was limited and involved his having "shadowed" the locksmith at times. Reyes submitted certificates showing he had attended the following classes: Schlage L Lock Servicing, Schlage D Lock Servicing, ADA Power Operator Workshop, and Intro to Electromechanical Products and Wiring. Reyes also submitted a letter from the owner of a locksmith company which stated that prior to Reyes' employment with the County, he had training "with a certified and highly trained locksmith" at the company, that he was trained on various key-cutting machines, and trained to make keys, to rekey locks, to master key different locks, and to repair various locks and locking mechanisms. Pierzchala conceded that he did not know what Reyes' certificates meant as far as the skills needed or what coursework was involved to obtain them, and that he did not ask Reyes what they entailed. Based upon the interviews, only Reyes was certified for the position at HOC.

The position at the HOC was formerly held by two employees, and was titled Carpenter (Locksmith). In 2001, apparently as a result of a dispute between the Machinists Union and the Carpenters Union, an agreement was reached between the County and the two unions to reallocate the position to the Machinists bargaining unit and retitle it as a Machinist

position. This was reflected in the following agreement with the Machinists Union dated April 12, 2001:

COLLATERAL AGREEMENT  
Reallocation and Retitling of the  
Carpenter (Locksmith) Position  
Department 5702, Title Code 20510

Pursuant to Section 5.04, Collateral Agreements, of the current Agreement between Milwaukee County and District No. 10, International Association of Machinists and Aerospace Workers, the parties agree to reallocate and retitle the position of Carpenter (Locksmith), Department 5702, Title Code 20510, specifically Ken Schofield and Don Collier to Machinist, Department 5702, Title Code 26400. This Reallocation and retitling to become effective July 1, 2000. The bargaining unit agrees to train Carpenter (Locksmith) position(s) in question relative to Machinist duties.

The Union shall immediately withdraw all grievances, prohibited practice charges and any and all other legal actions or litigation that may be pending, or proposed and/or contemplated that relates to the Carpenter (Locksmith) position. The Union and the affected employees agree to make no further claims, whatsoever, against Milwaukee County.

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The representative for the Carpenters Union sent the following letter commemorating his understanding of the agreement that was reached:

April 16, 2001

Mr. Todd Ashworth  
Milwaukee County House of Correction  
8865 So. 68<sup>th</sup> Street  
Franklin, WI 53132-8202

Dear Mr. Ashworth:

A meeting was held Thursday concerning the carpenter/locksmith position that is in the Machinists' union. The purpose was to try to arrive at a

conclusion to the problem of no back pay, and a split wage rate for a bargaining unit. We agreed to three (3) items. Mr. Schofield has a copy of the agreement. The attorney present was Mr. John Conti <sup>2/</sup> from the Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C. The three items are:

1. Mr. Schofield will remain in the Machinists' union as a machinist effective retroactive to July 1, 2000.
2. House of Correction will be able to advertise the position now held by Mr. Schofield as a Machinist position, but the qualifications will be the same as those possessed by Mr. Schofield. In other words, a locksmith can be hired, and his title will be Machinist, with machinist pay.
3. Mr. Collier and Mr. Schofield will both be able to avail themselves of the opportunity to be trained in the machinist trade, should they desire.

Yours truly,

Seaver P. Bigler /s/  
Seaver P. Bigler  
Business Representative

A grievance was filed regarding the recall of the less senior Reyes, rather than Gregory, to the position at HOC. Unable to resolve their dispute, the parties proceeded to arbitration before the undersigned.

### POSITIONS OF THE PARTIES

#### Union

The Union asserts that the parties' collective bargaining agreement requires that recall be performed on the basis of strict seniority and that there is no provision in the Agreement dealing with either layoff or recall which provides for any consideration of factors other than seniority. Therefore, the recall of Reyes in front of Gregory was improper.

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2 There is no evidence in the record with regard to who Attorney Conti was representing at the meeting.

There are two basic types of seniority provisions. There is the strict seniority provision, which requires that an employer must give preference to the employee with the longest continuous service without regard to any other considerations. The second type is known as a modified seniority clause, under which an employer is contractually entitled to consider factors other than seniority when deciding whom to recall or layoff. Elkouri and Elkouri, *How Arbitration Works* (Sixth Edition, 2003) at 872. Having failed to negotiate a modified seniority clause, an employer cannot seek at arbitration to introduce such a clause or argue for the ability to place a restriction in order to claim the retention of rights not specifically obtained at the bargaining table. Here, the parties have negotiated a strict seniority clause.

The layoff and recall provisions are located in Article 2.29 of the Agreement. Under Section 2 of that provision, it clearly states that layoffs are in “inverse order” on the basis of “county-wide seniority.” Under Section 4 of the provision, it states that recall will be “in the classification previously held in the inverse order of layoff.” In effect, the language provides that senior employees will be the last to be laid off and the first to be recalled and that the only factor to be considered is seniority. There is no contractual language to support the County’s argument that qualifications somehow play a role in recall. Where the words of the Agreement are plain and clear, there is no occasion to resort to interpretation, and meaning is to be derived entirely from the nature of the language used. Elkouri and Elkouri, at 434. The County seeks a result which is contrary to the plain meaning of the language of the Agreement. Both Reyes and the Grievant were in the same classification at the time of recall and the latter had more seniority. Given the clear language of the Agreement, the County violated the Agreement when it recalled Reyes out of order of seniority.

While the Agreement states that seniority is the only criterion which can be used in evaluating whom to recall, and reference to relative qualifications is inappropriate, even if some form of modified seniority provision was used in this case, the County failed to prove that the Grievant was unqualified for the Machinist position at the HOC. The evidence demonstrates that general Machinists, including the Grievant, have performed locksmith work for the County in the past. Union Steward Weber testified that both he and the Grievant had worked together on locksmithing tasks in the past, including helping out at the HOC. Neither Weber nor the Grievant had any “certifications” for locksmithing, nor was there any issue ever raised as to whether they were qualified to perform such work. When Machinists/locksmiths within the bargaining unit are unavailable, other Machinists fill in for them. This precludes any argument that the Grievant was utterly unqualified to perform such work. Although the County argues that the Jail is a secure facility holding many criminals, this was presumably also true at the time Weber or the Grievant worked there in the past. The need to keep criminals incarcerated is no less whether the Machinists are employed on a temporary or permanent basis. Where a Machinist is employed at locksmithing tasks for months at a time, there is no objective basis for later claiming they are unqualified to perform those tasks on a permanent basis.

The County failed to prove that Reyes was substantially more qualified than the Grievant. In order to overcome a challenge to its selection of a junior employee over a senior employee under a relative ability clause, an employer must show that the junior employee's ability was "substantially superior" to the senior employee's ability. *RIANIER PORT COLD STORAGE, INC.*, 79 LA 441, 448 (Armstrong, 1982). The County produced no evidence that demonstrates that Reyes was substantially more qualified than the Grievant. The County relies on certifications Reyes produced during the interview, however, Pierczhala acknowledged that the County made no effort to determine what the certifications actually represented. When asked to explain these certifications, Pierczhala had no idea of what work skills Reyes was certified in or what skills the certifications covered, rather, he stated that because Reyes presented certifications and the Grievant did not, presumably Reyes was more qualified. Rather than evaluating the relative abilities of Reyes and Gregory, the County simply adopted Reyes' certificates as proof of his competence. Thus, the argument that the Grievant was unqualified is meritless. The County ignored the Grievant's past work for the County and relied almost exclusively on ambiguous certificates that it never bothered to evaluate. The Grievant was presumptively qualified for the position of Machinist, since he held the position at the time of his layoff and had performed all of the job duties which that classification required, including locksmithing.

Last, the Union asserts that the County cannot rely on the civil service statutes to support its decision. Section 63.05(1)(a), Stats., refers to "established minimum criteria". There is no evidence that the County had established such criteria at the time of recall, nor that it had relied on such criteria when having Machinists perform locksmithing tasks. The job description upon which the County relies does not apply to the position of a Machinist, rather, it is a job description for a Carpenter (Locksmith) position which existed in 1998, and was part of the Carpenter's bargaining unit. County witness Minnie Lanyear testified that the Union had never been presented with a copy of the job description or its criteria. While the County had discussions regarding the qualifications of the position once it became part of the Machinists' Union in 2001, the evidence suggests that such discussions were between the Carpenters and the County, rather than the Machinists. Thus, the County relies on a job description which existed when another union represented the position and which describes a job classification that no longer exists in the current bargaining unit and upon bargaining history with a different union. There is also no evidence that the County relied on the position description when filling the Machinist position at the HOC. There is inadequate evidence that Reyes possessed the required criteria listed for the position in the position description. As the County admitted that it did not inquire into the scope of Reyes' certifications, the County is precluded from arguing that the certificates somehow constitute a course of study, and there is no evidence that Reyes ever performed any type of apprenticeship. Thus, the County cannot rely on the civil service regulations, since at the time Reyes was recalled no established minimum criteria existed.

The Union concludes that the County has violated the parties' Agreement when it recalled Reyes to the position of Machinist out of order of seniority. The Union asks that the grievance be sustained and the Grievant made whole for any lost wages and reinstated to employment with the County. The Union also requests that the Arbitrator retain jurisdiction for ninety days in order to address any disputes concerning remedy.

### County

The County first asserts that while the Agreement does in fact call for recall from layoff in inverse order of layoff, the record is silent as to the respective order of layoff between Reyes and the Grievant. The County concedes that the Grievant was more senior, but asserts that the recall language omits specific citation to seniority as a factor or even a decisive factor. The Agreement also reserves certain rights to the County, including, the sole right to manage its affairs in accord with all applicable laws, ordinances, resolutions and executive orders. More to the point, these rights include "the right to direct the workforce; the right to establish qualifications for hire, to test and to hire, promote and retain employees." The County further reserved to itself the determination of "the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions."

The record shows that the County's HOC is the State's largest correctional institution. It is beyond question that in such a setting the necessity of being able to close and effectively lock the doors is paramount. The appointment of Reyes paid homage to hiring the necessary qualifications, as set forth in the position description. Reyes was also the next most senior person on layoff.

The record further demonstrates that when the locksmith position was transferred from the Carpenter's Union to representation by the Machinists' Union, the County relied upon the Union's representation that, prospectively, the Union recognized the dichotomy between true Machinists' work and locksmith work at the HOC. Thus, the Union represented in the letter to the County that a locksmith could be hired at the HOC and that the position's title will be Machinist with Machinist pay. Thus, there is recognition of the essential duties that the Grievant was, and is, incapable of performing. The County relied upon this representation when making its staffing determinations.

The Grievant opted not to appear at the arbitration hearing and therefore could not be examined on the issues at bar. Thus, to the extent that a factual dispute exists, any presumption should be drawn adversely to the Grievant for abandoning his grievance. Thus, neither he nor the Union can be said to contradict the factual predicate for hiring one qualified person versus an unqualified individual solely on the basis of his being more senior.

The qualifications factor is key. Even the Union's witness, Weber, grudgingly acknowledged that the skills required were more than nominal. He averred that the lock system had changed at the HOC and been updated since he last worked there. He also volunteered that there is a lot more to locksmithing than just a key, and spoke to sophisticated technologies, linkages, levers and mechanisms, all requiring a special skill set. There is no contention that the Grievant possessed any portion of the skill set required to adequately perform locksmith duties sufficient to satisfy the legitimate and overarching needs of the County. Weber also acknowledged that Reyes had no experience or performance deficiencies functioning as a locksmith, but he could not even speculate that the Grievant could adequately perform those duties.

The County concludes that the seniority mantra offered by the Grievant, must, of necessity, give way to merit, qualifications and the security of the facility in deciding this case. The County bargained for, and was led to believe by the Union, that it could fill the HOC position with a qualified locksmith. That would not be the Grievant. The County expressly reserved to itself the ability to assess the relative qualifications for jobs and the ability to perform core functions. To that end, what ever weight might be given to seniority must be discounted to allow the County to do its job. Thus, the grievance should be denied.

### DISCUSSION

This is a contract interpretation dispute. Therefore, consideration of the merits of the parties' positions must begin with the wording of their collective bargaining agreement. 3/

Article 2.29 Layoff and Recall, provides in relevant part:

(2) . . .Layoff shall be made on a county-wide basis in the inverse order of total county-wide seniority.

. . .

(4) Employees on layoff shall be recalled to vacancies in the classification previously held in the inverse order of layoff.

Under that clear and unambiguous language, employees are to be laid off in the inverse order of county-wide seniority and recalled in the inverse order of layoff, i.e., by seniority. The wording permits of no other interpretation. The only qualification is that such recall rights are limited to vacancies in the classification the employee held at the time of his/her layoff. There

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3 While the Arbitrator took notice of the Civil Service Statutes at the County's request, an arbitrator's authority is restricted to the parties' Agreement.

is no provision in this wording for consideration of qualifications in recalling laid off employees to vacancies beyond this. It could be deduced from this that the parties have concluded that a Machinist possesses the basic qualifications for any of the jobs within that classification. 4/

Here, both the Grievant and Reyes were in the Machinist classification at the time of their layoff and the vacancy in issue was the Machinist position at the HOC. While the County asserts there is no evidence as to the order in which the Grievant and Reyes were laid off relative to one another, it must be presumed that Reyes was laid off before the Grievant, unless the County is asserting it violated Section (2) by not following seniority when it laid them off.

The County relies on its reserved management rights in Article 1.05 Management Rights, in arguing that it has the right to determine the qualifications required for a position, as well as to determine who is qualified. However, that provision qualifies those rights, stating:

These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement.

Article 2.29, Sections (2) and (4), specifically apply to layoff and recall and therefore qualify the rights the County has reserved to itself under Article 1.05. Further, it is a generally-accepted principle of contract interpretation that specific contract language will take precedence over more general contract language, such as Article 1.05, where there is a conflict.

The County also asserts that the Union represented that it recognized that the locksmith duties, and concomitantly the qualifications, of the position at the HOC are different from true Machinist work, and that the County relied upon this representation in making staffing determinations. However, the only record evidence in this regard is a letter from a representative from the Carpenters Union at the time the position was reallocated to the Machinist bargaining unit. The Collateral Agreement reached with the Machinist Union at the time is silent with regard to what qualifications will be required when a vacancy in the position is to be filled. It simply states that the position will be reallocated and retitled to "Machinist" effective July 1, 2000 and that the incumbents in the position will be trained relative to Machinist duties. Thus, there is not sufficient evidence upon which to find that the Union has agreed to a modification of the recall rights under Article 2.29 in filling the Machinist position at the HOC.

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4 It is also noted that while there is a "Carpenter Locksmith" classification and wage rate in the Agreement, the HOC position is a "Machinist" position according to the parties' 2001 Collateral Agreement.

While the Arbitrator recognizes the County's concerns with qualifications in this case as real, given the foregoing, he is constrained to find that the parties' Agreement required the County to recall the more senior Grievant to the Machinist position at the HOC, and that by not doing so, it violated that Agreement. Therefore, the County is ordered to immediately recall the Grievant and to make him whole as to lost wages and benefits resulting from the County's violation.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

**AWARD**

The grievance is sustained. Therefore, Milwaukee County is to immediately recall the Grievant, Daniel Gregory, to the Machinist position at the County's House of Corrections or a comparable position, and to make him whole as to wages and benefits he would have received but for the County's violation of the Agreement. For the limited purpose of resolving any disputes as to remedy, the Arbitrator will retain jurisdiction in this matter for sixty (60) calendar days from the date of this Award.

Dated at Madison, Wisconsin, this 19th day of May, 2005.

David E. Shaw /s/

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David E. Shaw, Arbitrator

