

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**WALWORTH COUNTY HIGHWAY EMPLOYEES,
LOCAL 1925, AFSCME, AFL-CIO**

and

WALWORTH COUNTY

Case 159
No. 64247
MA-12850

(Notice of Layoff)

Appearances:

Thomas G. Berger, Staff Representative, AFSCME, P.O. Box 044635, Racine, WI 53404-7013, appearing on behalf of the Union.

Mari E. Nahn, Deputy Corporation Counsel, P.O. Box 1001, Elkhorn, WI 53121, appearing on behalf of the County.

ARBITRATION AWARD

Walworth County (hereinafter referred to as the County or the Employer) and AFSCME Local 1925, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a grievance filed by the Local concerning the issuance of layoff notices to four Highway Patrol employees in July of 2004. The Undersigned was so designated. A hearing was held on May 2, 2005, in Elkhorn, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted post hearing briefs which were simultaneously exchanged through the Undersigned on May 18, 2005, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the Arbitrator makes the following Award.

ISSUE

The parties stipulated that the following issue should be determined herein:

Did the County violate Article VII of the collective bargaining agreement in issuing its layoff notices in July of 2004?

RELEVANT CONTRACT LANGUAGE

ARTICLE VII - SENIORITY

. . .

- 7.06 Application of Seniority. Seniority shall be followed in promotion, demotion, layoff, recall from layoff, shift preference, vacation and transfer where the employee is able to perform the work. If two or more employees are hired by the County on the same date, seniority of such employees shall be decided by tossing a coin.
- 7.07 Layoff. In the event it becomes necessary to reduce the number of employees, the probationary employees shall be the first laid off and then the employees with the least seniority. Employees laid off in a reduction in force shall have their seniority status continue for a period equal to their seniority at the time of layoff, but in no case shall this period be less than one (1) year or more than three (3) years.

ARTICLE VIII - JOB POSTING

- 8.01 Vacancies - Posting. Notices of vacancies due to retirement, quitting, new positions, or for whatever reason, shall, for the first five (5) working days, to overlap two (2) consecutive weeks, be posted in the Highway Department no later than one (1) day following the vacancy. . .
- 8.02 Posting Information. The job requirements, qualifications, shift, testing methods to be used and rate of pay shall be part of the posting and sufficient space for interested parties to sign said posting.

. . .

BACKGROUND

The County operates a Public Works Department, with responsibility for highway maintenance and facilities maintenance. Employees in the Highway operations are represented by the Union, AFSCME Local 1925. Employees in facilities operations are represented by a separate AFSCME local, Local 1925-B.

The County receives reimbursement from the State in two classifications – Discretionary Maintenance Allocations and Routine Maintenance Allocations. In mid-July, 2004, County Public Works Director Shane Crawford was advised by the Wisconsin Department of Transportation that, effective immediately, Discretionary Maintenance Allocations were being frozen, and that any projects the County undertook in that category would not be reimbursed. Since the County Highway Department is staffed at a level to perform both discretionary and routine maintenance operations, Crawford determined to issue layoff notices. Notices were prepared for Highway Patrolmen Page Grandon, John Miller, Brian Schwartz and David Woodhouse. Grandon and Miller were among the four least senior employees in the unit. Schwartz and Woodhouse were the two next junior employees among Patrolmen, but had greater seniority than Mechanics Donald Boyd, Buddy Buckau and Arthur Nelson.

At roughly the same time, Crawford summoned Union Vice President David Gross, and told him of the DOT notice and the likely layoffs of Schwartz, Grandon, Miller and Woodhouse. Crawford also told him that layoffs might be avoided if the Union would agree to allow highway employees to work on available facilities work. Gross told them that since the formation of the Public Works Department, highway employees had from time to time worked in facilities, and that he was agreeable to whatever would avoid layoffs.

On July 14th, the County issued the notices to the four Patrolmen, advising them that they would be laid off on July 24th. On reviewing the seniority list, Gross decided that the County had erred in sending notices to Miller and Woodhouse, since there were less senior employees in the unit. Gross based his judgment on Section 7.07 of the contract, which provides in part “In the event it becomes necessary to reduce the number of employees, the probationary employees shall be the first laid off and then the employees with the least seniority.” The instant grievance was filed on July 16th, contending that the junior mechanics should be laid off before the two Patrolmen.

On July 23rd, the Union and the County reached agreement on a Memorandum of Agreement to allow Local 1925 employees to work on projects in facilities. The following day, the County advised Schwartz, Miller, Woodhouse and Grandon that they would not be laid off.

POSITIONS OF THE PARTIES

The Union

The Union takes the position that Article 2 of the collective bargaining agreement provides a clear mandate that management rights be exercised in accordance with the terms of the contract. Article 7 is likewise clear: “In the event it becomes necessary to reduce the number of employees, the probationary employees shall be the first laid off and *then the employees with the least seniority.*” This language states, in the simplest possible terms, that seniority governs the order of layoff. Nothing about it suggests that the County may pick and choose, or make this decision on the basis of efficiency or skills or some other factor.

The Union rejects the County’s suggestion that there is support for laying off out of seniority in either past practice or other provisions of Article 7. The Public Works Director claimed at Step One of the grievance procedure that there was a past practice within the County of factoring available skills into the layoff decision. The Union points out that each bargaining unit has its own seniority list and its own unit description, and that practices in other bargaining units are irrelevant to the meaning of the Highway workers’ collective bargaining agreement. There is no evidence that layoff outside of seniority have been allowed under this contract.

At Step Two of the grievance procedure, the Assistant Corporation Counsel cited Section 7.06 of the contract as allowing layoff outside of seniority. Section 7.06 says, in part: “Seniority shall be followed in promotion, demotion, layoff, recall from layoff, shift preference, vacation and transfer where the employee is able to perform the work.” The structure of this language, with the qualifier “where the employee is able to do the work” following immediately after the word “transfer” demonstrates that it is in the area of transfers that seniority rights may be tempered by ability. The Union notes that Section 7.07, which deals specifically with layoffs, does not contain the qualifying language. Each section stands on its own merits, and the general language of Section 7.06 cannot serve to change the clear and specific language of Section 7.07.

The Union suggests that the speed with which the County moved in this instance should most reasonably be interpreted as proof that the County’s true purpose here was to leverage a deal for cross-jurisdictional assignment of work between the highways and the facilities. The layoff notices were simply a pressure tactic to force the Local into executing a Memorandum of Agreement. The County should not be rewarded for this bad faith conduct, and cannot be allowed to set a precedent through this case. For those reasons, the Union urges the Arbitrator to reject any argument by the County that the lack of actual layoffs makes this grievance moot. The Union is entitled to know whether the issuance of these notices was proper, so that future cases will not be processed under the intense and unfair pressure of an improper layoff notice.

The County

The County takes the position that the grievance is without merit and should be denied. The plain language of Section 7.06 of the contract requires the County to follow seniority in “promotion, demotion, layoff, recall from layoff, shift preference, vacation and transfer.” The Union seeks to have the Arbitrator stop reading at that point. However, the provision goes on to say “where the employee is able to perform the work.” That qualifier applies to all instances in which seniority is invoked. The Union’s argument that the qualifying phrase applies only to transfers, because that is the word immediately preceding it, is absurd. There is no reason to think that the County would have a special concern about ability in the case of transfers, but be willing to follow strict seniority in all other cases.

The Union appeals to the Arbitrator to read only Section 7.07, which applies to layoffs and does not mention ability as a balancing factor with seniority. That reading requires the Arbitrator to effectively read Section 7.06 out of the contract. It specifically mentions layoff as an instance in which ability should be a factor, and it cannot be ignored. Instead, the two provisions should be read as part of a single coherent plan for the application of seniority to layoffs. Both should be given meaning, and neither should be treated as mere surplusage.

A common sense reading of the contract, one which gives meaning to both Section 7.06 and Section 7.07, shows that these parties have agreed to a modified seniority clause, balancing the seniority rights of employees with the need of the employer to maintain its operation. Here, the Union want the County to layoff the mechanics who keep the heavy equipment for the entire Department operating, and assign that work to more senior Patrolmen, despite the fact that there is no evidence the Patrolmen can actually do the work. Patrolmen do, as part of their normal duties, perform “driver preventative maintenance” but that is simple work, such as oil changes, and proves nothing about the ability of a qualified Patrolman to keep the County’s fleet of heavy equipment on the job. Given the circumstances and the specialized nature of the Mechanics’ duties, the County acted reasonably in skipping the two Mechanics and going to the two least senior Patrolmen.

The County also points to evidence of past practice in support of its actions. While there have never before been layoff notices in this bargaining unit, it was undisputed that the Nursing Home bargaining unit had experienced layoffs in the past. In that unit, also represented by AFSCME and having very similar language in its contract, layoffs were not done in strict seniority order – instead, ability to do the work was factored in and some junior employees were retained because the more senior workers could not do the work of their classification.

Finally, the County urges the arbitrator to consider the emergency nature of the situation leading to the issuance of these layoff notices. There was a completely unexpected and immediate cutoff of funding for a portion of the work being done by the Department. The County acted immediately, on two fronts. It sought to broker an agreement with the two

Locals to allow Highway employees to perform available work in the facilities. Highway workers have historically been allowed to do facilities work, and this should not have been a controversial idea. That would have (and ultimately did) avoid the need to lay off Highway workers. At the same time, since there was no guarantee that such a deal could be struck, it issued notices of layoff. There was nothing panicked or underhanded in the County's treatment of the workers. It took the only courses of action open to it in an urgent situation. The decision to pass over the Mechanics was also a considered and good faith decision. There are three Mechanics' jobs, one of which was vacant. Losing the only two remaining mechanics would have meant parking most of the equipment, and laying off even more Patrolmen. Thus, the County's actions were the most reasonable possible responses to the emergency. It acted in good faith and in compliance with the contract, and the grievance should therefore be denied.

DISCUSSION

The question in this grievance is whether the County had the right to weigh the relative abilities of workers in deciding who to layoff, or instead was obliged to layoff in strict order of seniority. The Union points to the language of Section 7.07, which specifically addresses layoff, and calls for the least senior employee to be laid off, without referring to abilities. For its part, the County points to the preceding section, 7.06, which discusses the general application of seniority, and calls for the use of seniority in transactions "where the employee is able to perform the work."

Considering Section 7.07 in isolation provides very strong support for the Union's position:

7.07 Layoff. In the event it becomes necessary to reduce the number of employees, the probationary employees shall be the first laid off and then the employees with the least seniority. . . .

Probationary status and seniority are the only two factors listed in determining who shall be laid off. On its face, this is a strict seniority provision. It is not, however, the only provision addressing seniority and layoffs. Those topics are also addressed in the immediately preceding section of the contract. The relevant portion of Section 7.06 reads:

7.06 Application of Seniority. Seniority shall be followed in promotion, demotion, layoff, recall from layoff, shift preference, vacation and transfer where the employee is able to perform the work. . . .

The Union argues that the qualifier in Section 7.06 applies only to transfers, because it immediately follows that term and is not separated from it by a comma. While that is a possible reading of the provision, it is not a likely reading. Assuming for the sake of argument

that the placement of commas in this sentence has the significance assigned by the Union, at a minimum, it must be the case that ability applies to both transfers and vacations, since no comma separates those terms. There is no reasoned basis for believing that the parties would have singled out those areas for different treatment. It is reasonable to ask, as the County does, why the parties to this contract would have felt ability was relevant only to transfers, when it would be of at least equal concern in the other staffing transactions included in the list. A transfer, after all, suggests a lateral move, where ability can usually be presumed, as opposed to a promotion, where the move is to a different and more highly rated position. Ability would be a matter of even more pressing concern in the case of layoffs, where skills are being removed from the work force, rather than just shifted. Likewise in the case of recalls, skills that have been removed are being restored to the work force, and it is more likely that the restoration would occur on the basis of needed skills than pure seniority.

The parties have the right to treat different transactions differently. However, the absence of a comma is scant evidence that they chose to make the very unusual distinction urged by the Union between transfers and every other personnel transaction. The more reasonable reading of Section 7.06, and the one I conclude was intended, is that the parties agreed that minimum ability should be a factor in all of the personnel transactions listed in that Section.

It is a basic principle of contract interpretation that the contract should be read as a coherent whole, rather than piecemeal. Another basic principle is that, where possible, contract provisions should be harmonized, so that all of them are given meaning. Applying those principles to this case, if Section 7.07 is read in isolation as establishing a strict seniority system for layoffs, the specification of ability in Section 7.06 becomes meaningless. Reading the two provisions in concert with one another gives meaning to each. Section 7.07 mandates the use of seniority as the presumptive factor in deciding the order of layoff. Section 7.06 defines how seniority is to be understood and applied in undertaking specific transactions, including layoffs. Read in accordance with the established principles of interpretation, the contract provides that ability is a permissible basis for varying from strict seniority order.

The consideration of ability provides a legitimate basis for skipping over employees with specialized skills, so long as the more senior employees do not possess the minimum levels of ability required to do those jobs. This is not to say that a blanket exemption of certain classifications is permissible. The contract does not expressly allow, nor does it reasonably suggest, that layoffs are to be accomplished on the basis of how employees are classified. The contract speaks to actual ability. If, for example, a senior Patrolman had previous experience as a heavy equipment mechanic, the fact that he is classified as a Patrolman would not warrant laying him off in favor of a junior mechanic. Here, the only evidence that the senior Patrolmen might be able to function as mechanics is the reference in their job descriptions to performing "driver preventative maintenance." This does not rise to the minimum skill level reflected in the Mechanic II's job description.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The County did not violate Article VII of the collective bargaining agreement in issuing its layoff notices in July of 2004. The grievance is denied.

Dated at Racine, Wisconsin, this 14th day of June, 2005.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator