

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MARATHON COUNTY OFFICE AND TECHNICAL EMPLOYEES,
LOCAL 2492-E, AFSCME, AFL-CIO**

and

MARATHON COUNTY

Case 331
No. 68796
MA-14347

(Nesbitt Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin, appearing on behalf of Local No. 2492-E.

Mr. Frank Matel, Employee Resources Director, Marathon County, 500 Forest Street, Wausau, Wisconsin, appearing on behalf of Marathon County.

ARBITRATION AWARD

Marathon County Office and Technical Employees, Local 2492-E, AFSCME, AFL-CIO, hereinafter "Union," and Marathon County County, hereinafter "County," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on June 11, 2009, in Merrill, Wisconsin. The hearing was not transcribed. The parties offered post hearing briefs and reply briefs, the last of which was received by August 4, 2009 whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The Union asserts that the grievance is untimely and frames the substantive issues as:

Did the County violate the collective bargaining agreement when it denied the Grievant bumping rights when the Grievant's employment relationship with the County was severed? If so, what is the appropriate remedy?

The County frames the substantive issues as:

Did the County violate the collective bargaining agreement when it refused to invoke the contractual layoff provisions due to a change in Union representation? Is so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I frame the issues:

Is the grievance timely; and

Did the County violate Article 6 of the parties' collective bargaining agreement when it denied the Grievant bumping rights on or before December 31, 2008? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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Article 1 - Recognition

The County hereby recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time nonprofessional employees in the employ of Marathon County pursuant to the Wisconsin Employment Relations Commission Decision No. 20999, Case LXXXIII, No. 31883, ME-2242 for the purpose of conferences on wages, hours and conditions of employment. Employees expressly excluded from representation include all confidential, supervisory and managerial employees, elected officials and all other represented employees of Marathon County.

Article 2 - Management Rights

The County possesses the sole right to operate the departments of the county and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include, but are not limited to, the following:

- A. To direct all operation of the respective departments;
- B. To establish reasonable work rules;

- C. To hire, promote, transfer, assign and retain employees;
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
- E. To relieve employees from their job duties because of lack of work or for legitimate reasons;
- F. To maintain efficiency of department operations entrusted to it;
- G. To take whatever action is necessary to comply with State and Federal laws;
- H. To introduce new or improved methods or facilities;
- I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;
- J. To change existing methods or facilities;
- K. To determine the methods, means and personnel by which operations are to be conducted;
- L. To take whatever action is necessary to carry out the functions of the departments in situations of emergency
- M. To utilize temporary or seasonal employees when deemed necessary provided such employees shall not be utilized for the purposes of eliminating existing full-time and part-time positions.
- N. To contract out for goods and services so long as no employees in the department in which the subcontracting occurs are laid off or released by such action.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the rights of the County to continue to exercise these management rights.

Article 3 - Grievance Procedure

- A. Definition of Procedure: A grievance shall be defined as a dispute over interpretation and application of the provisions of this collective bargaining agreement between the County and the Union. Grievances shall be handled and settled in accordance with the following procedure:

Step 1: An employee covered by this Agreement who has a grievance is urged to discuss that grievance with the immediate supervisor as soon as the employee is aware of the grievance. In the event of a grievance the employee shall continue to perform the assigned task and grieve the complaint later. Within ten (10) working days after the employee knows or should have known of the event giving rise to the grievance, the employee shall set forth the grievance in writing, dated, and signed.

The Grievance shall be submitted to the immediate supervisor if it concerns a matter over which the immediate supervisor has authority. All other grievances shall proceed directly to Step 2.

Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, and relief sought, the date the incident or violation took place, the specific section of the agreement alleged to have been violated, if any, and the signature of the grievant and the date.

The immediate supervisor shall investigate the grievance and discuss the matter with the grievant and the Union, and provide a written answer to the grievance within ten (10) working days after receipt of the written grievance.

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- B. Arbitration:

1. Notice: If a satisfactory settlement is not reached at Step 4, the Union must notify the Employee Resources Committee in writing as soon as possible thereafter but no longer than twenty (20) working days after receipt of the Employee Resources Committee disposition that they intend to process the grievance to arbitration.

2. Selection of Arbitrator: The employer and the Union will use their best efforts to elect a mutually agreeable arbitrator within thirty (30) days after the Union has notified the Employer of its intent to process the grievance to arbitration. If the parties are unable to agree upon an arbitrator, either party may request the Wisconsin Human Relations Commission to appoint a Commissioner or staff Member to act as an arbitrator. If neither party requests the panel from the Wisconsin Employment Relations Commission within forty-five (45) days of the Notice of Intention to Arbitrate, the grievance shall be considered waived.
3. Arbitration Hearing: The Arbitrator selected shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony related to the grievance. Upon completion of this review and hearing, the Arbitrator shall render a written decision to both the County and the Union, which shall be final and binding on both parties.
4. Costs: Both parties shall share equally the costs and expenses of the arbitration including any filing fee. Each party, however, shall bear its own costs for witnesses and all other out-of-pocket expenses including possible attorney's fees. Employees who may attend such hearing without loss of wages shall be limited to the grieving employee, and not more than two grievance committee members, if necessary. There shall be a transcript prepared upon request of either party. The party making the request shall bear the full cost of said transcript. Any party requesting a copy of the transcript shall bear the cost of the copy. If a transcript is requested by the arbitrator, the parties shall share the cost equally.
5. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

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Article 6 - Seniority

- B. Layoff: In the event it becomes necessary to reduce the number of employees in a department, temporary and seasonal employees in that department shall be the first to be laid off before the employee in the

classification in the department whose position is being eliminated. The employee whose position is being eliminated shall, if necessary, be allowed to replace an employee with less seniority in the same or a lower pay range provided the employee (whose position is eliminated) is qualified to perform the work of the position selected. The employee replaced under this provision shall be allowed to exercise similar rights under this provision. Employees laid off in a reduction in force shall have their seniority status continued for a period equal to their seniority at the time of layoff, but in no case shall this period be more than two (2) years. When vacancies occur in any department while any employees hold layoff seniority status, these employees shall be given the first opportunity to be recalled and placed in those jobs, provided they are qualified to perform the available work.

- C. Termination and Notice: Any employee covered by this Agreement whose employment is terminated for any reason other than disciplinary action shall be entitled to ten (10) working days notice. Employees shall give the County ten (10) working days notice in writing of their intention to resign. Employees that receive less than ten (10) working days notice shall receive paid compensation for those working days at his/her rate of pay.

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Article 25 - Duration of Agreement

- A. Terms: This Agreement shall be in effect as of January 1, 2006, and shall remain in full force and effect until December 31, 2008.
- B. Negotiations: Negotiations for any changes in this contract shall be processed by mutual exchange by October 1st.

This timetable is subject to adjustment by mutual agreement of the parties consistent with the progress of negotiations.

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APPENDIX A
LISTING OF CLASSIFICATIONS - PAY LEVEL

Nutrition Driver 1

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BACKGROUND AND FACTS

The Grievant, Kathy Nesbitt, was hired by the County on February 18, 2002, to a half-time Van Driver position. In 2004, the County increased her to a 58% employee and changed the job title to Nutrition Driver. As a Nutrition Driver, she was responsible for delivering meals to various sites within the County for the aging population. The Nutrition Driver position was represented by Local 2492-E.

In 2005, the County entered into discussions with Wood County to consolidate the aging services of the two counties. The discussions progressed through 2006 cumulating into an intergovernmental cooperation agreement creating the Aging & Disability Resource Center – Central Wisconsin (ADRC-CW). The agreement addressed the authority of 66.0301 Board as follows:

SECTION FOUR

THE 66.0301 BOARD

- 4.01 Creation. Pursuant to Sec. 66.0301 of the Wisconsin Statutes, there is hereby created an intergovernmental cooperation Board composed of the Member Counties and a Board to be known as the ADRC-CW Board.
- 4.02 Powers and Duties of the Board. The Board shall have the powers common to its Member Counties and is authorized, in its own name, to do all acts necessary to exercise such common powers to fulfill the purposes of this Agreement referred to in Section Two. In addition, the Board shall have the following powers:
 - A. The Board shall have the power to establish the Board's annual budget as provided in Section 5.02.
 - B. The Board shall have the authority to hire, supervise, and support the Executive Director of the ADRC-CW and to take other action deemed necessary for the operation of the ADRC-CW provided for in this Agreement. Subject to the above authority of the board and further subject to future amendments of this Agreement, the Executive Director shall be considered an employee of Marathon County. All other employees of the ADRC-CW, other than the Executive Director, shall be subject to the supervisory authority of the Executive Director and shall also be considered employees of Marathon County.
 - C. The Board shall have the authority to enter into leases or contracts necessary for the provision of services provided under

this Agreement. Said leases or contracts shall not exceed two (2) years unless approved by the Governing Bodies of each Member County.

- D. The Board shall provide an annual report to the Member Counties of the programs and services provided by the Board and the financial aspects of the programs and services provided.

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In June 2008, the ADRC-CW voluntarily recognized Wisconsin Council 40, AFSCME, AFL-CIO as the bargaining representative for the nonprofessional employees of ADRC-CW. Subsequent to this recognition, the parties (ADRC-CW and AFSCME) began negotiating the wages, hours and conditions of employment for the newly created bargaining unit, Local 1531.

Concurrent to the negotiations between Local 1531 and ADRC-CW were negotiations between Local 1492-E and the County. On January 1, 2009 the County and 2492-E reached a tentative agreement for the calendar years 2009, 2010 and 2011. Inclusive to the terms of that tentative agreement was the removal of the Nutrition Driver position. All provisions, except those specifically identified as "effective 1st pay period after all ratification," were retroactive to January 1, 2009. Item 26 of the document provided:

26. Appendix A – Job Classification Lost By Pay Level, revise:

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DELETE – ADRC-CW Classifications

- 3 Adult Day Services Program Caregiver
- 1 Nutrition Driver
- 9 Nutrition Services Coordinator
- 2 Site Manager

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On April 9, 2009, the ADRC-CW and Local 1531 reached a voluntary agreement for the time period of January 1, 2009 through December 31, 2011.

Additional facts, as relevant, are contained in the DISCUSSION section below.

ARGUMENTS OF THE PARTIES

Union

The Grievant was effectively laid off as a result of a change in employers on January 1, 2009. The Grievant was denied her right to bump per the contractual language which constitutes a violation of the collective bargaining agreement.

The Union first addresses the County timeliness argument. The County did not contest the timeliness of the grievance until hearing. The failure of the county to raise this issue prior to the arbitration hearing constitutes an waiver and should be held against the County. As for the County's desire to go back to January 2007 when the consolidation occurred, the Union had no reason to believe that any terms or conditions of employment was changing at that time. The record supports a conclusion that the grievance is properly before the arbitrator.

The Grievant's employment with the County was effectively severed on January 1, 2009 when ADRC-CW became her employer. The Grievant was a County employee as evidenced by her wages, hours and conditions of employment codified in the 2006-2008 collective bargaining agreement between 2492-E and the County. The ADRC-CW's attorney made it clear in his correspondence that ADRC-CW was the Grievant's sole employer and bargaining commenced between ADRC-CW and the ADRC-CW employees. At no time did the County assert joint employment and the evidence makes it clear that the ADRC-CW controls the employee's wages, hours and conditions of employment.

The Grievant was laid off when her employment relationship with the County was severed. On January 1, 2009, the Grievant's position was reduced or effectively eliminated from the County's control since it no longer bargained her wages, hours or conditions of employment. The Grievant desired to exercise her right to bump a less senior 2492-E member pursuant to Article 6(B), but she was denied this right. This violated clear and unambiguous language contained in the parties' collective bargaining agreement.

The County now takes the position that it is a joint employer of the Grievant. If the County is joint employer with ADRC-CW, then why did it condone a labor relationship between AFSCME and ADRC-CW?

The Grievant's employment was severed and she was denied her right to bump a less senior employee. The Union requests that the Arbitrator find the that the Grievant was effectively laid off and she be allowed to bump per Article 6 of the collective bargaining agreement between 2492-E and the County.

County

The County's timeliness argument is justified by the Union's assertion at hearing that the County was not the employer. The Union maintained that the County was the Grievant's employer, either sole or jointly, up until the grievance hearing. At hearing, the Union changed its position, thus making it necessary for the County to put forth its timeliness challenge.

The Grievant was not laid off. There is no credible evidence to support a finding that the County violated Article 6 of the labor agreement. The Grievant awoke on January 1, 2009 and just happened to be covered by a different collective bargaining agreement. The Grievant continues to do the same job, at the same location, with the same paycheck and W2 being issued by the County. There was no change in the employment relationship, only the union local changed. Thus, there could not have been a lay off. Moreover, There is no evidence to suggest that the parties intended the lay off provision of Article 6 to apply to this situation.

The County asserts that “the follow the work principle” as stated in Elkouri & Elkouri is relevant to this situation. In *JOHN WILEY & SONS V. LIVINGSTON*, 376 US 543, 551 LLRM 2769 (1964) the Supreme Court upheld the arbitrability of grievances following their employer’s disappearance by merger and the expiration of the collective bargaining agreement, where there was a “substantial continuity of identity in the business enterprise” before and after the merger. That same principle is applicable to this situation. Moreover, when AFSCME voluntarily agreed to form a new union local to represent the ADRC-CW employees, it acknowledged this continuity.

The County maintains it has not violated the terms of the labor agreement and seeks a dismissal of the grievance.

DISCUSSION

I first address the County’s assertion that the grievance is untimely. The facts establish that the first time the County offered this challenge was at hearing. Not only do I concur with the line of thought that concludes a party has waived its right to raise a procedural challenge if it is first offered at hearing, but I also cannot find on these facts that the Union that the “occurrence” of the alleged contractual violation happened in 2007. The Grievant did not know when the County entered into the intergovernmental agreement that she would ultimately find herself in the current predicament. Lacking this knowledge or ability to foresee this outcome, I find this grievance to be timely.

Moving to the substantive issues, this case is driven by the contractually created rights afforded the Grievant. She is seeking the right to bump a less senior employee relying on Article 6 of the 2492-E collective bargaining agreement which provides:

In the event it becomes necessary to reduce the number of employees in a department, temporary and seasonal employees in that department shall be the first to be laid off before the employee in the classification in the department whose position is being eliminated. The employee whose position is being eliminated shall, if necessary, be allowed to replace an employee with less seniority in the same or a lower pay range provided the employee (whose position is eliminated) is qualified to perform the work of the position selected. The employee replaced under this provision shall be allowed to exercise similar rights under this provision. Employees laid off in a reduction in force shall

have their seniority status continued for a period equal to their seniority at the time of layoff, but in no case shall this period be more than two (2) years. When vacancies occur in any department while any employees hold layoff seniority status, these employees shall be given the first opportunity to be recalled and placed in those jobs, provided they are qualified to perform the available work.

There are three components to this reduction in force provision. First, the County must be reducing the number of employees in the department. Second, the affected employee's position must be eliminated and third, that employee must have more seniority in order to displace a less senior employee.

In looking to the facts of this case, there was no lay off. The Grievant was represented by 2492-E through December 31, 2008. On and at the conclusion of the day of December 31, 2008 she held the position of nutrition driver, was paid at the bargained for nutrition driver hourly rate, worked the assigned hours, and received all wages and benefits she was entitled to as contained in the 2492-E labor agreement. As of that date – December 31, 2008 - the County had not eliminated her position and therefore she was not laid off and had no bumping right to replace a less senior employee.

Effective January 1, 2009, the Nutrition Driver position was removed from the 2492-E agreement. This removal terminated all rights or obligations that the Grievant was afforded consistent with the 2492-E labor agreement. Thereafter, her rights and obligations were contained in the collective bargaining agreement that was voluntarily entered into by the ADRC-CW and AFSCME on behalf of Local 1531. The 1531 bargained-for rights, as contained in the labor agreement, are defined. They start on a date specific, January 1, 2009; end on a date specific, December 31, 2011; and are offered to “all regular full-time and regular part-time employees in the employ of ADRC-CW” including the Nutrition Driver position.¹ There is no carry over or continuation of 2492-E rights into 2009 or into the 1531 agreement.

There is no question that the distinction between the Grievant's pre-January 1, 2009 rights and as of-January 1, 2009 rights could be viewed as overly technical, but to find otherwise would require that the clear and unambiguous language of the 2492-E labor agreement be ignored. The 2006-2008 Local 2492-E labor agreement sets forth who it represents and for what duration. Those are not immaterial components, but rather are quintessential and required elements of a written contract and must be given full force and effect.

¹ The Arbitrator recognizes that the dynamic status quo doctrine exists, applied in this instance and is applicable in situations where the parties are negotiating at the expiration of a labor contract, but have been unable to reach agreement. The doctrine extends to employees but all extended rights terminate upon ratification of the successor agreement and its terms, unless otherwise provided, are retroactive to the first day of the successor agreement.

The Union argues that the Grievant's employment with the County was severed on December 31, 2008. That is not true. There was no change to the Grievant's wages, hours or conditions of employment on that date and she remained employed through the end of the day of December 31. It was not until January 1 that her employment status changed, but since that change occurred after her rights as a member of the 2492-E bargaining unit expired, she therefore was not entitled to the Article 6 bumping provisions of the 2492-E labor agreement

The position argued by the Union extends well-beyond the four corners of the parties' agreement. Ultimately the Union is asking that I insulate this employee and her job when there is a change in her employer. That is not a right afforded the Grievant, or any other employee, per the 2492-E agreement. This Arbitrator is restricted by Article 3 of the parties' agreement to interpreting the contract. The contract in this case is the 2006-2008 collective bargaining agreement between the County and 2492-E. There was no change to the Grievant's employment status during the life of this labor agreement and as such, my authority cannot surpass the terms of the agreement. For me to act as the Union suggests would be an inappropriate exercise of authority in contradiction to that explicit limitations contained in the labor agreement.

AWARD

1. The grievance is timely.
2. No, the County did not violate Article 6 of the collective bargaining agreement when it denied the Grievant bumping rights on or before December 31, 2008.
3. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 22nd day of October, 2009.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

LAM/gjc
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