

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PEPIN COUNTY

and

**LOCAL 1946-A, THE AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO**

Case #55
No. 69354
MA-14578

Appearances:

Mark DeLorme, Staff Representative, 411 Colfax Street #1, Augusta, Wisconsin 54722, appearing on behalf of Local 1946-A, American Federation of State, County and Municipal Employees, AFL-CIO.

Anders B. Helquist, Weld, Riley, Prens & Ricci, S.C., P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Pepin County.

ARBITRATION AWARD

Pepin County, hereinafter County or Employer, and Local 1946-A, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter AFSCME or Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to assign a Commissioner or staff member to resolve a dispute between them regarding the meaning of seniority in their collective bargaining agreement. Commissioner Susan J.M. Bauman was so appointed. A hearing was held on February 19, 2010 in Durand, Wisconsin. The hearing was not transcribed. The record was closed on April 2, 2010, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties agreed that there are no procedural issues. They could not, however, agree upon a statement of the substantive issue to be decided and agreed that the Arbitrator could formulate the issue based on the evidence and arguments presented. The Employer would state the issue as:

Did Pepin County violate Article IV, Section 1 of the parties' collective bargaining agreement when the County interpreted and classified employees' seniority based on "date of hire" with the County, especially when it classified and preserved those employees' seniority based on the "date of hire" with the County when Pepin County's Department of Human Services assumed the functions and positions of incoming Senior Services and Child Support Agency employees?

If so, what is the remedy?

The Union would state the issue as:

Did the County violate the collective bargaining agreement when it decided that seniority would be calculated based on date of hire with the county rather than date entering the bargaining unit?

If so, what is the remedy?

The Undersigned has determined the issue to be decided to be:

Did the County violate the collective bargaining agreement when it awarded seniority to persons in newly accreted positions based on their date of hire by the County rather than when they entered the bargaining unit?

If so, what is the remedy?

BACKGROUND and FACTS

The underlying facts of this case are not in dispute. The Union was initially organized in the late 1970s. An Order was issued by the Wisconsin Employment Relations Commission on December 5, 1979 which certified the results of an election among "the regular full-time and regular part-time employees of the Pepin County Department of Social Services, the Pepin County Nurses Department, and the Pepin County Office of Aging, excluding managerial, supervisory and confidential employees" and directed another election among the "regular full-time and regular part-time professional social workers employed by the Pepin County Department of Social Services, excluding supervisory and confidential employees. . ."

The Union bargained its first contract with the County to cover the period January 1, 1980 through December 31, 1980. That agreement contained the following language in Article I, the recognition clause:

The Employer hereby recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time employees of the Pepin County Department of Social Services, the UWEX Secretary and the Office of Aging Secretary, except the Social Services Director, supervisory, confidential and temporary employees, for the purpose of bargaining and negotiating in good faith on all matters pertaining to wages, hours and conditions of employment.

The Agreement also described seniority in Article IV:

SECTION 1. Seniority shall commence upon the most recent date of hire and shall be based upon actual length of continuous service and shall not be diminished by temporary layoff due to lack of funds. . . .

The Agreement also provided, in Article XVIII, Miscellaneous:

SECTION 4. The employer shall, by January 15th of each year, post a list of all employees, showing their classifications, starting date of employment, the amount of sick leave accumulated and the amount of seniority accumulation.

The parties bargained a successor contract for 1981. By County Board Resolution No. 20-81 on June 15, 1981, the County Board acknowledged that the Pepin County Department of Social Services was dissolved as of December 31, 1980 and was reorganized as the Pepin County Department of Human Services and that the contract for 1981 was to be for a one (1) year duration with all benefits, wages and language changes to be retroactive to January 1, 1981 and that wherever the name "Social Services" appeared in the contract, it was to be changed to read "Human Services." Article IV, Section 1, was modified to include an additional sentence at the end: "Employees hired prior to January 1, 1980 shall retain all previously accrued seniority." The language of Article XVIII, Section 4 was unchanged.

According to Paul Hoch, a County employee since 1979 and a member of the Union bargaining team for at least the initial two contracts, this additional sentence was added to Article IV, Section 1 to allow the initial members of the bargaining unit to accrue seniority from their start date with the County, and to clarify that new bargaining unit members would only accrue seniority from the time that they were part of the bargaining unit.

From the inception of the bargaining unit until sometime in 2004, no person became a member of the bargaining unit after serving in any other County position. Accordingly, there was never any question regarding employees' seniority dates: For those persons hired prior to the inception of the Union, the initial hire date was the date used to calculate seniority and for new hires, the date of initial hire was the date used to calculate seniority. Annual seniority lists were prepared in accordance with this understanding and the contractual requirement for the County to provide such lists. The Union never questioned the seniority lists produced by the County.

Sometime in 2004, Sharon Gunderson, the Sheriff's Office Secretary, sought to become a Union member. Gunderson has been employed by the County since August 2001. She contacted the then Union president, Ann Bates, and expressed her interest in becoming a represented employee. At the time, the parties were engaged in consensus bargaining for a successor contract. Darlene Brunner took the minutes of the September 29, 2004 meeting regarding this matter which state, in pertinent part:

Union proposed accretion of Sheriff's Office Secretary into the bargaining unit. Parties determined that the position is not a managerial, supervisory, or a confidential employee that would be privy to information regarding negotiations or contract negotiations that the union is not privy to. Determined that employer determines the qualifications for this position, which may include experience in the Law Enforcement area. Options: County may voluntarily agree to a position being recognized into the union through negotiations, or union may petition WERC for the position. Consensus reached for the position to be included in union as of January 1, 2005, and paid at the negotiated rate of pay for the Program Assistant. Seniority date for the person in this position in the union would be January 1, 2005. Benefits and wages would be calculated as of date of hire. (Thumbs up)

The seniority lists produced by the County in accordance with the terms of the collective bargaining agreement reflected this agreement until the events giving rise to the instant grievance. In January 2009 numerous formerly unrepresented positions were accreted into the bargaining unit when the County merged the Senior Services Agency into the Human Services Department. Subsequently the County merged the Child Support program into the Department, effective March 2009. Nine positions were accredited into the Department as a result of these mergers: one child support coordinator, one benefit specialist, two meal site managers, and five van drivers.

The 2009 seniority list prepared by the County in January 2009 reflected the above referenced seniority date for Gunderson and reflected zero accumulated seniority for the positions accreted in January. After the Child Support function was added to the Department, questions arose as to the manner of determining the seniority of all the newly accreted positions.

Darlene Brunner, Pepin County Personnel Supervisor, sent the Union a revised 2009 seniority list under cover of letter dated August 25, 2009. This letter and revised list followed communications with the Union on this topic, including a meeting and an e-mail message from Union Business Representative DeLorme. The Union and the County continued to disagree on the manner in which the seniority of persons in the accreted positions was to be calculated. The parties were unable to resolve the dispute and a grievance was filed. The grievance was processed to arbitration.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE III – MANAGEMENT RIGHTS

Except as expressly modified by other provisions of this contract, the County possesses the sole right to operate the County and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the County;

. . .

F. To take whatever action is necessary to comply with State or Federal law;

. . .

ARTICLE IV – SENIORITY

Section 1. Seniority shall commence upon the most recent date of hire and shall be based on actual length of continuous service and shall not be diminished by temporary layoff due to lack of funds. Part-time employees shall be credited with seniority on a prorated basis. Employees hired prior to January 1, 1980 shall retain all previously accrued seniority.

Section 2. The county recognizes and agrees to comply with the principles of seniority. Seniority rights shall, among other things, be applicable to increases and decreases in the work force, promotional opportunities, including lateral changes.

Section 3. In reducing employee personnel, the last person hired shall be the first person laid off, providing the remaining employees are capable of performing the remaining available work. The last person laid off shall be the first person rehired provided such employee is able to perform the available work. No new employees shall be hired while there are employees possessing seniority rights on the laid off list who are able to perform the work available.

Section 4. Termination: Seniority shall be deemed to have been terminated when:

1. An employee who is able to work fails to do so for three days or more unless due to circumstances beyond his/her control:
2. A laid off employee fails to report to work within one (1) week of being notified to do so;
3. An employee resigns;
4. An employee is not employed for one (1) year after having been laid-off:
5. An employee is discharged for just cause;
6. An employee on leave of absence for personal or health reasons accepts other employment without permission from the County;
7. An employee retires.

ARTICLE V – PROBATION

Section 1. New employees shall serve a probationary period of one (1) year. The County may separate an employee from service during such probationary period without recourse to the grievance procedure. All employees shall be entitled to all rights and benefits granted under this Agreement from the original date of employment following successful completion of probation as determined by the director or department head. . . .

ARTICLE XIII – VACATIONS

Section 1. All regular full-time employees shall earn paid vacation in accordance with the following schedule:

Under one year employment.....1/2 day per month
One year to five years employment.....1 day per month
Over five years employment.....1-1/4 days per month
Over ten years employment.....1-1/2 days per month
Over fifteen years employment.....1-3/4 days per month
Over twenty years employment.....23 days per year
Over twenty-five years employment.....25 days per year

...

ARTICLE XVIII – MISCELLANEOUS

...

Section 4. The Employer shall, by January 15 of each year, post a list of all employees showing their classifications, starting dates of employment, the amount of sick leave accumulated and the amount of seniority accumulated.

...

DISCUSSION

Seniority is a concept that is very important in the Union movement as it rewards employees for their service to an employer and protects them in the event of layoffs. As a general rule, unless specified in the contract, seniority can begin to accrue only when the employee joins the seniority unit.¹ In the instant case the language in the collective bargaining agreement has been in place since the second contract between the parties and has not been the subject of any controversy until the recent accretion of a number of positions into the Human Services Department. Until the revised seniority list for 2009 was promulgated, the parties appear to have interpreted the contract in the same way: Individuals who were employed by the County in this bargaining unit prior to its formation in 1979 were accorded seniority based on the date of their hire. Persons new to the County who were hired into the bargaining unit were accorded seniority based on the date of their hire. The one position that was accreted into the bargaining unit effective January 1995 was accorded seniority based on the date her position was accreted into the bargaining unit, although her placement on the wage scale and the amount of paid leave she received was based on the date of her initial hire by the County.

¹ See THE COMMON LAW OF THE WORKPLACE, 2nd edition, p. 137.

This is a contract interpretation case. In interpreting contract language, the usual course of action is to look at the contract language and if the language's meaning is clear, there is no reason to look outside the language. Here, however, the County contends that the language is almost irrelevant because sec. 46.23(3)(d), Wis. Stats., "strongly supports a finding that the County properly interpreted" Article IV Section 1 to mean that seniority and date of hire with the County are synonymous.

The statutory provision in question states:

(d) *Employee protections.* All persons employed by a county or by a state, whose functions are assumed by a county department of human services shall continue as employees of the county department of human services without loss in seniority, status or benefits, subject to the merit or civil service system.

At first blush, this language would appear to control the situation. However, the County's argument fails for two reasons. First, the language of sec. 46.23(3)(d), Stats., is part of larger statutory scheme regarding the creation of county human services departments. In Pepin County, the Human Services Department was created, as noted above, as of January 1, 1981 immediately following the dissolution of the Pepin County Department of Social Services, effective December 31, 1980. Arguably, persons moved into the newly formed Human Services Department in 1981 could not do so without loss of seniority. However, the same is not true in 2009 when certain positions were added to the existing Human Services Department.

Even if this language were applicable to the 2009 transfer of positions to the Human Services Department, sec. 46.23(3)(d), Stats., is not an absolute guarantee that persons moved into a human services department do so without loss in seniority. Such an interpretation ignores the existence of the phrase "subject to the merit or civil service system." In *DANE COUNTY V. MCCARTNEY*, 166 Wis. 2d 956, 964, 480 N.W.2d 830, 834 (1992) (citations omitted), the Court of Appeals found that

The only reasonable interpretation of sec. 46.23(3)(d), Stats., is that the "subject to" clause modifies the continued employment clause. This interpretation is consistent with the statute's clear meaning and language. Therefore, because the statute has only one reasonable interpretation, it is unambiguous and we look no further than its language to interpret and apply it.

As did the former head of the Dane County Department of Social Services, Jerry McCartney, in arguing that he had a right to his former position when Dane County dissolved its Social Services Department and created a Human Services Department, Pepin County in the instant case ignores the "subject to" clause of the statutory provision. Employees being added to the Pepin County Human Services

Department do not have an absolute right to continued employment without loss of seniority as the County contends. Rather, assuming that the statutory provision is applicable² to the instant situation, it is necessary to determine whether a “merit or civil service system” controls the seniority of the persons accreted to the Human Services Department.

Although not denominated as a civil service system as such, the terms of the collective bargaining agreement are adopted by the County Board and the provisions of the collective bargaining agreement modify any existing civil service system as it applies to employees covered by the collective bargaining agreement.³ Accordingly, it is necessary to review the terms of the collective bargaining agreement to determine the proper seniority of the employees who were accreted into the bargaining unit in 2009.⁴

The language in question is not clear and unambiguous. Article IV reads as follows:

Section 1. Seniority shall commence upon the most recent date of hire and shall be based on actual length of continuous service and shall not be diminished by temporary layoff due to lack of funds. Part-time employees shall be credited with seniority on a prorated basis. Employees hired prior to January 1, 1980 shall retain all previously accrued seniority.

It is the position of the County that “the most recent date of hire” means date of hire with the County. The Union takes the position that this means the date of hire into a position in the bargaining unit. The language, except for the sentence, “Employees hired prior to January 1, 1980 shall retain all previously accrued seniority”, has been in the collective bargaining agreement since the first contract was entered into in 1980. The last sentence was added in the second bargain, according to the Union, to make clear that for employees hired prior to the employees organizing and becoming a certified bargaining unit, their seniority dated from the time they were hired, not from the time of the formation of the bargaining unit.

² As indicated above, it is the opinion of the undersigned that the provision is only applicable when a human services department is being created, not when positions are moved from other departments into an already existing human services department.

³ The collective bargaining agreement between the parties provides at Article XVIII – Miscellaneous that the terms and conditions of the collective bargaining agreement supersede any County or departmental resolutions, ordinances, or rules and regulations which may be in conflict with the Agreement.

⁴ The County argues that the management rights clause of the collective bargaining agreement, Article III, F: “the County has the right to “ take whatever action is necessary to comply with Federal or State law” supports the action it has taken. Given the above finding that the state law in question does not control the instant situation, this provision of the management rights clause does not pertain to the question before me.

The Union presented verbal evidence in support of its position, but no contemporaneous bargaining notes were offered to support this contention. The Employer argues that the testimony, in the absence of written evidence to support it, is without value. The Employer, however, presented no evidence regarding the inclusion of this additional sentence. It contends that for the sentence to have the meaning claimed by the Union it would have to read “Only employees hired prior to January 1, 1980 shall retain all previously accrued seniority.”

It is a well established tenet of contract interpretation that, to the extent possible, all language included in the agreement should be given meaning. The County contends that the last sentence “merely clarifies that those employees would retain their seniority, and it helps resolve any ambiguity when seniority begins for other employees that enter the unit – on the date of hire with the County.”⁵ This contention is unsupportable. If the sentence simply restates that seniority begins to accrue on the date of hire by the County, it is superfluous. The contract provision already says seniority commences upon the date of the most recent hire; the last sentence must have additional meaning or the parties would not have bargained to include it in the collective bargaining agreement.

There is no doubt that the language is not artfully drafted. In order to give meaning to the last sentence, however, there must be a reason to specifically state that employees hired prior to January 1, 1980 shall retain all previously accrued seniority. The only logical explanation that has been offered is that prior to the addition of that sentence, the members of the bargaining unit were all accorded seniority from January 1, 1980, the date that they were covered by the first collective bargaining agreement, initial members of the bargaining unit. Given that the language appears in the second collective bargaining agreement between the parties, the language must have been negotiated in order to clarify something that had taken place during the term of the first contract. There is no record evidence as to what the initial seniority list looked like, but it is not a stretch to reach the conclusion that the language was added so as to allow the employees who had been employed by the County prior to the existence of the bargaining unit to retain seniority from their date of hire, rather than from the time that they entered the bargaining unit.

Having concluded that the last sentence of Article IV Section 1 was added to allow employees hired to perform bargaining unit work to retain the seniority accrued from the time of their initial hire, even though at that time that they were not bargaining unit employees, the logical conclusion is that with respect to other individuals who were hired after January 1, 1980, no seniority accrued while they were not members of the

⁵ August 25, 2009 letter from Darlene Brunner, Personnel Supervisor, to Mark DeLorme, AFSCME Business Representative.

bargaining unit. However, it is necessary to examine other sections of the collective bargaining agreement and the practices of the parties to determine the appropriate seniority dates for persons accreted to the bargaining unit in 2009, to see if there is support for the proposition that for those hired after January 1, 1980 hired means hired into a position in the bargaining unit.

The County and the Union agree that regardless of the seniority dates assigned, the accreted employees are to receive benefits based on the number of years that they have been employed by the County. The County, however, sees this acquiescence on the part of the Union as support for its position that seniority is based on date of hire by the County, not date of hire into a position within the bargaining unit. Specifically, the County points out that the number of weeks of vacation that the employees receive is based on number of years of employment. The County also references the contract language and points to the probationary period which was not required of the accreted employees in 2009, though presumably they did serve a probationary period when initially hired.

Although in some cases there may be a correlation between the number of years of employment and an individual's seniority date, the County errs in conflating the two concepts. The section of the collective bargaining agreement regarding vacation does not mention seniority, nor does it mention date of hire. The provision refers to years of employment. Accordingly, the accreted employees should receive the number of weeks of vacation in accordance with the number of years they have been employed by the County, whether this is more or less than they would have received had they remained unrepresented. Traditionally, the only role that seniority has with regard to vacations is the ability of more senior employees to pick their vacation time, or some of their vacation time, before individuals with less seniority.⁶ That is not an issue in this proceeding and need not be further addressed here.

Similarly, the article regarding probation refers to "new" employees, persons who are newly employed by the County. The accreted employees are not new employees and, therefore, were properly not required to serve a probationary period. This provision makes no reference to seniority whatsoever.

A review of the collective bargaining agreement makes it clear that seniority is only referenced in Article IV – Seniority, Article VI – Job Posting and Job Promotion, Article X – Leave of Absence, and Article XVIII – Miscellaneous and is only relevant to the issues described in those articles. Article IV defines seniority and discusses how it applies in the event of layoff or recall; Article VI defines the manner in which seniority can be a factor in selection of an individual for promotion; Article X defines

⁶ Article XIII provides that the date requested shall govern the choice of the vacation period in the event two or more employees choose the same vacation period.

under what circumstances seniority does or does not continue to accrue when an employee takes a leave of absence; and Article XVIII provides for the manner in which a seniority list is to be created annually. Since there is no mention of seniority in any other provision of the collective bargaining agreement, the terms and conditions of employment enumerated in those provisions apply to all employees as described in those provisions without regard to seniority.

In 2004 the parties agreed to accrete a position held by Sandy Gunderson and to assign her a seniority date of January 1, 2005, the first date that her position would be in the bargaining unit. Although Ms. Gunderson had worked for the County since 2001, she began to accumulate seniority in 2005 and all seniority lists generated by the County reflected this agreement until the aforementioned revised 2009 seniority list was promulgated in August 2009.⁷

Numerous positions were accreted, effective January 1, 2009. In accordance with the collective bargaining agreement, a seniority list was generated by January 15th and provided to the Union. This seniority list indicated that all the people in the newly accreted positions, the benefit specialist, the meal site managers, the van drivers, and the fill-in meal site manager and van drivers had zero (0.00) seniority. Thereafter, the County decided to place the position of Child Support Coordinator in the Human Services Department, but not in the bargaining unit. The Union filed a unit clarification petition. After discussions with a Commission hearing examiner⁸, the County agreed that the position would be accreted to the bargaining unit effective July 1, 2009.

An issue arose regarding the seniority of the incumbent in the Child Support Coordinator position, Luann Berger. Ms. Berger had been a member of the bargaining unit until she was appointed Interim Pepin County Child Support Director in 2003. At the time, the Union and the Employer entered into a Side Letter Agreement regarding Ms. Berger's pay and seniority.⁹ Of particular note is paragraph 3 which reads: "Employee shall retain all seniority she has accrued through September 23, 2003, but shall not accrue further seniority with the Union during her tenure as Interim Director."

⁷ Regardless of the County's interpretation Article IV Section 1, it is unclear to the undersigned as to the basis on which the County could unilaterally change Ms. Gunderson's seniority accumulation when the parties had clearly bargained and reached agreement on her "date of hire" for purposes of seniority.

⁸ Coincidentally, the Hearing Examiner assigned to the unit clarification proceeding was the undersigned.

⁹ The Side Letter was admitted as evidence during the hearing without objection from the Employer. The document provides, in part, "This Agreement shall not be deemed precedential and shall not be pointed to by any of the parties hereto as precedence in any future court proceeding or arbitration hearing." In written argument, the Employer contends that the document cannot be considered in any manner in this case. I disagree. It is not being utilized as precedence but, rather, a historic document regarding the parties' understanding at the time it was drafted and signed, October 2003.

Darlene Brunner was unable to explain why Ms. Berger's seniority would not continue to accrue while she was not a member of the bargaining unit. This fact gives credence to the Union's position that seniority is based on time worked as a member of the bargaining unit, not time worked as a County employee.

Further support for the Union's argument is found in the provision of the collective bargaining agreement that requires the Employer to provide a seniority list on an annual basis. Article XVIII Section 4 mandates the preparation of a list of all employees showing their classifications, starting dates of employment, the amount of sick leave accumulated and the amount of seniority accumulated. If seniority were based solely on the date of hire (starting date of employment), there would be no reason to provide additional information regarding the amount of seniority accumulated. One could simply look at the list, by classification if desired, to determine the most senior employee by finding the one with the earliest hire date. If seniority and date of hire were equivalent, these requirements of this section would be superfluous. In order to provide meaning to all parts of the contractual language, it must be that, under some circumstances, one's seniority does not correlate directly with one's date of hire. Contrary to the County's contention, therefore, date of hire must mean date of hire into the bargaining unit, not the County, for purposes of determining seniority.

The County also points to the language contained in its contract with the Pepin County Communications/Corrections Officers Association as support for its position that seniority is measured by one's date of hire with the County, regardless of whether the position is in the bargaining unit or not. That agreement provides:

Section 1. The seniority of all bargaining unit employees covered by the terms of this Agreement shall begin with the employee's starting date of employment. No prior employment time shall be included in the computation. The employee's seniority shall not be diminished by temporary layoff due to lack of work, shortage of funds or any other contingency beyond the control of either party to this Agreement.

...

Section 3. If a regular, full-time bargaining unit employee is promoted to a position not covered by this Agreement, but does not sever his/her employment with the Pepin County Sheriff's Department, he/she shall retain for a total of twenty-four (24) calendar months, his/her bargaining unit seniority. During this twenty-four calendar month period, he/she can return to the bargaining unit without loss of any bargaining unit benefit. If an employee is either desirous of returning to the bargaining unit, or involuntarily returned outside of the twenty-four month window, he/she shall return to the bargaining unit at the point which he/she left the bargaining unit, provided there is a vacancy in the bargaining unit classification he/she previously served.

This collective bargaining agreement does not contain a clause related to a seniority list or what such a list should contain. Tiffany Kees, the President of the Pepin County Communications/Corrections Association, testified that the contract language meant that seniority was calculated based on the date of hire by the Department, regardless of whether the position was in the bargaining unit or not. She specifically referred to part-time employees who become full-time employees and therefore members of the Union.

While informative as to the situation in other bargaining units¹⁰, the language contained in the Communications/Corrections Association contract differs from that in the AFSCME contract that is the subject of this arbitration. A practice developed by that Association and the County pursuant to that language, and the nature of the employment practices in that bargaining unit, have no bearing on the matter before this arbitrator. While it is true that the language of Article IV Section 1 is ambiguous and it is necessary to look at outside factors in determining its meaning, I am not persuaded that the relationship between the Communications/Corrections Association and the County, a relatively new relationship, is the basis for a finding in support of the County's position herein.

The County makes a number of additional arguments to support its position that seniority is based on date of hire by the County, rather than date of hire into the bargaining unit. The County appears to rely on comments made by Union representatives at a meeting in April 2009 convened by Darlene Brunner to discuss the seniority of the Child Support Coordinator, Luann Berger. Ms. Brunner raised the question of how seniority was to be calculated and, according to Ms. Brunner's testimony, Union representatives present agreed with the County's interpretation that the date of hire by the County would be used to determine seniority. However, Ms. Brunner requested a written statement from the Union regarding its interpretation of the language. By e-mail dated July 8, 2009, Business Representative DeLorme advised Ms. Brunner in pertinent part as follows:

In discussing the seniority language with the membership and looking at the plain language itself, the Union's position on this language is as follows:

The Union was established on December 5, 1979. The last sentence of section 1 indicates that employees entering the new Union who were hired prior to January 1, 1980 would retain their seniority for non-union work with the county. Since this sentence included January 1, 1980 (shortly after December 5, 1979), it indicates an exception to the

¹⁰ Interestingly, the agreement with the Communication/Corrections Association makes clear that seniority does not accrue for work performed for the County if it is not bargaining unit work, of duration greater than 24 months.

seniority rule that would normally only include time in the Union. If the first sentence were to include all county time, union or non-union, the last sentence would not be necessary. Therefore, it stands to reason that the language regarding seniority only includes time within the Union. It is a standard in contract interpretation that one must give meaning to all parts of the contract and harmonize them. The last sentence specifically makes an exception to the requirement that seniority is only based on the date entering the Union.

The writing requested by Ms. Brunner at the April 9 meeting clearly contradicts the position that the County contends the Union took at that meeting. Regardless of what was said by Union members and representatives on April 9, a request was made that they provide a written statement regarding the Union's position. The Employer cannot rely on the oral statement that is in clear contradiction to the written position of the Union. The Employer certainly cannot claim that it, in any way, relied on the verbal statement to its detriment. The County did not solidify its position until Ms. Brunner's August 25, 2009 letter regarding this issue. The County's argument that the Union's position at the meeting came across as "firm" does not stand up to a test of reasonable reliance.

The County also argues that past practice does not support the Union's position in this matter. In order for a practice to be a "past practice", there must be a known and accepted way of acting over a long period of time which is mutually understood, recognized and accepted by the parties to the collective bargaining agreement. Here the Union argues that the many years that the County produced seniority lists that reflect its understanding of the definition of seniority until the revised list was produced in 2009, coupled with the negotiated agreement reached regarding Sandy Gunderson in 2004 (seniority commencing in 2005), establish a past practice. In particular, the Union points to the initial 2009 seniority list in support of its position where numerous newly accreted positions were listed with zero seniority.

The Gunderson situation and the initial 2009 seniority list, which was later rescinded and replaced with a list that shows many months of seniority for the accreted positions, do not establish a past practice. Other than the Gunderson accretion¹¹

¹¹ The County appears to argue that there is a difference in the manner in which the Gunderson situation, a voluntary accretion, and the 2009 involuntary accretions should be treated. Nothing could be further from the truth. Whether the parties voluntarily agree to accrete positions into a bargaining unit or the positions are added as a result of a WERC order following a unit clarification proceeding, the bargaining representative and the employer have a duty to bargain the terms and conditions of employment of the accreted positions (persons). Here, all the 2009 accretions were voluntary on the part of the Employer, although some of the employees, notably Berger, were reluctant to become part of the Union. Ms. Berger had previously accrued seniority in this bargaining unit prior to her becoming Interim Child Support Director and, thereafter, Child Support Director. The parties could have entered into a Side Letter regarding Ms. Berger's seniority in lieu of the instant proceeding.

effective in 2005, there were no other individuals accreted to the bargaining unit since the inception of the Union in 1979 until the 2009 accretion. All of the seniority lists prepared by the County from 1980 through 2008 reflected the hire dates of the employees as their seniority date or the bargained seniority date for Gunderson. Except for Gunderson, the hire date into the bargaining unit and the hire by the County were the same date. The initial 2009 seniority list would appear to reflect the County's agreement with the Union's position. The County, however, rescinded that list and, therefore, it cannot really be used to demonstrate that the County agreed with the Union.

There is no binding past practice in support of the Union's interpretation of the contract language. However, the contract language itself, in Article IV Section 1 and Article XVIII Section 4, can only be logically read to support the position of the Union in this matter.

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

AWARD

Yes, the County violated the collective bargaining agreement when it awarded seniority to persons in newly accreted positions based on their date of hire by the County rather than when they entered the bargaining unit.

The County shall re-issue the 2009 and 2010 seniority lists to reflect employee seniority in accordance with the date(s) the accreted employees entered the bargaining unit. All future seniority calculations shall be based on date of hire into the bargaining unit.¹²

Dated at Madison, Wisconsin, this 17th day of May 2010.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

¹² Inasmuch as neither party's statement of the issue asked specifically about Ms. Berger's seniority, that question has not been addressed in this Award. It may be that Ms. Berger's seniority is the sum of that accrued while she was a member of the bargaining unit prior to assuming the position of Interim Child Support director plus time as a bargaining unit member, commencing July 2009 if she has been continuously employed by the County throughout that period.