

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY

and

**SHEBOYGAN COUNTY SOCIAL WORKERS,
LOCAL 437, AFSCME, AFL-CIO**

Case 417
No. 69357
MA-14581

(Bumping Grievance)

Appearances:

Mr. Sam Gieryn, Staff Representative, AFSCME, Wisconsin Council 40, 187 Maple Drive, Plymouth, Wisconsin 53073, on behalf of Local 437.

Mr. Michael J. Collard, Human Resources Director, 508 New York Avenue, Room 336, Sheboygan, Wisconsin 53081, on behalf of the County.

ARBITRATION AWARD

Sheboygan County, hereafter County or Employer, and Sheboygan County Social Workers, Employees Union Local 437, AFSCME, AFL-CIO, hereafter Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising there under. The parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as arbitrator of the instant dispute. The undersigned was so appointed and a hearing, which was not transcribed, was held on January 28, 2010 in Sheboygan, Wisconsin. The record was closed on March 24, 2010, following receipt of the parties' post-hearing written argument. Having considered the record as a whole, the undersigned makes and issues the following Award.

ISSUES

At hearing, the parties were unable to stipulate to a statement of the issues. The Employer proposes the following statement of the issues:

1. Were the Grievant's services terminated through layoff, within the meaning of Article 26 of the collective bargaining agreement?

If this question is answered in the affirmative, a second question will be presented:

2. Did the County reasonably exercise its right to reassign the Grievant to an assignment not of her preference in order to insure continuity in providing services?

The Union proposes the following statement of the issues:

Did the Employer violate Article 26(2) of the collective bargaining agreement when it denied the Grievant's request to bump?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 4
MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the employer.

By way of further enumeration and not as a limitation because of such enumeration, the employer shall have the explicit right to determine the specific hours of employment and the length of the work week and to make such changes in the various details of the employment of the various employees as it, from time to time, deems necessary for the effective and efficient operation of County business.

The right to contract for any work it possesses and to direct its employees to perform such work wherever located is specifically reserved to the employer.

The employees coming under the terms of this Agreement agree that they will provide a diligent work effort during their hours of employment, and that personal matters will not be transacted during working hours. Recognizing the professional nature of their employment, all employees will maintain a personal decorum, dress, and appearance in keeping with this professional status.

The Union agrees that it will, at all times, promote the proper operation of the Health and Human Services Department-Division of Social Services and will make diligent efforts to protect the public interests of Sheboygan County.

Sheboygan County may adopt reasonable and binding rules and amend the same from time to time and the Union agrees to cooperate in the enforcement thereof, and the herein paragraph shall be subject to the provision of the grievance procedure.

...

ARTICLE 25 **JOB POSTING**

Whenever a vacancy occurs in the department for which a member of the Union may be qualified, the department shall post notice of this vacancy in a conspicuous place within the department for a period of five (5) working days before the date the said vacancy is to be filled.

No vacancy shall be filled prior to the expiration of the five (5) day posting period. Each vacancy notice shall state the position, its classification and its salary and/or salary range and any other pertinent information concerning the position including anticipated duration of the position and whether or not it is a full or part-time position.

A member of the Union, if interested in applying for the position, shall make written application to the Division Manager of the Department or the Human Resources Director of the County.

The Division Manager of the Department, after reviewing with the Human Resources Department, the qualifications of the applicants and affirmative action goals of the County, shall have the sole discretion in filling all vacancies. In exercising his/her discretion, however, he/she shall weigh the qualifications of all applicants. In the event that one or more applicants are equally qualified he/she shall be given consideration to the length of the service with the Department in making the determination and filling the vacancy. The Grievance Procedure shall not apply to the decision filling the vacancy, but shall apply to the requirements of the job posting procedures itself.

Newly hired individuals from outside the agency must remain in his/her position for a period of eighteen (18) months prior to posting to a new position. If the employee requests to apply for a vacancy before this time period has passed, management may waive the time limit.

If more than one employee within the Agency applies for any given vacancy and is not the employee chosen for the position, said employee shall be quoted written reasons for not being the employee chosen for the position upon the request of that employee.

ARTICLE 26 **LAYOFF**

Whenever the County determines it is necessary to decrease the work force and to lay off employees, such layoff shall be in inverse order of the employee's "seniority". That is to say, the employee with the least seniority shall be laid off first and the employee with the longest continuous seniority shall be laid off last subject to the following:

1. Seniority: The employer recognizes seniority for layoff purposes. Such seniority shall be calculated from the employee's most recent date of employment with the bargaining unit.

2. Bumping: An employee with permanent status whose services are terminated through layoff has the right to induce layoff consideration (bumping) into another position where the employee in that position has less seniority.

Two (2) representatives from the Local and three representatives of the County will meet to determine the least senior position to be ultimately impacted by the layoff. The employee(s) affected by the layoff will indicate their position preference. Management will review the employee's preference and qualifications and make the final decision regarding overall reassignment within the division(s) to insure continuity in providing services.

The union retains the right to file a grievance if the employee preference is not followed.

3. Temporary Employee: No employee with permanent status shall be laid off from any position while any limited term, emergency or probationary employee is continued in a permanent position of the same class or equivalent class in the agency.

4. Probationary Employee: Employees serving a promotional probationary period in a class affected by layoff shall be restored to their former position if they had been promoted within the agency.

5. Reinstatement: An employee who has been laid off or demoted in lieu of layoff shall be reinstated when a vacancy for which he/she is qualified

occurs in the agency according to the inverse order of the layoff. The appointing authority shall notify each person laid-off that they may establish reinstatement eligibility within two (2) years from the date of the layoff.

A laid-off employee refusing a position of similar work and class from which he/she was laid off or who fails to respond to the agency's offer to reinstatement after being given forty-five (45) days to respond, need not be offered any further reinstatement opportunity by the agency.

6. Notice of Layoff: Affected employees and the Union shall be notified in writing thirty (30) calendar days prior to the effective date of the layoff and such notice shall contain:

- (a) The reason of layoff.
- (b) The effective date of layoff.
- (c) The last day of pay status.
- (d) Time limitation thereof.
- (e) Statement of reinstatement rights.
- (1) Statement of "bumping" rights.
- (g) Statement of appeal rights. (h) Statement of status of fringe benefits, i.e., life insurance, health insurance, etc.
- (i) Classes to be affected and the number of positions to be vacated in each class.

...

BACKGROUND

On or about July 6, 2009, Martin J. Bonk, the County's Manager, Division of Social Services, sent a letter to Social Worker II Tamara Rueger, hereafter Grievant, that includes the following:

...

RE: Transfer of Job Duties

Dear Tammy:

This letter is being written to officially inform you that as of Monday, July 27, 2009, you will be reassigned to the Child Protective Services Unit supervised by Sarah Mueller. As I have told you in several recent discussions, this reassignment is being done to meet the workload demands of the Division. While I realize you are disappointed in this reassignment, I trust you will react responsibly and professionally to this change in job duties.

...

On or about July 6, 2009, the Grievant provided Manager Bonk with a letter that includes the following:

...

Re: Change of Position

On 6-29-09 I was informed that I was to be transferred to a CPS Ongoing unit. Per our contract, I would like to make my formal request to utilize the bumping procedures and bump a worker with less seniority so that I may have his/her position. According to my union representative, this is in agreement with the contract.

Please inform me as to when you would like to meet to discuss this process.

...

On or about July 13, 2009, a grievance was filed alleging that the Grievant "... was reassigned to the CPS Ongoing Unit from the Strive Program. We feel this is a violation of Article 26 of our Labor Agreement. We believe she is entitled to the Bumping Process as there was a decrease in the work force." In a letter dated July 24, 2009, Manager Bonk responded:

...

This letter is being written in response to your grievance of July 13, 2009, in which you believe that Tammy Rueger's reassignment to a social work position in the Child Protective Services Ongoing Unit "is a violation of Article 26 of our Labor Agreement. We (the union) believe she is entitled to the Bumping Process as there was a decrease in the work force."

It is the position of the Department that bumping rights are not available to Tammy under the collective bargaining agreement because her services are not being terminated, and this reassignment is not a "decrease in the work force". Rather, this is a change of her job assignment as a Social Worker within the Division. Therefore, my decision is to deny the grievance.

...

In a letter dated September 11, 2009, Michael J. Collard, the County's Human Resources Director, states:

...

A meeting was held at step 2 of the grievance procedure in this matter on August 28, 2009. In this grievance, the union contends that the County's action in reassigning the Grievant, who had been working with the Strive program, to CPS ongoing work, violated Article 26 of the collective bargaining agreement. In particular, the union contends that the Grievant should have been given bumping rights if the number of positions working with the Strive program had to be reduced.

Article 30 provides:

2. Bumping: An employee with permanent status whose services are terminated through layoff has the right to induce layoff consideration (bumping) into another position where the employee in that position has less seniority.

By its terms, this provision only applies to an employee "whose services are terminated through layoff." That was not the case here. The Grievant's services were not terminated; at all relevant times she has continued to be actively employed in her position as a Social Worker II. Only her assignment has changed, and the collective bargaining agreement does not provide bumping rights in the event of an assignment change.

The grievance is denied.

...

This grievance, which was denied at all steps, was processed to arbitration. At hearing, the parties stipulated that there were no issues of procedural arbitrability.

Union

Tamar Rueger, the Grievant, is a Social Worker with the County. In June of 2009, she held a position in the Juvenile Court Intake "STRIVE" Unit. At that time, the County informed her that they were reducing the number of employees working in the STRIVE unit and, since she had the least seniority of any of the STRIVE workers; she would be reassigned to an open position in the County's Child Protective Services-Ongoing Unit. The Child Protective Services-Ongoing position to which the Grievant was reassigned was an open position that had been posted pursuant to Article 25, but no one had signed for it.

Viewing the elimination of her position as a layoff, she requested to bump into a position in the Child Protective Services-Intake Unit pursuant to Article 26. The Employer told the Grievant that she was not being laid-off, but rather, was being reassigned. When she

asked what would happen if she did not take the reassignment, the Employer implied that she would not have a job.

Article 26, Section 2, provides that employees whose services are terminated through layoff have a right to bump less senior employees. Thus, the Grievant, whose position was eliminated and whose service would have been terminated through layoff, had a right to bump. The Employer does not have the right to transfer employees to avoid bumping rights conferred in Article 26.

The Employer's contention that, in lieu of laying off the Grievant, the Employer can transfer the Grievant, conflicts with the Management Rights clause. This clause is limited to situations involving proper cause. No such cause has been shown in this case.

Within six months of denying the Grievant's request to bump, the Employer allowed bumping for three other employees. All of these bumps were caused by a reduction in the total work force and the elimination of an occupied position.

One must distinguish between a reduction in the "workforce" (which is the number of occupied positions plus the number of open positions the employer intends to fill) and a reduction in "personnel" (which is the actual number of people working). The Grievant's reassignment; Mountain's bump of Weiland-Heyden; and Weiland-Heyden's offer of bumping and eventual reassignment were all caused by a reduction in the total "workforce" and not by the reduction of any actual personnel.

The fact that the Employer, on one prior occasion, may have assigned employees due to reorganization or position elimination is insufficient to establish a binding past practice. To establish a binding past practice as an implied term of contract, the way of operating must be so frequent and regular and repetitious so as to establish a mutual understanding that the way of operating will continue in the future. (Elkouri and Elkouri)

Neither the employees involved, nor the Union, viewed that situation as an actual transfer. Additionally, given that the relied upon practice is in direct contravention of clear contract language, it should not be considered. If considered, it should not be given effect where, as here, the record fails to establish that the parties intended the "practice" to supersede the contract language. (cites omitted)

It is not evident that any employee involved in a prior reassignment complained to the Union or otherwise objected. As Union Grievance Chairman Bugarino testified at hearing, his policy toward these situations was "No harm, no foul," and, thus, it is not likely that a reassignment to an open position would be challenged if the reassigned employee did not complain.

The Employer's argument that the phrase "terminated through layoff" should be literally interpreted ignores the fact that an employee cannot be terminated through layoff if the

employee has bumping rights. Employee Mountain was never terminated, yet was granted bumping rights. For Section 2 to have any effect, there must be a trigger for bumping rights short of actual termination.

The Employer may argue that this trigger is the elimination of a position when there are no open positions to which they can be transferred. Such an interpretation does not square with the Employer's actual practice with Mountain and Weiland-Heyden and creates contradiction and disharmony with other provisions of the contract. The evidence of this practice indicates an Employer intention to administer the provision in a discriminatory and arbitrary manner.

The drafters of the contract language must have intended the real trigger for bumping rights to be the displacement of an employee from their position due to a reduction in the workforce. This was the trigger for employee's Mountain and Weiland-Heyden. Also, given that the Employer is prohibited, under Article 4, from simply transferring employees whose position are set for elimination without proper cause that is the only option available to the Employer.

The evidence indicates that it is not usually the least senior members who receive the layoff or elimination of position notices. Nonetheless, this seems to have been anticipated by the parties in drafting the language, because Sections 1 and 2 of Article 26, which follow the preamble, appear to be perfectly designed to address situations in which someone other than the least senior person is laid off due to a reduction in the workforce.

The Employer's interpretation is inconsistent with prior practice and gives no credit for seniority; permitting an employee to be reassigned without regard to the number of desirable positions occupied by junior employees. The Union's interpretation is consistent with the treatment of employee's Mountain and Weiland-Heyden; creates the least disharmony with other contract provisions; and is consistent with Article 25 and the Article 26 preamble showing intent to honor seniority.

The record evidence does not support the Employer's claim that it considered "continuity of service". The Grievant testified that the Employer had determined that she would be reassigned prior to being informed of her request. The Employer's response to the grievance does not indicate that it ever took her request to bump seriously or considered the impact of this request upon "continuity of service." Evidence submitted by the Union indicates that her assignment to CPS-Ongoing was more disruptive than her request to bump to CPS-Intake.

The Employer did not have proper cause to transfer the Grievant, as required by Article 4. Thus, the Employer's only option was to terminate her services through layoff and allow the Grievant to bump as provided under Article 26, Section 2.

The Grievant, who has become acclimated to her new position, may wish to remain in that position. Therefore, the Grievant should be granted the option of accepting the enforced transfer or exercise the bumping rights which she initially requested. If the Grievant elects to bump to another position, she should be paid for any additional expenses (mileage, etc.) which she may have incurred due to the improper transfer.

County

The crux of this grievance is the desire of the Grievant to bump another social worker out of his or her job in a CPS intake unit in order to avoid a transfer into a CPS ongoing unit; where County management had determined there was a need for an additional social worker.

The threshold question to be answered is whether the Grievant's "services were terminated through layoff" under Article 26, Section 2. If not, the collective bargaining agreement does not afford any bumping right. Under arbitral precedent, bumping rights are not implied. Rather, such rights are created in clear contract language.

The Grievant's services were not terminated in any sense of the term. At all relevant times, the Grievant continued to provide services through her employment as a Social Worker. Although the Grievant believes there was an implied threat that she would lose her job if she refused reassignment, it was nothing more than the possibility of losing one's job that applies to anyone who refuses to carry out his or her work assignments.

Arbitrators have ruled that the term "layoff" must be interpreted to mean any suspension from employment or an actual severance from employment. (Elkouri and Elkouri) These definitions do not apply to the Grievant. The County's conduct in this matter does not indicate that the Grievant's reassignment was a layoff or treated as such.

Most significantly, the grievance does not claim that the Grievant was laid off. Rather, the Union states that the Grievant was reassigned.

Article 26 implies that an additional element of the definition of "layoff" is that it must result from the necessity of decreasing the work force. There was no decrease in the work force associated with the Grievant's transfer to CPS ongoing. The reason for the transfer was simply a management decision about the best allocation of resources. The facts in this case are analogous to a prior decision of the arbitrator and the conclusion should be the same. (cite omitted)

The Union implies that the County may not involuntarily transfer an employee from one assignment to another, but there is no contract language to support this. Rather, Article 4 provides management with the right to transfer. Arbitrators generally require any restriction on the right to transfer to be clearly stated. (Elkouri and Elkouri)

The Union argues that the County must have proper cause to transfer. The phrase “proper cause,” as that term is used in Article 4, is limited to “discharge.” If this were not the case, the County would need proper cause to “hire” or “promote;” which would be ridiculous.

The County’s right to transfer has not been tested in that necessary staffing changes have been accomplished on a voluntary basis or through attrition. A possible exception occurred in 1995 when it seems that the Union agreed to procedures to be followed.

There may not have been a need for an involuntary transfer of a social worker. In addition, the County has never allowed a Social Worker to bump another bargaining unit member in lieu of accepting a transfer.

A practice may have developed under which the County may have an obligation to post a position before transferring an employee. Such a posting requirement, if it exists, is not at issue in this grievance because the Grievant was transferred into a position that had been posted.

Dan Mountain and Bev Hein, who were laid off due to lack of work occasioned by loss of the Community Care contract, were issued layoff letters. The County had lost a contract that required that the workforce be reduced by 4 FTE. Allowing Mountain to bump did not produce additional disruption, but rather, facilitated the best and most efficient allocation of resources. Additionally, given that this grievance indicated that the union had changed its position regarding management’s ability to transfer a worker, the County believed that bumping letters would be the safer course.

These layoff letters, which occurred after this grievance, are not indicative of any understanding regarding a right to transfer. No evidence was submitted regarding any bumping rights given to any employee in the Grievant’s situation prior to this grievance situation.

Under Article 26 provides that in the event of a layoff, management will review the employee’s preference and qualifications and make the final decision regarding overall reassignment within the division to insure continuity of services. Department managers determined that disruption that was necessary to meet service needs. The County reasonably decided not to honor the Grievant’s preference as to position, consistent with its Article 26 rights.

Transfers, discharges and layoffs are not the same and there should be no difficulty in distinguishing the three. The grievance should be denied.

As the Grievant admitted at hearing, she had been offered the opportunity through posting to move into the exact position that she wanted, but she declined this opportunity. If the grievance is granted, there is no reason to give her another opportunity. Thus, any remedy should be solely proscriptive.

DISCUSSION

Issues

The undersigned concludes that the issues presented in the grievance, as filed and processed through the grievance procedure, are most appropriately stated as:

1. Did the County violate Article 26(2) of the collective bargaining agreement when it denied the Grievant's request to bump?
2. If so, what is the appropriate remedy?

Merits

The Union, contrary to the County, argues that the Grievant's position was eliminated and her services were terminated and, thus, the Grievant has an Article 26 right to bump. Under the plain language of Article 26, a layoff occurs when the County determines that it is necessary to decrease the work force and bumping rights are provided to an employee "with permanent status whose services are terminated through layoff..."

The Union would define the term "work force" as the number of occupied positions plus the number of open positions that the employer intends to fill. The term "work force" is more reasonably defined as the total number of existing employees. The total number of existing employees did not change as a result of the County's conduct in moving the Grievant from her Strive position to the vacant position in the Child Protective Services Ongoing Unit.

The Grievant did not experience any separation from County employment. When the Grievant asked what would happen if she did not accept the transfer to the vacant position in Child Protective Services Ongoing Unit, County management implied that she would not have a job. County management reasonably explained that the Grievant would not have a job because the County would have considered the Grievant to refuse to perform her newly assigned work.

The testimony of Martin Bonk, the County's Manager of the Division of Social Services, establishes that budget and program considerations lead County management to conclude that:

- 1) the County needed an employee to perform the work of the vacant position in the Child Protective Services Ongoing Unit;
- 2) that, if the County hired a new employee into that position, then a deteriorating financial situation would make it likely that this new hire would be laid off in the near future;

- 3) that the most efficient use of County resources would be to reassign the Grievant from her position as a Social Worker II in the Strive program to the vacant position in the Child Protective Services Ongoing Unit; and
- 4) that the Grievant's Strive position was not eliminated as a County position and remains unfilled.

It is undisputed that the Grievant was the least senior employee in the Strive program.

Contrary to the argument of the Union, the evidence of the County's conduct does not provide a reasonable basis to conclude that the Grievant's services were terminated through layoff. Rather, the most reasonable conclusion to be drawn from the evidence of the County's conduct is that the County transferred the Grievant from her Strive position to the vacant position in the Child Protective Services Ongoing Unit.

Article 4, Management Rights Reserved, recognizes that the County has the right to "transfer" and "to make such changes in the various details of the employment of the various employees as it, from time to time, deems necessary for the effective and efficient operation of County business." The plain language of Article 4 does not distinguish between voluntary and involuntary transfers.

The Union, contrary to the County, argues that, under the plain language of Article 4, the "transfer" must be "for proper cause." With respect to this issue, the plain language of Article 4 is unclear and ambiguous. Assuming *arguendo* that the Union is correct, the standard of "proper cause" would be met if the County had a legitimate business purpose for effecting the transfer and the transfer did not contravene another provision of the contract.

It is not evident that the County's transfer decision was motivated by any factor other than to use available County resources in the most efficient manner. Thus, the County has a legitimate business purpose for effecting the Grievant's transfer.

Prior to placing the Grievant in the vacant Child Protective Services Ongoing Unit position, the County had posted the vacancy for the requisite five days, as required by Article 25, and no bargaining unit employee had applied for this vacancy. Thus, the County's conduct did not deprive any bargaining unit employee of an opportunity to bid for the vacant position in Child Protective Services Ongoing Unit.

As the County argues, the layoff letters in the "Family Care Unit" situation were issued after the Grievant had been placed in the vacant Child Protective Services Ongoing Unit position. However, as evidenced by Ann Wondergem's email of Monday, April 6, 2009, the County's decision to apply the layoff procedure in the "Family Care Unit" situation predates the Grievant's situation. Thus, the evidence of the parties' conduct in the "Family Care Unit" may be considered when determining whether or not the parties have a "past practice" that is relevant to the determination of the Grievant's contract rights.

In the “Family Care Unit” situation, the County had a contract to provide services. When this contract for services terminated, the work that had been performed by four bargaining employees also terminated.¹ Contrary to the argument of the Union, the Grievant’s situation and the “Family Care Unit” situation are not analogous.

The evidence of the parties’ conduct in the “Family Care Unit” situation does not provide a reasonable basis to conclude that the parties mutually intended Article 26, including the bumping rights afforded therein, to be applied to the Grievant. Nor does such evidence warrant the conclusion that the County has been arbitrary and/or discriminatory in its application of Article’s 26 and/or 4 by applying layoff procedures to the employees affected by the “Family Care Unit” situation, but not to the Grievant.

The Grievant, who was hired from the outside, did not post into her Strive position. Under the Article 25 posting procedures, bargaining unit employees do not have a strict seniority right to bid into a position. Rather, management retains discretion in filling all vacancies. The Article 4 provision that addresses the County’s right to “transfer” does not reference seniority. Notwithstanding any Union argument to the contrary, in transferring the Grievant, the County has not disregarded any of the Grievant’s contractual seniority rights.

Conclusion

In the present case, the County did not determine that it was necessary to decrease the work force and to lay off employees. The Grievant was not laid off within the meaning of Article 26 of the parties’ collective bargaining agreement. Therefore, the Grievant does not have an Article 26 right to bump.

In reassigning the Grievant from her Strive position to the vacant Child Protective Services Ongoing Unit position, the County exercised its Article 4, Management Rights Reserved, to “transfer” the Grievant. As discussed above, the parties disagree as to whether the County must have “proper cause” to “transfer” the Grievant. Inasmuch as the County had a legitimate business purpose for implementing this transfer, *i.e.*, efficient use of County resources, and this transfer does not contravene any provision of the parties’ collective bargaining agreement, the standard of “proper cause” if applicable, has been met.

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

¹ Two of these employees, who job shared, posted into a vacant position prior to the time that the County issued layoff letters. The remaining two employees received lay off letters. One of these employees bumped into an occupied position; the displaced employee then went into a vacant position. The second employee who received a lay off letter did not bump, but rather, retired from County service.

AWARD

1. The County did not violate Article 26(2) of the collective bargaining agreement when it denied the Grievant's request to bump.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 30th day of November, 2010.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator