BEFORE THE ARBITRATOR

In the matter of an Arbitration of a Grievance Between

TAYLOR COUNTY COURTHOUSE & HUMAN SERVICES EMPLOYEES LOCAL 3679 AFSCME, AFL-CIO

and

TAYLOR COUNTY

Case 110
No. 69907
MA-14797

(Furloughs)

Appearances:

John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin 54452, for the labor organization.

John Prentice, Simandl & Prentice, S.C., Attorneys at Law, 20975 Swenson Drive, Suite 250, Waukesha, Wisconsin 53186, for the municipal employer.

ARBITRATION AWARD

Taylor County Courthouse & Human Services Employees Local 3679, AFSCME, AFL-CIO and Taylor County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which county concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to the county's imposition of five days of unpaid leave. The commission designated Stuart D. Levitan as the arbitrator. Hearing in the matter was held in Medford, Wisconsin, on August 17, 2010; a stenographic transcript was not provided. The parties submitted written arguments by October 20, 2010, and waived their right to file replies.

ISSUE

At hearing, the parties stipulated to the following issue: "Did the County violate the collective bargaining agreement when it directed employees to take five furlough days in 2010?

If so, what is the appropriate remedy?" Upon review of the written arguments of the parties, I suggested to the parties that the actual issue before me was, "Did the County violate the collective bargaining agreement by the manner in which it directed employees to take five days of unpaid leave in 2010?" The union agreed to amend the issue; the county did not.

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 4 – MANAGEMENT RIGHTS

All management rights are vested in the county subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to: the direction of the working force; the right to hire, promote, transfer, and assign employees; the right to suspend, demote or otherwise discipline for proper cause; to establish reasonable work rules which are not in conflict with this Agreement; to contract for goods and services; to determine the size and composition of the workforce and the work to be performed by employees; to lay off employees from their duties for lack of work or any other legitimate cause; and to utilize temporary, part-time or seasonal employees when deemed necessary (provided such employees shall not be utilized for the purpose of eliminating full-time positions.) The County reserves the full right to determine what layoffs are necessary and the number of employees to be laid off. The County shall recognize the principle of progressive discipline.

ARTICLE 7 – SENIORITY

Seniority is defined as the length of time an employee has been hired as a regular full-time or regular part-time employee, computed from his/her most recent hiring date.

. . .

ARTICLE 10 – HOURS OF WORK

Section 1. The normal workweek for employees is thirty-five (35) hours, except for part-time employees who are scheduled at less than thirty-five (35) hours per week. Each employee shall be entitled to one hour for lunch. [1]

Section 2. Employees required or given permission to work more than thirty-five (35) hours shall be paid straight-time for hours worked from thirty-five (35) to forty (40) hours, to be paid in cash or compensatory time off at the discretion of the employer, and time and one-half (1-1/2) their regular rate of pay when

[1] Jailers/Dispatchers work a different schedule under Section 4 of this Article.

working over forty (40) hours per week, also to be paid in cash or compensatory time off at the discretion of the employer. Holiday, vacation, and personal days will be considered time worked for overtime purposes. Employees attending authorized, out-of-county training sessions/meetings shall be granted travel time.

. . .

ARTICLE 18 – LAYOFF AND RECALL

The Employer shall have the right to reduce the number of jobs in any classification. Employees whose jobs have been eliminated shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified to perform the junior employee's job. Such junior employees who have lost their positions as a result of a bump shall have the right to exercise their seniority in the same manner as if their jobs had been eliminated. Employees who have lost their positions as a results (sic) of a bump or a reduction in the number of positions shall have the option to accept the layoff and may decline to exercise their bumping rights, if any. Laid off employees shall have recall rights as provided below.

An employee who has been on layoff status for twelve (12) or more months since the date of the last layoff shall lose all seniority rights, privileges, and recall status under this Agreement.

RECALL RIGHTS: The employee(s) with the greatest seniority shall be recalled first, provided they are qualified to perform the available work. Notice of recall shall be sent by the Employer to the laid off employee's last known address, certified mail, return receipt requested, and the laid off employee shall be required to respond affirmatively within ten (10) working days from the date of receipt of the recall notice. A laid-off employee shall have recall rights for a period of twelve (12) months from the date of the most recent layoff.

ORDER OF LAYOFF: In the event a layoff becomes necessary, the Employer shall first solicit volunteers by class grouping, with the most senior given preference. In the event a sufficient number of volunteers is not obtained, layoff shall proceed as follows:

1. All probationary or temporary employees in the affected class group shall be laid off first; then

2. All part-time employees who work less than 600 hours per year shall be laid off next by class group in order of their seniority with the junior employees laid off first; then,

3. Regular full-time and part-time employees in a class group in reverse order of their seniority with the junior employees laid off first.

   BUMPING: Employees so laid off shall have the right to bump any other employee in an equal or lower class with less seniority for which the laid off employee possess the necessary qualifications.

BACKGROUND

Like almost all Wisconsin municipalities, Taylor County has faced significant economic pressures the past few years. Among other structural problems, there have been reductions in state aid and sales tax revenue, an increase in tax delinquencies and foreclosures, and higher costs for state-mandated services, all of which have left it with fewer resources and more problems. In 2009, Taylor County's expenses exceeded its revenues by $406,860, following operating deficits of $246,571 and $267,592 in 2007 and 2008, respectively.

Believing that a unilateral reduction in its personnel costs was an appropriate and necessary strategy to help address its deficit, the county decided to impose unpaid leave, which it called "furlough days," on almost all county employees. [2] In 2009, it mandated that represented and unrepresented employees take three specified days as unpaid furlough days. No grievances were filed, although the bargaining unit of highway employees (AFSCME Local 617) requested of the county that if furlough days were to be imposed in the future, that employees be given the freedom to schedule them, rather than have the days be uniform throughout the county workforce.

The financial projections for 2010 continued to cause concern for county officials, especially as revenues would be cut even further by the unexpectedly early opening of a new jail in Lincoln County, whose inmates Taylor County had been housing. According to Taylor County Finance Director Larry Brandl, the county faced an even greater operating deficit, of about $700,000. Its general fund balance on Dec. 31, 2009 was $2,825,626, down from $3,746,649 at the close of 2006. A little less than half of this fund balance was designated and/or reserved for various capital projects or to comply with state and/or federal mandates, leaving about $1.4 million unallocated.

The county decided to impose additional, greater unpaid leave for 2010, but acceded to Local 617's request that the workers be given the opportunity to schedule their own days off, rather than have standard days be set county-wide. This method also provided better service to anyone doing business with Taylor County government, because it meant there wouldn't be

[2] The county's terminology is consistent with federal regulations, which define furlough as,"the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons." 5 CFR 752.402

any days on which county government would be entirely closed. AFSCME Local 3679 did not express a position on the scheduling process.

On December 17, 2009, Taylor County Human Resource Manager Marie Koerner issued the following memo:

To: All Taylor County Employees

Re: 2010 Furlough Days

The Taylor County Board of Supervisors has approved the 2010 Budget with the plan for all employees to take five furlough days in 2010. The Personnel Committee has approved the following furlough day schedule and stipulations with it.

HOURLY EMPLOYEES

- All hourly employees will take five furlough days in 2010. (Highway Department employees will take four 10 hr. days off.)
- Hourly employees are required to take furlough days in full day increments.
- Hourly employees are allowed to take all five furlough days on a random basis with the approval of his/her supervisor.
- Hourly employees can only take one furlough day per pay period, but can take more than one furlough day in an eight-week period. Employees shall take at least:

	Eight-Week Periods:
The 1st day between	January 3 – February 27
The 2nd day between	February 28 – April 24
The 3rd day between	April 25 – June 19
The 4th day between	June 20 – August 14
The 5th day between	August 15 – October 9

- All furlough days must be taken by October 9, 2010.
- When you take a furlough day, please indicate "UP" in the regular hour's column of your time sheet.

Local 3679 was not involved in the development or approval of this policy. [3] The practical affect of this memo, the parties stipulated, was that on any given day a more senior employee might be on furlough while a less senior employee was at work. The memo, and the furloughs, did not apply to the Correctional Officers and 911 Telecommunicators in the Sheriff's Department, also represented by Local 3679. [4]

On January 5, 2010, Local 3679 President Kevin Mayer filed the following grievance:

> (Circumstances of Fact):
> On December 18, 2009, Union President Mayer received a letter from Human Resource Manager Koener indicating Taylor County would furlough employees five days in 2010.
>
> (Article or Section of contract which was violated if any):
> Article 4 – Management Rights; Article 7 – Seniority
> Article 10 – Hours of Work; Article 18 0- Layoff and Recall
> And any other applicable Article of the CBA
>
> (Request for Settlement):
> Cease + desist directive for furlough days in 2010. Make employees whole for lost wages + benefits.

The grievance was properly processed through the process specified in the collective bargaining agreement and advanced to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

> Furloughs are layoffs, not a reduction in hours; this is an attempt by the County to bypass the layoff provisions in the collective bargaining agreement, which was carefully crafted by the parties as work preservation clause for senior employees. There is no question that the county's actions were a layoff, as the employment relationship was severed, employees not paid, and their benefits reduced. The management rights clause of the agreement does not distinguish between temporary and permanent layoff. Characterizing furloughs as reductions in hours renders the layoff and bumping language in the agreement meaningless and violates the spirit of job security for senior employees agreed to by the parties.

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[3] Nor was Local 617.

[4] Local 3679 has not based any of its challenge to the furlough plan on the fact that it exempted these public safety workers.

Reading the agreement in its entirety demonstrates that the county violated the contract by the manner in which the layoffs were implemented. The county has the right to layoff but such layoffs must be done by the elimination of jobs or positions, but that is certainly not how the county implemented the five layoff days in 2010. And even if the county did have the right to lay off employees by furloughs, the contract was still violated when junior employees were working while a senior employee was laid off.

Arbitral authority supports the position that the county's actions here constituted a layoff; as such, the layoff language must be enforced. Yet the county failed to allow senior employees to bump, in violation of the collective bargaining agreement, which the parties carefully crafted to give full force and effect to all its provisions – including those allowing senior employees the right to maintain full employment by bumping junior employees.

The county argues that the way in which it implemented the layoffs enabled all employees to share the pain equally, and that this method avoided the major workforce unrest which would have resulted had the county laid off by positions or jobs. But Arbitrator Bellman has already rejected this type of argument. The county has a contractual obligation to layoff by positions or jobs even for brief periods; whether or not this would lead to some workplace difficulties is immaterial to this dispute. The parties agreed to seniority as a method of work preservation, and that intent must be honored no matter how disruptive.

The county's layoff created a permanent reduction in benefits for employees retiring, resigning or dying within the next three years. It has improperly modified employee benefits by the use of furloughs. The layoff violates the collective bargaining agreement in so much as the benefit reduction is permanent.

Further, the county's claim that the layoff was legitimate is dubious. The county had enough in its general fund balance that it could have applied to make up the alleged budget shortfall and eliminate the need for furlough/layoffs.

The grievance should be granted and the county ordered to make whole those employees affected by its violation of the collective bargaining agreement.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

Taylor County clearly had the right under the management rights provisions to require bargaining unit employees to take five unpaid furlough days. Contrary to the union argument, there was no layoff involved, but rather a temporary, sporadic reduction in employees' hours of work. Also, the specific language of

the layoff clause strongly suggests that its terms are applicable only to permanent or indefinite reduction or elimination of positions. Most arbitrators reject the union theory that a reduction in hours is the functional equivalent of a layoff and thus should be treated the same. Instead, most arbitrators have held that a layoff requires an actual severance or break in service to trigger bumping or other seniority provisions.

The fact that employees have a regular workweek of 35 hours does not constitute guaranteed hours of work or restrict the county's ability to unilaterally reduce the hours of work. Absent specific language that the number of hours is guaranteed, provisions for "normal" or "regular" hours of work do not guarantee such hours.

The layoff provisions of Article 18 provide employees with a relative claim to available work. However, Article 18 is only violated if the County lays off employees by some standard other than one specified therein when eliminating or reducing bargaining unit positions. That language is obviously applicable only to permanent or indefinite reduction of hours or elimination of positions. No positions were eliminated or reduced here; in fact, it was the County's intent not to do so. Arbitrators have almost universally held that in the absence of an actual severance or break in service, employers may reduce hours or work as long as such reduction does not favor junior employees over more senior ones. Provisions for layoff by seniority do not automatically require employers to resort to layoffs in periods of slack demand; in the absence of contractual language, management's discretion to schedule work and assign the workforce is fettered only by a requirement that it be exercised reasonably.

Because there is no explicit contractual restriction to management's right to temporarily and sporadically reduce the hours of work for all unit members; the reductions were based upon sound business and policy reasons; the reductions were not implemented for an indefinite period of time, did not sever the employment relationship and therefore did not constitute layoffs; and the reductions applied equally to all bargaining unit members, the grievance should be denied.

DISCUSSION

This grievance determines whether Taylor County was within its rights under the collective bargaining agreement to impose on AFSCME Local 3679 the 2010 furlough plan described in the December 17, 2009 letter from Human Resources Manager Koerner. The county contends it was; the union asserts the action violated one or more provisions of the agreement, especially Articles 4 and 18.

Under Article 4, the county has both the right to "determine the size and composition of the workforce and the work to be performed by employees," as well as the right "to lay off employees from their duties for lack of work or any other legitimate cause." When the county exercises its "full right to determine what layoffs are necessary and the number of employees to be laid off," Article 18 empowers it to "reduce the number of jobs in any classification," provided that "employees whose jobs have been eliminated shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified to perform the junior employee's job."

This is not the employer's first grievance over short, fixed-term layoffs. In 1983, having agreed to a wage increase that it had not budgeted for, the county directed all department heads to "take necessary steps to reduce the impact of the raises granted." That August, the Finance and Personnel Committee directed all department heads to save half of the raise granted, "either by direct layoff or by all employees affected by the raise taking voluntary time off without pay (equivalent to 50% of their respective increases.)" The Highway Commissioner's effort to get employees to take time off voluntarily was not entirely successful, so in October he notified the workforce that starting on November 4 "and each payday Friday until further notice, all operations of this department will be closed down." [5]

AFSCME Local 617 grieved, arguing that the county violated the contractual provisions for a regular work week and for layoff by seniority. [6] According to the award, the union contended that seniority was "undermined if the Employer can unilaterally determine that 'everyone is to be on layoff at the same time,' and that a 'regular' workweek provision is reduced to uselessness if the Employer is free to revise it for any or all employees at any time."

WERC Arbitrator Christopher Honeyman, while expressing concern that the commissioner's reference to "each payday Friday" may have betrayed an improper anti-union animus, rejected both arguments. He found first that "the phrase 'regular' workweek … implies that there may upon occasion be irregular or abnormal workweeks," either through mandatory overtime, layoffs or other changes. Part of the award is worth quoting in full:

> The contract language present here, in providing seniority protection for layoffs together with a normal or regular workweek provision, is similar to many industrial agreements. But in industry it is common for substantial seniority protection to co-exist with occasional shutdowns of departments or entire plants, and such language is not violated by these practices here any more than in industry, even though in the public sector such actions may come to the Union as an unwelcome novelty. Not only, however, is there no violation of the principle of seniority when all employees are laid off on the same day, but

[5] Because the need to prepare for winter weather made continuing shutdowns undesirable for the employer, the department was only closed on Nov. 4 and 18.
[6] The union, county and arbitrator all used the term lay-off.

> Article I, Section 3, of this Agreement specifically notes that employees may be laid off in any numbers at management's discretion. The function of the seniority clause in this connection is that when employees are laid off in fewer than department-wide numbers, seniority shall govern the selection, with stated exceptions. This is therefore a different situation from the "work sharing" case, argued by the Union to be similar. In that case, the employees were assigned to take rotating time off, which resulted in days when senior employees were laid off while junior employees were working. TAYLOR COUNTY (HIGHWAY), No. 33053 (Honeyman, 8/1984).

The union cites this award in support of its case, noting the reference above to there not being a violation "when all employees are laid off on the same day," and the distinction the arbitrator drew with the so-called "work sharing" case. The aspect of "fewer than department-wide numbers" is not an issue in the matter before me, in that the union is not claiming any violation due to the public safety employees not being affected by the "furlough" plan.

The union has cited several other awards in support of its argument, especially DANE COUNTY (5/20/83, Bellman), in which the layoff language of the collective bargaining agreement was substantially equivalent to that before me. In that case, the distinguished Arbitrator (and former WERC Commissioner) Howard Bellman found that Dane County violated the collective bargaining agreement by denying bumping rights when it imposed one-week layoffs in various departments. Bellman explicitly rejected the County's stated interpretation of the labor agreements "that bumping is not permissible for layoffs of less than two workweeks duration." However, Bellman also found there was "no evidence of bumping where positions were not actually eliminated...." Overall, I am not entirely sure how directly applicable this award is to the controversy before me. [7]

In LINCOLN COUNTY (COURTHOUSE), No. 37514 (Honeyman, 3/1987) the county laid off "11 or 12 employees ... for periods varying from 1 to 12 days," resulting in there being days "on which senior employees were laid off while junior employees in the same department were working." The arbitrator, determining that the collective bargaining agreement applied to temporary as well as permanent reductions in force, found that this violated the "fixed procedure for laying off employees," because there were "several occasions" on which "junior employees were retained at work while senior employees were laid off." While this analysis obviously provides strong support for the union, there is a significant factual distinction between the two controversies. In LINCOLN COUNTY, the employees were laid off "for periods varying from 1 to 12 days," with the reasons for such a range, and how it was applied, not reflected in the award. That is, under the facts as stated in the award, a senior employee might have been off for 12 days while a junior employee, whose job the more senior employee was qualified to perform, was only off for one. In the matter before me, however, all employees

[7] I should disclose to the parties that I was a member of the Dane County Board of Supervisors from April, 1982 to September, 1987, when I resigned to accept my current position with the WERC, and was in office when the 1981-1983 agreement was executed in July, 1982. However, I took no part in the negotiations other than voting for ratification, and thus I do not believe this affects my analysis of the Bellman Award.

were off for the same number of days (five). LINCOLN COUNTY (COURTHOUSE) thus provides some support for the union in the instant matter, but is far from convincing.

The union also relies in part on WAYNE STATE UNIVERSITY, 76 LA 368 (Cole, 1981), in which the arbitrator found the university's imposition of ten random furlough days ("Days Without Pay Program") to be a layoff. While the union is correct that there are obvious similarities between that case and the one before me, there are some important distinctions. First, a reduction in a university employee's work hours in a week appears to have had implications for an employee's status as full or part time; there are no such considerations in the matter before me. Also, the arbitrator took account of a unique aspect of the parties' history which is not here replicated – namely, that the university had several years prior to its imposition of the furloughs *asked* the union to accept such a plan, but dropped it when the union did not agree. As the arbitrator reasoned:

> The approach taken by the University in 1975 amounted to a clear and open concession that the collective bargaining contracts in these bargaining units barred unilateral institution of a days off without pay program such as the one at issue in the instant grievances. Against that background …the University is hardly in good position now to claim contractual freedom to institute the here disputed Days Without Pay Program in these bargaining units.

Accordingly, while WAYNE STATE UNIVERSITY is helpful to the union's position, these significant distinctions make it less than completely persuasive.

The union asserts that there "can be no question in the instant dispute that the actions of the County should be characterized as a layoff." To the contrary – there is indeed a question on that point. As noted above, the personnel transaction certainly meets the federal definition of a "furlough."

The introductory paragraphs of Article 18 are as follows:

> The Employer shall have the right to reduce the number of jobs in any classification. Employees whose jobs have been eliminated shall have the right to bump any junior employee in an equal or lower classification, provided they are qualified to perform the junior employee's job. Such junior employees who have lost their positions as a result of a bump shall have the right to exercise their seniority in the same manner as if their jobs had been eliminated. Employees who have lost their positions as a results (sic) of a bump or a reduction in the number of positions shall have the option to accept the layoff and may decline to exercise their bumping rights, if any. Laid off employees shall have recall rights as provided below.
>
> An employee who has been on layoff status for twelve (12) or more months since the date of the last layoff shall lose all seniority rights, privileges, and recall status under this Agreement.

The defining event of a layoff, therefore, is that the county "reduce the number of jobs in any classification," resulting in employees "who have lost their positions." The labor agreement does not provide further insight into how much a position must be reduced, or how long the employee's loss must last, for there to be a layoff.

The dispute over whether the layoff language applies to so-called "partial layoffs" (reductions in hours) is a "common but nonetheless thorny one under collective bargaining agreements, yielding highly idiosyncratic results based upon nuances of language in the layoff clauses, prior practices of the parties, and the extent to which important benefits, such as seniority and access to health insurance, are affected." SCHOOL DISTRICT OF KETTLE MORAINE, Dec. No. 30904-D (WERC, 4/2007). A review of arbitration authorities reveals that, "where the contract language is not clear on its face, arbitrators tend to decide the issue in an equitable manner that permits the employer to meet its reasonable needs while at the same time preserving significant benefits that the employees reasonably expect." See Elkouri & Elkouri, *How Arbitration Works* (6TH ED. BNA, 2003) at 723-279, and 785-86; BORNSTEIN, GOSLINE, AND GREENBAUM (Matthew Bender, 2006) at Sec. 29.05; AMPCO-PITTSURGH CORP., 80 LA 472 (Briggs, 1982), cited in SCHOOL DISTRICT OF KETTLE MORAINE.

In CALIFORNIA OFFSET PRINTERS, 96 LA 117 (Kaufman, 1990), it was held that the cancellation of a single shift for one employee constituted a layoff. The arbitrator quoted with apparent approval this analysis by a former president of the National Academy of Arbitrators:

> Technically speaking, it seems inescapable that at any time employees are relieved of duty for lack of work, they are laid off and a reduction in the working force is effected, albeit the layoff or reduction in force … may be short-lived and extremely temporary. AMERICAN IRON & MACHINE WORKS CO., 32 LA 345, 348 (Abernathy, 1959).

But in OSCAR MAYER & CO, 75 LA 755 (Eischen, 1980) the arbitrator held that the reduction of the grievant's work schedule from 40 hours per week to 24 did not constitute a layoff. "The weight of authority and the better reasoned cases on this point," he explained, "have all required a severance of employment status, whether of short or indefinite duration, to apply seniority provisions governing layoffs." He cited with approval the summary given in J. R. SIMPLOT CO. 68 LA 1167,1169 (Flagler, 1977) that "a layoff necessarily involves a 'severance,' a 'suspension' of employment, a 'termination,' either temporary or indefinite of the employment status of the employee. Because seniority provisions are "concerned solely with the attainment, retention or loss of an employee's *status* as such," employees who were scheduled to work fewer hours were not laid off because their employment status was not affected.

The union quotes at length from A. HOEN & CO., 64 LA 197 (Feldesman, 1975), in which the arbitrator found the company's decision to reduce the five-day work week, instead of resorting to the lay off procedure, violated the collective bargaining agreement. However, it is important to note three critical differences between the HOEN case and the current controversy.

First, the collective bargaining agreement at issue in HOEN did not contain a management rights clause empowering the company the exclusive right to manage the plant and direct/schedule the work force. As one of the giants of labor jurisprudence has noted, "even a vague management-functions clause" provides guidance on the extent of the employer's authority. Archibald Cox, *Reflections on Arbitration in Light of the Lincoln Mills Case*, ARBITRATION AND THE LAW, BNA Books, 1959, pp. 24-67, at 52. [8] Second, past practice showed that the company had reduced the work week on two occasions in 1969, but had then promised the union it would not do so again. Finally, the evidence established that the only reason the company chose to reduce the work week rather than undertake formal layoffs is that doing so would result in greater savings through ancillary efficiencies, which the arbitrator found tantamount to an intentional evasion of the layoff procedure. Accordingly, HOEN is helpful to the union, but again not persuasive.

In its brief, the union states that the "employment relationship was severed" by the five irregular days of involuntary unpaid leave. I do not believe that to be the case. The employees were still employees; they were simply – and temporarily – put into an unpaid status.

The second paragraph of Article 18 *does* establish how the employment relationship is severed: "An employee who has been on layoff status for twelve (12) or more months since the date of the last layoff shall lose all seniority rights, privileges, and recall status under this Agreement." *That* is what severing the employment relationship means. Because they only had five furlough days, the workers were never subject to the possibility of losing their seniority right and privileges. The fact that this fundamental aspect of the layoff clause could never apply to this situation raises serious questions whether this situation was covered by the layoff clause at all.

Article 4 enumerates the county's "right … to determine the size and composition of the workforce and the work to be performed by employees" as a multi-faceted right distinct and apart from its separately enumerated layoff rights. It thus must mean something other than imposing layoffs, defined by Article 18 as reduction in "the number of jobs," leaving employees "whose jobs have been eliminated."

Article 10, Section 1, establishes that the "normal workweek" for full-time Local 3679 employees affected by the furlough plan is thirty-five hours. That is not a guarantee – that is a statement of what is "normal." Defining a 35-hour workweek as "normal" necessarily implies that, on occasion, a workweek will be other than 35 hours. [9] The word "normal" in this context is coterminous with the word "regular," which "has almost universally been held not to guarantee the hours set forth in the defined week," so that "some variation is tolerated." JACKSON COUNTY, No. 62559, Dec. 6808 (Houlihan, 3/2005), where it was held that a

[8] Of course, it is also well established that general references to an employer's rights to set hours and schedules, determine the size of the work force, and allocate and assign work, do not overcome specific contractual provisions that limit those general prerogatives. CITY OF EAU CLAIRE, DEC. NO. 29346-C (WERC, 12/02).

[9] Section 2 details what happens when an employee works *more* than 35 hours in a week.

"single incident, involving a three-day variation," did not violate "either the spirit or the intent of the Article." See also, TAYLOR COUNTY (HIGHWAY), No. 33053 (Honeyman, 8/1984).

Ultimately, though, determining if the employer's action constituted a furlough or a layoff may only be a secondary issue, subordinate to the question of whether the county did or did not violate the principle of seniority.

As the union correctly summarizes, the "spirit and intent" of the layoff language is to provide "job security for senior employees." Job security does not mean senior employees are totally immune from having their positions eliminated or their hours reduced; it only means that if their positions are eliminated, or the hours of their position are reduced before those of junior employees, or their hours are reduced by a greater amount than junior employees, that they have the right to bump into any junior employee's position for which they are qualified.

The senior employees here did not have their hours reduced prior to those of junior employees, nor did any senior employee suffer a greater loss of hours than any junior employee. All employees were notified on the same date of the reduction in hours, all had the same reduction in hours, and all had the same time-frame for the reduction. As the union acknowledges in its brief, "no one employee was financially harmed more than another." The fact that a senior employee may have chosen to take unpaid leave on a day when a junior employee was still at work was only a matter of scheduling, which itself was under the control of each individual employee. That they all had the same number of days of unpaid leave was more important than when they all took their days off. Even if the "furlough days" were considered partial layoffs, the county did not violate the spirit or practice of seniority.

There are two situations in which the 2010 Furlough Plan would have violated the agreement. One is if a senior employee were denied her or his choice of a day on which to take leave because a junior employee had already scheduled that as a furlough day. The other is if a senior employee affected by the plan were qualified to perform the correctional officer or dispatcher job of a junior employee, but not allowed to do so. However, there is nothing in the record to indicate either situation ever arose.

The union declares that the reduction in the work force, whether called furlough or layoff, was not justified because the county's claim of economic necessity was "dubious." The union is correct that the county had enough money in its general fund to avoid the reductions, and that it could have cut back elsewhere, raised taxes (to the extent allowed under levy limits) or simply accepted a lower general fund balance. But the management of the county's affairs is entrusted exclusively to the county, subject only to the terms of the labor agreement and applicable law. A determination how to address elemental budgeting pressures – whether to subject the citizenry to a lower level of public service, raise taxes, or accept a lower general fund balance – is a basic public policy choice that is reserved for the elected officials. Here, the Taylor County Board of Supervisors, on recommendation of its professional staff, determined that it could not responsibly cut further into its General Fund balance, and that their constituents would rather accept a lower level of service (inherent in cutting the number

of hours worked) than pay higher taxes (to the extent allowable under the state-imposed levy limits). Given the steady decline of the Taylor County General Fund balance, the streak of deficit spending, and the current external financial and political realities, I cannot find the county acted in an illegitimate or unreasonable manner by the policy choice it made.

Having made the public policy choice that it should and would reduce personnel costs, the county next had to determine how to do so. The county could not reduce the hourly wage rates, because they were set by the collective bargaining agreement. So it looked to cut the number of hours worked.

The county had several options. It could have amended the budget and personnel lists to formally remove one, or a handful, of positions. It could have reduced the number of hours for a small group of positions for an extended, but not permanent, period of time. Either of those actions would have constituted a layoff, thus requiring compliance with Article 18. Or it could have reduced the hours of all positions for a shorter period of time. The union appears in its brief to argue that the county's only choice in implementing layoffs is the full elimination of jobs or positions, and that it cannot reduce the work schedule of all employees. I do not agree the language of the collective bargaining agreement supports that conclusion.

Based on the language of Articles 4 and 18, and a review of relevant precedent, I believe there is such a thing as a "furlough" which is different from a "layoff." The two critical factors in differentiating these two personnel transactions are the percentage of employees affected and the length of time off. Furloughs are short and have broad applicability; layoffs are long are have narrow applicability. Reducing the number of hours of an employee group smaller than the entire bargaining unit permanently, or for an extended period of time, constitutes a layoff or partial layoff requiring compliance with Article 18. But a limited reduction in the number of hours of the entire bargaining unit reflects the county's right to determine the size and composition of the workforce and the work to be performed, and thus constitutes a furlough under Article 4. [10]

But even under Article 4, the county does not have fully unfettered discretion in the terms of the furlough. Its manner of scheduling the five unpaid days must still conform to applicable law, not violate seniority, and be within the general standard of reasonableness.

I have already noted how the county's plan did not violate seniority. The plan -- at least one leave day (up to four) every eight weeks, no more than one leave day per pay period, with all days taken by October 9 – also satisfies the standard of reasonableness. This matrix offers the employee great flexibility, allowing leave to be taken any time from deep winter to early fall, and on any day of the week. The requirement that the unpaid leave be taken in full day increments helped the county in its legitimate need to properly plan for and administer

[10] Again, it is important to note the union does not challenge the fact that the Sheriff's Department employees which it represents were not affected by the "furlough" plan, or allege that there were more senior employees who were affected who were qualified to perform the tasks of employees who were not so affected. For the purposes of this discussion, it is as though the entire bargaining unit was affected by the "furlough" plan.

compliance; the county could have chosen to offer other timing options, but was not required to do so.

It is an unfortunate, but unavoidable, irony that this grievance arose because Taylor County was *too* accommodating to its workers in how the unpaid leaves were scheduled. As noted above, there were no grievances when the county imposed three county-wide furlough days in 2009; however, AFSCME Local 617 asked that if future furloughs were to be forthcoming that the employees be allowed to schedule them to meet their own personal arrangements. The county agreed. And yet it is that greater flexibility, by creating the situation wherein a senior employee might be off on a day a junior employee is on, that has generated this grievance.

I do not mean to minimize the impact on the employees represented by Local 3679, whose members suffered a pay cut of about 2%, plus a potential cut to their retirement benefits.[11]. And just as local and state governments are undergoing financial pressures, so too are their employees; cutting its own employees' wages will not help generate additional sales tax revenue in Taylor County, improve the local economy, or reduce the number of foreclosures and tax delinquencies. So I do not herein decide whether the county *was* right to impose on Local 3679 the five further furlough days in 2010; I only consider whether it *had* the right to do so. It did.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 18th day of January, 2011.

Stuart D. Levitan /s/
Stuart D. Levitan, Arbitrator

[11] There was also a pay cut and potential loss of retirement benefits from the 2009 furlough, which the union did not grieve.

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