

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

**SHEBOYGAN COUNTY HIGHWAY DEPARTMENT EMPLOYEES,
LOCAL 1749, AFSCME, AFL-CIO**

and

SHEBOYGAN COUNTY

Case 429
No. 70239
MA-14917

Case 430
No. 70240
MA-14918

Appearances:

Mr. Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, on behalf of the Union.

Mr. Michael J. Collard, Sheboygan County Human Resources Director, 508 New York Avenue, Sheboygan, Wisconsin 53081-4692, on behalf of the County.

ARBITRATION AWARD

Sheboygan County Highway Employees, Local 1749, AFSCME, AFL-CIO (herein the Union) and Sheboygan County (herein the County) have been parties to a collective bargaining relationship for many years. At all time pertinent hereto there was a collective bargaining agreement in effect dated February 17, 2010, which covered the time period from January 1, 2009 until December 31, 2010 and which provided for binding arbitration of grievances. On October 12, 2010, the Union filed requests with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over two alleged violations of the collective bargaining agreement arising from the County's laying off of five members of the bargaining unit, while retaining the Bookkeeper, who was the least senior member of the unit, and by not permitting the more senior employees to bump into the Bookkeeper's position. The undersigned was appointed to hear the dispute, the grievances were consolidated for hearing

and a hearing was conducted on November 30, 2010. The proceedings were not transcribed. The parties filed briefs by December 18, 2010 and reply briefs by January 7, 2011, whereupon the record was closed.

ISSUES

The parties stipulated to a statement of the issues, as follows:

Did the Employer violate the collective bargaining agreement when it failed to layoff the Bookkeeper while laying off more senior bargaining unit members?

If so, what is the appropriate remedy?

If not, did the Employer violate the collective bargaining agreement when it refused to allow more senior laid off employees to bump the Bookkeeper?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 3

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. If any action taken by the Employer is proven not to be justified the employees shall receive all wages and benefits due him [sic] for such period of time involved in the matter.

...

ARTICLE 4

RECOGNITION AND BARGAINING UNIT

The employer recognizes the Union as the exclusive bargaining agent for all Sheboygan Highway department employees, (but excluding the highway commissioner, patrol superintendent, shop superintendent, monthly salaried supervisors and temporary seasonal employees) as certified by the Wisconsin Employment Relations Board (dated January 27, 1966).

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ARTICLE 27

SENIORITY

It shall be the policy of the department to recognize seniority.

- (a) Lay-Offs: If a reduction of employee personnel is necessary the last person hired shall be the first person laid off and the last person laid off shall be the first person recalled.

BACKGROUND

Sheboygan County has a collective bargaining relationship with its Highway Department employees, except those excluded by the recognition clause in the parties' contract. The unit, therefore includes employees in multiple classifications, including not only the employees who perform the various functions involved in the construction and maintenance of the County's highways and parks, but also the Department's office and clerical employees. The contract provides a procedure for the layoff of employees, set forth in Article 27, but prior to the events set forth herein there had been no known layoffs of Department employees. Further, much of the revenue supporting the Department's budget is derived from contracts the County negotiates with cities, villages and townships for snow removal, road construction, grass cutting, etc.

In the first six months of 2010, the Department experienced a shortfall in anticipated revenue of approximately \$400,000. This was largely the result of municipalities not contracting for Department services due to their own budget constraints. Thus, the Department was also faced with a reduction of available work. As a result, the County Highway Commissioner, Greg Schnell, determined that it was necessary to institute layoffs. Accordingly, in July 2010 he laid off five employees – Shannon Lukens, Charles Lulloff, Paul Holzwart, Matthew Lohr and Jeremy Tetzlaff, who were the five least senior road employees. Schnell did not lay off the Department Bookkeeper, Tracy Gordon, however, even though she was the least senior employee in the Department.

On July 19, 2010, the Union filed a grievance over the layoffs, asserting that the lay off of the five employees, while continuing to employ the least senior employee, was a violation of the contract. The grievance was denied on the basis of the County's management rights which, it asserted, allowed it to lay off employees by classification based on its determination of its workforce needs. The County further maintained that the five road employees would have been laid off in any event, so laying off the Bookkeeper, as well, would have served no useful purpose.

In August 2010, in response to the grievance denials, two of the laid off employees, Jeremy Tetzlaff and Matthew Lohr, made requests to the Commissioner to bump Gordon based on their seniority rights. These requests were denied on the basis that the contract does not provide bumping rights to laid off employees. Accordingly, on August 31, 2010, the Union filed a second grievance claiming an additional contract violation for the County's refusal to allow Tetzlaff and Lohr to bump into the Bookkeeper's position. These grievances were also denied on the same basis as the denial of the original requests. Additionally, the County asserted that a previous reference to bumping in 1982 by a displaced employee was not relevant to the current situation. The grievances were processed through the contractual procedure and consolidated for arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that by laying off bargaining unit members out of order of seniority, the County clearly violated Article 27, Section (a) of the contract. The preamble to Article 27 states that the policy of the Department is to recognize seniority. Section 2 (a) states that, if layoffs become necessary, the last person hired shall be the first laid off, and so on. This is a "strict seniority" clause, which requires the employer to honor seniority in making layoff decisions without regard to other considerations. Nothing in the bargaining history or past practice of the parties suggests any other interpretation of this language. The seniority rights provided under Article 27 are, likewise, unit wide and nothing in the practice or history suggests that the language was ever intended to be applied according to classifications, or any other subdivision of the unit. By failing to lay off the least senior person in the unit before more senior employees, therefore, the County violated the contract.

The County may assert that applying strict seniority interferes with its managerial discretion and creates inefficiencies in Department operations. The Union does not deny this possibility, but asserts that the specific language of the seniority clause must take precedence over the general grant of authority contained in the management rights clause. Moreover, whatever the negative effects of the seniority language, this was the language the parties agreed to and it should be applied according to its terms. It is also not the case that the County had no other options. It could have chosen to forgo the layoffs and find economies elsewhere. The record also shows that there are other employees who are capable of doing the Bookkeeper's work. Thus, the hardship of having to lay off the Bookkeeper was not as great as claimed.

In the alternative, the Union asserts that, if the County has the right to lay off employees outside the order of seniority, then there is an implied right of bumping, which allows more senior employees to bump into positions of more junior employees for which they are qualified. The parties recognized this in 1982 when a displaced employee whose position had been eliminated was permitted to bump a more junior employee in another position. At

hearing, the County attempted to show that the two employees who requested the right to bump were not qualified for the Bookkeeper's job. The County's denial of the requests, however, was not based on qualifications, but on its position that there are no bumping rights. If the arbitrator accepts the argument that strict seniority does not apply, then he should conclude that more senior laid off employees have the right to bump. At that point, it would be appropriate to inquire into necessary qualifications.

The County

The County points out that the language of Article 27, Sec. 2(a) requires the layoff of the last person hired, not the last person to join the bargaining unit. It also asserts that the phrase, "If a reduction of employee personnel is necessary," implies that the County has authority to determine which classifications of employees are to be laid off and to then apply seniority within that classification in determining who is to be laid off. The Union assumes that the most junior member of the bargaining unit is to be laid off, but the language is capable of multiple interpretations. Taken in its most literal sense, the Bookkeeper, Tracy Gordon, was hired by the County in 2004, whereas the most senior of the laid off employees was only hired in 2007, making her more senior than any of them. Her transfer into the bargaining unit in 2008 did not technically constitute a hire. The County's position is further supported by the fact that her original date of hire is used for purposes of longevity pay and the establishment of her pay rate. Sec. 2(a) is ambiguous, but the interpretation most consistent with the actual language is that it applies only in areas where a layoff is necessary, and that the "hire" date is the date the employee was first hired by the County.

Interpreting the language in such a way as to require the layoff of an essential position would lead to an absurd and unreasonable result. The evidence shows that the Bookkeeper position is essential to the efficient operation of the Department. It is a unique position in the unit and requires special qualifications. Anyone new to the position would require months to master the job, so the loss of the Bookkeeper would cause a severe disruption to the Department's operations. The Union specifically agreed "at all times, as far as it has within its powers, to further the interest of Sheboygan County." These grievances do not live up to that standard. Further, laying off the Bookkeeper would not have avoided the layoffs of the other five employees. Requiring her to be laid off, therefore, would lead to an absurd result, which the arbitrator should avoid. In the event that the arbitrator sustains the grievance, however, the only available remedy is to lay off the Bookkeeper. As explained above, the five road workers would have been laid off regardless, so no remedy is merited for any of the laid off employees.

The County also asserts that there are no bumping rights available under the contract. Further, there is no past practice of any Highway Department employee ever being allowed to bump. The only evidence on the subject is that in 1982 the Personnel Director made a reference to bumping in a letter regarding a grievance by a displaced employee, but he was ultimately placed in another position without bumping another employee. This is insufficient evidence to claim the existence of a bumping right, especially since the last time the Union

sought a bumping right, in 2009, the County denied the request and did not acknowledge the existence of any bumping right. Bumping rights should be obtained through negotiation, not the decision of an arbitrator, but in the event the arbitrator was to find the existence of such a right, it should still require the bumping employee to establish his or her qualifications for the position.

Union Reply

The County argues for classification based seniority, but this is not consistent with the contract language. Nothing in Article 27 provides for layoff of the “last person hired” on a classification basis. The draw such a conclusion would require the arbitrator to impermissibly add to the language of the contract. Further, the County waived the argument that seniority for layoff purposes includes time worked outside the bargaining unit. Although the contract does say “last person hired,” the parties have both acted throughout on the common understanding that Tracy Gordon was the last person hired because she was the last person added to the bargaining unit. That was the basis for the grievance and the contention was not denied by the County in any of its grievance responses. Instead, the County contended that it could base layoffs on classification.

The Union also disputes the County’s use of longevity and wage rate information as irrelevant to the proper analysis for determining seniority vis-à-vis other employees for entitlement to contract rights and protections. The seniority list clearly indicates that Gordon is the least senior member of the unit with a “seniority date” of 10/7/08. It does a disservice to the dispute resolution process to allow the County to change its tack at this late date.

The County’s argument that laying off the Bookkeeper would lead to an absurd result is also without merit. As shown in the Union’s initial brief, the County had other options it chose not to exercise. In any event, the strict seniority clause was the result of mutual negotiations and should not be disregarded just because the County now finds it inconvenient.

As to remedy, it is the employer’s burden to show that all five road employees would have been laid off in any case. It is speculative to state that all five would have been laid off in addition to the Bookkeeper. That claim is self-serving and is not based on evidence. Further, the inference of the existence of bumping rights is not unreasonable where there is a plant-wide seniority system, but the employer claims the right to lay off by classification. The Union relied on the clear language of Article 27 in good faith. If the County is permitted to apply an inconsistent interpretation, therefore, the Union should be permitted to assert bumping rights. In this regard, the Witt letter from 1982 is perfectly consistent with the Union’s position that the County has agreed that bumping rights exist for any bargaining unit employee who loses his position.

County Reply

The County reasserts its position that the contract expressly ties layoffs to necessity and, thus, the requirement of layoffs in reverse order of seniority only applies among employees in groups where the layoffs are necessary. This has been the County's position throughout and the Union has not responded to it, but has instead mischaracterized the County's position to be that the contract provides for layoffs by classification.

The County did layoff the last employee hired because the Bookkeeper was first hired by the County in 2004 and all the road employees were hired in 2007 and 2008. Further, the evidence does not support the Union's contention that the County had other options. There is clearly only one person who is qualified to do the Bookkeeper's job, the County's Finance Department Controller, a management employee. To require her to move over to the Bookkeeper's job would be unreasonable. The Union has also not established that reinstatement of the most senior road employee, Tetzlaff, is merited, nor has it refuted the evidence that he would have been laid off in any event.

Finally, the parties have not agreed to permit bumping. The 1982 Witt letter is inconclusive and none of the subsequent contracts make any reference to bumping, even though the County expressed a willingness to bargain such a provision.

DISCUSSION

Here the operative layoff language is purported by the Union to be a "strict seniority" clause. Typically, such language is inserted in a contract to assure that certain contract rights, such as layoff order, are exercised exclusively according to seniority, without regard to other considerations, such as efficiency of employer operations or the ability of the remaining employees to do the work of those laid off. Where such clauses exist, therefore, they often have the effect of limiting the flexibility of the employer to manage the workforce and tailor it to operational needs. Such would be the case here, where the County found itself needing to reduce its workforce of road employees. Under the application of a strict seniority system, the least senior employee, Tracy Gordon, the Bookkeeper, would normally need to be laid off first, despite the fact that she occupies a unique and essential position in the Highway Department. This is because under a strict seniority system the only relevant criterion when making layoff decisions is the relative seniority of the employees in the bargaining unit.

The County argues forcefully, and persuasively, that such an outcome would lead to an absurd and unreasonable result and should, therefore, be avoided if at all possible. It also asserts that the applicable language does not necessarily require layoffs to be conducted unit-wide by strict seniority. That is, the inclusion of the word "necessary" can be read to imply that the County can make necessary layoffs in specific areas, while not laying off less senior employees in other areas where lay offs are not needed. It also argues that in this particular case that the actual seniority date for the Bookkeeper should be her hire date with the County,

which predates her entry in to the bargaining unit, and which would make her more senior than the laid off road employees.

As to the appropriate date upon which to base her seniority, I think it is clear that such is the date upon which she was added to the bargaining unit, which was October 7, 2008 according to the bargaining unit seniority list. Unit seniority is typically determined by the established seniority list, not the date of original hire by the employer, unless contract language provides otherwise. There is no such modifying language in the contract, therefore I find that for purposes of bargaining unit seniority Gordon's seniority date is October 7, 2008, making her the least senior member of the bargaining unit.

More persuasive to my mind is the argument that the County must have some flexibility over determining areas within which layoffs are to occur under certain circumstances, this being such an instance. The record makes it clear that the basis for these lay offs was lack of work, and an accompanying reduction in revenue. The Department had lost numerous municipal contracts for providing road construction, snow plowing and other services and, therefore, did not need, nor could it afford, as many road employees. There was, however, no lack of work for the Bookkeeper. She has a highly technical position in which she manages all the Department accounts and handles billings to other governmental bodies for services, inventories of all materials and tracking materials to the proper accounts and managing payroll data. This work requires specific knowledge of the County's computer system and software programs, which takes a significant amount of time to acquire. It is generally acknowledged that, while other employees could, perhaps, learn the Bookkeeper position over time, Gordon is the only bargaining unit employee qualified to do the work at present. Indeed, the record reveals that the only other County employee who could immediately step in and do Gordon's job would be Pam Kacmarynski, the Controller in the County Finance Department, who is a management employee not working in the Highway Department. In order to do this, however, she would have to be released from some of her other duties, which would have negative impacts for the County, as well.

I recognize that the layoff language in Article 27 appears to apply unit-wide in every situation and that arguably that means that the reason for the layoffs should be irrelevant to the application of the language. The contract must, however, be read and interpreted as a whole. Where, as here, the layoffs were necessitated by a lack of work, specifically road construction and maintenance work, it would make no logical sense to then lay off employees in areas where there was no lack of work in order to retain employees who would be underemployed. Reading the layoff language in light of the reason for the layoffs honors all the contract language and permits a decision that optimizes the use of resources while still respecting the principle of seniority. Given the County's operational needs, therefore, and the inefficiencies that would arise if it were required to layoff an employee in a necessary position before it could lay off other employees where there was a demonstrated lack of work, I find that the County did have authority under the circumstances to lay off the five least senior road employees without having first to lay off the Bookkeeper.

As to the issue of bumping, I find that there are no bumping rights available to the laid off employees. Bumping rights are created and conferred as a function of contract, which not only identifies them, but also defines how they operate. PIERCE COUNTY, MA-12373 (Jones, 7/04) Here, the contract is silent as to the existence of any right to bump. The Union asserts that bumping rights may be inferred, but I disagree. Bumping raises questions about the process whereby qualifications for other positions are determined, what happens if an employee bumps a less senior employee in a higher pay range, etc., that cannot be answered by a simple assertion that bumping rights exist. Consequently, absent some more clear indication that the parties have mutually agreed to such a process, I am unwilling to find one where the contract is otherwise silent on the subject. The Union also asserts, however, that the Witt letter from 1982 establishes the existence of bumping rights. This letter, discovered in the Union's records, is the only reference to a bumping right in the parties' bargaining history. Further, it does not appear that the right was ever subsequently asserted except in one instance in 2009 involving a grievance by bargaining unit member, Ed Karsteadt. In that case, however, the County denied the existence of bumping rights and the grievance was ultimately resolved without the County modifying its position. Consequently, I find this to be insufficient evidence that the County has recognized the existence of a bumping right for the members of this unit and I am unwilling on this record to impose one.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The Employer did not violate the collective bargaining agreement when it failed to layoff the Bookkeeper while laying off more senior bargaining unit members. Nor did it violate the collective bargaining agreement when it refused to allow more senior laid off employees to bump the Bookkeeper. The grievances are denied

Dated at Fond du Lac, Wisconsin, this 7th day of April, 2011.

John R. Emery /s/

John R. Emery, Arbitrator

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