BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF CAMPBELLSPORT EMPLOYEES, LOCAL 1366 AFSCME, AFL-CIO

and

VILLAGE OF CAMPBELLSPORT

Case 4
No. 69968
MA-14823

(Furlough Grievance)

Appearances:

Mr. David A. Dorn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 336 Doty Street, Fond du Lac, Wisconsin 54935 for the Union

Davis & Kuelthau, S.C., by **Attorney Tony J. Renning,** 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, for the City.

ARBITRATION AWARD

Village of Campbellsport Employees' Local 1061, AFSCME, AFL-CIO (herein the Union) and the Village of Campbellsport (herein the Village) are parties to a collective bargaining relationship. At the time of the events that are the subject of the grievance herein the parties were operating under a collective bargaining agreement dated December 30, 2009 and covering the period from January 1, 2010 through December 31, 2012, which provides for final and binding arbitration of disputes arising thereunder. On June 28, 2010, the Union filed a request with the Wisconsin Employment Relations Commission (herein the WERC) to arbitrate a grievance concerning the Village's decision to issue 6 furlough days to members of the bargaining unit during 2010. The undersigned was selected by the parties from a panel of WERC staff members to arbitrate the matter. A hearing was held on December 14, 2010, in Campbellsport, Wisconsin. The hearing was transcribed. The parties filed initial briefs by March 21, 2011 and replies by April 21, 2011, whereupon the record was closed.

ISSUES

The parties did not agree to a statement of the issue in this matter. The Union would frame the issues as follows:

> Did the Village violate the Collective Bargaining Agreement by contracting out for services while bargaining unit employees were on layoff status?
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> Did the Village violate the Collective Bargaining Agreement by laying off Wastewater Superintendent Bill Hess while a bargaining unit employee who was not qualified or certified to perform the work remained on the job?

The Village would frame the issues as follows:

> Did the Village violate the Collective Bargaining Agreement by implementing six (6) layoff/furlough days for all bargaining unit members?
>
> If so what is the appropriate remedy?

The Arbitrator frames the issues as follows:

> Did the manner in which the Village implemented six (6) layoff/furlough days for the bargaining unit violate the Collective Bargaining Agreement?
>
> If so what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE V
Management Rights

Except as expressly provided by other provisions of this Agreement, the Village retains the sole right to operate the Village and all management rights repose in it. Without limiting the generality of the foregoing, these rights include, but re not limited to, the following:

A. To direct all operations of the Village;

B. To establish and require observance of work rules and schedules of work;

C. .To hire, promote, transfer, schedule and assign (including overtime assignments) employees in positions in the Village;

D. To suspend, demote, discharge and take other disciplinary action against employees;

E. To relieve employees from their duties for non-disciplinary reasons;

F. To maintain efficiency of Village operations;

G. To take whatever action is necessary to comply with state or federal law;

H. To introduce new or improved methods or facilities;

I. To change existing methods or facilities;

J. To determine the methods, means and personnel by which Village operations are to be conducted;

K. To select employees, establish quality standards and evaluate employee performance;

L. To contract out for goods and services provided no bargaining unit employee qualified to perform the contracted services is on layoff status;

M. To create, revise and eliminate positions; and

N. To determine the kinds and amounts of services to be performed as pertains to operations, and the number and kinds of classifications to perform such services.

. . .

ARTICLE XV
Layoff and Recall

In the event of a reduction in the work force, employees shall be laid off by department (Village Clerk, Police Clerk, Department of Public Works, Library) in inverse order of seniority, provided the remaining employees have the qualifications and certification necessary to perform the work. An employee receiving a layoff notice may exercise his or her seniority rights to displace a junior employee in the same department from a position, provided he or she has the qualifications and certification necessary to perform the work or can meet the qualifications and obtain the certification necessary to perform the work within sixty (60) days.

BACKGROUND

Village of Campbellsport Employees Local 1061 represents all regular full-time and regular part-time employees of the Village of Campbellsport, excluding managerial, supervisory, professional, confidential, casual, substitute and temporary employees and law enforcement employees with power of arrest. Included in the bargaining unit are Assistant Village Clerk Roseanne Schill, Public Works General Laborers Diane Clark, Ryan Koll and Brandon Thieme, Wastewater Superintendent William Hess, Police Clerk Carole Ferber and Assistant Librarian Katie Klotz.

On December 30, 2009, the parties entered into a collective bargaining agreement covering the period from January 1, 2010 through December 31, 2012. Throughout the fall of 2009, the Village Board was also engaged in developing the 2010 Village budget and determined to do so without increasing the tax levy for the citizens. Ultimately, due to certain extraordinary expenditures and a reduction in aid provided by the State of Wisconsin, the Board determined that it would be necessary to institute layoffs/furloughs within the bargaining unit to achieve the necessary economies. There is no evidence of the Village ever having had to institute layoffs at any time in the past. In early 2010, the Village engaged in conversations with the Union to develop a plan for implementing the layoffs/furloughs, but no agreement was reached. The Board moved forward on its own thereafter and ultimately decided to layoff/furlough the bargaining unit employees on six specified days during 2010 – April 30, May 24, June 11, August 27, September 2 and November 16. The employees were recalled to their normal duties on the next business day after the furloughs. On the specified days Roseanne Schill, Ryan Koll, Brandon Thieme, William Hess and Carole Ferber were each laid off. Diane Clark was not laid off because, under a separate agreement with the Village, she had agreed to take unpaid personal leave on certain other days during the year in lieu of the scheduled furlough days. Katie Klotz was not laid off because her position was under the jurisdiction of the Library Board, which determined to not institute layoffs.

On Friday, April 30, 2010, the first of the layoffs was imposed, with all the named employees being furloughed from that date until Monday May 3, 2010. On April 30, the duties of the bargaining unit employees were covered by supervisory personnel – Village Clerk Diane Lemke, Public Works Director Mark Gruber and Police Chief Randy Karoses, as well as Clark, who covered Hess' duties as Wastewater Superintendent. Further, on Saturday, May 1, the Village contracted with Mueller Excavating, Inc. to provide grading services for the Village snow dump and Columbus Park parking lot. It is not disputed that the Village has contracted out for these services in the past, but also that the Village has also used its own employees and equipment to do such work in the past. On May 12, the Union filed the instant grievance, alleging that the Village had violated the collective bargaining agreement in the way that it instituted the furloughs. On Friday, June 11, the employees were furloughed for a second day in the same fashion, with their date of return specified as Monday, June 14. On Friday, June 11, the Village allegedly contracted with a private vendor to perform maintenance on one of the Village trucks. It is likewise clear that this type of work has, in the past, been contracted out, but also performed by bargaining unit employees. The grievance was

ultimately denied and the matter was advanced to arbitration according to the procedure set forth in the contract. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

PARTIES' POSITIONS

The Union

The Union does not dispute the rights of management to contract out for services or to lay off employees. Nor does it contend that the Village could not institute temporary layoffs one day at a time. Thus, it does not challenge the legitimacy of furloughs *per se*. It does maintain, however, that the right to contract out work under Article V, Section L, and the right to lay off employees under Article XV are subject to specific limitations and that, in different ways, the Village violated both of these provisions.

Article V, Section L permits contracting out for services "provided no bargaining unit employee qualified to perform the contracted services is on layoff status." This does not mean that the layoff must be caused by the contracting out of services, but only that contracting out for services is not permitted while employees qualified to do the work are on layoff status. On May 1, 2010 the Village contracted with a private vendor to have grading work done on the Village snow dump and in a Village park. This is work that bargaining unit employees have done in the past, are qualified to do, and for which the Village has the necessary equipment. At the time, Public Works employees Ryan Koll, Brandon Thieme and Bill Hess were on layoff for the period from April 30 to May 3. All three employees are qualified to do grading work. Likewise, On June 11, 2010, the Village contracted with another vendor to do muffler repair work on a Village pickup truck. This is also work that Koll, Thieme and Hess had done in the past and for which the Village had the necessary equipment, but, again, they were laid off at the time for the period from June 11 to June 14. These actions by the Village, contracting out for services that could have been performed by bargaining unit employees who were currently laid off, was a clear violation of Article V, Section L.

Article XV sets forth rules controlling the manner in which employees may be laid off. Specifically, it requires layoffs to be instituted in inverse order of seniority "provided the remaining employees have the qualifications and certification necessary to perform the work." This permits the Village to avoid seniority under certain circumstances in order to assure that employees are not put in positions of having to perform tasks for which they are not qualified. On the six days in question, Koll, Thieme and Hess were laid off while Diane Clark, the most senior Public Works employee, remained on the job. However, Bill Hess, the Wastewater Superintendent and least senior member of the Department, is the only employee qualified and certified to operate the Village's wastewater treatment facility and should not have been subject to layoff on the basis of seniority. Arguably, this could make Hess exempt from layoff, but this is not unusual under the circumstances. The Village is required to have a certified employee on staff to operate the wastewater facility. Clark is not certified for this work, but was put in the position of having to do it in Hess' absence. Had there been a situation at the treatment facility,

she would have had to deal with it. The Village has elected to have only one certified staff member. Laying off that employee, even for a short time, puts the Village and its citizens at risk. Thus, the parties agreed that layoffs could only occur if there were remaining employees who were qualified and certified to do the work of those on layoff status. By laying off Hess and requiring Clark to do work for which she was not qualified and certified, the Village violated Article XV. The union requests, therefore, that the grievances be sustained and the affected employees made whole.

The Village

The Village asserts that the management rights clause gives the Village broad authority to manage the affairs of the Village, including the right to schedule and assign employees with a view toward optimum efficiency. The actions takes by the Village here were designed to preserve the Village's fiscal well-being by maintaining continuity of services without increasing taxes during a time of reduced state support.

Arbitrators have long recognized that management has the right to schedule work and regulate the hours of employees, except as restricted by the contract. (citations omitted) This right is justified by the need to maintain optimum efficiency. The Village did not act to favor junior employees, to subvert the seniority rights of employees or to undercut the Union. Rather, it operated to increase efficiency and did not violate the contract in so doing. The right to furlough employees is not mentioned in the contract, but neither is it forbidden. Thus, it is available to management under its reserved or residual rights. The Union asserts that the layoff of all employees violates the principle of seniority. In fact, however, seniority was observed because all employees, except the most senior, were furloughed.

Arbitrators have ordinarily treated furloughs as layoffs. JACKSON COUNTY, MA-12338 (Houlihan, 2005); LANGLADE COUNTY, MA-12597 (Bielarczyk, 2005); SCHOOL DISTRICT OF OMRO, MA-14628 (Bauman, 2010); FOND DU LAC COUNTY, MA-14636 (Jones, 2010). In these cases, the employers instituted furloughs as cost-saving measures. In each instance, the Union argued that the employer violated the principle of seniority by not laying of only the least senior employees, but the arbitrators found that .there was no violation when all employees were laid off and that the actions were justified by the need to maintain continuity of services. Since, therefore, the Union concedes the Village's right to implement furloughs/layoffs, the only question remaining is whether the Village did so in accordance with the language of Article XV. The language of that Article makes it clear that the Village may spread the layoffs out among multiple employees as long as it does so by seniority. (Cf. NECEDAH SCHOOL DISTRICT, MA- 10854 (Emery, 2000); ATHENS SCHOOLS DISTRICT, MA-12056 (Emery, 2003). The relative seniority of the employees was maintained and there is no limitation on the Village's right to institute partial layoffs. Thus, the contract was honored and the grievances should be denied.

On the other hand, sustaining the grievances would lead to absurd and nonsensical results. If, as the Union contends, the least senior member should have been laid off, an

employee's position would have been eliminated and the remaining employees would have to have been reassigned, resulting in reduced efficiency. Such a result was not contemplated by the parties, whereas the Village's action leads to a just and equitable result.

Union Reply

The Union has established that the Village violated the language of Article V, Section L and Article XV by the manner in which it managed the layoffs of the bargaining unit employees. The Village argues that the contract permits it to layoff bargaining unit employees, but misses the point. The Union does not dispute the Village's right to lay off employees, but that right is not unfettered. The Village is required to institute the layoffs in accordance with the limitations set forth in the contract. The Union is entitled to the benefit of its bargain with the Village, which means that the Village cannot excuse itself from the requirements of the contract when it suits it to do so. The contract limits the layoff language by requiring the Village to retain employees who are qualified and certified to do the necessary work. More importantly, the Village cannot contract out work the employees are qualified to do while they are on layoff status. In this case, the Village violated both of those provisions and the grievances should be sustained.

Village Reply

The Village reasserts that it did not violate the contract by the manner in which it instituted the layoffs. It notes initially that, contrary to the Union's contention, the most senior employee, Diane Clark, was furloughed, as well. The record established that, while she was not furloughed on the same days as the other employees, Clark was furloughed on an equivalent number of days throughout the year. In the end, all bargaining unit employees were subject to the same amount of unpaid leave.

At the hearing, the Union acknowledged the Village's right to layoff/furlough employees, but modified its position to contend that the Village violated the language regulating contracting out for services and failed to employ qualified and certified bargaining unit members to perform specified services during the layoffs. In cases where parties attempt to expand the scope of the arbitration at hearing, arbitrators have refused to consider the matter. CITY OF MANITOWOC, MA-9892 (Hahn, 1997); STONE CONTAINER CORP., 91 LA 1186 (Ross, 1988); NATIONAL LABOR RELATIONS BOARD, 76 LA 450 (Gentile, 1981), BETHLEHEM STEEL CORP., 50 LA 1214 (Seward, 1968); SWIFT & CO., 17 LA 537 (Seward, 1951) Since the Union here raised these issues for the first time at arbitration, it should be precluded from expanding its claims and enlarging the scope of the case. The issues of subcontracting and the Village's obligation to continue to employ qualified and certified employees are separate from the substantive issue of the Village's right to layoff/furlough employees and should not be considered.

Even if the arbitrator considers the issue of subcontracting, there was no violation of the contract. The Village acknowledges the limitations on subcontracting contained in

Article V, Section L, but asserts that the type of work involved was work that the Village has routinely contracted in the past without objection from the Union. The only issue from the Union's standpoint is the timing of the subcontracting. If it had happened on another day when the employees were not laid off, the Union would have no argument. Here, the subcontracting of the grading work occurred on May 1, 2010, the day after a furlough day. Diane Lemke testified that this work is usually contracted out to Mueller excavating. Further, the senior employee, Diane Clark, was working on the day in question. It is also established that even in the event of no layoff, bargaining unit employees are not routinely scheduled to work on Saturdays. With respect to the truck repair, here, again, the Union has never objected to the contracting of this work in the past. Further, the Union was not able to establish that this work occurred on a layoff day, whereas Diane Lemke testified that the Village records show this work did not occur on a layoff day. Also, bargaining unit member Diane Clark was on duty on the days the other employees were on furlough. Finally, the Union had the opportunity to negotiate with the Village to schedule the furloughs in such a way as to avoid just this type of situation, but refused to do so, placing the Village in the position of having to act as it did.

The Village also did not violate the layoff language concerning qualified and certified employees. The Village acknowledges the requirements of the language, but contends that it is not required to have a qualified and certified bargaining unit member in the wastewater treatment plant at all times. Bill Hess is the only qualified and certified wastewater treatment employee, but his employment relationship with the Village was not severed by the layoff. He remained and remains a Village employee despite the layoffs. Further, Hess testified that he misses work for vacation, sick leave, etc., during which time Clark and Public Works Director Mark Gruber perform his duties at the wastewater plant. Finally, the State of Wisconsin does not require that a certified employee be on site at the wastewater plant at all times. If the Union's position is sustained, it would mean that Hess could never be absent, which would lead to an absurd result. The Village's position, however, leads to a just and equitable result in that it is able to institute furloughs in the interest of efficiency and Hess is able to utilize vacation and sick leave.

The Village instituted the layoffs under its management rights in the interests of the fiscal well being of the Village. In doing so, the Village considered the appropriate staffing levels for the various positions, which it is authorized to do. The Village's action did not favor junior bargaining unit members, evade seniority, or undercut the Union. If the arbitrator find the layoff language to be applicable, therefore, he should find that the Village was in compliance with it. The grievances should, therefore, be denied.

DISCUSSION

In this case, the Union is contesting the manner in which the Village implemented six furlough days imposed on members of the bargaining unit during 2010. At the outset, it should be noted that the parties have used the terms furlough and layoff interchangeably throughout and so what is really at issue here is six temporary layoff days. The Union does not dispute the right of the Village to do this, but argues that the way in which it was done violated certain

contractual restrictions on the Village's layoff power. For its part, the Village claims it did not violate the contract in instituting the layoffs, and further asserts that, to the extent that the Union raised certain tangential issues at the hearing, they should not be considered. Specifically, it argues that the issues of subcontracting and the qualifications and certifications of bargaining unit members are outside the scope of the grievance.

As to the scope of the arbitration, I regard the Village's argument as being in the nature of an affirmative defense. As such, if the Village contends that the issues of subcontracting and certification are precluded, it is the Village that must sustain the burden of this claim. The pertinent language of the grievance procedure is as follows:

> A. Definition of Grievance. A grievance shall be defined as a dispute concerning the application or interpretation of the express provisions of this Agreement.
>
> B. Subject Matter. Only one (1) subject shall be covered in any one grievance. A written grievance shall contain the name and position of the party filing the grievance, the issue involved, the relief sought, the date of the incident or violation occurred, the article(s) and section(s) of the Agreement alleged to have been violated, the signature of the party alleging the grievance and the date.

The grievances assert that the matter in issue is that the Village instituted rolling layoffs of certain bargaining unit employees on specified days and, in so doing, violated Articles II, V, XV, XX and XXVI of the contract. There is no evidence in the record indicating what conversations took place between the parties before the hearing, but certainly the Village did not claim surprise at the hearing by the Union's presentation of its case. While the circumstances underlying the grievances are stated in general terms, they do raise the contract language of Articles V and XV, which address subcontracting and certification, as being applicable. Moreover, these issues directly go to the Village's ability to exercise its layoff power so, to my mind, they fall within the scope of the Union's claims and are proper for decision in this arbitration..

As to the subcontracting issue, the language of Article V, Section L. is clear. The Village has the ability to contract out for services "provided no bargaining unit employee qualified to perform the contracted services is on layoff status." The Union asserts that this occurred on two occasions. First, on Saturday May 1, 2010, between the furlough day scheduled on April 30 and the call back day on May 3, the Village contracted with a private company to do grading work, which some on the furloughed employees had done in the past. Second, on Friday, June 11, during another furlough day, the Village contracted with an auto repair company to repair brakes on a Village truck, again work that the furloughed employees had done in the past. The Village asserts that the contracting here did not violate this section for two primary reasons. First, it argues that the work in question, grading the Village park and snow dump and repairing the Village pickup truck, are services that have been contracted

out in the past without objection. Second, that one bargaining unit member qualified to do the work, Diane Clark, was on duty on the days in question. The Village also maintains that the truck repair work did not occur on a furlough day.

As to the first argument, the contract language makes no distinction as to whether the specified work had been contracted out in the past; it only asks whether qualified bargaining unit employees were on layoff status at the time. It also applies if any qualified employees are on layoff, regardless of whether any employees are still working. There is no question that qualified bargaining unit employees were on furlough at the time the grading work was done. The parties stipulated that the employees were laid off on specific days and called back on the next business day. Thus, if the employees were laid off on a Friday, the layoff continued until the next Monday and if work was contracted on a Saturday it technically occurred while qualified employees were on layoff status, notwithstanding that the work occurred on a weekend.

As to the second argument, again the contract language creates no exception for work that has been contracted out at times in the past when no employees were on layoff status and to which the Union has not objected. Presumably, this is because there is not a problem with contracting out work when the bargaining unit members are all working. The pinch comes when qualified bargaining unit members are on layoff status and the employer, for economic reasons, makes an intentional choice to contract out available work rather than call them back. So far as the record shows, this situation has never arisen before, but that is what occurred here. In sum, therefore, by contracting out work at times when bargaining unit employees qualified to do the contracted work were on layoff status, the Village violated Article V, Section L. of the contract.

As to the remaining point, whether the truck repair occurred on a furlough day, the evidence is in conflict. Wastewater Superintendent Bill Hess testified that the work was performed on Friday, June 11, and based his assertion on a phone call to the service provider, which confirmed the date the work was done. No one from the service station testified, nor were any records produced, to confirm this. From the Village's standpoint, Village Clerk Diane Lemke testified that she checked the Village's billing receipts and confirmed that no contracted work was performed on furlough days. Again, no supporting records were produced. In my view, Ms. Lemke was more likely to have first hand knowledge as to when the work was done. Without more than a second hand assertion by the repair provider that the work was done on a furlough day, I cannot say that it was more likely than not that the work was done on a furlough and find that this claim has not been sustained.

The Union's other claim is that the Village violated Article XV by laying off furloughing Wastewater Superintendent Bill Hess, who was the employee certified to operate the wastewater treatment facility, and having General Laborer Diane Clark or Public Works Director Mark Gruber do the work. Article XV permits layoffs only when there are employees available who are qualified and certified to do the work of the laid off employee(s). The record is clear that on each of the specified furlough days, Hess was off work and no certified employee remained to staff the wastewater facility.

The Village argues that the furlough was permissible because the State only requires that a certified employee be on staff at all times, not necessarily on site, and that Hess was never severed from employment. It also points out that on past occasions, when Hess has been off work on sick leave or vacation, Clark or Gruber has performed the work, which has not caused problems with the state, and which indicates that Clark and Gruber were qualified to do the work. The Union, however, views the language as instituting an absolute ban on layoffs if such would result in the only certified employee being laid off.

In this situation, I am of the view that the Village has the stronger argument. The concern raised by the language here is one of protecting bargaining unit positions from being eliminated by downsizing and transferring the necessary work to other employees regardless of their ability to do the work. This might occur in the circumstance of an indefinite layoff where an employee is downsized with no specific guarantee of return. In such a case the employee might never be recalled and ultimately might lose his or her recall rights altogether after eighteen months. Here, however, the layoffs, or furloughs, were limited to one day in duration and Hess' return was guaranteed on the next regular work day. This seems to me closer to the situation of Hess taking a day off, which the record discloses has been done in the past without objection from either the state or the Union. Hess' employment relationship was never severed and in each case he did, in fact, return to work on the following Monday. In such a case it does not seem to me that the Village is forbidden from instituting a temporary layoff in order to meet economic exigencies.

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

AWARD

The Village did violate the Collective Bargaining Agreement when it furloughed qualified bargaining unit employees from April 30, 2010 to May 3, 2010 and contracted out the grading of the Village park and snow dump during the interim. As and for a remedy, the Village shall make the furloughed bargaining unit employees whole by paying them one day's backpay at their rate of pay on May 1, 2010. The Village did not violate the Collective Bargaining Agreement by furloughing Wastewater Superintendent Bill Hess and assigning his work to Diane Clark. That grievance is denied.

The arbitrator will retain jurisdiction over this award for a period of thirty (30) days to resolve any issues that may arise in the implementation of the award.

Dated at Fond du Lac, Wisconsin, this 6th day of July, 2011.

John R. Emery /s/

John R. Emery, Arbitrator
JRE/gjc
7744