

AFL-CIO. A copy of Article IV and Article VIII of the Agreement are marked as Exhibits 1 and 2 respectively, and are attached hereto and incorporated herein by reference.

4. By letter dated June 18, 1982, Schmit was discharged from her employment. The discharge was effective January 28, 1982. (A copy of the June 18, 1982, letter is marked as Exhibit #3, and is attached hereto and incorporated herein by reference.) The reason for the discharge - sexual contact with a resident - is set forth in Exhibit #3.

5. Pursuant to Article IV of the Agreement, Schmit grieved her termination. The grievance procedure is the exclusive procedure for appealing her termination. Section 5. The grievance was processed pursuant to the grievance procedure and on December 14, 1982, the respondent denied the grievance at the third step. A copy of the respondent's decision at the third step is marked as Exhibit #4, and is attached hereto and incorporated herein by reference. Schmit did not appeal the third step decision to arbitration.

6. The activities which led to her discharge were twice litigated in Wisconsin Courts under charges of misconduct in public office. Both the Circuit Court for Dodge County, Judge Thomas W. Wells, presiding, Case No. 82-CR-96, and the Wisconsin Court of Appeals, State v. Schmit, 82-1489-CR (1982), determined that Schmit was not guilty of misconduct in public office since sexual activity between a prison guard and a prisoner was not forbidden by law to be done by her in her capacity as a public employe; and, therefore, not in violation of Section 946.12(2), Wisconsin Statutes. [NB: This finding was taken from appellant's brief dated April 3, 1984, p. 2.]

7. By letter dated November 1, 1983, Schmit requested reinstatement. A copy of the November 1, 1983 letter is marked as Exhibit 5 and is attached hereto and incorporated herein by reference.

8. By letter dated November 8, 1983, Schmit's request for reinstatement was denied. A copy of the November 8, 1983 letter is marked as Exhibit 6 and is attached hereto and incorporated herein by reference. Schmit appealed the decision to the Commission on November 18, 1983.

OPINION

This case involves an appeal of the respondent's refusal to reinstate the appellant. While the appellant in her brief suggested that the Commission could hear this matter as an appeal pursuant to §230.44(1)(c), Stats., of her discharge,¹ the Commission has no jurisdiction over that transaction, for two reasons.

First, the appeal with the Commission was not filed within 30 days of the discharge. See §230.44(3), Stats. This provision states that an appeal "... may not be heard unless the appeal is filed within 30 days ...," (emphasis supplied), and has been interpreted as jurisdictional in

¹ Although the question is not directly before the Commission, it is noted that the appellant in her brief argued that there was not just cause for her discharge because the courts determined, with respect to criminal charges against her, that she "... was not guilty of misconduct in public office since sexual activity between a prison guard and a prisoner was not forbidden by law to be done by her in her official capacity as a public employee; and, therefore, not in violation of Section 946.12(2), Wisconsin Statutes." Appellant's brief dated April 3, 1984, p. 2. However, the fact that the alleged improper activity was not cognizable under the criminal law does not dictate a conclusion that there was no just cause for discharge. Even if the criminal charges had been heard on the merits, an acquittal would by no means be conclusive because of the difference in the legal standard in the evaluation of evidence in a criminal case on the one hand and in a discharge appeal before an administrative agency on the other hand. See Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971).

nature. See, e.g., Richter v. DP, Wis. Pers. Commn. No. 78-261-PC (1/30/79); State ex rel D.O.A. v. Personnel Board, Dane Co. Circuit Court No. 149-295 (1976).

Second, appeal or grievance procedures with respect to disciplinary actions are mandatory subjects of bargaining, see §111.91(1)(a), Stats., and §111.93(3), Stats., provides in part:

"... if a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes relating to wages, hours, and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement."

Therefore, even if the appeal had been filed with this Commission in a timely fashion, the Commission's jurisdiction would be supplanted by the effect of the foregoing statute. See, e.g., Matulle v. UW, Wis. Pers. Commn. No. 81-433-PC (1/27/82); affirmed, Winnebago Co. Circuit Court No. 82CV207 (11/19/82).

The appellant also argues that the appeal of the refusal to reinstate is cognizable pursuant to §230.44(1)(d), Stats., which provides:

"A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the Commission."

As the respondent pointed out in its reply brief, if reinstatement is a mandatory subject of bargaining, then the Commission lacks jurisdiction pursuant to §111.93(3), Stats., because of the superseding effect of the collective bargaining agreement.

On the other hand, if this is not a mandatory subject of bargaining, then the reinstatement is subject to the civil service code, more particularly §230.31(1), Stats., which provides that reinstatement eligibility is only available for an employe "... who has separated from the service

without any delinquency or misconduct on his or her part but owing to reasons of economy or otherwise ..."

In this case, the appellant separated from the service by way of a discharge for allegedly having had sexual contact with a resident. On the face of it, this was a separation for alleged "delinquency or misconduct." Because of the operation of §111.93(3), Stats., the only avenue for reviewing the merits of this discharge was under the grievance procedure of the collective bargaining agreement. The appellant in fact initiated a contractual grievance over this matter, but it was resolved against her at the third step and it was not taken to arbitration. Therefore, the third step decision was final.

This Commission does not have the authority to review this discharge because of the operation of §111.93(3), Stats. The question of whether the appellant's separation from the service was with or without "any delinquency or misconduct" was resolved when the contractual grievance over the discharge was not pursued beyond the third step denial.

If the Commission were to proceed now to make a determination as to whether or not there was a factual basis for respondent's allegation of misconduct, it would be usurping the role of the contractual grievance procedure as the exclusive means of reviewing the basis for a disciplinary discharge, in violation of §111.93(3), Stats.

The appellant also argues that the reason the grievance was not carried beyond the third step was because:

her Union arbitrarily refused to represent her any longer ...
Without Union representation, appellant would be required to pay half of the costs of the arbitration procedure ... which she could not afford. (Appellant's brief dated April 3, 1984, p. 3.)

However, the appellant has cited no statutory basis for the Commission to hear and decide an allegation of an arbitrary refusal of representation by

the union, and such a matter is outside this Commission's jurisdiction. Rather, such matters are within the province of the Wisconsin Employment Relations Commission (WERC), see, e.g., Mahnke v. WERC, 66 Wis. 2d 254, 225 N.W. 2d 617 (1975).

In summary, what happened here is that after the appellant was discharged for misconduct, she pursued a contractual grievance, which was the exclusive means of litigating whether there was just cause for her discharge. Once that matter was not pursued beyond the third step it became a final determination on the merits of her discharge. If this Commission were to consider this appeal on the merits and to rule that her separation was without delinquency or misconduct, which would be the only circumstances under which she would have any reinstatement rights under §230.31(1), Stats., this would have the effect of nullifying the final resolution of the grievance. While the final decision of the grievance is undoubtedly res judicata, the difficulty with the Commission proceeding with this appeal goes beyond res judicata. The superseding effect of §111.93(3), Stats., acts to deprive the Commission of subject matter jurisdiction over bargainable subjects such as a review of the discharge.

Even if it could be conceptualized that the Commission had jurisdiction over the appeal in the first instance, the respondent would be entitled to prevail as a matter of law, as the appellant would have had no reinstatement rights unless she separated from state service "... without any delinquency or misconduct ...," §230.31(1), Stats., and this subject has been irrevocably settled against the appellant in the contractual grievance procedure.

ORDER

Inasmuch as the Commission lacks the authority to review this appeal on its merits, it is dismissed for lack of subject matter jurisdiction.

Dated: April 25, 1984 STATE PERSONNEL COMMISSION

AJT:jat


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

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In addition, the Personnel Commission is without jurisdiction to hear appeals of State employees who are covered by a collective bargaining agreement.

"Section 111.93(3). If a labor agreement exists between the state and a union representing a certified or recognized bargaining unit, the provisions of such agreement shall supersede such provisions of civil service and other applicable statutes related to wages, hours and conditions of employment whether or not the matters contained in such statutes are set forth in such labor agreement."
(Emphasis added)

The subject of reinstatement is dealt with in Article VIII, Section 7, of the bargaining agreement between the State and AFSCME. (See attachment) Appellant was a member of this bargaining unit. She was aware that her position was covered by the union agreement (see her appeal letter), and in fact had discussed her rights pursuant to that contract. Her appeal rights must be pursuant to the contract.

Since there is no authority under §230.44 or .45 for the Personnel Commission to hear this appeal, it must be dismissed.

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Anthony J. Theodore
March 2, 1984

Decisions to reinstate or not reinstate are not (a) actions of the Administrator; (b) delegated actions; (c) layoff, demotion, and so forth; (d) actions after certification; or (e) actions relating to discretionary performance awards. Accordingly, the Personnel Commission lacks subject matter jurisdiction of the appeal.

ARTICLE IV

Grievance Procedure

Section 1: Definition

41 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

42 Only one subject matter shall be covered in any one grievance. A grievance shall contain a clear and concise statement of the grievance by indicating the issue involved, the relief sought, the date the incident or violation took place, and the specific section or sections of the Agreement involved. The grievance shall be presented to the designated supervisor involved in quadruplicate (on mutually agreed upon forms furnished by the Employer to the Union and any prospective grievant) and signed and dated by the employe(s) and/or Union representative.

43 An employe may choose to have his/her designated Union representative represent him/her at any step of the grievance procedure. If an employe brings any grievance to the Employer's attention without first having notified the Union, the Employer representative to whom such grievance is brought shall immediately notify the designated Union representative and no further discussion shall be had on the matter until the appropriate Union representative has been given notice and an opportunity to be present. Individual employes or groups of employes shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement.

44 All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

41A Except for grievances filed by employes in the Security and Public Safety Unit, the parties will make a good faith effort to handle filed grievances in a confidential manner. A breach of confidentiality will not affect the merits of the grievance.

Section 2: Grievance Steps

45 Step One: Within seven (7) calendar days of receipt of the written grievance from the employe(s) or his/her representative(s) the supervisor will schedule a meeting with the employe(s) and his/her representative(s) to hear the grievance and return a written decision to the employe(s) and his/her representative(s).

46 Step Two: If dissatisfied with the supervisor's answer in Step One, to be considered further, the grievance must be appealed to the designated agency representative within seven (7) calendar days from

receipt of the answer in Step One. The appropriate agency representative(s) will meet with the employee(s) and his/her representative(s) and attempt to resolve the grievance. A written answer will be placed on the grievance following the meeting by the appropriate agency representative and returned to the employee(s) and his/her representative(s) within seven (7) calendar days from receipt of the appeal to the agency representative.

47. Step Three: If dissatisfied with the Employer's answer in Step Two, to be considered further, the grievance may be appealed to the decision of the appointing authority (i.e., Director, Administrator, Bureau Director, or personnel officer) within seven (7) calendar days from receipt of the answer in Step Two. Thereafter, in Step Three, the department will provide copies of Steps One and Three to the Division of Collective Bargaining of the Department of Employment Relations as soon as possible. The designated agency representative(s) will meet with the employee and his/her representative and a representative of Council 24 (as Council 24 may elect) to discuss and attempt to resolve the grievance. Following this meeting the written decision of the agency will be placed on the grievance by the Appointing Authority of the agency and returned to the employee, his/her representative and Council 24 representative within twenty-one (21) calendar days from receipt of the appeal to Step Three. By mutual agreement of the parties' Third Step representative, the parties may hold a Third Step grievance hearing by telephone conference. The State's DAV line facilities will be used wherever possible.

48. Step Four: Grievances which have not been settled under the foregoing procedure may be appealed to arbitration within thirty (30) calendar days from the date of the agency's answer in Step Three, except grievances involving discharge or layoffs filed under Section 230.36 of Wisconsin Statutes must be appealed within fifteen (15) calendar days, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration, it shall be considered resolved for the basis of the Third Step answers of the parties without prejudice or precedent in the resolution of future grievances. The issues stated in the Third Step shall constitute the sole and entire subject matter to be heard by the arbitrator, unless the parties agree to expand the scope of the hearing.

49. Within seven (7) calendar days from the date of appeal to arbitration, the parties shall meet to select an arbitrator from the panel of arbitrators according to the selection procedure mentioned.

50. Where two or more grievances are appealed to arbitration, an effort will be made by the parties to agree upon the grievances to be heard by any one arbitrator. On the grievances where agreement is not reached, a separate arbitrator from the panel shall be appointed for each grievance. The cost of the arbitrator and expenses of the hearing, including a court reporter if requested by either party, will be shared equally by the parties. Except as provided in Section 11 of this Article, each of the parties shall bear the cost of their own witnesses, including any lost wages that may be incurred. On

grievances where the arbitrability of the subject matter is an issue, a separate arbitrator shall be appointed to determine the question of arbitrability unless the parties agree otherwise. Where the question of arbitrability is not an issue, the arbitrator shall only have authority to determine compliance with the provisions of this Agreement. The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process.

ARBITRATION PANEL PROCEDURES

51 1. Both parties agree that there will be a panel of twelve (12) arbitrators selected to hear arbitration cases that are covered under the Agreement between the parties.

52 The procedure for selecting this panel of twelve (12) arbitrators is as follows:

(A) Both parties will make an attempt to mutually agree on a panel of twelve (12) arbitrators.

(B) If mutual agreement cannot be reached on the total twelve (12) arbitrators then the remaining number of arbitrators needed to complete the panel will be selected equally between the two parties.

(C) After one year from the date the panel was selected, either party shall have the right to eliminate up to two (2) arbitrators from the panel.

(D) In replacing the arbitrators that were eliminated from the panel the procedure in 1-B above shall again be used, but, it is noted that any arbitrator eliminated in 1-C above may not be placed back on the panel.

53 2. The procedure for selecting an arbitrator from the panel to hear a particular case is as follows:

(A) Each arbitrator shall be assigned a number 1 through 12.

(B) In selecting an arbitrator for a case the parties shall draw five (5) arbitrator numbers at random from the total twelve (12). Then the elimination process will be used to select one (1) arbitrator from the group of five (5).

(C) If both parties mutually disagree with the arbitrator number that has been selected in 2-B above then the original process of selecting an arbitrator shown in 2-B above will again be used.

(D) If, after two attempts, the parties mutually disagree with the arbitrator number that has been selected, then both parties shall jointly request a panel of arbitrators from the Federal Mediation and Conciliation Service.

(E) Both parties shall jointly send letters to the jointly (D) arbitrators selected and request these arbitrators to jointly participate on the panel and comply with specific requirements.

(F) Both parties agree to some type of restraint on the part of the selected arbitrators in addition to a set back fee, to be paid each arbitrator for his/her services.

54 3. Both parties shall jointly contact court reporters located around the state and develop a listing of these reporters who will agree to return the transcript of a hearing within a specified period of the date of the hearing.

55 4. If briefs are to be filed, both parties shall file their briefs within fourteen (14) days from the date of their receipt of the transcript. This time limit may be extended if mutually agreed to by the parties.

56 The decision of the arbitrator will be final and binding on both parties of this Agreement. When the arbitrator declares a bench decision, this decision shall be rendered within fifteen (15) calendar days from the date of the arbitration hearing. On distribution of 230.36 hazardous duty cases the decision of the arbitrator shall be rendered within fifteen (15) calendar days from receipt of the transcript of the parties or the transcript in the event briefs are not filed. On all other cases the decision of the arbitrator shall be rendered within 30 days from receipt of the briefs of the parties or the transcript in the event briefs are not filed.

Section 5: Time Limits

57 Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been adjudicated on the basis of the last preceding Employer answer. Grievances not answered by the Employer within the designated time limits in any step of the grievance procedure may be appealed to the next step within seven (7) calendar days of the expiration of the designated time limits. The parties may, however, mutually agree in writing to extend the time limits in any step of the grievance procedure.

58 If the Employer representative with whom a grievance is filed is located in a city other than that in which the grievance was processed in the preceding step, the mailing of the grievance appeal form shall constitute a timely appeal if it is postmarked within the appeal period. Likewise, when an Employer answer is forwarded to a city other than that in which the Employer representative works, the mailing of the answer shall constitute a timely response if it is postmarked within the answer period. The Employer will make a good faith effort to insure confidentiality.

Section 4: Retroactivity

50 Settlement of grievances may or may not be retroactive as the equities of particular cases may demand. In any case, where it is determined that the award should be applied retroactively, except for administrative errors relating to the payment of wages, the maximum period of retroactivity allowed shall be a date not earlier than thirty (30) calendar days prior to the initiation of the written grievance in Step One. Employees who voluntarily terminate their employment will have their grievances immediately withdrawn and will not benefit by any later settlement of a group grievance.

Section 5: Exclusive Procedure

60 The grievance procedure set out above shall be exclusive and shall replace any other grievance procedure for adjustment of any disputes arising from the application and interpretation of this Agreement.

Section 6: Number of Representatives and Jurisdictions

61 Council 24 shall designate a total of up to 750 grievance representatives who are members of the bargaining units for the bargaining units.

62 The Union shall designate the jurisdictional area for each grievance representative and his/her alternate. Each jurisdictional area shall have a similar number of employees and shall be limited to a reasonable area to minimize the loss of work time and travel giving consideration for the geographic area, employing unit, work unit, shift schedule and the right and responsibility of KSPU to represent the employee of the bargaining unit. Jurisdictional areas shall include other employing units and/or departments where the number of employees in such units or departments are too minimal to warrant designation of a grievance representative.

63 Each local Union may appoint one chief steward whom the designated grievance representative of the local may consult with by telephone pursuant to the provisions of Article II, Section 9 (Telephone Use) in the event the grievance representative needs advice in interpreting the Agreement or in handling a grievance.

64 In those instances where there is not a designated grievance representative from an employee's bargaining unit available in the same building, a designated grievance representative from another KSPU represented bargaining unit or local Union within the same building shall be allowed, pursuant to Paragraph 69, to cross bargaining unit or local Union lines so as to provide grievance representation. Such substitute grievance representative shall obtain approval from his/her supervisor prior to providing such substitute representation.

65 The Union shall furnish to the Employer in writing the names of the grievance representatives, and their respective jurisdictional areas within thirty (30) calendar days after the effective date of this Agreement. Any changes thereto shall be forwarded to the Employer by the Union as soon as the changes are made.

66 The Employer will supply the local Union with a list of supervisors to contact on grievance matters.

67 (Paragraph number skipped for consistency with other PMA Contracts.)

Section 7: Union Grievances

68 Union officers and stewards who are members of the bargaining unit shall have the right to file a grievance when any provision of this Agreement has been violated or when the Employer interpretation of the terms and provisions of this Agreement leads to a controversy with the Union over application of the terms or provisions of this Agreement.

Section 8: Processing Grievances

69 The grievant will be permitted a reasonable amount of time without loss of pay to process a grievance (including consultation with designated representatives prior to filing a grievance) during his/her regularly scheduled hours of employment. The employee's supervisor will arrange a meeting to take place as soon as possible for the employee with his/her Union representative through the Union representative's supervisor.

70 Designated grievance representatives will also be permitted a reasonable amount of time without loss in pay to process grievances (including consultations) in their jurisdictional areas during their regularly scheduled hours of employment. Only one designated grievance representative will be permitted to process any one grievance without loss of pay as above. Further, in a group grievance only one grievant, appearing without loss of pay, shall be the spokesperson for the group. (Group grievances are defined as, and limited to, those grievances which cover more than one employee, and which involve like circumstances and facts for the grievants involved.) Group grievances must be so designated at the first step of the grievance procedure and set forth a list of all employees covered by the grievance.

71 The grievance meeting as provided in Steps One, Two and Three above shall be held during the grievant's regularly scheduled hours of employment unless mutually agreed otherwise.

72 The Employer is not responsible for any compensation of employees for time spent processing grievances outside their regularly scheduled hours of employment. The Employer is not responsible for any travel or subsistence expenses incurred by grievants or Union representatives in the processing of grievances.

Section 9: Discipline

73 The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate disciplinary action against employees for just cause. An employee who alleges that such action was not based on just cause, may appeal a demotion, suspension,

discharge, or written reprimand taken by the Employer beginning with the Third Step of the grievance procedure except that written reprimands shall begin with the first Step of the grievance procedure.

74 An employe shall be entitled to the presence of a designated grievance representative at an investigatory interview (including informal counseling) if he/she requests one and if the employe has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

75 If any discipline is taken against an employe both the employe and Union will receive copies of this disciplinary action.

Section 10: Exclusion of Probationary Employes

76 Notwithstanding Section 9 above, the retention or release of probationary employes shall not be subject to the grievance procedure except those probationary employes who are released must be advised in writing of the reasons for the release and do, at the discretion of the Personnel Commission, have the right to a hearing before the Personnel Commission.

Section 11: Pay Status of Arbitration Witnesses

77 When an employe is subpoenaed by either party in an arbitration case that employe may appear without loss of pay if he/she appears during his/her regularly scheduled hours of work providing the testimony given is related to his/her job function or involves matters he/she has witnessed while performing his/her job and is relevant to the arbitration case.

Section 3:

110 In the event that the vacancy is not filled by transfer of an employe under provisions of Section 1 of this Article, the Employer shall select from interested qualified employes from other employing units of the department following the seniority requirements of Section 1 of this Article. In the event the vacancy is not filled by transfer, the Employer may fill the vacancy in accordance with the Wisconsin Statutes.

Section 4:

111 For purposes of this Article, a permanent vacancy is created:

(1) When the Employer has approval to increase the work force and decides to fill the new positions;

(2) When any of the following personnel transactions take place and the Employer decides to replace the previous incumbent: terminations, transfers out of the bargaining unit, promotion or demotion;

(3) If no employe has indicated a desire to transfer to a vacancy and the Employer fills such vacancy by transfer of an employe from another classification in the same salary range and determines that the vacated position is to be filled, such position shall be subject to the provisions of Section 1 of this Article;

(4) Transfers within the bargaining unit resulting from either 1, 2, or 3 above.

Section 5:

112 (1) The applications of the procedures in this Article shall be limited to a maximum of three (3) transfers resulting from any given original vacancy.

(2) Employes may not transfer under the provisions of Section 1 of this Article more often than once every six months.

(3) Employes transferring under the provisions of this Article shall not be eligible for payment of moving expenses by the Employer.

(4) In cases of involuntary transfers, the Employer will reimburse employes in accordance with Wisconsin Statutes 70.917.

Section 6:

113 It is expressly understood that transfer rights under Article VII supersede recall or reinstatement rights under Article VIII.

Section 7:

114 If the Employer conducts interviews related to the transfer procedure and the interview is conducted in the employe's assigned headquarters city, necessary and reasonable time for such interview shall be without loss of pay.

Exhibit 2

ARTICLE VIII

Layoff Procedure

Section 1: Application of Layoff

115 The Union recognizes the right of the Employer to layoff employees or to reduce their hours of employment in accordance with the procedures set forth in this Article. Such procedures, however, shall not apply to:

- (A) Temporary layoff of less than twenty (20) consecutive calendar days; and/or
- (B) Seasonal layoff of seasonal employees; and/or
- (C) School year employees at institutions and schools, during recesses in the academic year and/or summer

unless the parties mutually agree to apply all or part of the procedures to such situations.

Section 2: General Layoff Procedures

116 When a layoff occurs, the following general rules shall apply:

- (A) Layoff shall be by employing unit within the bargaining unit.
- (B) Layoff shall be by class as set forth in job specifications.
- (C) Employees within the employing unit within the same class shall be ranked by seniority as defined in Article V, Section 1 with the least senior employee laid off first, except that the Employer may exercise one of the two following options:

(1) the Employer may layoff out of line seniority to maintain a reasonable affirmative action program or where there is a demonstrable need for special skills. The Employer shall provide the Union with information relating to the exercise of these exemptions if so requested.

(2) The Employer may exempt 5% of the employees within an employing unit within the same class from the layoff procedure; however, such 5% shall not be less than one person.

(D) With the agreement of the Employer, a more senior employee may volunteer to be separated from employment in lieu of the layoff of a less senior employee with the guarantee that the Employer will not challenge the more senior employee's eligibility for unemployment compensation unless that employee, at a later point in time, refuses a reasonable offer of re-employment.

(E) Limited term employees in the same class within the employing unit (other than student employees) who are not in federally funded positions shall be laid off prior to laying off bargaining unit employees.

Section 3: Notice of Layoff

117 A. Impending Layoff. In the event management becomes aware of an impending reduction in work force, they will notify the Union as soon as practicable but not less than thirty (30) days with respect to the impending reduction and will also inform the Union, if the information is then available, of the classes in which the layoffs are to occur and the approximate number of positions to be eliminated. The Union may also request a meeting with management after notification of the impending layoff for the purposes of a mutual exchange of information then available on the matter.

118 B. Actual Layoff. In the event of an actual layoff, management will notify the affected employee(s) in writing not less than two (2) weeks in advance of the layoff date and will send a copy of such notice to the local Union and AISCME Council 24.

119 Where notices are sent by first class mail, the time shall begin to run on the date of mailing the notice.

Section 4: Reduction in Hours

120 In the event that management determines to reduce work hours, it may, at its option, reduce the weekly scheduled hours of some or all employees by class within an employing unit to not less than thirty-two (32) hours per week and such reduction shall not be considered a layoff, except that such reduction shall not last for longer than four (4) weeks at any given time, unless mutually agreed otherwise. If management determines, at its option, to reduce the weekly hours of some of the employees within the same class within an employing unit, the employee(s) who will work the reduced hours will be determined on the basis of seniority with the least senior employee(s) working the reduced hours.

Section 5: Employee Options Upon Notification of Layoff

121 Following notification of layoff the employee shall decide on which of the following options he/she shall exercise:

A. Transfer in Lieu of Layoff:

122 Prior to the layoff effective date the affected employee may transfer as follows:

(1) Within the Department --

- a. The employee shall be afforded the opportunity to transfer laterally to permanent vacant positions in the same class in any employing unit within the

department in accordance with the provisions of Article VII, Section 3.

- h. The employe may file a request for transfer with any employing unit in the department, and with approval of the appointing authority, may be appointed to any permanent vacancy in any other class for which he/she meets the necessary qualifications in the same or counterpart pay range as the position occupied at the time of notification of layoff.

(2) Between Departments --

The employe may file a request for transfer to any department in state service. Upon approval of that department, such employe may be appointed to any permanent vacancy in a class for which he/she meets the necessary qualifications in the same or counterpart pay range as the position occupied at the time of notification of layoff.

B. Layoff:

Within five (5) calendar days of notification of layoff, the employe shall elect to bump, request a voluntary demotion or be separated in accordance with the layoff notice.

(1) Bumping.

- a. Within the employing unit within the bargaining unit, any employe who is in the bargaining unit, or any employe who is promoted out of the bargaining unit into another bargaining unit or into a supervisory position and is serving a probationary period for that promotion from the bargaining unit, may elect to bump downward to a lower class in the same series or bump to a class within the employing unit in which they had previously obtained permanent status in the classified service and which is in the same or a lower pay range as the position occupied at the time of notification of layoff.
- b. An employe bumping under B. (1)(a) above shall be appointed to any permanent vacancy in that lower class. In the event no permanent vacancy exists in that same or lower class, the employe shall be included with those employes occupying a position in that class and the layoff procedure set forth in Section 2 of this Article shall apply.

(2) Voluntary Demotion:

For purposes of this Article, Voluntary Demotion is the movement of an employe to a vacant permanent position in a class in a lower pay range in which the employe had never attained permanent status in class. With the approval of the Employer, the employe may voluntarily demote to a vacant permanent position for which he/she is qualified.

(3) Separation:

If an employe has been notified of layoff and has not chosen to or been able to retain employment by utilizing the opportunities of A, B.(1) and B.(2) above, he/she shall be separated in accordance with the layoff notice.

Section 6: Recall

128 When a permanent vacancy occurs in the employing unit and class(es) from which an employe was laid off, or could have bumped to under Section 5(B)(1)(a), the employe shall be recalled according to seniority, with the most senior employe recalled first. A laid off employe who fails to respond to a recall offer within five (5) work days of the offer or who fails to accept a reasonable offer of recall within five (5) work days of the offer or who upon acceptance of the offer fails to be available for work within ten (10) work days of the offer, shall forfeit any further recall rights. If due to extenuating circumstances the employe is unable to report for duty within ten (10) work days of the offer or make other arrangements with the Employer, the employe shall not forfeit the right to recall when other permanent vacancies occur.

129 The employe's right to recall shall exist for a period of five (5) years from the date of layoff or until he/she is employed in a position in a class in the same or counterpart pay range as the class from which the employe was originally laid off, whichever occurs first.

Section 7: Reinstatement

A. Within the Department:

130 Any employe who is laid off may file a request within the department for which he/she worked to fill a permanent vacancy in an employing unit other than that from which he/she was laid off. An employe who has filed such a request will be appointed to a permanent vacancy within that employing unit in the class(es) from which the employe was laid off or could have bumped to under Section 5(B)(1)(a). Such reinstatement shall be by seniority, with the most senior employe reinstated first.

B. Other Departments

131 Any employee who is laid off may file a request for employment with any or all departments in state service. Upon approval of that department, an employee may be appointed to any permanent vacancy in a class for which he/she meets the necessary qualifications in the same, counterpart or lower pay range as the position from which he/she was laid off.

C. Employee Response

A laid off employee, having filed a request for reinstatement, who fails to respond to a reinstatement offer within five (5) work days of the offer or who fails to accept a reasonable reinstatement offer within five (5) work days of the offer or who upon acceptance of the offer fails to be available for work within ten (10) work days of the offer shall forfeit any further reinstatement rights. If due to extenuating circumstances the employee is unable to report for duty within ten (10) work days of the offer or make other arrangements with the Employer, the employee shall not forfeit the right to reinstatement when other permanent vacancies occur.

D. Duration

The opportunity for reinstatement under this Article shall exist for a period of five (5) years from the date of layoff or until the employee is employed in a position in a class in the same or counterpart pay range as the class from which the employee was originally laid off, whichever occurs first.

Section 8: A Reasonable Offer

A reasonable offer of recall or reinstatement is defined as an offer of a job:

(1) with an assigned headquarters located less than forty (40) miles from the employee's home unless the employee's worksite prior to his/her layoff was at a greater distance from his/her home in which case a job offer shall be reasonable if the headquarters of the position offered is no further from the employee's home than was the distance of the previous worksite, and

(2) the number of work hours required does not vary substantially from the number of hours previously allocated to the position from which the employee was laid off, and

(3) the pay range of the position offered is no more than two (2) pay ranges lower than the pay range of the position from which the employee was laid off unless the employee's rate of pay at the time of layoff is maintained in the position offered.

Section 9: Salary

A. Upon bumping, an employee shall retain his/her current rate of pay.