STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SIREN SUPPORT STAFF ASSOCIATION, Complainant,

vs.

SCHOOL DISTRICT OF SIREN, Respondent.

Case 31
No. 65201
MP-4192

Decision No. 31823-A

Appearances:

Attorney Nancy Kaczmarek, Wisconsin Education Association Council, 33 Nob Hill Drive, Madison, Wisconsin 53708, appearing on behalf of the Siren Support Staff Association.

Attorney Andrea M. Voelker, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin 54702, appearing on behalf of the School District of Siren.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 5, 2005, the Siren Support Staff Association filed a complaint of prohibited practices alleging that the School District of Siren had violated Sec.111.70(3)(a)5, Stats., by failing to follow the agreed upon order of lay-off, the twenty-five day notice for lay-off, and the agreed upon recall rights. Informal attempts to resolve the matter failed and the Commission, on September 26, 2006, appointed a member of its staff, Steve Morrison, to act as the Examiner to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.70(4)(a), and Sec. 111.07, Stats.

Respondent's answer was filed on November 6, 2006 and, pursuant to notice, a hearing on the matter was held in Siren, Wisconsin, on November 29, 2006. A transcript of that hearing was provided to the Commission on December 29, 2006. Briefing was completed on May 1, 2007 marking the close of the record.

The Examiner has considered the record evidence and arguments submitted by the parties. On the basis of the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Siren Support Staff Association, hereinafter referred to as the Association, is a labor organization and is the exclusive bargaining representative for the District's full-time and regular part-time non-certified employees.

2. The School District of Siren, hereinafter referred to as the District, is a municipal employer which operates a public school system in Siren, Wisconsin. Its principal offices are located at 24022 Fourth Avenue North, P.O. Box 29, Siren, Wisconsin 54872.

3. The Association and the District have been, at all times material herein, parties to a collective bargaining agreement, hereinafter "Agreement", which governs the wages, hours, and working conditions of the employees in the Association referenced in Finding 1. The Agreement contains the following pertinent provisions:

ARTICLE VIII - REDUCTION IN FORCE

When the Board determines a lay-off shall occur, in whole or in part**,** employees will be laid off within a department (custodial, secretarial, aides & study hall monitors, and food service) by inverse district seniority (within the bargaining department). This order of lay-off shall be followed to every extent possible while filling the remaining positions within the department with employees who are qualified to perform the available work. Affected employees will receive at least a 25 day advance notice prior to being laid off.

Employees who are laid off shall also have recall rights to vacant positions outside of the department they were laid off from if they are qualified to do the necessary work. In such cases, if the out of department laid off employee has more seniority (and is qualified for the position) than a laid off person within the department, the out of department employee will be recalled for the vacancy.

Laid off employees who are recalled to a position, which provides for less working hours than the employees had prior to his/her lay-off, may reject such recall without giving up their future recall rights.

ARTICLE X - INSURANCE AND RETIREMENT

A. All eligible employees will become members of the Wisconsin Municipal Employees Retirement System. The Board will pay the employees (sic) portion to the System at the present rate.

B. ***Health Insurance***

1. The School District will pay health benefit coverage for a jointly approved hospital medical plan in the amount of full payment per month for single coverage and up to a dollar amount equal to ninety-five percent (95%) of the premium per month for family coverage for the 2004-05 and 2005-06 school years. Employees taking full family health insurance shall have the portion of the premiums (not paid by the District) deducted equally from their payroll checks.

   For employees who work between twenty (20) and thirty-five (35) hours per week and were hired after October 28, 1992, the District shall pay 88% of the premium for family and single plans.

2. This coverage will be for the full twelve months (sic) period commencing July 1 and ending June 30 for all covered employees who complete their yearly obligation. If an employee's employment is terminated for reasons other than illness prior to the end of this yearly obligation, the coverage shall cease on the last day of the month (in) which said termination occurs.

3. . . .

C. . . .

D. . . .

E. The Board shall provide, without cost to the employee, a long-term disability insurance plan with a sixty (60) day waiting period.

F. The District agrees to provide dental insurance with coverage equal to or better than that provided by the WEA Insurance Group plan with benefits in effect for the 1998-99 year. The District shall contribute full dollar premium toward payment of the family premium, and full dollar premium toward payment of the single premium.

The Agreement does not provide for the final and binding arbitration of claims alleging a violation of the Agreement.

4. The District, during the school years 2004-2005, was faced with budget deficits necessitating partial or whole lay-offs of personnel. At a special school board meeting held on March 7, 2005 (Dist. Exhibit 1) the Board determined to make cuts as follows:

Reduce six full-time aides, each to 19 hours per week
Reduce the daytime custodian to 19 hours per week
Eliminate the meal monitor position
Eliminate the school nurse position

The Board further directed the administration to interpret the layoff language in the Agreement pertaining to seniority and issue the appropriate lay-off notices to the affected employees. The specific employees affected thereby who are the subject of this proceeding, are:

John Tinman, Aide, reduced to 19 hours;
Carol Mossey, Aide, reduced to 19 hours;
Linda Thill, Aide, reduced to 19 hours;
Barb Holcomb, Meal Monitor, position eliminated, full lay-off;
Philip Stiemann, Custodial, reduced to 19 hours.

5. The above persons were notified of the lay-offs on March 11, 2005 consistent with the 25 day notice provision contained in the Agreement. The notices indicated that the lay-offs were related to financial considerations and not job performance. The notices did not refer to recall provisions of the collective bargaining agreement.

6. Subsequent to the notices referenced in finding 5 above, the District further reduced the hours of three of those persons affected by the layoff (Mossey, Thill and Tinman) to 18.75 hours per week. The District did not provide the 25 day notice of this reduction to the affected employees in a timely manner as required by the Agreement.

7. Tinman's work hours during the 2005-2006 school year were 11:45 a.m. to 3:30 p.m. which hours conflict with the available part time position schedule which would otherwise have been available to him in the event of recall. The record does not reflect his hours during the 2006-2007 school year, consequently the Examiner is not able to make a finding regarding the 2006-2007 school year. In the event his schedule remained the same in 2006-2007 (and the Examiner believes this to be the case), he would not have been unable to work the available part time schedule in that school year. Thus, Tinman was not available to work the available hours in 2005-2006 (see finding 8 below) in the event he had been recalled for any of those positions.

8. Throughout 2005-2006 and 2006-2007 work remained available on a part time work schedule as follows:

Food service worker: 11:00 a.m. - 2:30 p.m.
Aide: 11:15 a.m. - 3:00 p.m.
Aide: 11:30 a.m. - 3:00 p.m.

9. Mossey has been returned to full-time employment pursuant to SCHOOL DISTRICT OF SIREN, DEC. NO. 31748-A (Morrison, 2/07); *aff'd by operation of law,* DEC.

NO. 31748-B (WERC, 5/07) and all monetary issues regarding her lay-off were resolved in that case. She is, consequently, no longer an issue in this case in terms of remedy, however, because she was a member of the original group affected in this action, she remains an issue in terms of any finding of statutory violation.

10. Thill's work schedule during the 2005-2006 school year was 10:15 a.m. to 2:00 p.m. which hours conflict with the available part time position schedule which would otherwise have been available to her in the event of recall. The record reflects her hours during the 2006-2007 school year to be 9:15 a.m. to 1:00 p.m. Thus, Thill was not available to work the available hours in the event she had been recalled for any of those positions.

11. Holcomb was the most senior of those employees affected by the lay-offs. Her work hours during the 2005-2006 school year were 6:30 a.m. to 10:15 a.m. Holcomb was available and qualified to work the available food service position which hours were 11:00 a.m. to 2:30 p.m. had she been recalled for that position. As the most senior employee she would have had the right to the food service position over Steimann in school year 2005-2006, even though Steimann was qualified and available to take that position had he been recalled for it. Holcomb was employed full time by the District in school year 2006-2007 and so was not adversely affected by the lay-off during that school year.

12. Steimann's work schedule during the 2005-2006 and 2006-2007 school years was 7:00 a.m. to 11:00 a.m (on Mondays) and 7:00 a.m. to 10:45 a.m. on Tuesday, Wednesday, Thursday and Friday. Steimann was available and qualified to work the available food service position from 11:00 a.m. to 2:30 p.m. had he been recalled for same but for the right of Holcomb, by virtue of her seniority over Steimann, to assume that position in the event of her recall. Consequently, the Examiner presumes, for the purposes of this exercise, that Holcomb would have taken the food service position had it been offered to her via recall, and Steimann would not have had the opportunity to do so. Steimann was also available and qualified to assume the position of Aide, which hours were 11:15 a.m. to 3:00 p.m., had he been recalled to that position pursuant to **Article VIII**.

13. The District's decision to reduce its staff by laying off employees did not violate the provisions of the Agreement.

14. The District's failure to provide a 25 day notice of lay-off to the three employees referenced in Finding of Fact 6 regarding the reduction from 19 hours per week to 18.75 hours per week constitutes a violation of **Article VIII** of the Agreement.

15. The District's failure to recall Mossey, Holcomb and Steimann and to otherwise follow the seniority recall provisions of **Article VIII** constitutes a violation of **Article VIII** of the Agreement.

CONCLUSIONS OF LAW

1. The Collective Bargaining Agreement does not provide for the final and binding arbitration of claims alleging violations of the Agreement and it is therefore proper for the Commission to exercise its jurisdiction to resolve the merits of the allegations that the District violated Sec. 111.70(3)(a)5

2. The District did not violate the collective bargaining agreement by laying off the affected employees and thus did not violate the provisions of Sec. 111.70(3)(a)5.

3. The District's actions in failing to recall Holcomb in school year 2005-2006; Steimann in school years 2005-2006 and 2006-2007; and Mossey in school years 2005-2006 and 2006-2007, and in failing to follow the seniority recall provisions contained therein, in violation of **Article VIII** of the collective bargaining agreement constitutes a violation of Sec. 111.70(3)(a)5.

4. The District's actions in failing to provide a 25 day notice of lay-off to Mossey, Thill and Tinman regarding the reduction from 19 hours per week to 18.75 hours per week in violation of **Article VIII** of the collective bargaining agreement constitutes a violation of Sec. 111.70(3)(a)5.

ORDER

To remedy its violations of MERA noted above, the District shall immediately:

a. Cease and desist from:

(1) Denying Holcomb full time employment and reducing her compensation by refusing to assign her to the food service position for the school year 2005-2006.

(2) Denying Steimann full time employment and reducing his compensation by refusing to assign him to the aide position for the school years 2005-2006 and 2006-2007.

b. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Notify Siren School District Support Staff personnel represented by the Siren Support Staff Association by conspicuously posting the attached APPENDIX "A" in places where notices to such employees are customarily posted, and take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty days.

(2) Pay Holcomb the difference between the amount she was paid for the 2005-2006 school year and the amount she would have been paid but for the District's refusal to recall her into the position of food service worker for that school year, together with interest at the statutory rate of 12% per year.

(3) Pay Steimann the difference between the amount he was paid for the 2005-2006 school year and the amount he would have been paid but for the District's refusal to recall him into the position of aide for that school year, together with interest at the statutory rate of 12% per year..

(4) Pay Steimann the difference between the amount he was paid for the 2006-2007 school year and the amount he would have been paid but for the District's refusal to recall him into the aide position, together with interest at the statutory rate of 12% per year.

(5) Pay Thill and Tinman the difference between the amount they would have been paid if they had worked 19 hours per week as opposed to 18.75 hours per week for a period of 25 days making them whole for the District's failure to provide the 25 day notice of the reduction from 19 hours per week to 18.75 hours per week, together with interest at the statutory rate of 12% per year.

(5) Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the District has taken to comply with this Order.

Dated at Wausau, Wisconsin this 29th day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/

Steve Morrison, Examiner

APPENDIX "A"

NOTICE TO EMPLOYEES OF THE SIREN SCHOOL DISTRICT REPRESENTED BY SIREN SCHOOL DISTRICT SUPPORT STAFF

As ordered by the Wisconsin Employment Relations Commission, the Siren School District notifies you as follows:

The Siren School District will not violate the layoff notice and the recall provisions of the Collective Bargaining Agreement with the Siren Support Staff Association.

SIREN SCHOOL DISTRICT

By

Name Title

Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED

SIREN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the District violated Sec.111.70(3)(a)5.

Complainant's Position

Article VIII - Reduction in Force of this Agreement requires the District to recall laid off (or partially laid off) employees in the event positions become available for which the laid off employees are available and qualified. The District violated this provision when, in the summer of 2005 prior to the 2005-2006 school year, it failed to recall several employees, who had been partially laid off (and consequently had lost their benefits), to available positions for which they were both qualified and available. Had they been recalled into these positions they would have been brought back to full time status and their contractual benefits would have been restored pursuant to **Article X** of the contract. Adding insult to injury, the District hired new personnel to fill these positions.

The District further violated **Article VIII** when it failed to give the 25 day notice to three employees whose post lay-off hours (19 per week) were further reduced to 18.75 hours per week.

The District is wrong when it maintains that its management rights provision give it the authority to circumvent the provisions of **Article VIII. Article VIII** modifies the management rights clause and takes precedence over it. The District is also wrong when it says that the Agreement precludes employees from holding "multiple positions"; when it says that the scheduling of the various aide positions would preclude recall because of "schedule overlapping"; and when it says that the contract does not provide for "partial recalls".

The District's interpretation of the Reduction in Force provision (**Article VIII)** would render the seniority language of the provision meaningless and give management too much discretion. Well-established principles of contract interpretation support the Union's position because the Employer's interpretation would result in the elimination of employees' bargained for recall rights and the parties could not have intended such a result.

District's Position

The District complied with **Article VIII** when it partially laid off support staff members in the Fall of 2005 due to legitimate financial reasons. The Association has failed to present any evidence to the contrary. When it failed to recall those members who had been laid off it complied with its contractual obligations under the recall provision. That provision does not provide for recall into positions which have the same or a lesser number of hours currently

held by laid-off employees and, since the available positions each had an equal number of hours as the laid-off employees, these employees were not eligible for recall. Also, recall into these available positions would result in employees holding "multiple" positions (as opposed to multiple "assignments") and this is not permitted by the District nor is it contemplated by the contract.

The fact that these employees were not recalled into other positions did not violate the contract because the positions conflicted with their current schedules. Their hours overlapped and it was not possible to redesign the schedule to accommodate them, so other employees had to be hired to fill the vacant positions. Further, employees are not allowed to pick and choose parts of positions but, rather, must be available and qualified to take the entire available position. In this case, they were not. Here, the employees sought to essentially create new positions on recall by taking bits and pieces of other jobs.

Complainant's Reply

Contrary to the District's assertion that it has made whole those employees who failed to receive the 25 day notice of the reduction in hours from 19 hours per week to 18.75 hours per week, such payments have not been made and the Examiner should order that they be paid. (Examiner's note: While the District did not argue in its brief that it had made these employees whole in this respect, it did argue that it had done so during the hearing.)

Regarding scheduling overlap, a number of the affected employees testified that they would have been available (and qualified) to take those positions in addition to their current schedules and that overlap would not have been a problem.

The District's argument that Ms. Holcomb was not harmed by the failure to recall her in a timely manner is not supported by the evidence. The evidence shows that she was harmed because she lost her opportunity to recover her full-time status and she lost her contractually based seniority rights to a newly hired employee with no seniority.

District's Reply

Partially laid-off employees are not eligible for recall unless the position they wish to be recalled into has more hours than they currently have. "For example, if a 20 hour position becomes available, then the most senior, partially laid-off employee in the 18.75 hour aide position would have recall rights to the 20 hour position." (District's Reply Brief at paragraph three.) Also, the contract does not prevent the District from hiring new employees to fill these other positions while others are on lay-off status.

District's Supplemental Brief

The administration determined the number of bodies needed during the critical time period between 11:00 a.m. and 1:00 p.m. and then worked out the aides' work schedules from

that point. To meet the minimum staffing levels required, the administration was not able to fashion a schedule which would accommodate the laid-off employees into the vacant positions and it was, consequently, necessary to hire additional staff to fill them. This prevented full lay-offs as well and allowed the current employees to work at least part-time. A number of issues were considered by the administration in coming up with the work schedules, including such things as mandatory 15 minute breaks.

The partially laid-off aides would have been eligible for recall if the vacancies had more hours per week than the laid-off employees currently had. The relevant recall language in this regard is:

> Employees who are laid off shall also have recall rights to vacant positions outside of the department they were laid off from if they are qualified to do the necessary work…Laid off employees who are recalled to a position, which provides for less working hours than the employee had prior to his/her lay-off, may reject such recall without giving up their future recall rights.

Complainant's Reply to District's Supplemental Brief

The Association disagrees with the District's interpretation of the language found in **Article VIII** and maintains that such an interpretation is illogical and unpersuasive as a matter of theory. It urges the Examiner to make his determination as to an appropriate remedy based on the evidence in the case.

DISCUSSION

Sec. 111.70(3)(a)5, Stats. makes it a prohibited practice for a municipal employer "To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment. . ." Normally, the Commission will not assert its jurisdiction to decide a Sec. 111.70(3)(a)5, Stats. case where the parties have contractually agreed to a grievance procedure. Here, the parties agreement does not contain such a procedure, so it is, therefore, appropriate for the Commission to exercise its discretion in this case.

The contractual analysis relating to the interpretation of **Article VIII-Reduction in Force** in this case is precisely the same as this Examiner set forth in the earlier case referenced in Finding of Fact 9 above.

The central contractual issue involves **Article VIII - Reduction in Force**. The Association posits that following the lay-off of these employees they became eligible under the terms of that Article for recall to the available positions of aide and food service worker because they were available and qualified for those positions. The District says that they were both unavailable and ineligible for recall for essentially three reasons: First, all of the positions had the same number of hours per week as the affected laid-off employees had in their current

positions and, therefore, would not result in an increase of hours. The Examiner rejects this argument because it does not make sense. If the contract had required, which it did not, that partial recall into a position which increased hours to pre-layoff levels was prohibited, then the District's argument would hold water. That is not the case here. The contract clearly and logically anticipates partial recall and does not limit the number of hours in any vacancy, nor does it demand that the number of hours in the vacant position exceed those in the current position in order for the employee to take advantage of the recall provisions. The District's reliance upon the last two paragraphs of **Article VIII** in this regard are misplaced**.** These paragraphs allow the employee being recalled to reject a position which has less hours than he/she had prior to lay-off without affecting his or her right to continue in the recall process. These two paragraphs enhance the rights of employees during recall, not detract from them as the District argues. The District's second reason these employees were not available and not qualified for the positions is because the parties' agreement does not permit partial bumping or an employee to hold "multiple" positions, so unless they wanted to move from one position to another with no change in hours, they were ineligible for recall. There is absolutely no record evidence to support this position. Also, the language in **Article VIII - Reduction in Force** is not ambiguous in any way. It specifically allows for partial lay-off and, by clear and logical implication, allows for partial recall. The District's final reason, that the District could not place these employees into the available positions because the work times "overlapped", is rejected by the Examiner in part and accepted in part. Tinman and Thill, as set forth in Findings of Fact 7 and 10, respectively, were unable to accept one of the available positions due to the overlapping of schedules and were, therefore, "unavailable". Holcomb and Steimann, on the other hand, were "available" because their schedules did not overlap. Since they were also both "qualified" to assume the available positions, they should have been recalled to those positions as set forth in Findings of Fact 11 and 12. As shown in Finding of Fact 9, Mossey is no longer at issue in this matter in terms of remedy.

As the above indicates, the Examiner rejects the District's argument that Holcomb was not adversely affected by the District's failure to recall her. The Examiner is likewise unpersuaded by the District's argument that recall into available partial positions which provide for less hours than current laid-off employees have is barred by the contract. As noted, there is no basis for this interpretation. Nor does the evidence support the argument that the laid-off employees were attempting to "pick and choose" parts of existing positions in order to create new positions. The available positions were "whole" positions (albeit part-time ones), not pieces of positions, and it is for this reason that the District's argument about "cherry picking" to create new positions by taking parts of existing ones does not apply here.

Finally, the Association does not argue, and the Examiner does not find, that the lay-off procedure used by the District in the Fall of 2005 violated the Agreement in any way other than in its failure to issue the 25 day notice regarding the reductions from 19 hours per week to 18.75 hours per week. The big problem here was the recall procedure, which, in the present case, was ignored in its entirety.

For all of the above reasons, the Examiner finds that the District has violated the provisions of **Article VIII - Reduction in Force.**

Therefore, upon consideration of the record as a whole, a Sec. 111.70(3)(a)5, Stats. violation has been proven.

Accordingly the Examiner has ordered conventional cease and desist, notice posting and make whole remedies, including interest remedies, for the violations found.

At hearing there was a dispute as to whether the make whole provision of this order relating to the 25 day notice had been complied with prior to the hearing. The parties subsequently agreed that the payments had not been made and so the Examiner includes this remedy in order that the affected parties be made whole at this time.

On the basis of the foregoing, the Examiner has concluded that a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats. and Sec. 111.70(3)(a)5, Stats. has been proven in this case.

Dated at Wausau, Wisconsin this 29th day of June, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/
Steve Morrison, Examiner

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