BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GREEN BAY AREA SCHOOL DISTRICT	
and	Case 111 No. 41252 MA-5340
GREEN BAY BOARD OF EDUCATION (CLERICAL) EMPLOYEES UNION LOCAL 3055B, AFSCME, AFL-CIO	

Appearances:
Mr. John Dennis McKay, Attorney at Law, 414 East Walnut, Suite 240, P.O. Box 1098, Green Bay, Wisconsin, 54305, appearing on behalf of the District.
Mr. James W. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2785 Whippoorwill Drive, Green Bay, Wisconsin 54304, appearing on behalf of the Union.

ARBITRATION AWARD

The Green Bay Area School District, hereinafter referred to as the Employer or District, and Green Bay Board of Education (Clerical) Employees Union Local 3055B, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a single, impartial arbitrator to hear and decide the instant dispute. On November 29, 1988, the Commission appointed Coleen A. Burns, a member of its staff, to hear and decide the instant dispute. Hearing was held in Green Bay, Wisconsin on Tuesday, January 31, 1989. The hearing was not transcribed and the record was closed upon receipt of posthearing briefs which were filed by April 26, 1989.

ISSUE

The parties were unable to agree to a statement of the issue. The Union formulates the issue as follows:

> Did the Employer violate the collective bargaining agreement when it unilaterally changed the present schedule of hours and/or working hours of the secretaries working in the Middle Schools and High Schools?
>
> If so, what is the appropriate remedy?

The District frames the issue as follows:

> Did the Employer violate the collective bargaining agreement when it changed the present schedule of hours and/or present working hours of the secretaries working in the Middle Schools and High Schools?
>
> If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

> Did the Employer violate the collective bargaining agreement when it changed the hours of work of the clerical employes at the Middle Schools and High Schools in August, 1988?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

. . .

ARTICLE II

MANAGEMENT RIGHTS

The Employer, on its own behalf, hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the constitutions of the State of Wisconsin and of the United States including the rights:

1. To the executive management and administrative control of the school system and its properties and facilities;

2. To hire all employees and, subject to the provisions of law and this Agreement, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion, and to promote and transfer all such employees;

3. To determine hours of duty and assignment of work;

4. To establish new jobs and abolish or change existing jobs;

5. To manage the work force and determine the number of employees required.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employee's right of appeal.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Employer, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes, Section 111.70, and then only to the extent such specific and express terms are in conformance with the constitution and laws of the State of Wisconsin and the constitution and laws of the United States.

. . .

ARTICLE XIV

HOURS OF WORK - SCHOOL CLOSING

The present schedule of hours and the present working hours of the Clerical Department shall remain as presently scheduled. The Union shall be notified prior to any changes in hours and such changes shall be the subject of negotiations.

. . .

BACKGROUND

On May 10, 1988, Marie Glasgow, District Personnel Director, issued a memo to the Union's ten- and eleven-month clerical bargaining unit employes which read as follows:

> This will confirm your employment as a member of the Clerical Unit in the Green Bay Area Public School District for the 1988-89 school year.
> Ten-month employees should return to work on Wednesday, August 17, 1988. Eleven-month employees should return to work on Monday, August 1, 1988. It is our understanding that changes in hours for the 1988-89 school year may result in a "bumping" situation; should you not be affected by this situation you would be returning to the same school you had in 1987-88.

On May 24, 1988, Personnel Director Glasgow issued the following memo to Ed DeRubis, President, AFSCME, Local 3055B (Clerical) Union:

> At the elementary level only one position has hours different from the 8 a.m. to 4 p.m. that all other full-time personnel work. Dorothy Krumpos' one-half hour lunch

> and earlier quit time is necessitated by the two different schedules followed by children in two different programs at Howe.
>
> At the secondary level, to get the needed office coverage, most clerical hours are 7:15 a.m. to 3:15 p.m. or 7:30 a.m. to 3:00 p.m. There are five other schedules: 8:00 a.m. to 3:30 p.m. at Edison Library; 7:45 a.m. to 3:45 p.m. Lombardi main office; 7:05 a.m. to 3:05 p.m. at Washington main office; 6:45 a.m. to 2:15 p.m. Prebel Food service; and, 8:00 a.m. to 4:00 p.m. Southwest main office.
>
> Because of the earlier start of the student day next school year, the clerical staff will be asked to start and end the day 15 minutes earlier than their current schedule.

On May 26, 1988, Personnel Director Glasgow issued the following memo to Union Representatives James Miller and Ed DeRubis:

> On May 26th, James Miller, Ed DeRubis, David Kampschroer and Marie Glasgow met at the request of the unit president to discuss the work schedules for clerical employees for the 1988-89 school year.
>
> At issue were the proposed elimination of overtime and modification of hours for two positions under Job Description M523 and change in schedules by 15 minutes for secretaries employed at the middle and high schools. The union had been notified of both changes in keeping with contract language.
>
> Mr. Miller maintained that the language of the contract requires that the changes in hours be given as proposals for negotiation. If the union needs to consider our "change in hours notification" as impact bargaining, we would submit that no additional compensation is warranted. If the union insists that the "modification of hours" is a subject of negotiations for the 1988-90 agreement, our proposal would be that the change in hours would not warrant additional compensation because the content of the job descriptions would remain unchanged.

On May 27, 1988, Personnel Director Glasgow issued the following memo to Union President DeRubis:

> Yesterday we discussed "change of hours" and AFSCME's position on a requirement to negotiate these changes. We clarified that our position is that changes in hours are a management right and that notification of the Union prior to implementation is required. We have properly notified the Union and have also told you that our position for negotiations is that the change in hours would not result in our proposing any change in level of responsibility and, therefore, no additional compensation.

> A larger and more immediate issue is whether or not the Union is declaring that the change in hours mandates a re-posting of these jobs. If so, and because of the magnitude of the positions to be affected, a "bumping meeting" would need to be held. We would prefer to stay with our "past practice" of not posting for changes of fifteen minutes or less and discuss the others on a case-by-case basis.
>
> We have copied President Reindl because the "new postings/bumping issues" apply to the maintenance unit as well. For obvious reasons (implementation for 1988-89), we need your written response to the ancillary issues of "new postings" and "bumping" no later than June 3, 1988, in order for us to hold a "bumping meeting" prior to the ten-month clerical members ending their year on June 8, 1988.

On or about September 8, 1988, the Union filed the instant grievance alleging that the District violated Article XIV - Hours of Work and any other pertinent provisions of the contract when it changed the hours in the Middle and High Schools. In remedy of this alleged violation, the Union requested that employes be returned to their former hours and made whole for any loss of wages/fringes. The grievance was denied at all steps and, thereafter, submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Union

The contract language relied upon by the Union is clear and unambiguous. The language does not state that the impact of changes in hours is negotiable, but rather specifically states that the changes themselves are negotiable. The Employer's position of "management rights" fails to take into account the limiting language contained in the management rights clause, i.e., "the exercise of management rights in the above shall be done in accordance with the specific terms of the agreement and shall not be interpreted so as to deny the Employee's right of appeal." The Employer's position that all they were required to do was to notify the Union and that, thereafter, they were free to make whatever changes they wanted as long as they claimed there were no additional duties, must be rejected. The contract language relied upon by the Union provides that the present schedule of hours and the present working hours shall remain as presently scheduled. The word that is used is shall, not maybe.

At the time that the Employer proposed the change in the hours at the Middle Schools and the High Schools, the Employer and the Union were negotiating a new labor contract to become effective July 1, 1988. The Union insisted that this matter be a part of the contract negotiation and, if the Employer wanted those changes, they were required to bargain them. Neither the Union's original proposals, nor the Employer's original proposals mentioned changing the clerical hours. The Union signed the tentative agreement and the Employer signed the tentative agreement, and no mention was made of any agreement to change the clerical schedule or working hours. The Employer filed its final offer without mentioning any change in the hours or schedules of the clerical employes. When the contract was settled, on or about December, 1988, there was no mention nor agreement on changing the schedule of hours or the present working hours for employes working in the Middle Schools or the High Schools. There was no change made in the language contained in Article XIV, which is the language in dispute. The agreement, which was retroactive to July 1, 1988, covers the period of time when the Employer unilaterally made the change in the hours of the clerical employes at the Middle and High Schools.

If the Employer wanted the hours changed, it was their responsibility to keep that proposal on the negotiating table until it was resolved. It is not the responsibility of the Union to keep the Employer's proposals alive and well. There is no evidence that the Union ever agreed to have those hours changed. A "no response" by the Union surely is no agreement.

In conclusion, the Employer violated the collective bargaining agreement by unilaterally changing the hours of the secretaries in the Middle Schools and High Schools by fifteen minutes per day. Had the Employer not changed the hours, but required the employes to come in fifteen minutes earlier, they would have been paid fifteen minutes of overtime. In remedy of the Employer's contract violation, the Union requests that the Employer be ordered to reinstate the employes' former schedule of hours and to make the employes whole for any loss of wages and/or fringe benefits.

Employer

Statutorily mandated student contact time required adjustments in the student day and the times that support staff were required to be available in the schools. The standard was mandated and had to be dealt with in terms of its impact on the various bargaining units within the District. The District did not have the luxury of doing nothing, it had to implement the changes.

The District recognized its obligation to inform the Clerical Union membership of the intended changes and the District's duty to bargain, if there were impact. Steps were taken to comply with the language and intent of the collective bargaining agreement. These steps are documented in Joint Exhibit Nos. 9, 10, 11 and 12.

From the beginning, the District indicated its willingness to bargain any impact resulting from its proposed changes. Joint Exhibit 11 makes it very clear, ". . .our proposal would be that the changes in hours would not warrant additional compensation because the content of the job descriptions would remain unchanged." At no time did the Union come forth with any proposal or position. To this day no one knows exactly what the Union wants.

At no time during the bargain of the successor contract, did the Union ever come forward with any proposals regarding the hours of work. Even during the process of mediation/arbitration, the Union chose to remain silent on any question regarding hours. The position now taken by the Union is indefensible, and they should be estopped from making their claim.

The District could have done nothing more in this matter consistent with its statutory duty to responsibly manage the schools. The District notes that, on the facts, there is no loss of wages and/or benefits to any clerical employe. The grievance should be denied and dismissed.

DISCUSSION

According to the unrebutted testimony of David Kampschroer, Assistant Superintendent of Human Resources, the Employer was not meeting the State hours standards at the High School level and, thus, needed to start the High School day fifteen minutes earlier. While the Middle School hours were sufficient to meet the State standards, the Middle School hours were required to be adjusted so that the school buses would have common starting and ending times. It is evident, therefore, that the Employer had legitimate business reasons to seek a change in the hours of clerical employes at the Middle and High School levels. However, in seeking a change in these hours, the Employer was required to comply with the provisions of Article XIV, which provides as follows: 1/

> The present schedule of hours and the present working hours of the Clerical Department shall remain as presently scheduled. The Union shall be notified prior to any changes in hours and such changes shall be the subject of negotiations.

It is evident that the Union was notified of the changes in working hours when the Personnel Director provided Union President Ed DeRubis with the memo of May 24, 1988. The question then becomes whether the changes in hours were the subject of negotiations.

As reflected in the Personnel Director's memo of May 26, 1988, Union representatives and Employer representatives met on May 26, 1988 to discuss the work schedules for the clerical employes for the 1988-89 school year. As Kampschroer acknowledged at hearing, the third paragraph of the Personnel Director's memo of May 26, 1988 reflects the fact that the Employer was informed that the Union maintained the position that the Employer was contractually required to negotiate the changes in the hours of the clerical employes. According to Kampschroer, the Employer, at that time, took the position that it would bargain any impact language that the Union cared to propose. The Union was informed, however, that the County did not consider any additional compensation warranted because there was no change in any of the employes' level of responsibility.

Kampschroer's testimony that the Employer offered to bargain the impact of any change in hours is supported by Personnel Director Glasgow's memo of May 27, 1988, which was directed to Union President, Ed DeRubis, and which stated inter alia, as follows:

> Yesterday we discussed "change of hours" and AFSCME's position on a requirement to negotiate these changes. We clarified that our position is that changes in hours are a management right and that notification of the Union prior to implementation is required. We have properly notified the Union and have also told you that our position for negotiations is that the change in hours would not result in our proposing any change in level of responsibility and, therefore, no additional compensation.

In response to Personnel Director Glasgow's memo of May 27, 1988, Union Representative Miller issued his letter of June 7, 1988 which stated, inter alia:

> I again refer you to Article XIV concerning the hours of

1/ The language existed in the parties' 1986-88 contract and continued, unchanged, in the parties' successor contract.

> work and any changes in the present working schedule. The language in (sic) clear and unambiguous that the hours of the clerical employee shall remain as presently scheduled and if any changes are to take place it shall be a matter of negotiations.
>
> Should the Board of Education change any of the hours before negotiations are completed and an agreement is reached the Union will have no other alternative but to file grievances under Article XIV, hours of work, and the overtime provision contained on Page 9 of the current labor agreement. The employees will work the hours that you assign them; however, we will retain the right grieve (sic). The Union would point out to you that there is no need to bump since there has been no agreement on the initial change of the hours.

It is not evident that there were any further discussions between the Union and the County concerning the change in clerical hours prior to August, 1988 when the Employer changed the clerical employes' work hours by having the employes report to work fifteen minutes earlier. The actual number of hours worked remained unchanged.

In denying the grievance in a letter dated September 22, 1988, Personnel Director Glasgow stated, inter alia, that the Employer's position regarding compliance with Article XIV was clearly stated in her letter of May 27, 1988. Glasgow went on to cite a portion of the May 27, 1988 letter as follows:

> ". . .our position is that changes in hours are a management right and that notification of the Union prior to implementation is required. We have properly notified the Union and have also told you that our position for negotiations is that the change in hours would not result in our proposing any change in level of responsibility and, therefore, no additional compensation."

The Arbitrator is persuaded that, at all times material hereto, the Union has maintained the position that the Employer is contractually required to negotiate the change in hours prior to implementation of any hours change. The Arbitrator is further persuaded that while the Employer has offered to negotiate the impact of any changes in hours, it has not offered to negotiate the change in hours. Rather, the Employer has maintained the position that the Employer had a management right to change the hours in dispute and that its duty to negotiate under the provisions of Article XIV was satisfied by notifying the Union of its decision to change the hours and by offering to bargain the impact of the change in hours. 2/ The Employer's position, however, is contrary to the requirements of the parties' collective bargaining agreement.

As the Union argues, Article II of the labor contract expressly provides that the Employer's management rights, including the right to determine hours of duty, are subject to limitation by the "specific and express terms" of the parties' agreement. The "specific and express terms" of the parties' agreement, i.e., the language of Article XIV relied upon by the Union, limits the Employer's management right to change the hours in dispute by requiring that the change in hours be "the subject of negotiations." While the Employer has agreed to negotiate the impact of the change in hours, it has not agreed to negotiate the change in hours. Accordingly, the Employer violated the provisions of Article XIV when it changed the hours of the clerical employes in dispute herein without negotiating the change in hours.

The Union argues that the Employer could have provided the early coverage it considered necessary by having the employes work overtime. The Employer does not dispute this argument. While it is true that there may be circumstances of "necessity" which would absolve an Employer of its contractual obligations, a desire to avoid the payment of overtime is not one of those circumstances.

In complying with the make-whole remedy set forth below, the employe is to be considered due all hours of pay which the employe would have received if the employe had been permitted to work his/her work hours as they existed prior to the August, 1988 change. Hours which were worked outside of the work hours as

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2/ As the Employer argues, the change in hours was not discussed at any time during the negotiation of the parties' successor agreement. It is not evident that the Employer has ever changed its position with respect to its perceived right not to negotiate the change in hours.

they existed prior to the August, 1988 change are to be compensated as additional hours in the same manner as they would have been compensated if the employe had worked both these hours and his/her work hours as they existed prior to August, 1988. For example, an employe who works a 7-1/2-hour day is entitled to be paid for the 7-1/2-hour day, plus fifteen minutes of overtime.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer violated the collective bargaining agreement when it changed the hours of work of the clerical employes at the Middle Schools and High Schools in August, 1988.

2. The Employer is to immediately restore the work hours in effect prior to the August, 1988 change and continue these hours until the parties negotiate a change in the hours.

3. The Employer is to immediately make whole any employe affected by the August, 1988 hours change.

Dated at Madison, Wisconsin this 27th day of July, 1989.

By _____
Coleen A. Burns, Arbitrator