BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MANITOWOC COUNTY COURTHOUSE EMPLOYEES LOCAL 986-A, AFSCME, AFL-CIO	Case 218 No. 42647 MA-5760
and	
MANITOWOC COUNTY	

Appearances:
Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221-0370, appearing on behalf of Manitowoc County Courthouse Employees Local 986-A, AFSCME, AFL-CIO, referred to below as the Union.
Mr. Mark Hazelbaker, Manitowoc County Corporation Counsel, 1010 South Eighth Street, Room 308, Manitowoc, Wisconsin 54220, appearing on behalf of Manitowoc County, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Jill Kellner and Pat Cummings. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was conducted in Manitowoc, Wisconsin, on September 26, 1989. The hearing was transcribed. The parties submitted briefs by October 13, 1989.

ISSUES

The parties stipulated the following issue for decision:

Did the Employer violate the terms of the Agreement on March 21, 1989, when it notified the employees not to report for work?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - SENIORITY

A. Seniority: It shall be the policy of the County Courthouse to recognize seniority.

B. Definition: Seniority shall be defined for the purposes of this Agreement as the net credited service of the employee. Net credited service shall mean continuous employment in the County beginning with the date and hour on which the employee began to work after last being hired. However, it is understood that job posting preference shall be given first to County Courthouse seniority. The department seniority shall be defined as net credited service within the department. Courthouse and County seniority shall include time spent in the armed forces of the Country (if such military service occurred after date of hire). Courthouse and County seniority shall not include unpaid temporary leaves of absence in excess of six (6) months in any period of twelve (12) consecutive months.

C. Layoffs: In reducing employee personnel, that employee may bump any other employee in an equal or lower classification to the position they hold now or previously held provided they have more seniority than the person they are bumping and can do the available work. Any employee bumped by a more senior employee may bump any other employee provided they have more seniority than the person they are bumping and can do the available work. The County shall give employees two (2) weeks notice prior to layoffs. Employees must utilize their bumping rights within forty-eight (48) hours. Employees shall be recalled in order of seniority provided they can do the available work. Employees will be given one (1) week notice of recall.

D. Loss of Seniority: Seniority and the employment relationship

shall be broken and terminated if an employee:

. . .

4. Fails to report to work within five (5) days after having been recalled from layoff, unless an extension is granted by the County. Employees who are sick or disabled shall report to work upon recovery from the illness or disability (after said five (5) work day period);

. . .

E. Notice of Recall: The notice of recall of any employee who has been laid off shall be mailed to the last known address of the employee on the books of the County. Such notice shall be deemed effective upon date of receipt of registered mail. Employees on layoff are responsible for notifying the County of any change in their mailing address. Notice of change in address shall be submitted to the last department where the employee worked.

ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including . . . the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

. . .

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department.

. . .

ARTICLE 8 - GRIEVANCE PROCEDURE

. . .

C. Steps in Procedure:

. . .

Step 4 - Arbitration:

. . .

e. Decision of the Arbitrator: The Arbitrator shall not modify, add to or delete from the terms of this Agreement.

. . .

ARTICLE 23 - HOURS AND PAY DATE

A. The guaranteed normal work day shall be Monday 8:30 a.m. to 5:00 p.m. with one-half (1/2) hour for lunch; and Tuesday through Friday shall be 8:30 a.m. to 4:30 p.m. with one-half (1/2) hour for lunch.

1. Counseling Center

The Counseling Center's one eight (8) hour day per week per employee shall on alternate weeks be:

a. Either Tuesday, Wednesday or Friday 8:30 a.m. to 5:00 p.m. with a one-half (1/2) hour unpaid lunch.

b. Either Monday or Thursday 12:30 p.m. to 9:00 p.m. with a one-half (1/2) hour unpaid lunch. If Thursday is so scheduled then Monday of the same week shall be 8:30 a.m. to 4:30 p.m. with a one-half (1/2) hour unpaid lunch.

The work cycle shall be a standard designation of days except employees may trade days provided the trade is approved by the Department Head.

2. Community Board

The work week, Monday through Friday, shall consist of four (4) seven and one-half (7 1/2) consecutive hour days and one (1) eight (8) consecutive hour day. The work day shall commence on or after 8:30 a.m. and conclude on or before 9:00 p.m. The work cycle shall be a standard designation of days except employees may trade hours provided the trade is approved by the Department Head.

3. Site Managers

Office on Aging Site Managers shall work no more than eight (8) hours between 9:30 a.m. and 7:00 p.m., Monday through Friday.

. . .

B. Custodial and Maintenance Staff

For the Custodial Staff at the Courthouse, County Office Building, and County Safety Building the guaranteed work days shall be eight (8) hours. The guaranteed work week is five days, Monday through Friday.

BACKGROUND

The County has operated a nutrition program for the elderly for over ten years. The program supplies hot meals at eleven sites throughout Manitowoc County. Each site is managed by an employe referred to either as a Community Supervisor or as a Site Manager. The position will be referred to in this decision as Community Supervisor. Both Kellner and Cummings were Community Supervisors in March of 1989. Kellner managed the Valders site, and Cummings managed the Whitelaw site.

On March 21, 1989, the County informed Kellner and Cummings not to report for work that day because the County was not going to provide meals at Valders and Whitelaw.

The grievance at issue here was filed on behalf of Kellner and Cummings on April 5, 1989. The grievance form states the factual basis of the grievance thus:

> Employees notified less than 24 hours in advance that they should not report to work on 3/21/89. Both the Valders and Whitelaw sites were going to be closed on 3/21/89 due to low attendance count.

The grievance form cites Articles 2, 23 and "(a)ny other articles that may pertain" as the source of the asserted contract violation.

On April 17, 1989, the Union and the County met in an attempt to resolve the grievance. The attempt proved unsuccessful. Robert Kellerman, the County's Director of its Aging Resource Center, issued the County's answer to the grievance in a letter to Debbie Peterson, the Union's Steward, dated April 18, 1989, which reads thus:

> On March 21, 1989 the Valders and Whitelaw meal sites were closed due to lack of attendance. Valders was reporting eight persons attending and Whitelaw was going to serve seven persons. Each site ordered one home delivered meal.
>
> The following was taken into consideration when making the decision to close.
>
> 1. Both sites had been closed in the past for this reason. As recently as March 1989 Valders was closed for two days because of low attendance while the site supervisor was away for two weeks. It was not a new experience for these sites to close due to very weak attendance.
>
> 2. Financial considerations were an important part of the decision. Labor costs are at least sixty dollars per day at each of these sites. The labor expenses did not seem appropriate to us at the time.
>
> 3. The contract and Personnel Department were consulted in the process. Article three of the bargaining unit contract gives management "the right to relieve employees from duty because of lack of work". The same section of the contract also agrees that management has "the explicit right to determine specific hours of employment and the length of work week AND TO MAKE SUCH CHANGES AS IT FROM TIME TO TIME DEEMS NECESSARY".
>
> Following the decision, both workers were notified as soon as possible.
>
> In our meeting on April 17, 1989 with the workers and a union representative, a twenty-four hour notice for future cancellations was discussed. Since meal site reservations for Whitelaw and Valders are not received in this office before early afternoon, a twenty-four hour notice is impractical. In addition, during snow days when sites are closed it is not unusual to close within four to six hours of "serving time".
>
> Lastly, I think it is appropriate here to add that the management in our department has been fair in its labor practices. We have been generous with training, vacation and leave requests and extra hours when possible. We have tried to be especially sensitive to the workers not covered by paid benefits.

. . .

The Union ultimately processed the grievance to Step 3 of the contractual grievance procedure. Beth A. Huber, the County's Personnel Director, denied the

grievance in a letter to Wilson dated May 15, 1989. The parties have stipulated that the grievance was processed in accordance with the requirements of the contract.

The Union and the County executed the following stipulation at the September 26, 1989, arbitration hearing:

> 1. This Stipulation is entered into in lieu of the presentation of factual evidence on the matters contained herein at the arbitration hearing herein. The parties stipulate that the following facts shall be part of the record for this proceeding:

2. Manitowoc County is a county of the State of Wisconsin with offices at the Manitowoc County Courthouse, 1010 South 8th Street, in the City of Manitowoc, Manitowoc, Wisconsin, 54220.

3. Among the departments and services operated by Manitowoc County is the Aging Resource Center, with offices at 821 Washington Street, in the City of Manitowoc, Manitowoc County, Wisconsin, 54220.

4. At all times relevant to this proceeding, Jill Kellner, "Kellner", and Patricia Cummings, "Cummings", were employees of Manitowoc County employed at the Aging Resource Center as community supervisors.

5. The attached document entitled "Labor Agreement Between Manitowoc County and Manitowoc County Courthouse Employees, Local 986-A, AFSCME, AFL-CIO, 1988-1989 and 1990", and identified as Joint Exhibit # 1 is the current collective bargaining agreement between the parties to this grievance arbitration, and is a true and accurate representation of such agreement.

6. The wages for both Cummings and Kellner during the time relevant to this proceeding were $8.66 per hour.

7. The Director of the Aging Resource Center is Robert Kellerman. Mr. Kellerman determined on March 21, 1989, that meal sites for the elderly nutrition program operated by the Aging Resource Center located at Valders and Whitelaw should not be opened on that date. Mr. Kellerman decided not to open those meal sites because, in his opinion, the attendance expected on that date at those two sites was insufficient to justify opening the sites.

8. Both Kellner and Cummings were notified less than twenty-four (24) hours in advance that they should not report to work on March 21, 1989.

9. Both the Valders and Whitelaw sites were not opened on March 21, 1989, and it is agreed that Cummings and Kellner each lost three (3) hours of work that would have otherwise been paid had the sites been opened for service on March 21, 1989.

10. On April 5, 1989, Cummings and Kellner presented the grievance which is the basis for the instant arbitration to Robert Kellerman. Mr. Kellerman denied that grievance at step 1 on April 17, 1989. The Union then contacted Attorney Mark Hazelbaker, at that time the Personnel Director of Manitowoc County, to appeal the grievance to step 3 of the agreed upon grievance arbitration process.

11. Mr. Hazelbaker forwarded the file to his successor, Beth Huber, who was appointed Manitowoc County Human Resources

Director. Ms. Huber scheduled a meeting between the grievants and their representative, Michael J. Wilson, AFSCME District Representative. That meeting was held Wednesday, May 10, 1989, at 3:30 P.M. At said meeting, the grievants presented their arguments and the grievance was denied at step 3. The grievants then appealed the grievance to arbitration pursuant to the applicable provision of the collective bargaining agreement.

The parties supplemented this stipulation with witness testimony, none of which poses any dispute here.

Kellerman testified that the Aging Resource Center has no established policy on minimum attendance required to keep a meal site open. Kellerman also testified that the County has opened meal sites for fewer than seven County residents both before and after March 21, 1989. Kellerman could not, however, remember how many times this has happened.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union initially notes that Article 2 governs layoffs, and that "(l)ayoffs do not have to be either permanent or of long duration to qualify under a contract definition of the term layoff." Acknowledging that the contract does not define the term "layoff", and that Article 3 provides the County the right to lay employes off due to lack of work, the Union argues that this right is "subject to the other provisions of the contract, i.e. notice of layoff, etc." Because the grievants work an established schedule, and because they were not afforded twenty-four hours of notice that they should not report for work on March 21, 1989, it follows, according to the Union, that the "instant case is not about scheduling work (but) is about cancelling scheduled work to save labor costs." Because such a cancellation must be considered a layoff and because the County did not comply with the procedures specified in Article 2, it follows, according to the Union, that the grievance must be sustained.

THE COUNTY'S POSITION

The County argues initially that "(n)othing in the agreement guarantees the grievants any number of work days or hours." The County cites Article 23 as the source of any possible guarantee of work, and summarizes the effect of that article thus:

Article 23, paragraph A (intro) provides a guaranteed work week for . . . Courthouse employees. Paragraph A. 1. does the same for Counseling Center employees. Paragraph A. 2. confers a guarantee for Community Board employees. Paragraph A. 3., which applies to "site managers" has no such guarantee.

Because Article 23 does not guarantee work for site managers, it follows, according to the County, that Article 3 governs this dispute. Article 3, the County argues, reserves to the County the authority "to relieve the grievants for lack of work or adjust the work week". Any other conclusion would require, according to the County, a modification of the terms of the collective bargaining agreement in violation of Step 4 of Article 8. Beyond this, the County contends that "(e)ven if the grievance could be used as a vehicle for adding to the contract, the instant case could not be raised by a grievance because it is not a mandatory subject of bargaining." Specifically, the County asserts that established case law grants the County "the right to unilaterally reduce its services through an economically motivated layoff." Beyond this, the County contends that the record will not support a finding that an unequivocal, clearly acted upon, and fixed past practice exists. Asserting that "(t)he agreement does not require the County to layoff in inverse seniority", the County concludes that the present record does not establish any violation of seniority rights. Concluding that the grievance is "frivolous", the County asks that the grievance be dismissed.

DISCUSSION

The stipulated issue questions whether the Employer violated the agreement by informing the grievants not to report for work at the Valders and Whitelaw meal sites on March 21, 1989, due to low attendance. The parties do not dispute that Article 3 reserves to the Employer the right to "relieve employees from duty because of lack of work or other legitimate reason". The rights of Article 3 are, however, expressly made subject to the balance of the agreement,
and the parties' dispute here focuses on whether the Employer's right under Article 3 to relieve the grievants from duty on March 21 1989, has been limited by other agreement provisions.

The Union's arguments center on Article 2. The Union notes that the grievants work a schedule of hours established by Article 23, but does so to underscore that their loss of work on March 21, 1989, constitutes a layoff under Article 2. The County has acknowledged that Article 23 guarantees work to certain unit employes, but neither party to this dispute argues that Article 23 guaranteed work for the grievants on March 21, 1989. The issue posed for decision here thus focuses on whether the notice requirements of Article 2 can persuasively be interpreted to preclude the Employer from notifying the grievants on March 21, 1989, not to report for work that day.

The Union's application of Article 2 to the present record is not persuasive. Citing arbitral precedent, the Union argues that the term "layoff" is broad enough to encompass the present dispute, and from this concludes that the Employer was obligated to afford the grievants two weeks notice of the closing of the Valders and the Whitelaw meal sites. The Union's contention that the term "layoff" can in the abstract be construed to cover the present dispute is persuasive. However, the issue posed here is not whether that term can be generally defined to cover the dispute, but whether the Union and the Employer specifically agreed to so define that term in Article 2.

Accepting the Union's interpretation of Article 2 would strain the language of that article, and would grant a guarantee of work not provided by Article 23. Section C of Article 2 defines layoff as "reducing employee personnel". While this reference is arguably broad enough to encompass the loss of hours experienced by the grievants, the balance of Section C applies to a situation in which an employe has lost their position. Thus, the section refers specifically to "that employee" and grants the employe selected for layoff the right to "bump any other employee in an equal or lower classification to the position they now hold or previously held provided they have more seniority than the person they are bumping". The section further requires the two weeks notice of layoff cited by the Union and provides that the right to bump be exercised within forty-eight hours. Section C concludes by requiring the Employer to give "one (1) week notice of recall". Each of these provisions contemplates the loss of a position, and provides detailed procedures to ameliorate that loss. Article 23, Sections D and E also contemplate the loss of a position by providing for recall rights which are difficult, if not impossible, to apply to the facts at issue here.

In the present case, the Employer responded to an unanticipated drop in demand at two meal sites on one day. The grievants each lost three hours of work due to the closing of the sites, but the Employer did not anticipate eliminating or reducing the work of their positions as Community Supervisors beyond the three hours noted above. It is, at a minimum, difficult to meaningfully apply the provisions of Article 2 to the loss of work at issue here. How the Employer could have provided the two weeks notice requested by the Union when the drop in demand was not clear until March 21, 1989, is not apparent. Nor is it clear how the bumping procedure could have been implemented. Nor is it clear how the required notice of recall could have been issued. Thus, the applicability of the provisions of Article 2 to the present facts is, at best, strained.

Whatever persuasive force the Union's interpretation of Article 2 may have is eroded by reading that article in light of Article 23. The County acknowledges that it has guaranteed work to certain unit employes in Sections A and B of Article 23. The distinction in language between the guarantees acknowledged by the County and that of Article 23, Section A, 3, is pronounced. The provision governing the work of Community Supervisors provides only that such employes "shall work no more than eight (8) hours . . . ". Article 23, Section B, starkly poses the distinction by providing that for "Custodial Staff at the Courthouse, County Office Building, and County Safety Building the guaranteed work day shall be eight (8) hours". It is apparent that the Union and the County stated work guarantees clearly, and chose not to express such a guarantee for Community Supervisors. Against this background, the Union's interpretation of Article 2 becomes unpersuasive. That interpretation grants the grievants a guarantee of work that is not granted in Article 23, Section A, 3. Article 2 is a provision of unit-wide scope, and thus the Union's interpretation provides through a general provision a right not granted in the provision specifically addressing the work of Community Supervisors. This interpretation can not be accepted without violating the admonition of Article 8, Section C, Step 4, that "(t)he Arbitrator shall not modify, add to or delete from the terms of this Agreement".

The record contains no evidence of past practice or bargaining history to lend persuasive force to the Union's interpretation of Article 2. Since the Union's interpretation of Article 2 strains the language of that article, and would grant a guarantee of work not provided in Article 23, which specifically addresses work guarantees, that interpretation can not be accepted. It follows that the Union has not established a contractual limitation on the Employer's right to relieve Community Supervisors from duty due to lack of work on March 21, 1989, and thus that the Union has not proven the existence of a contract violation in the present matter.

It is necessary to limit the conclusions stated above to the facts posed by this grievance. The relationship of Articles 2 and 23 can not be characterized as unambiguous, and no attempt can persuasively be made here to define the parties' rights or obligations in any situation other than that litigated here.

AWARD

The Employer did not violate the terms of the Agreement on March 21, 1989, when it notified the employes not to report for work.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 18th day of December, 1989.

By _____
Richard B. McLaughlin, Arbitrator