BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between UNITED LEGAL WORKERS and LEGAL ACTION OF WISCONSIN, INC.	Case 6 No. 54460 A-5521

Appearances:

Cullen, Weston, Pines & Bach, by Mr. Gordon E. McQuillen, on behalf of the Union.
Michael, Best & Friedrich, by Mr. Jose A. Olivieri, on behalf of the Employer.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Employer", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Madison, Wisconsin, on January 13, 1997. The hearing was transcribed and the parties thereafter filed briefs and reply briefs which were received by April 28, 1997. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Are the grievances arbitrable?

2. If so, did the Employer violate the two contracts herein when it laid-off and/or gave notices of lay-off to employes Jack Longert, Linda Orton, Patricia Fox-Caron, and Lisa Hutter and, if so, what is the appropriate remedy?

BACKGROUND

The Employer provides legal services to the poor in the State of Wisconsin where it maintains offices in Madison, Kenosha, and Milwaukee.

In 1996, the Employer's revenues for its Madison office were reduced by a $123,000 cut from the Legal Services Corporation ("LSC") basic filed grant; a $44,000 cut in the LSC migrant grant; an $84,767 cut from the LSC state support grant; an approximately $15,000-$20,000 cut from the Wisconsin WISTAF grant; a $35,892 cut from the Joyce Foundation; an interest

reduction of about $3,431; and a reduction in attorney's fees of about $784.

At the same time, the Employer in 1996 had lower employe expenses of about $46,000 (in large part because of layoffs) and it had a year-end fund balance of $60,214. For 1997, the revenues for the WISTAF basic filled grant increased from $68,576 to $90,209 and its migrant grant increased from $17,150 to $22,561.

The Employer in 1995-1996 studied how to best meet these revenue shortfalls. It ultimately decided on February 5, 1996, 1/ - after the Union was accorded the opportunity to speak to its Board of Directors - to lay off several employes effective November, 1996. It therefore notified the Union on February 15 about the layoffs and it later told the grievants on March 14 (Joint Exhibit No. 4), that they would be laid off in November.

The Union throughout this time opposed the layoffs on the ground that the Employer should reduce the hourly work week by 20 percent and freeze salaries, as it met on several occasions with the Employer's representatives to discuss what should be done in the face of the Employer's declining revenues. Union Coordinator Donn Lind thus testified: "we were trying to convince the administration to take different measures [such as renegotiating its lease, reducing library costs, changing insurance, etc.] so to avoid layoffs if at all possible." Lind also testified about the Employer's unsuccessful attempt in past negotiations to delete the "last resort" language found in the contracts.

The Employer rejected the Union's lay-off proposal because it believes that it is too impractical to reduce the normal work week. Executive Director John Ebbott thus testified that it was necessary to have full-time staff available to service the Employer's clients; that it would be too difficult for part-time attorneys to properly serve their own private clients and the Employer's clients at the same time; that an ethical conflict of interest might arise if they attempted to do so; that the Union's proposal would still leave a deficit of about $57,000 in 1997 and over $200,000 in 1998; and that the Union's proposal might not reduce family health insurance costs. Ebbott explained:

> "What I don't want is a whole office that has non-legal action private practice, family, whatever it is, to have substantial commitments to something else which exacerbates this unavailability."

Attorney Rodger Klopp, a member of the Employer's Board of Directors, corroborated Ebbott's explanation as to why it was too impractical to reduce the work week to 80 per cent, saying that it was "not a realistic option considering that we had to probably lay people off regardless if we did that, anyway."

1/ Unless otherwise stated, all dates herein refer to 1996.

The Employer on November 15 laid off attorney Jack Longert and secretary Patricia Fox-Caron. Thereafter, Fox-Caron was recalled on January 6, 1997.

In addition, the Employer initially told Susan Carter Pearsall that she would be laid off, but it subsequently rescinded her lay-off notice and never laid her off. 2/ The Employer also told employes Linda Orton and Lisa Hutter that they would be laid off effective November 15. Hutter quit her employment on October 3 or 4 to accept other employment and Orton quit her employment on November 1 to find employment elsewhere. But for their proposed layoffs, neither Orton nor Hutter would have quit.

The Union filed the instant grievances on March 27 protesting the proposed layoffs. The Employer denied them, thereby leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union asserts that the Employer violated the two contracts herein because the layoffs were not a "last resort" in the face of the other reasonable proposals the Union had advanced. It thus argues that it is not grieving the manner of the layoffs, but rather, "the basis for the staff reduction from the first instance". The Union also maintains that the grievances are timely because: (1), the Employer's Personnel Committee earlier agreed that they were timely filed; and (2), the Union, in any event, timely filed its grievances once the particular laid-off employes had been identified by the Employer on March 14. As a remedy, the Union asks for the recall of all laid-off employes and a make-whole order for those employes who have been adversely affected by their layoffs.

The Employer, in turn, contends that the grievances are untimely because they were filed more than 20 days after it notified the Union on February 15 about the proposed layoffs. It also maintains that the grievances on Hutter and Orton's behalf are moot because they resigned before their proposed November 15 lay-off date and that, furthermore, the Union is foreclosed under Article IX, Section 6, of the contract from arbitrating Attorney Longert's layoff. On the merits, the Employer asserts that the Union's proposal for a reduced work week must be rejected because the Union was unable to obtain that goal in past collective bargaining negotiations between the parties. The Employer also argues that the Union's proposal to avoid the layoffs is impractical, in part because it still leaves budget deficits.

DISCUSSION

As I ruled at the hearing, the grievances are not time-barred because: (1), the Employer's

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2/ The Union agrees that Pearsall's grievance is moot. Hence, her situation is not discussed below.

Personnel Committee on March 27 agreed during the grievance procedure that the grievances were timely filed (Joint Exhibit No. 12); 3/ and (2), it was impossible for the Union to grieve on behalf of the specific individuals herein until after the Employer identified them on March 14. Once they were so identified, the Union timely filed the instant grievances on their behalf on March 27, thereby complying with the contracts which specify that grievances must be filed within 20 working days of the event. In addition, the Union in any event notified the Employer well in advance of the November 15 layoffs that they would be grieved. For all of these reasons, the grievances are not time-barred.

The Employer also argues that the grievances relating to Hutter and Orton are not arbitrable because they quit their employment before their scheduled November 15 layoffs. I disagree, as the record shows that both did so only in order to obtain work elsewhere and that, moreover, neither would have quit but for their scheduled layoffs. Hence, their grievances are arbitrable since the Employer's proposed lay-off caused them to do what they did.

The Employer also argues that attorney Longert's grievance is not arbitrable under Article IX, Section 6, of the attorneys' contract which states:

> SECTION 6 Transfers and Reassignments of Primary Job Duties
>
> In this Article, "permanent" means any period of more than three months, and "set of primary job duties" means one or more duties which typically consume more than sixteen (16) hours of the employee's work week.
>
> In making decisions regarding the need for transfers or permanent reassignment to a different set of primary job duties of an employee, the Employer shall fairly consider the following factors:
>
> 1. the program's continuing capability in the substantive areas identified as priorities in the LAW Priority Plan.
>
> 2. the program's ability to engage in and provide adequate clerical support for a full range of legal activities, including individual or service work, group representation, legislative and administrative representation, impact litigation, and community education.

3/ The Employer offers no explanation as to why, after acknowledging in the grievance procedure that the grievances were timely filed, it now asserts otherwise.

3. the program's affirmative action obligations.

4. the program's ability to communicate with clients in Spanish, particularly in those areas where a significant portion of the client community is Spanish speaking.

5. the ability of the program to meet its administrative and fiscal responsibilities.

6. the program's obligation to satisfy the grant conditions of any funding sources.

7. the program's ability to maintain its knowledge of the agencies and institutions affecting the poor within the local client community and to retain its contacts with the local client community.

8. the needs and wishes of the particular employee(s) affected.

9. alternatives to a solution which conflicts with the wishes of the affected employee.

10. the impact of various alternatives on other employees.

11. the seniority of the employee(s).

12. any other relevant factors.

Decisions made by the Employer regarding layoffs in Article IX, Section 7 and transfers under Article IX, Section 6 may be grieved up to the level of the Board of Directors, under the procedures specified in Article VIII, but may not be taken to arbitration.

Decisions made by the Employer regarding job reassignments under this section may be grieved to the Director, under the procedures specified in Article VIII. Within ten (10) days of the notice to the employee of the Director's decision, the employee may request, in writing, a review of the decision by the Board of Directors. Upon receipt of the notice for review, the Personnel Committee of the Board of Directors shall, prior to the next regularly scheduled Board meeting, determine whether to review the decision of the Director. Within fifteen (15) days of the Personnel Committee's

> determination, the employee shall be notified of the Personnel Committee's decision. The Personnel Committee's decision may not be taken to arbitration.

The Employer relies on this language in support of its claim that the Union "may file a grievance to challenge a layoff decision regarding an attorney in the Madison unit, but it may not take the matter to arbitration."

However, this quoted language only refers to the layoffs referenced in Article IX, Section 7, which states:

> SECTION 7 Staff Reductions
>
> Staff reductions will be according to seniority unless the needs of the program require otherwise. In determining the needs of the program, the Employer shall consider the first seven factors listed in Section 6 of this Article.
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> In lieu of layoff, the Employer may offer an employee regular part-time work; however, the employee has the option to refuse such offer and be placed on layoff status. Such refusal shall not affect the employee's recall rights. Employees shall be recalled as needed to fill vacancies in reverse order of layoff, that is, the last employee laid off shall be the first one recalled to fill a vacancy in any job description for which the employee is qualified.

This language, as the Union makes clear, relates to who is to be laid-off and the criteria that is to be used in doing so; i.e., seniority "unless the needs of the program require otherwise."

Well here, the Union is not grieving either the selection process or the criteria used to effectuate Longert's layoff. Rather, the Union's grievance alleges a violation of a different part of the contract, i.e., Article IX, Section 3, entitled "Bases for Staff Reductions", which states:

> SECTION 3 Bases for Staff Reductions
>
> It is agreed that reductions in staff among members of the bargaining unit are to be avoided except in certain serious circumstances. A staff reduction shall only be implemented as a last resort, after reasonable measures short of reducing staff have been thoroughly considered and after consultation with the Union Management Committee (per the provisions of Article XII, Section 18) in a meeting called for that purpose. The meeting shall

be convened within five (5) days after the Employer gives written notice to the Union of the planned staff reduction. Such notice shall be given to the Union as soon as practicable upon management's learning of circumstances which may result in the necessity for staff reductions. Such a reduction in staff may be considered only:

a. if funding from the Legal Services Corporation or other major funding source is reduced, resulting in a decrease in funding available for the Madison Area office, or

b. if Legal Services Corporation or any other major funding source regulations, instructions, or grant conditions, either directly or indirectly, require or result in a reduction in funds available for the Madison Area office, or

c. if an increase in funding results in the opening of one or more full-time offices in locations within the Madison Area office's current service area. In such a situation, the total number of staff serving the six-county area now served by the Madison Area office will not be reduced, unless paragraph (b) of this section applies.

d. if an increase in costs and/or a reduction in funds available for the Madison Area office results in a serious financial problem which in the good faith judgment of management necessitates staff reduction.

Provided, however, that nothing in the above language regarding layoffs and staffing shall prevent the Employer from reaching agreement with an Employee who requests a reduction in work hours to so reduce those hours, so long as the reduction does not result in a substantial increase in compulsory overtime for any other member of the bargaining unit.

Hence, there is no language in this part of the contract which states that employes are prohibited from arbitrating the "Bases for staff reductions."

Indeed, the Employer itself has previously conceded that such matters <u>are</u> arbitrable, albeit under a stricter standard of review (a matter discussed below). Thus, Board Member Anne Willis Reed by letter dated March 19, 1987, informed then-Union negotiator Robert P. Nelson:

"What the arbitrator will be deciding, as we see it, is whether

> management really did make the judgment required by the contract: that is, whether management really thought there was a serious financial problem, really thought a layoff was necessary, and so on."

Having previously represented to the Union that the bases for layoffs could be arbitrated, the Employer is precluded from asserting otherwise now. As a result, and absent any contract language stating that the proviso found in Article IX, Section 3, is not subject to arbitration, Longert's grievance is arbitrable.

Turning now to the merits, this case turns on the application of that part of Article IX, Section 3, of the contract which states: "A staff reduction shall only be implemented as a last resort. . ."

In this connection, I find, contrary to the Union's assertion, that management throughout this time acted in good faith by consulting with the Union and by trying to find ways short of a layoff to meet its severe revenue shortfall. It is true, of course, that the Employer ultimately rejected the Union's plan for a reduced work week and a salary freeze and that its budget picture has somewhat improved. However, the combined testimony of Executive Director Ebbott and Board of Directors member Klopp shows that the Employer carefully studied the Union's plan before rejecting it. Hence, the Employer complied with that part of Article IX, Section 3, which requires it to thoroughly consider alternatives and to consult with the Union.

Ebbott and Klopp's testimony also showed that the proposed wage freeze and reduced work week option was not a viable one. Thus, both testified in substance that it was too impractical as an operational matter to go to a shortened work week because of its disruption to the regular office routine and because any reduction to part-time employment could cause certain ethical issues to arise and to also cause its attorneys to neglect their work here. Moreover, a reduction in the work week still would have left the Employer with a substantial budget deficit in 1998.

The Employer asserts that bargaining history supports its position in this regard because it specifically told the Union in negotiations leading to Article IX, Section 3, that this proviso was meant to be very narrowly construed. Thus, Personnel Committee Chair Reed by letter dated March 19, 1987, informed the Union's negotiator:

. . .

> The Board negotiating group has considered your letter of February 26. We feel that the term "in the judgment of management" must remain in the clause we proposed.

> You are concerned that this language will render the clause unreviewable by an arbitrator. We believe that meaningful review is possible. What the arbitrator will be deciding, as we see it, is whether management really did make the judgment required by the contract: that is, whether management really thought there was a serious financial problem, really thought a layoff was necessary, and so on. I understood your group to be primarily concerned about the danger of a layoff caused by whim or caprice. The clause we are proposing allows review that can and should reverse such a decision.
>
> We do agree with your proposal to move the general language limiting layoffs to a last resort and requiring a meeting with the union committee, so that this language governs each of the four layoff thresholds.

Nelson, however, rejected this interpretation in a letter dated April 28, 1987, and the parties at that time did not agree to any new contract language regarding this issue. In the end, the parties the next year agreed to the present language. The Employer therefore claims in its brief:

> "Where the intent and meaning of a contract proposal is stated as clearly as in this case and where the provision is subsequently agreed to with no change in meaning or intent, the contract must be interpreted to reflect the stated intent."

But, as the Union correctly points out, Reed's letter "merely provides" the Employer's understanding about what the "last resort" language meant. There is no evidence, however, that the Union in 1987 agreed to it. Hence, Reed's letter - standing alone - is not dispositive as to what meaning should be given to this language.

More important is what happened in the subsequent negotiations when the Union in 1990 tried to obtain contract language which stated:

> "The Union may decide to achieve the reduction in staff by a reduction in salary rather than personnel and by the commensurate creation of part-time positions." (Employer's Exhibit No. 8).

This proposal showed that the Union at that time recognized that employes could be laid-off under Article IX, Section 3, even if the Employer had not previously reduced their work week. For if that were not the case, the Union certainly would never have made this proposal.

Indeed, the face of Article IX, Section 3, shows why the Union believed it needed this extra protection: i.e., the fact that this proviso states that "nothing in the above language regarding

layoffs and staffing shall prevent the Employer from reaching agreement with an Employee who requests a reduction in work hours to so reduce those hours. . ." (Emphasis added). The key word here is "requests" because it shows that the Employer is not required to reduce anyone's hours in order to avoid a layoff. Hence, the "last resort" language earlier found in this same proviso does not require the Employer to do something which this proviso subsequently makes discretionary; i.e., whether to reduce someone's hours to avoid a lay-off.

The Union's failure in 1990 to obtain its proposed language shows that the parties then recognized that the contract should be interpreted in the way the Employer urges here - i.e., that the "last resort" proviso does not require the Employer to reduce the work week before it can lay off any of its employes.

The Union correctly points out that the Employer in negotiations also subsequently unsuccessfully tried to delete the "last resort" language (Union Exhibit 4). The Union thus argues that the Employer "had tried sometime ago to escape the obligations to which it had committed itself years earlier when the possibilities of layoffs looked dim." The Employer's unsuccessful effort at deleting this proviso does appear at first blush to cancel out the Union's earlier unsuccessful effort to strengthen this same language. However, there is a critical difference between the two situations: the Employer's efforts followed the Union's 1990 efforts, thereby showing that the Employer could effectuate layoffs under the "last resort" language without first reducing the work week, irrespective of whether the "last resort" language stayed in the contract, which is a separate question of what that phrase means. In addition, the fact remains that Article IX, Section 3, on its face shows that the Employer retains the discretion to reduce hours in order to avoid layoffs - a discretion which it has not chosen to exercise here.

I therefore find that the Employer's interpretation must be adopted over the Union's and that, as a result, the Employer did not violate the contract when it laid-off employes and/or gave them notices of recall without first reducing their work week.

In light of the above, it is my

AWARD

1. That the grievances are arbitrable;

2. That the Employer did not violate the contracts herein when it laid-off and/or gave notices of layoffs to employes Jack Longert, Linda Orton, Patricia Fox-Caron, and Lisa Hutter; their grievances are therefore denied.

Dated at Madison, Wisconsin, this 22nd day of July, 1997.

By ___Amedeo Greco /s/___________________________
Amedeo Greco, Arbitrator