

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CESA #11 HEAD START ASSOCIATE
AND PROFESSIONAL STAFF**

and

COOPERATIVE EDUCATIONAL SERVICE AGENCY #11

Case 19
No. 56028
MA-10149

(Team Leader Pay Grievance)

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, on behalf of the Association.

Weld, Riley, Prens & Ricci, S.C., by **Mr. Stephen L. Weld**, on behalf of the Agency.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "Agency", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Turtle Lake, Wisconsin, on April 21, 1998. The hearing was not transcribed and both parties filed briefs that were received by June 8, 1998. Based upon the entire record and arguments of the parties, I issue the following Award.

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

ISSUES

1. Is the grievance arbitrable?
2. If so, did the Agency violate Article VI and Article XXI of the contract by abolishing the Team Leader position and by taking away the \$1.00 an hour differential formerly paid to the grievants and, if so, what is the appropriate remedy?

BACKGROUND

The Agency used Team Leaders at its various sites to manage its educational centers and to perform such duties as supervising assistants and bus drivers; organizing staff meetings; canceling school; serving as liaison to the central office; and managing certain administrative matters.

Their job description, (Joint Exhibit 19), provided in pertinent part:

...

DUTIES AND RESPONSIBILITIES:	Supervise Center Assistants and Bus Drivers, Organize Staff Meetings, School Cancellations, Liaison to Central Office, Administrative Management of the Center, Maintain Confidentiality of all Client Information and Other Responsibilities and Duties as Required.
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COMPETENCY REQUIRED:	Leadership Skills, Problem Solving Skills, Supervision Skills, Flexible Scheduling, Generally Available at the Center.
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...

They thus were responsible for running each Center on a day-to-day basis, for which they were paid a \$1.00 an hour differential over and above their regular wages.

Largely because of a new state mandate that provides for more stringent day care requirements, the Agency at the end of the 1997 school year abolished the Team Leader position and took away the \$1.00 an hour differential from the nine (9) former Team Leaders. The Agency at that time created a new Site Facilitator's position which complies with new state regulations and which is outside the bargaining unit. Those new regulations, HFS 46 Licensing Rules For Group Day Care Centers, provide in pertinent part:

...

2. The center director shall be responsible for the supervision of the planning and implementation of the center's program for children, the education of staff at the center, staff meetings and orientation and continuing education for the staff.
3. A center director shall be employed on one of the following schedules:
 - * a. At least 10 hours a week for the exclusive purpose of carrying out center director responsibilities in a single full day center location licensed for 50 or fewer children.
 - * b. At least 20 hours a week for the exclusive purpose of carrying out center director responsibilities in a single full day center location licensed for 51 or more children.

...

The Agency therefore by letter dated June 20, 1997, (unless otherwise stated, all dates hereinafter refer to 1997), invited the nine (9) former Team Leaders to apply for said position. Five (5) Site Facilitators were needed for the Agency's Centers at Amery/New Richmond; Almena/Rice Lake; Menomonie/Ellsworth; Boyceville; and Chippewa Falls/Cornell. Four (4) former Team Leaders applied for said positions and all four (4) were hired. The other five (5) former Team Leaders have remained in the bargaining unit.

The job description for the new Site Facilitator position provides:

JOB TITLE: Site Facilitator

CLASSIFICATION: Supervisory Management Position – Exempt

**CRITICAL SUCCESS
FACTORS:**

- . Able to project a genuine, nurturing, welcoming, positive, and open presence with eye contact, excitement and energy.
- . Written and oral communication skills – clear and complete, demonstrating appropriate respect and good listening skills.
- . Demonstrates appropriate mentally healthy behavior and effective communication skills.
- . Demonstrates effective leadership, teaming, and conflict resolution skills.

- . Expresses a belief in the Federal Head Start program for both children and parents

**JOB
RESPONSIBILITIES:**

- . Be responsible for the supervision of the planning and implementation of the centers program according to Wisconsin Day Care Regulation skills (DCHFS 46.05(1)(B)2a)
- . Assisting in the supervision of center staff and complete the Performance Appraisal Process in conjunction with component coordinators
- . Facilitate center staff meetings and team development activities
- . Provide orientations for new staff, volunteers, parents
- . Support the ongoing, continuous education of staff
- . Participate in the hiring, evaluation and termination of staff
- . Schedule to work force, approve absences, overtime, comp time, breaks, etc.
- . Approve all time sheets
- . Recruit, train, and monitor substitutes and volunteers
- . Provide public relations function within the community
- . Assist component coordinators with record checks
- . Perform Bus Driver alcohol and drug testing procedures
- . Support transition process
- . Facilitate the parent and community concerns process
- . Support parent involvement activities at the center level
- . Assist in developing family literacy services
- . Manage labor contract issues at the center level
- . Oversee the center budget
- . Coordinate the development of the center calendar
- . Monitor and meet all day care licensing, federal performance standards, and federal health and safety standards
- . Assist in center accreditation process
- . Other duties as assigned

**PERFORMANCE
SKILLS:**

- . Demonstrate through Action Support for the Program Mission/Vision/Values
- . Use Program Resources Wisely
- . Manage Time Effectively

- . Identify and Implement Innovative practices (challenges the process)
- . Inspires a shared vision among center staff
- . Communicates optimistically, positively, and with honesty and openness
- . Displays effective problem solving skills
- . Creates an atmosphere of trust and shared ownership
- . Sets clear goals and outcomes
- . Models expected behaviors
- . Recognizes others contributions
- . Provides team with encouragement, support and appreciation
- . Displays skills to positively promote the program
- . Maintain confidentiality of all family and staff information
- . Ability to demonstrate high degree of compassionate partnering ability
- . Ability to work with diverse groups of people

QUALIFICATIONS:

- . Meet State Daycare Center Director Regulations
- . Demonstrates knowledge and skills in the area of Human Resources
- . Past supervisory experience such as Team Leader, Center Director, etc.
- . Successful completion of First Aid/CPR training
- . Can demonstrate through past performance appraisal process strong communication, facilitation, and leadership skills
- . Participation in a leadership or supervisory skills class

After learning that the Agency intended to abolish the Team Leader position and to create the new Site Facilitator position, Association Executive Director Alan D. Manson by letter dated May 14 informed Head Start Program Director Barbara Wehman that the Association wanted to bargain over the matter. Manson and Wehman subsequently met and discussed the issue over the next several months, during which time no formal grievance was ever filed.

The Association on October 28 filed the instant grievance wherein it claimed that the Agency had violated the contract by taking away the \$1.00 an hour differential paid to the five (5) former Team Leaders who remained in the bargaining unit. Wehman by letter dated November 10, (Employer Exhibit 6), informed Manson that the grievance had been improperly filed because:

...

We do not believe the grievance was filed at either level 1 or 2 in accordance with the terms of the current contract. There was no mutual agreement to hold this grievance in abeyance for discussion at the October 23 meeting. We were informed that the union intended to address this issue during a September phone call; however, there was no mutual agreement to operate outside of the current contract language.

...

By letter dated November 19, Manson informed Wehman that the grievance had been properly filed and that:

...

You cannot, without lying, deny that we have talked about the Team Leader pay situation several times since the summer. You cannot deny, without lying, that you agreed to meet with me to discuss the Team Leader situation and possible grievance on 10/28/97, and that you never raised any procedural issue prior to your letter of 11/10/97.

The grievance procedure allows NUE to file a grievance. NUE has filed this one. I filed it, for NUE, at Step 2 since we have been discussing it for some time.

If you insist that it be filed with the immediate supervisors of the Team Leaders, rather than with you, it is quite obvious that the outcome would be for the immediate supervisors to deny the grievance and for it then to be filed back with you.

Nevertheless, if you insist that this grievance be refiled with the immediate supervisors of the Team Leaders involved in the grievance, I will do so, even though that will result in time and costs to both parties. You can either call or write to direct me to refile this grievance with the immediate supervisors.

The Agency denied said grievance, hence leading to the instant proceeding.

As for the changes caused by the Agency's actions, former Team Leader Marge Rettenmund testified that she sometimes still performs her former Team Leader duties when she is involved with busing issues; when she prepares purchase orders; when she

fills in for the Site Facilitators about three days a week; when she helps out in the classrooms; and when she takes care of summertime matters. On cross-examination, she acknowledged that she has not been told to continue her busing duties or to continue to prepare purchase orders and that other employes also prepare purchase orders and are involved in busing issues. She also stated that she cannot work ten hours a week at the Agency's Eleva Center.

Former Team Leader Mary Donatelle, now a Site Facilitator at the Amery/New Richmond Center, testified that she now supervises the day-to-day operations at the Center; that she oversees the bus operations; that she handles parental complaints; that she serves as a liaison for the central office and the school site; that she sets up training; that she hires aides; that she handles staff issues such as scheduling; that she evaluates all employes; that she organizes staff meetings; and that she cancels school. On cross-examination, she agreed that but for evaluating other employes, she as Team Leader could have performed all of the present duties she now performs as a Site Facilitator.

Site Facilitator Betty Skapyak, Rettenmund's immediate superior, testified that she has not designated any special tasks to Rettenmund; that a "number of people" get involved with school closings; that she discharges employes; that she has hired aides and other employes; that she helps hire teachers, that she writes up employes over attendance problems; and that employes submit their time off requests to her for approval. She also told Rettenmund to refer parental complaints to her. On cross-examination, she said that Rettenmund has handled parental complaints and bus issues.

Head Start Director Wehman testified that some Team Leader duties were transferred to the Site Facilitators; that new day care rules require designating Center directors who can supervise staff; and that said new rules did not require transferring the former Team Leader duties to the Site Facilitators. She also said that the former Team Leaders could not spend 10 hours a week at each site, as is now required.

POSITIONS OF THE PARTIES

The Association contends that its grievance is arbitrable because it was filed as soon as it learned after informal discussions with Head Start Program Director Wehman that the Agency would not change its course. As to the merits, the Association asserts, "The central question here is whether or not the Employer can remove job responsibilities, and a job title, and specific compensation for those responsibilities and that title, from bargaining unit employes, thereby demoting them, without violating the terms of the collective bargaining agreement." It thus argues that while the Agency can phase out the Team Leader positions from the bargaining unit through attrition, it violated Articles VI and XXI of the contract because five (5) of the former Team Leaders are now

serving as “*de facto*” Team Leaders in their various sites due to the established patterns of their Head Start colleagues and clients.” As a remedy, the Association seeks reinstatement of the Team Leader positions and back pay.

The Agency maintains that the grievance is not procedurally arbitrable because it was untimely filed. It also asserts that it was entitled under the contract to eliminate the Team Leader responsibilities because no employees have been demoted; because it has the contractual right to transfer the Team Leader responsibilities to a management level position; because it in any event had “just cause for eliminating the Team Leader responsibility and pay”; and because the Association has not proven that any former Team Leaders are continuing to perform their duties.

DISCUSSION

The first issue that must be decided here is whether the grievance was untimely filed and thus procedurally barred under Article IV, Section 1, of the contract which provides in pertinent part:

“If the employee does not submit his grievance to the immediate supervisor within 15 workdays after such employee knew of the act or condition on which the grievance is based, the grievance will be deemed waived.”

Article IV goes on to state:

The parties hereto agree to follow each of the foregoing steps in the processing of a grievance. If CESA fails to give a written answer within the time limits set out for any step, the grievant may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped. The timelines may be extended by mutual agreement of the parties.

...

Here, the Association filed its October 28 written grievance well after the Agency announced in the spring of 1997 that it would be abolishing the Team Leader position. However, there was a valid reason for the Association’s delay: Manson on May 14 put the Agency on express notice that the Association wanted to bargain over said matter and he and Head Start Program Director Wehman subsequently continued to discuss it in an effort to informally resolve it. Up to the time of Wehman’s November 10 letter referenced above, neither Wehman nor anyone else on the Agency’s behalf ever put

Manson on notice that he had to file a written grievance within 14 days to protect the Association's right to grieve and to then arbitrate this matter.

Given Manson's good faith attempts to resolve this issue and his May 14 notice to the Agency that the Association was contesting the Agency's actions, I find that the Agency has not been prejudiced by the Association's delay in filing its written grievance and that it therefore is inequitable to hold the Association to a contractual time limit that Manson reasonably believed had been waived by the Agency in their informal discussions. Hence, the grievance is arbitrable.

As to the merits of said grievance, it is well recognized that – absent any express agreement to the contrary – an employer retains the inherent right to abolish existing job positions and to create new ones. See *How Arbitration Works*, Elkouri and Elkouri (BNA, 5th Ed., 1997), p. 697-699. Thus:

Arbitrators have often recognized the right of management, unless restricted by the agreement, to eliminate jobs (and where a few duties remain to reallocate them) where improved methods or other production justification exists and management otherwise acts in good faith. Arbitrators likewise have recognized management's right, where not restricted by the agreement, to eliminate job classifications (and reallocate the remaining duties) when done in good faith for a justifiable purpose.

In upholding the right of management to eliminate jobs or classifications, Arbitrator Howard S. Block offered the following evaluation:

The impact of a changing technology upon the work force has posed problems to both management and labor not easy of solution. That this issue has been a persistent and vexing one over the years is indicated by the significant number of arbitration proceedings on this subject dating back to the earliest reported decisions. A review of these decisions reveals that they fall into two fairly distinct categories which seem noteworthy here: (1) One line of cases emphasizes that where a Collective Bargaining agreement sets forth a comprehensive rate structure, the wage rate established for each classification evidences an agreement between the parties as to the wage rate, as well as the classification; these cases go on to provide that, in general, the terms of this bargained for exchange may not be unilaterally altered. To the extent that some of these decisions regard the classification structure as being

unalterably frozen during the life of the Agreement, they do not represent the weight of arbitration authority. (2) A second group of cases holds that the existence in the Agreement of a negotiated rate structure does not guarantee that the classifications will remain unchanged during the term of the Agreement. The reason advanced for this interpretation is that economic necessity in a competitive market makes it essential that management have the degree of flexibility necessary to adapt the work force to changed conditions. Where arbitrators have upheld management's right to eliminate jobs or classifications and reallocate residual job duties, they have stressed that such changes must be made in good faith, based upon factors such as a change in operations, technological improvements, substantially diminished production requirements, established past practice, etc. It is this second line of cases which appears to reflect the present weight of authority on this issue. (citations omitted). Id., at 698-699.

Here, since there is no contractual language mandating the continuation of the Team Leader classification, and since the Agency had a legitimate business reason for doing so, the Agency was free to abolish it pursuant to the broad management rights' proviso contained in Article III of the contract, entitled "CESA Functions", that states:

CESA hereby retains and reserves unto itself all powers, rights, authority and responsibilities to manage and operate the CESA system. The exercise of such power, rights, authority, duties and responsibilities of CESA, the adaptation of policies, rules and regulations and practices in furtherance thereof, shall be limited only by the specific and express terms of this Agreement and the laws and regulations of the State of Wisconsin and of the United States of America. The foregoing statement of the functions of CESA shall not be considered to exclude other functions of CESA not heretofore set forth; CESA retaining all functions and rights to act not specifically covered by this Agreement, including the right to subcontract out for goods and services, provided there is no reduction in the hours of employees who were employees as of 4/13/95.

Contrary to the Association's claim, the abolition of the Team Leader position does not constitute an unjust demotion under Article VI of the contract which states:

No employee shall be disciplined, demoted, or suspended without just cause and, after three (3) years. . . of probation, no employee shall be terminated without just cause.

Rather, it merely reflects the Agency's right under Article III to best manage its operations in response to a new state mandate which imposes higher daycare requirements.

However, that is a separate question of whether, as contended by the Association, the Agency is violating the contract by having the former Team Leaders perform their former duties without the added compensation they previously received.

If the former Team Leaders are still required to perform the distinguishing characteristics of their prior jobs, the grievance would be upheld because the Agency cannot escape paying for the contractually-mandated dollar-an-hour wage premium provided for in Article XXI of the contract through the subterfuge of removing an employee's title, but not the duties encompassed by that title.

As to that, former Team Leader Rettenmund testified that she still performs some of the same duties she previously performed as a Team Leader. In addition, Site Facilitator Donatelle, a former Team Leader, testified that but for evaluating other employees, she as a Team Leader could have performed all of the present duties she now performs as a Site Facilitator. Their combined testimony establishes that there is considerable overlap between the two positions.

However, Site Facilitator Skapyak – Rettenmund's immediate superior – testified without contradiction that she told Rettenmund not to perform some of her former Team Leader duties and that, furthermore, "other people" also get involved with some of those duties.

Trying to sort out who performs what duties is not an easy task here – a point acknowledged by the Association when it states the issue is "difficult to ascertain. . ."

Nevertheless, I conclude that the Agency has not violated the contract because Skapyak and Wehman testified that the Site Facilitators now exercise significant supervisory duties - such as evaluating employees, hiring employees and discharging employees that were not performed by the former Team Leaders. These supervisory duties, along with the fact that they now must spend ten hours a week at their Centers, are the distinguishing characteristics of the Site Facilitator's positions and they thereby show there is a significant difference between their duties and the duties formerly performed by the Team Leaders. If employees like Rettenmund therefore believe that they are still performing their former Team Leader duties, they have the right to grieve any such assignments.

In light of the above, it is my

AWARD

1. That the grievance is arbitrable.
2. That the Agency did not violate Article VI or Article XXI of the contract by abolishing the Team Leader position and by taking away the \$1.00 an hour differential formerly paid to the grievants.
3. That the grievance is hereby denied and dismissed.

Dated at Madison, Wisconsin this 4th day of September, 1998.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

