BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHEQUAMEGON UNITED TEACHERS

and

SOUTH SHORE SCHOOL DISTRICT

Case 37
No. 57050
MA-10497

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, appearing on behalf of the Union.

Mr. Henry Lamkin, District Administrator, appearing on behalf of the District.

ARBITRATION AWARD

Chequamegon United Teachers, hereinafter referred to as the Union, and South Shore School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Port Wing, Wisconsin, on February 25, 1999. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on March 26, 1999.

BACKGROUND

The facts underlying the grievance are not in dispute. On October 23, 1998, the District notified aides Julie Anderson, Dorothy Middleman and Lenore Holly that effective November 23, 1998, they would be partially laid off in that each would be reduced ½ hour per

day from eight hours to 7½ hours. The District at the time of the partial lay off, employed six aides, and Anderson, Middleman and Holly had the most seniority. The end result was five of the aides worked 7½ hours per day and one worked 3¼ hours per day. After the partial layoff no aide worked before 7:50 a.m. or after 3:20 p.m. The Union filed a grievance over the partial layoffs and the grievance was denied and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the District violate the collective bargaining agreement when it partially laid off Holly, Anderson and Middleman?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

II. MANAGEMENT RIGHTS

A. The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this Agreement. The Board shall have the sole and exclusive right to determine the number of employees to be employed, to determine the duties of each of these employees, the nature and place of their work, and all other matters pertaining to the management and operation of the District, including the hiring, transferring, demoting, suspending, or discharging of any employee. This shall include the right to assign and direct employees, to schedule work, and to pass upon the efficiency and capabilities of the employees, and the District may establish and enforce reasonable work rules and regulations.

The Board shall also have the right to designate the District as a job site for students participating in the JTPA program or other school-to-work and related programs, provided the placement of students in such programs does not displace any bargaining unit employees, and does not violate Article XVI and such program does not result in future lay-offs caused by such program. No bargaining unit member will have to supervise more than one student at a time and there will be no more than three students allowed per department during any one semester or summer.

B. The Board and the Association agree that as of the date of the execution of the Agreement the District may change management practices unless embodied in a specific provision of this Agreement. This provision will also include the changing of past practices that have not been expressed in this Agreement. Prior to the changing of such practices the School Board will notify the Union of their intent to change the practice.

C. It is understood that the above provisions do not remove the Board's statutory requirement to bargain the impact of the exercise of any function listed above as to its effect upon wages, hours and conditions of employment of the members of this bargaining unit.

. . .

XVI. LAY-OFF PROCEDURE

A. This procedure shall apply when the School Board reduces a position in part or in whole. The Board shall have the sole right to determine the position or positions to be eliminated. After the Board has determined which position shall be eliminated, the following procedure shall be used.

B. In the event that a lay-off is deemed to be necessary by the Board, the Board shall grant the employee to be laid-off thirty (30) calendar days (sic) advance notice.

C. For the purpose of lay-off, the non-instructional staff is divided into the following areas of classification:

1. Cook
2. Secretary
3. Custodian
4. Bus Driver
5. Aide

D. The selection of the employee to be laid-off shall be made according to the following guidelines.

. . .

3. If steps one and two are insufficient to accomplish the desired reduction of staff, the employee shall be laid off by the Board within the areas of classification and then in the inverse order of being hired within the District.

E. **Recall Rights**

. . .

Employees on lay-off status shall have first right of refusal to any temporary or substitute positions that become available which they are qualified to perform. If two or more qualified employees are on lay-off status, the employee with the greatest seniority has first refusal rights with the second most senior person having second refusal rights, etc. Employees on lay-off status who fill temporary or substitute positions shall receive the Districts' (sic) normal temporary substitute wage rates.

No new or substitute appointments will be made when there are laid-off employees available and qualified to do the work.

UNION'S POSITION

The Union contends that Article XVI applies to the partial layoffs of Middleman, Holly and Anderson. It submits that Article XVI, D. 3. requires layoffs to occur in the inverse order of being hired within the District and the District did not follow this requirement. It observes that there is no language in Article XVI or anywhere else in the contract that indicates the order of layoff can be sidestepped, ignored, not followed or bypassed. It insists the order of layoff must be followed even if scheduling is difficult or impossible. It points out that the order of layoff language has been in the contract for at least 16 years and three prior layoffs involved the last hired employe within a classification. It asserts that the District had a responsibility to negotiate a change in the contract language if it desired a change in the order of layoff, but the District never proposed any change, never notified the Union it would like a change nor that it was going to unilaterally implement a change. The Union notes that the aides' rate under the contract is $9.70 per hour and the District cannot decide to pay less because of financial reasons as there is no authority to reduce the wage rate. Similarly, according to the Union, it cannot change the layoff language simply because it would be more efficient. The Union cites a number of arbitration decisions in support of its argument that contract language must be followed even where the Employer can become more efficient or there is a better solution by not following the agreed-upon language. It asserts that the layoff language provides job security for long-term employes and the District has unilaterally taken away the job security of the most senior employes. It contends that the contract language does not allow such unilateral action and the parties never agreed to the District's only sometimes following the negotiated order of layoff.

The Union notes that the District based its argument on management rights until the hearing in this matter. The Union points out that the District's management rights are restricted by the provisions of the agreement and cannot change management practices

embodied in a specific provision of the agreement. It submits that the management rights clause does not permit the District to supersede the order of layoff set forth in Article XVI. It argues that the District must follow the contract until the parties agree to a change in the language.

The Union contends that for the past 18 years the District had a practice of employing some aides for an eight-hour workday. It points out that the District never proposed changing the length of the shifts or that eight-hour shifts were a problem. It also asserts that the District never gave it prior notice that it was going to implement a policy where no aides would have eight-hour work shifts and that three aides would be partially laid off due to the change in practice. It observes that Article II – B requires the District to give the Union prior notice of its intent to change the practice, thereby depriving the Union the opportunity to negotiate the issues and/or impact prior to implementation. The Union cited a number of arbitral authorities that a past practice can establish conditions of employment and an unintentional change violates the agreement. It insists that the District simply cannot unilaterally terminate an established practice of providing eight-hour shifts for aides who have the greatest seniority. It claims the Union must be notified that the District wishes to change the practice and negotiate prior to unilaterally implementing its desires.

The Union seeks a remedy that Middleman, Anderson and Holly be restored to eight-hour workdays and that they be paid for one-half hour per day back to November 23, 1998. The Union alternatively requests, in case of a finding that neither Article XVI nor Article II have been violated that the status quo ante be directed until the District notifies the Union that it intends to change the practice and the parties negotiate a successor agreement.

DISTRICT'S POSITION

The District contends that it followed the agreement, Article XVI, Lay-Off Procedure, and denies any violation of the letter or intent of the agreement. The District argues that the Union's reliance on Article II, Section C is not applicable as the layoffs or reduction of hours does not fall under that provision, and as the school day hours have not changed, the District does not have to bargain the impact of a change.

The District maintains that it followed the layoff procedure in Article XVI. It disputes the Union's position that less senior employes must be laid off before more senior employes can be cut back because hours cannot be taken from a less senior employe who works the same hours as the employe who seeks to bump by asserting seniority rights. According to the District, because there is no one with less seniority to take time from, it is nonsensical that a necessary position with less seniority must be eliminated before hours that are not required can be cut. It observes that if all the less senior aides were laid off first, it still would not create an extra half hour of work to be reinstated.

The District relies on the management rights clause which reserves to it the right to determine the number of employes to be employed, the duties each employe performs, the nature and place of work and all other matters pertaining to operation of the District including the right to schedule work. It claims that in exercising these rights, it assigned all aides to begin work no earlier than 7:50 a.m. and conclude no later than 3:20 p.m. so there is no aide work outside these hours.

The District asserts it was required to hire two additional aides but these provided no time for a more senior person to take hours from and the Union has failed to identify who should be laid off and in what order to remedy the situation to its satisfaction.

The District maintains its actions were necessary and not a violation of the contract. The District asserts that it has the right to determine the work schedule, the number of employes and the hours required for such work and if the grievance is upheld, it will divest the District of its managerial right to set work schedules and hours.

UNION'S REPLY

The Union contends that, contrary to the District's argument, it is not claiming that Article II requires the District to bargain the layoffs. The Union claims that if the layoff provision and the limitations in the management rights clause have not been violated, the District must bargain the change in the 18 year practice of having eight-hour work shifts within the aide classification. It submits that this is required by Sec. 111.70, Stats., as well as the management rights provision. It notes the agreement is silent on the length of work shifts and it has never been brought up in negotiations and the contract requires negotiations prior to the changing of practices and hours of work is a mandatory subject of bargaining.

It states that the reduction of hours was not due to lack of work as the additional work was performed by teachers or by the aides without pay. The Union asserts that the work done during the one-half hour reduction has not been discontinued from being performed.

The Union refers to the testimony of District Administrator Lamkin that the layoffs were for financial reasons and the layoffs saved $1,500 to $2,000 per year. It points out that the District created a new two-hour aide position and filled it. It disputes that there was a problem with lunch periods requiring the hiring of this aide and the one-half hour reduction of the three aides totals less than the two hours of the new hire, thus costing more than saved by the layoff. The Union states that this shows that the District was not in a financial bind.

DISTRICT'S REPLY

The District argues that the agreed-upon issue was whether the District violated the layoff clause, not the whole agreement. It asserts the Union's brief clouds the issue with past practice and does not focus on the Union's original grievance.

With respect to the facts, it notes that the Union acknowledges that aides had different starting and ending times to begin with and the District asserts that this demonstrates that each aide has a schedule that meets the needs of the student to which she is assigned. The District argues that it determines the needs and it is within its right to determine the schedule to meet the needs.

With respect to the Union's claim that the District must bargain the impact of changes, the District points out that the school day did not change, so it does not have to bargain about work day and as the contract has a layoff clause, the District does not have to bargain the impact of new individual layoffs.

The District maintains it simply has laid off three employes and there is no contractual language that says it must mutually agree on a work shift or schedule change. It asserts the Union's reference to wage reductions and past practice are not relevant. The District observes that not all aides worked for eight hours a day so past practice is not applicable.

It believes that it acted properly and in good faith.

DISCUSSION

Article XVI of the parties' collective bargaining agreement provides in Section A as follows:

> This procedure shall apply when the School Board reduces a position in part or in whole. The Board shall have the sole right to determine the position or positions to be eliminated. After the Board has determined which position shall be eliminated, the following procedure shall be used.

This language specifically refers to position or positions and the Board has the sole right to determine which position or positions to eliminate. It does not refer to classification or areas of classification. Thus, the District could decide to eliminate an aide position at Oulu elementary school and even if the most senior aide occupied that position, the position would be properly eliminated. It makes sense that if a Special Education Aide at Oulu was needed for a student and that student moves to a different district or school, the position would no longer

be needed. The District would not eliminate the position occupied by the least senior aide as that would make no sense. Although the agreement does not state that bumping is permitted, the language of Article XVI, Section D states that "selection of the employee to be laid-off shall be" in the area of classification in inverse order of seniority. If the least senior aide was a Special Education Aide at Port Wing elementary and the Oulu position was eliminated, then the Port Wing aide would be laid off and the Oulu aide would take that aide's place. This scenario is necessary in order to give effect to the words "position" in Section A and "employee" in Section D. This is easily understood. When the District reduces a position in part as it has the right to do, then what occurs? The District has the sole right to determine which positions to reduce and in the instant case, it decided to reduce the three eight-hour positions occupied by the most senior employes. Because the District has determined what positions are to be reduced, nothing requires the District to retain any eight-hour position. The layoff procedure in Section D then provides the least senior in the classification area be laid off. Assuming the least senior is laid off, it would not increase the positions to eight hours, just as elimination of a full position would decrease the number of positions. In the instant case, the three most senior employes were reduced because their positions were reduced but where could they go. There were no other positions occupied by less senior employes that they could move to that would give them an eight-hour position because the District had no eight-hour positions. All aides worked 7½ hours or less and during the same hours, thus the senior employes had no option but to accept the partial layoff. Selecting the least senior employe would not restore any hours to any employe so in this case the partial layoff must fall on the most senior.

The Union has asserted that the District violated past practice by reducing the positions from eight to 7½ hours. Past practice may be used to give meaning to ambiguous language. Here, there is no ambiguous language as the language is clear that the District can determine which positions to reduce in whole or in part.

Past practice may also be used to demonstrate a benefit under the contract where the contract is silent on a particular issue because this benefit after a period of time becomes an implied term of the contract. There are some past practices that are merely the exercise of management rights. Changing work schedules, adding or eliminating duties from a position, changing the method of operations are past practices which may be unilaterally changed by management. See Elkouri and Elkouri, How Arbitration Works, (BNA, 4th Ed.) at 443. Additionally, past practice cannot be used to abrogate express contract language. The provisions of the layoff clause reserve to the District the right to decide what positions to reduce in whole or in part. Asserting that past practice requires that the positions must remain at eight hours would run counter to this express language. See Elkouri at 454. The language of the layoff clause allows the District to reduce any and all positions in its sole discretion, thus past practice cannot be used to abrogate this express provision.

The Union has also argued that prior to changing the practice of eight-hour shifts, the District had to bargain impact. Layoff is a permissive subject of bargaining and the layoff clause demonstrates the parties bargained the impact of a layoff, whole or partial, and thus, the District had no obligation to bargain impact of the partial layoffs of the three positions. It follows that it had no obligation to bargain the change of eight-hour shifts to 7½ hours due to the exercise of its right to lay off.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The District did not violate the collective bargaining agreement when it partially laid off Holly, Anderson and Middleman, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 14th day of April, 1999.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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