BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DANE COUNTY, WISCONSIN MUNICIPAL EMPLOYEES LOCAL 60, AFSCME, AFL-CIO

and

OREGON SCHOOL DISTRICT

Case 29
No. 56929
MA-10463

(Grievance of Marilyn R. Macaluso)

Appearances:

Mr. Thomas Larsen, Staff Representative, on behalf of the Union.

Melli, Walker, Pease & Ruhly, S.C., by **Mr. Douglas E. Witte**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "District", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Oregon, Wisconsin, on January 11, 1999. The hearing was transcribed and both parties filed briefs and reply briefs that were received by March 10, 1999. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Did the District violate Article X, Section 2, of the contract when it reduced grievant Marilyn Macaluso's hours from 40 to 30 hours a week and, if so, what is the appropriate remedy?

DISCUSSION

Grievant Macaluso, an Educational Assistant, has been employed by the District for about 19 years. She served in that capacity in the Netherwood Knoll Elementary School during the 1997-1998 school year, during which time she worked 40 hours a week: 10 hours in the fourth grade and 40 hours in the fifth grade. The affected teachers and the District administration decided that Educational Assistants for the 1998-1999 school year should spend all of their time in one grade, rather than splitting their time between the fourth and fifth grades as had been the former case. That decision was based strictly on educational policy and had nothing to do with saving money.

Director of Special Education and Educational Assistant Coordinator Cathy Kooistra informed Macaluso by memo (Joint Exhibit 9) dated July 14, 1998 (unless otherwise stated, all dates herein refer to 1998):

. . .

> I hope you are enjoying your summer. We are busy getting ready for the start of school, as that time is quickly approaching. In preparation for the start of school, the building principals and I have been reviewing educational assistant needs.
>
> During the 1997-98 school year your assignment was 40 hours in 4th and 5th grade regular education. This letter is to let you know your specific assignment for the 98-99 school year.
>
> Building: Netherwood Knoll Elementary
> Classification: Non-licensed
> Assignment: 5th Grade
> Immediate Supervisor: Teri Mills/Larry Williams
> Program Teacher (if applicable):
> Approved Hours Per Week: 30
>
> Even if this does not represent a change in your assignment or hours, please read this entire letter. Your contract language allows for displacement by others (bumping) which may impact your position. If this assignment represents a reduction in hours, please complete the Response Section at the end of this letter and return it to me by July 24th. Also included with this letter are a copy of the seniority list and a current posting of educational assistant vacancies and available additional hours.

> Your specific hours within the approved limit will be determined by your building principal. Please plan to report to your classroom (building) on Wednesday, August 25th at the time designated by your building principal. If there is a need for you to begin your assignment on an earlier date, your building principal will contact you. An approval form signed by your building principal will need to be completed before the time is submitted for payment. A sample of this form is included for your reference. The three-part form may be obtained in your building principal's office. The yellow copy of this form must be attached to your time sheet whenever you work beyond your contracted weekly hours. Additional building work hours are approved by your building principal. Professional development hours are approved by me using the same form.
>
> Nearer to the start of school, you will be receiving information about back-to-school activities. There will be a Back-to-School luncheon in each building and you will be invited to attend.
>
> Enjoy the rest of summer vacation! I look forward to seeing you this fall.
>
> . . .

Kooistra sent similar letters to about 14 other employes who had their hours cut or eliminated, none of whom ever grieved the change in their status.

Macaluso replied to Kooistra via a July 23 memo (Joint Exhibit 10), that stated:

> . . .
>
> I am writing this letter regarding the changes in my position as regular Educational Assistant at Netherwood Knoll Elementary School. I am enclosing the response section of the letter you sent me dated July 14, 1998.
>
> I am checking Section 2 which states that I ACCEPT the reduction in hours for the 1998-99 school year as outlined in this letter and intend to submit a letter of interest for additional hours which may be posted. This pertains to the assignment of fifth grade Educational Assistant for Netherwood Knoll Elementary. I will accept the 30 hours for this position if an additional 10 hours can be found to bring my status to 40 hours.

I am checking Section 3 which states that I REJECT the reduction in hours for the 1998-99 school year as outlined in this letter and intend to submit a letter of interest to Human Resources for posted vacancies.

I am checking Section 4 which states that I REJECT the reduction in hours for the 1998-99 school year as outlined in this letter and plan to invoke my right to displace (bump) an employee in a comparable position (classification/hours) with less seniority than I have.

I appreciate all the help you have given me regarding this matter and any help you can give me in the future.

. . .

PLEASE COMPLETE AND RETURN THIS PORTION TO CATHY KOOISTRA BY JULY 24TH. MAKE SURE YOU SIGN AND DATE THE FORM.

_____I ACCEPT the reduction in hours for the 1998-99 school year as outlined in this letter and will remain in that position.

___X__I ACCEPT the reduction in hours for the 1998-99 school year as outlined in this letter and intend to submit a letter of interest for additional hours which may be posted.

___X__I REJECT the reduction in hours for the 1998-99 school year as outlined in this letter and intend to submit a letter of interest for posted vacancies.

___X__I REJECT the reduction in hours for the 1998-99 school year as outlined in this letter and plan to invoke my right to displace (bump) an employee in a comparable position (classification/hours) with less seniority than I have.

. . .

Macaluso by letter dated July 23 informed Principal Teri Mills and Assistant Principal Larry Williams (Joint Exhibit 2):

. . .

I am writing this letter in response to our verbal and written correspondence from the weeks of July 12, 1998 and July 19, 1998. On Tuesday, July 14, 1998, you verbally notified me that my assignment of fourth and fifth grade Educational Assistant (NKE) in the Oregon School District, was reassigned to fifth grade Educational Assistant (NKE). The reassignment resulted in a reduction in hours from forty per week for the fourth and fifth grade to thirty per week for the fifth grade. On Wednesday, July 15, 1998 I received written notice of the reassignment and resulting layoff from Cathy Kooistra, Educational Assistant Coordinator. This reassignment is in multiple violations of my union contract effective July 1, 1997 through June 30, 1999.

The first violation is my reduction in hours from forty to thirty per week. According to the union contract, this is defined as a layoff. (Article I, Definitions, Layoff – as used in this Agreement, layoff includes a reduction of hours (On a daily, weekly, or annual basis).)

Also in violation of the contract is my reassignment. In the letter to me dated July 14, 1998, it stated that you have assigned me to the fifth grade (NKE). This is classified as reassignment, as previously I was assigned to the fourth and fifth grade (NKE). (Article VI, Employee Responsibilities/Rights; Section 1,b. Assignment. Employees who are reassigned within the building shall retain their rights including their current number of hours.)

In accordance with the union contract, I am hereby filing a grievance. (Article XIII, page 13, line 37 through 58 and page 14, line 1 through 29.) The grievance is based on the following: 1. Violation of Article I, Definitions, 2. Violation of Article IV, Section 3. 3. Violation of Article VI, Section 1,b. 4. Violation of Article X, Section 1, Seniority. 5. Violation of Article X, Section 2, a and b, Layoff.

As a dues paying member of the Dane County Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, I am filing a grievance. You can rectify this matter in the following ways:

1. Return my employment status to forty hours per week at NKE.
2. Find ten hours that are compatible with my schedule giving me a total of forty hours per week.
3. Revert to last years assignment of forty hours per week for the fourth and fifth grade (NKE).

. . .

Assistant Principal Williams replied to Macaluso via a July 30 memo (Joint Exhibit 3), that stated:

. . .

> This letter comes in response to your letter received on July 23, 1998. Per our discussion on July 23, 1998, you were informed that your forty-hour position was reduced. You were further informed in a correspondence from Cathy Kooistra dated July 14, 1998, that you could do the following:
>
> 1. Accept the reduction in hours for the 1998-99 school year as outlined in the letter and will remain in that position.
>
> 2. Accept the reduction in hours for the 1998-99 school year as outlined in the letter and intend to submit a letter of interest for additional hours that may be posted.
>
> 3. Reject the reduction in hours for the 1998-99 school year as outlined in the letter and intend to submit a letter of interest for posted vacancies.
>
> 4. Reject the reduction in hours for the 1998-99 school year as outlined in the letter and plan to invoke my right to displace (bump) an employee in a comparable position (classification/hours) with less seniority.
>
> There are forty-hour positions available within the Oregon School District from which you can displace other individuals with less seniority. In addition, after the first day of school until October 1, 1998, positions **within** the building that **have not been assigned** as posted and not filled could be adjusted to provide opportunities for additional employment hours.

. . .

Macaluso on August 11 appealed the denial of her grievance to Kooistra who replied in an August 18 memo (Joint Exhibit 5):

. . .

I wish to respond to the appeal you have made regarding the Level I response to your grievance of July 23, 1998.

Your first concern was Article I, Definition of a layoff. It is my opinion that you were not layed off. As a result of the elimination of your specific position, you were displaced as per Article X, line 18, which resolves that: "An employee who has been displaced shall have the right to a position of equal or fewer hours held by an employee with less seniority in an equally paid or lower classification." A layoff occurs when there are fewer positions than people, and that is not the case.

Your second concern is with Article IV, Management Rights, Section 3. The district did not violate your rights under this language. In fact, in this section, Article IV, page 3, line 1, the management rights include: "the right to determine the methods, means and personnel by which the school system operations are to be conducted." This language allows us to determine optimal staffing patterns to meet the needs of our building, our staff and students.

Your third concern, Article VI, Employee Responsibilities/Rights: Section 1, b, Assignment does not appear to be relevant as this was not a reassignment.

The fourth item listed in your grievance relates to Article X/Seniority/Layoff/Recall: Section 1, Seniority. I believe that your seniority rights were honored. In the letter dated July 14, 1998, I wrote to you that you had the option to accept or reject the assignment of 30 hours at Netherwood Knoll in 5th grade. You checked that you "accept the reduction in hours for the 98-99 school year as outlined in this letter and intend to submit a letter of interest for additional hours which may be posted." You were also offered several other options in accordance with an agreement from earlier this summer with your unit, related to "Job Posting" (copy attached). On July 31, you were offered a 40-hour position. You rejected that position in a phone call with me August 3 and in a letter to me dated August 3, 1998. You have additional rights per your contract which include displacing another employee in your group with "less seniority in an equally paid or lower classification." You have not chosen to displace another employee as of this date.

Your final concern was per Article X, Seniority/Layoff/Recall: section 2, Layoff. As stated in your first concern it is my opnion that this is not a lay off. You have the right to 40 hours per week; you were offered a 40 hour-per-week job; you declined that. You may also displace another 40 hour-per-week employee with less seniority than you have. Again, a layoff occurs when there are fewer positions than people.

> In summary, it is my decision to deny this grievance. I am willing to discuss any of your concerns regarding this letter and am available at 835-3161, extension 4004.

. . .

Earlier, Macaluso on July 23 applied for the posted position of 1.0 FTE Special Educational Assistant – CDC, a 40 hour a week position. She was granted that position on July 31. On August 3 Macaluso informed Kooistra (Employer Exhibit 3):

. . .

> I am writing in regard to the letter I received from you on August 1, 1998 and to the phone conversation we had on August 3, 1998. I am not requesting a transfer to the posted 1.0 educational assistant position at Oregon Middle School in the program for students with cognitive disabilities. For personal reasons I would not be able to accept this position.
>
> Due to the grievance I filed on July 23, 1998, I am at this time not exercising my right to bump another position. I will stay at my reassigned position at Netherwood Knoll, maintaining my 40 hour status as per the union contract, until the grievance has been settled. If at the completion of the grievance, it has not been settled to my satisfaction, I may exercise my right to bump as outlined in your letter dated July 14, 1998.
>
> Thank you for all your help in this matter.

. . .

In addition, Macaluso was entitled at that time to bump into about five other 40 hour a week positions held by other employes with less seniority, but she chose not to do so. While all this was going on, District and Union representatives were meeting in the summer of 1998 to devise a means for dealing with employe hours reductions and additions. They did so because they had agreed in their last contract negotiations to address such issues at a later date. In July, 1998, the following language was drawn up (Joint Exhibit 11):

> Proposed EA Language
>
> Article VIII, Section 2 Job Posting

In the summer the principals and the educational assistant coordinator will design their optimum educational assistant staffing patterns. When a position is reduced, the incumbent will be notified in writing and given the following options:

1. accept the reduction in hours and remain in the position
2. accept the reduction in hours and submit a letter of interest for additional hours which may be posted
3. reject the reduction in hours and submit a letter of interest for posted vacancies
4. reject the reduction in hours and invoke the right to displace an employee in a comparable position (classification/hours) with less seniority.

When a position is increased, the incumbent will be displaced and the position will be posted.

Vacancies will be filled according to the contract language prior to the first day of school. From the first day of school through September 30th, for hours left vacant, any minor adjustments to the number of scheduled hours in a position can be made by the building principal after notice has been given via e-mail to all educational assistants in that building.

On October 1st each educational assistant's hours will be locked for benefit purposes for that school year. Benefits will remain at the 10/1 level even if the hours in a position are decreased during that school year. If hours are added to a benefited position within the 16 2/3% window, benefits will be adjusted accordingly. After October 1st, posting of additional hours is necessary if:

a. the additional hours would mean the position is now eligible for benefits
b. the additional hours would mean more than a 1/6 (16 2/3%) increase for that position based on the current hours per week of employment
c. the cumulative total of additional hours for each school for each position may not exceed 1/6 (16 2/3%) of the 10/1 total

An employee who accepts additional hours which are posted as a separate job in a different building will receive no travel reimbursement.

This language was never formally ratified by the Union and it was never signed by any Union representative. Nevertheless, Union Vice-President Shelly Hicks testified that this agreement reflected the parties' understanding. In addition, Union Staff Representative Thomas Larsen attended the meeting where this agreement was finalized and he did not object to it. The instant hearing marked the first time the Union ever informed the District it was not bound by this language and that the District violated the contract by applying it to Macaluso's situation.

POSITIONS OF THE PARTIES

The Union argues that the District violated the contract because "no layoff should have taken place"; because the July understanding dealing with job postings does not supersede the contract; because Macaluso was not required to bump into another position; and because Macaluso "was not made aware that additional hours were available to her to pick up." As a remedy, it asks that Macaluso be made whole for any wages and benefits she lost as a result of her reduction in hours.

The District contends that the grievance is without merit because no layoff in fact occurred; because the "parties jointly developed a procedure to deal with hours reductions which controls this grievance. . ." and because it complied with those procedures; because "the Union should be equitably estopped from bringing this grievance"; because even if the July, 1998 agreement is not controlling, the Union has still failed to prove that it violated the contract; and because Macaluso in any event is not entitled to any back pay because of her failure to mitigate damages.

DISCUSSION

The District is right, the Union is wrong.

For while the Union asserts that the July, 1998 agreement referenced above is not binding, the record establishes that Union Representative Larsen was present when Union Vice-President Hicks expressly agreed to it, thereby causing the District to reasonably believe that it was in effect for the 1998-1999 school year and that it covered Macaluso's situation in the summer of 1998. Thus, Kooistra testified without contradiction that she even telephoned Hicks to make sure her letters to Macaluso and other affected employes followed the terms of the agreement and that Hicks then agreed they did.

It therefore is immaterial that the Union never formally ratified it, as it is well understood that parties can agree to matters not covered in their contract even though their actions have not been formally ratified by their principles. See CITY OF SUPERIOR, Case 143, No. 53705, MA-9439 (Jones, 1996), wherein Arbitrator Raleigh Jones ruled:

. . .

> Based on the following rationale, the undersigned concludes that the parties' 1995 agreement to not post certain DPW positions is controlling here. It is noted at the outset that the parties to a labor agreement (namely the Union and the Employer) may amend or add to it by subsequent agreement. While the labor agreement is certainly the chief instrument that guides the parties in their relationship, on occasion it becomes necessary to clarify, add to, or make exceptions to the labor agreement in some manner. This is what a side agreement does. Such side agreements are very common in labor relations. That is what happened here.
>
> Id., at 5.

. . .

Arbitrator Daniel Nielsen reached a similar conclusion in CITY OF MANITOWOC, Case 113, No. 52623, MA-9046 (1995), wherein he stated:

. . .

> The Union argues that the agreement should have been reduced to writing if it existed, and that a unilateral letter cannot substitute for a clear written agreement. The first of these arguments overlooks the principle that conduct alone, much less an exchange of assurances, can create binding agreements. It is also completely inconsistent with the treatment of the scheduling issue, where the parties have honored the unwritten agreement. The parties have a legal obligation to reduce their agreements to writing if requested, but the lack of a document does not negate a bargain. In any event, the agreement here was not, strictly speaking, unwritten. It was reduced to writing by the City Attorney and presented to the Union before the contract was signed, with the clear expectation that the Union would make an objection if it disagreed. In that sense, the agreement was not unwritten and the letter was not unilateral. The Union had the option to object and return to bargaining, and the obligation to notify the City of its disagreement before the contract was signed. By instead allowing the City to sign the contract, thus terminating the employer's right to demand further bargaining or interest arbitration on the topic, the Union effectively acquiesced in the position set forth by the City Attorney.
>
> Id, at 4.

. . .

See, too, OWENS-CORNING FIBERGLASS CORP., 102 LA 757 (Dworkin, 1994); MACHINISTS AND CARPENTERS (SCOTT PAPER COMPANY), 98 LA 1085 (Lesnick, 1992); CC AIR, INC., 106 LA 57 (Nolan, Chair, 1995). Hence, the Union is precluded from now claiming that it is not in effect and that it is not dispositive of the grievance. See MILAS V. LABOR ASSOCIATION OF WISCONSIN, INC., 214 WIS. 2D. 1, 571 N.W.2D. 656 (1997).

The District followed the July, 1998 agreement to the proverbial "T" and Macaluso on July 23 exercised her options under that agreement, only to subsequently reject positions that offered her: (1), 40 hours a week; and (2), an additional 10 hours a week in addition to the 30 hours she already has. In short, the District has been most reasonable throughout this entire matter, only to be turned down by Macaluso at every turn. (Having turned down those opportunities then, Macaluso is now precluded from trying to bump other employes for the remainder of the 1998-1999 school year).

Moreover, the District in any event under Article IV of the contract, entitled "Management Rights", retains the right to "determine the methods, means and personnel by which the school system operations are to be conducted", which in this case means assigning only one Educational Assistant per class and determining the number of hours that are to be spent in each case. In addition, Macaluso's individual employment contract for the 1998-1999 school year does not list any specific class assignment, thereby showing that Educational Assistants are not hired for specific classrooms. All this is why the District is correct when it points out: "There is nothing in the contract which guarantees every individual a position, or a specified number of hours."

The Union asserts otherwise by claiming that the District violated Article X, Section 2, of the contract, which states:

> 2. Layoff. When the Employer determines to exercise its layoff authority, the Employer shall decide how many positions are to be affected within each classification.
>
> a. Employees on probation shall be laid off first.
>
> b. Employees not on probation shall be laid off based on seniority with those employees with the least seniority being laid off first.
>
> c. An employee who has been displaced shall have the right to a position of equal or fewer hours held by an employee with less seniority in an equally paid or lower classification.

d. The Employer will notify the employee of the layoff and of the employee's reemployment rights (recall) in writing thirty (30) calendar days in advance.

Here, however, the District never laid off Macaluso. Instead, it abolished her former position which covered both fourth and fifth grades and it created a new 30 hour a week position that was limited to the fifth grade. The District has the right to do that under the Management Rights clause without going through the contractual layoff procedure because: (1), Macaluso's former split position no longer exists; and (2), the District in any offered her opportunities to retain her forty (40) hour work week, thereby ensuring that she did not suffer any reduction in hours. The fact that Macaluso turned down those opportunities shows only that she refused to recognize that her former split position no longer exists. Her refusal, however, does not turn the District's actions into a breach of contract.

The District therefore has complied with the master contract, just as it has complied with the July, 1998 agreement to which Union representatives agreed.

In light of the above, it is my

AWARD

1. That the District did not violate the contract when it reduced grievant Marilyn Macaluso's hours from 40 to 30 hours a week.

2. That the grievance is hereby denied.

Dated at Madison, Wisconsin this 5th day of May, 1999.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

AAG/gjc
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