BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WEST CENTRAL EDUCATION ASSOCIATION – DURAND SUPPORT STAFF

and

SCHOOL DISTRICT OF DURAND

Case 36
No. 58255
MA-10897

Appearances:

Mr. Fred Andrist, Executive Director, West Central Education Association, 105 21st Street North, Menomonie, Wisconsin 54751, appearing for the Association.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Brian K. Oppeneer** and **Attorney Stephen L. Weld**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing for the District.

ARBITRATION AWARD

The Association and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association requested and the District concurred, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a dispute as set forth below. The Commission appointed Dennis P. McGilligan, a member of its staff. Hearing on the matter was held on May 2, 2000, in Durand, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by June 21, 2000.

ISSUES

The parties were unable to stipulate to the issues. The Association framed the issues as:

1. Did the District violate Article 6 – Discipline when they constructively discharged Ms. Bauer without cause?

2. If so, what is the appropriate remedy?

The District framed the issues in the following manner:

1. Did the District discharge the grievant by refusing to allow her to keep her 9-hour per week lunchroom clerical tasks after she resigned her ALAC supervisor duties and rejected a 15-hour per week aide position?

2. If the grievant was discharged, was there just cause?

3. If not, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Did the District violate Article VI – Discipline by constructively discharging the Grievant without just cause?

2. Did the District violate the collective bargaining agreement when it refused to allow the Grievant to retain her lunchroom clerical position after she resigned her ALAC supervisor duties?

3. If the answer to any of the above questions is YES, what is the appropriate remedy?

FACTUAL BACKGROUND

Barb Bauer, herein "Grievant," was a support staff employe of the Durand School District, herein "District," for seven years beginning in the 1992-1993 school year. During that period of time she was employed in a variety of positions.

During those seven years she also became active in the Association, culminating with her being President. She also served as the negotiation chair during the last bargain, which was a particularly difficult bargaining year that ended during the arbitration phase. Both Association positions caused her to advocate for other members and to question the practices of the District and the Superintendent with respect to, for example, job postings or the lack thereof.

In the spring of 1999, she decided to go to college to get her degree in education. She did not keep this a secret and it became common knowledge. At the time of her decision, she held two positions with the District, the Alternate Learning Attendance Center ("ALAC") Aide and Food Service Aide clerical position. The decision to go to college required the Grievant to reduce her workload at school.

The Grievant had been an Aide in the Attendance Center since 1996. In 1997, she assumed the lunchroom clerical duties which had previously been performed by Janice Randen. Randen had been assigned the lunchroom secretarial tasks when the Grandview School was closed and her position eliminated. Randen did not post for the work; the assignment was simply made. In 1997, the tasks previously performed by Randen were altered to include more computer skills and the number of hours allocated to perform the clerical tasks reduced. The assignment was posted. The Grievant responded to the posting and was awarded the position. The position was posted as a stand-alone position in 1997 and has remained that way until it was posted as a combined part-time ALAC Room/Food Service Aide position on August 2, 1999.

On July 26, 1999, the Grievant resigned her ALAC room duties but advised that she wanted to retain her Food Service Aide position.

Several phone conversations took place between District Superintendent Terry Olson and the Grievant before and after the above date. Superintendent Olson states in the grievance answer:

> On receipt of the letter, I phoned Ms. Bauer to advise her that the lunchroom secretarial tasks were not necessarily a separate position. I indicated that, while I would keep her interest in mind, I might need to use those hours, as I have in the past, to supplement vacant positions. During my tenure, the lunchroom secretarial duties have never been a stand alone position but rather have always been added to other assignments to create a position. I also advised that, when I knew exactly what the positions would be, including the hours which needed to be filled, I would be in contact with Ms. Bauer.
>
> During the week of August 9, 1999, I offered Ms. Bauer the last position the District needed to fill-three hours per day as an aide plus the nine hours per week performing lunchroom secretarial duties. I advised that the aide position had established hours from approximately 11:30-2:30 but the food service tasks could be scheduled either before or after her aide assignment on a given day. Ms. Bauer rejected the offer. . . .

The Grievant, on the other hand, testified that toward the end of July, 1999, she and the Superintendent had a conversation during which she informed him that she understood the District's difficulty in finding part-time help and desire to combine part-time jobs in order to fill part-time jobs. However, the Grievant also stated that she informed the Superintendent at that time that she held two different positions and hoped to keep the lunchroom job "since I have worked there for quite some time."

The Grievant also testified that on August 10, 1999, she had another conversation with Superintendent Olson during which the Superintendent indicated that he might be able to put together distance learning hours with lunch hour duty and that he would keep her posted. The Grievant stated that she was not offered a combined position at that time and was only informed that "this was a possibility."

On August 2, 1999, the District posted the duties previously performed by the Grievant (part-time ALAC Room/Food Service Aide).

On August 20, 1999, Superintendent Olson sent the Grievant a letter informing her that "we will not need your services in the food service area. As I indicated to you earlier, this position was put together in order to fill another part-time position."

The Grievant filed a grievance on August 25, 1999. In that grievance, the Grievant claimed either that she had been dismissed without just cause or laid off in violation of Article VIII of the agreement. For a remedy, the grievance stated: "Given the absence of a resignation letter, the District must either dismiss Ms. Bauer with cause or lay her off." The grievance adds that because the District neither dismissed nor laid off the Grievant "she is an active employee with all the rights and compensation afforded any other employee." The grievance requested that the District put the Grievant on paid administrative leave until it properly determined her employment status.

Superintendent Olson responded to the grievance on September 9, 1999, stating: "Based on Ms. Bauer's resignation from the ALAC duties and subsequent rejection of the aide/lunchroom secretary position, my understanding is she quit. Therefore, the grievance is denied."

The grievance was processed through the contractual grievance procedure to arbitration. At hearing, the Union indicated it would argue that the District constructively discharged the Grievant but never formally withdrew its claim that the District improperly laid off the Grievant. In its brief, the Association dropped the Article VIII (Layoff) allegation.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE III – MANAGEMENT RIGHTS

The School Board possesses the sole right to operate the School District and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the School District;
B. To hire, promote, transfer, schedule and assign employees in positions within the School District;
C. To suspend, demote, discharge and taken (sic) other disciplinary action against employees;
D. To relieve employees from their duties;
E. To maintain efficiency of School District operations;
F. To take whatever action is necessary to comply with State or Federal Law;
G. To introduce new or improved methods or facilities;
H. To change existing methods or facilities;
I. To determine the methods, means and personnel by which School District operations are to be conducted;
J. To take whatever action is necessary to carry out the functions of the School District in situations of emergency.

The Board recognizes that the inclusion of this provision does not alter their duty to bargain the impact of decisions affecting wages, hours and conditions of employment pursuant to this provision.

. . .

ARTICLE VI – DISCIPLINE

Any employee may be disciplined, suspended, demoted or dismissed by the employer for just cause. Any employee who is suspended, demoted or dismissed shall be given written notice of the reasons for such action. A copy of such notice shall be made a part of the employee's personnel record.

The parties agree that pursuant to Article VI – Discipline, that during an employee's one (1) year probation period that all employees are covered by just cause for suspension, demotion, and discipline (including probationary). However, probationary employees are not covered by the just cause provision (according to Article V – Probation) for dismissal.

POSITIONS OF THE PARTIES

Association's Position

In its brief, the Association first argues that the lunchroom secretary position is a stand-alone position, and that the Grievant held two positions, not one at the conclusion of the 1998-1999 school year. Because she planned to return to school and needed to reduce her workload, the Association points out that the Grievant resigned one (the ALAC Room Aide position) but not the other (the Lunchroom Secretary position).

The Association claims that conflict occurred between the Grievant and the Superintendent arising out of the Grievant's representational duties on behalf of the Association. The Association alleges that as a result the District viewed the Grievant as more of a liability than an asset. The Association believes that this motivated the District to constructively set the position filling process up and to combine positions knowing that the Grievant would be unable to maintain a position with the District. The Association argues that the District saw this as an opportunity to dismiss the Grievant "under the pretext of having trouble filling positions where no trouble had existed before."

The Association also argues that the record evidence does not support the District's contention that the Grievant quit her employment with the District.

In its reply brief, the Association makes the following new arguments: the District did not prove its point that it was forced to combine positions in order to attract applicants; the District's argument of combining positions to attract employes with benefits is contrary to their fiscal philosophy of not spending money; the District could have considered the food service aide position as a stand-alone position as they did in 1997; this dispute is about resigning one of her positions, not her refusal to perform over two-thirds of her assigned tasks as alleged by the District; the District's argument that the Grievant wanted to choose her duties trivializes the matter before the Arbitrator; and the District has had ten-hour or fewer employes in the past and could do so now to accommodate the Grievant's attendance at school.

The Association requests that the Arbitrator sustain the grievance; reinstate the Grievant to the Lunchroom Secretary position; and make her whole for all lost compensation in the amount of "$9.46 for each hour worked by anyone holding this position during the 1999-2000 school year."

District's Position

In its brief, the District argues that the Union's allegation the District denied the Grievant's request to continue in the Lunchroom Secretary position because she had served in a leadership role in the Union is not supported by the record and in the wrong forum. As

evidence of the District's lack of animus toward the Grievant, the District points to the Superintendent's attempt to accommodate the Grievant's decision to attend school by offering her the positions of distance learning aide and lunchroom clerical. The District also maintains that the proper forum for a concern about anti-union animus is not grievance arbitration but a prohibited practice complaint with the Commission.

The District also argues that the District did not violate the contract by denying Grievant's request to keep the lunchroom clerical tasks for the following reasons: the Grievant quit; and the Grievant's actions constitute just cause for dismissal.

The District next argues that in the absence of an express contractual limitation, the Employer retains all managerial rights and discretion including the right to create and define positions as it did herein when it determined "whether tasks will constitute a separate position or be combined with others." (Emphasis in original) The District asks rhetorically: "This situation is similar to a teacher holding a coaching position. The District would not automatically allow an employee to quit his or her teaching job and then by 'right' maintain his or her coaching 'position.'"

The District submits that if this grievance is sustained its ability to fill certain part-time positions including the disputed food service aide position with qualified individuals would be greatly reduced.

The District cites numerous authorities in support of the above arguments.

In its reply brief, the District rejects the Union's argument that the Grievant held two separate positions, and asserts that the lunchroom clerical tasks have been a supplemental assignment (not a "stand alone" position) since at least 1997.

The District adds it is undisputed that if the Grievant had remained on the job in food service she would have in effect resigned over two-thirds of her tasks. The District states that the Superintendent attempted to accommodate her by trying to create a position combining the food service tasks with distance learning duties. The District concludes: "Whether we call this a constructive resignation or a termination for cause" the fact is the Grievant chose not to perform the majority of her previous duties. The District is "under no contractual obligation to maintain a nine-hour a week position for her."

The District requests that the Arbitrator deny the grievance.

DISCUSSION

At issue is whether the District violated Article VI of the collective bargaining agreement by constructively discharging the Grievant without just cause.

The Association argues that the District constructively set the position filling process up and combined the distance learning aide position and the lunchroom clerical position with full knowledge that the Grievant would be unable to continue her employment with the District. However, the record indicates that the District offered her said positions in an attempt to assist her in retaining employment with the District. (Union Exhibit No. 1, Chapter 2, page 9). (The Examiner credits the testimony of Superintendent Olson in reaching this conclusion.) The District even offered her the flexibility of performing the food service tasks "either before or after her aide assignment on a given day."

It is true, as pointed out by the Association, that the District knew about the Grievant's intention to go back to school prior to the aforesaid offer. Consequently, the District had the opportunity to hire part-time employes and combine positions in such a way so as to make it impossible for the Grievant to continue working for the District. However, the record contains no persuasive evidence that the District made its hiring decisions with prior knowledge either that the Grievant would be unable to perform the two jobs because of her obligations related to her attendance at school or in an attempt to end her employment relationship with the District. In fact, the record is clear that the District had little knowledge about the Grievant's limitations while attending school beyond the fact that she would be attending school. Under these circumstances, it would be difficult for the District to construct with any certainty a hiring process that would preclude the Grievant from accepting employment with the District. There is no persuasive evidence in the record that the District even tried.

The Association also argues that the District denied the Grievant's request to perform her lunchroom aide duties because of her role in the Association. "The Association believes this is what motivated the District, not the perceived trouble in filling this position." In support of this contention, the Association offered testimony by the Grievant wherein she stated that after she raised several questions about postings "she felt like she shouldn't be asking those kinds of questions." The Association also notes that the last bargain was particularly difficult and that the Grievant played a prominent role in said bargaining.

Contrary to the above assertions, there is no persuasive evidence in the record that the District had any hostility toward the Grievant because of duties that she performed on behalf of the Association or that the District acted adversely toward the Grievant because of her Union duties. The Superintendent testified persuasively that there were legitimate business reasons (the need to effectively recruit and fill part-time positions with qualified individuals and thereafter retain said individuals as employes of the District), not related to any hostility toward the Grievant for her Association duties, for the District's actions.

The Association further argues there was no need for the District to combine the positions because the District's own Exhibit No. 1 shows that the position has been posted as a stand-alone position. However, said argument ignores record evidence indicating not only

does the District have a history of combining positions in order to attract and to retain qualified individuals but that the Grievant has held two such positions with the District since the 1995-1996 school year. (Union Exhibit No. 1, Chapter 1, page 1).

The Association maintains that the District's argument of combining positions to attract employes with benefits is contrary to their fiscal philosophy. However, the Association offered no persuasive evidence in support thereof; therefore, the Arbitrator also rejects this argument of the Union.

To support its claim of constructive discharge, the Association cites a decision by Arbitrator Stanford C. Madden in CITY OF KANSAS CITY, 87 LA 616 (1986). In that case, a disabled firefighter had to resign because evidence showed the fire marshal designed the position to eliminate him. In the decision, Arbitrator Madden ruled:

> While it is true that in many instances, management has the managerial right to operate inefficiently and this is not a concern of the Union or the grievant, in this case, the inefficiency discloses a design, which was the elimination of the grievant.
>
> Resignations which are forced and do not reflect the actual will of the employee are held to be discharges. GENERAL BATTERY CORPORATION, 74 LA 505; I.U.D.S.-MIDWEST, INC., 68 LA 962; EMGE PACKING COMPANY, 61 LA 250; ILLINOIS BELL TELEPHONE COMPANY, 67-1 ARB. 8111; RALPH'S GROCERY COMPANY, 77 LA 867.

The above case, however, is distinguishable from the instant dispute. The Association has made no showing herein that the District acted with intent and design to eliminate the Grievant as an employe of the District.

Having reached the above conclusions, the Arbitrator finds it unnecessary to address the other arguments raised by the parties related to the above issue.

Based on all of the above, and the record as a whole, the Arbitrator finds that the answer to the first issue as framed by the undersigned is NO, the District did not violate Article VI – Discipline by constructively discharging the Grievant without just cause.

A question remains as to whether the District violated the collective bargaining agreement when it refused to allow the Grievant to retain her lunchroom position after she resigned her ALAC supervisor duties.

Article III of the agreement provides that the School Board possesses the sole right to operate the District including the rights to: direct all operations of the District; hire, schedule and assign employes in positions within the District; maintain efficiency of District operations and determine the methods, means and personnel by which the District operations are to be conducted. The record is clear that the District had a legitimate business reason for rejecting the Grievant's request to work just the lunchroom clerical position – a need to combine part-time positions in order to hire and to retain qualified employes. (Testimony of Superintendent Terry Olson) The Association offered no persuasive evidence that the District acted improperly and in violation of the agreement by the exercise of the aforesaid management rights.

Based on all of the above and the record as a whole, the Arbitrator finds that the answer to the second issue as framed by the undersigned is NO, the District did not violate the collective bargaining agreement when it refused to allow the Grievant to retain her lunchroom clerical position after she resigned her ALAC supervisor duties.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the Association. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

In light of all of the foregoing, it is my

AWARD

The instant grievance is hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin, this 6th day of July, 2000.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

DPM/mb
6096.doc