

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 2485, AFL-CIO

and

WAUKESHA SCHOOL DISTRICT

Case 155

No. 61566

MA-11985

(Matthew Hamer)

Appearances:

Ms. Christine Bishofberger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W237 S4626 Big Bend Road, Waukesha, Wisconsin 53189, appeared on behalf of the Union.

Mr. Sean Scullen, Quarles & Brady, LLP, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appeared on behalf of the District.

ARBITRATION AWARD

On September 6, 2002, AFSCME Local 2489 and the Waukesha School District filed a request with the Wisconsin Employment Relations Commission seeking to have William C. Houlihan, a member of the Commission's staff, hear and decide a grievance pending between the parties. A hearing was conducted on December 2, 2002, in Waukesha, Wisconsin. A transcript of the proceedings was taken and distributed on December 13, 2002. Post-hearing briefs were submitted and exchanged by February 10, 2003.

This dispute addresses the elimination of the Kitchen Equipment Repair position, occupied by Matthew Hamer, the grievant.

BACKGROUND AND FACTS

Matthew Hamer, the grievant, was hired on January 21, 1998. He worked on the first shift as a Kitchen Equipment Maintenance and Repairman. Mr. Hamer testified to a number of incidents which caused him to challenge certain decisions of his employer, and/or to engage in protected, concerted activities.

During the 1999-2000 academic year, Mr. Hamer objected to the distribution of snowplowing overtime. He filed a grievance, which caused the matter to be discussed. As a consequence of the discussion, Hamer removed himself from the snowplow list. It was his testimony that Glen Norder, his supervisor, was present. He testified that he and Norder had a testy exchange relative to Hamer taking himself off the snowplow list. According to Hamer, the next time it snowed, Norder called him and asked if he could plow. The next year, Hamer testified that Norder did the same thing. According to Hamer, Norder refused to call him on a double-time situation which caused Hamer to file a grievance. It was Hamer's testimony that the resolution of that grievance was to give him overtime to make up for the time he was not called.

Ronald Stierman, the Director of Facilities, also testified with respect to Hamer's snowplowing grievance. According to Stierman, snowplowing had historically been handled on a building-by-building basis. Stierman testified that Hamer's grievance resulted in a re-examination of the snowplowing protocol. According to Stierman, a meeting was convened among bargaining unit members involved in the snowplowing. Stierman testified that a consensus came out of that meeting to continue snowplowing as it had historically been handled. At the conclusion of the meeting, Hamer indicated he wanted to be taken off the snowplowing list.

Mr. Hamer testified that at the conclusion of the snowplowing season, ". . .Glen told Pete Gerber, who was the maintenance manager at the time, a lie, that he witnessed me coming in late on 3-12-00 and 3-13-00, and that was the start of my entire nightmare with all of this."

Q. "Did you file grievances on that?"

A. "Yes, I filed a grievance on that."

Q. "Were they resolved?"

A. "They were resolved through mediation. And the letter was supposed to be pulled out of my file and it was supposed to be null and void, except Paul Roberts put me on notice there was an issue because I had admitted in the past that, yes, I had been late, but these two times in question were

inaccurate. And I believe the reason Glen Norder said this or made up this accusation was because he knew the grievance of the snowplowing was coming up. It was in retaliation of that. . .” (Transcript, p. 35-36)

In November of 2000, Mr. Hamer was selected to be the union steward for the Food Service employees. In his capacity as union steward, Mr. Hamer wrote the following letter, which was distributed in the January 7, 2002 Union newsletter:

. . .

The Future of the Union

Dear Union Brothers and Sisters, Local 2485,

The events of this year motivated me to make a decision to take action. If things continued on the same path, there would be no future for our local Union. Derogatory comments have been made. I myself have had complaints about the Union and its operations. What I did not do was speak up to be heard. That was my fault. Some Union members including myself had given up on the Union.

This letter is my attempt to do something to make a difference. As you may already know, the Union can be only as good and effective as its members are. If each person would contribute a small amount of time and voice his or her opinion, the result would be a stronger, more powerful and effective Union.

We as a Union, a group of people working together, can make a difference. Working together we can make our investment in the Union a powerful force to protect us all from discriminatory, unlawful, and unethical treatment. Let’s work together to restore the confidence of members of this Union. It is our right as Union members to share information, voice our opinions, and be heard.

I look forward to seeing you at the next Union meeting.

In Solidarity,
Matt Hamer, Food Service Steward

. . .

It was Mr. Hamer's testimony that he subsequently saw Mr. Norder reading the Union newsletter.

Ronald Stierman ultimately recommended the elimination of Mr. Hamer's Food Service repair position. Stierman testified that he did so for two reasons. According to Mr. Stierman, the District had experienced a long-standing problem with a backlog of plumbing maintenance and repairs. The District had two day-shift plumbers and had attempted to manage the plumbing work with existing staff for a period of years. This effort had proven unsuccessful in that the substantial backlog of plumbing orders never diminished. Stierman came to the conclusion that a third plumber, working second-shift, was necessary. However, due to the financial circumstances surrounding the District, any additional position had to come from existing resources. That is, the District was not in a position to add a new plumber without finding the money for that position from already existing positions.

Maintenance employees had been directed to log their repair and preventative maintenance time. It was Stierman's understanding that Norder had issued a directive to do so during the third quarter (July through September) of 2001. Mr. Hamer denied being given any such directive until December of 2001.

On December 20, 2001, a meeting was held involving Mr. Hamer, Dale Christianson, the Union Steward, Glen Norder and Ron Stierman. It was at that meeting that he was given his work-order printout which reflected very little work being done from September 1 through November 15. He was instructed to provide labor, time and material costs for all completed work orders in the future.

Mr. Hamer objected to the utilization of the electronic log, at least in part because he contends he was not advised that his activities should be recorded. Mr. Hamer kept a log, by school, of work performed. That log recorded the tasks, but not the amount of time spent at those tasks. After Mr. Hamer was questioned about the number of work orders he handled, he created a work order log sheet. The sheet that Mr. Hamer created reflected orders, time, tasks, etc.

None of the foregoing logs report a substantial number of work hours. Mr. Hamer testified that he worked many hours beyond those reflected in any of the logs.

Stierman reviewed the electronic log of maintenance and repair time and concluded that two positions, an air conditioning position, and the food service repair position, were less than full-time. The two positions experienced peak work seasons at different times of the year. Stierman concluded that the two positions could be combined, thus freeing up a new position, which could be filled by a second-shift plumber.

On January 11, 2002, a second meeting was held involving Christianson, Hamer, Pete Gerber, Norder and Stierman. It was at this meeting that Hamer was advised that there was not enough work in the Food Service Equipment repair area to require a full-time staff member. Stierman advised Hamer that he was recommending that the Food Service Equipment repairman be eliminated and replaced with a second-shift plumbing position. On February 7, 2002, Paul Roberts, Executive Director of Human Resources, sent Mr. Hamer the following letter:

Dear Matt:

This letter is a confirmation of the discussion we had with you on Monday, February 4, 2002. The position of Food Service Equipment repair has been eliminated as of that date, February 4, 2002. As we indicated in our conversations, you will be eligible to bump anyone less senior in maintenance if you can meet the posted qualifications. It is our understanding that you are not able to meet those qualifications, therefore you will have an opportunity to select from any vacant positions in the custodial unit. While working in the custodial position, you will continue to be paid at the same rate as you had been as a Maintenance worker. You will remain at that rate until you post for a different position, at which time you will be placed at the bargained salary for that position.

As a result of our discussions, you asked for a personal day for Tuesday, February 5, 2002, which was granted. We allowed you to use accrued vacation time for the balance of the week to get any personal affairs in order. Please make sure that this service building is notified that you in fact are using those days.

On February 25, Mr. Hamer filed the following grievance:

Mat Hamer's job was eliminated. Mat had to go to second shift or be laid off and then recalled the next day to job vacant on second shift. Mat had to use all his vacation time to get his life in order because of the hardship of going to second shift. If Mat had not gone to second shift, he would have been fired. Mat went to second shift under protest. . .Mat says he has the right to stay on first shift "a significant benefit" or go to layoff status until a first shift vacant position opens according to Article XXII, Layoff and Recall. Mat also claims management violated their rights under Article I - Management Rights, by retaliating against Mat and eliminating his job due to his past political actions. Mat claims management is abusing their rights under Article V - Definition of

Employees and Appendix "B" – Other Agreements, No. 7, and any other violations not mentioned.

ISSUE

The parties stipulated the following issue:

Did the District violate the collective bargaining agreement when it eliminated Mr. Hamer's job?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I – MANAGEMENT RIGHTS RESERVED

- 1.01 Rights. Unless otherwise herein provided, the management of the work force and the direction of the working forces, including the right to hire, promote, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested in the Employer. Effective February 1, 1984, the District shall have the right to subcontract second shift cleaning at Butler Middle School for the term of the labor agreement. The employees laid off as a result of this section shall be subject to the layoff and recall provision of the contract.
- 1.02 Employer Action. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him/her for such period of time involved in the matter.
- 1.03 Rules. The Employer may adopt reasonable rules and amend the same from time to time.

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ARTICLE XX – SENIORITY

- 20.01 Policy. It shall be the policy of the Employer to recognize seniority.

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ARTICLE XXII – LAYOFF AND RECALL

22.01 Layoff and Position Elimination Procedure. In the event that it becomes necessary to reduce the number of employees in the bargaining unit or a bargaining unit position is eliminated, the following procedure will be followed.

- a. The employee in the affected job classification, if qualified and capable, will be placed in any vacant position that exists at the time of layoff in the same job classification. If no vacant position is available, the affected employee may replace the employee in the same job classification with the least seniority with the Employer provided they are qualified and capable of performing the work.
- b. If an employee is replaced or if there is no vacant position, that employee, if qualified and capable, will be placed in any vacant position that exists at the time of layoff in the next lower job pay classification on the same shift. If no vacant position is available at the next lower job pay classification the affected employee may replace the least senior employee whether in the same or lower job classification on the same shift with the Employer provided they are qualified and capable of performing the work and has more seniority with the employer.
- c. The employee replaced in paragraph B may replace the least senior employee in the unit provided they are qualified and capable of performing the work and has more seniority with the employer.

22.02 Recall procedures. The last employee laid off shall be the first re-called and placed in any open position which is at the same or lower job category, provided that the employee is capable and qualified to perform the work in the job that becomes available (If available and desires to return to work). This procedure shall apply until all employees on lay-off are recalled. If a open positions occurs in a higher job category Article XXI shall apply until there is an open position at the same or lesser job category that the affected employee occupied at the time he/she was laid-off.

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POSITIONS OF THE PARTIES

It is the Union's contention that the Employer acted unreasonably, arbitrarily and capriciously in its consideration of the elimination of the Kitchen Equipment repair position. The grievant first became aware that the Employer was contemplating eliminating his position when he met with Director of Facilities, Ron Stierman, Maintenance Supervisor Glen Norder and then-Chief Union Steward Dale Christianson on December 20, 2001. During this meeting, the grievant was informed that the Employer had been able to account for only 23 of a possible 400 hours of work available during the period September 1 through November 15. Additionally, the Employer asserted that for the time period of November 16 through December 15, only 76 of a possible 160 hours were accounted for by work orders.

Subsequent to that meeting, the grievant took it upon himself to set up a more thorough time-tracking method, revisited the periods in question to more accurately account for his activity, compile that data, and attempted to submit it for reconsideration. The Employer refused to review the supporting documentation.

The Union contends that the District's rationale – reduce a Kitchen Equipment repair position to provide for an additional plumber – is suspect. The evidence does not support the District's rationale. In fact, the District testified that it has only reduced the plumbing work orders by nine in the nearly 11 months since the grievant has been removed from his duties.

The Employer had a duty to thoroughly investigate the workload of the grievant. The Employer never investigated or tried to assess why it appeared the grievant only worked 23 hours of a possible 400 or 76 of 160 hours. They saw what they wanted to see, and then refused to entertain a plausible explanation – their method of tracking hours was flawed. The Employer literally backed into the circumstance they desired by conveniently finding a way to justify the elimination of the grievant's position.

The Union asserts that the Employer acted out of anti-union animus when it eliminated the grievant's position. The Employer would have the arbitrator believe that it is a mere coincidence that the grievant's election to union office and elimination of his position happened within sixty days (November, 2001 and January 11, 2002). The history between this grievant and his supervisor is long-standing. The grievant filed prior grievances relating to the unequal distribution of overtime. It is plausible that these actions taken by the grievant had an impact on the employer's willingness to look impartially at the staffing levels and needs of its custodial/maintenance unit.

The Union asserts that the Employer felt compelled to "clip the wings" of a newly-elected steward who had previously exerted rights inherent in unionism. The elimination of a ranking officer's position sends a message loud and clear; don't challenge the employer. Short

of discharge, it is as severe an action as possible to elicit the desired effect; quell the zealous unionist under the guise of management's rights. To do so within two months of election indicates swift, profound action if you question the employer. The employer has set a dangerous precedent by the elimination of a union officer's position. The chilling effects are far reaching; don't run for office, lest you risk the likelihood of your job being eliminated, move to a less desirable shift and doing work other than what you have been hired to do.

The District argues that it did not violate the collective bargaining agreement by eliminating the grievant's kitchen equipment repair position. The District contends that the burden of proof rests upon the grieving party, in this instance, the Union. The grievant failed to meet that burden in this dispute. The collective bargaining agreement explicitly gives the District the right to eliminate positions due to a lack of work or for other legitimate reasons. The District had a legitimate business reason to eliminate the grievant's position; the need for an additional full-time plumber to address a backlog of plumbing work orders. The District based its decision solely on work loads, seniority, and available skills, and there is no evidence to support a finding that those reasons are in any way pretextual.

Pursuant to the explicit terms of the agreement's management rights clause, the District had the right to eliminate the grievant's position for lack of work or other legitimate business reason. The evidence demonstrates that the District had legitimate reasons for selecting the grievant's position for elimination. An extreme backlog in plumbing work orders caused the District to determine that it needed an additional second-shift plumbing position. The grievant himself acknowledged that he was aware of the large backlog. The District conducted a survey of the maintenance department to determine if any positions did not warrant full-time status and could be combined. Two positions were found: 1) the AC Maintenance position, which had its heaviest workload in the spring and summer, and 2) the Kitchen Equipment repair position, which had its heaviest workload during the school year. Looking at a three-month survey of the grievant's work orders, Stierman found that he identified work of approximately 100 hours out of a possible 560 hours.

The grievant did not present any credible evidence to dispute the low number of recorded work orders for his position. The grievant could not identify from his own records that he was working more hours than the District's logs recorded. Based upon his low seniority and lack of qualifications, the grievant was not eligible for the combined AC/Kitchen Equipment repair position. In addition, the grievant did not have the seniority or qualifications. The grievant failed to prove that the District's legitimate reasons for his position elimination were pretextual or based on union animus. The District cites authority for the proposition that ". . .there must be evidence or powerful inferences reasonably drawn from the evidence. . .mere assertions are not enough." The District points to Stierman's testimony to the effect that the District and the Union have a long history of working together and successfully resolving grievances. Moreover, the evidence actually negates any inference of

Union animus. The grievant became a union steward in November, 2001. By that time, the District had already begun investigating ways to reduce plumbing order backlog. In fact, the District had already begun its survey of the workloads in the maintenance department. The decision to eliminate the grievant's position was based solely on seniority and level of expertise. There is simply no evidence that the grievant's position was targeted for elimination because he was a union steward.

The grievant's January 7 letter to union members also fails to support his claim of union animus. As the grievant acknowledged, the letter was an internal document distributed to union members only. Moreover, by the time the letter was distributed, the decision to recommend the elimination of the grievant's position had already been made. Although the grievant alleged he saw Norder reading the letter sometime before his January 11 meeting with Stierman, even if true, it proves nothing. Norder was not chiefly involved in the decision to eliminate the grievant's position.

The grievant also attempted to suggest that the District eliminated his position because of prior grievances he had filed. The District contends there is no evidence to sustain that allegation. The grievant's prior allegations had been successfully resolved or dropped. Numerous other employees had successfully filed and processed grievances and not been subject to any retaliation. Finally, the snow grievance arose and was resolved over a year prior to the decision to eliminate his position. Thus, there is no temporal proximity giving rise to any inference of retaliation.

DISCUSSION

The employer's action in eliminating the Food Service Maintenance position, creating a second-shift plumber position, and causing Mr. Hamer to bump to a second-shift custodial position, all appear consistent with the authority possessed by the Employer under the terms of the collective bargaining agreement. Article I, cited by the Union, captures the traditional management right to plan and direct the work. The creation and/or elimination of positions to accommodate the emerging work is an inherent component of that right. Hamer did not have the seniority to bump into a first-shift job. Article XXII regulates layoff, bumping and recall with a focus on seniority.

The grievance seeks layoff status until a vacant first-shift position opens. Such an arrangement is not called for by the collective bargaining agreement.

The Union claims these actions are all pretextual; that they are retaliatory responses to Hamer's protected, concerted activities. I find no support for this contention. Mr. Hamer was clearly engaged in protected, concerted activity. He filed a number of grievances, he was a union steward, and his letter of January 7, 2002 was a call to action. I believe the Employer was clearly on notice of Mr. Hamer's protected activity.

The Union is correct in its assertion that retaliation can be chilling. However, the record is virtually silent as to Employer hostility and/or animus toward Mr. Hamer's activity. Mr. Hamer testified to one exchange between himself and Mr. Norder. Even under Hamer's account, Norder's remarks were more personally directed than directed at any protected conduct of Hamer. Norder and Hamer had an exchange over Hamer's self-removal from the snowplowing list. If Stierman's account of the incident is accurate, Hamer was complaining about a snowplowing system that his co-workers found satisfactory.

Taking Hamer's testimony at face value, it appears that Norder accused Hamer of coming in late on two dates, and that Hamer grieved. It also appears that the matter was resolved in mediation. No other details of, or reactions to, that incident are found in the record.

The record relative to Mr. Hamer's activities as a union steward consist of the following:

Q. "Have you ever held a union position, union officer position?"

A. "Yes."

Q. "What position was that?"

A. "That was food-service steward."

Q. "And when did you take that office?"

A. "Last November."

Q. "November, 2000?"

A. "Not this one which is 2002. It would have been 2001."

Q. "2001. And as union steward for food service employees, what were your roles and responsibilities?"

A. "To handle problems that may occur between the kitchen ladies, union kitchen ladies, and problems that may have occurred."

Q. "And did you do that?"

- A. “I really didn’t have too many problems. Being brand new to it, I wanted to do a good job. So I requested a contract between the school district and the . . .”

Nothing in this record suggests a particularly aggressive union steward. Nothing in this record even hints at employer retaliation.

Mr. Hamer authored a letter contained in the union newsletter printed in January of 2002. That letter is really a call to union employees. The letter does contain a reference to “. . .discriminatory, unlawful and unethical treatment.” The reference is unflattering to the District, though non-specific. However, this letter arose well after the whole plan to create and fill a plumber’s position was underway. It more appears that the letter was a reaction to the plan, not vice-versa. Mr. Hamer claims that he saw Norder read the letter. While this might establish knowledge, there is no evidence as to any Employer reaction.

The Employer lays out a rational basis for its decision. On its face, the Employer appears to have been pursuing a legitimate business purpose. In the absence of evidence to support a claim of animus, I conclude that the decision is what it is represented to be, an effort to get the work done.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 28th day of May, 2003.

William C. Houlihan /s/

William C. Houlihan, Arbitrator