BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CASSVILLE SCHOOL DISTRICT

and

CASSVILLE COUNCIL OF AUXILIARY PERSONNEL

Case 35
No. 62376
MA-12259

Appearances:

Ms. Eileen A. Brownlee, Kramer & Brownlee, LLC, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of the Employer.

Ms. Joyce Bos, Executive Director, South West Education Association, 900 North Washington Avenue, P.O. Box 722, Platteville, Wisconsin 53818-0722, appearing on behalf of the Union.

ARBITRATION AWARD

The Cassville School District, hereinafter referred to as the Employer, and the Cassville Council of Auxiliary Personnel, hereinafter referred to as the Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr. to arbitrate a dispute over the layoff of an employee. Hearing on the matter was held in Cassville, Wisconsin on August 19, 2003. A stenographic transcript of the proceedings was prepared and received by the Arbitrator on August 27, 2003. Post-hearing written arguments and reply the Arbitrator received briefs by October 21, 2003. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

"Did the Employer violate the contract when it chose to lay off one general aide while retaining two subcontracted Green Thumb employees?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

The District possesses the sole and exclusive right to operate the District and retains all rights except those expressly bargained away in this Agreement. However, upon the expiration of the term of this Agreement, the Board recognizes its statutory duty to bargain with the Association on mandatory subjects of bargaining. These rights include, but are not limited to the following:

A. The right to direct District operations;

B. The right to hire, promote, transfer, schedule, and assign employees in positions with the District;

C. The right to create, revise and eliminate positions;

D. The right to establish work rules and schedules of work;

E. The right to suspend, demote, discharge and to take other disciplinary action against employees;

F. The right to reduce staff and relieve employees for lack of work or any other reason not prohibited by law;

G. To maintain efficiency of District operation;

H. To take whatever action is necessary to comply with state or federal law;

I. To introduce new or improved methods or facilities and to change existing methods of services to be performed and the number and kind of classifications to perform such services;

J. To contract out for goods or services;

K. To determine the methods, means and personnel by which School District operations are to be conducted;

L. To define job descriptions and duties of employees;

M. To take whatever action is necessary to carry out the functions of the School District in an emergency; and,

N. The right to use time clocks.

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ARTICLE VII – SUBCONTRACTING

The Board reserves the right to subcontract work if the work is not currently performed by bargaining unit employees, or if the subcontract does not result in the layoff or reduction in hours of bargaining unit employees, or if the work of newly-created bargaining unit positions is not subcontracted.

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BACKGROUND

The Employer and the Union have been parties to a series of collective bargaining agreements. Under the provisions of the agreement the Employer may subcontract work provided it does not result in a layoff or reduction of hours of bargaining unit members. During calendar year 1998 the Employer entered into a contract with Green Thumb, a State of Wisconsin program for providing employment opportunities at no cost to the Employer. Green Thumb hired Richard Ekedahl and he began performing light custodial duties for the Employer working 7:00 a.m. to 11:00 a.m. or 12:00 Noon, Monday through Friday, twelve months per year. During all materials times herein Ekedahl has continuously worked at the Employer as an employee of Green Thumb. In September 2000 the Employer hired Donald Metcalf, hereinafter referred to as the grievant, as a general aide performing custodial duties, generally working 3:00 p.m. to 6:00 p.m., Monday through Friday, during the school year. The grievant also on occasion worked 5:00 p.m. until 10:00 p.m. during school functions and occasionally substituted for absent custodians. During the 2002-03 school year the District contracted for a second Green Thumb employee, Katie McKillip, primarily working in the Employer's kitchen facility.

In April 2003 the Employer laid-off two general aides, including the grievant. The Employer continued to use the Green Thumb employees and the instant grievance was filed and processed to arbitration in accord with the parties' grievance procedure.

UNION'S POSITION

The Union contends the mutually negotiated collective bargaining agreement is clear and unambiguous. The Union argues that the Employer has the right to subcontract work provided the subcontract does not result in the layoff or reduction in hours of bargaining unit employees. The Union acknowledges the Employer began using Green Thumb employees in 1998 but avers the subcontracted work did not result in a lay off until it retained the Green Thumb employees and laid off bargaining unit employees.

The Union points out duties performed by the Green Thumb employees are similar to the grievant's duties. The Union points to Joint Exhibit 4, wherein the Employer asserted work performed by the Green Thumb employees was work never performed by bargaining unit employees. The Union argues that the grievant performed similar duties as the Green Thumb employees including cleaning sinks, cleaning windows and mirrors in the elementary school, and washing windows in the high school. The Union argues that the decision given by the Employer states that the Employer believes the collective bargaining agreement prohibits it from subcontracting duties actually being performed by bargaining unit members at the time of the subcontract. The Union acknowledged it has never filed a grievance on such an issue but avers the issue herein is whether the Employer retained a subcontracted employee while laying off a bargaining unit employee. The Union avers the Employer has retained a subcontracted employee while laying off the grievant who is available and capable of performing the work of the subcontracted employee.

In support of its position the Union points to BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT, Case 30, No. 56866, MA-10441 (8/30/99) wherein the arbitrator held the laid off employees would have performed and were capable of performing the work and would have except for the subcontracted workers. The arbitrator held the duration of the subcontracting arrangement was not determinative and directed the District cease subcontracting bargaining unit work if there were qualified employees on layoff status who can perform the work. The Union argues in the instant matter the Employer subcontracted work thus causing the layoff of a bargaining unit employee.

The Union also argues the Employer elected to save money by using Green Thumb employees, workers it did not have to pay for, and laid off the grievant. The Union asserts the Employer's conduct undermines the bargaining unit by subcontracting available work and eliminating a bargaining unit position therefore violating the subcontracting provision of the agreement. The Union also points out the Employer did not put into any evidence it was necessary to lay off employees.

In its reply brief the Union points out it did not participate in obtaining the services of the Green Thumb employees and it has not waived its right to challenge the Employer when it laid off a bargaining unit employee and retained a subcontracted employee.

The Union would have the undersigned sustain the grievance and would have the arbitrator direct the Employer to make the grievant whole for all lost wages and benefits.

EMPLOYER'S POSITION

The Employer contends it did not violate the collective bargaining agreement when it chose to lay off one general aide employee while retaining two subcontracted Green Thumb employees. The Employer points out the collective bargaining agreement includes certain management rights including the right to reduce staff and the right to contract out for goods and services. The Employer acknowledged the right to contract out for work is limited by the subcontracting provision of the collective bargaining agreement. The Employer asserts the limitations on subcontracting occur under three specific conditions. First, it cannot subcontract work currently being performed by bargaining unit members. Second, it cannot subcontract if it results in the layoff or reduction of hours of bargaining unit employees. Third, it cannot subcontract the work of newly created bargaining unit positions.

The Employer points out that the specific contract entered into began in 1998. The Employer points out at least one bargaining unit employee was aware of the subcontracting. The Employer points out in the five years the subcontract has existed the Union has never asserted that the work performed by the Green Thumb employees was work being performed by bargaining unit members. The Employer also points out the Union has never asserted the Green Thumb position was newly created bargaining unit work. The Employer also points out it was only when the grievant was laid off that under the Union's theory the work became bargaining unit work.

The Employer contends that the Union waived any right it may have to argue the work being performed by Green Thumb employees is bargaining unit work. The Employer argues had the Union desired to raise the issue it should have done so at the time the subcontracts were entered into. The Employer points out bargaining unit members participated in obtaining the services of both Green Thumb employees.

The Employer points out the subcontract existed two years prior to the hiring of the grievant and the work being performed has not changed. The Employer argues that the Union's theory is that subcontracting must cease if a bargaining unit employee later loses work. The Employer asserts such an interpretation is inconsistent with the plain language of the collective bargaining agreement. The Employer also asserts there is no evidence the subcontract resulted in the grievant's layoff. The Employer points out the grievant was a school year employee who worked evenings while the Green Thumb employee worked mornings and year round. The Employer also points out that even it the Green Thumb contract were terminated the Employer would not recall an employee to perform the work. The Employer concludes the subcontract did not result in the grievant's layoff.

The Employer also argues that if the arbitrator were to direct the Employer to cease subcontracting with Green Thumb it would still not result in the recall of the grievant as under its management rights through right of assignment it could determine to have other bargaining unit members perform the work.

In its reply brief, the Employer asserts the language in the BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT case is misplaced because there is a difference in the language. The Employer points out the prohibition herein is limited to work currently being performed by bargaining unit employees, a distinguishable factor from the BEECHER-DUNBAR-PEMBINE SCHOOL case. The Employer again points out the Union has had years to claim the disputed work and has not done so. The Employer also points the disputed work is being performed year round in the morning and has never been bargaining unit work.

The Employer would have the Arbitrator deny the grievance.

DISCUSSION

The burden herein, as the Employer has pointed out, is for the Union to demonstrate the actions of the Employer in retaining two (2) subcontracted employees resulted in the lay off or reduction of hours of the grievant. Article VII clearly gives the Employer the right to subcontract work that is currently not being performed by bargaining unit employees. At the time the Employer entered into contracts with Green Thumb, the work subcontracted was not being performed by bargaining unit employees. Thus the subcontracting was not a violation of the collective bargaining agreement. The record also demonstrates bargaining unit members were aware of the subcontracting relationship. The arbitrator notes here that this provision, the ability of the Employer to subcontract work not currently being performed by bargaining unit members, distinguishes this matter from the BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT case cited by the Union. Therein the Employer did not have the contractual right to subcontract work not currently being performed by bargaining unit employees.

The record also demonstrates the laid off employee worked evening hours. There is no evidence the subcontracted employees ever performed the grievant's duties, or, that the subcontracted employees ever filled in for absent employees as the grievant had after the grievant was laid off. The Union argument, that if the grievant can perform the duties being performed by the subcontractor's employees, that work had to offered to the grievant. However, to reach such a conclusion would nullify the Employer's right to subcontract out work not currently being performed by bargaining unit employees.

Therefore, based upon the above and foregoing and the arguments, evidence and testimony presented, the undersigned finds the subcontracting did not result in the grievant's loss of hours or lay off. Had the Employer assigned the Green Thumb employees to perform work

normally performed by the grievant a different conclusion would result. There is no evidence the Green Thumb employees were assigned additional duties that had been performed by the grievant. The record demonstrates the work being performed by the Green Thumb employees was work that was, at the time of the subcontracting, work not currently being performed by bargaining unit employees. Therefore the grievance is denied.

AWARD

The Employer did not violate the contract when it chose to lay off one general aide while retaining two subcontracted Green Thumb employees.

Dated at Madison, Wisconsin, this 12th day of December, 2003.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

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