BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHERN EDUCATIONAL SUPPORT TEAM

and

MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT

Case 58
No. 62729
MA-12422

Appearances:

Gene Degner, Director, Northern Tier UniServ, 1901 West River Street, P. O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of NEST.

Quarles & Brady LLP, by **Attorney Alexis L. Pheiffer**, One South Pinckney Street, P. O. Box 2113, Madison, Wisconsin 53701-2113, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "NEST" and "District", are signatories to a collective bargaining agreement providing for final and finding arbitration. Pursuant thereto, hearing was held in Minocqua, Wisconsin, on November 25, 2003. The hearing was transcribed and the parties thereafter filed briefs that were received by February 16, 2004.

Based upon the entire record and arguments of the parties, I issue the following Award.

STIPULATED ISSUES

1. Did the District violate Article 18, Section B of the 2001-03 collective bargaining agreement between the parties when it reduced the Grievant's hours from 6½ hours per day to 5½ hours per day?

2. If so, what is the appropriate remedy?

DISCUSSION

By letter dated July 30, 2003, the District notified Alice M. Kosky ("Grievant") that the School Board had voted to reduce her hours of employment from 6½ hours to 5½ hours per day. This action reduced the Grievant's health insurance benefit from being fully paid (95% contribution by the District) during the 2002-03 school year to no benefit for the 2003-04 school year.

NEST argues that the above action violates the collective bargaining agreement while the District takes the opposite position.

Article 18 – Layoff provides that the following procedure will be followed when the School Board decides to reduce personnel or reduce hours:

> B. Selection: Reduction in personnel shall be within each classification. The selection of employees in each classification to be laid off or reduced in hours shall be made according to the following guidelines:
>
> 1. Normal attrition resulting from employees retiring or resigning will be relied upon to the extent possible.
>
> 2. Employees serving in the probationary period shall be considered next.
>
> 3. If Steps 1 and 2 are insufficient to accomplish the desired reduction in staff, the least senior employee within the classification in which the reduction is occurring shall be the first to be laid off or reduced in hours provided the remaining employees are capable of performing the available work.

The question before the Arbitrator is whether the District complied with the above language when it reduced the Grievant's hours.

Article 18, Section B, provides that reduction in personnel shall be within each classification. The District decided to reduce hours in the Food Service classification. In doing so, the District was first obligated to consider "normal attrition resulting from employees retiring or resigning."

Initially, the District considered attrition within the Food Service classification. One food service employee did resign at the end of the 2002-03 school year. (Tr. p. 94).

However, not filling this position created a problem for Food Service because it left the kitchen understaffed. The District has long had at least four total employees during lunch service and the hour immediately before and after lunch. (Tr. p. 94). Three employees simply could not perform all the necessary duties. (Tr. pp. 60-61, 90, 94). Consequently, the District hired a new employee (Bev Karl) to fill the three-hour shift from 10:15 a.m. to 1:15 p.m. (Tr. p. 51, 94, Union Exhibit No. 2).

Instead, NEST argues that the District should have first addressed its need to reduce hours in the Food Service classification by attrition and not filled the vacant position. However, the agreement does not say that you have to first reduce hours or personnel by normal attrition. It only states that normal attrition "will be relied upon to the extent possible." (Emphasis added). Here, the District could not rely on normal attrition because it was necessary to employ four employees in food service. Therefore, the Arbitrator rejects this argument of NEST.

NEST next argues that the District could have addressed its budget shortfall by reducing the new employee (Karl) one hour. However, reduction of one hour would only have saved between $1,600 and $1,800. (Tr. p. 96). The District would not have been able to make reductions only in Karl's position to meet its budgetary needs; more cuts would have been necessary. (Tr. pp. 96-97).

In addition, the agreement does not say that employees serving a probationary period shall be "reduced in hours" next. It simply states that employees "serving in the probationary period shall be considered next." (Emphasis added).

Contrary to the District's assertion, there was a probationary employee (Karl) in food service. However, the District is correct in pointing out that removing or reducing her position would have left the cafeteria short-handed. Moreover, elimination of Karl's three-hour position, whether due to natural attrition or layoff, would have saved the District only $6,000 – not enough to address its budget problems. (Tr. pp. 96-98).

The District already had made cuts elsewhere in the budget. During the 2002-03 school year, the District had three full-time administrators: a superintendent, a principal and an assistant principal. Id. For the 2003-04 school year, the assistant principal position was eliminated, leaving only two full-time administrators. Id. Cuts were also made in the District teaching staff. Id. The District hired two full-time teachers for the 2002-03 school year. Id. Both teachers were laid off and recalled at only half-time for 2003-04. Id. The District also considered support staff reductions. Id. It first laid off all of its paraprofessional staff, and while most of the paraprofessionals were recalled, one staff member remains on lay off. Id. The District managed a small savings in its custodial staff when, following resignation of the

Building and Grounds Supervisor, the District was able to hire a new supervisor at a salary $5,000 lower than the former supervisor. (Tr. pp. 78-79). The District also looked at cuts in building expenses, and transportation. (Tr. p. 97). One of the areas that was untouched was food services so the District looked there to make more cuts. Id.

Article 6, Section A, states that the Board possesses "the sole right to operate the school system and all management rights reposed in it except as modified by the specific terms and provisions of this Agreement." Specifically, the Article provides that the District has the following rights: "to direct all operations of the school system; to establish schedules of work; to relieve employees from duties because of lack of work or lack of funds; to maintain efficiency of school system operations; [and] to determine the methods and means by which school system operations are to be conducted." (Emphasis added). The aforesaid contractual language supports the District's view that it acted properly herein by first making cuts across the board, (Tr. p. 97), and then cutting $17,000 in Food Services by eliminating one (1) hour daily from the Grievant's schedule. Article 18, Section B, steps 1 and 2 of the reduction procedure do not expressly restrict the District's authority under the management rights clause to act in this manner.

Finally, NEST argues that there is no defense for the District not to reduce the least senior employee because the remaining employees could have accomplished the remaining work. Article 18, Section B, Step 3, does state that if the first two steps are insufficient to accomplish the desired reduction in staff, "the least senior employee within the classification in which the reduction is occurring shall be the first to be laid off or reduced in hours provided the remaining employees are capable of performing the available work." (Emphasis added).

NEST claims that an hour could have been removed from the least senior employee and the work accomplished. In support thereof, NEST relies on the testimony of the Grievant and a co-worker that they could do the final cleanup of the day. (Tr. pp. 22-24, 40).

It is true that all the employees in the kitchen know, (Tr. p. 59), and do the same jobs. (Tr. pp. 17, 38 and 59). However, the District still needs three employees back there in addition to the supervisor. (Tr. p. 59). The District has always had four employees in the kitchen. (Tr. pp. 60, 94). If the District did not have a third employee back doing dishes before lunch service ended it would be a "disaster" back there. (Tr. p. 59). The kitchen could not operate efficiently with less because " there's just too much to do in that time span from serving to end." (Tr p. 60). The District still needs four employees at the end of the day when only cleanup remains because there's just "too much" work. (Tr. p. 65). The District could not get by with one or two employees working longer because "you have to have the third person there to be washing dishes" in addition to the other duties being performed. (Tr. p. 66).

The management rights clause gives the District the authority to "direct all operations of the school system" including the kitchen. The clause also gives the District the authority to "schedule and assign employees to positions," to "maintain efficiency of school system operations," and to "determine the methods and means by which school system operations are to be conducted." The aforesaid contract language provides express authority for the District to run the kitchen in the manner it deems appropriate. The District has demonstrated that if it reduced hours or laid off a Food Service Worker the remaining employees would not be capable of performing the available work. As a result, Article 18, Section B, Step 3, does not provide a basis for ordering the District layoff or reduce hours of the least senior employee within the Food Service Worker classification in order to restore the Grievant her one (1) hour of work per day so she is eligible for health insurance.

Assuming *arguendo* that NEST is correct and the kitchen work could be accomplished by removing one hour from the least senior employee, NEST's position still must fail. Reducing the least senior employee's work schedule by one (1) hour a day or even eliminating the position entirely would not provide the cost savings to the District necessary for its budget. (Tr. p. 83). In order to be "fiscally responsible," the District needed to reduce the Grievant by one (1) hour in order to generate "over $17,000" in savings. Id. It would take the elimination of more than one job in the kitchen to achieve the necessary cost savings for restoring one hour to the Grievant's schedule. The record is clear that the kitchen could not function with that level of staffing.

Contrary to NEST's assertion, an earlier arbitration between the parties supports the District's actions in the present matter.

The grievant in the first arbitration, Kate Schaffer, worked 7.5 hours per day until August of 2000, when she was notified that her hours were reduced to 5.5 hours per day. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, Case 54, No. 59204, MA-11220, p. 6 (Gallagher, 8/01). At the time her hours were reduced, only one aide had more seniority than Schaffer. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, p. 8. Several aides with less seniority were neither laid off nor reduced. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, pp. 6-8. The arbitrator found that the District did not violate the collective bargaining agreement when it reduced Schaffer's hours. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, p. 14.

NEST argues that the instant dispute is different than the first arbitration because the prior "decision turned on the argument of the grievant's right to bump only a portion of an employees work." NEST opines that "differs itself from this case where we are talking about the correct order of layoff and strict construction of the contract."

The issue before the Arbitrator was addressed in the first arbitration: "Did the District violate the collective bargaining agreement, particularly Articles 15 and 18, when it reduced the hours of Kate Schaffer for the 2000-01 school year?" (Emphasis added). MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, p. 2. The prior arbitration contained an additional issue related to Article 15's definition of a normal workweek and whether that definition guaranteed Schaffer a certain number of hours per week also present in the instant dispute.

It is true that one of NEST's arguments before Arbitrator Gallagher was whether Schaffer should have been allowed to select duties or hours of other aides in order to maintain her 30 hour per week status for purposes of health insurance. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, p. 14. Arbitrator Gallagher found no language in the contract that would permit an employee to partially bump a less senior employee in a layoff or reduction in hours scenario. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, p. 15.

However, Arbitrator Gallagher also rejected NEST's argument in the earlier arbitration "that Article 18, Section B, by reference to 'the least senior employee' requires a conclusion that the District must redistribute work hours and then lay off the least senior employee in this bargaining unit." Id. Arbitrator Gallagher reached this conclusion, in part, because the District demonstrated good reasons for assigning aide employees as it did. Id.

In the instant dispute, the District has demonstrated that it was necessary to employ and to assign three Food Service Workers in the manner it did in order to get the kitchen work done. There are other similarities between this arbitration and the earlier arbitration. Both the aides and the Food Service Workers are in the same bargaining unit and covered by the same collective bargaining agreement. (Joint Exhibit No. 1). Article 18 is at the heart of both arbitrations. (Joint Exhibit Nos. 2, 12). Resolution of both cases requires interpretation of Article 18. The language of Article 18 has not changed. Id.

In both cases, the District faced a budget problem and made reductions in the support staff. Both Schaffer and the Grievant were chosen for hours reduction because of the cost-savings resulting from elimination of benefits coverage when union employees move from full-time to part-time status. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, pp. 9, 14. (Tr. pp. 83, 97).

NEST is correct that, unlike the earlier arbitration, this dispute involves a question as to the proper order of layoff within the meaning of Article 18, Section B, Paragraphs 1, 2 and 3. The proper order of layoff was not at issue in the earlier arbitration because the District first laid off employees by attrition and then probationary employees before laying off a senior

employee in the Aide classification. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, pp. 6-8. However, NEST asserted in the earlier case that Schaffer should have been given portions of other, less senior, employees' jobs in order to maintain her hours. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, p. 15. In finding for the District, Arbitrator Gallagher found that the contract "does not require the District to parse or reorganize workloads to accommodate more senior aides." Id. The same conclusion applies to the senior Food Service employee herein.

With respect to the issue of the proper order of layoff, NEST argues that it is a "fallacy" that the District first considered attrition, then probationary employees and then seniority before it laid off the Grievant. To the contrary, the record indicates that the District followed that progression when considering who to layoff. (Tr. pp. 79-80, 94, 96-98). However, it decided not to layoff in that sequence. Id. Despite mistakenly assuming there were no probationary employees that could be considered for layoff, (Tr. p. 80), the District took the only action it could. (Tr. p. 95-97). In doing so, it did not, as noted above, violate the language of Article 18, Section B.

Because of the great similarities between the Schaffer grievance and the present dispute, the Arbitrator finds that the earlier result should be given "great weight" when considering proper resolution of this dispute.

NEST argues, however, that the District, without bargaining, made a unilateral decision in violation of Sec. 111.70 Stats., to impose their wish of removing paid health insurance benefits for the 2003-04 school year from a long time Food Service Worker who was the only such worker to enjoy those benefits during the prior school year. NEST also argues that the District must bargain the impact of its decision. However, in analyzing the grievance concerning Alice Kosky, the Arbitrator sees no indication that NEST raised these arguments prior to making them in its brief. (Joint Exhibit Nos. 5, 6, 7, 9, 11 and Tr. pp. 7-8). Therefore, NEST's duty to bargain argument has not been considered in this case. MINOCQUA-HAZELHURST-LAKE TOMAHAWK SCHOOL DISTRICT, supra, p. 15.

NEST further argues that the District improperly categorized employees by the hours they worked rather than the category of work they performed when deciding who to lay off. Assuming *arguendo* that NEST is correct, it does not change the outcome of the case.

In addition, NEST maintains that because the agreement provides fringe benefits (including health insurance) to 6 hours per day employees that the District acted unfairly when it reduced the Grievant's hours below that threshold. However, as pointed out in the prior arbitration, "the normal workweek stated in Article 15 cannot be construed as a guarantee of a certain number of hours to unit employees." MINOCQUA-HAZELHURST-LAKE TOMAHAWK

SCHOOL DISTRICT, supra, p. 13. Therefore, the District did not act in an improper manner when it exercised its authority under Articles 6 and 18 to reduce the Grievant's hours.

NEST insists that the District failed to recognize the importance of seniority when it laid off the Grievant citing a number of authorities in support thereof. The Arbitrator agrees with NEST regarding the important role seniority can play in layoff. However, Article 18 - Layoff does not provide for strict seniority in determining who is laid off. At every step of the layoff procedure, the District has the contractual right to consider other factors when reducing personnel including budgetary considerations and whether "the remaining employees are capable of performing the available work." The District acted in good faith herein when it reduced the Grievant's hours while addressing its budgetary and operational concerns. Therefore, the Arbitrator rejects NEST's argument that the District ignored seniority in violation of the agreement when it took the action it did in the instant case.

Finally, NEST argues that there "was never any evidence introduced into the record to show there was a lack of funds within food services or any other part of the budget for the necessary reduction." However, the record is replete with examples of the need for budget cuts. (Tr. pp. 76-79, 83, 89-91, 96-98). Contrary to NEST's assertion, the agreement does not prohibit the District from seeking cost savings in food services regardless of the amount of funds in that area.

NEST cautions that if the Arbitrator finds in favor of the District he would be legislating rather than interpreting the contract. However, the plain meaning of the contract and arbitral precedent favor the District's position that it did not violate the collective bargaining agreement by its actions herein. NEST offered no evidence of past practice or bargaining history that would lead to a different conclusion.

Based on all of the foregoing, the Arbitrator finds that the answer to the Stipulated Issue is NO, the District did not violate Article 18, Section B of the 2001-03 collective bargaining agreement between the parties when it reduced the Grievant's hours from 6½ hours per day to 5½ hours per day.

Based on all of the above, and the record as a whole, it is my

AWARD

The grievance is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 4th day of May, 2004.

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

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