BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BIRCHWOOD SCHOOL DISTRICT

and

NORTHWOODS UNITED EDUCATORS

Case 24
No. 63125
MA-12501

Appearances:

Mr. Richard A. Postlewaite, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin, appearing on behalf of the Union.

Mr. Richard J. Ricci, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of the Employer.

ARBITRATION AWARD

Birchwood School District, hereinafter referred to as the Employer, and Northwest United Educators, 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 reduction in hours of three (3) employees. Hearing in the matter was held in Birchwood, Wisconsin on March 31, 2004. Post-hearing written arguments were received by the Arbitrator by June 24, 2004. 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 where agreed upon the following issues:

"Is the grievance timely?"

"If yes, did the Employer violate Article 18 of the collective bargaining agreement when it reduced the scheduled hours of some of its Aides?

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE X – GRIEVANCE PROCEDURE

A. Definitions:

1. "Grievance" is defined as any controversy or dispute, concerning the application or interpretation of express provisions of this Agreement.

2. The term "day" when used in this article and except where otherwise indicated, means working day; weekend or vacation days are excluded.

3. The "grievant" may be any employee or group of employees.

B. Initiation and Processing:

Step 1:

a) An effort shall first be made to settle the matter informally between the employee and the employee's immediate supervisor.

b) If the matter is not resolved, the employee shall, within twenty (20) days of when the employee knew or should have known of the occurrence on which the grievance is based, submit a written grievance to the employee's immediate supervisor on the subject previously discussed. The immediate supervisor shall in turn give a written answer within ten (10) days of receipt of the employee's written grievance.

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BACKGROUND

The Employer has employed Judy Smith, Becky Darkow and Lois Sampson, hereinafter referred to as the Grievants, as Special Education Aides. Smith has been employed by the Employer since the 1992-93 school year. Darkow has been employed by the Employer since the 1995-96 school year. Sampson has been employed by the Employer since the 1999-00 school year. During the 2002-2003 school year Smith's primary assignment was K-5 EEN, Darkow's primary assignment was 6-8 EEN and Sampson's primary assignment was 9-12 EEN. During the 2002-2003 the grievants were assigned to work thirty-five (35) hours per week.

During deliberations on its budget for the 2003-2004 school year the Employer determined it was necessary to achieve costs savings and to achieve some costs savings it determined to reduce the grievants work week from thirty-five (35) hours to thirty-two and one-half hours (32½) hours. District Administrator Frank Helquist informed the grievants and the local Union representative, Donna Manning, by notice that he would meet with the grievants on June 4, 2003 to discuss next year's work schedule. Helquist also informed Manning the grievants' would have their hours reduced the next school year. On June 4, 2003 Helquist met with the grievants and informed them of the Employer's actions. Some of the grievants worked June 5 and 6, 2003, and, all three (3) worked the opening of school in-service, August 26, 27 and 28, 2003. The first day of school was September 1, 2003.

On September 12, 2003 the grievants met with their Union representative, Richard Postlewaite, and discussed the matter. On September 16, 22, and 23, 2003 Postlewaite discussed the matter with Helquist but the matter remained unresolved. On September 29, 2003 Postlewaite reduced the matter to a written grievance and mailed the grievance to Helquist. Helquist received the grievance on October 1, 2003. Helquist denied the matter as untimely. Thereafter, the matter was processed to arbitration in accord with the parties' collective bargaining agreement's grievance procedure.

During the 2002-03 school year the Employer employed aides as follows (listed in order of their seniority):

Smith	K-5 EEN	8:00-3:30
Darkow	6-8 EEN	8:00-3:30
Sampson	9-12 EEN	8:00-3:30
Severson	Pre-K	12:00-3:30
Connell	Pre-K	7:45-11:15
Soper	1 child	8:00-12:00

Commencing with the 2003-2004 school year the Employer employed aides as follows (listed in order of their seniority):

Smith	K-5 EEN	8:00-3:00
Darkow	6-8 EEN	8:00-3:00
Sampson	9-12 EEN	8:30-3:30
Severson	Pre-K	12:00-3:30
Connell	Pre-K	7:45-11:15
Soper	1 child	8:00-12:00
Widiker	Outside	10:00-1:00
Hayes	IMC	10:00-1:00 or 2:00

EMPLOYER'S POSITION

The Employer contends the grievance is not timely. The Employer points to Article X of the collective bargaining agreement and asserts that in order for a grievance to be timely it must be submitted in writing to a grievant's supervisor within twenty (20) days of when the grievant knew or should have known of the occurrence on which the grievance is based. The Employer also points out that a day is defined in the collective bargaining agreement as a "working day" with weekends and vacations excluded. The Employer further points out the grievants worked June 5 and June 6, 2003 and August 26, 27 and 28, 2003. The Employer stresses the hours worked on these days are used in the calculations for determining health insurance premium proration. The Employer also points out there are twenty-one (21) working days between September 1, 2003 and October 1, 2003, when Helquist received the written grievance.

The Employer also argues that the mailing of a grievance, herein September 30, 2003, cannot meet the collective bargaining agreement's requirement that a grievance be "submitted" to the immediate supervisor within twenty (20) working days. The Employer argues the collective bargaining agreement calls for presentation or delivery to a person, not a mailbox. The Employer asserts the language of the collective bargaining agreement does not specify the grievance is to be postmarked in the mail in twenty (20) days.

The Employer also argues the Union assertion the grievance is a continuing grievance claiming each day the work schedule is reduced is another grievance would gut the twenty (20) day requirement and render it meaningless.

The Employer also asserts it did not Violate Article XVIII when it reduced the hours of the grievants equally. The Employer argues that School Districts are looking for ways to run more efficiently in light of reduced revenues. The Employer asserts it concluded to lessen the amount of teacher aide services and reduced the grievants' hours of work. The Employer points out that this is clearly within the scope of Article V – Management Rights. The Employer also argues that even if the Arbitrator concludes the instant matter poses a layoff issue, the Employer complied with the provisions of Article XVIII. However, the Employer asserts there is nothing in collective bargaining agreement preventing it from reducing hours worked. The Employer

also points out there is nothing in the collective bargaining agreement that contractually binds it to provide thirty-five (35) hours per week to its aides.

The Employer contends it reduced the hours the grievants in the most expeditious and least disruptive manner. The Employer argues to require it to lay off the least senior employee makes no practical sense.

The Employer would have the Arbitrator find the grievance untimely. In the alternative, the Employer would have the Arbitrator deny the grievance.

UNION'S POSITION

The Union contends the grievance was filed on a timely basis and that the Arbitrator should rule on the merits of the instant matter. The Union points out the matter was being discussed throughout the month of September 2003. The Union argues these discussions were in accord with the grievance procedures mandate that an effort be made to resolve the matter informally. The Union argues that if the Arbitrator ruled the matter untimely the grievants would be punished for attempting to resolve this matter informally. The Union also points out there is no evidence the District was in any way harmed or inconvenienced by the September 29, 2003 filing. The Union also argues the instant matter can be considered a continuing violation of the collective bargaining agreement in that hours are reduced every day of the 2003-2004 school year. The Union contends the grievance was submitted on the twentieth (20^{th}) day following the September 2, 2003 school year start date.

The Union also contends Article XVIII clearly applies to the instant matter. The Union argues that the collective bargaining agreement clearly states, "in whole or in part" in regard to the decision to lay off. The Union also argues the employee with the least seniority should have been reduced seven and one-half (7½) hours per week. The Union asserts applying partial layoffs to multiple employees is a violation of the collective bargaining agreement. The Union avers the "remaining" work could be completed by the grievants. The Union points out there was work between 8:00 a.m. and 3:30 p.m., and, the least senior employee should have had their hours reduced instead of the grievants.

The Union would have the arbitrator find the grievance timely. The Union would also have the Arbitrator make the grievants whole.

DISCUSSION

The parties' collective bargaining agreement, Article X, Grievance Procedure, Step 1, paragraph b, requires grievances to be reduced to writing and submitted within twenty (20) days of when the employee knew or should have known of the action initiating the grievance. This

language is clear and unambiguous. The grievant's were made aware of the Employer's decision to reduce the hours of their work week on June 4, 2003. While, as the Union has argued, the parties informally discussed the instant matter, such informal discussions are required by Article X, Step 1, paragraph a. The informal discussions do not toll the time frame for the filing of a grievance. Paragraph b does not specify that the filing of a grievance can be delayed while the parties informally discuss the matter. Thus the Arbitrator finds no merit in the Union's argument that the matter was tolled because the parties were attempting to resolve it informally. The Arbitrator notes here that had the Union presented any evidence that the parties had a practice of tolling the time frame for filing a grievance while they informally discussed the matter a different conclusion may be reached. However, there is no evidence the parties mutually agreed to toll the time frame for the filing of the grievance while they attempted to voluntarily resolve the matter. Therefore, in accord with the clear and specific language of Article X, Step 1, paragraph b, in order for the grievance to be timely the grievance must be submitted to the employee's supervisor within twenty (20) days of when the employee knew or should have known of the action on which the grievance is based. Herein, that date is June 4, 2003.

The Grievance Procedure also defines the term "day" as a working day, the only exclusion being weekend or vacation days. Herein, the Grievants worked June 5 and 6, 2003, and August 26, 27 and 28, 2003. The Employer has pointed out and the Union did not dispute that these days are used by the Employer in determining the proration of the grievants' benefits. The grievants therefore had five (5) work days before the first day of school on September 2, 2003. The record also demonstrates some of the grievants worked a summer school work schedule, twenty-two (22) work days. The grievance was dated September 28, 2003, a Sunday, postmarked September 29, 2003 and not received by Helquist until October 1, 2003. Even were the Arbitrator to decide that the placing of the grievance in the mail, as argued by the Union, satisfied the collective bargaining agreement's requirement that the grievance be submitted to the employee's supervisor, for the grievance to be timely the Arbitrator would have to conclude that June 5 and 6, as well as August 26, 27 and 28 were not work days. In effect, the Union is asking the Arbitrator to exclude the June 5 and 6 workdays and to exclude the August 26, 27 and 28 work days. Such a conclusion would add to the terms and conditions of the collective bargaining agreement. The record demonstrates there were nineteen (19) workdays in the month of September 2003 prior to September 29, 2003. Given the June 5 and 6 work days and the August 26, 27 and 28 work days, in order for the grievance to be timely the Union was required by the collective bargaining agreement to submit it no latter than September 22, 2003.

The Arbitrator has not addressed the question of whether summer school work should be included in the calculation of when the grievance should be filed. Such a decision is unnecessary because the grievants worked, at a minimum, five (5) days prior to September 2, 2003. The Arbitrator therefore finds the grievance is untimely.

The Union has also argued that the instant matter is in effect a continuing violation of the collective bargaining agreement and thus the timeliness issue is in effect moot. However, herein the date of the reduction of hours was made clear to the grievants on June 4, 2003. There is no dispute it was also made clear to the Union's representative, Manning, at the same time. Thus the Union and the grievants were aware of "the occurrence on which the grievance is based" as of June 4, 2003. To conclude the instant matter is a continuing violation would render meaningless the collective bargaining agreement's specific time frame for submitting a grievance.

The Arbitrator notes here that had the Union raised the instant matter prior to September 2, 2003, and, had the Union believed the Employer may of changed its decision, there would be a basis for determining that until the Employer enacted the reduction of hours there was no grievance. However, the grievants did not discuss the matter with Postlewaite until September 10, 2003 and he did not raise the matter with the Employer until September 16, 2003. Thus there was no basis for the grievants to believe their reduction in hours would not commence on September 2, 2003.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented, the Arbitrator concludes the grievance is untimely. The grievance is therefore denied.

AWARD

The grievance is untimely.

Dated at Madison, Wisconsin, this 21st day of September, 2004.

Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

EJB/gjc
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