BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE ASSOCIATION OF MENTAL HEALTH SPECIALISTS

and

ROCK COUNTY

Case 359
No. 63793
MA-12715

(.5 Crisis Positions to .4 Crisis Positions)

Appearances:

John Williamson, Attorney at Law, 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, on behalf of the Association.

Eugene Dumas, Deputy Corporation Counsel, Rock County, Courthouse, 51 South Main Street, Janesville, Wisconsin 53545, on behalf of the County.

ARBITRATION AWARD

On June 24, 2004, the Association of Mental Health Specialists and Rock County 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 July 23, 2004 in Janesville, Wisconsin. A transcript of the proceedings was taken and distributed on September 8, 2004. Post-hearing briefs and reply briefs were filed, and exchanged by November 10, 2004.

This dispute addresses the right of the County to reduce three .5 FTE Crisis Intervention Worker positions to .4 FTE status.

BACKGROUND AND FACTS

Rock County and the Association of Mental Health Specialists are signatories to a collective bargaining agreement, the relevant portions of which are set forth below. Crisis Intervention Workers are members of the bargaining unit, and are covered by the terms of the collective bargaining agreement. The Crisis Intervention Unit is staffed continuously.

Historically, the Unit has been staffed by employees working either full time or half (.5) time. This scheduling configuration led to instances of "doubling up", situations where two or more employees worked at the same time. Over time, the employer began to reduce certain vacant .5 FTE positions to .4 FTE positions. The effect of so doing was to reduce the level of coverage by reducing "doubling up".

In a previous Arbitration, these parties litigated the right of the County to reduce a vacated .5 FTE position to a .4 FTE position. The County prevailed on that matter, which was before me, in a decision that provided the following:

> The question as to the appropriate level of staffing is one historically reserved to the employer under its Management Rights Clause. Absent a violation of some other provision of the contract, the question of whether there should or should not be duplicative staffing is one reserved to the Employer. Here, there exists a rational basis for the Employer's decision to staff at .4 FTE. (ROCK COUNTY, WERC Case 341, No. 61197, MA-11844, 1/31/03, Houlihan)

This dispute was prompted when the County determined to reduce three occupied .5 FTE positions to .4 FTE, effective January 1, 2004. Incumbent employees were notified of the change, and were offered the option to either accept the reduction or exercise bumping rights. Two employees accepted the reduction. The third exercised a bump. These changes further reduced the "doubling up" of staffing. They occurred at a time when the workload was increasing.

The Union grieved the matter on December 4, 2003, citing various provisions of the Agreement. The Employer denied the grievance on May 13, 2004, relying significantly on the Award cited above.

In distinguishing the two situations the Union points out that the prior Arbitration involved the reduction of a vacant position, and this matter addresses the reduction of positions occupied by bargaining unit members. In support of its claim, the Union points to a grievance resolution of a previous dispute between the parties. In 2002 a layoff notice was sent to a number of employees. Those employees were advised that there existed a right to bump into positions held by less senior employees. There were further advised that should they elect to bump into one of two existing .5 Crisis Intervention positions, that those positions would become .4 rather than .5 as they currently stood. John Becker, Director of Human Resources, granted the grievance with the following analysis:

> In the face of many changes and budget constrictions within County operations and budgets, it has become necessary for the Human Services Department to lean its staffing levels to the most operationally efficient levels. Among the changes sought is to reduce the overlapping scheduling of the .5 Crisis Intervention positions by reducing the hours to .4 as vacancies develop in the .5 positions. The union is aware of this intention.

However, in the case of employees exercising their bumping rights, a vacancy cannot truly be said to exist. But for the senior employee bumping into the position, the incumbent would remain and the position would remain a .5 position. Therefore, it is inappropriate to change the position from a .5 to .4 during the bumping process.

. . .

This decision in no way limits management from exercising its rights to establish staffing levels in the Crisis Intervention workers, or in any other aspects of its operations.

ISSUE

The parties stipulated to the following issue:

Did the County violate the collective bargaining agreement when it reduced three existing .5 Crisis Intervention Worker positions, which were not vacant at the time it reduced the positions, to .4 positions.

If so, what is the remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE II – MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the management of the County of Rock and the direction of the workforce is vested exclusively in the County, including, but not limited to, the right to hire, the right to promote, demote, the right to discipline or discharge for proper cause, the right to transfer or lay-off because of lack of work, the discontinuance of services, or other legitimate reasons, the right to abolish and/or create positions, the right to create job descriptions and determine the composition thereof, the right to plan and schedule work, the right to subcontract work (when it is not feasible or economical for County employees to perform such work), together with the right to determine the methods and processes and manner of performing work are vested exclusively in the management. In exercising these functions management will not discriminate against any employee because of his/her membership in the Association.

. . .

ARTICLE XV – HOURS OF WORK, CLASSIFICATION, PREMIUM PAY

15.01 A. Regular Workweek. The regularly scheduled workweek for full-time employees shall be forty hours per week, 8 or 10 designated daily hours (10 hr./day, 40 hr. Monday-Thursday), excluding regularly scheduled hours on Saturday and Sunday. Any permanent change for employee, unit, classification of employees in said hours will be mutually agreed upon by the employee/employees, administration and the union. Any employee may request a flexible change in schedule in any two week time/pay period with approval from his/her supervisor. This provision shall also apply to part-time employees who have not previously (prior to January 1, 2000 worked Saturday or Sunday hours, but does not restrict the County's right to create or maintain part-time positions that include such hours.

. . .

C. Crisis Workers. Regularly scheduled workweek of full time workers will be a total of eighty hours within a regularly recurring fourteen-day pay period.

. . .

F. Method of Calculating Actual Hours Worked.

. . .

2. Part–time Employees. – All hours that part time employees work, whether or not they receive premium pay for such work, shall be included as actual hours worked in determining the pro rata benefits.

. . .

G. When the County establishes new job descriptions, the County shall negotiate with the Union as to the proper wage classification, hours and conditions of work for said descriptions.

. . .

ARTICLE XXII – LAYOFF, REHIRE

22.01 A. Layoff Procedure. In a layoff of employees because of reduction in force, the employees with the least seniority shall be laid off first provided that those remaining are capable of carrying on the Employers usual operations effectively by State Laws/Regulations. . . .

POSITIONS OF THE PARTIES

The Union contends that this matter may be distinguished from the prior Arbitration between these parties in that the positions in this dispute were occupied. In the view of the Union, the third step grievance disposition more directly sets forth the understanding of the parties as to whether or not the County is free to reduce occupied positions. The Union contends that in the grievance disposition the County acknowledged that it could not reduce positions that, but for the ongoing bumping, were filled. The Union argues that the settlement underlies the point that prior to this case the County and the Association mutually agreed that the hours of occupied positions could not be decreased absent loss of work. The Union asserts that absent loss of work the hours of incumbents may not be decreased.

It is the Union's view that the County now asserts that once an employee obtains a .5 FTE position by bidding or bumping, the hours of that position can be decreased the day after the bid or bump becomes effective. That is alleged to make no sense. It may be that an employee who is informed that the .5 position which he/she has just secured is to be reduced is in a worse position than was the employee who was informed of the decrease before the bid or bump takes effect.

The Union points out that employees bid or bump into positions for a variety of reasons. The availability of insurance is certainly a significant consideration for anyone, as is the particular hours of work offered by different positions.

The Union points to Section 15.01 and notes that the provision explicitly protects the hours of full time employees. The Union cites the last sentence of the provision, and, while acknowledging that it is not the model of craftsmanship, argues that it must be regarded to extend the same protections to part-time employees. The Union points to Section 15.01 G, and contends that that provision requires the County to negotiate over the creation of a new job description. The County is not free to act unilaterally.

It is the Union's view that what the County is essentially arguing, is that the Union has waived its right to bargain over what amounts to hours of work. Such a waiver should not be lightly inferred.

It is the view of the County that the grievance should be denied because the County's actions are expressly authorized under the Management Rights provision of the collective

bargaining agreement. The County also contends that this identical claim was raised, considered, and rejected in the prior Arbitration award.

The County distinguishes the grievance settlement. In that matter, the Human Resources Director considered it inappropriate to condition a change in staffing levels on whether or not a bargaining unit employee chose to exercise her contractual right to bump into an existing position. The critical fact, in the eyes of the employer, was that the bumping employee was to be treated differently than the incumbent.

The County contends that this dispute is solely concerned with the County's right to reduce a position. There is no question as to entitlement to fringe benefits presented. It is the view of the County that the right to reduce a part time position has been squarely addressed in the prior Award. There is no contractual provision or practice to compromise the County's right to reduce positions. There is no allegation that it is acting in other than good faith.

DISCUSSION

The County relies upon my past Award in this matter. The Union relies upon Becker's grievance disposition in a prior matter. Each address the reduction, real or proposed, of a .5 FTE to a .4 FTE. Each of these is distinguishable from the facts underlying this dispute. In the prior Arbitration, the employer reduced a vacant position. Here, the positions reduced were filled. At a minimum, there are contractual provisions regulating the sequence of a reduction in the work force.

In the grievance resolution, the County had reduced/eliminated certain positions. The two Crisis Intervention positions were not among those reduced. The initial decision was that if employees exercised their bumping rights to bump into a Crisis Intervention position, the position would be reduced. It was the act of exercising the contractual right to bump that would have prompted the employer to reduce positions that would have otherwise remained intact. As I read the grievance disposition, the Human Resource Manager reversed a decision that would have conditioned the reduction in position on whether or not a bargaining unit employee exercised a contractual right.

The logic of the disposition did draw a distinction between vacant and occupied positions. I believe it did so as a matter of explanation/distinction, as opposed to a construction of the collective bargaining agreement. The background, as explained, was that the County was reducing .5 Crisis Intervention positions, as they became vacant. It was not then reducing occupied positions. The Department had evidently taken the position that if an employee was bumped out of a .5 position the position was vacated, and subject to reduction. I believe the upshot of Becker's grievance disposition was that the position was never really vacant. I believe the true thrust of the decision was that the County ought not be telling employees that if they exercised their contractual rights their jobs would be cut.

Here, the County has advanced beyond the reduction of vacant positions. It is reducing occupied positions. Its actions have to be measured against the terms of the collective bargaining agreement. It appears that the motive of the employer in reducing positions was to save money. The reduction in the hours of these three people resulted in fewer hours of coverage. The employer determined that it could live without the "double up" coverage.

I think the basic decision as to the level of staffing is reserved to the employer. The Management Rights clause specifically grants to the employer the right to lay off for "…other legitimate reasons…". Management has historically enjoyed the right to determine the level of staffing and such a decision falls easily within the sweep of "legitimate reason". The Union established that the work load was increasing. It goes on to argue that the employer is not free to reduce the workforce absent a reduction/decline in the amount of work. I disagree. The fact that the employer has never reduced the workforce in this fashion in the past does not rise to the level of an interpretive practice.

A past practice is typically regarded as a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action. (*The Common Law of the Workplace*, St. Antoine, Ed. BNA, 1999, p.81) The behavior described here is not a pattern of action at all. It is, rather, a history of non-action. As budgets grow ever tighter, employers respond to cut expenses. As the pressures mount, employers are forced to search out money saving devices and/or approaches, many of which have never been considered before. The mere fact that this has never been done in the past does not constitute either a practice nor an admission that it is contractually barred in the future.

The Union points to Article XV, Section 15.01 as providing regulation of the workweek of part time employees. The first sentence of Section 15.01 defines the workweek of full-time employees. The second sentence addresses the circumstances under which "…said hours…" may be adjusted. I regard the reference to "said hours" to refer back to the hours described in sentence one. The third sentence allows for flexible change under certain circumstances. It is the final sentence that is alleged to support this grievance.

The last sentence makes reference to "This provision shall also apply to part-time employees…" As noted, this is not the model of clarity. It is less than clear what provision applies to part-time employees. No evidence was presented as to the history, application, or intent of the parties in crafting the sentence. It appears to refer to an involuntary switch to Saturday/Sunday hours. While it is difficult to construe this sentence without evidentiary support, it is difficult to read it as a provision that freezes the FTE level of part-time employees absent the mutual agreement of the parties.

The Union contends that unless its construction of the sentence is given effect, part-timers will be afforded second-class status. I believe the contract distinguishes between full-time and part-time employees. Section 15.01 A. defines a full-time work week and work day. There is no such definition of a part time work week/day. Section 15.01 F. 2 recognizes the fact that part-time employees may work a variety of hours.

In making the reductions the employer offered the impacted employees the opportunity to either accept the reductions or exercise bumping rights. Bumping rights are found in Article XXII, the Layoff clause. The effect of affording impacted employees bumping rights was to allow them to move to more desirable positions, for which they had the seniority and skills. The employer followed the Layoff clause in reducing the workforce. There is no claim that the Layoff clause was violated.

I believe that the County acted within its rights when it reduced the three .5 FTE Crisis Intervention Worker positions to .4 FTE.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 24th day of March, 2005.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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