BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

OCONOMOWOC SCHOOL DISTRICT

Case 38
No. 64973
MA-13070

(Reduction of Full-Time Staff)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Timothy C. Hall**, on behalf of Teamsters Union Local No. 695.

Davis & Kuelthau, S.C., Attorneys at Law, by **Mark L. Olson**, on behalf of the Oconomowoc School District.

ARBITRATION AWARD

Teamsters Union Local No. 695, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a Commissioner or member of its staff to arbitrate a dispute between the Union and the Oconomowoc School District, hereinafter the District, in accord with the grievance procedure in their labor agreement. The parties subsequently jointly requested that David E. Shaw, a member of the Commission's staff, be appointed to arbitrate in this dispute as part of a voluntary resolution of a related dispute. The undersigned was then appointed to arbitrate and a hearing was held before the undersigned on November 1, 2005, in Oconomowoc, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by February 15, 2006.

Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

> Did the District violate any section or provision of the 2004-2005 Collective Bargaining Agreement between the Oconomowoc Area School District and Teamsters Union Local No. 695 custodial employees when the District implemented staff reductions in the custodial bargaining unit for the 2005-2006 school year?
>
> If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The parties cite the following provisions of their collective bargaining agreement, in relevant part:

Article V. BOARD OF EDUCATION RIGHTS

Those rights and responsibilities which have been reserved exclusively to the Board by virtue of Legislative enactments, court decisions, Department of Public Instruction rulings, and/or other legal mandates, cannot be abridged by the Union. It should be clearly understood that 5.01 is not intended to be all-inclusive of the Board's right to manage.

5.01 Rights: The right of the Board, in accordance with applicable law and this Labor Agreement to promulgate and apply rules and regulations to:

A. Carry out the statutory mandates and/or Board tasks assigned to the agency utilizing personnel, methods, and means in the most appropriate and efficient manner possible.

B. Manage the employees of the agency, including the hiring, promotion, transfer, assignment, and retention of employees in positions within the school system, and in that regard to establish work rules. In the event that conditions occur where continuation of a position(s) is not practical and a layoff is required, the Board shall determine who shall be retained.

. . .

Article XXIV. SENIORITY

24.01 Seniority Classifications: Seniority shall be determined by length of service. There shall be three classifications of seniority: Regular full-time, regular part-time, and seasonal. Regular full-time seniority shall take precedence over all forms of seniority. Regular part-time seniority shall take precedence over seasonal seniority.

24.02 Layoffs: In the event of a layoff, those employees with the least seniority shall be laid off first, provided that those employees retained are deemed qualified for the position.

24.03 Layoff Call-Back: When employees are called back to work, those employees having the greatest seniority shall be called back first, provided those employees called back are deemed qualified for the position.

It shall be the responsibility of part-time and seasonal employees to inform the Board of their intent to be available for work should there be job openings for which they are qualified. Such intent should be on file April 1 for seasonal positions, and August 1 for part-time positions.

. . .

24.06 Bumping Procedure: An employee whose job is being eliminated may use his/her seniority to bump an employee with less seniority. The employee who is exercising his/her right to bump into a higher classification will have up to thirty (30) days to demonstrate his/her competency to fill the new position. The least senior full-time employee affected by this procedure may opt to work as a part-time custodian or may elect to take a layoff in accordance with Article XXIV, 24.02, and will have recall rights as specified in Article XXIV, 24.03.

. . .

BACKGROUND

The Union represents the District's custodial staff, including regular full-time, and regular part-time and seasonal employees.

Due to severe budget problems the District determined that it was necessary to reduce custodial staff by 3.5 FTE for the 2005-2006 school year. In order to implement these cuts, the District proposed to eliminate two full-time custodial positions, John Luby's Maintenance Custodian position at the High School and David Masko's Custodian I position at the Middle School, as well as, four part-time custodial positions. Employees in those positions were given preliminary notice of layoff and of their bumping rights. The cuts were implemented in early May, 2005, and Luby bumped into the full-time position of Head Custodian at Park Lawn Elementary School and Masko bumped into a part-time (6 hours) Custodian position at Meadow View Elementary School. [1]

Subsequently, on May 16, 2005, a part-time (6 hours) custodial position was posted at the High School and a part-time (4 hours) custodial position was posted at the Middle School.

Part-time custodial positions pay less and have lesser benefits than full-time employees. Masko went from earning $16.40/hour as full-time to $12.00/hour in the part-time position.

When the bumping was completed, two full-time custodial employees ended up in part-time positions and four part-time custodial employees were laid off from the District's employ. There still remained 23 part-time custodial positions in the District.

A grievance was subsequently filed by Luby on the basis that any part-time employees should be laid off first before any full-time employees have their hours reduced or are separated from employment. The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the District's staffing changes violated the clear terms of the seniority provisions in the parties' Agreement. The clear wording of Section 24.02 states that, in the event of a layoff, "those employees with the least seniority shall be laid off first." Section 24.01 of the Agreement specifies three classifications of seniority: regular

[1] Masko initially desired to bump into a full-time Head Custodian position, but due to concerns about his qualifications for that position, he ultimately elected to bump into the part-time position.

full-time, regular part-time and seasonal, and states that regular full-time seniority takes precedence over all forms of seniority. Here, it is undisputed that Luby and Masko were laid off while several part-time positions were untouched. Under the seniority provisions, Luby's and Masko's work hours should have had seniority preference over those of the part-time employees.

Next, the Union asserts there is no language in the Agreement that allows the District to override the contractual seniority provisions in times of financial distress. While Article V, Board of Education Rights, grants the District the right to layoff employees, it specifies that these rights must be exercised in accord with the Agreement.

Here, the District unilaterally imposed a wholesale restructuring of the workforce without any language in the Agreement authorizing such actions. The situation in this case is similar to that in BLAW-KNOX CONSTRUCTION EQUIPMENT, 116 LA 1095, 1105 (2001). In that case, the union grieved the employer's unilaterally combining seven job classifications into one. The employer argued it had the right to do so based upon the management rights clause in the contract, along with the lack of any language prohibiting the action, and past practice. The arbitrator in that case stated the rule of contract construction that the parties' intent is to be determined from the instrument as a whole, not from a single word or phrase. The arbitrator then concluded that while the management rights provision gave the employer the right to create or terminate jobs, there was no language with regard to combining jobs. In the absence of such language, the employer had failed to show that the parties intended the employer to have the unilateral right to combine jobs. Further, the management rights were subject to other provisions in the agreement, and the arbitrator found the employer's action was not authorized in the face of clear language elsewhere in the contract. The arbitrator also rejected the employer's reliance on past practice, finding that the employer had never combined jobs in the past without the union having grieved it.

The Union asserts BLAW-KNOX is directly applicable in this case. Here, the District focuses solely on the bumping language in isolation from the rest of the Agreement. By doing so the District acknowledges there is no express contract language to support its actions. Also, the management rights provision explicitly is subject to other provisions of the Agreement. The clear language of the layoff provision trumps those rights. The District also relies on past practice; however, the instances it cites involved the closing of entire schools and were more akin to "job eliminations", rather than the staffing changes here. The Union did not grieve those prior instances because they did not constitute a "layoff" under the Agreement.

The Union also cites arbitral precedents for the proposition that financial difficulties do not permit an employer to violate the parties' Agreement.

The Union also asserts that the staffing changes here constituted a "layoff" under the Agreement, and the District cannot avoid its contractual obligations by now trying to recast its actions as "job eliminations". That the changes were not job eliminations is demonstrated by the subsequent posting of Luby's and Masko's reduced positions.

In LUFKIN INDUSTRIES, 90 LA 301, 306 (1988), the arbitrator noted the parties differed in their definitions of the term "layoff", and concluded the employees were in fact laid off, as they were receiving unemployment compensation. Here, the District itself originally called its actions a "layoff", before it realized the problems with that under the specific provisions of the Agreement.

Last, the Union asserts that the District tacitly acknowledged the weakness of its case by its attempt to show there was a past practice of disregarding contractual seniority rights. However, the District failed to establish there has been such a practice. As in LUFKIN, here the Union has not acquiesced to layoffs in disregard of seniority and the prior instances of school closings are inapposite.

The Union concludes that by laying off the full-time employees Luby and Masko, while leaving a large number of part-time custodial positions untouched, the District has violated the seniority provisions of the Agreement. The Union requests that the grievance be sustained and that all affected employees be made whole.[2]

District

The District notes that due to a severe budgetary crisis, it implemented a new staffing plan for the start of the 2005-2006 school year that included cuts in staffing levels for all categories of employees. The plan called for the elimination of two full-time and six part-time custodial positions. The District was careful to balance its financial needs with its operational needs in doing so. The District believes that to operate efficiently and meet operational needs it needs a balance of full-time and part-time custodians. The two full-time positions eliminated were held by Luby and Masko and both were notified they would be allowed to bump employees in the bargaining unit with less seniority. Both exercised their bumping rights. All employees were permitted to exercise their bumping rights and ultimately the only custodians actually separated from employment as a result of the layoff decisions were the four least senior part-time employees.

As the bargaining unit consists of both full-time and part-time custodial employees, there was no erosion of the bargaining unit. Further, the ratio of part-time employees to full-time employees has become more equal, as more part-time custodial positions have been cut in recent years than have full-time positions. Thus, it cannot be argued that the District has retained part-time employees at the expense of full-time employees in the unit or that the District is eroding the ranks of the full-time employees in order to employ part-time employees. Here, no full-time employee was separated from employment as a result of the District's staffing decisions and Luby and Masko were permitted to exercise the precedence of their full-time seniority, as required by Section 24.01.

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[2] The Union waived filing of a reply brief.

The District asserts that it has the authority to determine which positions are to be eliminated. In construing an employer's right to eliminate positions in light of seniority language in the contract, arbitrators have distinguished between the elimination of a "position" and the selection of the "employee" who is to be separated from employment due to the layoff event. In SOUTH SHORE SCHOOL DISTRICT, MA-101497 (Arbitrator Crowley, 1999), the union challenged the employer's reducing the hours of the three most senior aides, while still employing three less senior aides who worked less than full-time, arguing the seniority language required to the employer to maintain the full-time hours of the senior aides while reducing the hours or eliminating the positions of the less senior aides. The contract in that case gave the employer the "sole right to determine the position or positions to be eliminated." The arbitrator held that wording gave the employer the right to determine which position would be eliminated. The contract also stated that employees would be selected for layoff in inverse order of being hired. The arbitrator concluded that the employer had the sole right to decide which positions to reduce, and that the seniority language did not require the employer to retain the full-time positions of the senior employees.

As in SOUTH SHORE, the clear language of Section 5.01, B, provides that the District retains the authority to determine which positions will be eliminated and retained, while Section 24.02 defines which employees will be separated from employment in the event of a layoff. This distinction between the "employee" to be laid off as a result of the decision to eliminate a "position" is further emphasized by the bumping language of Section 24.06. This provision states, in relevant part, "an employee whose job is being eliminated may use his/her seniority to bump an employee with less seniority." The seniority provisions do not restrict the District's specifically reserved right to determine if layoffs are necessary, nor its determination of which positions are necessary for the operational efficiency of the District, rather those seniority provisions allow more senior employees to bump less senior employees after the District determines which positions are to be eliminated or reduced.

Next, the District asserts it has complied with the seniority provisions of Article XXIV. Luby and Masko, the two full-time custodians whose positions were eliminated, were permitted to bump into positions held by less senior custodians. The end result was that no full-time custodians were separated from employment and the four least senior part-time custodians were separated from employment. Thus, both Luby and Masko exercised precedence over the part-time employees as Section 24.02 requires.

The Union would interpret Sections 24.01 and 24.02 so as to prohibit the District from eliminating a full-time position, if part-time positions still exist. Such a tortured reading of those provisions would conflict with Section 5.01, B, and Section 24.06. The latter provision clearly specifies that the least senior full-time employee affected by the bumping procedure may elect to work as a part-time custodian or take a layoff with recall rights. Under the Union's interpretation, however, there would be no part-time positions into which the least senior full-time employee could bump. The Union's absurd interpretation thus renders that

language in Section 24.06 meaningless. It is a principle of contract interpretation that an interpretation that leads to absurd results and an interpretation that renders contract language meaningless are to be avoided. Conversely, the District's interpretation gives meaning to and harmonizes all of the relevant contract language.

The District also asserts that while the clear and unambiguous language of the Agreement supports the District's interpretation and it is unnecessary to look at parol evidence, both past practice and bargaining history support the District's actions. On at least two separate prior occasions, the District reduced full-time and part-time custodial employees, while continuing to utilize part-time custodians, without the Union's having grieved in either instance. The Union unconvincingly argued in the processing of the instant grievance that it did not grieve on the prior occasions because "no one got laid off." However, in both instances full-time positions were eliminated while part-time positions continued to exist. The evidence shows that, as was the case here, the full-time employees were issued a notice of layoff and were permitted to exercise their bumping rights. It is unreasonable for the Union to now assert a position it never previously stated under identical circumstances. It is further noted that the relevant contract language is the same now as it was then.

Bargaining history also supports the District's position and demonstrates that the Union has recognized the District's right to eliminate full-time positions while retaining part-time positions. While the relevant contract language has remained unchanged, the Union has made no proposals to limit the District's right to hire or use part-time employees, nor did it propose to require the District to eliminate all part-time positions prior to laying off a full-time employee. Those negotiations spanned the two prior occasions where schools were closed and full-time positions were eliminated. It was only in the negotiations for a successor agreement that the Union has proposed to permit part-time employees to bid on other vacant part-time positions in order to convert to full-time status. The District did not agree to the proposal; however, by making the proposal the Union admits the current contract language does not limit the District's right to use part-time employees. The Union may not obtain through arbitration that which it could not acquire through negotiations. U.S. POSTAL SERVICE V. POSTAL WORKERS, 204 F.3D 523 (4th Cir., 2000).

There is no language in the Agreement which would support the Union's position. By the absence of such contractual limitations on the District's rights involved here, there can be no reasonable conclusion that the District's actions violated any terms of the parties' 2004-2005 Agreement.

In its reply brief, the District asserts that the Union's argument that the District inappropriately asks the Arbitrator to focus solely on Section 24.06 in isolation from the rest of the Agreement, both misconstrues the District's position and misapplies the BLAW-KNOX case. It is the Union who relies solely on the seniority provisions in Section 24.02, while ignoring other applicable parts of the Agreement, including the rest of Article XXIV. The Union

dismisses the applicability of Section 24.06, rather than attempting to resolve any conflicts between that provision and Section 24.02. It is a rule of contract construction that "where possible, contract provisions should be harmonized, so that all of them are given meaning." Walworth County, MA-12850. (Nielsen, 2005). Here, the District's interpretation harmonizes all provisions of Article XXIV and the rest of the Agreement, while the Union ignores Section 5.01, B, and Section 24.06. The Union's interpretation renders those provisions meaningless. It ignores the contractual procedure which calls first for identification of the position(s) to be eliminated (Section 5.01, B), second the elimination of the position(s) identified, and third bumping by those employees whose positions have been eliminated (Section 24.06) by utilizing their seniority rights, as stated in Section 24.01, resulting in the employees with the least seniority being laid off first, as required by Section 24.02. The District's actions here were consistent with all of those provisions.

The District also responds that the Union's reliance on BLAW-KNOX is misplaced. The arbitrator in that case relied on specific contract language addressing the employer's ability to create positions and limiting the employer's right to add duties to existing positions, while the generic management rights clause did not address the combining of positions. The arbitrator concluded from this that the parties did not intend for the employer to have the unilateral right to combine jobs. None of the circumstances relied upon by the arbitrator in BLAW-KNOX are present in this case. Here, Section 5.01, B, explicitly gives the District the right to determine which positions will be eliminated when the District deems a layoff is necessary.

The arbitrator in BLAW-KNOX also concluded that the employer did not establish that past practice supported its position, finding the circumstances were not the same in the cited prior instances as the case at hand and that in most instances the union had grieved the employer's actions or the employer had obtained "consensus with the union" pursuant to the specific contract language regarding job creation. In contrast, here the Union had not grieved the past instances. The Union's assertion that those instances are distinguishable on the basis that schools were entirely closed in those instances has no merit. In each of those cases, the District eliminated full-time and part-time positions, as here, processed the layoff notices and bumping rights, as here, and the contract language has been the same. However, not until this case did the Union grieve or otherwise protest the District's actions. The Union's failure to grieve in the prior instances constitutes acquiescence in the District's interpretation and application of the relevant language of the Agreement.

The arbitrator in BLAW-KNOX also found that bargaining history did not favor the employer's position, as the employer had previously attempted, but failed, in bargaining to achieve job combinations. Here, it was the Union that failed to achieve concessions in bargaining to compel the District to combine part-time work in order to create or maintain full-time positions. Thus, BLAW-KNOX, upon which the Union has heavily relied, supports the District's position, rather than the Union's.

Finally, the District asserts that the Union attempts to merge the decision to eliminate the positions with the resulting layoffs in an effort to cloud the issue. This demonstrates a fundamental misunderstanding of the nature of a layoff decision. The Union relies on LUFKIN INDUSTRIES to establish a definition of a layoff that distinguishes between a layoff and the elimination of a position. That reliance is misplaced, as in LUFKIN the employer implemented an across-the-board reduction in hours for all employees and then assigned "short-term assignments" on a rotating basis. The arbitrator found there was a "layoff" under the terms of the agreement, on the basis that the employees' hours were reduced and they were eligible for unemployment compensation. In EAGLE CREST FOODS, 95 LA 482 (Stephens, 1990), the arbitrator rejected LUFKIN as precedent, based on the specific contract language in LUFKIN, and concluded that the term "layoff" must be accorded its normal meaning as a temporary or permanent separation from employment.

Here, the Union attempts to combine the decision to eliminate the positions and the effect of that decision (the bumping and eventual layoffs) in order to mislead the Arbitrator into applying only Section 24.02, without reference to the rest of the Agreement, to both the decision to eliminate positions and to the resulting layoffs. Section 24.02 has no application to the decision of which positions to eliminate, as Section 5.01, B, leaves that decision to the Board.

The District concludes that the evidence has established that it was under immense financial pressure in the 2003-2004 and 2004-2005 school years resulting in a need for across-the-board budget cuts. As part of that process, the Board determined it was necessary to reduce the level of staffing in its custodial workforce and at the same time meet the District's operational needs. It fully complied with the contractual procedures in implementing its decision and therefore requests that the grievance be dismissed.

DISCUSSION

While the District spent considerable effort in establishing its fiscal problems to explain its actions, the Arbitrator does not understand the District to argue that those problems relieved it of its obligations under the Agreement, nor would that be the case. Absent a contractual provision otherwise, an employer's financial situation has no impact on its obligations to comply with the terms of a collective bargaining agreement to which it is a party. [3]

As to the merits of this dispute, the Union argues that the parties' Agreement does not authorize the District to take the staffing actions it took in this case, in regard to both the impact on Luby's and Masko's positions and the retention of part-time positions at the same time that Masko ultimately went to 6 hours from 8 hours a day.

[3] This disregards the impact bankruptcy laws may have on an employer's obligations.

The Union argues that the District may not, under the Agreement, take an action that results in a full-time employee ending up in a part-time position while there are still part-time employees in positions that did not have their hours reduced or eliminated. In this regard, the Union relies on Section 24.01, which states that, "Regular full-time seniority shall take precedence over all forms of seniority," and Section 24.02, which provides, in part, "In the event of a layoff, those employees with the least seniority shall be laid off first. . ." The Union argues that Luby and Masko were "laid off" ahead of part-time employees.

There is also a dispute as to whether Luby's and Masko's jobs were in fact "eliminated" or simply restructured to part-time positions, as the Union claims. The evidence establishes that Luby's and Masko's full-time positions at their schools were eliminated and replaced with part-time positions, which the District posted. While the Union is understandably concerned with the loss of full-time positions in the unit, there is no express limitation in the Agreement on the District's ability to eliminate and/or create positions, nor is there any contract language cited that limits the District's use of part-time positions. To the contrary, Section 5.01, A, authorizes the Board to utilize personnel "in the most appropriate and efficient manner possible." Section 5.01, B, provides, in part, "In the event that conditions occur where a continuation of a position(s) is not practical and a layoff is required, the Board shall determine who shall be retained." While, as the Union notes, Section 5.01 requires that these rights must be exercised "in accordance with. . . this Labor Agreement", Sections 24.01 and 24.02 are the only provisions cited that impact on the Board's authority in this area. As discussed below, those provisions impact which employees will be retained, not which positions the Board may eliminate, retain or create. [4]

There is often confusion in situations such as this as to what action constitutes the "layoff"; is it the initial decision to eliminate a position, which often, as here, precipitates a "notice of layoff", or the final action in the process of separating an employee from employment. It is a rule of contract interpretation that absent evidence otherwise, parties are assumed to intend that the words they used are to be given their normal meaning. Robert's Dictionary of Industrial Relations (Fourth Edition), defines the term "layoff" as:

A temporary or indefinite separation from employment. . . (p. 417).

As both parties have noted, it is a rule of contract construction that a determination of the parties' intent must be based upon a reading of the Agreement as a whole, not on an isolated word or provision. In this case, Sections 5.01, A and 5.01, B, authorize the Board to determine which positions will be eliminated and which will be retained (or created in their place), and the provisions of Article XXIV determine which employees will be retained in the remaining positions and who will be separated from the District's employ. As Luby and Masko were full-time employees, pursuant to Section 24.01, their regular full-time seniority

[4] The Arbitrator does not find the BLAW-KNOX case particularly instructive, as the arbitrator in that case relied primarily upon specific language he found applicable to the employer's actions and upon bargaining history.

took precedence over any regular part-time employee's seniority. This precedence is exercised pursuant to Sections 24.02 and 24.06. While Section 24.02 establishes the order of who will be laid off, i.e., be separated from the District's employ, Section 24.06 establishes the manner in which Section 24.02 will be implemented.

The evidence establishes that after their full-time positions were eliminated, both Luby and Masko exercised their regular full-time seniority. Luby had sufficient seniority to bump into another full-time position, while Masko's seniority and qualifications only permitted him to bump into a part-time position. In doing so, Masko exercised the "precedence" of his regular full-time seniority by bumping out the part-time employee who had held that position. As the District asserts, there is no provision in the Agreement that would require the District to create a full-time position out of existing part-time positions into which Masko could bump. In this case, the affected employees exercised their seniority and the end result was four part-time employees were laid off.

Contrary to the Union's assertion, this interpretation gives meaning and effect to all of the applicable provisions and does not render the seniority rights of full-time employees meaningless. They have the right to exercise their seniority rights to their advantage over the seniority rights of part-time employees for the remaining positions. At the same time, the Board's rights under Section 5.01 to determine which positions will be retained or eliminated are recognized and given effect. [5]

It is, therefore, concluded that the District's actions in this case did not violate the parties' Agreement.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 28th day of August, 2006.

David E. Shaw /s/
David E. Shaw, Arbitrator

[5] Given these conclusions, it is not necessary to look at past practice or bargaining history; however, it is noted that the evidence in these regards does not conflict with those conclusions.