

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, AFL-CIO, LOCAL 3286

and

RICE LAKE AREA SCHOOL DISTRICT

Case 76
No. 69113
MA-14484

(Crotteau Grievance)

Appearances:

Mr. Steve Hartmann, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin, appearing on behalf of Local 3286.

Mr. Stephen L. Weld, Attorney, Weld, Riley, Prenz & Ricci, S.C., 3624 Oakwood Hills Pkwy., P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of Rice Lake Area School District.

ARBITRATION AWARD

AFSCME, AFL-CIO Local 3286, hereinafter "Union," and Rice Lake Area School District, hereinafter "District," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on November 4, 2009, in Rice Lake, Wisconsin. The hearing was not transcribed. The parties submitted briefs and reply briefs, the last of which was received by December 17, 2009, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties bifurcated the proceeding and stipulated that the sole issue before the arbitrator was:

Was the Grievant a probationary employee?

If she was, then the grievance is dismissed. If she was not, the parties shall proceed to address the substantive issues relevant to her termination.

RELEVANT CONTRACT PROVISIONS

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ARTICLE 5 – GRIEVANCE PROCEDURE

Section 5.03: The arbitrator appointed shall meet with the parties at a mutually agreeable date and place to review the evidence and hear testimony relating to the grievance. Upon completion, the arbitrator shall render a written decision to the Board and the Union which shall be final and binding on both parties. The arbitrator shall have no authority to change, alter or modify any of the terms or provisions of this Agreement.

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ARTICLE 6 – SENIORITY

Section 6.01: Seniority defined. Seniority is the continuous full-time service of the employee.

Section 6.02: Employment, for purposes of determining seniority, shall include time for vacations, approved leaves of absences (properly applied for and granted), military service prescribed by law, illness or accident under the leave provision hereinafter set forth, or by mutual agreement between the Board and the Union. Employees on layoff or unpaid leaves of absence shall retain their seniority prior to the date of layoff or leave; however, no seniority or benefits shall accrue to employees on layoff status or unpaid leave which exceed on full calendar month. For purposes of accrual, regular full-time school year employees shall be defined as full-time employees.

Section 6.03: Any employee hired as a seasonal or casual employee shall not become a seniority employee.

Section 6.04: The word “seasonal” as used herein is meant to cover situations such as “Christmas” or summer when school is not in session. The word “casual” as used herein is meant to cover situations such as replacements for absenteeism and vacations. Regular part-time employees shall earn seniority on a pro rata basis.

Section 6.05: Should two or more employees be employed on the same date and hour, then seniority shall be determined by arranging said employees or group of employees in alphabetical order on the seniority list starting with the last name and then the first name.

Section 6.06: The Board shall compile and deliver to the Union on or before October 1 a list of all employees covered by this Agreement and their respective dates of employment and job classification. [This provision applies to regular full time and regular part time positions, not temporary assignments.]

Section 6.07: Re-employment rights for an employee laid off under this Section shall terminate after twelve (12) months from the day of layoff.

Section 6.08: The period of seniority of an employee shall be forfeited if:

- A. The employee is absent due to occupational or non-occupational sickness or accident for more than twelve (12) months without securing permission of the Board;
- B. The employee is laid off and not re-employed in a one (1) year period from such layoff

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ARTICLE 7 – JOB POSTINGS AND PROMOTIONS

Section 7.01: A vacancy shall be defined as a job opening within the bargaining unit.

Section 7.02: When the District determines that a vacancy should be filled or a new position created within the bargaining unit, the new or vacated position shall be posted on various departments and/or school bulletin boards for a period of five (5) working days. Such postings shall set forth the job title, minimum qualifications, required, work locations, scheduled hours and rate of pay.

Section 7.04: The selection of the person to fill the vacancy shall be on the basis of relative skill, ability and seniority.

Section 7.05: On or before May 15, an employee may elect, by written statement delivered to the office of the business manager, to be considered in any and all postings in a particular school or department which occur during the subsequent calendar year.

Section 7.06: A current employee who posts for and is assigned to fill a new or vacant position shall be given a two month trial period during which the Employer is to evaluate whether the transferred/promoted employee is able to satisfactorily perform the work duties of the new position. In the event the employer determines that the transferred/promoted employee is not, the employee shall be returned to his/her former position. The employer may, at its discretion, extend the trial period an additional month. The employee may, at any time in the first month of the trial period, opt to return to his/her former position. A current employee who posts for and is assigned to fill a new or vacant position shall be given a two-month trial during which the Employer is to evaluate whether the transferred/promoted employee is able to satisfactorily perform the work duties of the new position.

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ARTICLE 9 - PROBATION PERIOD

Section 9.01: All employees shall serve a probationary period of one (1) year from the date of hire in the bargaining unit. Probationary employees shall be eligible for a wage adjustment after 150 days. Effective on date of hire, probationary employees shall receive all benefits except vacation. Vacation eligibility shall be as provided for in Art. 22.

Section 9.02: The Employer shall have the right to extend the probationary period for up to thirty (30) days upon notification in writing of the reason forwarded to the Union president and the employee.

Section 9.03: It is understood that the period during the summer when an employee is not at work shall be excluded from the computation of the probationary period for the school year employees.

Section 9.04: During the probationary period, the employee shall be subject to dismissal without recourse through the grievance period.

Section 9.05: Upon completion of the probationary period, the employee shall be granted seniority rights from the employee's date of hire. Probationary employees shall be entitled to health insurance. The Employer agrees to make contributions to the Wisconsin Retirement System on behalf of probationary employees. Probationary employees, upon successful completion of the probationary period, shall accrue vacation and sick leave from the date of hire. Probationary employees shall be entitled to no other fringe benefits during their probationary period.

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BACKGROUND AND FACTS

The Grievant, Jane Crotteau, was hired by the District on December 12, 2007 to a 183 day, 4 hours per day Cross Categorical Aide position. The Grievant was hired to work with a student with special needs. The student left the District during January, 2009 prompting the District to issue the Grievant a lay off notice. The notice informed the Grievant that the lay off was “not in any way a reflection of your performance, but rather is precipitated by economic and operational constraints,” that her last date of work was February 14, 2008 and that she had recall rights.

On June 11, 2008 the Grievant informed the District that she was interest in a posted Cross Categorical Aide vacancy for the 2008-2009 school-year. The Grievant was recalled to work on September 2, 2008.

The Grievant received a pay adjustment from a probationary wage to a non-probationary wage after her 150th day of work. This occurred during the thirteenth week of the 2008-2009 school year, on or about December 19, 2008.

On June 4, 2009, Chad Harnisch, Lincoln Elementary School Principal, informed the Grievant that she was a probationary employee and that he was recommending her termination. The Grievant was terminated effective June 9, 2009.

The Union grieved the termination on the basis that it lacked just cause. The District countered that just cause existed, but that the Grievant was a probationary employee and therefore her termination was not subject to challenge through the grievance procedure.

At hearing, the parties agreed to bifurcate the grievance addressing the procedural challenge first.

DISCUSSION

The sole issue in the case is whether the Grievant’s period of lay off may be excluded from the calculation of the probationary period. If, so then the Grievant was a probationary employee as of the date of her termination and therefore it is without recourse to the grievance procedure.

This is a contract interpretation case. The parties’ dispute arises out of the meaning of their labor agreement. Contract interpretation is the ascertainment of meaning. Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. p. 430 (2006). Language is clear when it is susceptible to one convincing interpretation, but may be deemed ambiguous if there is more than one plausible interpretation. *Id.* at 434. If the plain meaning of the language is clear, it is unnecessary to resort to extrinsic evidence. *Id.*

The parties disagree as to the meaning and application of the probationary period language. The Union asserts that the written language of the agreement describes the length of the probationary period as one year from the date of hire. It maintains that the language is a specific written contract provision and the arbitrator has no authority to consider other general contract provisions to determine the meaning of the language. In contrast, the District argues that the Union's interpretation of the probationary period language is inconsistent with other provisions of the labor agreement. The District maintains that its method of calculating the Grievant's probationary period is consistent with its treatment of the Grievant's wages and seniority and the reason for a probation period.

The Probationary Period language in dispute is contained in Article 9, Section 9.01 which reads:

All employees shall serve a probationary period of one (1) year from the date of hire in the bargaining unit. Probationary employees shall be eligible for a wage adjustment after 150 days. Effective on date of hire, probationary employees shall receive all benefits except vacation. Vacation eligibility shall be as provided for in Art. 22.

Focusing on the first sentence, the Union points to the word "year" and argues that once an employee has completed twelve calendar months, then they are no longer a probationary employee. The Union reviews the options - 365 days, 12 consecutive months, calendar year or lunar year - and concludes that the most logical in this context is a "space of 12 calendar months". I disagree. The language reads that probation is complete one year after the date of hire. Thus, the date in which the employee was hired, a date specific, is the starting point and the only way to measure one year from a date specific is to do so by days, not months.

The fact that the parties disagree as to the meaning of Section 9.01 does not necessarily mean that the language is ambiguous, but coupled with the reasonableness of both sides' interpretation, it is appropriate and necessary to consider extrinsic evidence in determining the intent of the parties as it relates to the probationary period. That evidence includes other sections of the labor agreement and the course of dealing and usage between the parties.

Section 6.01 states that seniority is continuous service and then goes on in Section 6.02 to explain that employment, for purposes of seniority:

shall include time for vacations, approved leaves of absences (properly applied for and granted), military service prescribed by law, illness or accident under the leave provision hereinafter set forth, or by mutual agreement between the Board and the Union. Employees on layoff or unpaid leaves of absence shall retain their seniority prior to the date of layoff or leave; however, no seniority or benefits shall accrue to employees on layoff status or unpaid leave which exceed on full calendar month.

Thus the parties discussed and agreed that they would not count time spent while on lay off (in excess of one month) when calculating seniority. Although seniority and probation have differing purposes, it is reasonable to conclude that if the parties believed that it was appropriate to exclude lay off time for purposes of calculating seniority, then they would have the same view when it related to completion of a probationary period. This section support the District's position that the parties expected time spent during lay off would be excluded from all benefit calculations, including probation.

Even more pertinent would be the parties' handling as it relates to the probationary period. Consistent with Article 9.01, the District increased the Grievant's pay after 150 days of employment, not 150 days from her date of hire. ¹ The District credited the Grievant with 58 days from the 2007-2008 first period of employment and used this amount as the starting balance toward her attaining 150 "days of employment" for purposes of eligibility toward a wage adjustment. The District processed this increase after 150 days of active employment from which the Grievant was eligible to earn seniority. The District's application of 9.01, by counting all calendar days during active employment and deducting the period of lay off, is persuasive not only because it is consistent with how the District implemented the probationary clause, but more so because at the time the probationary wage increase was implemented, it is highly unlikely that termination was contemplated.

I therefore move to the calculations. The Grievant's date of hire was December 12, 2007. At the time of her lay off on February 14, 2008 she was employed for 58 calendar days in the 2007-2008 school year. In 2008-2009, she started on September 2 and ended on June 9 tallying 281 days. The Grievant therefore was in active employment status a total of 351 days starting from the date of her first hire through her layoff and restarted on September 2 when she returned to work through her termination on June 9. The Grievant did not complete the 365 day, one year, probationary period.

This conclusion is supported by the rule of reason. The probationary period is the one time an employer can closely monitor a new employee's behavior and performance and, if the employer-employee relationship is not a good one, summarily dismiss the employee. To deny this employer such an opportunity when the rule of reason recognizes that an inordinate interruption in employment warrants a discontinuation of the probationary period is inapposite to its purpose.

The Union asserts that the result of this finding will be that the District will terminate employees on lay off in order to deny them attaining non-probationary status. Quite the

¹ The Union argues that it did not know the date the District processed the Grievant's 150 day pay increase, that the date it did so tardy and violated the labor agreement, and that the District cannot support its methodology in this grievance with that incorrect administrative action. I disagree. The District's actions as it relates to the 150 day graduation from a probationary wage to a non-probationary wage is relevant and above reproach. Not only did it occur long before the District envisioned terminating the Grievant, there is no evidence to indicate it was a sinister effort to manufacture evidence to support to District's actions.

opposite. Application of this decision will result in probationary employees who are on lay off for less than one year retaining their recall rights even though their probationary period will be interrupted. That interruption will extend the amount of time the probationary employee is in probationary status, but will not extend the overall probationary period. It remains 365 days. The probationary employee will still have the opportunity to complete the probationary period and attain regular status.

AWARD

1. The Grievant was a probationary employee.
2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 18th day of March, 2010.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator