

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF OMRO

and

**OMRO SCHOOL EMPLOYEES, SECRETARIAL DIVISION,
LOCAL 1838, AFSCME, AFL-CIO**

Case 48
No. 69496
MA-14628

Appearances:

Mary Scoon, Staff Representative, AFSCME District Council 40, W5670 Macky Drive, Appleton, WI 54915, on behalf of Omro School Employees, Secretarial Division, Local 1838, AFSCME, AFL-CIO.

Tony J. Renning, Davis & Kuelthau, S.C., LLP, P.O. Box 1278, Oshkosh, WI 54903-1278, on behalf of the School District of Omro.

ARBITRATION AWARD

The School District of Omro, hereinafter District or Employer, and Omro School Employees, Secretarial Division, Local 1838, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The parties jointly requested the Wisconsin Employment Relations Commission to appoint Commissioner Susan J.M. Bauman to serve as the arbitrator in this matter. She was so appointed. A hearing was held on March 30, 2010 in Omro, Wisconsin. The hearing was transcribed. The record was closed on June 22, 2010, upon receipt of all post-hearing written arguments.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

There are no procedural issues to be decided. The parties were unable to stipulate to the substantive issues to be determined in this case. However, they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument, as well as the parties' suggested issues. The Union frames the issues as:

Did the Employer violate the collective bargaining agreement during the 2009-2010 school year when it unilaterally reduced the work schedule of the employees of the bargaining unit? If so, what is the appropriate remedy?

The Employer states the issue as:

Did the district violate the collective bargaining agreement by laying off ten clerical employees for the 2009-2010 school year per seniority and, if so, what is the appropriate remedy?

The undersigned adopts the following issue:

Did the District violate the collective bargaining agreement when it reduced the hours of the least senior members of the bargaining unit by 26 days and that of the remaining members of the bargaining unit by four (4) days for the 2009-2010 school year? If so, what is the appropriate remedy?

FACTS

The facts of this case are not in dispute. The District employs eleven (11) clerical employees, ten (10) of which are in the bargaining unit. Of these, nine (9) hold secretarial positions and one (1) holds a payroll/accounts payable coordinator position. Two positions work twelve (12) months per year, thirty-seven and one-half (37.5) hours per week, with the remaining eight (8) positions working between nine (9) and eleven (11) months each year, also working thirty-seven and one-half (37.5) hours per week.

In May 2009, the District was advised by the State of Wisconsin that it would receive a reduction in state funding of approximately \$300,000 for the 2009-2010 school year. The District had to implement cost-saving measures to address this reduction, including decreasing labor costs. The District sought to reduce these costs through attrition throughout the ranks of its employees, but was unable to do so in this bargaining unit. Accordingly, in July 2009, the Employer notified the employees that their work schedules were being reduced due to budgetary constraints. The reductions varied anywhere from three (3) to ten (10) days per employee for an approximate total of sixty (60) to sixty-five (65) days for the entire unit. The Union filed grievances on behalf of the affected employees and on or about September 2009, the parties resolved the grievances on a non-precedential, non-practice setting basis.

The District still needed to reduce labor costs associated with its clerical employees. It solicited input from the Union which suggested that the District layoff the least senior employee or employees. The District determined that it would not be able to maintain operations in the most appropriate and efficient manner possible if it were to follow the Union's suggestion. Instead, the Employer partially laid off all ten (10) clerical employees by reducing the two least senior employees by 26 days (a 10% layoff) and the remaining employees for four (4) days each. The total reduction amounted to eighty-four (84) days for the entire unit.

The Union filed grievances on behalf of the affected employees and processed them through the grievance procedure. The parties were unable to resolve the dispute and the matter proceeded to arbitration. Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

SECTION III – Board Functions

The Board maintains and reserves the following functions and shall not exercise these rights in violation of the specific provisions of this Agreement:

- A) The operation of the school system and the determination and direction of the working force, including the right to plan, direct and control operation; to carry out the statutory mandate and goals assigned to the school board in the most appropriate and efficient manner possible, to manage the work force and assign work to employees on said jobs, to determine the means, methods, materials and schedules of operation, to determine the work to be performed, to maintain the efficiency of employees, to determine the number of employees on jobs, to create, revise, eliminate jobs, to establish and require the employees to observe reasonable rules and regulations, to hire and layoff, to maintain order, and to suspend, demote, discipline and discharge employees for cause, are the functions of the Board.
- B) The exercise of these powers, rights, authority, duties and responsibilities by the Board, and the adoption of such rules, regulations and policies as it may deem necessary shall be limited only by the specific and express terms of this Agreement.
- C) The Union shall be supplied with a copy of all new written rules adopted by the Board and the Union shall have the right to grieve any unreasonable rules.

SECTION IV – Probationary Period and Definition of Employees

Employee classifications are defined and applied as follows:

- A) **Probationary Period:** All new employees shall serve a probationary period of one (1) year duration to determine whether or not they are suited and qualified for the job. If during that time they do not perform their duties satisfactorily, they may be discharged without recourse through the Grievance Procedure. Thereafter, they may be discharged for cause only. During the first six months of employment, an employee shall not be entitled to post into another position.
- B) **A regular full-time employee** is hereby defined as one who is working thirty-seven and one-half (37 ½) hours or more per week, twelve (12) months per year.
- C) **A regular part-time employee** is hereby defined as one who is working thirty-seven and one-half (37 ½) hours per week less than twelve (12) months per year.
- D) **A part-time employee** is hereby defined as one who is working less than thirty-seven and one-half (37 ½) hours per week who is on an irregular non-scheduled basis.
- E) **A temporary employee** is one who is hired for a specific period of time or to perform on a specific project, not to exceed ninety (90) working days or six hundred (600) hours, and who will be separate [sic] from the payroll at the end of such period or project. The Union shall be notified of all new employees in the bargaining unit. The ninety (90) days may be exceeded in cases where the employee is filling in for a regular employee.
- F) **Clerical Substitutes** shall be paid at the rate set forth in Appendix A. Such substitutes shall be used only for the temporary replacement of regular employees, and that said substitutes shall receive no fringe benefits.

SECTION X – Seniority

The Board shall recognize departmental seniority in this Agreement to be based on the employee's date of employment starting in the department.

- A) The employees shall not lose their departmental seniority because of absence due to lack of work, funds, or any other conditions beyond the control of either party to this Agreement. Department, for the purpose of this Agreement shall mean secretarial department. A seniority list shall be developed by the administration based on the actual hire date of the employee and reviewed by the Union.
- B) **Termination of Seniority:** In computing length of continuous service there shall be no deduction of any time, which does not constitute a break in continuous service. Continuous service is broken by voluntarily quitting the school system, discharge for cause from the school system, failing to report for work at the termination of an authorized leave of absence, or extension thereof. In computing seniority, seniority shall be computed on a departmental basis only.

SECTION XI – Layoffs

In the event that it becomes necessary to make layoffs to reduce the working force, the employees with the least seniority shall be laid off first, providing that those remaining employees can adequately perform and meet the needs of the Employer as determined by the Administrator. The employee shall receive a two (2) week written layoff notice. Recall of employees shall be in the inverse order in which they were laid off. Employees shall have recall rights for a period of eighteen (18) months from the date of layoff.

SECTION XXII – Work Day – Work Week

The normal workday-workweek rules shall be followed:

- A) The normal workday shall be seven and one-half (7½) hours per day, Monday through Friday, between 7:00 a.m. to 4:00 p.m., for all secretaries, with a thirty (30) minute lunch period. During periods when normal operational schedules must be changed, the administrator may schedule the seven and one-half (7½) hour workday during the unique operational hours. Modifications of the above schedule may be made by management by one-half (1/2) hour provided a one (1) week notice is given to the Union, and further that such modified schedule shall be in effect for a minimum of one (1) week. Any further changes in the schedule shall be by mutual agreement between management and the employees, notification to the Union except as provided in Paragraph B. Except during periods of unusual operational hours, employees shall not be required to work beyond 5:00 p.m.

- B) The Union agrees that in the event that the number of pupils in the District increases beyond the physical capacity of the present building necessitating, in the opinion of the Board, the use of staggered or extended periods when school is in session, the above times may be changed by the Board by one (1) hour earlier or later than indicated in Paragraph A. The hours under the Paragraph B shall be allocated on a seniority basis.
- C) Employees shall be paid at the rate of time and one-half (1½) their hourly rate for all hours worked outside their normal work hours.
- D) Employees requested to attend School Board meetings shall receive a minimum of one (1) hour at time and one-half (1½) or pay at time and one-half for time in attendance at such meetings, whichever is greater.
- E) In the event that schools are closed for inclement weather; the first, third, and fifth such day in the school term shall be with no loss of pay. Additional days may be made up at the end of the school year per state guidelines.

DISCUSSION

At issue herein is the question of whether the Employer has the right, under the terms of the collective bargaining agreement with the Union, to reduce the hours of work of members of the bargaining unit for the sole purpose of reducing labor costs. The parties are in agreement that the action taken by the Employer is governed by Section XI – Layoffs of the labor agreement. That section provides, in pertinent part:

In the event that it becomes necessary to make layoffs to reduce the working force, the employees with the least seniority shall be laid off first, providing that those remaining employees can adequately perform and meet the needs of the Employer as determined by the Administrator.

Unlike the language contained in many other agreements in cases cited by the parties, this contract speaks generally of “reduc[ing] the working force.”¹ Also unlike many of the cited cases, the parties do not dispute whether the action taken by the Employer constituted a layoff, or whether the layoff clause is applicable to the case.

While agreeing that the Employer’s action constitutes a layoff, the Union contends that in applying the layoff provision, the Employer should have laid off the most junior employee, rather than reducing the hours of all employees. In agreeing to the language of Section XI, the Employer agreed to the principle of seniority, but in reducing hours of all employees, the Employer violated that principle. In particular, the Union points to the fact that on any given day, the employee with the least seniority might be working while a more senior employee might be on layoff.

In response, the Employer notes that the language of Section XI does not speak of “the employee” with the least seniority but, rather, “the employees” with the least seniority. Accordingly, the District contends that it is not obligated to layoff the least senior employee before reducing the hours of any other employees, as long as the relative seniority of the employees is not affected by the layoff. The Employer also points out that although it determined the number of days that each employee was to be off work, it did not mandate the particular days that each employee would be off work. As a result, the fact that a more senior employee is off work on a day that an employee with less seniority is working is the result of the employee’s decisions, not those of the Employer.

¹ In NEEDED AREA SCHOOL DISTRICT, MA-10854 (Emery, 5/2000) the layoff clause reads:

The Board shall determine the number of employees to be laid off or reduced. . .

In MANITOWOC COUNTY, MA-13340 (Houlihan, 5/2007), the layoff clause reads:

In reducing personnel, the last person hired shall be the first laid off, and the last person laid off shall be the first person rehired. All temporary employees shall be laid off before regular employees are laid off.

...

In ATHENS SCHOOL DISTRICT, MA-12056 (Emery, 10/2003), the layoff clause reads:

In the event of a work location reduction in force, including reductions caused by the discontinuance of a facility or its relocation, the employees shall be laid off in the inverse order of seniority within the job classification of the employee provided the employee is deemed qualified to fill a remaining position.

In SUPERIOR MEMORIAL HOSPITAL, A-5165 (Shaw, 9/1994), the layoff language reads:

In laying off employees, the policy of departmental seniority shall prevail. The person in the department and classification in which the Employer determines the layoff shall occur with the least departmental seniority shall be the first person laid off provided the remaining employees are capable, able and qualified to perform the work.

No full-time employee shall be laid off while there are part-time employees working in the department provided the said full-time employees are qualified to perform the work . . .

In FOND DU LAC COUNTY, MA-13502 (Bauman, 3/2007), the pertinent layoff language reads:

No employee with permanent status shall be laid off from any position while any limited term, emergency or probationary employee is continued in a position of the same class or equivalent class in the department. . .

The District is correct that the language of Section XI does not require it to layoff the most senior employee before it reduces the hours of any other employee, as long as the principle of seniority is adhered to. The language of Section XI makes reference to reducing the work force, and addresses the laying off of those with the least seniority. Unlike other contracts which address issues such as temporary or part-time employees being the first to be laid off, or those that speak only to layoff, the language of Section XI makes reference to reduction. The usage of the words "reduce the work force" implies that partial layoffs, such as those utilized by the District, are appropriate. Nothing in the language of Section XI clearly states that an employee must be completely removed from employment before the hours of another employee can be reduced. Neither does the language state that a single employee must be reduced (to zero) before another employee's hours can be reduced. The language is written in such a manner that the Employer must (partially) layoff the employees with the least seniority before it can (partially) layoff more senior employees. Although the parties did not introduce any bargaining history regarding this provision, and it is quite possible that in adopting this language neither party contemplated that a partial layoff would occur, the language can readily be interpreted to allow partial layoffs, as long as the principle of seniority is maintained.

Here, the Employer determined to reduce the number of days worked by the two least senior employees by 26 days, and to reduce the number of days worked by the remaining members of the bargaining unit by four (4) days each. In reaching this decision, made in the interests of continuing to operate the District as efficiently as possible in light of budgetary constraints, the Employer did not violate the principle of seniority or Section XI by its actions.

The Union next argues that all of the employees in the bargaining unit have worked a consistent number of days for many years, two (2) of whom are full-time employees and eight (8) of whom are regular part-time employees as defined in Section IV. According to the Union, the reduction in the number of hours worked by each of these employees results in a redefinition of the status of the employees of the District. In fact, the Union argues, inasmuch as the work schedule of the two regular full-time employees is modified by a reduction of 26 days in 26 weeks, it is a modification of Section XXII which defines the normal workday and workweek. Citing this arbitrator's decision in FOND DU LAC COUNTY, MA-13502 (Bauman, March 2007), the Union contends that this violates the collective bargaining agreement. The Union also argues that Section XXII provides the means for modification of workdays and workweeks which, with exceptions not applicable to the instant matter, require the parties to reach a mutual agreement as to any modifications.

The Employer contends that under the terms of the collective bargaining agreement, Section IIIA (Board Functions), management has retained the right to determine schedules, work hours and number of hours of work unless those rights have been specifically bargained away. The limitations on the District in this regard must be contained in specific provisions of the collective bargaining agreement. The District's right to layoff employees, including the right to reduce hours, is contingent only upon doing so in accordance with Section XI, by inverse seniority. Section XXII allows management considerable leeway in making adjustments to workdays and workweeks as needed for efficient operations of the District.

This section does not provide employees with a guarantee of work hours or workdays. According to the District, reading Section XXII as restricting the District's authority to layoff employees, including the authority to reduce work hours, would render Section XI as superfluous. The District had a need to reduce costs without disrupting the services provided by the District. It is the District's decision to determine the most efficient manner in which to reduce costs without disruption. According to the District, were it to agree to the Union's reading of the collective bargaining agreement, it would have to re-assign employees which would result in a less efficient operation for the entire District.

Having already determined that Section XI provides the Employer with the ability to reduce working hours of the entire work force, rather than just that of the most junior employee, the question to be determined is whether, in its action of reducing the two most junior employees by 26 days and the remaining employees by four (4) days, the Employer violated any other provisions of the collective bargaining agreement. The Union points to two distinct provisions that it contends were violated: Section IV that provides definitions of various types of employees, and Section XXII that describes the normal workday and workweek for employees and the circumstances under which deviations can occur.

Section IV defines the following pertinent classifications of employees:

A regular full-time employee is hereby defined as one who is working thirty-seven and one-half (37 ½) hours or more per week, twelve (12) months per year.

A regular part-time employee is hereby defined as one who is working thirty-seven and one-half (37 ½) hours per week less than twelve (12) months per year.

A part-time employee is hereby defined as one who is working less than thirty-seven and one-half (37 ½) hours per week who is on an irregular non-scheduled basis.

The Union contends that by reducing the number of days employees work, by 4 or 26 throughout the year, the Employer has violated this section because the two most junior employees, who were regular full-time (12 month) employees no longer worked thirty-seven and one-half (37 ½) hours or more per week for twelve months, and the remaining regular part-time employees no longer worked thirty-seven and one-half (37 ½) hours per week less than twelve (12) months per year. This change in the number of hours that the employees worked (less than 37 ½ hours per week for 26 weeks for the most junior employees and less than 37 ½ hours per week for four (4) weeks for the others) had no other impact on the employees than a reduction in wages during the weeks in question. As the Employer points out, the record in this case is devoid of any evidence that the employees were denied any of the

rights and benefits to which they were previously entitled due to the fact that they worked less than 37 ½ hours in some weeks.² The definitions are included in the bargaining agreement in order to establish the benefit levels available to employees in each classification. The definitions, in and of themselves, do not establish any rights or benefits that accrue to the employees. There has been no violation of this provision of the collective bargaining agreement.

The other provision that the Union contends was violated when the Employer reduced the number of days worked by all members in the bargaining unit was Section XXII which defines the workday and the workweek. In pertinent part, that provision of the agreement provides as follows:

The normal workday-workweek rules shall be followed:

- A) The normal workday shall be seven and one-half (7½) hours per day, Monday through Friday, between 7:00 a.m. to 4:00 p.m., for all secretaries, with a thirty (30) minute lunch period. During periods when normal operational schedules must be changed, the administrator may schedule the seven and one-half (7½) hour workday during the unique operational hours. Modifications of the above schedule may be made by management by one-half (1/2) hour provided a one (1) week notice is given to the Union, and further that such modified schedule shall be in effect for a minimum of one (1) week. Any further changes in the schedule shall be by mutual agreement between management and the employees, notification to the Union except as provided in Paragraph B. Except during periods of unusual operational hours, employees shall not be required to work beyond 5:00 p.m.

This provision does not provide a guarantee of seven and one-half (7 ½) hours per day, Monday through Friday. It does, however, provide that the normal, or usual, workweek of the employees covered by this collective bargaining agreement shall be seven and one-half hours.³ For the regular part-time employees, eight members of the bargaining unit whose work schedule was reduced by four days in their work year, to be taken at a time of their choosing (with the approval of the administration), there is no question that the deviation from the normal workday-workweek rules is clearly within the bounds of “normal” and there is no contract violation.

² Indeed, there is no question that the status of all but the two most junior employees remains that of regular part-time employees under the definitions contained in the collective bargaining agreement. Whether the two junior employees have, in some way, changed from regular full-time to regular part-time employees is not as clear, but under the provisions of Article III (Board Functions), the Employer does have the right to modify jobs.

³ Interestingly, the preamble to the sections A through E of Section XXII represents the operative portions of this Section as “normal workday-workweek rules”. (Emphasis added)

The more difficult question arises with respect to the two most junior employees who were required to take off 26 days during their work year. The Union cites FOND DU LAC COUNTY, SUPRA, for the proposition that in a 52 week year, a deviation from the norm 50% of the time violates the concept of “normal”. However, FOND DU LAC COUNTY involved a different fact situation, different contract language and more than 26 weeks, or 50% of the year, were affected. In that case, the Employer determined to reduce the number of hours certain employees worked each week for more than half the year. In making its decision to address budgetary concerns by this reduction in hours, it did not reduce the hours of work of all members of the bargaining unit but exempted a specific group of employees covered by the collective bargaining agreement. In addition, the reductions, with that particular exception, were made across the board, with no regard to the seniority of the affected employees. In addition, in FOND DU LAC COUNTY, the layoff clause differed from the language between the parties in this matter. Also, in that case, the actual timing of the reduction in workday/workweek was dictated by the Employer whereas in Omro, the Employer made the decision as to how many days each employee was to take off, but did not specify when those days were to be taken.

Thus, even if the layoff clause did not apply, which it does, the 26 days off does not necessarily translate into a deviation from the normal workweek, greater than 50% of the year, since it is not more than 50% of the year, and the employees could, in consultation with the administration, determine when the time would be taken off. One of the junior employees could have decided to take the 26 days off by working three day weeks over the summer, for example, resulting in less than 26 weeks being affected.

It is not necessary, however, to speculate regarding the manner in which the employees take the time off. Since the parties agree that the action of the Employer is a layoff, the employees are no longer working 100% schedules. With respect to the two least senior employees, they experienced a 10% reduction in hours. As a result, it is logical that, for them, the “normal” workweek would be reduced by 10%. There is, therefore, no violation of Section XXII.

The “Board Functions” section of the collective bargaining agreement leaves broad discretion to the Employer

. . . in the most appropriate and efficient manner possible, to manage the work force and assign work to employees on said jobs, to determine the means, methods, materials and schedules of operation, to determine the work to be performed, to maintain the efficiency of employees, to determine the number of employees on jobs, to create, revise, eliminate jobs. . .

The action taken by the Employer in this matter was to, in effect, revise jobs, consistent with other provisions of the collective bargaining agreement: the layoff clause. Section IV defines classifications, but does not prohibit the Employer from modifying those classifications to meet the needs of the District so as to “manage the work force” in the “most appropriate and efficient manner possible.” Had the Employer, in addition to modifying the number of days

worked by the members of the bargaining unit, modified their benefits, this would be a significantly different case. However, the modification of the number of days worked, arguably a change in the classifications of the employees (although nobody's classification actually changed) and of the normal workday-workweek did not result in any change to the benefit levels received by those employees.

Seniority is a basic tenet of unionism, and the collective bargaining agreement between the Union and the District recognizes the principle of seniority. The Union argues that the least senior employee should have been laid off, in whole or in part, leaving the remaining employees unaffected. The layoff clause of the labor agreement between these parties does not require this, and the District, in exercising its rights to manage the District in the most efficient and appropriate manner possible⁴, did not violate the seniority principle in determining the reductions in force that it implemented. It is axiomatic that, to the extent possible, all of the sections of the collective bargaining agreement should be read as a whole, giving meaning to every clause. By reading the layoff clause to allow the Employer to reduce the hours of the employees in the manner that it has, the undersigned has considered the arguments of both parties that contend their position is required in order to ensure that all provisions of the agreement are meaningful. The ability of the Employer to reduce hours of employees, but ensuring that the relative seniority of the employees remains intact, does not eviscerate any other provisions of the contract. There is nothing in the contract that prevents the Employer from acting in the manner that it did, and all other provisions remain intact and meaningful under the conditions herein.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

No, the Employer did not violate the collective bargaining agreement when it reduced the hours of the least senior members of the bargaining unit by 26 days and that of the remaining members of the bargaining unit by four (4) days for the 2009-2010 school year. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 12th of July, 2010.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

⁴ The Union argues that the Employer failed to prove that efficiency required the action it took. It is the opinion of the undersigned that the Union has not met its burden of persuasion that the action taken by the Employer was not in the best interests of the District as a whole.