

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1397, AFSCME, AFL-CIO

and

SUPERIOR SCHOOL DISTRICT

Case 133

No. 69614

MA-14676

(Christenson Grievance)

Appearances:

Mr. James Mattson, Staff Representative, 8480 East Bayfield Road, Poplar, Wisconsin, appearing on behalf of Local 1397, AFSCME, AFL-CIO.

Mr. Kenneth A. Knudson, Attorney, and **Ms. Johanna R. Kirk**, Attorney, Knudson, Torvinen, Jones & Kirk, S.C., 823 Belknap Street, Suite 222, Superior, Wisconsin, appearing on behalf of Superior School District.

ARBITRATION AWARD

Local 1397, AFSCME, AFL-CIO hereinafter "Union" and Superior School District, hereinafter "District," mutually requested that the Wisconsin Employment Relations Commission assign a staff member to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot was assigned the case. The hearing was held before the undersigned on June 3, 2010 in Superior, Wisconsin. The hearing was not transcribed. The parties submitted briefs and reply briefs, the last of which was received by September 18, 2010, 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 stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union frames the substantive issues as:

Did the District violate the terms of the Collective Bargaining Agreement, Article 7, Section 10-A, and past practice when it changed the regular work schedule of the Grievant by more than forty-five (45) minutes? The Grievant's scheduled hours of work were changed from 7:45 a.m. to 12:15 p.m. to new hours 10:45 a.m. to 3:15 p.m. With this change of three (3) hours the District did not either abolish the Grievant's position or repost the new position with new hours noted.

The appropriate remedy is in the event the District decides to change an employee's hours of work by more than forty-five minutes the District must either abolish the position or post the new position for bidding.

The District frames the substantive issues as:

Did the District violate Article 7, Section 10-A when it shifted Grievant's working hours to meet the needs of special education students to ensure the provision of FAPE as required by State and Federal laws?

Is Article 7, Section 10-A of the contract violated when Grievant's working start and stop times were shifted but her total working hours were not increased or decreased?

Did Management properly exercise its right to establish job descriptions and duties pursuant to Article 20, Section 1-C?

Having considered the parties' framing of the issues, the evidence, and the arguments, I frame the issues as:

Did the District violate Article 7, Section 10-A of the Collective Bargaining Agreement when it changed the Grievant's work hours from 7:45 a.m. to 12:15 p.m. to 10:45 a.m. to 3:15 p.m.? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article 1 – Purpose

It is the purpose and intent of this Agreement to use the democratic practices and procedures of collective bargaining as a peaceful, fair and orderly way of reaching a basic agreement which covers rates of pay, hours of work and conditions of employment to be observed between the Board and the Union. The Union and the Board subscribe to the principle that differences shall be resolved by peaceful and appropriate means.

...

**Article 6 – Salary Schedule – Paydays – Guaranteed Hours of Work -
Shift Differential Pay – Overtime Pay**

...

Section 2. Work Day – Work Week:

...

I. Work Day/Work Week for Special Education Assistants:

1. The work day for this classification shall be all days when students are scheduled (except for inclement weather days). (sic)

...

Article 7 – Seniority – Promotions – Assignments – Layoffs

Section 3. When any position is abolished, the employee whose position is abolished may displace any employee having less seniority within the classification (not including promotional positions as identified in Addendum A and not including special education assistants and educational interpreters), provided he or she is qualified to fill the position. (Refer to Section 10 for special education assistants and educational interpreters.)

...

Section 10. In regard to special education assistants and educational interpreters, job abolishment shall be deemed to have occurred when an existing position is eliminated or when a position is increased or decreased in time by more than forty five (sic) minutes per day.

- A. Should it become necessary to make assignment changes during the course of the school year, it shall be understood that such assignment changes shall be the prerogative of the administration. Any assignment or reassignment of special education assistants or educational interpreters will be based on experience and qualifications. Seniority will be considered in those cases where

experience and qualifications **are** deemed to be equal. In no case, however, will a special education assistant or educational interpreter be economically disadvantaged during the course of a given school year as the result of assignment change.

- B. All vacant positions including newly created positions occurring during the previous school year which were temporarily filled by either long term subs or by assignments in Special Education Assistants and Educational Interpreter classifications will be posted at the end of the current year and each interested employee shall apply for the job vacancy or new position, in writing, and only those applicants who meet the prerequisites will be considered for the job. Those regular employees who have applied from within the job classification in which the vacancy occurred, will be considered. Those oldest in point of service shall be given preference in filling job vacancies provided the experience, qualifications and physical fitness of the applicants on said list are relatively equal.
- C. When any special education assistant or education interpreter position is abolished, the employee whose position is abolished may displace any employee having less seniority within the classification, provided he/she is qualified to fill the position.

...

Article 20 – Management Rights

- Section 1. The Board, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and the United States, included, **(sic)** but without limiting the generality of the foregoing of the right:
 - A. To the executive management and administrative control of the total school system and its properties and facilities, and the assigned school activities of the employees;
 - B. To hire all employees;
 - C. To establish job specifications and duties for their employees, the reasonableness of which shall be subject to arbitration.

Section 2. The exercise of the foregoing powers, rights, authority, duties and responsibilities of the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specified and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance (sic) with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

...

STIPULATIONS

The parties stipulated that the Grievant is a good employee and that there are no disciplinary concerns related to this case. Further, there are no health related issues involving the Grievant and this case.

BACKGROUND AND FACTS

The Grievant, Tanya Christianson, was hired by the District on October 27, 2003 and currently holds the position of Special Education Assistant. The Grievant worked at the middle school in 2003 and 2004 and moved to the high school in 2005. The Grievant's supervisor is High School Principal Kent Bergum.

At the start of the 2009-2010 school year, the Grievant worked four and one-half hours per day, from 7:45 a.m. to 12:15 p.m., in a high school medical needs room. The Grievant's primary duties were to assist students with eating, mobility, and hand on hand coordination.

During the fall of 2009, an issue arose regarding special education Student A and his/her success in a regular education classroom situation. The District reviewed Student A's individualized education plan (IEP) and decided that changes to the IEP would better meet the student's needs. The changes included the assignment of an aide to provide one-on-one and in classroom assistance.

In mid-October, the District approached the Grievant and asked if she would be willing to change her work hours to 10:45 a.m. to 3:15 p.m. in order to assist Student A. The Grievant declined because she had another job – providing day care from 2:30 p.m. to 6 p.m.- and the new hours would conflict.

On October 19, 2009, the Grievant received a notice from Bergum informing her that work hours were changing to 10:45 a.m. – 3:15 p.m. effective October 28, 2009. The Grievant was assigned to assist Student A. That date was later delayed to November 3, 2009 to accommodate the Grievant.

The Union filed a grievance on November 3, 2009 asserting that the District had violated Article 7, Section 10-A and the “long standing practice” when it changed the Grievant’s hours by three hours. The grievance was denied at all steps and is properly before the Arbitrator.

Additional facts, as relevant, are contained in the DISCUSSION section below.

DISCUSSION

The facts in this case are not in dispute. The issue is whether the labor agreement allows the District to unilaterally modify the Grievant’s workday. The Union argues it cannot and that Article 7, Section 10-A and past practice are controlling.

The Management Rights clause of the parties’ agreement provides the District the broad discretion to manage and control the school district and the right to “establish job specifications and duties.” Inclusive to these management rights is the ability to determine what work needs to be done and when it needs to be performed. Therefore, unless there is a specific contract clause which the District violated, then it was well within its rights to change the starting and ending times of the Grievant’s workday.

The Union argues that Article 7, section 10 regulates the District and curbs changing an employee’s work hours by more than one hour. Article 7, section 10 provides that:

In regard to special education assistants and educational interpreters, job abolishment shall be deemed to have occurred when an existing position is eliminated or when a position is increased or decreased in time by more than forty five (sic) minutes per day.

This sub-section defines “job abolishment.” If a job is abolished, then sub-section C establishes bumping rights for the more senior bargaining unit member provided he/she is qualified. It is therefore necessary to determine if the Grievant’s job was “abolished” when the starting and ending time changed.

Section 10 states that a job is abolished if the position is eliminated or if it is “increased or decreased in time by more than forty-five minutes per day”, the Grievant’s four and one half hour per day position continues to exist, it is just starting two hours later. Prior to the change in her starting and ending time, the Grievant worked in the medical needs classroom and now works with Student A. While it is true that the duties have changed, the parties specifically granted the District in Section 10-A the sole prerogative to make assignment changes during the course of the school year, so long as the total working hours did not change.

The alternate definition of “abolished” in Section 10 provides that if the position is “increased or decreased in time by more than forty-five minutes per day,” then it has been

abolished. In this instance, the Grievant worked four and one half hours per day before the change and four and one half hours per day after the change. The Union argues that since the Grievant's work hours changed by three hours, this clause applies and her position was abolished. I disagree.

Looking to the language of the clause, the "increase" or "decrease" relates to the "time" that an employee works in a day. If the time that she works increases or decreases, then the time would be more or less. "More" or "less" does not refer to a specific hour of the day, but rather refers to a cumulative total. For example, if the daily work hours increase from four hours to five hours, then there is more time. The Grievant's hours in a day did not change, only the times of day in which she worked them. The Grievant's start time changed from 8:15 a.m. to 10:15 a.m. It did not increase to 10:15 a.m. nor did it decrease to 10:15 a.m., but rather the start time was later. There is no reasonable reading of this language that encompasses the meaning which the Union posits.

This is a case of first impression. At no time prior was an employee reassigned involuntarily. In all prior instances, the employee was approached by the District, informed that the hours of worked needed to move and the employee agreed to the change. There is no past practice addressing the facts of this case.¹

The Grievant testified that she had been asked in the past to modify her work hours and she was allowed decline. She further testified that no other person was ever "forced to change their hours like" her. The District's decision to not exercise its management right in the past does not negate the fact that the right exists.

The Union makes two fundamental fairness arguments. First, that the three hour change in the Grievant's work schedule negatively impacted her; second, that the District could have staffed the 10:45 a.m. to 3:15 p.m. shift in another way. The Union also points out that the District cannot claim its actions are justified because it is complying with that state and federal law.

The evidence establishes that the change in work hours forced the Grievant to either give up or reduce the number of hours she provides child care services to others. This job, providing child care service, supplemented the Grievant's income and the shift in her District work hours negatively impacted her overall economic situation. But, the fact that the change in hours detrimentally impacted the Grievant does not create a contractual violation. The District has the right to modify work hours so long as the total hours of work do not increase

¹ The Union argues that there is a past practice of employees considering the work hours when determining which special education assistant job they will sign for each year. I do not dispute that the special education assistants follow this procedure, but the fact that the hours of work including starting and ending times are a primary consideration of the Union membership does not create a binding past practice which the District has agreed to follow. A controlling past practice does not exist which creates an obligation on the District to allow employees to consider and turn down job reassignments when the hours are not conducive to their personal schedules.

or decrease by greater than forty-five minutes thereby economically disadvantaging the employee. It further is allowed to select staff to fill special education positions based on experience and qualifications. That is exactly what has occurred and the effect on the Grievant, while not personally desirable, is consistent with the terms of the labor agreement.

The Union's second fundamental fairness argument asserts that the District had other, more reasonable means, to cover the 10:45 a.m. to 3:15 p.m. position. While the Union is correct that the District could have posted the position, could have asked for volunteers for the shift, and could have consulted with the Union to reach a more amicable resolution, there is no contractual authority which required the District to pursue these alternatives.

Finally, the Union argues that the District's behavior is not excused by the state and federal special education regulations. Not only is the the District is contractually bound to the terms of the parties' collective bargaining agreement, but it also must comply with external law. The District's actions were consistent with the terms and conditions of the labor agreement, therefore is unnecessary to review external law to address this case.

AWARD

1. No, the District did not violate Article 7, Section 10-A of the Collective Bargaining Agreement when it changed the Grievant's work hours from 7:45 a.m. to 12:15 p.m. to 10:45 a.m. to 3:15 p.m.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 16th day of December, 2010.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

LAM/gjc
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