BEFORE THE ARBITRATOR

In the Matter of Arbitration of a Dispute Between

BANGOR EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

BOARD OF EDUCATION, BANGOR SCHOOL DISTRICT

Case 27
No. 70219
MA-14908

Appearances:

Gerald Roethel, Executive Director, Coulee Region United Educators, 2020 Caroline Street, LaCrosse, Wisconsin 54603, for the labor organization.

Robert Butler and **Ben Richter**, Attorneys, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, Wisconsin 53703, for the municipal employer.

ARBITRATION AWARD

Bangor Educational Support Personnel Association and the Bangor School District are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On October 4, 2010, the Association made a request, in which the District concurred, for the Wisconsin Employment Relations Commission to provide a list of five randomly selected WERC-employed arbitrators from which they could select an arbitrator to hear and decide a grievance over the meaning and interpretation of the terms of the agreement relating to reduction of hours. The commission provided such a list on October 7, and on October 22 the parties informed the commission they had selected the undersigned to serve as the impartial arbitrator. Hearing in the matter was held in Bangor, Wisconsin on January 25, 2011. The parties filed written arguments and replies, the last of which was received on April 1, 2011.

ISSUE

The parties stipulated the issue as:

> "Did the School District of Bangor violate the collective bargaining agreement when it reduced Kristi Elliott's hours? If so, what shall the remedy be?"

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE II MANAGEMENT RIGHTS

Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of this Agreement. The rights include, but are not limited by enumeration to, the following rights:

A. To direct all operations of the school District;
B. To establish and require observance of reasonable work rules and schedules of work;
C. To hire, promote, transfer, and schedule and assign employees in positions within the school District;

. . .

E. To lay off employees from their duties because of lack of work or any other financial reason;
F. To maintain efficiency of school system operations;
G. To take whatever action is necessary to comply with state or federal law, or to comply with state or federal agency decisions or orders;
H. To introduce new or improved methods or facilities;

. . .

J. To determine the methods, means and personnel by which school system operations are to be conducted, including the right to determine whether goods and services are to be provided or purchased as long as no bargaining unit members have their regular hours reduced (exclusive of overtime) or are laid off due to such contracting out for goods and/or services; and

. . .

ARTICLE VII REDUCTION IN FORCE, POSITIONS & HOURS

A. In the event the Board determines to reduce the number of positions (full layoff) or the number of hours in any position (partial layoff), the provisions set forth in this Article shall apply. Layoffs shall be made only for the reasons asserted by the Board, and shall not be used to discipline an employee for his or her performance or conduct.

B. The District will give at least thirty (30) calendar days notice of layoff. The layoff notice shall specify the effective date of layoff. A copy of this notice will be sent to the President of the Association

C. SELECTION FOR REDUCTION

In the implementation of staff reductions under this Article, individual employees shall be selected for full or partial layoff in accordance with the following steps

Step One - Attrition.

Normal attrition resulting from employees retiring or resigning will be relied upon to the extent that is administratively feasible in implementing layoffs.

Step Two - Selection.

The Board shall select an employee(s) for a reduction in the affected Department in the order of the employees' length of service in the District, with the employee having the shortest length of service being the first selected. If two or more employees have identical length of service, the selection shall be based on relative qualifications. Departments for the purpose of this Article shall be defined as:

a. Custodial/Maintenance
b. Secretaries
c. Food Service
d. Teaching Assistants
e. Transportation/Bus Drivers and Van Drivers
f. Computer Technician

Seniority. For purposes of this Article, seniority is measured by an employee's date of hire with the District. Employees shall be defined as full-time or part-time consistent with Article V. Employee Definitions. In calculating seniority the District will annually produce a seniority list and forward that list to the President of the Association. The Association will raise any objections to the proposed seniority list within two weeks of receipt. There will be no bumping across departments.

Step Three - Reduction in Hours.

Full-time employees who are reduced in hours shall not lose any benefits they have accrued. Benefits are defined as seniority, sick leave, and vacation

earned as a full-time employee. Reduced in time employees shall have all the rights and privileges of full-time bargaining unit members under this Agreement except that economic provisions will be prorated to be consistent with the portion of a full-time position held.

Any employee who is reduced in hours (partial layoff) may choose to be fully laid off without loss of any rights or benefits as provided herein.

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ARTICLE XIV – COMPENSATION

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B. **FRINGE BENEFITS**

. . .

3. The employer shall provide all employees who are scheduled to work one thousand (1000) hours or more in any contract year full single or family health and dental insurance, life insurance, long-term disability insurance, and long-term care. The health plan will be a POS Level 4 with a $10 copay on Level I office calls and a $25 copay on Level II and III office calls and emergency room visits and a 0/5/20 drug card.

. . .

BACKGROUND

The Bangor School District, located in central La Crosse County, operates two kitchens, one in the elementary school (for breakfast and lunch) and one in the middle school/high school (for lunch). The schools are adjacent to each other, a few hundred yards apart. Over the past five years, the elementary school breakfast program has averaged about 8,500 student and adult meals per year, with the combined lunch programs at both schools averaging about 84,900 student and adult meals each year. This grievance concerns actions the district took to balance the Food Service Program budget by cutting employee hours and benefits.

In the 2009-10 school year, the District employed two cooks in each building, with the following assignments and schedules:

Name	Title	Location	Start	End	Total Hours
Kastenschimdt, Jan	Head Cook	Elem.	5:45 AM	2:00 PM	8.25
Kaiser, Colleen	Cook	M.S./H.S.	6:45 AM	2:00 PM	7.25
Elliot, Kristi	Cook	M.S./H.S.	6:45 AM	2:00 PM	7.25
Robinson, Kathy	Cook	Elem.	6:15 AM	1:30 PM	7.25

For 2009-2010, cooks had a starting wage of $9.65, going to $11.15 at step 3, with an additional $0.30 at 10, 14 and 16 years of consecutive service. [1] Because they all worked more than 1,000 hours per year, all four received the full package of fringe benefits listed under section XIV.B.3 of the collective bargaining agreement.

The Bangor School District participates in the federally assisted National School Lunch Program. Under state and federal laws and regulations, a school district must maintain a separate account for its Food Service Program, and cannot maintain a deficit in its FSP. Pursuant to the Wisconsin Uniform Financial Accounting Requirements promulgated by the Wisconsin Department of Public Instruction, a school District must cover an operating deficit resulting from student food services by transferring funds from the General Fund.

The recent history of the Bangor School District shows the following decline in participation in the combined student lunch program:

2005-2006	83,517
2006-2007	81,772
2007-2008	81,102
2008-2009	80,885

The decline in participation, and the increase in free and reduced meals, led to the following deficits in the Food Service Program, which had to be covered by transfers from the General Fund:

2005-06	$24,844
2006-07	$35,769
2007-08	$40,325
2008-09	$43,160
2009-10	$53,830

To understand the reasons for these deficits, and to suggest ways to address them, the District contracted with the Wisconsin Association of School Boards for a Food Service Assessment and Report. The FSAR, submitted by consultant Ted Kozlowski, RSBA, on April 14, 2010, made a series of recommendations in several areas. The recommendations, and their status as of the hearing in January, 2011, were as follows:

[1] The head cook's comparable range was $11.15 to $12.65, with the same longevity increases.

Accounting Recommendations	**Implemented?**
1. Consider expanding the chart of accounts for expenditure functions to correspond to revenue functions for breakfast, lunch, milk and vending	Yes
2. Consider expanding the chart of accounts for revenue and expenditure locations for the ES and HS/MS	Yes
3. Consider defining purchasing procedures to include accounting expansions in 1 and 2.	No
4. Consider using Skyward purchasing/receiving software systems including approving and encumbering.	No
5. Consider providing access to Skyward reports and/or accounts by Head Cook.	No
6. Consider requiring quarterly monitoring reports and profit/loss reports for the FSP by programs including participation and fiscal data.	Yes
Participation Recommendations	**Implemented?**
1. Consider monitoring program participation database on a daily basis by school, i.e. Number of Meals served, entre, date, school.	No
2. Consider establishing a participation percentage of 75% as a target for lunch meals served and 54% for breakfast meals served.	No
3. Consider providing multiple entrees choices.	Yes
4. Consider ala carte meal option.	Yes
5. Consider evaluating meal nutrition levels.	Yes
6. Consider establishing building level student committees to evaluate menus, products and presentations.	No
7. Consider developing and implementing an obesity/nutrition policy in harmony with both schools.	Yes
Management Recommendations	**Implemented?**
1. Consider establishing documentation of responsibilities for each staff member who works in the food service program [FSP].	No
2. Consider establishing a FSP manager to provide guidance for an effective FSP.	No
3. Consider establishing a financial accounting system for all publics.	No
4. Consider establishing benchmarks for monitoring purposes.	No
5. Consider establishing goals and objectives for the FSP.	No
6. Consider providing a communication system for students, staff, parents, board and general public.	No
Fiscal Recommendations	**Implemented?**
1. Consider increasing revenues to potentially reduce the deficit, i.e. increase participation by 6% resulting in $16,400 and increase meal rates by 5% resulting in $8,300.	No

2. Consider bidding the major food vendor annually.	Yes
3. Consider costing/pre-costing menu meals.	No
4. Consider having a non-compete policy for vending machines.	Yes
5. Consider reducing labor costs by 10%, more in line with comparable Districts.	No
6. Consider decreasing the labor hours per day and increasing the meals per labor hour.	Yes
7. Consider reducing health insurance costs for the FSP, i.e. modifying the eligibility language in the Bangor Educational Support Personnel Association master contract; bidding health insurance; modifying the health insurance cost structure with co-pays, deductibles, etc.	No
8. Consider in-service training for safety, efficiencies, quality, etc.	No

Among its several actions responding to the Kozlowski report, the District administration recommended to the board of education that it cut one food service position by 2.25 hours. By bringing the least senior cook, Kathy Robinson, below the 1000-hour threshold, this would save the District about $5,000 in wages and about $25,000 in health insurance and other fringe benefits. The board of education chose to make a deeper cut, and on July 21, 2010, voted 4-3 "to reduce one food service staff in both buildings by 2¼ hours daily." At that meeting, the board also voted 7-0 "to eliminate one teaching assistant position."

On July 22, 2010, District Administrator Roger Foegen wrote Kathy Robinson and Kristi Elliott identical letters, as follows:

> The Bangor Board of Education, meeting on Wednesday, July 21, 2010, voted to reduce two food service positions form (sic) 7 ¼ hours per day to 5 hours per day, effective with the start of the 2010-2011 contract year. This letter serves as your final notice of reduction in hours as required under Article VII of the BESPA Master Contract. Your contract is being reduced due to financial/budget considerations. This reduction in hours notice is not based upon performance or conduct. Recall rights and selection for reduction procedures are listed in Article VII of the 2009-2011 BESPA Master Contract (See pages 7-9).
>
> With the reduction of hours, you will no longer qualify for benefits (i.e. health, dental, long term disability, long term care of life insurance). The District will carry your insurance through the month of August, 2010. Please contact the WEA Trust for other insurance information or availability.
>
> If you have any questions about this reduction in hours please feel free to contact me.

Robinson's date-of-hire for seniority purposes was December 5, 2003. Elliot's date-of-hire for seniority purposes was August 27, 2001. Kastenschmidt and Kaiser were hired in 1983 and 1986, respectively, making Robinson the least senior and Elliot the second least senior member of the food service department.

Following this reduction in hours, the employees of the food service department worked the following schedule: [2]

Name	Title	Location	Start	End	Total Hours
Kastenschimdt, Jan	Head Cook	Elem.	5:45 AM	2:00 PM	8.25
Kaiser, Colleen	Cook	M.S./H.S.	6:45 AM	2:00 PM	7.25
Elliot, Kristi	Cook	M.S./H.S.	8:15 AM	1:15 PM	5.00
Robinson, Kathy	Cook	Elem.	8:15 AM	1:15 PM	5.00

At all times material, the district has served lunch in the elementary school from 11:10 A.M. to 12:35 P.M. (four sittings, some overlapping) and 11:22-12:44 at the middle/high school (two sittings).

On August 9, 2010, BESPA President Larry Langrehr wrote Principal Don Addington as follows:

> Re: Level I Grievance
>
> The letter to Kristi Elliott and the Bangor Educational Support Staff violates the collective bargaining agreement Article VII, C, Step 2 – Selection for Reduction. The contract requires that "The Board shall select an employee(s) for a reduction in the affected Department in the order of the employee's length of service in the District, with the employee having the shortest length of service being the first selected."
>
> The District needs to restore Kristi Elliott's hours. You may respond via fax (XXX-XXX-XXXX) or US mail to CRUE, Attention: Gerry Roethel, 2020 Caroline Street, La Crosse, WI 54603.

On August 16, 2010, Addington responded as follows:

> The following areas of Article II Management Rights of the collective bargaining agreement.
>
> A. To direct all operations of the school District.
> B. To establish and require observance of reasonable work rules and schedules of work.
> C. To hire, promote, transfer, and schedule and assign employees in positions within the school District.
> E. To lay off employees from their duties because of lack of work or any other financial reason.

[2] Foegen conveyed their new schedules to Robinson and Elliot in a letter dated August 12. 2010.

F. To maintain efficiency of school system operations.

On August 19, Langrehr sent to Foegen a letter identical to the one he had sent Addington, designated Level II Grievance. Foegen responded on September 3 with the text of the letter Addington had sent, with the following addition:

> All support the letter sent to Kristi Elliott and the Bangor Educational Support Staff. In addition the work needs to be done in both buildings during the same hours.
>
> For these reasons I deny the Level II grievance.
>
> If the union decides to appeal this decision to the school Board, the agenda for the next scheduled Board meeting, Wednesday, September 22, 2010 at 7:30 p.m. will be compiled by Wednesday, September 15, 2010.

On September 9, Langrehr sent the District Board of Education a letter identical to the ones sent Addington and Foegen. On September 24, Foegen and the Board responded, in part, as follows:

. . .

> The BESPA has the burden of proof in this matter to demonstrate that contract violation occurred. The District has denied your grievance and your remedy sought for the following, though not limited by enumeration, reasons. The delineation of the following reasons for denial does not preclude the District from asserting additional reasons for the denial of the grievance in a subsequent, if any, step in the grievance procedure.
>
> The District denies the grievance based upon the following contractual provisions:
>
> *ARTICLE II*
> *MANAGEMENT RIGHTS*
>
> . . .
>
> *ARTICLE III*
> *REDUCTION IN FORCE, POSITIONS & HOURS*
>
> . . .

ARTICLE XVII
DURATION OF AGREEMENT

. . .

In reviewing the contract language it is clear that the contract language does not state that the District must reduce the least senior staff even if the remaining employees are unable to perform the work at the time that work is available and must be performed.

Article III, Management Rights, Section A affords the District the right to direct all operations of the school District. The District has determined that it needs to have food service personnel available in both building site locations for preparation duties and serving duties at the same time. The locations are separate and cannot be performed by the same employee in an efficient manner. Article III, Management Rights, Section B allows the District to establish schedules of work. The District's decision to establish the food service employees' schedules or work was not done in an arbitrary or capricious manner and is in full compliance with the terms of the collective bargaining agreement. Article III, Management Rights, Section C provides the District with the opportunity to assign employees in positions within the school District. The District exercised this right by assigning employees into the two building site locations. Article III, Management Rights, Section F, provides the District with the opportunity to maintain efficiency of school system operations. It is the District's position that two separate food service employees are needed at the two separate locations and that the District needs to assign these employees in these locations in order to maintain efficiencies in the food service area. Since the work has to be performed in two separate locations at the same time, the District complied with the collective bargaining agreement when a reduction in hours was delivered to Ms. Elliott.

On October 4, the Association made a request, in which the District concurred, for the Wisconsin Employment Relations Commission to provide a list of five WERC-employed arbitrators from which they could select an arbitrator. The commission did so on October 7, and on October 22 the parties notified the commission that they had selected the undersigned to serve as the impartial arbitrator. Hearing in the matter was held in Bangor, Wisconsin on January 25, 2011. The parties filed written arguments, the last of which was received on April 1, 2011.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

The reduction in hours of the second least senior cook is in direct conflict with Article VII, C, Section 2, which allows for no administrative discretion in determining who is to be reduced. The District violated the agreement by not reducing the least senior cook.

The District may wish it had the ability to reduce both positions by 2.25 hours in order to have both positions below the threshold for the benefit program, but the agreement does not provide for it. While the District has the management right to lay off employees, it can only do so under the specific methodology of the layoff clause.

The past practice of the parties clearly demonstrates the District has always agreed with the Association's position, in that the least senior employee in a classification absorbed the entire reduction that was necessary. The District has previously reduced a bus driver, which in turn eliminated a route, so that the children from that driver's route were placed among the remaining drivers. In two occasions when the District reduced aides, an aide was fully laid off, and an aide was reduced to half-time. The reduction of the full-time aide resulted in one full-time aide being reduced rather than two aides being reduced to half-time. The reduction of a full-time aide to a half-time position was accomplished by removing all the hours from one aide. That is what the District should have done in his instance. When the District decided it could operate the kitchens with 4.5 fewer hours of work, it needed to take all 4.5 hours away from the least senior cook, rather than taking half of that reduction from the least senior cook and half from the grievant.

The District acted as it did not just to cut the total number of hours but also to reduce the number of employees eligible for benefits. But because of the improper reduction in the two positions, labor costs were cut not by the recommended 10% but by 39% -- far exceeding both the consultant's recommendation and that of administrative staff, and in violation of the collective bargaining agreement. The District should have followed the pattern it set in the past by reducing the hours of the least senior person in the department.

The specific language of the layoff clause controls over the general language of the management rights clause. The District has the general right to lay off employees, and was able to make the business decision to reduce 4.5 hours from the cook complement. But the District must follow the specific language of the layoff clause, and not just do what may be more convenient, easier and less complicated.

Arbitrator Houlihan has agreed with the Association's position in a case with virtually an identical set of facts, and nearly identical management rights language, concerning the Royall School District. He held that reduction of

multiple employees within one subset of the bargaining unit would negate the language of the master agreement. This reflects an identical situation to Bangor. If the District is left unchecked, there is nothing to prevent it from simply taking 2¼ hours from every school-year employee to essentially eliminate the benefit program from every school-year employee. That is clearly not the intent of the parties nor of the language. It violates the sum and substance of what a collective bargaining agreement provides to the employees, namely the stability of positions. The District gets to determine how many hours are required in each department, but the District has agreed with the Association how to reduce those hours. This attempt to reduce costs by eliminating benefit packages for two cooks versus eliminating the benefit package for one is inappropriate and violative of the collective bargaining agreement.

The parties on three previous occasions have agreed to the Association's interpretation of how the layoff language should be applied. This prior conduct and mutual interpretation must now be again enforced under the auspices of the arbitration procedure. The parties have uniformly applied the Association's position to the three previous layoffs, and it should be done so again. The specific language of the layoff language is controlling and provides the parties with the procedure to be followed. The Association has provided specific, concrete and simple directions the employer could follow so as to abide by the contract and still allow for all the kitchen work to be accomplished.

The grievance should be sustained and the District directed to restore the 2.25 hours to Kristi Elliott and to make her whole for the time and benefits lost due to the District's violation of the contract.

In support of its position that the grievance should be denied, the District asserts and avers as follows:

The contract language does not require the District to reduce the least senior staff even if the remaining employees are unable to perform the work at the time the work is available and must be performed. The District, which has the management right to direct all operations, establish schedules and assign duties, has determined that it needs to have food service employees available in both buildings at the same time. The locations are separate and cannot be performed by a single employee. This decision was not arbitrary or capricious.

The District's management rights are not "explicitly, clearly and unequivocally restricted by the express terms of this Agreement," including Article VII. Noting in Article VII limits the number of employees in a department the District may reduce at one time, nor does the provision require the District to completely lay off the least senior department employee prior to reducing another. Were the District required to do so, the contract language would not refer to reducing employees, using the plural.

The labor contract does not require the District to rearrange the food service employees' work schedules to provide Ms. Elliott with some of Ms. Robinson's remaining hours, and such an accommodation was not possible. Reducing one employee by 4.5 hours would not have left adequate staffing in each building nor generated the savings necessary to offset the program's structural deficit. The District therefore reduced the two least senior employees and ultimately reduced labor costs by over $45,000 in health insurance premiums alone.

Because of the nature of food preparation and clean-up, schedules could not be modified to accommodate Ms. Elliott because there simply is no work available for her to perform at times she is not already scheduled. Ms. Robinson is needed at the elementary school at the same time Ms. Elliott is working at the middle/high school. The District could not have accomplished its goal by scheduling Ms. Elliott to the elementary school prior to 8:15 because the cleanup work does not yet exist and lunch can neither be prepared that early nor while breakfast is being made.

This case is analogous to IOLA-SCANDINAVIA SCHOOL DISTRICT, where the employer addressed a structural deficit in its food service program by reducing a food service employee who was not the least senior. With contract language nearly identical to that under review, the arbitrator accepted the District's explanation of operational necessity for reducing the more senior employee and denied the grievance. Another arbitrator reached a similar conclusion under similar circumstances and contract language in MELLEN SCHOOL DISTRICT.

In the instant case, the only way the administration could comply with the directive to cut 4.5 hours of labor per week, comply with the terms of the collective bargaining agreement, and maintain adequate staff at peak duty times was to reduce the least senior employee in each building by 2.25 hours. Because the District complied with the directive in Article VII, C. to reduce the least senior member of the department when it reduced Robinson's hours, it was free to also reduce Elliott's as well. And even if the Association's interpretation of the contract is accepted, cutting Robinson's hours would not have maintained Elliott's, because the District needs both employees to be working in separate buildings at the same time, meaning that Elliott is not available to work the 2.25 hours at the time those hours of work are needed because she is already working.

This grievance would prevent the District from exercising its management rights to run the food service program in an efficient manner. The Association has failed to prove the District violated the contract, which grants the District the right to reduce multiple employees within the same department and does not require the District to completely lay off the least senior employee prior to reducing another, or if the remaining employees are not available to perform the

least senior employee's duties. The Association's interpretation would lead to an absurd and harsh result and severely restrict the District's ability to balance its food service budget. The Association has failed to meet its burden, and the grievance should be denied.

In further support of its position that the grievance should be granted, the Association replies as follows:

The District's assertion that the collective bargaining agreement does not have explicit, clear and unequivocal restrictions allowing the District to change the hours of each position is simply not true. After an employee begins work in a newly established position, the District does not change the time of the job or the time in the job. Reducing the amount of time allocated for a job must be done through the layoff procedure. The District's inconsistent action within the various departments underscores its cavalier attitude toward this significant component of the labor agreement.

The District's first argument overinflates its own capacity to manage under the Management Rights clause, hoping the arbitrator will not play close attention. It is most troubling that the District, by its own analysis, believes it could reduce every employee by one hour per day. The clear language of the agreement says the least senior employee is reduced and/or laid off – not reduced in part.

Assume the District had determined it was going to reduce nine hours from the food service department. Because it could not reduce only one person to achieve that, it would have to entirely reduce Robinson and taken another 1.75 hours from Elliott. That's the problem the District has gotten itself into. This is an excellent example of the potential of multiple individuals involved in a layoff situation. There is very clear language that provides absolute, unfettered discretion as to how this process needs to be accomplished, which the District has ignored and now hopes the arbitrator will ignore as well.

The District also erroneously claims it has the capacity to set the times for all positions and that there is no contractual requirement to transfer any of Robinson's work to Elliott because the District has established that the work needs to be accomplished between 8:15 and 1:15. This opens the door to a significant amount of harm to multiple classifications, whereby all employees could be given schedules with less than 1,000 hours and thus no benefits. This vision of the future is certainly not something the board conveyed to the Association when it negotiated this agreement, and it is not the vision the Association had when it bargained the agreement.

The Association absolutely disagrees with the notion that there isn't any work for Elliott to do outside of 8:15-1:15. The ability to wash dishes or prepare

meals at the elementary school is certainly something Elliott can accomplish. Of the 25.5 hours of work in the food service department, Kastenschmidt works 8.25 and Kaiser 7.25. Elliott has the skills to perform 7.25 of the remaining ten hours, with Robinson working the remaining 2.75 hours. The additional 2.25 hours for Elliott would probably not happen at the same time that Robinson performs them, but there is nothing preventing the District from having 3 people working full time and a fourth person working 2.75 hours. The contract absolutely requires this rearrangement; there is no phrase in the collective bargaining agreement about "qualified" or "available." These are words from other agreements; if the District wanted the capacity to have a threshold of availability to be the first cut in decisions about reductions or layoffs, it should have bargained that rather than using the present strategy of improperly implementing a reduction and hoping its position is sustained in a grievance.

The District would like to be able to set the times for employees and then slot people into those times in the manner that it chooses. But its managerial right is absolutely restricted by the specifics of the agreement that determines that reductions and layoffs must be done based on seniority.

The basic question is whether the District has to follow the contract. The Association believes the agreement is a binding document. It provides for reductions and layoffs by seniority. Not in some convenient hodgepodge, but that Robinson be reduced by 4.5 hours and Elliott's 7.25 hours remain unmodified.

In further support of its position that the grievance should be denied, the District replies as follows:

The Association errs in asserting the District did not reduce the least senior cook. Nothing in the collective bargaining agreement required the District to fully lay off the least senior employee prior to reducing a more senior employee. The collective bargaining agreement explicitly contemplates multiple reductions within the same department provided the District reduces the least senior employees, which is exactly what it did in this case.

Further, the District would not have been able to operate both its food service operations if it had fully laid off Robinson, or reduced her for the full 4.5 hours needed. Nor could the District have offered some of Robinson's hours to Elliott, because Elliott worked in another building, performing food preparation duties at the middle/high school at the same time Robinson is needed to clean up after breakfast at the elementary school. The Association's remedy would be unreasonable in that it would have Elliott work an additional 2.25 unnecessary hours at the high school, while leaving the elementary school understaffed.

The Association also errs in its analysis of previous layoffs. The District was able to fully lay off the least senior bus driver because, due to declining enrollment leading to fewer stops, the other drivers was qualified and available to perform the remaining work. Similarly, the District reduced or laid off the least senior teaching aide because those layoffs were caused by a reduction in the number of special education students.

The Association further errs in presenting the scenario of across-the-board reductions to completely eliminate work schedules providing benefits. In earlier situations in which the remaining employees were available to perform the work, the District gave the full reduction to the least senior member of the department. And the District did not implement across-the-board reductions in this case. The Association has failed to prove that the District had a duty to offer some of Robinson's hours to Elliott, or that a suitable schedule would have allowed for such an arrangement. The Association should not be able to force the District to maintain a more senior employee's hours to the detriment of the food service program, especially when the second least senior employee is not even available to perform the work that would have been vacated by the least senior employee.

The fact that the District's motivation in reducing the food service program was to cut costs doe not prove that the District violated the labor agreement when it reduced Elliott's hours. Nor does the fact that the board exceeded the administration's recommendations mean it violated the contract.

The Association errs further in citing the ROYALL SCHOOL DISTRICT case, which, despite the Association's claims, did not feature an identical set of facts, but rather an across-the-board reduction, not present in the current case. Had the District here implemented across-the-board reductions of an hour for all four food service employees, it would have done what the Royall arbitrator concluded was spreading the budget reductions among all employees. That is not what happened here, so that case is not controlling. Instead, the IOLA-SCANDINAVIA and MELLEN cases are the most relevant, and support the District's argument.

DISCUSSION

This grievance arises out of the decision by the Bangor School Board to balance the budget in its Food Service Program by reducing the work hours of two cooks so that they lost their health, dental, life, long-term disability and long-term care insurances. The association contends that the partial layoff should have been limited to just the least senior cook, and that the district violated the collective bargaining agreement when it partially laid off the next least senior cook as well.

The collective bargaining agreement empowers the district to exercise certain traditional management rights, except to the extent such rights are explicitly restricted by the agreement. The express terms of Article VII provide just such a restriction on the management rights to define the size and assignment of the workforce. I therefore reject the employer's assertion that its management rights are not "explicitly, clearly and unequivocally restricted by the express terms" of the agreement; they are. It remains to be determined, however, whether the employer's actions in reducing Kristi Elliott's hours violated those terms.

The relevant facts of this grievance are not in dispute.

Pursuant to state and federal laws and regulations, the Bangor School District must cover any deficit in its Food Service Program with a transfer from its general fund. For the 2009-2010 school year, that deficit was $53,830, bringing the shortfall since the 2005-2006 school year to $197,754. In order to reduce the deficit, District Administrator Roger Foegen recommended to the school board that it cut one cook by 2.25 hours, saving the district about $25,000 in direct wages and insurance benefits the district would no longer be obligated to pay because the employee would fall below the 1,000-hour threshold for such benefits. [3] But by a vote of 4-3, the school board cut the hours of two cooks, bringing them both below that threshold and thus saving the district about $50,000. The two cooks the district partially laid off were the least senior member of the Food Service department, Kathy Robinson, and the second least senior departmental employee, Kristi Elliott. Elliott grieved, contending that the district should have reduced Robinson by the 4.5 hours, and not reduced Robinson or eliminated her health insurance benefits.

The parties cited three grievance arbitration awards written by WERC staff members which they believe should inform my analysis. All are certainly informative, but none is completely dispositive.

The Association cites ROYALL SCHOOL DISTRICT, No. 66116, MA-13432 (Houlihan, 6/07), wherein the Royall Educational Support Personnel Association was represented by the same WEAC affiliate as the Bangor Association, Coulee Region United Educators. Perhaps owing to that shared representation, the relevant language of the respective collective bargaining agreements is identical. Each provides that the District:

> … retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of this Agreement.

[3] Article XIV, B. 3. provides that "the employer shall provide all employees who are scheduled to work one thousand (1000) hours or more in any contract year full single or family health and dental insurance, life insurance, long-term disability insurance, and long-term care."

Each provides that:

> In the event the Board determines to reduce the number of positions (full layoff) or the number of hours in any position (partial layoff), the provisions set forth in this Article shall apply. Layoffs shall be made only for the reasons asserted by the Board, and shall not be used to discipline an employee for his or her performance or conduct.

Each provides that:

> In the implementation of staff reductions under this Article, individual employees shall be selected for full or partial layoff in accordance with the following steps

The process for selecting staff for layoff under the Bangor agreement is quoted above. The Royall language before arbitrator Houlihan provided:

> The Board shall select the least senior employee(s) for a reduction in the affected Department. If a position is eliminated in any classification the most senior affected employee(s) shall have the right to bump into any position in their classification with less seniority. Seniority will be the determining factor for a bumping process.

I regard the Royall and Bangor clauses as functionally equivalent.

But while the critical texts are identical in large part, and otherwise functionally equivalent, the two cases have a distinct difference in their facts. First, there is an important difference in the bargaining history, in that the Royall school board had proposed, but later withdrew, the following amendment to the language delineating the process for selection:

> The Board shall select the least senior employee(s) for a reduction in the affected Department <u>providing that the remaining employees are qualified and available to perform the remaining work.</u> If a position is eliminated in any classification the most senior affected employee(s) have the right to bump into any position in their classification with less seniority <u>providing that the remaining employees are qualified and available to perform the remaining work.</u> Seniority will be the determining factor for the bumping process. <u>If an employee bumps into a new department, the employee will be considered probationary for a 90 day period.</u>

It would have been an important consideration in my analysis if the Bangor board had proposed, but then withdrawn, language explicitly making availability for work a factor in the selection process. But it did not make such a proposal.

The other distinguishing difference is the nature of the layoff in Royall. There, the District, facing declining enrollment and accompanying loss of state revenue, imposed annual layoffs. Prior to 2006 the District had always laid off or reduced hours in the inverse order of seniority, except for one instance in which the District reduced the hours of two cooks; the Association grieved, and the District reinstated the hours of the more senior cook. In early 2006 the District made another round of layoffs, including the reduction or elimination of aides, a custodian, food service, and secretarial employees. The Association grieved the reduction of the two senior secretaries from calendar year to school year status (as the two junior secretaries were already assigned), and the reduction in the work day of all aides, regardless of seniority, by 15 minutes (which the District imposed because it determined that the alternative, the elimination of half an aide position, would provide poorer service). The other reductions, made in inverse seniority, were not in dispute.

The arbitrator determined that the District effectively eliminated two full time, twelve month secretarial positions and created two full time, school year secretarial positions, which he found was its inherent right under the Management Rights clause, and something acknowledged in the Layoff clause (Article VIII, Sec. C, Step 2). He found that the parties had not bargained either specific jobs or guaranteed work hours or work weeks into the contract, but had bargained the existence of both twelve month and school year positions. "It is a reasonable application of the Management's Rights to conclude that the employer is to determine which positions are to be filled," he held in denying this aspect of the grievance, adding, "(t)he alternative to this would be to sustain the Association's conclusion, which I regard as harsh and impractical in the School setting."

Arbitrator Houlihan analyzed the aspect of the grievance concerning the aides differently. "Unlike the Secretarial reductions the reductions here do not alter positions from one contractually recognized class to another," he noted. "Rather, it spreads the budget reduction among all employees," which he found to violate the contractual requirement (Art. VIII, C., Step Two) for the District to "select the least senior employee(s) for a reduction..." A "fair reading of that provision," the arbitrator concluded, is that the District:

> is to select the junior employee for reduction. Selecting all employees for reductions is the antithesis of this requirement. I read this as a layoff by seniority provision which elevates the security rights of senior employees over those of junior employees. The Association is right when it asks what the limits of the Boards right to reduce hours across the board would be. If the District has the right to reduce all employees 15 minutes, it has the right to reduce hours by a larger number, unilaterally changing the nature of contractual positions, including benefit status. Article VIII would be rendered a nullity. I do not think the Article, or the contract as a whole, is intended to be read in such a fashion.

Accordingly, the arbitrator ordered the District to reinstate the 15 minutes it reduced from the work hours of the Aides, and to make them whole for lost earnings retroactive to the date of the reduction.

Thus, while the specific facts in ROYALL SCHOOL DISTRICT do not exactly track those before me (only two of the cooks were reduced, not all four), the arbitrator's broad statement supporting the seniority rights of senior employees over those of junior employees does interpret language which is before me, and is very supportive of the association's argument. However, ROYALL SCHOOL DISTRICT does not address a key element in the employer's case, namely operational necessity. That consideration is addressed in the two cases the district cites, IOLA-SCANDINAVIA SCHOOL DISTRICT, No. 51627, MA-8677 (Gallagher, 1/95) and MELLEN SCHOOL DISTRICT, MA-8208 (Crowley, 10/94).

In IOLA-SCANDINAVIA, the text of the Management Rights clause was substantially equivalent to that before me. Article XII - Seniority and Layoff provided as follows:

> B. Reduction in Hours: Reduction in hours shall be made in each department and school by seniority provided the remaining employees are qualified to do the work. An employee who is reduced may elect to displace a less senior employee whose work he/she is qualified to perform.

The grievance before WERC arbitrator Gallagher involved the Kitchen Manager at the District's Elementary School, Judy Biedermann. Prior to the 1994-95 school year, Biedermann worked seven hours per day, arriving at the High School at 7:00 AM to assist with food preparation until shortly before 9:30, when she would travel to the Elementary School to begin food preparations. From 9:30 to about 1:00 PM, Biedermann would prepare and serve food at the Elementary School, where a server and dishwasher would assist her from 11:00 AM to their quitting time of 1:00 PM. Biedermann would have her unpaid lunch from 1:00 to 1:30; finish cleaning up at the Elementary School until 2:00, when she would return to the High School and assist its staff until her quitting time of 2:30. Working seven hours daily, Biedermann had the full amount of her health insurance premium paid for by the District.

Facing a deficit of about $2,200 in the food service account, the District reduced Biedermann's position to six hours per day in June, 1994. As a result, in addition to losing an hour's pay per day, Biedermann fell below the threshold for full benefits, and was required to pay $123.42 per month for her health insurance. At the time, Biedermann was third in the relevant seniority group, with two dishwashers and a server having less seniority. The Association grieved, arguing that the least senior dishwasher at the high school should have had her hours reduced, and Biedermann assigned to perform part of that job, or that all the less senior employees' jobs should have been analyzed so that Biedermann could have taken over some of those functions without losing any work hours.

The arbitrator found that the only employee who Biedermann could bump who had less seniority was the high school dishwasher, but that Biedermann could not complete her job as Elementary Kitchen Manager and also perform high school dishwashing duties. She also found that the District's operational argument that it would be inefficient for Biedermann to travel each afternoon to the High School to clean up for 15-20 minutes was well-placed. Because of Biedermann's duties as Elementary Kitchen Manager, the arbitrator found her presence was

required at the school until 2:00 p.m. each day, and was thus not available to displace the dishwasher "and could not efficiently perform the necessary functions continuously performed" by the dishwasher at the High School between 2:00 p.m. and 2:30 p.m. The arbitrator stated:

> Yet, the strong implication of Article XII, B, and a reasonable application of the language as a whole would require that the person whose position is reduced must be available as well as qualified to perform the duties of the position he/she wishes to bump into. Thus, it may not be reasonable or efficient for the reduced person to be allowed to displace another less senior employee for only a portion of the less senior employee's shift/work, giving the proper weight to the District's legitimate non-discriminatory considerations regarding efficiency, economy and operational needs. IOLA-SCANDINAVIA SCHOOL DISTRICT, No. 51627, MA-8677, at 10.

Contrary to the District's argument before me, the language at issue in Iola-Scandinavia was *not* "nearly identical" to the same provision in this case. The decision in that case turned on the provision that a senior employee may elect to displace a less senior employee "whose work he/she is qualified to perform." The Bangor agreement, however, has no such provision. Thus, while the *facts* of IOLA-SCANDINAVIA SCHOOL DISTRICT are relevant to the case before me, the contract language has a significant distinction.

In MELLEN SCHOOL DISTRICT, the collective bargaining agreement provided that the "(r)ights of management shall not be abridged or limited unless they are clearly and expressly restricted by some specific provision of this agreement." The agreement, Article VIII, Section B, also provided that:

> When the District determines that a lay-off (in whole or in part) shall occur within a department (food service, clerical, aides, and custodians), employees shall be laid off in inverse order of seniority within the department.

For the 1993-94 school year, aide Linda Eschke was assigned to work 9:30 a.m. to 12:40 p.m; an aide with less seniority, Toni Niebauer, was assigned to work 11:00 a.m. to 12:40 p.m. A few weeks after the school year began, the district changed Eschke's schedule to 10:00 a.m. to 12:55 p.m., a 15-minute reduction in her work day. At the same time, the District increased Niebauer's work day by 30 minutes, scheduling her from 10:30 a.m. to 12:40 p.m. The association grieved, arguing that the reduction in Eschke's hours and the increase in Neibauer's hours violated the contractual provisions on layoff and posting, respectively.

Arbitrator Crowley denied and dismissed the grievance in its entirety. Addressing the claim concerning the layoff language, that aspect relevant to the matter before me, he reasoned:

> Article VIII, Section B, of the parties' agreement provides that when the District determines that a layoff shall occur within a department, employes shall be laid off in the inverse order of seniority. It is undisputed that Eschke was partially laid off by 15 minutes and a literal reading of Section B would require that a less senior employe should be subject to the partial layoff. Article VIII, Section B, must be read in conjunction with Article XIV which reserves to the District the right to layoff and to set hours of work. The District has the right to make requisite changes in hours to meet its operational needs. If Eschke could perform Neibauer's duties at a different time such that Neibauer could be reduced 15 minutes, then Neibauer should be reduced as she is the less senior. However, where the District's operational requirements are such that Eschke and Neibauer are required to work at the same time, reducing Neibauer's hours would not benefit Eschke because Eschke is not available to work the hours. Additionally, increasing Neibauer's hours by 30 minutes does not change the result because operational requirements prevented Eschke from picking up these hours. MELLEN SCHOOL DISTRICT, MA-8208 (Crowley, 10/94), P. 5

I believe that the MELLEN case comes closest to the matter before me, both in terms of the text of the relevant contractual provisions and the relevant facts. Like the contract before me, the MELLEN agreement had a strong management rights clause, and seniority-based layoff language that did not reference availability or qualifications. Like the case before me, the employer in MELLEN relied on operational and practical considerations. The major difference is that in Mellen, the district completely by-passed the least senior employee in imposing the partial layoff, while in Bangor, the district partially laid off the least senior *and* the next-least senior employee.

The district's actions here must be evaluated in light of the provision that it retains all management rights, "except to the precise extent such functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of this Agreement," including:

> A. To direct all operations of the school District;
> B. To establish and require .... schedules of work;
> C. To ... schedule and assign employees in positions within the school District;
>
> . . .
>
> E. To lay off employees from their duties because of lack of work or any other financial reason;
> F. To maintain efficiency of school system operations;
>
> . . .

J. To determine the methods, means and personnel by which school system operations are to be conducted .....

. . .

Article VII, Section A. empowers the district to reduce the number of hours in any position (a "partial layoff"). Section C establishes the steps for selecting "individual employees ... for full or partial layoff," as follows:

> The Board shall select an **employee(s)** for a reduction in the affected Department in the order of the **employees'** length of service in the District, with the employee having the shortest length of service being the first selected. If two or more employees have identical length of service, the selection shall be based on relative qualifications. (**emphasis** added).

Thus, as the employer correctly notes, the text of Article VII certainly allows for more than one employee for a full or partial layoff. Further, the text does not explicitly require that one employee be laid off fully before another employee is subject to a partial layoff. The text only requires that the least senior employee is "the first selected," and that when two or more employees have identical seniority, the selection "shall be based on relative qualifications."

The association contends that there is a past practice which "clearly demonstrates the District has always agreed with the Association's position," and put the entire reduction in hours on the single least-senior employee in the affected classification. But the fact that something was done a particular way once or twice does not establish a past practice; in the absence of a written agreement, a practice to become binding on the parties must be "(1) unequivocal, (2), clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." CELANESE CORP. OF AM., 24 LA 168,172 (Justin, 1954). The fact that the district had previously eliminated an entire bus route and a driver position, and reduced its component of aides by a full layoff of one aide and a partial layoff of another rather than two partial layoffs, does not establish a binding past practice that governs the instant dispute.

Nor was the district's action improper merely because it cut its labor costs by more than the consultant or the administration recommended. There is no mystery to why the board of education disregarded the administrator's proposal to reduce just Robinson by 2.25 hours. By also reducing Elliott to five hours per day, the district also brought her down below the threshold for health insurance, saving the district about another $25,000.

The association also challenges the validity of the district's claim of operational necessity, arguing that it could, and should, have restructured the respective duties so that Elliott worked 7.25 hours and Robinson worked 2.75 hours. However, whether or not the

district *could* have restructured the workload to preserve all of Elliott's hours does not answer the question of whether the district *had* to do so, which is the essential question before me. [4]

To be sure, there are aspects of the food service program – certain cleaning activities, and the elementary school salad bar – that the district has sacrificed by reducing staff hours. "There's a lot of that stuff that we don't do anymore," Elliott testified. But unless the collective bargaining agreement is being violated, the balance between level of service and cost is a policy choice for the elected school board members to make. Likewise, it was a policy choice to address the program deficit by cutting labor costs, rather than seeking to raise revenue by increasing what it charged for meals.

The question is not whether I agree with the four members of the school board who voted to balance the Food Service Program account by taking away the health and other insurance benefits from a cook making about $12 an hour. The question before me is whether the district violated the collective bargaining agreement in doing so.

The collective bargaining agreement empowers the district to direct all school operations, establish schedules of work, schedule and assign employees, lay off employees for financial reasons, maintain the efficiency of district operations, and determine the methods, means and personnel for operating the district, "except to the precise extent such functions and rights are explicitly, clearly, and unequivocally restricted by the express terms of this Agreement."

Under the terms of the collective bargaining agreement, the District could not have partially laid off Elliott, or any other food service employee, and not partially laid off Robinson. Nor could it have reduced Elliott's hours, or any other food service employee's hours, by more than it reduced Robinson's. But there is nothing in Article VII which "explicitly, clearly, and unequivocally" restricts the district from imposing the same partial layoff on the two least senior employees, as it has done here.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

[4] While the district's analysis that the entirety of the food service operation could not be efficiently fulfilled under the distribution of hours as proposed by the association, because there would have been no work available for Elliott other than at the time she would already be working, seems reasonable, Robinson could have forced the district into making such a situation work had she exercised her right under VII C. Step 3 to accept a full layoff instead of the partial reduction the district imposed.

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 16th day of June, 2011.

Stuart D. Levitan /s/
Stuart D. Levitan, Arbitrator

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