BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OAKWOOD LUTHERAN HOME ASSOCIATION, INC.

and

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU)
HEALTHCARE WISCONSIN CTW, CLC

Case 16
No. 70349
A-6440

Appearances:

Nicholas E. Fairweather, Hawks, Quindel, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 450, Madison, Wisconsin, appeared on behalf of the Union.

Michael J. Westcott, Axley Brynelson, LLP, Attorneys at Law, 2 East Mifflin Street, Suite 200, Madison, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Oakwood Lutheran Home Association, Inc., hereinafter "Employer," and Service Employees International Union (SEIU) Healthcare Wisconsin CTW, CLC, hereinafter "Union," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Madison, Wisconsin, on June 12, 2012. Each party filed a post-hearing brief, the last of which was received June 27, 2012, and the record was closed as of that date.

ISSUES

The parties agreed to the following statement of the issues:

1. Did the Employer violate an express provision of the collective bargaining agreement when it did not increase the wages of the COTA's, PTA's and Activities Assistants effective March 28, 2010?

2. If so, what is the appropriate remedy?

FACTS

The Employer is a faith-based full-provider of care for seniors. The Union represents various non-supervisory employees of the Employer.

Except as noted below, the facts are not seriously in dispute. Mary Bjorklund is the Human Resources Director. She performs the personnel function for the Employer. One of her many duties is to represent the Employer in collective bargaining with the Union. Ms. Bjorklund is not an officer or director of the Employer. She acts solely as an agent of the Employer in negotiations for comprehensive collective bargaining agreements with the Union. She derives her authority to make proposals from the officers and directors of the Employer. It is her responsibility to administer any collective bargaining agreement the parties agree upon. In that regard, she does have independent authority to resolve grievances and make minor agreements with the Union.

When the parties reach agreement on a new comprehensive collective bargaining agreement, the Union must submit the tentative agreement to its membership for ratification. The Employer does not reserve a similar right.

Prior to the 2009 negotiations for a comprehensive successor collective bargaining agreement, the Employer was having difficulty recruiting employees for the positions of Certified Occupational Therapist (herein "COTA") and Physical Therapy Assistants (herein "PTA") and Activities Assistants. Ms. Bjorklund supervised a wage rate study and determined that the Employer was paying less than the market rate for these positions. As a result, during the negotiations leading to the 2009 comprehensive collective bargaining agreement, the Employer sought language allowing it to unilaterally increase the rate for these two positions during the term of the agreement. The agreement was concluded without adopting the language. The agreement continues to contain fixed wage rates for the positions in dispute.

On February 16, 2010, Ms. Bjorklund sent an unsolicited e-mail to the Union explaining that it still remained difficult to hire employees in the positions in dispute and proposing specific new increased wages for those positions. Ms. Bjorklund and Jan Latham who represented the Union, met on March 2. Thereafter Mr. Bjorklund and Union representatives Latham and Mrotek met and agreed upon all of the changes. They discussed the effective date. The parties disagree over what was said about that, but Ms. Bjorklund did state that it could be effective March 28. The Union alleges that she stated that it would be effective March 29. It is undisputed Ms. Bjorklund said something to the effect that she would have to "run this by" the Employer's Boards and Committees.

Ms. Bjorklund did submit the agreed-upon changes to the Boards and Committees and advocated for their adoption. The Boards and Committees declined to approve the pay increases because of budgetary reasons.

The Union filed the grievance herein. During the pendency of the grievance, the Employer and Union did agree to implement the agreement effective November 21, 2010, without prejudice to the grievance herein. The grievance was properly processed to arbitration.

RELEVANT AGREEMENT PROVISIONS

ARTICLE 5 – MANAGEMENT RIGHTS

5.1 Scope. The parties recognize that this Agreement addresses the employer-Staff member relationship existing between the Employer and its Staff members in the collective bargaining unit represented by the Union, and that the rights and duties between them in their relationship are those of Employer and Staff member. It is agreed that, except as otherwise expressly limited by this Agreement, the management of the Employer and the direction of the work force including, by way of example and not by way of limitation, the right to select, hire and assign Staff members, promulgate and enforce reasonable rules and regulations it considers necessary or advisable for the safe, orderly and efficient operation of the Employer, direct and assign work, determine work schedules, transfer Staff members between jobs or departments or sites, fairly evaluate relative skill, ability, performance or other job qualifications, introduce new work methods, equipment and processes, determine and establish fair and equitable work standards, select and implement the manner by which the Employer's goals and objectives are to be attained, and to discharge Staff members for just cause or relieve Staff members from duty for lack of work or other legitimate reasons are vested exclusively with the Employer, but this provision shall be construed to harmonize with and not to violate other provisions of this Agreement. It is further understood that all functions of management not specifically relinquished or limited in this Agreement shall remain vested in the Employer.

Procedure in Case of Disagreement in Interpreting. In the practical administration of this contract, it will be necessary for supervisors and administrators to interpret its applicability to certain situations that may arise. For the sake of vital and safe conduct of the Employer's business, it is imperative and agreed that every Staff member shall follow the instructions of her/his supervisor. In cases where s/he disagrees with her/his supervisor on the interpretation of the applicable part of the contract or feels that a directive given is unfair to her/him, s/he shall have the right to question the interpretation or direction through the grievance procedure outlined in Article 7. It is agreed that the failure of a Staff member to follow the reasonable instruction of her/his supervisor

constitutes possible just cause for corrective action up to and including discharge.

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ARTICLE 7 – GRIEVANCE PROCEDURE

7.1 **Resolving Issues**. It is the intention of the parties that, prior to initiating a grievance, efforts will be made by the aggrieved Staff member(s) and/or Union Representative to engage in a meaningful dialogue concerning the particular issue. The grievance procedure should not be a substitute for attempts to informally resolve issues or concerns.

7.2 **Grievance Defined and Initiation of Grievance**. A grievance within the meaning of this Agreement is a claim by a Staff member that the Employer has violated an express provision of this Agreement. To be considered, a grievance must be presented to the Employer within seven (7) calendar days, excluding Saturday, Sunday and holidays, after the Staff member knew or should have known of the alleged violation.

7.3 **Written Grievance**. Only one subject matter shall be covered in any grievance to be considered. A grievance shall contain a clear and concise statement of the grievance indicating the issue involved, the relief sought, the date of the incident/violation and the provision of the contract alleged to be violated.

7.4 **Timelines**. Any grievance shall be considered settled at the completion of any step in the procedure if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next. The time limits in this Article are intended to be mandatory. Any failure by a Staff member, the Employer or the Union to abide by the time limits specified shall result in the grievance being considered settled.

7.5 All grievances shall be handled and adjusted in the following manner:

STEP 1. The grieving Staff member and/or a Work Site Leader and/or a Union Representative shall present the grievance orally, and in writing to the Staff member's immediate supervisor who shall answer the grievance in writing within seven (7) calendar days, excluding Saturdays, Sundays and holidays.

STEP 2. If the grievance is not settled in Step 1, the grievance may, within seven (7) calendar days, excluding Saturdays, Sundays and Holidays after the answer in Step 1 be presented to Step 2. The grievance shall be in writing, signed by the grievant and/or Work Site Leader and/or Union Representative and/or Union Representative and presented to the grievant's Department Head or designee, who shall give an answer in writing within seven (7) calendar days, excluding Saturdays, Sundays and holidays.

STEP 3. If the grievance is not settled in Step 2, the grievance may, within seven (7) calendar days, excluding Saturdays, Sundays and holidays, after the answer in Step 2, be presented by the grievant, Work Site Leader and/or Union Representative in this step to the Human Resources Director or designee who shall render a decision in writing within seven (7) calendar days, excluding Saturdays, Sundays and holidays.

7.6 Notice of Arbitration. A grievance which has been processed through, but not resolved by, the grievance procedure may be appealed by the Union to arbitration by written notice to the Wisconsin Employment Relations Commission (WERC) and a copy to the Employer. Such notice must be given within sixty (60) calendar days, excluding Saturdays, Sundays and holidays, after the receipt of the answer at the third step of the grievance procedure.

7.7 Selecting an Arbitrator. In the notice described above, the Union shall request the Wisconsin Employment Relations Commission (WERC) to appoint an impartial panel of five (5) arbitrators by and from its staff. The Employer and Union shall strike names from the panel until a final arbitrator remains, who shall be assigned to preside over the arbitration proceeding. The grieving party shall be the first to strike a name from the list.

7.8 Authority of Arbitrator. The jurisdiction and authority of the arbitrator shall be confined to the interpretation of the provisions of this Agreement. The arbitrator shall not have the power to add to, subtract from, ignore or modify any provisions of this Agreement. The award of the arbitrator shall be final and binding upon the parties to this Agreement.

7.9 **Cost of Arbitration**. The Union and the Employer shall share the cost of arbitration equally. It is further agreed that if one of the parties desires a copy of the transcript of the arbitration proceedings, the requesting party shall bear full cost of said copy.

7.10 **Related Arbitrations**. Only one grievance shall be submitted to an arbitrator in any one arbitration proceeding, provided, however, that the parties may, by mutual consent, submit more than one related grievance to the same arbitrator in the same arbitration proceeding.

7.11 **Extension of Timelines**. Any of the time limits referred to in either the grievance or arbitration sections of this Agreement may be extended by mutual written agreement of the Union and the Employer.

7.12 **Employer's Right to File a Grievance**. Nothing contained herein shall be construed as prohibiting the Employer from filing a grievance pursuant to this Article.

7.13 **Suspensions and Discharges**. In cases of suspensions and discharges, grievances shall commence at Step 2, following the procedure as described above.

ARTICLE 8 – NO STRIKES OR LOCKOUTS

8.1 During the term of this Agreement, the Union and all Staff members in the bargaining unit represented by the Union, individually and collectively, will not encourage, cause, permit, condone or take part in any strike, picketing, sympathy strike, shutdown, sit-down, stay-ins, slowdown or other curtailment of work or interference with operations in or about the Employer's facility, premises, equipment, suppliers, residents and Staff members.

8.2 The Employer will not engage in any lockout during the term of this Agreement.

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ARTICLE 20 – RATES OF PAY

20.1 **Wage Increase**. All staff shall receive 2% increase effective July 1, 2009 and another 3% increase effective July 1, 2010.

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For starting rates see Appendix B.

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Starting rates as of Feb. 1, 2008

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Job Class	Start Rate	1 year	2 year	3 year	4 year	5 year
			. . .			
Activity Assistant	10.30	10.55	10.80	11.05	11.30	11.55
			. .			
PTA	18.30	18.55	18.80	19.05	19.30	19.55
COTA	17.60	17.85	18.10	18.35	18.60	18.85

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POSITIONS OF THE PARTIES

Employer

The Employer takes the position that the tentative agreement was not final because Ms. Bjorklund stated that it was subject to a condition that it be approved by the Employer's Human Resources Committee as well as the Boards of Oakwood. It did not receive approval as originally negotiated. Ms. Bjorklund's testimony of the meetings with Ms. Latham should be credited by the arbitrator because her memory of the circumstances is better and is supported by the documentation. Further, Ms. Mrotek in her July 16, 2010 communication after the filing of the grievance acknowledged that Ms. Bjorkland did inform the Union that she needed to speak to the Boards in the beginning of April, 2010, to get "approval." The Union did not call Ms. Mrotek as a witness. The arbitrator should draw an adverse inference from this.

This makes sense. When bargaining a successor comprehensive agreement, Ms. Bjorklund obtains authority to make proposals in advance. She did not have advance authority to negotiate the changes in dispute. It also makes practical sense that Ms. Bjorkland would need approval after negotiating the changes, because the financial impact could not be determined until after the agreement. The Employer asks that the grievance be dismissed.

Union

The Employer has historically given Ms. Bjorkland express authority to negotiate comprehensive collective bargaining agreements with the Union without requiring subsequent

ratification. This authority has extended to execute side letters of agreement on its behalf. Here, Ms. Bjorklund had apparent authority to agree to amend the agreement.

At no time prior to Ms. Bjorklund's March 23, 2010, meeting with Latham did anyone on behalf of the Employer indicate that the effective date of the increase was dependent upon the cost to the Employer. The information to cost the increase was available to the Employer before the parties commenced these negotiations.

Ms. Bjorklund testified that she had the authority to negotiate collective bargaining agreements but that she cannot recall whether she had predetermined term ranges within which she could negotiate. It is inconsistent to then assert after the parties agreed upon these increases that the Union "needs to be flexible on the effective date, allowing the information and request process to occur." Accordingly, the arbitrator should find that the parties agreed to amend the collective bargaining agreement as the Union has alleged and order that the affected members of the bargaining unit be made whole for all lost wages and benefits.

DISCUSSION

1. Substantive Arbitrability

The parties agreed at the outset there were no "procedural" arbitrability issues. The Employer did not raise any issue as to substantive arbitrability. The parties agreed to the statement of the issue as stated above without discussion. The Employer is now effectively arguing that because the parties stipulated to the above statement of the issue[1] the arbitrator is authorized only to apply the salary provisions of the existing, un-amended agreement. The issue stated is ambiguous because the term "express" could relate to mere ambiguities as to effective date. The Employer had the right to raise a substantive arbitrability issue and expressly preserve that right. It did not do so. The litigation proceeded solely on the basis of whether the parties did or did not enter into a final agreement to voluntarily amend the existing agreement. I conclude that the issue of substantive arbitrability is waived.

2. Voluntary Agreement to Amend

The determinative issue presented is whether the parties mutually agreed to amend the collective bargaining agreement effective March 28 or 29. The determinative issue submitted is a legal issue and not an issue of interpretation of the existing agreement. If the Union is correct in its position, then the remaining issues involve enforcement of that agreement. The law which is applicable to the determinative issue is the federal common law under Sec. 301 of the Labor Management Relation Act, as amended, (herein "LMRA").[2] The jurisdiction of Sec. 301, LRMA, as amended, extends to determining the existence of collective bargaining

[1] Employer brief, p. 9, last full paragraph
[2] Textile Workers v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957)

agreements and agreements to amend them.[3] In turn, the main principles applying to the voluntary amendment of collective bargaining agreements are essentially those of ordinary contracts taking into account the special nature of collective bargaining agreements.[4] In general, the ordinary rules of contract amendment require that the Employer must have made an unconditional offer to amend the agreement and the offer must have been accepted. If the offer was subject to a condition which had to be met subsequent to the offer and acceptance, the Union must demonstrate that the condition was met. Both parties' arguments assume these basic contract principles and, therefore, they are not in dispute.

One of the differences between ordinary contracts and collective bargaining agreements is that the negotiation process is regulated by the National Labor Relations Board under the LMRA. Under Section 8(a)5, and derivatively, Section 8(a)1, LMRA, an employer is under an obligation to bargain in good faith with a union representing its employees in the negotiation of a comprehensive collective bargaining agreement and, after the conclusion of that process, is under a continuing, but limited, duty to bargain with the representative of its employees.[5] Neither party has an obligation to bargain to change an existing express provision of an agreement during the term of that agreement.[6] The reason for this rule is to provide for labor peace during the existence of a collective bargaining agreement. Thus, the purpose of the LRMA is to make negotiations for any modifications of specific terms of the agreement entirely voluntary. Once the parties do voluntarily agree to bargain with respect to modifying a specific term of an existing agreement, the duty to bargain requires that the parties execute a written agreement to that effect if, and only if, the parties did reach a final agreement.[7]

The Union heavily relied upon Metco Products, Inc. v. NLRB, 884 F.2d 156, 132 LRRM 2777 (4th Cir, 1989). In Metco, the 4th Circuit affirmed the NLRB's finding that an employer had committed a refusal to bargain by not executing a comprehensive collective bargaining agreement after the parties reached agreement on all of its terms and rejected the employer's argument that the employer's agent's agreement to the terms was subject to the approval of the employer's principals. The court noted that:

> [T]he NLRB has adopted a clear and simple rule regarding the creation of apparent authority on the part of a labor negotiator. The NLRB has long held that 'when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principals in the absence of clear notice to the contrary.' [Citations omitted.]

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[3] IBEW v. Sign-Craft, Inc., 864 F. 2d 499, 130 LRRM 2198 (7th Cir7, 1988); Kozera v. Westchester-Fairfield Chapter of the National Contractors Association, Inc. 868 F.2d 48 (2d Cir, 1990

[4] See, Marine Transport Line v. IOMMP, 878 F.2d 41 (2d Cir, 1989).

[5] See Sec, 8(d), LMRA, as amended, and NLRB v. Jacobs Manufacturing Co., 196 F.2d 680, 30 LRRM 2098 (2d Cir, 1952); Bath Marine Draftsmen's Association v. NLRB, 475 F. 3d 14, 181 LRRM 2267 (2007).

[6] See, Zimmerman Painting, 302 NLRB 856, 137 LRRM 1156 (1991).

[7] See, Pacific Coast Metal Trades (Lockheed Ship Building), 282 NRLB 239, 125 LRRM 1124 (1986).

The court affirmed the finding of fact of the NLRB that an Employer's agent's representations during negotiations that he needed to discuss certain specific proposals with his principal before agreeing to them did not mean that the union's representatives knew that when they reached agreement on all of the terms, that the entire agreement was subject to approval by the employer's principals. Based upon that finding of fact, the court concluded that the employer's agent failed to give "clear notice" that the final agreement was subject to ratification.

The foregoing arose during negotiations for a comprehensive collective bargaining agreement, not one for a modification of an express provision of an existing agreement. The reason for the NRLB's policy is clear. Mutual discussion and agreement as to the ground rules and conditions for negotiations at the outset of negotiations fosters mutual trust. Suddenly imposing an unexpected condition for ratification near the end of negotiations undermines that trust. If a party were freely allowed to do so, it would present the opposing party with a *fait accompli* situation. In most, but not all, situations, such a condition creates a tactical advantage for that party. It may also undermine union members' confidence in their union.

The NLRB has addressed a similar issue in a situation involving a provision in the agreement requiring mid-term negotiations. In Pacific Coast Metal Trades[8] the NLRB held that a union did not violate its duty to bargain when it refused to execute a mid-term modification agreement. The NLRB concluded from conflicting testimony that the union reserved the right at the conclusion of negotiations to have a "courtesy review" by union officials that it concluded was a right to disapprove the agreement. It concluded that no violation occurred when the union officials subsequently raised good faith objections to the agreement.

I conclude that the parties did not reach a final agreement on effective date of the amendment in dispute. This is a situation in which there was no duty on either party's part to bargain for a change in the agreement: it was an entirely voluntary choice to enter into the process. I am satisfied that Ms. Bjorklund had no independent authority to make decisions to change wage rates. While the Union may well have believed from the circumstances that Ms. Bjorklund had advance authority from her principals to make the offers in dispute, it is unbelievable that they believed she had authority independent of those principals to make changes to wage rates.[9] Her sole function was to act as the agent of the Employer. The better view of the evidence is the Ms. Bjorklund made an honest error as to the extent of her authority to make the changes in dispute. If I had concluded otherwise, the result in this matter might well be different. I am also satisfied that at the conclusion of the discussions in which the parties reached agreement, Ms. Bjroklund made a statement to the effect that she had to "run it by" her management. Those words were more than the fact that she was seeking their signatures on the agreement, but words which can only be understood as ones

[8] See note 7.

[9] Even in Metco, *supra*, at pp. 279-80, the court recognized that "apparent authority" does not arise if the other party is aware of the limitations on the authority of the agent.

seeking approval.[10] This is true even though Ms. Bjorklund fully expected that approval would be forthcoming. In this regard, the Union had to be entirely surprised by what occurred. As noted above, "apparent authority" situations have the potential of serious impacts on the credibility of a union to its members and the bargaining relationships. The better view is that the decision as to whether an employer should be held liable for a mistake by its agent should be evaluated by an analysis to the prejudice (adverse impact) the situation has created.[11]

In this situation, there was no prejudice. The changes were being initiated by the Employer and there was no hard bargaining involved. The Employer's position was to implement a starting pay increase to attract employees and to treat current employees fairly. The parties were on the same page virtually from the beginning. The Boards and Committees that had to approve this raised good faith financial objections. I conclude that they acted in good faith. The Union had not communicated the agreement to its membership until it was actually implemented. Under these circumstances, there was no prejudice to the Union. I conclude that the agreement was subject to a condition, approval by the Boards and Committees, which was not met until November. Accordingly, the grievance is denied. Accordingly, the Employer did not improperly fail to implement the tentative agreement before November, because the parties had not reached final agreement on an effective date.

AWARD

The Employer did not improperly fail to implement the tentative agreement before November and, therefore, the grievance filed herein is denied.

Dated at Madison, Wisconsin, this 29th day of August, 2012.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

[10] See, Pacific, *supra.*
[11] See, Higgins v. International Union, Security, Police, Fire Professionals of America, 398 F.3d 384, 176 LRRM 2659 (CA 6, 2005) for use of an "adverse impact" analysis in similar circumstances.

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