BEFORE THE ARBITRATOR

In the Matter of the Arbitration of an Impasse Between

DISTRICT COUNCIL 48, AFSCME and its affiliated LOCAL 2

and

WHITNALL SCHOOL DISTRICT

Decision No. 25839-A

Appearances:
Quarles & Brady, Attorneys-at-Law, by David B. Kern, for the Municipal Employer.
Podell, Ugent & Cross, Attorneys-at-Law, by Monica M. Murphy, for the Union.

ARBITRATION AWARD

The above-captioned parties selected, and the Wisconsin Employment Relations Commission appointed (Decision No. 25839-A, 1/19/89), the undersigned Arbitrator to issue a final and binding award pursuant to Sec. 111.70(4)(cm)6 and 7 of the Municipal Employment Relations Act resolving an impasse between the parties by selecting either the total final offer of the Employer or of the Union.

A hearing was held in Hales Corners, Wisconsin on April 6, 1989. No transcript was made. Briefs were exchanged on May 11, 1989.

The collective bargaining unit covered in this proceeding consists of all regular custodial employees, part-time custodial aides and maintenance employees, excluding supervisory, craft and confidential employees and certain specified individuals. There are approximately 21 employees in this unit.

The parties are seeking an agreement for the 1988-1989 and 1989-1990 school years.

THE FINAL OFFERS:

The Union proposes several "language" or "non-economic" revisions of the parties' 1986-1988 agreement. The Employer would maintain the terms of the 1986-1988 agreement in every such instance.

The 1986-1988 agreement at Article 3, Section D., provides that the Employer has the right "To suspend, demote, discharge and take other disciplinary action against employees". The Union would add "for just cause" at the end of that provision.

The 1986-1988 agreement, at Article 7, Section A., provides as follows.

> "Promotions or transfers (except as provided in subsection C, D, E, and F below) to another job classification shall be determined on the basis of relative ability, experience and qualifications. Where the above stated factors are relatively equal, seniority shall be the determining factor."

The Union would add "seniority" to the factors listed in the first sentence.

The Union would also drop the second sentence.

The Union proposes the following as a new Section B. of Article 7.

> "Whenever the Board deems it necessary to make a promotion, fill a vacancy due to a quit, discharge, retirement or death of an employee or fill a new position in the bargaining unit, the Board will post such position(s) for a period of five (5) working days on the bulletin board established herein. Such employee interested in applying for the job shall endorse his/her name upon such notice in the space provided. The employee with the greatest seniority shall be awarded the vacant position, provided he/she is qualified to perform the work."

This provision would consist of terms appearing in the 1986-1988 agreement, plus the final sentence quoted above.

The Union would delete Section D. from Article 7 of the 1986-1988 agreement. That section provides as follows.

> "Shift of Personnel: A vacancy shall not be deemed created and the Board shall not be required to follow the procedures under Subsection A and B above, when one employee is assigned to the job of another employee and the employee that is displaced is reassigned to another job even though this may mean that employees are transferred to different buildings. Provided, however, the employees involved remain in the same job classification that they held prior to the job reassignment.

> Such shifts in personnel shall be based solely on the needs of the School Board for service or for the good of the employees involved. When a shift of personnel occurs the Business Manager or his designee shall inform the employees in writing of the reason or reasons for the transfer."

The Union would add the following to Article 9, Section C. of the 1986-1988 agreement which includes a number of provisions regarding overtime.

> "All Saturday, Sunday and holiday work shall be performed by full-time employees and shall be equally distributed insofar as possible among all full-time employees. If no full-time employee wants the overtime, the most senior part-time employee in the building where the overtime is to be worked, may be offered the overtime work."

The Union would revise the second paragraph of Article 9, Section D. of the 1986-1988 agreement which provides as follows.

> "Before substitutes are brought in to fill for an absent employee, the hours of the absent employee shall be offered to the other part-time employees only in the building where the absent employee works, and only if the part-time employee is qualified to perform the work."

The proposed revisions include deleting the final clause referring to qualification; and adding at the end "Substitutes shall not be used for Saturday or Sunday work."

DISCUSSION:

The Union recognizes and accepts a point that the Employer emphasizes quite heavily. That is that its proposals to change negotiated terms -- the status quo -- must be supported by strong reasons. The Union states that it is required "to show compelling reasons for the change and to show that its proposals fulfill a need in an equitable manner." The Employer cites considerable authority for this view.

The Arbitrator also agrees with the Union that most of the "factors" specified at Sec. 111.70(4)(cm)7 of the Municipal Employment Relations Act are not applicable in this case. Indeed, as explained below, in the judgment of the undersigned this case should not be determined on the basis of "internal and external comparables" such as both parties discuss at some length, because of aspects of the Union's proposal which render even such comparisons inappropriate. Thus, the Arbitrator has applied "such other factors . . . which are normally or traditionally taken into

consideration . . .", as specified at Sec. 111.70(4)(cm)7,j of the Act.

The parties' 1986-1988 agreement specifies, at Article 4, Section B., that an employee loses seniority when "discharged for just cause". The Union urges that this allows disciplinary measures short of discharge, such as those specified at Article 3, Section D., quoted above, without just cause. The undersigned is inclined, as a general matter, to rule for the inclusion of the "just cause" standard for all disciplinary measures. It is concluded, however, that while the terms of Article 3 make it clear that the Employer may impose certain disciplinary measures, including discharge; Article 4, which explicitly limits that discharge prerogative to cases of just cause, implicitly subsumes the whole list of measures. That is, because the ultimate measure is so restricted, it follows that lesser ones are as well.

Although a strictly logical reader of the 1986-1988 agreement might conclude that the explicit just cause limitation on discharge implies another standard for the lesser disciplinary measures which are not so explicitly limited, it seems superior reasoning to conclude that it would be absurd to limit discharge in this manner, but infer a broader discretion for suspensions and demotions. Those measures can be tantamount to discharge, and conceivably even more harsh in their extremes.

Therefore, the Union's proposal does not reflect a strong reason for revising the previously negotiated terms.

This conclusion is bolstered by a grievance arbitration award issued to these parties by Arbitrator Lionel L. Crowley on November 4, 1987 under the 1986-1988 agreement. In that case Arbitrator Crowley upheld a disciplinary suspension. The issue placed before him by the parties was whether the District violated the collective bargaining agreement when it suspended the grievant. In discussing the facts and the parties' contentions, Arbitrator Crowley stated, "Just cause requires evidence establishing that the grievant was guilty of the misconduct charged." Nothing in the award suggests the application of "just cause" was controversial.

The Arbitrator also finds that the Union's proposals regarding the importance of seniority are, if not contradictory, obviously ambiguous. At Article 7, Section B., the Union would provide that in the specified personnel transactions, following posting, "the employee with the greatest seniority shall be awarded the vacant position, provided he/she is qualified to perform the work." On the other hand, at Section A. of the same Article, the Union would provide that promotions and transfers (included in the Section B. listing) "shall be determined on the basis of seniority, relative ability, experience and qualifications." Thus, the agreement would contain two legitimate and conventional, but clearly different, standards for selecting among bidders. One standard prefers the senior bidder, if he or she is qualified; while the other applies the criteria of seniority, ability, experience and qualifications more or less equally.

Although the Union contends that certain actions by the Employer in particular cases support revision of these terms, it cannot justify a determination herein which would render the parties' agreement so ambiguous on such an important matter. A great many contract implementation disputes grow out of interpretations of such terms as these, and it seems clearly ill-advised to proceed to incorporate an obvious basis for such disputes.

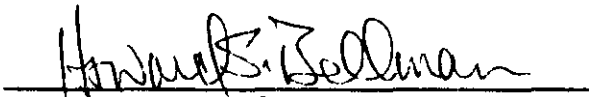
Similarly, the Arbitrator is more than reluctant to adopt the Union's revisions of Article 9, Section D. regarding substitutes. Whatever experience might suggest in terms of the need for improving practices, these proposed revisions might require assigning work to unqualified employees, and shutting down valuable Saturday and Sunday programs when unit members are not available. Such results are not justified, in the judgment of the Arbitrator.

Indeed, the Arbitrator concludes that, inasmuch as the just cause standard does reach all of the disciplinary measures, the flaws in the revisions proposed by the Union discussed above render its final offer ill advised. It does not seem necessary to discuss the other revisions proposed, except to say that they do not constitute changes which are so compelling as to make those flaws tolerable.

AWARD

On the basis of the foregoing, the record as a whole, and due consideration of the "factors" specified in the Municipal Employment Relations Act, the undersigned Arbitrator selects and adopts the final offer of the Municipal Employer.

Signed at Madison, Wisconsin, this 7th day of July, 1989.



Howard S. Bellman
Arbitrator

HSB/sf