

IN THE MATTER OF ARBITRATION

GRIEVANCE ARBITRATION

between

Tri-County Community Action
Inc., Brainerd, Minnesota

Arbitrability; 60 Calendar
Day Notice Provision

-and -

AFSCME Council No. 65, Local
Union No. 3628, AFL-CIO

April 2, 2009

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APPEARANCES

For Tri-County Community Action Program, Inc.

Samuel W. Diehl, Attorney, Gray, Plant Mooty, Mooty & Bennett,
P.A., Minneapolis, Minnesota
Joe Ayers, Executive Director
Larry Ketchum, Director of Operations

For AFSCME Council No. 65, Local Union No. 3628

Sarah Lewerenz, Staff Attorney
Steve Preble, Executive Director
Ginger Thrasher, Staff Representative
Gary Johnson, Former Executive Director (By Telephone)
Denise Brown, Former Teacher

JURISDICTION OF ARBITRATOR

Article 10, Grievance Procedure, Section 3, Step 5 of the
July 1, 2007 through June 30, 2008 Collective Bargaining
Agreement (Union Exhibit p. 1a-27) between Tri-County Community
Action, Inc. (hereinafter referred to as the "TCC" or "Employer")
and AFSCME Council No. 65, Local Union No. 3628 (hereinafter
referred to as the "Union") provides for an appeal to arbitration
of properly processed disputes through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and the Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on February 10, 2009, at 9:30 a.m. at the TCC Offices, 2410 Oak Street, Brainerd, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties filed post hearing briefs which were received by e-mail on March 20, 2009, and exchanged by the Arbitrator on that same day, after which the record was considered closed.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Is the grievance arbitrable?
2. If arbitrable, did the Employer violate Article 9, Section 4's 60 calendar day notice provision?
3. If a Contract violation occurred, what shall be the remedy?

STATEMENT OF THE FACTS

The Employer is a nonprofit community action agency. Its purpose is to operate programs providing a range of services and activities for low-income families for residents of Morrison, Todd and Crow Wing Counties ("Tri-County"). Its approximately 80 employees provide Head Start Program, weatherization, home

repair, car loans and similar services for low-income families in the Tri-County area. TCC is largely funded by state and federal funding but it also receives private funding. Until 1996, TCC also operated a Senior Nutrition Program. Until the fall of 2007, TCC also operated a Child Care Center ("Center") in Brainerd, Minnesota which is the subject matter of this arbitration.

TCC's Center began operations in 2000. The desired goal of the Center was to meet a community need by providing affordable child care services for low-income families that TCC already served through Head Start and Early Head Start. Over the seven years the Center operated, federal and state policy changed and the families' co-payments steadily increased to the point where low-income families could no longer afford the Center's services and families began to shift children out of the Center to friends and family care. Funding for the Center was largely dependent on the number of children enrolled in the Center. As child enrollment in the Center dropped--corresponding to decreasing public subsidies--TCC had to take money from other programs to meet shortfalls in the Center's budget. Facing significant economic losses, TCC's Board of Directors discussed and then decided on August 16, 2007, to close the Center. (TCC Exhibit #6).

After its decision to eliminate the Center, TCC immediately notified the Center's employees, parents, and Union of its plans to eliminate the Center on October 19, 2007. (Union Exhibit pp. 29, 30, 32). The notification to the Union and the Center's employees is required by the Contract language contained in Article 9, Seniority, Section 4 as follows:

Any Employee who is to be laid off for a period of time greater than thirty (30) calendar days shall be given a written notice at least ten (10) working days in advance. If a program is to be eliminated, the Employer shall give written notice to the Union at least sixty (60) calendar days in advance.

The Contract language in Article 9, Section 4 requires that written notice to the Union must be given by the TCC at least 60 calendar days in advance of the elimination of a Center program. TCC's notice to the Union was dated August 20, 2007, and stated:

The terms of TCC's agreement with AFSCME require the Employer to give the Union 60 days notice of program termination. TCC is closing its Brainerd Child Care Center on Friday, October 19, 2007. This letter is your official notice. A copy of the letter which was distributed to staff today is enclosed.

(Union Exhibit p. 29).

The Contract language in Article 9, Section 4 also requires that written notice to employees must be given by the TCC at least 10 working days in advance of a layoff period greater than 30 calendar days. The letter to employees was also dated August 20, 2007, and stated:

TCC's Brainerd Child Care Center will be closing as of October 19, 2007. The terms of TCC's contract with AFSCME Local #3628 require 10 working days notice of layoff. Your employment will continue at least through August 31 and may extend up to October 19, depending on how soon families find other child care. As numbers reduce, we will begin layoffs based on seniority.

(Union Exhibit p. 30).

TCC also sent a letter to the Center's parents on August 20, 2007, indicating that the Center would be closing for child care as of October 19, 2007, due to financial reasons. (Union Exhibit p. 32).

Immediately after the parents received notification that the Center would be closing, parents began to move their children to other child care facilities. (TCC Exhibit #7). In the three weeks after parents received notice, the Center went from over 30 children attending, to just over ten. (Id.) The following week, there were only five children attending the Center. (Id.) Because of this dramatic decrease in children attending the Center, staff schedules were changed.

As the number of children attending the Center dropped, TCC was forced to layoff staff at the Center. On September 10, 2007, TCC began laying off several members of the Center staff. By September 21, 2007, all remaining non-supervisory employees were laid off. TCC only laid off the non-supervisory employees after all the parents had found alternative child care.

All employees who were laid off received three to five weeks advance notice--well in excess of the 10 working days notice of layoff required by the Contract. All employees that were laid off were paid for the wages and benefits they were owed. (Union Exhibit pp. 49b-71).

Federal regulations prohibited TCC from transferring employees to positions in its Head Start program, but employees were encouraged to apply for other jobs. TCC individually, contacted Center employees and asked them if they were interested in applying for other positions. A significant number of employees did, in fact, seek other positions with TCC and were hired into other full or part-time jobs at TCC. (Union Exhibit pp. 49b-71).

After the non-supervisory staff were laid off, skeletal operation of the program continued, as the Center's supervisor, Justin Motherway, continued to work in the Center. He collected past-due fees, drafted reports, submitted food service reimbursements, and finished general record keeping duties, working into November 2007. (TCC Exhibit #8).

On September 10, 2007, Union Staff Representative, Ginger Thrasher, sent a letter to Joseph Ayers, TCC's Executive Director, requesting an immediate meeting to discuss the Center's closing, and the effects this layoff will have on the bargaining

unit employees. (TCC Exhibit #3). This letter was returned to Ms. Thrasher because it was incorrectly addressed. (Id.)

On September 18, 2007, Ms. Thrasher came to Mr. Ayers' office--without prior notice--along with Tara Coffman, Union Local President, and asked to meet with Mr. Ayers. At the meeting, Ms. Thrasher hand-delivered the September 10, 2007 letter.

Mr. Ayers met with Ms. Thrasher and Ms. Coffman for approximately one hour. (TCC Exhibit #4). They discussed effects of the Center program closing, including employee layoffs, seniority, what employees were doing after layoff and whether they would be offered other TCC positions. (Id.) Mr. Ayers also explained that the 60 calendar day notice of program closing provided to the Union was different from the 10 working day employee layoff notice. (Id.)

The following day, Mr. Ayers sent a letter to Ms. Thrasher indicating that he believed TCC committed no Contract violation in the closing of the Center, suggesting that AFSCME follow the Contract's dispute resolution mechanisms, and requesting that he be provided adequate notice of future meetings. (Union Exhibit p. 34).

The Union never requested another meeting to bargain the effects of the Center's closing. However, on September 28, 2007,

certain Center employees filed a class action written grievance. (Union Exhibit pp. 35-36). The grievance stated that the "Employer violated Art. IX, Seniority, Sect. 4, by not recognizing/honoring 60 day closing notice; and, violated Union request to bargain effects on the employee as a result of the closing..." (Id.)

The grievance proceeded through the Contract's grievance process and was denied by TCC at all steps. (Union Exhibit pp. 40-45). TCC denied the grievance for procedural reasons alleging that the Contract "does not contain a provision for class action" grievances. (Union Exhibit p. 40). It also denied the grievance on substantive grounds, first noting that TCC did give the Union notice of program closing 60 calendar days prior to TCC's intended program closing date. (Id.) TCC also made clear that the Contract "does not contain a requirement that individual employees receive 60 days notice." (Id.)

After finishing the preliminary steps in Contract's grievance process, the Union decided on January 25, 2008, to exercise its contractual right to arbitration. (Union Exhibit p. 46). By the end of January 2008, the Parties agreed to mutually select the Arbitrator. (Union Exhibit pp. 47-48).

The Union did not advance the grievance to arbitration until late-September 2008. The only explanation for the delay given at

the hearing was through the testimony of Ms. Thrasher, wherein she testified that "[h]istorically, TCC never follows through to an arbitration."

UNION POSITION

The Union did not commit procedural violations in bringing this matter to arbitration and arbitration of the substantive issue is appropriate. The Union is the appropriate party to this matter. In addition, the doctrine of laches does not prevent the arbitration of this matter.

The Employer violated Article 9, Section 4 of the Contract which requires that before a program is closed the Union must be given a 60 calendar day notice. The Employer's arguments as to this Contract violation are dismissive of its value. They argue it was met by the continuing employment of a management support employee to complete administrative tasks after all of the child care employees were laid off and all of the children left the Center. They argue there was no program closing in spite of their own notice specifically stating a program was closing. They even argue the clause was not operative because the Union did not want to take over the program, this in spite of the fact that the language allowing that option was never adopted by the Parties. All of these arguments fail to recognize the importance of this language to the Union. The 60-calendar day language was

negotiated to protect the employees of TCC in the event of a program closing. The early layoff denied them that protection and this violated the Contract.

The proposed remedy for TCC's failure to provide the 60 calendar day notice is to pay the employees for the days between the time they were laid off and the end of the 60 calendar day notice period. This will properly compensate them for the time they lost that would have prepared them for the layoff. The Contract envisioned the employees continuing to work for 60 calendar days, that is the damage they suffered--the loss of work and concomitant loss of pay.

EMPLOYER POSITION

After waiting eight months, in September 2008, the Union finally advanced the grievance at issue in this arbitration against TCC. Because of this unjustified delay and other procedural deficiencies, the grievance is not arbitrable.

Regardless, there is no merit to the Union's substantive arguments. AFSCME offers a tortured Contract interpretation that is contradicted by both the plain meaning of the Contract language and the undisputed bargaining history. There are two notice provisions in the Collective Bargaining Agreement. Based on its Union right under one of these provisions, the Employer gave and the Union received 60 calendar days notice of a program

elimination as to the Center, and the Center continued certain essential functions of its operation even beyond those 60 calendar days. Based on TCC's employees' right to 10 working days notice of layoff under the other of these Contract provisions, employees received three to five weeks notice before layoff.

The Union suffered no harm, as TCC met and bargained with the Union on the only occasion for which the Union asked for a meeting. The grievance must be denied because ultimately, the Union is asking the Arbitrator to ignore the clear Contract language and provide the Union a result to which it is not entitled, based on rights for which it did not bargain, and which it simply does not have.

The Union has not met its burden to show a violation of the Collective Bargaining Agreement, either in spirit or in letter. Therefore, the Arbitrator's award should deny the grievance in its entirety.

ANALYSIS OF THE EVIDENCE

The Employer has alleged that the grievance is inarbitrable for several reasons. First, the Employer avers that because of the Union's delay in advancing the grievance to arbitration they should be estopped under the doctrine of laches from having the grievance heard on its merits.

It is undisputed that the Union on January 24, 2008, decided to exercise their option and pursue the grievance to arbitration pursuant to the last step in the contractual grievance procedure. In fact, the Parties mutually selected the Arbitrator to hear the grievance during this time period. The Union, however, did not advance the grievance to arbitration until late-September 2008. Ms. Thrasher offered the only explanation for the delay by stating that "[h]istorically, TCC never follows through to an arbitration."

While the Arbitrator has heard better reasons or explanations for delaying a grievance to arbitration in his 33 years of arbitration experience than offered by Ms. Thrasher, the reality is that the Contract does not include an explicit deadline for advancing a grievance to arbitration after an arbitrator is selected.

In the absence of an explicit deadline for pursuing arbitration, as is the case here, arbitrators have enforced a "reasonableness" requirement in pursuing arbitration. One arbitrator deemed a reasonable period to be six months. Food Barn Stores, 95 LA 572 (1990).

The Arbitrator, on the other hand, has not set forth a hard and fast rule as to what period of time is reasonable for a union to pursue a grievance to arbitration in the absence of a

contractual deadline. The Arbitrator has instead relied upon the definition of "laches" and applicable court decisions to determine a "reasonable" period of time.

"Laches" is defined as an "equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought." Black's Law Dictionary, 879, (7th Ed. 1999). The federal Circuit Court of Appeals in Sandobal v. Amour and Company, 429 F.2d 249, 256 (8th Cir. 1970) held regarding laches that "...it is not applicable unless there has been harmful reliance by the other party."

The Employer presented no evidence of harmful reliance on or prejudice from the Union's delay in bringing the grievance to arbitration. If perhaps this had been a termination case where continuing liability was an issue, the Employer could argue it had been prejudiced. Or, if the delay had been so lengthy as to cause loss of records or problems with witnesses' memories, again, the Employer could argue it had been prejudiced. Here, no prejudice or reliance occurred and the Employer raised no objection to the delay until the arbitration hearing. Laches does not prevent this matter from being decided on the substantive issues.

The Employer also argues that since the Union claims that the Union is not a Grievant and since the employees-Grievants were not represented, TCC believes the grievance is not arbitrable. Related to this argument, the Employer alleges that the Grievants purport to represent a class, but class action grievances are not allowed under the Contract. Similarly, grievances of Union rights are not allowed under the Contract according to the Employer.

The arguments raised by the Employer are without merit. The Contract is between the Union and the Employer and thus it is the Union that has the exclusive right to bring the grievance to arbitration and the concomitant obligation to fairly represent members of the bargaining unit, whether it be individually or collectively in a "class action" grievance. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). In fact, Article 10, Section 3, Steps 4 and 5 of the Collective Bargaining Agreement make specific reference to the Union in the processing of a grievance. Specifically, Article 10, Section 3, Step 5 gives the Union the exclusive right to advance a grievance to arbitration:

If the grievance remains unresolved, the Union may, within seven (7) calendar days after the response of the TCC Board, by written notice to the Employer, request arbitration of the grievance.

The Union represents the employees and the Union possesses the exclusive right to bring the grievance in this matter to the Arbitrator on their behalf.

In the final analysis, the grievance is both procedurally and substantively arbitrable. Accordingly, the merits of the case shall follow.

The merits of the case involves the Arbitrator making a decision as to the meaning and application of the Contract language contained in Article 9, Section 4 of the Contract. The first sentence in Article 9, Section 4 requires that employees are to receive from TCC 10 working days notice of layoff when there is a layoff lasting more than 30 calendar days. There is no dispute that the Employer complied with the contractual requirement in Article 9, Section 4 of giving a written notice at least 10 working days in advance of the employees' layoff at the Center. All employees who were laid off from the Center received three to five weeks advance notice, which is well in excess of the mandatory 10 working days notice of layoff required by the Contract.

It is axiomatic in arbitration that clear and unambiguous language must be enforced, even if the results are contrary to the expectations of one of the parties, as it represents, at the very least, what the parties should have understood to be the

obligations and the benefits arising out of the agreement.

Heublein Wines, 93 LA 400, 406-407 (1988); Texas Utility
Generating Division, 92 LA 1308, 1312 (1989).

The second sentence in Article 9, Section 4 is the heart of the dispute between the Parties. This language is clear and unambiguous. This sentence patently provides that "[i]f a program is to be eliminated, the Employer shall give written notice to the Union at least sixty (60) calendar days in advance."

The Union's position is essentially to replace the first sentence with the second in the event of a program closing. In other words, under the Union's reading of Article 9, Section 4, employees, as well as the Union, would be entitled to receive from TCC a 60 calendar day notice before TCC would be allowed to terminate the program and layoff the employees. It is clear from Article 9, Section 4 that employees have a right to 10 working days notice of layoff and the Union is entitled to 60 calendar days notice of a program closing. The Contract does not provide employees a contractual right to 60 calendar days notice of layoffs.

Even assuming *arguendo* that the Contract language in Article 9, Section 4 is ambiguous, both bargaining history and practice enhances the Employer's position.

The bargaining history of Article 9, Section 4 shows that the two notice provisions are separate and distinct rights of separate and distinct Parties, namely, employees and Union. Gary Johnson, Former Union Executive Director and negotiator of the Contract language in dispute, testified that he did not recall the negotiations and further that the documents produced by TCC accurately reflected the provisions' bargaining history. Of particular importance is the documentation showing the Union's bargaining proposals and the final, negotiated outcome of that bargaining. (TCC Exhibits #1, 2).

Prior to 1986, TCC employees had a right to 10 days notice of extended layoffs. (Union Exhibit p. 82). In the negotiations of the 1986-87 contract, the Union made two separate, unrelated proposals. (TCC Exhibit #2). The Union made a proposal ("Proposal 3") related to the 10 day employee layoff notice-- suggesting a change from "10 days" to "10 working days." (Id., p. 2). They also proposed new Contract language, separately, ten proposals later, ("Proposal 13") seeking the addition of the following language:

General - In the event that the Agency wishes to abolish, merge, phase out, sell, consolidate or transfer any program or programs they will afford the Union the first opportunity to take over the operation of said program or programs. The Agency shall formally notify the Union President of their intent after which the Union shall have 60 calendar days to exercise this option.

(Id., p. 7). There is no evidence linking the negotiation or creation of the two proposals. Instead, the two proposals were both incorporated into the document in whole or in part. (Union Exhibit pp. 7-8 (Contract Art. 9, Section 4.)). There is, however, convincing evidence that the 60 calendar day notice language is clearly drawn from Proposal 13. While the final negotiated provisions resulting from Proposal 3 and Proposal 13 were placed together in the final contract language, there is no evidence that there was a linkage in the meaning of the two proposals or that the program closing notice was designed to supersede the employee layoff notice.

The record establishes that there have been two programs subject to termination at TCC. The first being the Senior Nutrition Program in 1996 and the second being the Center in 2007. The Union implies that TCC's actions in regard to the Senior Nutrition Program in 1996 demonstrated that TCC understood the 60 calendar day notice of program elimination provision required 60 calendar day notice of employee layoffs.

The Union's contention is without merit. On the contrary, TCC's 1996 actions do not conflict with its 2007 actions or with its consistent interpretation of the Contract. TCC's actions in 1996 only demonstrate that TCC provides as much notice as

possible of employee layoffs. In 1996, TCC lost its grant funding for the Senior Nutrition Program on a date certain, and it was required to provide services until that date certain. The Child Care Center at issue in this arbitration was dependent for its funding on the number of children attending the Center and TCC had no control over when children left the program for other child care providers.

It is clear from not only the clear and ambiguous Contract language in Article 9, Section 4, but also from the bargaining history and practice of the Parties in regards to this language that the 10 working day notice of layoff and 60 calendar day notice of program closings are separate and distinct rights of employees and the Union. Union Proposal 13 and its resulting language in Article 9, Section 4 did not grant employees 60 calendar day layoff notice nor did it prohibit TCC from undertaking necessary layoffs connected with a program closing. Had the Union desired such rights, it could have proposed and negotiated Contract language, such as: "both employees and the Union are entitled to a 60 calendar day notice before layoffs can be implemented." Such language nor intent exists in Article 9, Section 4.

The Union's position is that if the Employer terminates a program before the 60 calendar days notice to the Union, laid off

employees are entitled to receive compensation from the date of their layoffs until the 60 calendar day period has expired. Once again, the Union's position fails to recognize that employees are entitled to a 10 working day notice of layoff and not a 60 calendar day notice of layoff.

It is undisputed that TCC provided the program closing notice to the Union on August 20, 2007. Employees were laid off in mid-September 2007--considerably less than 60 calendar days. Even though the Employer's failure to provide the full 60 calendar day notice to the Union occurred, the Union is not entitled to any compensation for laid off employees because employees received more than the 10 working days notice to which they are entitled under the Contract. The Union cannot simply "pass on" any remedy to employees, who are not entitled to damages by the plain meaning of the first sentence in Article 9, Section 4.

While the Employer failed to provide the Union with the full 60 calendar day notice before the employee layoffs occurred, the Union would not be entitled to any damages. The Union simply cannot demonstrate any harm to itself. TCC met and bargained with the Union the only time it requested to meet.

Steve Preble, Union Executive Director, offered significant testimony as to the impact of the 60 calendar days notice on the

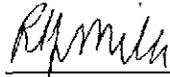
Union. He testified that the 60 calendar days notice would provide the Union with the

opportunity for those 60 days to investigate why [the Center] is being closed. If there is any alternatives to before the employees are gone--is there anything that we can do as a Union whether it would be concessions or whether the adjusting language or hours of work--just a couple of examples that we would look at. And then other ones, when it gets closer to the end of the 60 days and close to the layoff, then we could look at alternatives moving from one program to another where there was openings, bumping rights --we would have to take time to look at the Contract to see what it means when it gets closer to the end.

If such discussions, investigation, or concessions were possible or even considered, the Union offered no such evidence. In fact, the Employer requested from the Union prior to the arbitration hearing "[a]ny documents which reflect proposals, ideas, draft agreements, agreements, or any other materials prepared by AFSCME for presentation or discussion with TCCA, at any time, which are related to the closing of the Child Care Center, regardless of whether such documents were presented to TCC." No documents responsive to this request were produced by the Union, leading to the inevitable conclusion that the Union had not such proposals or ideas. The Union only asked for one meeting with TCC about the effects of the closing of the Center on the employees. At this meeting, the Union offered no concessions or proposals which could have been agreeable to TCC to keep the program open.

AWARD

Based upon the foregoing and the entire record, the grievance and all requested remedies are hereby denied.



Richard John Miller

Dated April 2, 2009, at Maple Grove, Minnesota.