

IN RE ARBITRATION BETWEEN:

ISD #186, PEQUOT LAKES PUBLIC SCHOOLS

and

SEIU, LOCAL #284

DECISION AND AWARD OF ARBITRATOR

BMS No. 09-PA-0561

JEFFREY W. JACOBS

ARBITRATOR

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November 3, 2009

IN RE ARBITRATION BETWEEN:

ISD #186, Pequot Lakes Public Schools,

and

DECISION AND AWARD OF ARBITRATOR
BMS #09-PA-0561
Jodell Dickmeyer grievance

SEIU, Local 284.

APPEARANCES:

FOR THE UNION:

Sarah Huntley, Esq., Attorney for the Union
Jodell Dickmeyer, grievant
Carol Diane Hayes, Union Steward
Carol Nieters, Exec. Director Local 284
Laurie Stammer, Business Rep. Local 284
Marie Rosa, Paraprofessional ISD 186

FOR THE DISTRICT

Joe Flynn, Esq., Knutson, Flynn & Deans
Rick Linnell, Superintendent of Schools, ISD 186
Rick Skogen, Business Manager, ISD 186

PRELIMINARY STATEMENT

The hearing in the matter was held on July 23, 2009 at 10:30 a.m. at Citilites Facility in Pequot Lakes, Minnesota. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on September 1, 2009 with Reply Briefs to be submitted by October 15, 2009 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement from July 1 2007 to June 30, 2009. The grievance procedure is contained at Article XII. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural issues and that the matter was properly before the arbitrator.

ISSUES

The Union asserted that the issues were as follows:

1. Did the School District violate the 2007-2009 Agreement between ISD 186 Pequot Lakes and SEIU Local 284 when it denied Jodell Dickmeyer her contractual right to layoff and recall?

2. Did the District have just cause to discharge Jodell Dickmeyer when considering all facets of the issue at hand?

The District asserted that the issue is as follows: Whether or not the School District violated the collective bargaining agreement between the School District and the Union when it terminated the Grievant following her failure to report to work for the 2008-09 school year?

The issues as determined by the arbitrator are as follows:

1. Did the grievant abandon her position with the District?
2. In the alternative, the District have just cause to terminate the grievant due to her failure to appear for work under these facts and circumstances? If not, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE XI

LAYOFF AND RECALL PROCEDURE

Section 1. Seniority: The employer recognizes that the purpose of seniority is to provide a declared policy as to the order of layoff and recall of employees. Employees with the least continuous service will be laid off first within the affected classification as defined as cook, custodian, clerical, paraprofessional, computer technician, offset operator. Employees may bump within their pay range or in a lower pay range.

Section 2. Bumping Rights: Seniority is based on an employee's date of hire. In no way can a less senior employee bump a senior employee. An employee can bump a less senior employee within their pay range or in a lower pay range provided the more senior employee is qualified as determined by the immediate supervisor and/or administration for said position. Pay range is defined as their comparable worth ranking. If any employee holds years of service within another classification, other than what they currently are in, they shall be credited with work years within said classification for bumping rights.

Section 3. Reductions: If an employee's position is eliminated, or hours reduced by thirty (30) or more minutes per work day, the employee shall have the right to displace any employee as described in Section 2 of this Article.

Section 4. Recall Rights: If any opening subsequently occurs, the laid off employee with the most seniority within the respective classification shall be recalled first. When an employee comes back, said employee shall pick up their seniority and step placement where they were at the time of layoff.

Subd. 1. Eligibility: In order to be eligible for recall, a permanent employee must have completed their probationary period.

Subd. 2. Duration: An employee shall retain recall rights for a period eighteen (18) months from the date of layoff provided the employee has provided proper notification to the district. An employee who does not accept in writing within ten (10) working days a position of like hours and classification, the District's offer of reinstatement, will forfeit any further rights to reinstatement.

Subd. 3. Notification: The employee's right to reinstatement shall terminate if the employee fails to file a written statement requesting reinstatement with the School District by August 1 of each year the layoff is in effect.

Appendix A
Differentials and Job Classifications

Differentials

| | | |
|-----------------------|----|-------------|
| <u>Supervision</u> | 1. | 0 |
| | 2. | \$1.00/hour |
| <u>Difficulty</u> | 1. | 0 |
| | 2. | \$.25 |
| | 3. | \$.50 |
| <u>Conditions</u> | 1. | 0 |
| | 2. | \$.25 |
| | 3. | \$.50 |

A111

Library Aide - Elementary
Paraeducator - Classroom
Library Aide - Secondary
Cooks Helper II
Dishwasher
Ala Carte
Ala Carte Preparer & Dishwasher
Office Para

A121

Paraeducator - Handicapped
Paraeducator - Preschool
Copy Machine Operator
Cooks Helper I
Library Assistant
HS Clerical Aide

A122

Custodian

A131

Paraeducator-Handicapped
Health Para

B111

Attendance Secretary
Community Ed Secretary

B121

Assistant Engineer
Assistant Head Cook
Computer Technician

B131

Elementary Secretary
Secondary Secretary
Middle Level Secretary

B221

Media Coordinator

B222

Lead Custodian

C121

Head Cook

C122

Custodial Maintenance

PARTIES' POSITIONS

DISTRICT'S POSITION:

The District took the position that it had just cause to terminate the grievant due to her failure to appear for work on August 27, 2008 and that whether there was a violation of the provisions of the layoff and recall provisions is entirely immaterial. Alternatively, the District took the position that the grievant abandoned her job since she failed to appear for work. The District asserted that no violation of the agreement occurred and that the grievant was not laid off but was merely assigned to a different position for 2008-09. In support of these positions the District made the following contentions:

1. The District noted that the grievant was employed as a computer technician working 180 days in the 2007-08 school year. The Superintendent, in anticipation of possible budget cuts due to decreasing funding from the State, met with the grievant in July 2008 and advised her that he would be recommending to the Board that her position be cut for the upcoming year.

2. The Board did not entirely cut the grievant's position, see District Exhibit 1 but instead cut only 50% of her position, leaving the remaining 50% of her computer technician position in place.

3. The Superintendent then met with the grievant a few days prior to August 18, 2008 and informed her that her position had not been cut after all but was rather reduced by 50%. The District then sent the grievant a letter dated August 18, 2008 advising her of her assignment for the 2008-09 school year. See, District exhibit 3.

4. The grievant was assigned her 50% position as a computer technician and was assigned 50% as a paraprofessional. The District maintained adamantly that the grievant was not "laid off" within the meaning of the labor agreement. Instead, the District argued, she was granted a position that was substantially the same in terms of hours and gross pay to the position she held the previous year.

5. The grievant sent a letter to the District dated August 25, 2008 requesting a right to layoff. The District asserted there is no "right to layoff" and that the District retains the right to determine when to lay off personnel.

6. The District further argued that the grievant and the Union have confused the notion of a layoff with bumping rights. The District pointed to the provisions of Article XI, and asserted that the grievant's employment was never terminated by the District's action to reassign her to a 4 hour position as a Computer Technician and 4 hours as a paraprofessional.

7. Further, the grievant never grieved her assignment nor did she ever assert her right to bump into another position. The District noted that she may have had the right to bump into a lower paying position but never asserted that right. Instead she assumed that she was on layoff and would be placed on the recall list referenced in Article XI Section 4 cited above.

8. The District asserted that this was an invalid assumption on her part since she was not laid off and had no right to be placed on a recall list. Moreover, the District asserted most vehemently that the proper procedure to follow if the grievant truly believed there was a contractual violation in the assignment given to her in August 2008 was to file a grievance over that. She failed to do so, instead embarking on a calamitous path to simply refuse to appear for work. This was a violation of the most fundamental proposition in all of labor relations: obey now and grieve later. She did not do that, opting to abandon her job, apply for unemployment compensation (which was denied by the State UIM Judge) and then to leave the State of Minnesota for a vacation in Hawaii for over a month.

9. She should therefore, according to the District, have appeared for work on August 27, 2008, which was the first day of school and commenced her job. The fact that she may not have liked the paraprofessional position did not entitle her to simply refuse to perform it.

10. The grievant failed to appear for work from August 27, 2009 and never contacted the District to advise them of her whereabouts. She apparently relied on the errant letter she sent to the District of August 25, 2008. The District asserted that this letter was of no effect and did not relieve her of the obligation to show up for work.

11. The District further noted that the grievant simply wanted to be laid off so she could collect unemployment compensation. This too was denied by a State Unemployment Compensation Judge. See District Exhibit 6. While this decision is not binding, it shows an intent to simply walk away from her job because she just did not like it. That is not her right, according to the District: she must either appear for work or provide valid reason for her failure to do so. None was provided here.

12. Under the clear terms of the discipline policy, the District retains the right to impose whatever discipline it feels is appropriate given the circumstances of each case. Here the District determined that the grievant's failure to appear for work from August 27, 2008 to September 16, 2008 without any valid excuse was a dischargeable offense.

13. The essence of the District's position in this matter is that the grievant abandoned her job due to her failure to appear. In the alternative she was subject to severe discipline for her failure to appear and that termination was the appropriate penalty.

The District seeks an award denying the grievance in its entirety.

UNION'S POSITION:

The Union took the position that the District violated Article X and XI of the labor agreement when it denied the grievant's right to layoff and recall and subsequently terminated her on September 16, 2008 for her attempt to enforce her rights under the labor agreement and for her Union activities as a steward. In support of this the Union made the following contentions:

1. The grievant is a 13-year employee of the District with exemplary reviews and evaluations. She served in the position of a computer technician during the 2007-08 school year working 180 days. She earned some \$19,641.60 in the 2007-08 school year. Had she been employed full time as a computer technician in 2008-09 she would have earned \$20,073.60. Thus the District's position had the grievant accepted it, would have resulted in a substantial loss of income for her.

2. In July 2008 she met with Superintendent Rick Linnell and was advised that he would be recommending that her position be eliminated due to budget cuts and financial shortfalls. She inquired as to whether she should clear out her desk at that time but was informed only that the final decision was with the Board and that once that decision was made, Mr. Linnell would get back to her.

3. She met again with the Superintendent and with Mr. Skogen in August 2008 and was advised that her position as a computer technician was not in fact eliminated but was rather cut by 50%. She acknowledged receiving the Notice of Assignment, District Exhibit 3, dated August 18, 2008. She was not satisfied with her assignment however since 50% of her assignment for the coming year was as a paraprofessional performing a job she had never done before. She further had no training for this position and knew that it was a very difficult job dealing with special needs students. This job was described by the Union and its witnesses as a very demanding position requiring changing of diapers and other personal tasks for students in need of such services.

4. The grievant further acknowledged that she did not grieve the assignment but instead asserted that under the provisions of Article XI, Section 3 Reduction, her position was reduced by more than 30 minutes per day. Thus, according to the Union, the grievant had the right to be laid off and placed on the recall list for 18 months. See Article XI, Section 4 , subd, 2

5. The grievant fully advised the District of her intentions not to accept the position as assigned and sent a letter to the Superintendent dated August 25, 2008. In that letter she clearly stated as follows:

The position that was offered to me of 4 hour computer tech and 4 hour paraprofessional is a new position in the bargaining unit. As there is no other computer tech position at 8 hours a day 180 days per year to bump into I am exercising my right to layoff. I am notifying you to please place my name on a layoff and recall list for a period of 18 months. I look forward to hearing from you when a like position within the computer tech classification becomes available. See Union Exhibit 1.

6. She heard nothing and assumed that her request for layoff had been honored and that she did not have to appear for work on August 27, 2008. Further, the Notice of Assignment, District Exhibit 3, did not state the date on which she was to start work nor did it provide any further information as to a location to report nor any person to contact with questions.

7. The next thing she heard from the District was her termination letter dated September 16, 2008. District Exhibit 4. The grievant was shocked when she got this since she was never advised after her letter of August 25, 2008 that her request for layoff had not been honored or that the District still wanted her to appear for work on August 27, 2008.

8. The Union further asserted that the findings of an Unemployment Compensation Judge are not binding and not relevant to this proceeding and should be ignored by the arbitrator. Unemployment compensation is based on very different statutory considerations and should not control the result here.

9. Further, the Union asserted that the intent of the language of Article XI is to allow individuals whose positions have been reduced by as much as the grievant's was, to take a layoff and be placed on the recall list in the event her job comes open again.

10. The Union asserted that it sought no back pay or accrued contractual benefits other than to have the grievant placed on the recall list per Article XI section 4 and be allowed to reclaim her job if and when it comes open again. The Union further asserted that the 18 months should run from the Arbitrator's decision and award in this matter since so much time has already transpired.

11. The essence thus of the Union's case is that the grievant's position was reduced by 50% and that allowed her to opt for a layoff rather than to accept the position offered by the District. The Union claimed that the District's action was in effect a layoff and that the grievant thus had the right to be placed on the recall list.

The Union seeks an award granting the grievant 18 months of recall rights from the date of the arbitrator's award herein pursuant to Article XI of the labor agreement.

MEMORANDUM AND DISCUSSION

The salient facts of the case were largely undisputed. The grievant worked in the 2007-08 school year as a computer technician. She had held that position for 13 years. It was an 8 hour per day 180 day per year position. Prior to that however, the grievant had been employed as a paraprofessional in the District. The Computer Technician and paraprofessional positions are classified within the same classification in the Labor Agreement.

Due to projected budget cuts the District looked to cut positions for the 2008-09 year. The superintendent met with the grievant in July 2008 to advise her that he was going to recommend that the District cut her position in its entirety. The School Board however decided only to cut the grievant's position in half rather than eliminate it altogether. The Union argued that the grievant's Computer Technician position was thus eliminated due to the District's action but the evidence did not support this assertion. The hours were reduced but the position was not eliminated as the Union suggested. This will be discussed more below but one of the main premises on which the Union's case rests is that the grievant somehow had the right to assert a layoff under these circumstances based on the claim that her job had been eliminated. As noted further herein, the evidence showed it was not.

District representatives met with the grievant on August 18, 2008 to advise her that the Board had in fact not eliminated her job but had rather reduced it to a 4 hour position. The grievant was advised that she would be offered her 4 hour computer tech position along with a 4 hour paraprofessional position to fill out the time. There was a small loss of income as between the new position and the position the grievant had held in 2007-08.

The District sent the grievant a notice advising her of the assignment to the new position on August 18, 2008. She acknowledged receipt of this notice. She sent a letter back to the District dated August 25, 2008 advising the District that she was "exercising her rights to layoff that is afforded me within the Collectible Bargaining Agreement as specified in Article XI, layoff and recall procedure."

The Union's main argument is that the District did not offer the grievant a position of "like hours and classification" due to the difference in income and the fact that the paraprofessional job was not the same as her computer position. The Union further argued that the grievant had the right under the provisions of Article XI to take a layoff and remain on the recall list for 18 months and that the District should have treated the grievant's status as "on layoff" at that point.

This will be discussed more below, but the essential fact is that the grievant did not appear for work on August 27, 2008, the day school started. The Union asserted that the notice sent to the grievant was deficient since it did not advise her of the start date of the school year or the location. This argument rang particularly hollow since the grievant had been with the District for 13 years. It strains credibility to assert that she did not know when the first day of school was or where she was to work, even though 4 hours of her job was the same job she had already held the previous year. As the District noted, she might well have simply asked these details if she had truly wished to begin work.

Further, the evidence showed that the grievant did not appear for work as she had been directed to but instead assumed that she was on layoff and was not required to work even though she had no confirmation of her status. There is an old adage about assumptions like this and it holds particularly true here – the grievant should not have assumed her status and should have appeared for work.

In addition, the grievant never grieved the assignment nor did she assert any rights to bump into another position within the District. This too was a major fact in the case. Instead of grieving the assignment or making the assertions that the District had violated the provisions of Article XI, the grievant simply assumed she did not have to appear for work as directed and assumed that she could make the argument that the District's violation of the agreement somehow excused her from showing up for work as directed. This, as noted below, was a fatally mistaken assumption.

The main dispute was over whether this is a contract interpretation matter, a disciplinary matter or one involving job abandonment. The Union asserted most strenuously that the District violated the provisions of Article XI when it assigned the grievant a position for the 2008-09 school year that was not of “like hours and classification.” The Union further asserted that since the position the District attempted to assign to her was not of like hours and classification, that gave her the right to be placed on the layoff list and to retain her rights to recall for 18 months.

Article XI of the labor agreement sets forth the procedure for layoffs and recalls in the District. It applies only on layoffs however. Article XI section 3 allows for a unit employee to displace, i.e. bump, a junior employee if the senior employee’s position is “eliminated or hours reduced by more than 30 minutes per day.” Clearly, this provision would apply to have allowed for such a move by the grievant had she asked for it. The problem for the grievant here is that she did not seek to bump into another position. Instead she asserted a right to layoff. Thus, this provision did not apply to protect the grievant under these facts.

The essence of the Union’s claim is that the grievant had an absolute right to be placed on layoff once her position was reduced or eliminated and that she had to have been placed on the layoff list for 18 months if the position offered to her was not of like hours or classification. The Union relied on the language of Article XI, Section 4, subd. 2 for this proposition.

There is no definition of the term “like hours and classification.” The evidence showed that the hours of work were similar, i.e. the computer technician position was 8 hours as was the new position for 2008-09. The Union asserted that the classification was not the same and that this difference obligated the District to treat the grievant as laid off and to place her on the layoff list for 18 months.

Article XI Section 3 does not by its terms trigger the grievant’s rights to be placed on the 18 month layoff list. The clear language of that section provides for the employee whose position has been eliminated or reduced by more than 30 minutes per day to be able to displace a junior worker as defined on Section 2.

Section 4 provides for recall rights for “the laid off employee.” It then provides for the procedure for recalling employees once they are laid off. Elkouri notes that some arbitrators have ruled that the term layoff must be interpreted to include any suspension from employment arising out of a reduction of the workforce or, to quote the words of one arbitrator, an “actual severance from the Company’s payroll, and a break in continuous service.” Elkouri and Elkouri, *How Arbitration Works*, BNA books, 5th Ed. at p. 770, citing Arbitrator Daly 98 LA 626, 628. There is considerable merit to the District’s position that the grievant was not laid off within the meaning of the provisions of Article XI and that the grievant did have the “right” to assert a layoff.

More importantly, there is a difference between bumping rights, which can be triggered by the elimination or reduction of a position, and recall rights, which are triggered when there is a separation of employment due to a true layoff. Thus, a close reading of the salient provisions of the contract reveals that the grievant did not have a “right” to assert that she be placed on a layoff list. The District gave the grievant a full time position; albeit different from the one she had in the prior year. There was no separation of employment and no true layoff as that term is traditionally applied in labor relations.

Moreover, the provision relied on by the Union, Article XI section 4 subd. 2, speaks to the procedure when the employee is recalled. Despite testimony about how that provision has changed over time; that provision did not apply here. There was no layoff and therefore there was no requirement that the grievant be placed on the layoff list. The essence of this case does not turn on whether the Union was correct in its assertions about the interpretation of Article XI, but rather on the fact that the grievant refused her assignment for the 2008-09 school year. It is true that she did not *intend* to give up her rights when she did not appear for work. There may have also been a miscommunication somewhere as well but the fact remains that she was given an assignment and simply did not show up for work. As noted above, there never was a grievance over the assignment, as there could have been, that would have led to an award one way or other about those provisions.

The grievant made a choice not to appear for work as she was directed. While the way in which this was handled seems somewhat “sharp” in that the District never contacted the grievant after receiving her letter of August 25, 2008 in which she asserted her rights to be placed on the layoff list. Why no one ever contacted her was not made clear at the hearing and perhaps frankly they should have. Still though it is not the District’s responsibility to call people to whom they have given an assignment to make sure they will come to work; it was the grievant's responsibility to show up for work when she was directed to do so.

One of the most basic tenets of labor relations when there is a dispute about the provisions of the labor agreement is to obey the directives of the employer and grieve later. This “obey now grieve later” principle applied here with the same force and effect as it would have anywhere else. There was also no evidence of a safety or other exigent reason for why the grievant could not have come to work when she was directed to.

On these facts, the focus of the case is thus not on the provisions of Article XI and whether there was a violation of that language but rather whether the District was justified in treating the grievant as having abandoned her job by failing to show up for work under these circumstances.

The District asserted that it had the right to insist that the employees they assign to work will in fact do that. Here the District asserted that when the evidence is considered as a whole its actions were reasonable. The grievant had sent a letter indicating that she was rejecting the assignment by letter dated August 25, 2008. When she did not show up for several weeks, it was not unreasonable for the District to infer that she had left the job.¹

¹ The District argued that this conclusion was supported by the Findings of the Unemployment Compensation Judge in the UIC case the grievant filed. The District cited several conclusions reached by the unemployment judge and noted that the grievant's claim for UIC was denied. None of this evidence was considered in rendering this decision. Pursuant to Minn. Stat 268.105, subd. 5 (c) and subd. 5(a) neither the conclusions reached by an unemployment compensation judge nor any evidence adduced at such a hearing is admissible in this proceeding.

The Union argued most strenuously that the grievant's long and excellent record should work to overturn the District's action here. The evidence did show that the grievant was an outstanding employee and that her work record has no discipline and that by all accounts her work is exemplary. Here traditional just cause analysis does not apply. The District argued that there was just cause for her discharge based on the notion of her refusal to comply with the reasonable order of management.

That however was based on an alternative theory; the first basis of the district's case was job abandonment. Simply stated, for whatever reason, the grievant made a choice to assume that she was on a layoff list rather than verify that or to communicate with the District to make sure of it.

Neither did she appear for work or take any steps to grieve the assignment, which could easily have been done. Under these circumstances the essential feature of this case is that the grievant's choices, albeit innocently made, resulted in the abandonment of her job.

Moreover, whether the District violated the agreement at Article XI is not strictly material to this inquiry. Even if the District did violate the agreement the approach chosen by the grievant In this case was not the way to have dealt with that issue. As noted above, there was insufficient proof not only that the District violated the agreement but also insufficient evidence to show that there was an automatic placement on a layoff list that would have excused the grievant from work or to require the District to treat her as a laid of employee. Accordingly, as unfortunate as it is, these facts compel an award denying the grievance.

AWARD

The grievance is DENIED.

Dated: November 3, 2009

Jeffrey W. Jacobs, arbitrator