

Arbitration

**In The Matter of Arbitration
Between:**

**AFSCME Council 5, Local 70, Union
and
Ramsey County, Employer**

**BMS Case No. 13-PA-0097
Lake Owasso Residence-Layoff Language**

**Carol Berg O'Toole
Arbitrator**

Representatives:

For the Employer:

**Marcy Cordes
Labor Relations Manager, Ramsey County
121 Seventh Place East
Saint Paul, Minnesota 55101-2148**

For the Union:

**LoRita Powell, Field Representative
AFSCME Council 5
300 Hardman Avenue South
South Saint Paul, Minnesota 55130**

Witnesses:

For the Employer:

**Joanne Tollas, HR Trans. Spec.
Dana Castonawy, Administrator
Bill Stich, Program Director**

For the Union:

**Jim McGee, Residential Counselor
Tara Foster, Treasurer, Local 707 and Direct Caregiver
Traci Schendel, President, Local 707, Residential Counselor**

Preliminary Statement

The hearing in the above matter commenced on December 7, 2012, at 121 Seventh Place East, Saint Paul, Minnesota, at the Human Resources Office of the Employer. The parties involved are Ramsey County (Employer) and AFSCME, Council 5, Local 707 (Union). The parties presented opening statements, oral testimony, oral argument, and exhibits. All exhibits were received with the arbitrator's admonition that, depending on the exhibit, some would be given greater weight. Post hearing briefs were filed by both parties. The arbitrator closed the hearing upon receipt of both briefs on February 4, 2013.

Issue Presented

The parties could not agree on the issue in dispute so the issue was framed by the arbitrator as follows:

Issue : Did the Employer violate the Collective Bargaining Agreement when it reduced employee schedules at Lake Owasso Residence in January, 2012?

Contractual and Statutory Jurisdiction

The Union is the certified bargaining representative for "the following job classifications in the recognized bargaining unit:

Behavior Analyst

Custodial Worker 1

Residential Counselor 1

Residential Counselor 2," Union Exhibit 5.

The Employer and the Union are signatories to a collective bargaining agreement (Agreement), Union Exhibit 5, covering the period from the first day of January, 2009, to the last day of December, 2011, which provides in Article 15 that if the grievance is not resolved in Step 3 of the grievance procedure, the grievance may be referred to arbitration. The parties could not agree on a resolution through the grievance procedure; thus, the dispute is properly before the arbitrator. Neither party raised timeliness nor other procedural issues.

Union's Opening Argument

The Union opened the hearing with the description of the Employer's 2011 budget reduction as, "painful to employees". The Union argued that new employees were added while current employees were still on layoff and could have been recalled and that the reduction was a 4.4 full time equivalency. The Union termed the process "unnecessary".

Employer's Opening Argument

The Employer opened by stating that the real inquiry should be whether the county, in implementing the budget cut and corresponding schedule reduction, adhered to the seniority based layoff provisions of the Agreement, specifically Article 17. The Employer termed the grievance, a "back door challenge" by the Union to the Employer's "right to direct and determine the number of personnel, to set schedules, and otherwise determine the means of service to clients of a residential care facility for the developmentally disabled". The residential care facility has a hundred residential counselors in the bargaining unit. In December, 2011, the county cut the budget by \$220,000 for Lake Owasso. The administrators at Lake Owasso implemented the cut

by reducing the hours in a number of schedules on the day and evening shifts. The budgetary impact did not include a “meaningful reduction”, in the number of positions. Employer’s Opening Statement, The Employer stated that because more senior employees were negatively impacted, the Employer treated it as a layoff and implemented it in inverse order of seniority. The Employer stated that Article 17 does not provide “any direction on how to implement a schedule reduction based on seniority, in an operation that has three different shifts. The Employer indicated that despite requests for talks with the Union to develop a process to be used to implement the new schedules, the Union only wanted to discuss the budget and the schedule change, not the process for implementation. The employer went ahead and did a campus-wide rebid to reshuffle employees into the new schedules based on seniority. The Employer stated that the result of the bid was that the least senior employees ended up with the fewest number of scheduled hours, employees with more seniority, ended up in positions with great number of hours and the most senior employees ended up with the same scheduled hours and even the same positions. The Employer concluded that this process complied with the provisions of the contract requiring consideration of seniority in work reductions.

Union’s Case in Chief

Witnesses: James McGee

McGee, a residential counselor #1 at Lake Owasso, was the first to be called by the Union to testify. McGee has worked for seven years in direct care, passing medication, developing relationships with clients, and creating a home environment. McGee testified that the residents were developmentally disabled to the extent that they

could not “make it in a traditional home setting”. McGee described his position as going from full-time work at 64 hours per pay period to part-time at 32 hours per pay period. He indicated that he has to pay more now for his health insurance, from \$31 per pay period to “\$230 more.” He said he was notified of the layoff by Dana Castonawy who said to him, ‘Here are the positions available.’ They included a 40 hour position which he took. McGee “signed off on it” because he is a full time student. He was told he could pick up additional hours, but he has a “crazy school schedule” which makes it difficult to arrange. McGee testified he could not “fit an eight hour pick up”.

On cross examination, McGee indicated he did have the opportunity to bid on a 64 hour evening position which would have made him eligible for the employer paid insurance. He couldn’t take that position and said he is still able to pay the additional money for health insurance.

Witness: Tera Foster

The Union’s next witness was Foster, who testified that she provides direct care to eight residents and intermittent care to seven other houses. Her duties are behavioral support, cleaning, cooking and laundry. Foster testified that the position she has moved into as a result of the reduction is a diminution of pay in the amount of \$1.06 per hour. She can pick up hours to work full time, but the needs are not known as most result from illness or injury and are not permanent. One of the detrimental aspects of this is that she cannot take vacation time on the non-permanent part of the job. On cross examination, she stated that she can increase her “after layoff 32 hour position” to 40 hours. She indicated that she did receive shift differential before the layoff, but doesn’t now and doesn’t have as many days to pick up extra hours.

Witness: Traci Schendel

Schendel will have worked for the Employer for 27 years next Fall. Among other things at Lake Owasso, she volunteers as a coach for Special Olympics. She is president of her local AFSCME, and was previously the vice president and secretary/treasurer. She testified that the Employer and the Union “work together pretty well”. Schendel identified the Union Exhibit 2 entitled “Lay Off Timelines for Lake Owasso Residence 11/29/12”. She indicated that the people laid off did not know who they were until the bidding was finished. On a Tuesday, they received notice and the change was effective on a Friday. Schendel identified Union Exhibit 4, the Lake Owasso Residence Lay Off List, dated as revised on 2/8/12. She pointed out that McGee was first on the list of laid off employees, showing his original position at 64 hours per pay period and the reduction to 40 hours per pay period. Schendel described the efforts the Union team made to mitigate the damages and how those efforts were met by a “No”. Union Exhibit 7. She described how House 1, 2, 3, and 4 had eight intermittent staff and stated they had been removed in the layoff. Schendel stated that 28 hour positions after the layoff were “abhorrant”. She posed the rhetorical question, “Did the ER follow the contract, the layoff restrictions?” She answered, “No, because people were harmed.”

On cross exam, Schendel was asked about job responsibilities. She said that there was a slight responsibility change where there were, “less people to do the same”. She indicated that there was no work contracted out and agreed that a change from day shift to evening is not a layoff. She identified Union Exhibit 10, an effort to “hammer out a master schedule” as the Union’s effort to avoid a layoff.

Employer's Case in Chief:

Witness: Joanne Tollars

Tollars identified Employer Exhibit 2, AFSCME Local 707 Lake Owasso Residence Seniority List as of 1-3-12, as created quarterly, posted on line, and sent to the Union on January 3, 2012. Tollars said the next one was sent on March 30, 2012.

Witness: Dana Castonawy

Castonawy testified next for the Employer. She is the administrator at Lake Owasso and has been since June, 2011. She is a graduate of University of Minnesota at Duluth and holds a Masters in Business Administration from St. Mary's University. Castonawy has twenty-two years of experience in direct care. At Lake Owasso, there are four nurses on site and eight homes on the campus. Most of the residents are off campus from 9 to 2 P.M. There are three nurses on duty in the afternoon, three in the morning, one with three on call at night. The staffing minimums are regulated by license. Castonawy testified that in 2010 and 2011 there were administrative cuts. Employer's Exhibit 5. Between 2007 and 2011, 4.5 full time equivalents were cut from administrative costs.

Castonawy testified that labor was the biggest component of the budget. She was aware that the proposed budget reduction was \$220,000 and that it was a point of controversy. The Union primarily focused on not implementing the budget cut. Castonawy indicated she was directed to cut the budget. Of the 101 staff, 29 staff got reduced schedules. Part time staff comprised half of the staff, both before and after the budget reduction. Two hundred shifts were available every pay period. An employee would call in sick and had to be replaced. Castonawy indicated that one could receive

health benefits even if your work was reduced from 64 to 40 hours per pay period. She testified that employees who wanted additional hours, got them. All intermittent staff was laid off. Least senior staff took the brunt of the layoff and the most senior employees were able to get positions.

Witness: Bill Stich

The program director, Stich, testified next. He stated he had worked for the Employer for twenty-nine years. He holds a Bachelor of Science from the University of Wisconsin and started with Ramsey County as a residential counselor. He indicated he had forty years in the field. He described the regulatory environment set by the federal government and overseen by the Minnesota Department of Health. Employer Exhibit 9. Stich testified that the Employer tries to maintain staff levels to protect residents, provide active treatment, teach people new skills, and engage people. The consequences of not maintaining staffing include citations, fines, and closure.

Stich described the efforts made to work with the Union. The Employer was willing to talk, but felt the Employer had the right to establish a schedule as long as the process was based on seniority. The Employer had to reduce staff in a way that would be the least detrimental to the Lake Owasso clients and, at the same time, abide by the seniority provisions of the Agreement.

Stich described in detail the 24 hour schedule including staffing on weekends. He identified Employer Exhibit 10 showing staffing before and after the layoff with 2.8 FTEs fewer on the day shift. Stich described what the considerations were in deciding where to cut. They considered the overlap of shifts and the possibility of taking a half hour off at the beginning and end of shift. Stich indicated that they decided to take 1.4

FTEs off the evening shift. They had 17 employees working the night shift and now have 15. All the intermittent employees were released.

Stich described how the same process had been used twelve years ago when the Employer added positions. It was done with the cooperation of the Union. Stich testified that using the same process for a reduction made sense from a historical perspective.

On cross examination, Stich was asked if anything was in writing and if there was a rebidding process. He answered no to both. In redirect, Stich was asked if any of the process was a restructuring or reorganizing. He said the process wasn't either. He described the process as a schedule restructure.

Discussion

The essence of this dispute is seniority. "Collective bargaining agreements generally provide for the recognition of seniority in many aspects of the employment relationship. In addition to promotions and layoffs...Indeed, consideration of seniority looms so importantly that it has been said that "one of the principal purposes for entering into a collective bargaining agreement is usually to secure for the employees the prized right of seniority..." Cournoyer v. American Television Co., 28 LA 483, 485 (Minn.1957), as cited by Elkouri & Elkouri, *How Arbitration Works*, (6th Ed. BNA 2003) at 841.

Seniority in the Agreement is described sparingly. The Union argues that the layoff carried out in January, 2012, was violation of the Agreement. The Union alleges a violation of Article 17, 17.1 and 17.2. Union Exhibit 5. Section 17.1 provides that new positions be posted for five days. In the selection of employees for new positions,

classification seniority and the employee's ability and capacity to perform the job are to be considered. Union Exhibit 5. No witness testified at the hearing regarding a failure of the Employer to post new positions.

The Agreement provides in Article 17, Workforce, section 17.2 (a) "In the event it becomes necessary to lay off employees for any reason, employees shall be laid off in the inverse order of their seniority, provided all temporary, provisional and intermittent employees shall be recalled from layoff according to their seniority. No new employees shall be hired until all employees on layoff status desiring to return to work have been recalled." Union Exhibit 5. There was no testimony from any witness indicating violations of any of the seniority provisions of Article 17. Testimony was given by two witnesses that they had turned down jobs for various reasons, e.g., compatibility with school schedules.

The Union reasons that the layoff hurt employees and that such hurt is a violation of the Agreement. The Union argues that the Employer "forced all employees to relinquish their current positions, and rebid by seniority for a new position." Union's Post Hearing Brief. They cite "extreme disruption and chaos" from the reduction particularly for employees who lost insurance eligibility because of the fewer hours worked. Two individuals testified as to their personal hardships: McGee; Foster. McGee described increased costs for health insurance because of the reduction of hours. However, McGee testified that he turned down a full time position that would have provided him paid health insurance because he is going to school and "it was difficult to arrange".

Foster testified that she had the opportunity to pick up the extra hours “in a different manner”. Instead of working an evening shift, she now works unusual shifts, morning and or evening shifts. And, she doesn’t have the ability to immediately request available non-permanent hours, as she would prefer. She has the ability to work the same number of hours as before, but they are different hours. She testified that the current schedule makes her work more days in a row and, in addition, it is more difficult to take vacation because she can’t take it on non-permanent hours. She indicated that her short term disability was not less than last year,

It is important to note that neither employee who testified, said that she or he lost hours to a person less senior. There was no testimony at all from McGee or Foster regarding the failure of the employer to consider his or her seniority or the awarding of either of their hours to someone less senior or a total loss of hours. Both were inconvenienced. Both would have preferred to have the old schedule. Both thought the layoff unpleasant. McGee testified that the layoff made it harder for him to keep going to school. The layoff will most likely make day care more difficult for the expectant Foster to manage. No one discounts how difficult it is to work and go to school at the same time, or how complicated child care can be. These are hurtful for employees and the Union is correct in pointing that out. However, these difficulties don’t constitute a violation of the seniority provisions of the Agreement.

It is understandable that the Union preferred to challenge the actual reduction instead of participating in how it was carried out. After all, objections to the layoff worked at least one time before, when a proposed layoff was put off by the County Board. Union Exhibit 7. The Union would have squandered an opportunity had it not

tired to convince the County Board that the same should happen this time. The Union would not have been doing its most important job if no complaints had been raised about the hurt endured by its membership. Hurt, however, is not a contract violation: not in this Agreement with the language of Article 17.

Union Exhibit 12 contained written statements of harm by a variety of employees, one of which was anonymous. None of these employees testified at the hearing. The complaints ranged from having to work whatever is available to the difficulty with high gas prices to get to work. Remedies, including reducing administrative employees, were suggested.

Much of what is complained of cannot be fixed by a Union, even one that is as vigorous and strong as this one. Neither can an arbitrator make employees “whole by restoring hours and benefits lost to employees” when such loss is the result of budget shortfall instead of a violation of the Agreement. Union Post Hearing Brief. A better economy and increased government funding are the “fixers” for such problems. The Agreement doesn’t provide remedies for “family obligations and school commitments” described by employees. Union Post Hearing Brief. Such real hurts, and I have no doubt that they are real, are not addressed in the language of the Agreement. Nor are any of the “hurts” violations of the Agreement’s seniority provisions.

This was not a layoff where four or five separate positions were discontinued. It was a layoff of portions of jobs, mostly day time hours and some hours at the beginning and end of shifts. The only discreet and whole positions laid off were intermittent workers, which the contract requires. For the other positions, an hour was cut here or there, as needed. Employees in order of seniority were then given opportunity to add

hours back in. McGee decided not to add hours although he was eligible by virtue of seniority. Foster chose to add non-permanent hours, although she finds them unsatisfactory. Both of these individuals testified that they were given an opportunity for a job at the same hourly level as before. No violation occurred.

No witnesses testified that they were denied seniority rights. The employer correctly asserts that Article 5.1 of the Agreement provides that the Employer “retains rights and authority necessary to operate and direct...” Union Exhibit 5. Article 6.2 further provides that staffing schedules and assignment are under the purview of the Employer. Employer’s Post Hearing Brief. The Employer carried out the reduction under those provisions and gave due deference to the seniority provisions of the Agreement.

Award

I find no violation of the Agreement. The grievance is denied.

Dated this 11 day of February, 2013.

Carol Berg O’Toole