FMCS Case No. ----------

In the Matter of Arbitration between:

Union

and

School District

Arbitrator: Richard Bales
Grievant: Class action

Grievance: August 10, 2020
Hearing: January 21, 2021
Brief Exchange: February 19, 2021
Award Date: February 20, 2021

Award

I. Facts

The [Board] is responsible for a rural, K-12 school district located [in] Ohio. The District is a public employer under Ohio law. Ohio R.C. 4117.01(B). Maintenance and custodial employees of the District are represented by Union. The Union is an employee organization as defined by Ohio R.C. 4117.01 (D). The relationship between the District and the Union is governed by the CBA.

The District presented testimony that beginning in 2020, it began to experience a significant fiscal deficit. The District's projections through fiscal year 2024 show deficits widening every year up to about $2M in 2024, which is about 10% of the District's annual budget. District Ex. 1. The Union challenged the District's projections on cross examination, and obtained concessions that the District's current financial situation is not quite so dire as that. Regardless, I will assume without deciding that the District is experiencing some degree of fiscal distress. The District attempted to raise money by putting an income tax levy on the ballot in November 2019, but the effort failed. Board Ex. 2.

JS became District Treasurer in March 2020, a few months after the levy failed. Before her arrival, the District already had been considering various cost-saving measures, including outsourcing and subcontracting. In late spring and early summer, she costed-out various possibilities, one of which was subcontracting-out the work being done by members of the Union bargaining unit. She concluded that subcontracting this work would save the District approximately $237,000 per year.

Ms. JS discussed the issue with Superintendent JFK, who in turn raised the issue with the Board of Education. On July 17, Mr. JFK signed a contract with XYZ Ltd. for XYZ to do all the work that according to the CBA was supposed to be done by Union bargaining unit members. Though the contract with XYZ did not explicitly say so, Mr. JFK testified "it was assumed" that the contract would not go into effect until the Board approved it.

On approximately July 23, Mr. JFK apparently met with the Union Field Representative LM to tell him the work done by Union bargaining unit members might be subcontracted out. See District Ex. 3 (memorandum from Mr. JFK describing that meeting). On July 29, Mr. JFK sent a memorandum to each member of the Union bargaining unit telling them the District was considering subcontracting, that if so they would be laid off, and that the expected layoff date would be on or after August 18. *Id*.

On July 30, the District posted a formal notice of layoff. This notice began by listing the eleven members of the Union bargaining unit, with each member's classification and date of hire. The remainder of the notice stated:

> Please be advised that the Superintendent is going to recommend to the Board of Education that it layoff all of the employees listed above with the exception of DK. (Mr. DK resigned his employment effective August 6, 2020.) The Superintendent's layoff recommendation will occur at the August 17, 2020 Board meeting. As indicated previously, the reason for the layoff recommendation is because the Superintendent will be recommending, for financial reasons, that all custodial and maintenance services be performed by an outside company.
> Posted on July 30, 2020

Joint Ex. 4. On August 13, Mr. JFK sent a memorandum to all Union bargaining unit members telling them the layoff date would be October 1 instead of August 18. District Ex. 4.

On August 17, the Board of Education approved the contract with XYZ. Joint Ex. 5. All eleven members of the Union bargaining unit were fired on September 30. *Id*.

XYZ subsequently hired approximately six members of the bargaining unit to work for XYZ performing substantially the same work they had been performing under the CBA. Testimony of Mr. JFK. MG, a twenty-five year Custodian for the District, testified that although hourly pay from XYZ was identical to what the Union bargaining unit members had received under the CBA, all other benefits were significantly worse, including health insurance and all provisions for paid time off. At the arbitration hearing the District emphasized the identical hourly pay but did not challenge the reduction in benefits, and proffered no evidence to otherwise explain how XYZ had saved the District $237,000 per year.

The Union grieved the matter as a class action. Joint Ex. 2. The parties agreed to proceed straight to mediation through FMCS. Mediation failed, and the Union notified the District it would proceed to arbitration. Joint Ex. 3. The parties selected me as arbitrator, and agreed to an online hearing because of the COVID-19 pandemic. That hearing was held January 21, 2021. Both parties submitted post-hearing briefs.

II. Stipulated Issue

Did the District violate the collective bargaining agreement when it laid off the custodial and maintenance employees and subcontracted with a private provider of services and if so, what shall the remedy be?

III. Relevant CBA Provisions

ARTICLE 1 – Recognition

1.01 The Board, hereinafter referred to as the BOARD, recognizes the Union, hereinafter referred to as the UNION, as the sole and exclusive bargaining agent of all regular full-time and part-time classified personnel, as defined in this Article:

(a) Custodian
(b) Groundskeeper
(c) Maintenance
(d) Head Custodian

All other employees in the school district are excluded from the Bargaining unit.

1.02 This recognition shall remain in effect during the term of this Agreement.

* * *

Article 2 – Negotiations

2.01 If either party desires to initiate bargaining for a successor agreement, it shall notify the other party in writing no later than May 1st nor earlier than March 15th of the year in which this Agreement expires. Notification from the Union shall be to the Superintendent and notification from the Board shall be to the Union President.

2.02 The parties shall set a date for an initial meeting which will be no later than fifteen (15) days after receipt of the initial notice unless a different date is mutually agreed upon.

* * *

2.08 If the parties are unable to reach tentative agreement on all items by June 15 of the year in which this Agreement expires, either party may declare a bargaining impasse, in which case the parties will mutually request the services of a mediator from the Federal Mediation and Conciliation Service. * * * If mediation does not produce a tentative agreement, the Board may implement its last offer and the Union may exercise its rights under Section 4117.14(D)(2) of the Ohio Revised Code.

Article 3 – Rights of the Board

3.02 Except as modified by a specific and express term of this Agreement, the Board hereby retains and reserves to itself and the Superintendent all powers, rights, authority, duties and responsibilities conferred upon and vested in them by the laws and the Constitution of the State of Ohio, and of the United States, including but not limited to the right to: * * * lay off employees; maintain and improve the efficiency and effectiveness of school operations; determine the overall methods, process, means, or personnel by which school operations are to be conducted * * *, and to utilize personnel in a manner determined by the Board to effectively and efficiently meet these purposes * * *.

The Board has the responsibility and shall exercise at all times, its exclusive authority to manage and direct in behalf of the public, all the operations and activities of the school district to the full extent authorized by law. The exercise of these powers, rights, authority, duties and responsibilities by the Board and the adoption of such policies, rules and regulations as it may deem necessary shall be limited only by the specific and express terms of this Agreement as entered in the Board minutes with the organization representing the negotiating unit.

Article 10 - Reduction in Force

10.01 When the Board determines it is necessary to reduce the number of bargaining unit positions, the procedures and principles set forth in R.C. 3319.172 will be utilized.

10.02 The following classifications shall be used for the purpose of defining pay classifications in the event of a layoff:

Custodian
Head Custodian
Groundskeeper
Maintenance

10.03 Within each classification affected, employees will be laid off by classification seniority, with the least senior employee laid off first. * * *

10.05 Ten (10) days prior to the effective date of lay-offs, the Board shall prepare and post, for inspection, in a conspicuous place, a list containing the names, seniority dates and classifications and indicate which employees are to be laid off. Each employee to be laid off shall be given advance written notice of the lay-off. Each notice of lay-off shall state the following:

(a) Reasons for the lay-off or reductions.
(b) The effective date of lay-off.
(c) A statement advising the employee of his/her rights of reinstatement from the lay-off.

10.06 An employee whose name appears on the RIF list shall be offered re-employment in order of system seniority when a position in the bargaining unit becomes available that the laid off employee has previously held. Written notice of such vacancy shall be sent by certified mail to the employee's last known address. If the employee fails to accept re-employment, in writing, post-marked within ten (10) calendar days from the date of the notification or attempted delivery, said employee will be deemed to have rejected the offer and will be removed from the RIF list. Employees shall remain on the RIF list for eighteen (18) months from their last day of active service unless they fail to accept recall or waive their recall rights in writing.

* * *

Article 19 - Grievance Procedure

19.01 A "grievance" is the allegation by an employee that the Board has misinterpreted, misapplied, or violated a specific and express term of this written Agreement. * * *

19.05 * * * The arbitrator shall have no power to add to, subtract from, modify, or alter any provisions of this Agreement. * * *

Article 34 - Agreement

34.01 Except as otherwise may be provided herein, this agreement represents the entire agreement between the parties and supersedes all prior agreements, understanding or practice, whether oral or written, between them. This agreement shall become effective July 1, 2018 and shall remain in full force and effect through June 30, 2021.

34.02 The parties acknowledge that during the negotiations which resulted in this agreement, each had the opportunity to make proposals, and that the understanding and agreements arrived at by the parties after the exercise of that opportunity are set forth by this Agreement.

34.03 Therefore, for the life of the Agreement, the Board and the Union each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to negotiate with respect to any subject or matter not specifically referred to or covered in this Agreement unless otherwise agreed.

IV. Relevant Provision of Ohio Revised Code

3319.172 Reasonable reductions in nonteaching employees

[incorporated by reference in Article 10]

The board of education of each school district wherein the provisions of Chapter 124. of the Revised Code do not apply and the governing board of each educational service center may adopt

a resolution ordering reasonable reductions in the number of nonteaching employees for any of the reasons for which the board of education or governing board may make reductions in teaching employees, as set forth in division (B) of section 3319.17 of the Revised Code. In making any reduction under this section, the board of education or governing board shall proceed to suspend contracts in accordance with the recommendation of the superintendent of the district or service center who shall, within each pay classification affected, give preference first to employees under continuing contracts and then to employees on the basis of seniority. On a case-by-case basis, in lieu of suspending a contract in whole, a board may suspend a contract in part, so that an individual is required to work a percentage of the time the employee otherwise is required to work under the contract and receives a commensurate percentage of the full compensation the employee otherwise would receive under the contract. Any nonteaching employee whose continuing contract is suspended under this section shall have the right of restoration to continuing service status by the board of education or governing board that suspended that contract in order of seniority of service in the district or service center, if and when a nonteaching position for which the employee is qualified becomes vacant or is created. No nonteaching employee whose continuing contract has been suspended under this section shall lose that right of restoration to continuing service status by reason of having declined recall to a position requiring fewer regularly scheduled hours of work than required by the position the employee last held while employed in the district or service center. Notwithstanding any provision to the contrary in Chapter 4117. of the Revised Code, the requirements of this section prevail over any conflicting provisions of agreements between employee organizations and public employers entered into after the effective date of this section.

V. Arguments and Analysis

The District argues, correctly, that both Ohio statute and the Management Rights article of the CBA give the District the right to lay off members of the Union bargaining unit. O.R.C. § 3319.172; CBA Article 3. However, the parties have bargained for specific procedures the District must follow before it can do so. Article 10.05 states that, at least ten days before a layoff, the District "shall prepare and post, for inspection, in a conspicuous place, a list containing the names, seniority dates and classifications…" of employees to be laid off. This notice must also state:

(a) Reasons for the lay-off or reductions.
(b) The effective date of lay-off.
(c) A statement advising the employee of his/her rights of reinstatement from the lay-off.

Id.

At the arbitration hearing, the District proffered a single document it had posted notifying the Union bargaining unit members of the impending layoff: Joint Ex. 4. The District posted this notice on July 30, 2020 – well before the October 1, 2020 layoff – thus satisfying the ten-day

requirement. The notice was posted and in writing, and contained the names, seniority dates, and classifications of the Union bargaining unit members, thus satisfying those requirements. The notice gave a reason for the layoff – financial considerations – thus satisfying that requirement.

However, the notice did not comply with Article 10.05(b)'s requirement that it contain "[t]he effective date of lay-off." At best, the effective date for the layoff of the members of the Union bargaining unit might be inferred as an unspecified date after "the August 17, 2020 Board meeting" referenced in the notice. However, the notice neither says so specifically, nor provides a specific "effective date" as required by Article 10.05(b).

Likewise, the notice did not comply with Article 10.05(c)'s requirement that it contain a "statement advising the employee of his/her rights of reinstatement from the lay-off." The word "reinstatement" appears nowhere in the notice; nor is there any mention in the notice of the circumstances under which the Union bargaining unit members might later become re-employed by the District.

The District makes two counter-arguments. First, the District argues any reference to reinstatement would have been pointless because the layoffs resulted from subcontracting and there was no chance any of the Union bargaining unit members would be reinstated. But that is not relevant. The CBA says the notice must contain a "statement advising the employee of his/her rights of reinstatement from the lay-off." The District did not comply with this requirement, even if simply to say that reinstatement would be governed by Article 10.06 but that no reinstatements were anticipated. Because the District's notice did not contain the required statement regarding reinstatement, the notice was invalid and the District was not entitled under the CBA to proceed with the layoff.

Second, the District argues its failure to include a statement regarding reinstatement in the notice was later cured because XYZ interviewed many of the Union bargaining unit members in anticipation of hiring some of them to do the work heretofore done by the bargaining unit. However, the District proffered no evidence that XYZ gave any "notice" of these interviews in writing, whether the notice was posted, whether it was provided more than ten days before the layoff, whether it provided a reason for the layoff, or whether it provided an effective date for the layoff. And even if XYZ had done all that, it would not have satisfied the *District*'s obligation under Article 10.05 to provide proper notice before a layoff. Nor did XYZ make any attempt to comply with the requirement, found in both Article 10.06 and in O.R.C. § 3319.172, that laid-off employees be reinstated in order of seniority.

The District argues that absent specific language in a CBA prohibiting subcontracting, a recognition clause in a CBA by itself cannot be interpreted as a prohibition. The District cites to two labor arbitration awards from the mid-1950s for this proposition. And the proposition is true enough. But the District does not mention that in the 65 years since those awards were issued, arbitrators have coalesced around a balancing test to evaluate employer efforts to subcontract

when a collective bargaining agreement is in effect but contains no express language prohibiting subcontracting:

> In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. This general right to contract out may be expanded or restricted by specific contractual language.

Shenango Valley Water Co., 53 L.A. 741, 744-45 (McDermott, 1969), cited in ELKOURI & ELKOURI, HOW ARBITRATION WORKS § 13.15.A at 13-125 (7th ed. 2012). See also, more generally, ELKOURI & ELKOURI § 13.15.A-C.

I will assume without deciding the District's good faith and the reasonability of its business decision. The remaining two factors, however, weigh heavily in favor of the Union. The District's subcontracting of the work previously done by the Union bargaining unit members, if permitted, would eviscerate the CBA, as there would no longer be any members covered by the CBA. The CBA thus would be a meaningless shell. Likewise, the District's subcontracting not only would "seriously weaken[] the bargaining unit" – it would destroy it entirely, as there no longer would be any members in the bargaining unit.

The District argues the Union is trying to get in arbitration a no-subcontracting clause that it was unable to achieve in bargaining. However, the balancing test described above explicitly applies "[i]n the absence of contractual language relating to contracting out of work".

More fundamentally, the District has unilaterally abrogated every promise it explicitly made in the CBA. When the District signed the CBA, the District recognized the Union as the "exclusive bargaining agent" of workers who would perform the District's custodial and maintenance work (Article 1) through June 30, 2021 (title page; Article 34), and to provide them the wages (Articles 28-29) and benefits (Articles 13-15, 24-25, 31-32) described in the CBA. The District promised that if the Union wished to continue the collective-bargaining relationship beyond the expiration of the current contract, the Union may initiate that process by providing the District with timely notice (Article 2.01), and that if a bargaining impasse resulted the parties would mediate through FMCS (Article 2.08). The District promised it would follow the procedures described in Article 10 before laying off members of the bargaining unit. The District has failed to honor any of these contractual promises.

VI. Disposition

For the reasons described above, the Grievance is sustained. The District is ordered to reinstate with back pay all members of the Union bargaining unit, to provide them all benefits

they are entitled to under the CBA backdated to the date of layoff, to otherwise to make them whole, and to comply with all terms of the CBA.

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Richard A. Bales, Arbitrator
February 20, 2021