

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
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SCHOOL DISTRICT OF WISCONSIN DELLS :
 : Case 23
and : No. 42964
 : MA-5861
LOCAL 1401-A, WISCONSIN :
COUNCIL 40, AFSCME, AFL-CIO :
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Appearances:

Mr. Karl L. Monson, Consultant, Wisconsin Association of School Boards, Inc., on behalf of the District.
Mr. Lawrence S. Rodenstein, Staff Representative, Wisconsin Council 40, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the District and the Union respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration. Pursuant to said agreement, the undersigned was appointed by the Wisconsin Employment Relations Commission to hear the instant dispute. Hearing was held on January 9, 1990, in Wisconsin Dells, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedule on March 6, 1990. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties at hearing stipulated to the framing of the issue as follows:

Did the District violate the collective bargaining agreement when it failed to credit the grievants with respect to benefits and seniority for their summer employment with the District?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

Article 1 - Recognition

1.01The board hereby recognizes the Union as the exclusive collective bargaining agent of all employees of the School District of Wisconsin Dells, consisting of all regular full-time and regular part-time employees, but excluding supervisory employees, confidential employees, managerial employees and professional employees as certified by the Wisconsin Employment Relations Commission on the 12th of August 1987, Decision No. 24604-B.

Article 2 - Management Rights

2.01Except as otherwise provided in this Agreement, nothing herein shall limit the Employer in the exercise of the rights and functions of ownership or management, including, but not limited to, the right to manage the operations of the Employer and direct the working forces, the right to hire new employees, to assign work, to determine the number and location of its operations, the services required therein, and the quality of such service, including the means and processes of services and the materials used therein. This provision shall not be used to discriminate against any employee.

. . .

Article 8 - Employee Definitions

8.01Regular Full-Time Employee: A regular full-time employee is hereby defined as an employee who works nine (9) or more months per year at six (6) or more hours per day.

8.02Regular Part-Time Employee: A regular part-time employee is hereby defined as an employee who works nine

(9) months at less than six (6) hours per day.

Article 9 - Seniority

9.01 It is the policy of the Employer to recognize seniority.
There shall be five (5) departments defined as follows for employees covered by Local 1401-A:

- a. Maintenance and Custodial (including Laundry);
- b. Clerical and Secretarial;
- c. Food Service;
- d. Aides;
- e. Transportation

* * *

9.03 Seniority shall consist of the total calendar time elapsed since the date of original employment with the School District of Wisconsin Dells in a bargaining unit position with the department named above; provided, however, that no time prior to a discharge for cause or a quit shall be included; and provided that seniority shall not be diminished by temporary layoff or leaves of absence of less than one (1) year duration. To retain seniority upon recall from layoff, an employee must notify the Employer within five (5) work days of his/her intention of return and must report for work within an additional ten (10) work days.

* * *

Article 10 - Hours of Work

10.01 The hours of work (see Appendix C) for each employee shall be the status quo which existed for the members of the bargaining unit as of October 6, 1988. The Employer has the right to change such hours of work for each employee for operational reasons provided it gives the affected employee(s) five (5) working days prior notice.

* * *

10.05 Additional Work: If additional work, which is normally performed by bargaining unit employees, becomes available during the periods which school-term employees are not working, such work shall be offered to school-term employees on the basis of seniority before non-bargaining unit employees are scheduled or called in, provided, however, that such school-term employees are qualified and capable of performing the work that becomes available. Any employee who is interested in such work must inform the business office in writing no later than October 1 for the additional work during the school calendar and May 15 for summer employment. The business office shall give notice of such deadlines by posting, at least ten (10) working days prior to the deadline date.

* * *

Article 13 - Holidays

13.01 All twelve (12) month full-time employees will be granted eight (8) paid holidays; Labor Day, Thanksgiving Day, Christmas Eve Day, Christmas Day, New Year's Day, Good Friday, Memorial Day and July 4.

Article 14 - Vacations

14.01 Regular twelve (12) month employees shall be entitled to vacation leaves with pay on the anniversary date of their employment in accordance with the following schedule:

One (1) week; After one (1) year

Two (2) weeks; After two (2) to ten (10) years

Three (3) weeks; After ten (10) years...

Article 15 - Sick Leave and Other Leaves of Absence

15.01The Employer agrees that all regular twelve (12) month employees shall be entitled to sick leave with pay according to the following schedule:

0 - 4 years' experience: 5 days per year
4 - 7 years' experience: 7 days per year
7 - 9 years' experience: 10 days per year
Over 10 years' experience: 12 days per year
cumulative
to 100 days

Regular part-time employees shall be entitled to three and one-half (3-1/2) working days' sick leave per year; five (5) working days' sick leaves per year for employees with over ten (10) years' experience, cumulative up to forty (40) days.

Sick leave shall only cover necessary absences from duty because of illness or bodily injury of the employee. Any employee obtaining sick leave benefits by fraud, deceit, or falsified statement may be subject to disciplinary action, including up to discharge.

Article 16 - Miscellaneous

The Board agrees to provide a longevity payment as follows:

16.03Longevity: The Board agrees to provide a longevity payment as follows:

Employees with over five (5) years of service shall receive in the month of April of the sixth (6th) year and each year thereafter, a one percent (1%) bonus on gross wages of the previous calendar year shall be paid. Employees with over 10 years of service shall receive in the month of April of the eleventh (11th) year and each year thereafter, a two percent (2%) bonus on gross wages of the previous calendar year shall be paid. Employees with over 15 years shall receive in the month of April of the sixteenth (16th) year and each year thereafter, a three percent (3%) bonus on gross wages of the previous calendar year shall be paid.

APPENDIX A - SALARY SCHEDULE

July 1988

<u>Classification</u>	<u>6</u> <u>Start</u>	<u>1</u> <u>Months</u>	<u>2</u> <u>Year</u>	<u>5</u> <u>Years</u>	<u>Years</u>
Custodian I	\$5.05	\$5.40	\$5.70	\$5.85	\$5.94
Custodian II	6.50	6.90 7.30	7.50	7.64	
Assistant Cook	4.40	4.65	4.90	5.15	5.44
Head Cook	5.35	5.65	5.95	6.25	6.42
Teaching Assistant	4.60	4.85 5.10	5.35	5.54	
Secretary I	5.00	5.25	5.50	5.75	5.84
Secretary II	5.35	5.65 5.95	6.25	6.42	
Mechanic/Maintenance	7.50	7.90	8.30	8.65	8.91

July 1989

<u>Classification</u>	<u>6</u> <u>Start</u>	<u>1</u> <u>Months</u>	<u>2</u> <u>Year</u>	<u>5</u> <u>Years</u>	<u>Years</u>
Custodian I	\$5.45	\$5.80	\$6.10	\$6.25	\$6.51
Custodian II	6.90	7.30 7.70	7.90	8.21	
Assistant Cook	4.80	5.05	5.30	5.55	6.01
Head Cook	5.75	6.05	6.35	6.65	6.99

Teaching Assistant	5.00	5.25	5.50	5.75	6.11	
Secretary I	5.40	5.65	5.90	6.15	6.41	
Secretary II	5.75	6.05	6.35	6.65	6.99	
Mechanic/Maintenance	7.90	8.30	8.70	9.05	9.54	

July 1990

<u>Classification</u>	<u>6 Start</u>	<u>1 Months</u>	<u>2 Year</u>	<u>5 Years</u>	<u>Years</u>
Custodian I	\$5.85	\$6.20	\$6.50	\$6.65	\$6.97
Custodian II	7.30	7.70	8.10	8.30	8.67
Assistant Cook	5.20	5.45	5.70	5.95	6.47
Head Cook	6.15	6.45	6.75	7.05	7.45
Teaching Assistant	5.40	5.65	5.90	6.15	6.57
Secretary I	5.80	6.05	6.30	6.55	6.87

Secretary II	6.15	6.45	6.75	7.05	7.45
Mechanic/Maintenance	8.30	8.70	9.10	9.45	10.00

All employees shall receive an increase equal to their appropriate placement on the wage schedule or 21 cents per hour increase whichever is greater.

J.Side Agreement

Subject: Work Performed by Non-Bargaining Unit Employees

Work historically performed for the Employer by Charles Simonitsch and James Murphy during the summer months shall be exempt from the provisions of the Article 10 - Hours of work, Section 10.05 until such time as the above-named persons no longer perform the work.

This side agreement shall expire when the above-named persons no longer perform work.

APPENDIX C - HOURS OF WORK

<u>Name</u>	<u>Position</u>	<u>Hours</u>
* * *		
Department: Teacher Assistants		
Karen Conrad	EEN	8:00 a.m. - 3:30 p.m.
Department: Food Service		
Kay Chambers	Assistant Cook/Lake Delton	9:30 a.m. - 2:00 p.m.
Jan Voltz	Head Cook/Grade School	6:00 a.m. - 2:00 p.m.

FACTUAL STIPULATIONS OF THE PARTIES:

The parties at hearing stipulated to the following:

- 1.Joint Exhibit 11 is the Union's initial proposal on additional work and that section appears in the current agreement without any change from the initial proposal.
- 2.These are three grievants. Karen L. Conrad, normally works during the school year as a teacher's aide for approximately seven (7) hours per day. Kaye L. Chambers works during the normal school year as a cook for approximately four and one-half (4-1/2) hours per day. Janet M. Voltz works during the normal school year as a head cook for approximately eight (8) hours per day.
- 3.The above-mentioned grievants were employed on an average of eight hours per day during the summer (1989) from June 9 through September 1, as Custodian I's.
- 4.In the current agreement, there is an Article 8 called Employee Definitions. The parties agree that Conrad and Volz are classified as regular full-time employees. The parties also agree that Kaye Chambers is classified as a regular part-time employee.

BACKGROUND:

The collective bargaining agreement is the initial agreement between the parties. In the spring of 1989, the District posted a notice to the support staff. It stated, "The School District will have three (3) summer Custodial I positions available. They will be classified part-time and the hours will be 7:00 a.m. to 3:30 p.m., Monday through Friday. The summer schedule will begin June 12, 1989 and will finish September 1, 1989. If you are interested in this position, please give me written notice by May 15, 1989." The grievants accepted the positions. At the time of their acceptance, they were informed that they would be paid the base rate for a Custodian I effective July 1, 1989, and receive an increase effective July 1, 1989 to \$5.45 per hour. There was no discussion at this time as to whether the grievants would receive benefits. However, at some point during the summer around the Fourth of July, the employees were informed that they would not receive seniority credit nor any credit toward their benefits based upon their summer employment.

The grievants received the \$5.45 pay increase on their first paycheck in July of 1989 covering two (2) days. In subsequent paychecks they were returned to the 1988 rate. The instant grievance was filed as a result of the District's refusal to pay the higher rate and to credit the grievants' summer employment for benefits eligibility or seniority purposes.

During the preliminary steps of the grievance procedure, the School Board agreed to honor a "verbal agreement" purportedly made to the grievants promising to pay \$5.45 rate as of July 1, 1989. The District has maintained that this act is premised upon a verbal representation made by one of its supervisors and not upon any contractual obligation.

As the factual stipulation indicates, the parties agree that Conrad and Volz are classified as regular full-time employees while Chambers is classified as a regular part-time employee. As a result of the summer employment, all three grievants worked for the entire 1989 calendar year.

POSITIONS OF THE PARTIES:

Union:

The Union argues that summer custodial work is paid for under the contract and that the District's specious bifurcation of summer and school year employment is not grounded in the terms of the Agreement. Noting the definition of the term "additional" as in "additional work" set forth in Section 10.05, the Union maintains that this unambiguous term contains the notion that two or more groupings or sets are combined to create a larger unified grouping. According to the Union, the additional work provision is a clear and unambiguous directive that summer work shall be considered on the same footing with school year work for purposes of the instant dispute.

The Union specifically seeks the following additional fringe benefits: seniority credit, additional holiday pay for grievants Volz and Conrad, additional vacation and sick leave pay for all three grievants, and credit for purposes of longevity.

In order for the District's position to be sustained, the Union asserts, an express exclusion for summer employment would have to exist in the agreement which exclusion does not exist. Pointing to the definitions of full-time and part-time employees under the agreement, Sections 8.01 and 8.02, the Union stresses that the bottom line for benefits eligibility is the length of time worked. It claims that nothing in the record contradicts the obvious assertion that the actual length in time of work performed determines one's placement into the specific benefit classifications. The District's interpretation, it avers, would require the arbitrator to disregard or nullify the meaning of Section 10.05.

The Union, in response to District arguments, argues that there is a reasonable expectation that if additional work exists, it will be offered to interested unit members based upon seniority given the seniority rights set forth in the agreement. It disputes any District reliance on the concept of a "continuing expectation of work". It further stresses that there is no basis under the contract by which additional work assigned can be ignored or treated any differently than any other work assigned.

In summation, the Union urges the arbitrator to find that summer custodial work is bargaining unit work covered by the agreement and that employees working twelve months are entitled to the benefits based upon twelve months of work. It asks the arbitrator to make the grievants whole with respect to applicable "seniority and benefits to which they are entitled." It also requests her to make a ruling regarding the District's obligations to offer additional work under Section 10.05.

DISTRICT:

The District denied that there was ever an agreement reached between the parties which would support the Union's position and, in fact, alleges that the

Union is attempting to gain additional benefits through grievance arbitration that it was unable to gain through the collective bargaining process.

It maintains that it did not consider the part-time summer custodial positions as "regular" because of the limited duration of the jobs and because there is no guarantee that the positions would be offered again. According to the District, none of the grievants have had or have in the future any reasonable expectation of being offered the summer work. It claims that this is the case because there is no guarantee that the jobs would be available in future summers and because the jobs are offered based upon seniority, there being 15 to 41 other unit employees more senior who may take the jobs in future summers.

The District believes the term "regular" to refer to the nature of work for which the employees are primarily employed, in this case, cooks and a teacher's aide. According to the District, the only regularity upon which the grievants may rely is that associated with their primary school employment; not with a one-time summer custodial job.

In response to Union arguments, the District calls the Union's assertion that there is a clear and unambiguous obligation to credit all work under the contract "wishful thinking". It stresses that the contract makes provisions for benefits for various types of "regular employees". It points to specific benefit provisions to dispute Union claims that nothing in the contract contradicts the assertion that the actual length in time of work performed determines one's placement into the specific benefit classification.

The District requests that the grievance be dismissed in its entirety.

DISCUSSION:

In evaluating the contentions of both parties, the undersigned is cognizant that the agreement in dispute is an initial contract and that there is no particularly helpful or applicable past practice or bargaining history to assist in interpreting the various disputed provisions of the agreement. What the arbitrator is left with in the instant case is the express language contained in the agreement.

The Union, relying primarily on Section 10.05, vociferously argues that summer work is to be considered on the same basis as school year work and that all fringe benefits must be premised upon the totality of work performed during any given calendar year. To hold differently, according to the Union, would render Section 10.05 null and void.

This argument is rejected by the undersigned as clearly erroneous. To be sure, Section 10.05 does require the District to assign any extra bargaining unit work, including summer work, to bargaining unit employees based upon seniority provided that such employees are capable of performing such work. It does not, however, address the question of credit to be afforded for performance of this additional work directly or by implication. It merely assures that qualified bargaining unit employees will be offered such work if it exists first, prior to non-bargaining unit individuals, and in order of seniority. Section 10.05, in and of itself, neither precludes nor mandates the receipt of fringe benefits for summer work performed.

The District, on the other hand, appears to claim that the additional work specified in Section 10.05 is not covered by nor subject to any provision of the contract because it does not constitute "regular" work under any circumstances. This also is an unacceptable, overly broad interpretation of the contract language. 1/

It is clear that the parties from the onset in drafting the agreement made some attempt to identify regular full-time employees, Section 8.01, and regular part-time employees, Section 8.02. They did not, however, define or distinguish between regular nine month employees and regular twelve month employees in Article 8, the employee definition provision of the contract. Moreover, language keyed to very specific benefit provisions is not uniform either in that some provisions refer to all twelve month employees while others refer to regular twelve month employees and still other provisions refer to all regular twelve month employees. Because it must be assumed that the parties

1/ While the Union argues that the additional summer work must be paid at the contractual rate set forth in the agreement, and the District appears to dispute this argument, neither party addressed this issue squarely. The parties did not include this issue in the stipulated issue for resolution by the undersigned. Furthermore, the parties did not directly address this issue in their briefs. Because the District did, in fact, pay the contractual wage rate for the additional summer work and the parties did not fully litigate this issue, it is inappropriate for the undersigned to make any finding with respect to this issue under the circumstances.

contemplated and intended the specific language set forth in the benefit provisions to apply, this language must be carefully reviewed.

Section 9.03 expressly states that seniority "shall consist of the total calendar time elapsed since the date of original employment" (with the District) (emphasis added) "in a bargaining unit position with the department named above; . . . provided that it shall not be diminished by temporary lay off or leaves of absence of less than one (1) year duration." From this language and that set forth in Sections 9.01 and 9.02, it must be concluded that the parties established a system based upon departmental seniority. Such seniority shall consist of the total time elapsed in a bargaining unit position with the department named above. Therefore, the grievants may acquire seniority based upon their summer work in the custodial department. This seniority, however, would be separate and distinct from the other departmental seniority which they might earn as aides or food service employees. It is cumulative and based upon their summer employment as custodians for 1989 and in the future, should they continue to serve in this capacity.

Article 13 states that "all twelve (12) month full-time employees will be granted eight (8) paid holidays; . . ." (emphasis added) The term "regular" is omitted from this provision. Moreover, the word "all", a very broad term, is included to describe which employees are entitled to this benefit. There is no question that two of the grievants worked for the entire twelve months of the calendar year as full-time employees. The two full-time employees Conrad and Volz are therefore entitled to this holiday benefit.

Section 14.01 and the initial sentence of Section 15.01 key select benefits, both vacation and sick leave, to "regular twelve (12) month employees." Regular full-time employees working nine or ten months are specifically referred to under the second sentence of 15.01. They receive more limited sick leave benefits than do regular twelve month employees but these benefits are nevertheless superior to sick leave benefits received by regular part-time employees.

Sections 14.01 and 15.01 squarely present for resolution the question of whether the grievants are "regular twelve month employees." The Union submits that they are, while the District maintains that they are not under any circumstances. Because this is an initial agreement and the first year under which the parties have worked pursuant to the dictates of Section 10.01, it is premature to conclude that the grievants are, in fact, regular twelve (12) month employees. Moreover, the District makes some very persuasive points in arguing that in future summers the work may not, be available and/or that others with more seniority than the grievants may post for such work. Accordingly, it is concluded that the grievants are not at this time "regular" twelve month employees entitled to the benefits set forth in Sections 14.01 and the first sentence of Section 15.01. However, should the same grievants continue to perform the additional work in subsequent summers for a significant period of time, they may be determined to have become "regular" twelve month employees.

The Union also maintains that the grievants are entitled to longevity based upon the additional summer work. Section 16.03 sets up entitlement to longevity based upon years of service. Inasmuch as there is no qualifying language which excludes such work, it can fairly be inferred that additional summer work may be computed to determine years of service for longevity purposes. In any event, the specific language of Section 16.03 dictates that the additional summer work is to be included for calculating longevity benefits because longevity is to be computed as a percentage of "gross wages of the previous calendar year." (Emphasis added) Accordingly, the grievants are entitled to have their additional summer work of 1989 considered in computing longevity benefits when their gross wages are calculated for that year.

Therefore based upon the above, it is my decision and

AWARD

1. That the District did violate the collective bargaining agreement when it failed to credit the grievants with respect to certain benefits 2/; namely seniority, holidays, and longevity, for their summer employment with the District.

2. That the District did not violate the collective bargaining agreement when it failed to credit the grievants for their summer employment with respect to vacation and sick leave benefits.

2/ Various portions of the parties' collective bargaining agreement containing provisions relating to other contractual benefits were omitted from Joint Exhibit 1, the contract. The parties in their briefs make no mention of these other benefits such as health insurance and retirement. Accordingly, the undersigned has limited her determinations solely to those benefits set forth in the exhibits introduced at hearing and briefed by the parties.

3. That the District is ordered to credit the grievants' summer employment for seniority and longevity purposes in accordance with the rationale advanced in the discussion section of this award.

4. That the District is further ordered to make grievants Karen Conrad and Janet Volz whole with respect to holiday entitlement, treating them as twelve (12) month full-time employes for 1989 and for subsequent years should they work full-time in future summers.

Dated at Madison, Wisconsin this 21st day of March, 1990.

By _____
Mary Jo Schiavoni, Arbitrator