BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SUPERIOR SCHOOL DISTRICT EMPLOYEES LOCAL 1397, AFSCME, WCCME, AFL-CIO	
and	Case 98 No. 43270 MA-5943
SUPERIOR SCHOOL DISTRICT	

Appearances:
Mr. Victor S. Musial, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 5, Superior, Wisconsin 54880, appearing on behalf of the Union.
Gee, Hendricks, Knudson & Gee, S.C., Attorneys at Law, 312 Board of Trade Building, Superior, Wisconsin 54880-2588, by Mr. Kenneth A. Knudson, appearing on behalf of the District.

ARBITRATION AWARD

Superior School District Employees Local 1397, AFSCME, WCCME, AFL-CIO, hereinafter the Union, and Superior School District, hereinafter the District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of the Commission's staff, to act as arbitrator. Hearing in the matter was held on March 29, 1990, in Superior, Wisconsin. The hearing was not transcribed and the record was closed on June 15, 1990.

ISSUE:

The parties were unable to agree upon a statement of the issue. The Employer relies upon the arbitrator to frame the issue. The Union frames the issue as follows:

> Did the Employer violate an existing past practice between the parties by unilaterally implementing changes in the procedures for filling temporary vacancies within the Food Service Department?

The Arbitrator frames the issue as follows:

> Did the Employer violate the collective bargaining agreement by assigning substitute employes to work in the temporary vacancies which are the subject of Grievances Numbered 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE VI

Section 1

. . .

D. All food service workers, custodians, engineers, and bus drivers will request in writing, to their immediate supervisor, an interest to move to a temporarily vacated position. If approved, the employee will begin to receive pay for the position the day they begin, or no later than two (2) working days following the date the request was received.

1. The school district must know or be reasonably assured that a job will be vacated for seven (7) working days or more beyond the receipt of request.

2. The district agrees that any decision regarding a regular employee moving to a position made available as a result of the absence of another regular employee, would not be made in an arbitrary or capricious manner.

E. Regular employees substituting in a higher paying job

classification receive the salary or rate of pay for that step of the substitute position that is listed for the step they currently hold in their regular position.

Regular employees substituting in a lower paying job classification shall not receive less in pay than their regular salary.

. . .

Article XXII - Management Rights

Section 1. The Board, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and the United States, included, but without limiting the generality of the foregoing, the right:

A. To the executive management and administrative control of the total school system and its properties and facilities, and the assigned school activities of the employees;

B. To hire all employees;

C. To establish job specifications and duties for their employees, the reasonableness of which shall be subject to arbitration.

Section 2. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

. . .

BACKGROUND

Neither the parties' previous collective bargaining agreement, effective July 1, 1985 through June 30, 1987, nor any other prior collective bargaining agreement, contained any language on the filling of temporary vacancies. At the time of the expiration of the parties' 1985-87 collective bargaining agreement, the parties had a longstanding practice of filling temporary vacancies by offering the work to regular employes prior to assigning such work to substitute employes.

In November, 1987 the parties entered into a Letter of Understanding which provided as follows:

1.All *bus drivers, food service employees, custodians, and engineers will request in writing, to their immediate supervisor, an interest to move to a temporarily vacated position. If approved, the employee will begin to receive pay for the position the day they begin, or no later than two (2) working days following the date the request was received.

2.The school district must know or be reasonably assured that the job will be vacated for 7 working days or more beyond the receipt of request.

3.The district agrees that any decision regarding a regular employee moving to a position made available as a result of the absence of another regular employee, would not be made in an arbitrary or capricious manner.

*To be included only if bus driver letter of understanding is signed.

The parties 1987-1990 collective bargaining agreement, which was in effect at the time that the instant disputes arose, was signed on December 15, 1987. The language of the November, 1987 Letter of Understanding was incorporated in all material respects into Article VI, Section 1, D of the 1987-90 agreement.

Grievances Numbered 1, 3, 4, 6, 7, 8, and 9

The Head Cook at the Senior High School was absent from work due to surgery. The District assigned the Assistant Head Cook to the Head Cook position and assigned a substitute employe to the Assistant Head Cook position. The Union claims that Kitchen Assistant Marge Palumbo should have been offered the work of the Assistant Head Cook on August 29, 30 and 31 and on September 5, 6, 7 and 8.

Grievance No. 5

On August 30, 1989, Kitchen Assistant Marge Palumbo requested to take a floating holiday on September 1, 1989. The request was granted. On September 1, 1989, a substitute employe was assigned to work as Assistant Head Cook at the Senior High. The Union claims that Marge Palumbo should have been offered the work as the Assistant Head Cook at the Senior High on September 1, 1989.

Grievance No. 10 and 11

On September 21 and 22, 1989, the Head Baker at the Senior High was absent from work. The Assistant Baker was assigned to the Head Baker position. A substitute employe was assigned to the Assistant Baker position. The Union claims that Kitchen Assistant Marge Palumbo should have been offered the Assistant Baker position on September 21 and 22, 1989.

Grievance No. 12

On September 19, 1989, a Kitchen Assistant who works a seven hour shift was absent from work. A substitute employe was assigned to work the absent employe's seven hour shift. The Union claims that Kitchen Assistant Marge Palumbo, whose shift had fewer hours than the absent employe, should have been offered the opportunity to work the longer hours of the absent employe.

Grievance No. 13

A Kitchen Assistant was absent from work on October 5, 1989. A substitute employe was assigned to work in the absent employe's position. The Union claims that Kitchen Assistant Grace Anderson should have been offered this work, which would have provided Anderson with longer hours.

Grievance No. 14

On September 27, 1989, the Head Cook at the Senior High was absent from work. The Assistant Head Cook was assigned to work as the Head Cook. A substitute employe was assigned to work as Assistant Head Cook. The Union claims that Kitchen Assistant Marge Palumbo should have been offered the Assistant Head Cook work.

Grievances Numbered 15 and 16

On October 2, and 4, 1989, a Kitchen Assistant was absent from work. A substitute employe was assigned the work of the absent employe. The Union claims that Kitchen Assistant Marge Palumbo should have been offered the work, which work would have provided Palumbo with more hours.

Grievance No. 17

On September 22, 1989, an Assistant Head Cook was absent from work. A substitute employe was assigned the work of the absent employe. The Union claims that Mary Omberg should have been offered the Assistant Head Cook work.

POSITION OF THE PARTIES 1/

Union

The Union argues that there is no clear contractual language existing between the parties which specifically addresses temporary vacancies of less than seven (7) days, but that there is a past practice governing the filling of such vacancies which must be given effect herein, i.e., that temporary vacancies are filled by moving regular employes into the temporary vacancies and then utilizing a substitute employe to fill-in the few remaining hours and/or the lower paying classification. Since this practice existed for a period of at least seventeen (17) years, it must be concluded that the past practice was known by both parties and was an accepted way of conduct between the parties. The Employer has not demonstrated a need to change this practice due to a legitimate business necessity.

1/ The parties have requested that the Arbitrator retain jurisdiction for the purpose of resolving any disputes over the remedy if the Union should prevail in the grievances.

The past practice fills a "gap" in the parties' collective bargaining agreement. Arbitrators have recognized that an established practice may be used, not to set aside contract language, but to fill-in contract "gaps". (Cites omitted) The past practice which has existed for seventeen (17) years is binding upon the District. Should the Employer wish to change this practice, it must do so during negotiations. The grievances should be sustained and the District should be ordered to cease and desist the actions which gave rise to the grievances and make the grievants whole.

District

The letter of understanding dated November 9, 1987 was incorporated into the current contract, which was executed on December 11, 1987. Both the letter and the contract provide that Union members can change jobs to fill vacancies that exceed seven days, by application to Management. To set aside the negotiated contract language and use the same procedure to fill vacancies that are less than seven days, as the Union argues, would be to provide the Union with a benefit that it did not negotiate.

As the record establishes, the fall of 1989 was unusual for the numbers and scope of the absences of employes in the higher classification. Management's decision to reduce further confusion by not bumping all of the employes all over the District was based upon legitimate business concerns and is consistent with the District's contractual rights. To accept the Union's argument would require Management to telephone one employe after another to offer them the chance to change jobs, schools or hours on a daily basis. The Union is attempting to gain through arbitration what it failed to gain through negotiation. The grievances are without merit and, therefore, should be dismissed.

DISCUSSION

The Union argues that there is a past practice with respect to filling vacancies which must be given effect as an implied term of the contract. For the reasons discussed below, the undersigned does not find the Union's argument to be persuasive.

Neither the parties 1985-87 collective bargaining agreement, nor any other prior collective bargaining agreement contained any language concerning the filling of temporary vacancies. However, at the time of the expiration of the 1985-87 collective bargaining agreement, the parties had a longstanding and well-established practice of filling vacancies caused by the temporary absence of regular employes, i.e, the work normally performed by the absent employe was offered to regular employes before the District assigned the work to substitute employes. The duration of the temporary vacancy was not a factor in filling the vacancy. That is, regardless of the duration of the vacancy, the work of the vacant position was offered to regular employes prior to assigning the work to substitute employes.

In November, 1987, during the hiatus period between the expiration of the 1985-87 agreement and the execution of the 1987-90 agreement, the parties entered into a written Letter of Understanding which set forth a procedure for filling temporary vacancies. The Letter of Understanding did not incorporate, nor reference, the past practice of offering the work of all temporary vacancies to regular employes prior to assigning such work to substitute employes. Rather, the Letter of Understanding provided regular employes with a right to fill a temporary vacancy in circumstances in which the District "Must know or be reasonably assured that a job will be vacated for seven (7) working days or more beyond the receipt of the regular employe's written request to work the temporary vacancy." By entering into the Letter of Understanding, which set forth a procedure for filling vacancies which differed from that of the past practice, the parties repudiated the past practice.

At the time of hearing, Benjamin Kanninen had been Superintendent of Schools for three years. Kanninen stated that, prior to the execution of the November, 1987 Letter of Understanding, the previous Superintendent told the Union that it was repudiating the unwritten practice of filling temporary vacancies and that, as a result of this repudiation, the parties met to negotiate a mutually acceptable procedure for filling temporary vacancies. Kanninen, who was Superintendent at the time that the parties executed the November, 1987 Letter of Understanding, further stated that the intent of the Letter of Understanding was to require bargaining unit employes to submit a written request to fill-in for a temporary vacancy and to limit the bargaining unit employes' right to fill-in for temporary vacancies to instances in which the District had knowledge that the position would be vacant for at least seven days.

Kanninen's testimony concerning the genesis of the Letter of Understanding was not contradicted herein. The evidence of the negotiation history of the Letter of Understanding supports the conclusion that, at the time that the parties entered into the November, 1987 Letter of Understanding, the previous practice of filling temporary vacancies had been repudiated.

The provisions of the November, 1987 Letter of Understanding were incorporated, in all material respects, into Article VI, Section 1, D, of the parties' 1987-90 collective bargaining agreement, which agreement was executed in December, 1987. It is not evident that, between the execution of the November, 1987 Letter of Understanding and the execution of the 1987-90 collective bargaining agreement, that the parties had any discussions concerning the language of Article VI, Section 1, D.

Evidence of past practice may be used to interpret ambiguous contract language, to establish an implied term of contract, or to demonstrate that unambiguous contract language has been amended, by mutual agreement. 2/ In each instance, to be effective, such evidence must be (1) unequivocal, (2) clearly enunciated and acted upon and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. 3/

For the reasons discussed supra, the undersigned is persuaded that, at the time the parties entered into the 1987-90 agreement, there was no past practice with respect to filling temporary vacancies which was accepted by both parties. Accordingly, the evidence of practices which existed prior to the execution of the 1987-90 agreement may not be used to interpret ambiguous language of the 1987-90 contract, to establish an implied term of contract, or to demonstrate that unambiguous contract language has been amended by mutual consent.

Given the record presented herein, the undersigned is satisfied that, at the time of the incorporation of Article VI, Section 1, D, into the 1987-90 collective bargaining agreement, the parties intended the filling of temporary vacancies to be governed solely by the plain language of Article VI, Section 1, D. The plain language of Article VI, Section 1, D, does not provide bargaining unit employes with an unrestricted right to fill temporary vacancies. Among the restrictions is the requirement of Section D(1), i.e., that "the school district must know or be reasonably assured that a job will be vacated for seven (7) working days or more beyond the receipt" of the employe's written request to be assigned to the vacancy.

There is no contractual right to be assigned to temporary vacancies which do not meet the requirements of Article VI, Section 1, D(1). It follows, therefore, that the District has the right to decide the manner in which it will fill temporary vacancies which do not meet the requirements of Article VI, Section 1, D(1).

The record demonstrates that, from the execution of the 1987-90 agreement until the end of the 1988-89 school year, the District did fill temporary vacancies which did not meet the requirements of Article VI, Section 1, D(1) by offering the work to regular employes, before assigning such work to substitute employes. At the beginning of the 1989-90 school year, the District began assigning substitute employes to fill such vacancies, which assignment generated the grievances at issue herein.

The District's conduct from the time of the execution of the 1987-90 agreement until the end of the 1988-89 school year does not serve to establish a binding past practice. Rather, it must be concluded that the District's decision to fill vacancies which did not meet the requirements of Article VI, Section 1, D(1), by offering the work to regular employes, involved the exercise of the District's right to unilaterally determine the manner in which such vacancies are filled.

The conclusion that the District's conduct, from the time of the execution of the 1987-90 agreement until the end of the 1988-89 school year, does not demonstrate an intent to be bound to a procedure of filling vacancies of less than seven days by offering the work to regular employes is supported by the settlement of the Grace Armstrong grievance of December 17, 1987. When this grievance was settled on January 11, 1988, Gerald Peck, Assistant Superintendent, issued the following letter to Union Representative James Ellingson: 4/

> After meeting this afternoon with Leona and Judy, a decision was made by Judy to drop the grievance of 12-17-87. The concern of the Union was that a substitute was hired in a job which should have gone to a regular employee at Lake Superior School.
>
> It was mutually agreed that the regular employee that was out

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2/ Elkouri and Elkouri, How Arbitration Works, Fourth Edition, BNA (1985) p. 437.

3/ Id. at 439.

4/ Union Exhibit 2.

did not properly notify the Director of Food Service about being absent. When notified, the food service secretary immediately contacted a substitute for the job, which is normal practice. If the district had known of the absence of the regular employee, the position would have been offered to the next senior employee at Lake Superior, if the Director found that move to be in the best interest of the district and food service department.

It has and will continue to be the District's position that it is management's right to decide when a regular employee will be used in a short term vacancy of another regular employee. (Emphasis supplied)

I am pleased that we were able to solve this misunderstanding without a hearing before the Board of Education.

For the reasons discussed supra, the undersigned is satisfied that while the District may fill temporary vacancies which do not meet the requirements of Article VI, Section 1, D(1) by offering the work to regular employes, there is no contractual obligation to do so.

Grievances Numbered 10, 11, 12, 13, 14, 15, 16 and 17

Grievances No. 10, 11, 12, 13, 14, 15, 16 and 17 involve temporary vacancies due to an employe absence of two days or less. The Union does not argue, and the record does not demonstrate, that the District knew or had any reasonable assurance that any of these vacancies would continue for at least seven working days beyond the receipt of the employe's request to work the vacancy. Since it is not evident that any of these vacancies met the requirements of Article VI, Section 1, D(1), the Grievants do not have any contractual right to be assigned to these vacancies. The District did not violate the collective bargaining agreement when it assigned substitute employes to the temporary vacancies which are the subject of Grievances Numbered 10, 11, 12, 13, 14, 15, 16 and 17.

Grievances Numbered 1, 3, 4, 5, 6, 7, 8 and 9

Prior to the start of the 1989-90 school year, the District was advised by Mary Brochu, Head Cook at the Senior High, that she would be absent from work due to surgery. Brochu worked on August 29, 1989, her first scheduled day of work, and was absent from August 30, 1989 until September 11, 1989. 5/ On August 30, 1989, the Grievant, Marge Palumbo, submitted a written request to work as Assistant Head Cook during Brochu's absence. On August 30, 1989, Pat Halliday the District's Director of Food Services denied the request on the basis that she expected Brochu's absence to be brief. During Brochu's absence from work, the Assistant Head Cook was assigned to work as the Head Cook and a substitute employe was assigned to work as Assistant Head Cook.

At the time that Brochu advised the District of her surgery, she told the District that she would not know her return to work date until after she was examined by her Doctor postoperatively. Prior to September 7, 1989, Brochu told Halliday, that she would be seeing her Doctor on September 7, 1989 and agreed to call Halliday to tell Halliday the results of this examination. The record fails to establish the exact date upon which Halliday learned of the September 7, 1989 examination date. Brochu saw her Doctor on September 7, 1989, at which time she was given permission to return to work on September 11, 1989. Brochu telephoned Halliday on September 8, 1989 and informed her that she would return to work on September 11, 1989.

For Palumbo to have a contractual claim to the vacancy caused by the Assistant Head Cook's assumption of Brochu's position, the record must demonstrate that the temporary vacancy is one which meets the requirements of Article VI, Section 1, D(1), i.e., that the District knew or had reasonable assurance that the vacancy would continue to exist for at least seven working days beyond the receipt of Palumbo's written request to fill the vacancy. On August 30, 1989, the date of the receipt of Palumbo's written request to fill the vacancy, the District did not know when Brochu would return to work. 6/ Assuming arguendo, that on August 30, 1989, Halliday knew that Brochu would be seeing her Doctor on September 7, 1989, there is no reasonable basis to conclude that Halliday, or any other District representative, knew, or had any reasonable assurance, that Brochu would not be returning to work on

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5/ Grievance No. 1 alleges that Brochu was off work on August 29, 1990. The Arbitrator has credited Brochu's testimony that she worked on August 29, 1989 and that this date was an inservice day.

6/ The record fails to reveal the nature of Brochu's surgery. There is no basis to conclude that Brochu's surgical procedure was of a type that would provide the District with a reasonable assurance that Brochu would be absent for more than seven days beyond August 30, 1989.

September 8, 1989. 7/

7/ The Assistant Head Cook was assigned to Brochu's position. Thus, it is Brochu's absence which determined the length of the temporary vacancy in dispute.

The record presented herein fails to demonstrate that the District knew, or had any reasonable assurance, that the Assistant Head Cook position would be vacant for at least seven working days beyond the receipt of Palumbo's request to fill this vacancy. Accordingly, Halliday did not violate the collective bargaining agreement when she denied this request. 8/

Based upon the above and foregoing, as well as the record as a whole, the undersigned issues the following

AWARD

1. The District did not violate the collective bargaining agreement by assigning substitute employes to work in the temporary vacancies which are the subject of Grievances numbered 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.

2. Grievances 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 are denied and dismissed.

Dated at Madison, Wisconsin this 24th day of August, 1990.

By _____
Coleen A. Burns, Arbitrator

8/ Taking into consideration that September 4, 1989 was a holiday, Labor Day, Brochu was actually absent for six working days beyond the date of Palumbo's request, i.e., August 31 and September 1, 5, 6, 7 and 8.