BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 523, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES	Case 34 No. 44763 MA-6409
and	
PARKVIEW SCHOOL DISTRICT	

Appearances:
Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Mr. James Ruhly, Esq., Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, P.O. Box 1664, Madison, Wisconsin 53701-1664, appeared on behalf

ARBITRATION AWARD

On November 2, 1990, Local 523, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission to provide an arbitrator to hear and issue a final and binding award on a grievance pending with the Parkview School District. Following jurisdictional concurrence from the District, the Commission, on December 5, 1990, appointed William C. Houlihan, a member of its staff, as Arbitrator. A hearing was conducted on February 12, 1991 in Orfordville, Wisconsin. The proceedings were not transcribed. Briefs were filed and exchanged by April 15, 1991.

This grievance involves the right of employe Marion Vogel to bump another employe.

BACKGROUND AND FACTS

The parties submitted the following stipulation as to facts:

A. The Grievant, Marion Vogel had been employed by the Parkview School District as a teacher's aide since December, 1982. Initially, she worked at the Orfordville Elementary School four (4) hours a day.

B. During the 1984-85 school year Vogel started working three hours a day as an EEN aide in the LD Room at the Orfordville Elementary School, with an additional hour as a teacher's aide for a total of four (4) hours a day.

C. In June of 1987 the District posted a vacancy for a three hour a day EEN Aide in the EMR Room at the Footville Elementary School. Vogel offered to take the vacancy. Since the combination of the positions would result in Vogel working in excess of six hours a day, the Footville position was reduced by mutual agreement to two and one-half hours a day, and offered to Vogel for a total of five and one-half (5 1/2) hours a day. Vogel accepted and worked 5 1/2 hours per day for the 1987-88 school term.

D. On July 12, 1988, the Board of Education voted

to eliminate the 3 hour EEN aide position at Orfordville Elementary School due to low enrollment. (Jt. Exh. 5) On July 18, Vogel contacted Vicky Baldridge, the District's Business Manager to inquire as to the status of her position and her bumping rights. Vogel informed Baldridge of her desire to bump into a seven hour IMC Aide position at Parkview Jr./Sr. High School. (Other aspects of this conversation are in dispute.)

E. On July 19, 1988, Baldridge informed Vogel that aide Geri Brown was leaving employment and her 3-hour position was going to become available, and Baldridge could offer that position to Vogel. (Other aspects of this conversation are in dispute.) Vogel did not accept Baldridge's suggestion.

F. By letter dated August 8, 1988 (Jt. Exh. #6), the District informed Vogel that her assignment for the 1988-89 school year would be as a two and one-half hour Aide at Footville. On or about August 11 the District posted the three hour EEN Aide at Footville position which Geri Brown had previously held.

G. On August 17 a meeting was held during which the parties attempted to resolve Vogel's concerns. A District offer to Vogel of 6 hours for 1988-89 was rejected by Vogel two days later. After Vogel's rejection, the District involuntarily assigned Vogel to Geri Brown's 3-hour position, and the grievance which is the subject of this grievance proceeding was filed.

H. The EEN Aide and IMC Aide positions are the same classification in the labor contract. Martha Aasen was the District's IMC Aide since fall 1985. (Stipulation #3) Marion Vogel had greater seniority that (sic) Martha Aasen.

In 1985 Don Albright, the High School Principal, acting as the Superintendent's designee, placed Martha Aasen into the IMC position, which had been posted, after determining Marion Vogel was not relatively equal to Ms. Aasen. Ms. Vogel did not challenge that determination. The contract language in effect at that time is identical to that found in Sec. 7.02 of the current collective bargaining agreement.

Paragraph "D" of the parties' stipulation makes reference to a disputed telephone conversation between Vogel and Baldridge. According to Vogel, Baldridge indicated that she (Vogel) had bumping rights as a consequence of her position being reduced to 2 1/2 hours. Vogel indicated that Baldridge called the next day and indicated that she had been directed to inform Vogel that there had been a job reduction, not elimination, and so there were no bumping rights. Baldridge denies indicating that bumping rights existed; rather that she told Vogel she would look into it and get back to her. Baldridge claims she called Vogel the next day and told her there were no bumping rights.

Vogel turned the 3 hour position (created by Geri Brown's departure) down

because she understood it was for one year only and involved working with a child who bites, kicks and scratches. What is disputed is whether the offer to her was characterized as for one year and whether or not she ever indicated the basis for her rejection of that offer. Whatever the discussion relative to this student, District officials were aware of Vogel's concerns. Vogel was subsequently injured by the student.

ISSUE

The parties were unable to stipulate the issue.

The Union advances the following:

> Did the Employer violate the collective bargaining agreement by failing to allow the grievant (Marion Vogel) to exercise her bumping rights? If so, what is the appropriate remedy?

In the District's view, the following issues are raised:

> When the Board of Education took action in July, 1988 which would in effect reduce grievant from 5 1/2 hours the prior year to 2 1/2 hours the ensuing year, did grievant have a right to "bump" under section 7.05 of the Agreement? (If answered in the negative the remaining issues need not be answered and the grievance should be dismissed.)
>
> If issue number 1 is answered in the affirmative, did the District violate grievant's rights when it restored grievant to the identical work load of 5 1/2 hours for the ensuing year (thereby eliminating any reduction in her hours) rather than allowing her to bump?
>
> If issue number 2 is answered in the affirmative, did such right permit grievant to bump into a position occupied by an employee with whom grievant previously had been determined not be "relatively equal in qualifications and abilities," which determination she had not grieved? (If answered in the negative the grievance should be dismissed.)
>
> If issues 1, 2 and 3 are answered in the affirmative, did the right to bump permit grievant to bump into a position of greater hours than grievant had ever been employed in the District? (If answered in the negative the grievance should be dismissed.)
>
> If issues 1 through 4 are answered in the affirmative, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE VII - SENIORITY

> 7.01 Seniority. Each employee shall earn, accumulate or lose seniority as follows:
>
> A) Seniority shall be determined

and accumulated as to the total hours worked for the School District;

. . .

7.02 Job Posting Procedures. Whenever there is a job opening within the school district, either as a result of a termination, promotion, transfer, or creation of a new position, the Employer shall post a notice on all designated bulletin boards. Such notice shall provide the job title, job description, qualifications, rate of pay and job location. The posted notice will specify how long it will be posted, which will be no less than five (5) weekdays (excluding weekends, holidays, and vacations) unless an emergency compels otherwise. Such posting shall provide space for each interested employee to sign for the job opening. The Parkview chief steward will be sent a copy of the posting along with the five (5) building representatives.

In filling unit positions, if applicants within the unit are determined by the Superintendent to be relatively equal in qualifications and abilities to each other and to outside applicants, the most senior applicant from within will be appointed.

All employees who apply for open positions and are not selected, shall be notified in writing by the Employer stating the reasons they were not selected.

. . .

7.05 Layoffs. The Employer shall have the right to reduce the number of jobs in any classification and/or department because of shortage of funds, lack of work, or because of a change in organizational duties. Employees whose jobs have been eliminated shall have the right to bump any junior employee in their department. The five departments are clerical, custodial, food services, aides and transportation. Clerical will consist of secretaries, bookkeepers and computer operators.

Such junior employees who have lost their positions as a result of a bump shall have the right to exercise their seniority in the same manner as if their job had been eliminated. Employees who are without jobs as a result of a bump or a reduction in the number of positions shall be laid off and shall be placed on a re-employment list. Employees who do not choose to exercise their bumping rights shall also be laid off and placed on the re-employment list.

7.06 Re-employment List. The Employer shall maintain a re-employment list of such laid off employees. Such list shall be in the order of the employee's seniority at the time of the layoff with the most senior being number one on the list. Employees on the re-employment list shall maintain seniority as

> provided in the Agreement and shall maintain recall rights for one (1) year from the date of layoff.
>
> 7.07 Recall from Layoff. Employees shall be recalled from layoff in accordance with their seniority. The Employer shall not employ any new employees in a department for which there exists a qualified employee on the re-employment list. Notice of recall shall be sent by the Employer to the laid off employee's last known address.

POSITIONS OF THE PARTIES

In the view of the Union a layoff occurred when the Board eliminated the 3 hour EEN Aide position at Orfordville due to low enrollment. The elimination of 55% of an employe's workday and pay constitute a layoff. The position eliminated was a clearly identified position.

Vogel was not offered additional hours until after she attempted to exercise her contractual bumping rights. She did not accept the hours offered because of job security and personal safety considerations.

The collective bargaining agreement guarantees employes the right to bump any junior employe in their department. The grievant was senior to the IMC Aide and both were within a common department. The Employer does not have a unilateral right to transfer employes in violation of the employes' right to seek a position of their own choosing.

As a remedy, the Union seeks the wages and benefits lost by virtue of the employer's refusal to allow Vogel to bump.

In the view of the District, Vogel had no bumping rights. Bumping rights are available to employes whose jobs have been "eliminated" and who are "without jobs". They are not available to employes whose hours are reduced. Any rights Vogel may have possessed were extinguished when the District restored hours equal to those eliminated. She suffered no loss, and thus has no claim, the Employer argues:

> Vogel seeks to bump into a position which she could not secure through a qualifications assessment in the posting procedure. There is no evidence in the contract or from bargaining history that such a result was intended. If Vogel is correct, an unsuccessful employee under the section 7.02 posting process can undermine the judgments reserved to the employer in section 7.02 by "bumping" under section 7.05 in the event of any reduction in assigned hours of work. Such a reading of the contract makes little, if any, sense.

Rather, the District contends that its position is supported by harmonizing Secs. 7.02, 7.05, 7.06 and 7.07.

It is the Employer's view that the contract should not be used to allow a part-time employe, who has never qualified for Board-paid benefits, to bump into a position of greater hours that would strip another employe of benefits. The contract creates a method for a part-time employe to attain Board-paid benefits, which is to sign a posting for a 30 + hour a week position. Vogel attempted to do so in 1985 and was subjected to the qualifications assessment.

The Board characterizes the Union's position as follows:

> This grievance seeks to exploit the Board's July 12, 1988 action into an incident of good fortune. As grievant apparently sees it, a reduction in hours means: 1) she can decline assignments based on her assessment of the "difficulty" of handling the students involved (even when the proposed assignment would restore hours to pre-reduction levels); and 2) she can secure a job she was previously denied on the basis of qualifications (see V, C, below); and 3) she can enhance her employment status by expanding her employment over pre-reduction status at the expense of another employee.

The Board urges dismissal of the matter.

DISCUSSION

The heart of this dispute revolves around the question of whether or not Vogel ever had bumping rights. The Union claims such a right under Article 7.05. The Union claims that such a substantial reduction in hours and wages constitute a layoff. However, as argued by the District, the clause reserves bumping rights to those "whose jobs have been eliminated." "Employees who are without jobs"...are "laid off", placed on a re-employment list and subject to recall. The Union's construction of the Article plays loosely with the literal terms used. It is not at all obvious to me that a reduction in hours was intended to trigger bumping rights. There is no evidence relative to a practice or a bargaining table understanding that supports the Union's interpretation. The words of the contract stand alone. On their face, the words support the District.

Ms. Vogel testified that during the 1987-88 school year she worked in two separate and different positions; one at Footville and another at Orfordville. She was not paid mileage between the schools because the positions were separate. If she took a leave day, she was required to file two slips, one for each position. However, her individual contract for the 1987-88 year is a single contract for 5 1/2 hours per day.

While it may well be that Ms. Vogel held two separate positions in 1987-88, her job consisted of those two assignments. Her job was not "eliminated". She was not "without a job". She did not "lose a position as a result of a bump." In my view, she had no right to bump.

I do not view the text of the disputed conversation between Vogel and Baldridge to be critical. Assuming that Vogel is correct and that Baldridge believed her to have bumping rights, Baldridge was wrong. The contract does not so provide. Any error in communication was cured the next day. There was no reliance upon any such representation.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 24th day of October, 1991.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator