BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
THE CHEQUAMEGON UNITED TEACHERS, and LESLIE PETERS	Case 16 No. 45437 MA-6600
and	
THE SCHOOL DISTRICT OF MELLEN	

Appearances:
Mr. Barry Delaney, Executive Director, Chequamegon United Teachers, Route
Ms. Kathryn J. Prenn, Esq., Weld, Riley, Prenn & Ricci, Attorneys at Law,
715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-

ARBITRATION AWARD

On March 13, 1991, the Chequamegon United Teachers and the School District of Mellen filed an arbitration request with the Wisconsin Employment Relations Commission, asking the Commission to appoint William C. Houlihan, a member of its staff, to hear and render a final and binding award on a pending grievance. A hearing was conducted on June 4, 1991 in Mellen, Wisconsin. The proceedings were not transcribed. Post-hearing Briefs and Reply Briefs were filed and exchanged by August 13, 1991.

This grievance involves the recall rights of employe Leslie Peters.

BACKGROUND AND FACTS

The School District of Mellen and the Chequamegon United Teachers are signatories to a collective bargaining agreement governing the wages, hours and conditions of employment for the District's unionized regular full-time and regular part-time support staff employes. The January 1, 1989 through June 30, 1991 contract is the first collective bargaining agreement between the parties.

During the 1989-90 school year, Leslie Peters was employed as a Day Care Aide and worked approximately seven hours per day. Ms. Peters position was classified within the Aides department. The District closed its day care center effective with the 1990-91 school year, and Ms. Peters was laid off. Prior to the start of the 1990-91 school year Ms. Peters was recalled to a playground/office aide position. In this position Ms. Peters worked approximately two and three-quarter hours per day.

From time to time, the District needs to employ temporary and/or substitute employes to fill in for regular employes who are sick or on vacation. When a regular employe is absent, the District usually hires a substitute to fill in. In order to have a pool of substitutes, the District advertised for substitutes at the beginning of the 1990-91 school year. A substitute list for support staff was developed from the persons who responded to the ad. That list was subsequently expanded during the early part of the 1990-91 school year. District Administrator Sally Sarnstrom directed the Principal and the head secretary to use this list when assigning substitutes for support staff employes.

On October 19, 1990, Ms. Peters wrote Sally Sarnstrom the following letter:

When there is a need to hire temporary workers to fill any of the support staff or other work that arises, I would like for you to consider hiring me for those hours.

I know that an ad was placed in the local paper asking for substitutes for these temporary positions. The reason I never placed an application was that I thought any extra hours would be offered to union personnel who are on layoff or partial layoff and if any of the union members didn't want these hours then temporary personnel would have been properly considered.

In talking with Ms. Sarnstrom and Barry Delaney, union representative, I have found that there was no apparent need to ask anyone on layoff to fill in the temporary hours. Therefore, I am asking that if any additional hours or temporary work becomes needed that you would consider me for this work.

Sincerely,

Leslie A. Peters /s/
Leslie A. Peters

Ms. Peters was not hired for any of the part-time temporary work that arose during 1990-91. Rather, the District, when it needed aides, hired from outside the bargaining unit for a total of 179 hours during the 1990-91 school year. The predominance of aide work was filled by a non-bargaining unit member by the name of Mary Morris. Ms. Morris first applied for placement on the substitute list in November of 1990. She had no prior training or experience in any of the positions filled.

Lauri Neibauer, a District secretary, whose position is included within the bargaining unit, took a three-month maternity leave. Anticipating Ms. Neibauer's leave, Leslie Peters wrote Sally Sarnstrom the following letter on November 14, 1990:

Dear Ms. Sarnstrom:

I would like to apply for the secretarial job to replace Lauri Neibauer while she is on maternity leave.

I am familiar with the Mellen school office procedures, as well as Apple II computer programs. I have taken word processing courses on two separate occasions at Gogebic Community College, Ironwood, Michigan.

Please consider that I am currently a partially laid-off District employee and am invoking my recall rights.

Your prompt response on this matter is requested.

Sincerely,

Leslie A. Peters /s/
Leslie A. Peters

Ms. Peters was not hired to replace Ms. Neibauer. Rather, the District hired Dawn Sederholm, a non-bargaining unit employee as secretary for a total of 592 hours during the 1990-91 school year.

The District hired Tom Polencheck to perform custodial work during the 1990-91 school year. As of the date of the hearing, Mr. Polencheck had worked 800 hours.

Ms. Peters filed a series of grievances over the District's failure to provide her with any of this part-time and/or substitute work. Those grievances were consolidated into a single hearing.

ISSUE

At hearing the parties were unable to stipulate the issue to be decided.

The Union feels that the issues are as follows:

> Did the Mellen district violate the collective bargaining agreement when it did not notify employees of vacancies during the 1990-91 year, did not recall Leslie Peters from a partial layoff, and did not fill positions with a bargaining unit member who applied? If so, what should the appropriate remedy be?

The District would frame the issues as follows:

A. Has the District violated the collective bargaining agreement by not hiring Leslie Peters for substitute aide, secretarial and custodial hours?

B. If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - RECOGNITION

A. The Board of Education acting for the School District of Mellen recognizes the Chequamegon United Teachers as the exclusive and sole bargaining representative for all regular full-time and regular part-time employees of the Mellen School District, excluding professional, confidential, supervisory and managerial employees.

ARTICLE VIII - SENIORITY, LAY-OFF AND RECALL

. . .

B. LAY-OFF

When the District determines that a lay-off (in whole or in part) shall occur within a department (food service, clerical, aides, and custodians) employees shall be laid off in inverse order of seniority within the department.

C. RECALL

Rehiring of employees who have been laid-off shall be in reverse order to that of laying-off, provided the recalled employees are qualified to perform the available work. Recall rights shall only apply to positions within the department from which the employee was laid-off. Laid-off employees shall retain seniority rights for the remainder of the school year in which the lay-off took effect plus the following school year. The Notice of Recall for any employee who has been laid-off shall be sent by certified mail to the last known address of the employee. Employees on lay-off shall forward any change of address to their immediate supervisor.

Employees on lay-off shall be notified of vacancies outside of their department and shall have the same rights under the Job Posting Article as employees who have not been laid-off.

ARTICLE IX - JOB POSTINGS

When there is a vacancy within the bargaining unit, the District shall notify each bargaining unit member of the vacancy at least ten (10) working days prior to the vacancy being filled. Present employed employees shall be selected to fill vacancies provided they are qualified to do the work and apply for the position. If two or more qualified bargaining unit members apply for a vacancy, the employee with the most seniority shall receive the position.

Current employees selected for a vacancy or a new position shall serve a trial period of twenty (20) work days in said position. Should the employee not be qualified or should the

employee so desire, he/she shall be reassigned to his/her former position without loss of seniority during the trial period.

ARTICLE XIV - MANAGEMENT RIGHTS

The management of the school and the direction of all school employees is vested exclusively with the Board of Education and the District Administrator acting as its agent. The Board retains the sole right to direct the employees of the District; to assign work or co-curricular assignments: to select, hire, lay-off, determine job content; to determine hours of work; to determine the process, methods and procedures to be used in managing the schools. The Board will not contract out for goods and services if such subcontracting would result in the reduction of time and/or layoffs of any bargaining unit member.

Rights of management shall not be abridged or limited unless they are clearly and expressly restricted by some specific provision of this agreement. The parties agree that the above enumerated rights shall not be construed in a manner which conflicts with applicable statutes.

ARTICLE XVI - GRIEVANCE PROCEDURE

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B. Definition of Grievance: Any disagreement involving wages, hours and conditions of employment between the Union and the District can be grieved. Only those grievances involving disagreement of interpretation and/or application of a specific provision of this agreement can be advanced to binding arbitration.

. . .

4. Level Four:
If the Union is not satisfied with the School Board's response, the Union may appeal for binding arbitration within ten (10) days of receipt of the School Board's response. The District and the Union shall first attempt to voluntarily agree upon an arbitrator. In the event they are unable to agree, the arbitrator shall be selected from a panel of three on an alternate basis from a list previously agreed on between the District and the Union. This panel shall be selected from the Wisconsin Employment Relations

> Commission (WERC) staff. If a panel of three has not been agreed to, then the WERC shall appoint a staff member.
>
> It is understood that the function of the arbitrator shall be to provide a binding decision as to the interpretation and application of specific terms of this agreement. The arbitrator shall not have the power to issue any opinions that would have the effect of subtracting from, modifying, or amending any terms of this agreement.
>
> . . .

POSITIONS OF THE PARTIES

In the Union's view, Ms. Peters has recall rights. During school year, '89-'90, Peters worked seven hours a day as a day care worker within the aides department. She was subjected to a partial layoff and had recall rights. The aides work, available in 1990-91 fell within the aides department, the same department to which Leslie Peters has recall rights. The fact that the aide work/positions were not in the bargaining unit is irrelevant. The recall rights language speaks to "...provided the recalled employees are qualified to perform the available work." Unlike the language in the posting clause, which speaks to a vacancy within the bargaining unit, the language within the recall provision simply uses the term "available work". Available work and bargaining unit work do not mean the same thing. Had the parties wanted the recall rights classification of vacancies to mean the same thing as the classification of vacancies within the job posting provisions, they would have used the same terms. They did not. The only recall restriction is that the laid-off employee be capable of performing the available work. Peters is clearly capable.

The Union believes Ms. Peters to also have transfer rights. Two positions opened: a custodial and a secretarial. Article IX requires that those positions be posted. The District failed to so post. The work performed by both of these positions is bargaining unit-type work. Polencheck was hired to perform work that regular bargaining unit custodians were unable to attend to. Sederholm was hired to replace Neibauer, a bargaining unit employe. Both Polencheck and Sederholm were performing work normally performed by bargaining unit employes. Article IX requires that those vacancies be posted. It further requires that employes of the District who are "qualified" to do the work be given the posted position. According to the Union, Peters was the only bargaining unit applicant who was qualified and was entitled to the work. The Union points out that the District initially proposed the following language to be added to the job posting language during bargaining:

> Nothing herein shall preclude the District from filling a vacancy with an applicant from outside the bargaining unit.

The District was unsuccessful in getting the right to fill vacancies by outside candidates when there are qualified bargaining unit members who apply. What the District is trying to do now is to achieve that which they could not obtain through bargaining.

It is the Employer's view that the clear, unambiguous language of the contract supports its position. The Employer urges that the contract be read as a whole. The bargaining unit consists of regular full-time and regular part-time employes. Substitutes and temporary employes are not a part of the unit. The Management Rights clause gives the employer broad rights restricted only where specific provisions of the Agreement clearly and expressly do so. The employer had a right to hire non-unit substitutes rather than give the work to the Grievant.

The Recognition Clause does not include substitutes. That, coupled with the Management Rights clause creates a burden on the Union to demonstrate that contractual language exists which expressly makes recall and job posting provisions applicable to substitute or temporary work. The Union has failed to meet that burden.

Recall rights only apply to the department from which the employe was laid off. For vacancies outside that employe's department the job posting language, rather than the recall language, is applicable. No vacancy existed, so neither recall nor job posting provisions apply. The employer points out that notification of recall is by certified mail. Absences calling for substitute employes typically arise without warning and without notice. The employer could never have sent a certified letter. In the employer's mind, this fact alone argues that the parties never intended that the recall provision be applicable to substitute work.

If a vacancy arises outside the department, Article IX, "Job Posting", applies. The first paragraph of this article requires that employes receive ten days notice. Under the circumstances of the work involved here, such notice is not possible. The second paragraph speaks of a twenty-day trial period. Substitute work typically does not last twenty days. This points out the inapplicability of the clause. Read together, the provisions do not apply to substitute work, for which there is an incumbent.

The Employer argues that the parties' bargaining history further supports the District position. In its initial proposal the Union included the following:

> No new or substitute appointments may be made while those who are laid off are available to fill such vacancies.

The reference to substitute appointments was dropped as the negotiations proceeded. The Board further points to the testimony of School Board member Carol Lynn Holmes a member of its negotiations team. Ms. Holmes testified that she was present at all of the bargaining sessions through the mediation process. She offered uncontroverted testimony that the Board's position throughout the negotiations was that substitutes were not included in the bargaining unit and that substitute work was not covered by the collective bargaining agreement. According to Ms. Holmes there was no mention of substitute work during negotiations beyond reference to the Union's initial proposals.

DISCUSSION

It is the view of the Union that Peters was in partial layoff status, and as such, had recall rights. I agree with the Union's contention with respect to her status. The Union lays claim to three separate forms of work; 1. aide work; 2. secretarial work; 3. custodial work.

Article I, the Recognition Clause, recognizes the Union as the bargaining

representative for "all regular full-time and regular part-time employees..." On its face, the language appears to exclude temporary, and casual employees. Nothing in the record suggests to the contrary. The Employer's testimony with respect to bargaining history suggests that there was never an effort to include temporary employes within the unit. Indeed, nowhere in this proceeding does the Union claim that temporary/substitute assignments fall within the scope of Article I.

To the extent that Peters has recall rights, those rights are limited to aides work. At the time of her layoff, Ms. Peters was in the aides department. By operation of Article VIII, C, her recall rights are restricted to the "department from which the employee was laid off." In my view, there was no "position within the department" created. The employer called Morris into work on an episodic, intermittent, irregular basis. She was, in essence, a substitute under circumstances where other employes were temporarily away from work. It appears that each time Morris was called in, it was to substitute for someone who was either ill, involved in a field trip, or taking a leave. Morris did not fill a "position".

As an employe on layoff, Ms. Peters also enjoyed rights under Article IX, "Job Postings". Her Article IX rights extend to secretarial and custodial work. Her rights with respect to secretarial and custodial work do not include the recall rights provided in Article VIII. In my view, there was no vacancy created with respect to either secretarial or custodial work.

The lion's share of work performed by secretarial employe Dawn Sederholm was performed in the period January through April. That work was as a replacement for employe Lauri Neibauer, who was on maternity leave. It was the realized expectation of the District that Neibauer would return to work from her maternity leave. As a temporary vacancy, Neibauer's vacated position was not a vacancy "within the bargaining unit". As already noted, temporary positions do not fall within Article I, the Recognition Clause. Sederholm also worked a number of hours in the months of April and May. However, nothing in the record suggests that the work performed at that time was ever made a permanent position.

Tom Polencheck performed approximately 800 hours of custodial work for the District during the '90-'91 school year. That is a considerable amount of work. In the beginning of the year, from approximately September 5 through October 12, Polencheck performed work which would normally be performed by District custodians who were otherwise busy constructing portable classrooms. During that period of time, he appears to have worked regularly. Following that, from approximately October 2 through January 11 he substituted for employees who were either vacationing or sick. From mid-January through the balance of the year, ending approximately May 17, Polencheck worked as a substitute for employe Tover who evidently missed a considerable amount of work due to illness. Polencheck worked regularly during this period of time. As of the date of the hearing, it was the employer's uncontradicted testimony that Tover was expected to return to work. Notwithstanding the fact that Polencheck worked a considerable number of hours during the year, I do not believe he occupied a vacant position. During the early part of the year, Polencheck's custodial work was intended to last no longer than it took the regular custodians to complete their portable classroom work. He did continue on intermittently during the Fall. However, this work, like that performed by Morris, was somewhat intermittent and substitute work. The second semester of the year he filled in for an ill Tover. The record indicates that Tover will return to work, thus eliminating the temporary vacancy that existed. As previously noted, temporary positions are not covered by the Recognition Clause.

It may well be that there is ultimately a vacant custodial position. Should that prove to be the case, the Union is free to insist upon compliance with Article IX. However, as of the date of hearing, that had not occurred.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 19th day of February, 1992.

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

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