

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
SCHOOL DISTRICT OF DRUMMOND	:	Case 36
EMPLOYEE'S ASSOCIATION	:	No. 48509
	:	MA-7627
and	:	
	:	
DRUMMOND AREA SCHOOL DISTRICT	:	
	:	

Appearances:

Mr. Barry Delaney, Executive Director, Chequamegon United Teachers, on behalf of the School District of Drummond Employee's Association.
Spears, Carlson & Lindsey, Attorneys at Law, by Mr. Jack A. Carlson, on behalf of the Drummond Area School District.

ARBITRATION AWARD

The School District of Drummond Employee's Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission designate a staff member to hear and decide the instant dispute between the Association and the Drummond Area School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The District subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on February 22, 1993 in Drummond, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by May 6, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues. The Association would state the issues as being:

- 1) Did the Drummond Area School District violate the Collective Bargaining Agreement when it placed a student as a worker in the District's Library? If so, what is the appropriate remedy?

- 2) Are the Union's charges in the September 22, 1992 letter valid? If so, what is the appropriate remedy?

The District would state the issue as follows:

Did the District violate the Collective Bargaining Agreement when it placed a student in the Library under a Jobs Target Program? If so, what is the appropriate remedy?

The parties have agreed that the Arbitrator will frame the issues within the confines of the parties' statements. The undersigned concludes that the District's statement adequately sets forth the issues to be decided.

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE II - ASSOCIATION RIGHTS AND BOARD RIGHTS

. . .

E. Board Functions

Management retains all rights of possession, care, control, and management that it has by law, and retains the right to exercise these functions during the term of the collective bargaining agreement except to the precise extent such functions and rights are restricted by the express terms of this agreement. These rights include, but are not limited by enumeration to, the following rights:

. . .

11. To determine the educational policies of the school district;
12. To determine the means and methods of instruction, the selection of textbooks and other teaching material, and the use of teaching aids, class schedules, hours of instruction, length of school year and terms and conditions of employment.

. . .

ARTICLE IV - GENERAL PROVISIONS

- C. The Board will not subcontract any work

previously done by the bargaining unit employees if such subcontracting would cause a layoff or reduction in compensation to any bargaining unit employee.

. . .

ARTICLE VIII - HOURS

. . .

C. The following are the hours that employees holding the following positions will be scheduled to work on normal scheduled work days:

Cable School: Ass't. Cook - 3 1/2 hours per day.

Drummond School: Head Cooks - 6 3/4 hours per day
Ass't. Cooks - 6 1/2 hours per day
Lunchroom
Ass't
. - 2
3/4
hours

per day
Ass't. Cook/Baking
Responsibility - 6
hours per day

Secretaries, Teacher Aides, Bookkeepers, Custodians and Mechanics - 8 hours per day

Library Aide - 2 1/2 hours per day

. . .

ARTICLE IX - REDUCTION IN FORCE

If necessary to decrease the number of employees (in whole or in part) in a department (cooks, clerical, bus drivers, custodians, mechanics and aides) the Board may lay off the necessary number, but only in reverse order of the appointment in each department. Such employees shall be reinstated in inverse order of their being

laid off when vacancies occur. Such reinstatement shall not result in loss of credit for previous years of service. No new or substitute appointments may be made while those who were laid off are available to fill the vacancies. Laid off employees have reinstatement rights for one (1) year and three (3) months, this time starts the first day the employee is unemployed.

. . .

ARTICLE XIV - JOB VACANCIES

Employees who desire a change in assignment or who desire to transfer to another building may file a written statement of such desire with the District Administrator. Such written statement shall include the assignment to which the employee desires to be transferred, in order of preference. Such statement shall remain on file for a period of one (1) year from the date of submission. Requests which are not acted upon must be resubmitted each year to remain active. Presently employed employees shall be selected to fill vacancies provided that they apply for such vacancies and they are equally or better qualified to fill such vacancies than outside candidates.

All employees with the bargaining unit shall be notified, by the District, of any bargaining unit vacancies at least two (2) weeks prior to that position being filled.

BACKGROUND

The District and the Association have been party to a collective bargaining agreement for a number of years that sets forth the wages, hours and working conditions for "all non-certified staff regularly employed by the School District of Drummond. . ."

At the end of the 1991-1992 school year, the District laid off two Teacher Aides, Alexia Pantaze and Marge Kmetz. Pantaze was contracted for four hours per day, but had averaged 5 hours per day over the year and 6 1/2 to 7 hours per day at the end of the year. Kmetz had worked 8 hours per day for the full 1991-1992 school year. Pantaze was hired by the District for the 1992-1993 school year as a Dishwasher for 2 3/4 hours per day. Kmetz was recalled for the 1992-1993 school year to a 6 hour per day Teacher Aide position.

Kmetz had been previously employed by the District in the position of Library Aide for the 1982-83 and 1983-84 school years, working 2 1/2 hours per day and covered by the parties' Agreement at the time. Kmetz was laid off from the Library Aide position at the end of the 1983-84 school year when the District eliminated the position. Kmetz left the District's employ and did not return until she was hired as a Special Education Teacher Aide in January of 1992.

The first school day for the 1992-93 school year was September 1st and the District placed a student in the Library under the Job Target Program (JTP) as a student aide for the Librarian two hours per day. The student received \$4.25 per hour and no benefits for the hours worked and was not eligible for Worker's Compensation. The student was a Special Education student who had been identified as "at risk" by the District's At Risk Committee. As part of that student's Individualized Education Program (IEP), she was to receive job training through the JTP in the District. The student had been in the JTP the prior two school years as well, working as a student aide the first year and spending the second year focusing on career assessment rather than working. In addition to the placement in the Library, the student was also placed as a student aide in a classroom. The student worked in the Library during the time she would otherwise be in the special education class with the Learning Disabilities (LD) teacher. The student's work consisted of checking in books, shelving books, putting things in place, shelving magazines and papers and checking books out to the Grade School.

The student's "training team" under the JTP consisted of her two "employer/trainers" the Librarian, Marcia Wellnitz, and the classroom teacher, Mrs. Laube, her LD teacher and the JTP Coordinator, Ralph Rossing. The student was paid by the District from federal special education funds, although she was erroneously paid from District funds for the first two paychecks.

During the 1991-92 school year there was also a student aide in the Library in the JTP who worked 50 minutes (one period) per day for four months. There were two others placed in the Library that school year, but one left after one week to take a placement with a bank and Wellnitz asked Rossing to remove the other after three days because the student did not work out. There have also been students placed as aides in classrooms under the JTP in the past. Wellnitz had made a request in the 1991-92 school year for a full-time Library Aide, but was told the District could not afford it.

The student's employer/trainer is responsible under the JTP for assigning tasks to perform and making sure they are done, keeping track of the student's attendance as to the worksite,

signing the student's hours sheet once a month and for evaluating the student every two months. The employer/trainer shows the student how to perform the assigned tasks, but does not otherwise "train" the student with regard to personality, attitude, dress, etc. Wellnitz testified that she spent very little time training the student in question as the tasks were simple and she caught on fast.

Rossing, as the JTP Coordinator, decides upon the wage for the student and the hours, and decides where the student will be placed. Rossing works with the employer/trainer with regard to setting the duties a student will perform. Rossing meets with the employer and explains the need for a worksite for a student, what the student's needs and problems are and then discusses what the employer's needs are and they work out something to suit both. In this case, Wellnitz and the student's LD teacher worked out the student's duties in the Library. As far as discipline or termination, the employer is supposed to go through Rossing to work out any problems with the student.

The focus of the JTP is to train the student in transition skills from high school to getting and keeping a job, i.e., interviews, job applications, understanding pay and benefits, how to be a good employe (appearance, attendance, attitude), how to obtain needed job training and assessing career possibilities.

The Association submitted a grievance in September of 1992 asserting that the use of the student in the Library violated the layoff/recall, subcontracting and/or posting provisions of the parties' Agreement, on the basis that the student was in a bargaining unit position and/or performing unit work. The grievance also alleged the District was violating the Agreement by not paying and treating the student worker as required by the Agreement. The grievance was processed through the steps of the grievance procedure. The parties, being unable to resolve the dispute, proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

The Association

The Association takes the position that the District has violated the parties' Agreement by employing a student aide in the Library while members of the bargaining unit were on layoff. The position of "Library Aide" still exists and is mentioned in Article VIII, C, of the Agreement and is part of the department of "Aides" listed in Article IX, Reduction in Force. Article IX states that: "No new or substitute appointments may be made while those who are laid off are available to fill the vacancies." According to the Association, regardless of whether the student aide is employed by the District, subcontracted by the District or otherwise engaged, Article IX does not permit the District to

obtain services from non-bargaining unit members when employes are on layoff and available to fill the position.

The Association cites a recent award involving these parties where the arbitrator concluded that whether or not a person provided the services to the District through direct employment or through subcontracting, the results were the same and bargaining unit members who were on layoff should have been assigned the position. The arbitrator held that by not doing so, the District violated either Article IX, the layoff clause, or the subcontracting clause, Article IV, C.

The Association also cites a Pennsylvania trial court decision that held a school district committed an unfair labor practice by unilaterally using volunteers to provide services that had been traditionally provided by bargaining unit employes. Citing, Athens Area School District v. Pennsylvania Labor Relations Board, PA CtCommPls, No. 92IR00153 (8/27/92). The testimony here shows that for at least the last fourteen years the District has never subcontracted or hired non-bargaining unit employes or students to perform bargaining unit work while a bargaining unit member is on layoff or working reduced hours. If the student is considered a "volunteer", then Article II, E, prevents the District from filling the position without first bargaining with the Association. There has been no bargaining, and the Association has not waived its rights in that regard.

Next, the Association asserts that the student is in the bargaining unit. The District has hired a student in a bargaining unit position in the past. A student was hired to fill a Dishwasher vacancy when no bargaining unit member was on layoff. That student worker was paid and treated according to the parties' Agreement. Similarly, the student Library Aide is an employe of the District and should be considered a bargaining unit member and paid and treated according to the Agreement.

The Association is not asserting that all the time the student spends in the Job Training Program is covered; rather, it excludes the hours spent by the student in counseling and training outside of the two hours spent in working in the Library. Wellnitz testified that she spent approximately twenty minutes training the student aide during the entire school year. Thus, the time spent working in the Library cannot be considered training time, rather the student is providing services to the District for pay. Further, the District possesses and exercises its authority as an employer over the student through Wellnitz and Rossing, i.e., the authority to hire or terminate, supervise and evaluate, assign job duties, determine the rate of pay, authorize time off, and establish work standards. The fact that the District receives federal funds for the program does not distinguish between other District employes who work in programs

that are federally-funded. 1/

In its reply brief, the Association disputes the District's claim that the student was simply participating in the Jobs Target Program and again notes that it is only taking issue with the two hours that the student spent working in the Library. The educational objectives of the JTP were accomplished outside of those working hours. Regarding Article IX, "No new or substitute appointments" includes all possible ways the District could get the work performed while employees are on layoff. If the parties had intended the language to apply only to new hires or subcontracting, they would have drafted the language in a more restrictive fashion. Thus, even if the student aide is not part of the bargaining unit, Article IX still requires that the District recall the laid off person to perform the work. Also, the JTP "Employer Agreement" the District signed states that the District as the "Employer" agrees that: "The student is not placed in any job which would violate child labor regulations or use the student training program to replace workers who are laid off."

With regard to the District's citation of the Commission's decision in South Shore School District, that case was a unit clarification and did not involve contractual rights. That case is further distinguishable because there the Commission found that an outside employer held the major control over the individual's work life and not the district. Here, the only person who is involved with the student aide who is not an employe of the District is the JTP Coordinator, however, he testified that his boss directed him to serve the best wishes of the District. Thus, the District has total control over the student library worker.

With regard to the District's argument that if the Association prevails, opportunities for students in the JTP program will cease, the Association notes it is questioning only one of twenty positions, and even if it prevails there is no effect on the other 19 positions. There is no reason for the District to shut down the entire program, and the parties have the option of bargaining different wages, hours, etc. regarding the one student library aide position.

As to the District argument that there was no "vacancy" to be filled or posted, since the Board never declared such a vacancy for the 1992-93 school year, there is no evidence that the Board is the only agent of the District that may declare a "vacancy".

1/ The Associates cites the Commission decision in School District of Solon Springs, Dec. No. 18200 (WERC, 10/80), where it was determined that the source of funding for a position is not a basis for excluding the position from a bargaining unit.

Someone declared a vacancy and made the decision to fill it with a student from the JTP. Since there were employes on layoff, they should have been recalled before a student was hired, and if neither of the laid off employes chose to be recalled, then the position should have been posted in accord with Article XIV.

Regarding the two student workers in the Library Aide position in the prior school year, those were only temporary assignments, one lasting only two weeks and the other working only one hour per day for a few months. Here, the student worker was assigned to work two hours per day for the entire school year. Further, there were no bargaining unit employes on layoff or reduced in work hours the prior year.

The contention that if an adult library aide had been hired, they would have substantially different duties from the student worker, is irrelevant. The testimony was that such a person would have some student supervision duties in addition to the duties performed by the student aide. That is irrelevant, since changing the duties of a bargaining unit position somewhat does not result in the position no longer being in the bargaining unit. Also, while one of the issues in this case is whether or not the position is in the bargaining unit, the recall rights and subcontracting issues do not hinge on that fact.

Finally, with regard to remedy, the Association requests that Kmetz be recalled to the position of Library Aide at 2 1/2 hours per day since she is senior to Pantaze, however, if she does not want the position then Pantaze should be recalled. If Pantaze takes the position she should be awarded the full 2 1/2 hours per day since she only worked 2.75 hours per day in the 1992-1993 school year and started 27 days after the school year started. She had been working an average of 5 1/2 hours per day over the school year and up to 6 1/2 to 7 hours per day at the end of the 1991-1992 school year. If neither Kmetz nor Pantaze want the position, then the position should be posted and filled per Article XIV. Whoever receives the posted position should be made whole by receiving retroactive wages and benefits back to September 1, 1992. The Association further requests that the student worker in the position should receive all of the benefits and the wages under the Agreement, including fair share deductions, retroactive to September 1, 1992.

District

The District takes the position that the Agreement was not violated by the placement of the student in the Library under the Jobs Training Program (JTP). The Agreement does not apply in this case since the District is not a "municipal employer" and the student is not a "municipal employee" as those terms are defined in Section 111.70, Stats. Further, even if it was held that the terms of the Agreement applied, no violations occurred.

In support of its position, the District first asserts that placement of the student in the library under the JTP does not constitute a municipal employer/municipal employe relationship as contemplated by Wisconsin Statutes. A "municipal employer" is defined as including a school district "which engages the services of an employe and includes any person acting on behalf of the municipal employer within the scope of his authority, express or implied." The District did not "engage the services of an employe" when it entered into the "Work Experience Agreement Form" and placed the student in the Library under the JTP. The Commission's decision in South Shore School District, Dec. No. 15228-A (WERC, 8/92), held that the indicia of the employer status includes the right to hire, evaluate, discipline and discharge, establish work rules, work schedules and work assignment, and to determine the wages and benefits and otherwise direct the employe's work activity.

Those factors needed to establish the employer/employe relationship are not present in this case. It is the JTP Coordinator, rather than the District, that first selects students based upon the eligibility requirements of the JTP and makes recommendations on placement. The Coordinator completes the Jobs Target Program EDP Goals and Service Plan and the Employability and Education Development Plan submitted with the student's application and used by the Coordinator in making a placement. The Coordinator is primarily in charge of the evaluation process and has primary responsibility and authority regarding discipline and discharge of the student, rather than the "employer". The Work Experience Agreement Form and the JTP "Student Contract" clearly establishes that the "employer" does not have the unrestricted right to establish work rules for the student, rather it must comply with the forms and the rules set forth in the Student Contract. The Coordinator restricts the total hours a student may work and those are set forth in the Work Experience Agreement Form. The "employer" also agrees not to allow the student to work on any day the student is absent from school. Thus, the District does not have primary control over the student's work schedule. The Job Training Plan establishes that the "employer" does not completely control the work assignments. Assignments must fall within the parameters of the plan, and must also comply with the terms of the Work Experience Agreement Form. The Coordinator determines the rate of pay and works with the "employer" in that regard. Because of the nature of the program, no benefits are payable and the employe is not eligible for unemployment compensation benefits. While the "employer" under the JTP provides day-to-day supervision, instruction and training, the direction of work activity is limited by the terms of the Work Experience Agreement Form and the Job Training Plan. Thus, the District did not "engage the services of an employe" and therefore is not a "municipal employer" in this case.

Even if it is concluded that the District engaged the services of the student, there still were no violations of the Agreement. The contention that Article IV, C has been violated is premised on the assumption that the student placement in the Library was subcontracting. The evidence establishes that no subcontracting was involved. Although the District was the "employer" within the context of the JTP, such an arrangement does not constitute a "municipal employer/municipal employee" relationship.

In response to the Association's argument that if the District is an employer, there are additional violations of the Agreement, the District reiterates that it is not a "municipal employer". Since no vacancy existed and the District did not create any new or substitute appointments, there was no violation of Article IX. In acting within the confines of the JTP, the District was fulfilling part of its educational program in placing the student in the Library. The JTP is oriented towards education and training and not jobs. For the same reasons, it did not violate Article XIV, Job Vacancies. Regardless of whether a Library Aide position existed almost a decade ago, no vacancy existed at the time in question and the Board never voted to reinstate or create a Library Aide position. The District was fulfilling its obligation to educate students and acted within the confines of the JTP in an attempt to carry out the Individualized Education Program of the student in making the placement. The contention that the student aide was entitled to the benefits and provisions of the parties' Agreement only reinforces the unreasonableness of the Association's position. The JTP is an educational and training program and the primary reason for making any payment to the student is to give the student a sense of realism and relate the program to the realities of the workplace. The placement at a worksite essentially constitutes a "simulated job". Finding that students placed in simulated job situations are entitled to the wage and benefit provisions of the Agreement would not only economically hamper the District, but would result in immediate shutdown of the JTP and the educational opportunities that program provides. Further, Article II, E, Board Functions, reinforces the District's right to educate its students and use the means and methods it deems best.

The prior arbitration award the Association cites involving these parties is irrelevant. While that grievance dealt to some extent with the JTP, the issue was the use of non-bargaining unit members to transport students to and from work experience sites in the JTP. That issue in no way dealt with or addressed whether or not students placed at worksites under the JTP were performing duties which triggered the application of provisions of the Agreement.

In its reply brief, the District disputes the claim it "hired", "appointed", or "decided that it was going to fill the

Library Aide position". The District placed the student not only in the Library, but in a teacher's classroom under the Jobs Training Partnership Act to obtain training as part of the student's educational program. The Pennsylvania trial court ruling cited in support of finding contract violations has absolutely no precedential value in Wisconsin or this proceeding.

The District did not fill a bargaining unit position. The evidence establishes that the duties of the student aide differ significantly from an adult aide position in that the student has absolutely no responsibility for discipline or supervision. Also, Rossing testified that the tasks performed by the student were essentially a "simulated job". The Association's analogy of this situation to a prior instance where a student was hired by the District as a Dishwasher also does not stand up. It was agreed that the student hired as a Dishwasher was a bargaining unit member and paid according to the Agreement. More importantly, the student in the Dishwasher position was not in the JTP and there was no evidence that student was a Special Education student or an "at risk" student.

The District reiterates its contention that it is not a municipal employer in placing a student in the JTP at a work site within the District. Participation in the JTP is tied to classroom attendance, grades and citizenship requirements, and requires the involvement of the JTP Coordinator, the student, the student's parents, the guidance counselor and the principal. Thus, it does not fall within the scope of a traditional employer/employee relationship. The students' schedule is tied to his/her class schedule, and the student is assigned to classes pertaining to the JTP. Thus, the District exercises little or no control over when the student will perform the tasks in the classroom or Library. Also, the Job Training Plan sets forth the specific tasks and skills a student is expected to learn and the Job Performance Assessment form indicates that the students' ability to master those tasks will be used to determine his/her grade. The fact that the JTP is referenced in the students' IEP further demonstrates that the JTP is part of the education program and does not constitute a traditional employer/employee relationship.

With regard to remedy, the District asserts that in the event a violation is found, the appropriate remedy is not reimbursement of wages and benefits for a 2 1/2 hour shift. Since Pantaze's contract for 1992-1993 was 4 hours per day, and she was working 2.75 hours per day in the 1992-1993 school year, her damages would be for 1.25 hours per day. Similarly, Kmetz was contracted for 8 hours per day in 1991-1992 and worked 6 hours per day in 1992-1993. Consequently, her damages would be for only 2 hours of work per day. Further, the District has the right to set off any interim earnings a bargaining unit member would not have otherwise earned had the violation not occurred. The request that the student worker receive all of the benefits set forth in the

Agreement would be "unnecessarily punitive and grossly inequitable to the District" if a violation is found.

DISCUSSION

The basic premise underlying the Association's position that the District violated Article IV, C, Article IX, Article XIV and other provisions of the Agreement, by virtue of having the JTP student working in the Library two hours per day is that the student was in a bargaining unit position and/or performing bargaining unit work. For the following reasons, that premise is rejected.

Although at one time the District employed a Library Aide, there has been no one in that position since the 1983-84 school year. Drallmeier testified the position was discontinued then because the Librarian was relieved of teaching duties and no longer needed an aide to help in the Library. Wellnitz, the present Librarian, testified as to what duties she would expect a Library Aide to perform as compared to those performed by the JTP student. Wellnitz stated she would expect a regular Library Aide to do interlibrary loans, cataloging, sign passes for students, maintain order in the Library and supervise student aides. Conversely, the JTP student checked in books, shelved books, shelved magazines and newspapers, did shelf reading and checked books out to the Grade School. (Jt. Exhibit No. 21). Those duties were decided upon between Wellnitz, Rossing and the student's LD teacher. More importantly, the evidence indicates that, unlike the student previously hired as a Dishwasher, the placement of the student in the Library was part of that student's Individualized Education Program. The student was a Special Education student and her IEP called for her to participate in the Jobs Training Program. Besides her placement in the Library, she also was placed in a teacher's classroom as a student aide one hour per day. These placements were alternatives to attending special education classes. There are indeed facets of an employer/employee relationship that are present as part of a student's participation in the program, since it is intended to simulate a real work experience for the student. However, the presence of aspects of the employer/employee relationship such as wages, work assignments, supervision, evaluations, and the possibility of termination from the placement does not create a work relationship in this case. Continued participation in the JTP placement by the student is not solely dependent upon doing a good job at the worksite, as it is required that the student complete her daily assignments and receive passing grades in all of her scheduled classes. (Jt. Exhibit No. 17 - Job Training Program Student Contract). In addition to receiving \$4.25 per hour for the hours she worked in the Library, the student was graded and received one credit for work experience training. (Jt. Exhibit No. 16 - Work Experience Agreement Form). All of this indicates that while some work is performed by the student, the

placement is a method of providing an educational experience for certain students that have been identified as needing this type of work experience training, and not a "job" or the creation of an employment relationship.

With respect to the Arbitration Award cited by the Association, the facts are distinguishable. The prior arbitration involved the District's decision to use persons other than the Bus Drivers in the unit to transport JTP students to their work sites.

Unlike this case, the placement of the JTP students was not the issue in dispute in that case. Further, as concluded above, the placement here did not constitute the hiring of a new employe, or a subcontracting arrangement.

As the placement of the JTP student in the Library was for educational purposes and did not constitute the filling of a bargaining unit position or the creation of an employment relationship, it is concluded that the District acted within its rights under Article II, E, 12 of the Agreement, and did not violate the parties' Agreement by having the student perform work in the Library as part of the Job Training Program while members of the bargaining unit had been reduced in hours or laid off, nor was the District required to post a Library Aide position under Article XIV or to apply the provisions of the Agreement to the student in the placement.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 16th day of July, 1993.

By David E. Shaw /s/
David E. Shaw, Arbitrator