BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
IRON COUNTY PUBLIC EMPLOYEES, LOCAL NO. 728-B, AFSCME, AFL-CIO	Case 25 No. 47634 MA-7339
and	
HURLEY SCHOOL DISTRICT	

Appearances:

Mr. James Mattson, Staff Representative, Iron County Public Employees, Local 728-B, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Roger A. Myren, Superintendent, and Mr. Gary Ilminen, School Board Member, Hurley School District, appearing on behalf of the District.

ARBITRATION AWARD

On June 25, 1992, Iron County Public Employees, Local 728-B, AFSCME, AFL-CIO, hereinafter Union, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as arbitrator in a dispute concerning the employment status of grievant, Noel Mattei, with the Hurley School District, hereinafter District or Employer. A hearing in the matter was held on December 3, 1992, at which time the parties were afforded an opportunity to present documentary evidence and testimony relevant to the dispute. No stenographic transcript of the proceeding was taken and the parties filed post-hearing briefs with the undersigned by March 8, 1993. The parties also stipulated at hearing that there were no procedural arbitrability issues for the undersigned to resolve, and that the matter was appropriately at the arbitration step of the grievance procedure.

ISSUE:

At hearing the Union proposed the following statement of the issue:

> Did the Employer violate the collective bargaining agreement and past practice by not placing the grievant's name on the Employer's seniority list, refusing to pay the grievant the proper wages as per the terms of the collective bargaining agreement and therefore refusing to recognize the grievant as an employe of the School District having completed the probationary period? And if so, the remedy is: The Employer to make the Employe whole for any and all lost wages and benefits to and recognize the grievant's seniority date as a permanent employe from May 3, 1991.

The Employer was unwilling to stipulate to the Union's proposed statement of the issue and proposed framing the issue as follows:

> Shall the Employer be compelled to violate state statutes, the labor agreement, and past practice by recognizing the grievant as a School District employe

having never authorized the creation of a position or hiring for such position?

After reviewing the testimony and the exhibits in this case, the undersigned believes the issue should be stated as follows:

Has the District violated the 1991-93 collective bargaining agreement by failing to treat the grievant Noel Mattei, as a permanent employe of the District entitling him to the wages, hours and conditions of employment as specified in said collective bargaining agreement after the grievant had worked for the District as a temporary full-time custodian from May 3, 1991 through mid-August, 1991, more than 90 calendar days, and continuing to treat him as a temporary employe? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE I - RECOGNITION

1. The Employer recognizes the Union as the exclusive bargaining agent for all non-instructional employees of the School District except school aides and supervisory personnel, for the purpose of negotiating with the Employer with respect to wages, hours and conditions of employment.

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ARTICLE 3 - PROBATIONARY PERIOD

1. All new Employees appointed by the Employer shall serve a probationary period of ninety (90) calendar days, beginning with their starting date of employment. The ninety (90) day probationary period may be extended by the mutual agreement of the School District and the Union.

2. Upon completion of said ninety (90) calendar day period, the Employee shall be notified of his/her acceptance or non-acceptance by the Employer.

3. During said probationary period, the new Employee may be discharged without right of appeal.

4. Employees shall be entitled to all rights and benefits, except as provided for in Section 3 above, provided by the terms of this Agreement, computed from the starting date of employment.

ARTICLE 4 - SENIORITY

1. Seniority according to this Agreement shall

begin with the employee's starting date of employment within this bargaining unit. Seniority shall not be diminished by absence due to illness, authorized leaves of absence or temporary layoff. Seniority lists shall be maintained by each department and on a unit wide basis. Each seniority list shall be brought up to date annually and copies of same shall be mailed to the Secretary of the Union.

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ARTICLE 5 - PHYSICAL EXAMINATIONS

1. At the time of initial employment, every Employee is required to have a physical examination and chest x-ray, and a certificate of sound health based on such examination shall be forwarded to the Employer by a licensed Physician. Forms for this examination shall be obtained from the Central Office.

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ARTICLE 6 - PROMOTION

1. When a vacancy exists or a new position is created which the District wishes to fill, promotion to the new position or vacancy shall be according to departmental seniority first, then unit wide seniority should no Employee within the department apply or qualify for said position, provided the Senior Employee can qualify for the position to be filled and is physically capable to perform the work.

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ARTICLE 7 - LAY-OFF AND HIRING

1. When it is the determination of the School Board to reduce the staff, lay-off shall be in inverse order of the length of service. Strict application of seniority shall prevail.

2. Employees shall be rehired in order of their seniority.

3. Whenever it becomes necessary to employ additional workers in either vacancies or new positions, former employees who rendered satisfactory service and were laid off without misconduct or delinquency on their part within three (3) years prior thereto shall be entitled to be rehired for such vacancies or new positions, provided they are qualified, in preference to all other persons. The Employee must accept or decline the position offered within thirty (30) days after notice of such vacancy or new position is received.

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ARTICLE 19 - CUSTODIAL/OFFICE/COOKS SALARY

1. New hire Employees shall be salaried according to the following schedule:

Start-		80% of Salary
6 Months	-	85% of Salary
12 Months	-	90% of Salary
18 Months	-	95% of Salary
24 Months	-	100% of Salary

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ARTICLE 22 - DUES DEDUCTION

1. The Employer agrees to deduct from the salaries of Employees who are Members of the Union, the dues as said Employees individually and voluntarily authorized the Employer to deduct, and to transmit monies promptly to the Union. Authorization to deduct Union Dues will be submitted to the Employer's Central Office on a form as prescribed by the Union.

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ARTICLE 23 - AGENCY SHOP

1. The Employer agrees to deduct from the monthly earnings of all Employees in the Collective Bargaining Unit an amount certified by the Union as being the current dues uniformly required of all Employees.

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3. As to new Employees, such deduction shall be made from the first pay check following the first thirty (30) days of employment.

. . .

BACKGROUND:

Since November of 1985, the grievant worked for the District on an on-call basis performing various custodial duties including cleaning, mowing grass and making minor repairs. He was called in on an as-needed basis to cover for other custodial employes who were absent due to vacation, sick leave, or other reasons, and he would perform their duties in their absence. This continued from November, 1985 until May of 1991, when the District scheduled him to work a specified schedule along with other custodial employes. He worked a regular schedule during the months of May, June, July and most of August until school started when he was told he was being "laid off" because of lack of money. Also, during this time, the District was moving into a new K-12 building which had just recently been completed. This meant that custodial employes, along with other employes, were involved with moving equipment from the old buildings to the new building, scrubbing and waxing floors, and assembling new furniture. On or about August 3, 1991, after having worked on a regularly scheduled basis for 90 days, the grievant, believing that he had become a permanent employe of the District who had completed his 90-day probationary period as specified in Article 3, Section 1, of the collective bargaining agreement went to the Union and asked to join. The local Union President, Levra, did not have membership cards available at that time, but did receive them on or about August 16, 1991. He gave one to the grievant who filled it out and returned it to the Union. Sometime thereafter, the Payroll Department of the District was presented with the grievant's authorization card, and thereafter dues deductions were made from his pay when he was called back to work periodically after being "laid off" at the start of the 1991-92 year.

At no time during the period May through August of 1991, did the grievant ever sign a job vacancy posting nor was he ever notified that he had or had not successfully completed the 90-day probationary period. Notwithstanding that fact, the grievant viewed himself as a regularly scheduled permanent employe, and believes he was entitled to the wages and benefits afforded other such employes. In October of 1991, subsequent to his "layoff" in August, he started collecting unemployment compensation which was charged against the District's account, and to date is still collecting unemployment compensation. The last day the grievant worked for the District was May 29, 1992. However, during the summer of 1992, two students were hired to perform the same kind of duties which the grievant had performed in previous summers, i.e., mowing grass, cleaning, etc. Throughout his employment by the District the grievant always agreed to work when called, was never absent, and had no disciplinary record.

In the past, the District has utilized students to perform custodial-type responsibilities during the summer months as it did during the Summer of 1991.

However, while students were employed during the summer, there were no permanent employes on layoff.

POSITIONS OF THE PARTIES:

The Union argues that since 1985, the grievant worked for the District as a custodian intermittently, up through the Spring of 1991, as a temporary employe. Historically, temporary employes, like the grievant, had been laid off prior to them working 90 calendar days. However, in 1991, the grievant worked more than 90 calendar days from May 3 through late August, when the 1991-92 school year started. After having worked 90 days he informed the District that he had joined the Union and paid dues, and shortly thereafter, at the commencement of the school year, he was laid off. 1/ Although he worked intermittently during the 1991-92 school year, as indicated on his pay stubs, he was not called in to work during the Summer of 1992. Instead, the District hired two college students to perform work which the grievant had performed in prior summers. The Union believes that once the grievant had worked more than 90 calendar days for the District, he became a permanent employe of the District entitled to all of the benefits accorded by the parties' collective bargaining agreement. Because he was not treated as a permanent employe after having work 90 days, the District violated the collective bargaining agreement and the grievant should be made whole for all wages, benefits and seniority rights which he has been denied.

The Union argues that the evidence is clear that an employer-employe relationship existed between the grievant and the District. The grievant's original job application shows his obvious interest in securing employment with the District and the facts establish that the grievant never refused an opportunity to work with the District from 1985 to 1991 when the District utilized him as an on-call, temporary employe. Further, the pay stubs of the grievant show him to be an employe of the District, and he collected unemployment compensation pursuant to a claim filed against the District.

The Union points to the fact that over the years temporary employes have come and gone and the District has always laid them off prior to their working more than 90 calendar days. In this case the Employer knew the terms of the contract and did not see fit to lay the grievant off prior to him completing the 90-day probationary period. Even though the Employer failed to notify the grievant that he had successfully passed his probationary period this does not negate the District's responsibility to comply with the terms of the contract. Thus, the absence of notice does not mean the grievant did not become a permanent, regular, full-time employe entitled to all of the benefits thereof. Thus, the Union believes that the undersigned should sustain the grievance and order that the District make the grievant whole for all lost fringes, wages and other benefits to which he was entitled had he been treated as a full-time permanent employe.

The District, in its brief, asserts that the facts establish it never acted to create any permanent position in the Maintenance Department for which the grievant could have applied. The grievant never signed a posting nor applied for any advertised position. Also, Board minutes back to January, 1991, prove no such hiring ever took place nor was any such hiring ever authorized by the Board. The Union's reliance on Article 3 of the contract, relative to probationary periods, ignores paragraph 1 thereof which provides

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1/ The Union states it is not claiming that his layoff was motivated by anti-union animus.

that the probationary period can only apply to a permanent employe "appointed by the employer." Because the grievant was a temporary, part-time employe and never appointed through appropriate Board processes to a permanent position in the District, no probationary period ever commenced nor was one ever served. The District contends that only the School Board is empowered to create vacancies for permanent employes, only the School Board is empowered to lawfully hire personnel for such vacancies, and such hiring can only be done by the Board during a lawfully convened, open meeting of the Board as required by the statutes. Such hiring must by law be recorded in the minutes of such a meeting, and there is no such record in the referenced minutes. Also, the terms and conditions of the collective bargaining agreement then in effect must be upheld with respect to the wages and benefits paid to the newly hired employe.

Also, the District argues the grievant never submitted to an initial employment physical as required by Article 5. Had the Board intended to employ the grievant as a regular, full-time, permanent employe it would have insisted that he submit to such a physical examination pursuant to the provisions of Article 5. Further, no one ever told the grievant that he was a permanent employe serving a probationary period.

For these reasons the District respectfully requests that the Arbitrator find in the District's favor and deny the grievance.

DISCUSSION:

In order for the grievant to prevail in this case, he must establish that because the District allowed him to work more than 90 consecutive days his employment status changed from casual or temporary summer help to a permanent employe of the District, even if the District did not intend that he become a permanent custodial employe. In other words, did the mere passage of time create a contractual obligation that the employe and Union can now enforce through the contractual grievance procedure. The undersigned, for the reasons set forth below, does not believe such an enforceable obligation exists.

As the record evidence established, at no time did the District ever advise the grievant hat he was hired as a permanent employe. Also, the District never posted a vacancy for a full-time custodial position. Further, the grievant was never advised by the District that he was serving a 90-day probationary period called for in Article 3 of the contract. However, the grievant, subsequent to having worked for a least 90 days in a full-time capacity, stated that in his opinion he had successfully completed his probation, and on or about August 3, 1991, he went to the Union and asked to join. 2/

Article 3, Section 1 of the parties' collective bargaining agreement specifies that "all new Employees appointed by the Employer shall serve a probationary period of ninety (90) days, beginning with their starting date of employment." In this case, this language is susceptible to more than one plausible interpretation, and therefore is ambiguous. For example, what does the term "appointed" mean? Also, does the term "employee" include all non-instructional employes of the District or only those non-instructional employes hired to fill full-time position vacancies, but exclude casual non-instructional employes or summer help?

The grievant was first employed by the District in November of 1985, and clearly, completed 90 days several years prior to August, 1991. He contends he never before worked 90 consecutive work days on the schedule, and therefore never before completed his probationary period. However, that standard, that an employe be <u>scheduled</u> to work in a full-time capacity more than 90 consecutive work days, does not appear anywhere in the contract. Further, there is no evidence in this case that any non-instructional employe has ever before been deemed to have completed a probationary period without the District acknowledging that it had appointed the employe to a permanent position requiring a probationary period. Absent more facts than are present in this case, the undersigned cannot conclude that an employe has become a permanent employe of the District merely because they work more than 90 consecutive work days, when the Employer denies it hired the employe to be anything other than a casual or temporary employe. Furthermore, there was no testimony elicited from the grievant's supervisor, or for that matter, any management employe stating they understood the grievant was working through his 90-day probationary period on his way to becoming a permanent employe.

Aside from the above, there are several factors that preclude a construction of the ambiguous language in a manner that leads to a conclusion that the grievant was on probation in a permanent full-time custodial position during the Spring and Summer of 1991. First, the grievant was not being paid the contractually specified rate for a probationary custodial employe, i.e., 80% of the 24-month salary rate specified in the contract. Also, the District never posted for a full-time custodial position, the grievant never signed such a posting, and no physical exam was ever given to or ordered for the grievant as required by Article 5, Section 1. In order for the result sought by the grievant to be sustained by the undersigned, it would require the ambiguous language to be construed so as to render the promotional bidding procedures of Article 6, as well as the recall rights spelled out in Article 7, a nullity in this limited fact situation. A principal canon of contract construction is not

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2/ It is not clear from the record why he thought he had to be a regular full-time employe before he could become a member of Local #728-B, AFSCME.

to construe ambiguous language in a manner that renders another clause(s) meaningless. Therefore, the grievant's position cannot be sustained.

Consequently, for all the reasons set forth above, the undersigned is not persuaded that the grievant's status was changed from a casual or temporary summer employe to permanent full time once he had been scheduled to and worked for more than 90 consecutive work days in 1991.

AWARD

The District did not violate the 1991-93 collective bargaining agreement by failing to treat the grievant Noel Mattei as a permanent employe of the District, entitling him to the wages, hours and conditions of employment as specified in said collective bargaining agreement after he had worked for the District as a temporary custodian from May 3, 1991 through mid-August, 1991, more than 90 consecutive work days. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 27th day of October, 1993.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator