

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
FLAMBEAU SCHOOL DISTRICT : Case 33  
: No. 50682  
: MA-8345  
and :  
NORTHWEST UNITED EDUCATORS :  
:  
:  
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Appearances:

Weld, Riley, Prenn and Ricci, by Mr. James M. Ward, 715 South Barstow,  
P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of  
the District.

Mr. Kenneth J. Berg, Executive Director, Northwest United Educators,

16 West John

ARBITRATION AWARD

Flambeau School District, hereinafter referred to as the District, and Northwest United Educators, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over pay. Hearing on the matter was held in Tony, Wisconsin on May 11, 1994. Post hearing arguments were received by the undersigned by June 22, 1994. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

"Was the District in violation of Article XVIII (Salary Schedule) when it unilaterally determined it would not pay the grievant for hours the individual student she works with as an Aide was absent?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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**ARTICLE II - MANAGEMENT RIGHTS**

Except as expressly modified by the other provisions of the Agreement, the School Board possesses the sole right to operate the School District and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the School District;
- B. To hire, promote, transfer, schedule and assign employees in positions within the School District;
- C. To suspend, demote, discharge or take other disciplinary action against employees;

- D. To relieve employees from their duties;
- E. To maintain efficiency of School District operations;
- F. To take whatever action is necessary to comply with State and Federal law;
- G. To introduce new or improved methods or facilities;
- H. To change existing methods or facilities;
- I. To determine the kinds and amounts of services to be performed as pertains to School District operations; and the number and kind of classifications to perform such services;
- J. To determine the methods, means and personnel by which School District operations are to be conducted;
- K. To take whatever action is necessary to carry out the functions of the School District in situations of emergency.

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#### **ARTICLE VII - WORK WEEK, HOURS OF WORK**

- A. The following are normal workdays for full-time employees in the various classifications in the bargaining unit: Employees' work schedules will not be changed without thirty (30) days' advance notice and prior discussion with NUE, except in the case of emergency.
  - 1. Custodians and Maintenance: All workdays of the year (Monday through Friday.)
  - 2. Food Service: The 181 days that students are scheduled for attendance, plus two (2) paid holidays.
  - 3. Secretaries: The 181 days that students are scheduled for attendance, plus two (2) days prior to the first student day, three (3) days following the last student day, one (1) parent-teacher conference day, and two (2) paid holidays.
  - 4. Paraprofessional: The 181 days that students are scheduled for attendance, plus two (2) paid holidays. The parties recognize that some paraprofessionals are normally scheduled for hours in addition to the foregoing.
  - 5. Bus Drivers: The 181 days that students

are scheduled for attendance plus two (2) paid holidays.

- B. The following are normal daily hours of work for full-time employees in the various classifications in the bargaining unit (with the exception of the bus drivers):
1. Custodians and Maintenance: Eight (8) hours plus a one-half (1/2) hour unpaid lunch period.
  2. Food Service: Up to seven and one-half (7 1/2) hours, which includes a paid lunch period as presently recognized.
  3. Secretaries: Seven and one-half (7 1/2) hours plus a one-half (1/2) hour unpaid lunch period.
  4. Paraprofessionals: From seven (7) hours to seven and one-half (7 1/2) hours plus a one-half (1/2) hour unpaid lunch period.
- C. This Article defines normal days and hours of work only and shall not be construed as a guarantee of hours or weeks of work per year or hours of work per week.
- D. Employees, with the exception of bus drivers, shall have one-half hour for lunch, with one fifteen minute break for each half day worked. All employees are expected to pay for their lunch if they eat school lunch.
- E. Employees who report for work for a regularly scheduled shift and are sent home early will receive a minimum of two (2) hours work or pay. This section is not applicable to situations where employees are notified not to report to work. For purposes of this provision, an announcement for broadcast on the local radio stations shall constitute sufficient notice to any employee who has not yet reported.

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#### BACKGROUND

At the commencement of the hearing in the instant matter the parties agreed upon the following facts: The grievant, Annette Vaughn, has been employed by the District at all relevant times as a special education aide, the grievant has been assigned since the 1992-93 school year to work exclusively with a severely cognitive disabled student (Roman) who is a resident of the school district but attends Ladysmith School District 1/, and the grievant

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1/ The District does not have an educational program for students such as Roman who are cognitively disabled. The District transports Roman to nearby Ladysmith which does have a program at one of it's elementary

received no loss of pay when Roman was absent during the 1992-93 school year. Initially when Roman was absent the grievant remained on the job even though, because of the nature of her one on one work with Roman, there was not much for her to do. The grievant shared this information with her immediate supervisor, the District's Director of Pupil Services, Dr. David Keller. At the hearing the grievant testified Keller, who is no longer working for the District, informed her she need not report for duty on those days when Roman was absent and the grievant testified that she received no loss of pay for not reporting to work.

The grievant also testified she stayed home approximately two (2) dozen times during the 1992-1993 school year. During the 1992-1993 school year the matter came to the attention of District Administrator John Schomisch. Schomisch testified that he never approved of Keller's actions and that he intended to remedy the matter with the commencement of the 1993-94 school year. Schomisch also testified that on May 13, 1993 the following proposal was made by the District during negotiations for the 93-95 collective bargaining agreement:

"Article VII, Section A, #4: In the case of special education aides assigned to an individual student, payment will be contingent upon days and hours of actual service to the child."

Schomisch also testified that as the parties were making progress during the negotiations it was withdrawn and that he did not feel withdrawing it would hurt the District's position on the issue.

At the commencement of the 1993-94 school year the grievant and another special education aide, Kathy Hauser, were informed that if the student they were assigned to was absent they would not work nor would they receive any pay when not working. On September 29, 1993 the following memo was sent to the grievant and Hauser:

TO: Kathy Hauser  
Annette Vaughn

FROM: Thomas E. Fuhrmann, ED.S.  
Director of Pupil Services

DATE: September 29, 1993

RE: Absence Policy For Teacher Aides Who Work With Specific Students

If a student from the School District of Flambeau requires an individual aide and is absent from school due to illness or other reason, such aide, whether working in the School District of Flambeau or in another district, will notify the student's teacher and the Director of Pupil Services from the School District of Flambeau for such absence(s). You will not work during the student's absence.

cc: Lynn Anderson

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schools.

Jolene Johnson

The grievant testified she never received this memo and first became aware of the District's decision when Roman was absent in October of 1993 and the District deducted a day's pay from her paycheck. This action was grieved by the grievant and the matter was processed to arbitration in accordance with the parties grievance procedure.

#### UNION'S POSITION

The Union contends the first time the matter of nonpayment was raised by the District was during the 1993-95 collective bargaining negotiations. The Union argues it strongly rejected the District's proposal and the matter was not raised again during negotiations. The Union also argues that neither the Union nor the grievant were informed of the District's intent to withhold wages until the District actually did so in October of 1993. The Union also asserts the District was aware the grievant was being paid when Schomisch testified he became aware of Keller's actions and he disagreed with them but choose to do nothing about it. The Union also argues the September 29, 1993 memo is not significant as there isn't any argument the grievance was timely. The Union also contends the District, by raising the issue at the table, wanted to change how it was administering the collective bargaining agreement. Failing to do so it unilaterally changed how it was dealing with the issue. The Union argues the District should not attain through arbitration what it was unable to obtain through negotiations. The Union concludes the facts in the instant matter support an award for the grievant.

#### DISTRICT'S POSITION

The District contends that inasmuch as the grievant's services are not needed on those days when the special education student to whom she has been assigned is absent, the District's directive to not report to work on those days is reasonable under the circumstances and should not be overturned unless it violates the express terms of the collective bargaining agreement. The District asserts it has acted in an eminently reasonable manner in exercising it's rights under the Management Rights provision. The District points out it was the Grievant who pointed out to Keller that there was nothing for her to do when Roman is absent.

The District also asserts the collective bargaining agreement, when construed as a whole, supports the right of the District to temporarily relieve the grievant of her duties for lack of work. The District points out Article VII, Section C, clearly points out that there is no guarantee of work and Article VII, Section E, clearly allows the District to relieve employees of their duties on regularly scheduled work days, subject only to a possible two hour reporting pay obligation if notice is not given. The District argues conversely if a two hour notice is given the District is not subject to a reporting pay obligation. The District asserts Article II allows it to issue the directive in question unless it somehow conflicts with the express provisions of the agreement.

The District also argues that it's pre-existing right to temporarily relieve the grievant of her duties for lack of work was not constructively waived by the withdrawal of the bargaining proposal addressing work hours for special education aides in particular. The District contends the bargaining proposal was simply an attempt to clarify the District's existing rights. The District also argues that had the proposal not been made there would be little difficulty for the arbitrator to find in the District's favor. The District concludes this pales in comparison with the District's expressly reserved Management Rights under Article II.

The District concludes its actions did not violate the agreement and would have the undersigned deny the grievance.

#### DISCUSSION

The undersigned notes that the September 29, 1993 memo addressed to Hauser and the grievant makes no mention of the fact the District intended for the grievant to remain at home and receive no pay. At most it directs the grievant to remain at home when the student she who she is an individual aide to is absent. There is no evidence the matter was verbally discussed with the grievant and that she was informed of the District's intent. Thus at most the September 29, 1993 memo can be construed as placing in writing what the grievant was verbally informed to do the previous school year.

The District is correct that it has retained certain rights unless expressly modified by express provisions of the collective bargaining agreement. However, Article VII of the parties collective bargaining agreement, while not a guarantee of work days and work hours as the District pointed out above, also clearly states in Section A, that a work schedule will not be changed without thirty (30) days advance notice, except in the case of emergency. Paragraph 4 of Section A also states the work schedule for paraprofessional employees is the one hundred and eighty-one (181) days students are scheduled for attendance. There is nothing in the record which would lead to a conclusion that the student the grievant is assigned to has a schedule less than one hundred and eighty-one (181) days. Nor is there any evidence in the record which would lead to a conclusion that the student's absences have been emergencies thus eliminating the need for the thirty (30) day notice. The undersigned therefore finds the grievant's work schedule is, at a minimum, the one hundred and eighty-one (181) days the student is scheduled to attend school. Further, that the District must give a thirty (30) day notice of a change in the student's schedule of attendance. Thus, except in an emergency, the District must change the student's schedule in order to change the grievant's schedule.

The undersigned notes here that had the District achieved the change in sought in negotiations, payment being based upon actual hours of service to the assigned student, a different conclusion would of clearly been reached. However, the parties collective bargaining agreement clearly defines the employees work schedule as the schedule of the student, not whether the student is in attendance. The District's actions of not paying the grievant is therefore in violation the collective bargaining agreement. The undersigned also finds that the District's reliance on Article VII, Section E, is misplaced. Nothing in this provision clearly states the grievant will not be paid if the student she is assigned to does not attend a day of scheduled school.

The undersigned finds that the above conclusion is supported by the District's actions during the 1992-93 school year. The grievant received payment whether the student was in attendance or not because there was no change in the student's schedule, there was no thirty (30) day notice to change the grievant's work schedule and because the student's absence was not an emergency.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented the undersigned finds the District violated the collective bargaining agreement when it directed the grievant not to report

to work and denied her pay when the student to whom she was assigned was absent from school. The District is directed to cease its actions and to make the grievant whole.

AWARD

The District violated the collective bargaining agreement when it directed the grievant not to report to work and denied her pay on the days when the special education student to whom she is assigned was absent from school. The District is directed to cease its actions and to make the grievant whole.

Dated at Madison, Wisconsin this 19th day of September, 1994.

By Edmond J. Bielarczyk, Jr. /s/  
Edmond J. Bielarczyk, Jr., Arbitrator