BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CHEQUAMEGON UNITED TEACHERS	Case 27 No. 50311 MA-8208
and	
MELLEN SCHOOL DISTRICT	

Appearances:

Mr. Barry Delaney, Executive Director, Chequamegon United Teachers, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Ms. Kathryn J. Prenn, appearing on behalf of the District.

ARBITRATION AWARD

Chequamegon United Teachers, hereinafter referred to as the Union, and Mellen School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Mellen, Wisconsin, on May 19, 1994. The hearing was not transcribed and the parties submitted post-hearing briefs which were exchanged on July 18, 1994.

BACKGROUND:

The facts are not in dispute. For the 1993-94 school year, Linda Eschke, a playground aide, was assigned to work from 9:30 a.m. to 12:40 p.m. Another aide, Toni Neibauer, was assigned to work from 11:00 a.m. to 12:40 p.m. Neibauer has less seniority than Eschke. On September 22, 1993, the District changed Eschke's work schedule to 10:00 a.m. to 12:55 p.m., a reduction of 15 minutes per day. The District changed Neibauer's schedule that same day to 10:30 a.m. to 12:40 p.m., increasing her work day by 30 minutes per day. The Union filed a grievance asserting that the reduction of Eschke's hours violated the layoff provisions and the increase in hours for Neibauer violated the posting provisions of the contract. Eschke resigned from her employment with the District on September 24, 1993. The District denied the grievance and it was advanced to the instant arbitration.

ISSUES:

1. Did the District violate Article VIII, Section B, when it reduced Linda Eschke's hours in the fall of 1993 and increased the working hours of Toni Neibauer? If so, what is the appropriate remedy?

2. Did the District violate the collective bargaining agreement when it increased the working hours for Toni Neibauer without posting the position? If so, what is the appropriate remedy?

At the hearing, the District asserted that the grievance was not arbitrable because Eschke had resigned, and the Union responded that any remedy should be prospective only, and the District did not further assert the non-arbitrability of the grievance.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE VIII- SENIORITY, LAY-OFF AND RECALL

A. SENIORITY

Seniority shall commence on the last date of hire in the District. It shall be based on actual length of continuous employment minus any time spent on unpaid leave exceeding six (6) continuous weeks. Employees on lay-off shall retain their seniority prior to the day of lay-off; however, no seniority shall accrue to employees while on lay-off status.

Loss of seniority shall be effected if an employee quits, is discharged, fails to report to work within fifteen (15) working days (days the employee is scheduled to work) after having been recalled from lay-off, or fails to be recalled from lay-off after a period of the remainder of the school year in which the lay-off takes effect plus the following school year.

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 status 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.

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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.

UNION'S POSITION:

The Union points out that Article VIII (B) covers layoffs, in whole or in part, and Eschke was laid off in part and the order of layoff applies to her situation. The Union contends that the District violated the contract by the order of layoff, and additionally, no layoff should have occurred. It submits that Eschke was reduced in hours, but Neibauer received an increase in hours greater than Eschke's reduction in hours, so there was no reduction in work force or a layoff situation. The Union points out that Article VI (B) provides that the hours of Eschke cannot be reduced unless there is a partial layoff and then the order of layoff must follow Article VIII's provisions. It concludes that increasing Neibauer's working hours at the same time Eschke's hours were reduced is a violation of the agreement.

It submits that Article VIII does not provide for any exceptions to the order of a partial layoff as it clearly requires layoff by inverse seniority. It asserts that the District violated the agreement when it partially laid off Eschke instead of the least senior aide in the department of aides. It takes the position that the District is required by the agreement to change the work schedules of some aides so the least senior aide is the one who is partially laid off.

The Union believes that the change in Eschke's hours because the mail was not ready at 9:30 a.m. is bogus and that Eschke picked up the mail at 9:00 a.m. on her own time in order to complete her tasks. It claims that the District not only removed the mail pick-up duties but other duties as well which Eschke had normally performed during the one-half hour between 9:30 a.m. and 10:00 a.m. It argues that the 15 minute reduction could have been avoided by having Eschke start at 9:45 a.m. instead of 10:00 a.m. and she could have done her normal office duties. It claims that there was no need to reduce her total working hours and it asks that the District be found to have violated Article VIII (B) by the partial layoff of Eschke.

The Union contends that the District created a new position when it increased Neibauer's working hours by thirty (30) minutes. It maintains that pursuant to Article IX, the District must post this position and select the senior qualified applicant. The Union argues that allowing the District to increase the hours of a less senior employe without posting it, could result in a less senior employe reaching full-time employment and more senior employes being unable to apply or get the position as provided in Article IX. It asserts that the District's actions nullifies the right of aides having greater seniority to increase their work hours. The Union further submits that other employes may apply for the position because of more desirable hours to perhaps take a second job or alleviate child care scheduling problems, or a full-time employe may wish to work part time.

Referring to arbitration decisions, the Union points out that where the duties of a janitor had changed as well as his/her schedule, the arbitrator found a "new job" was created requiring posting and arbitrators found that the assignment to a second shift required posting as did the combining of two positions which resulted in a part-time position which later became full time. It requests a finding that the District violated Article IX when it created a new position and assigned it to Neibauer without posting it.

DISTRICT'S POSITION:

The District contends that in Article XIV, it expressly reserved the right to assign work, to determine job content and to determine hours of work. The District insists that it changed Eschke's schedule because it determined that it had no work for her to perform between 9:30 a.m. and 10:00 a.m. It also claims that it determined that workload demands warranted expansion of Neibauer's hours; however, Neibauer's work day remained within Eschke's, so the less senior employe had fewer hours. It argues that Neibauer was the only aide whose schedule allowed for the additional time required as scheduled by the District.

The District alleges that the Union is seeking the authority to require that it determine when and how the hours for the various positions will be scheduled and assigned. The District maintains that it retains the right to assign work, to determine job content and determine hours of work. It claims that it had the authority to assign duties to Eschke and Neibauer during hours which overlapped and as long as the more senior employe retained the position with the greater number of hours, Article VIII, Section B, was not violated.

The District contends that the addition of 30 minutes per day to Neibauer's schedule does not require posting under Article IX. Article IX, according to the District, requires posting in only two situations: 1) vacated positions and 2) new positions. It states that common sense dictates that a vacant position is one lacking an incumbent and a new position is one recently created by the District but not filled. The District claims that it has the right to determine whether a vacancy exists and when it should be filled. The District notes that arbitrators have recognized that changes in work schedules do not trigger posting provisions. It points out that there was no vacancy or new position because Neibauer did not vacate her position; rather, management exercised its managerial discretion to increase her hours and this discretion was not exercised in an arbitrary, capricious or discriminatory manner. It maintains that absent any evidence of abuse of its management rights, its decision must stand. It requests the dismissal of the grievance.

DISCUSSION:

Article VIII, Section B, of the parties' agreement provides that when the District determines that a layoff shall occur within a department, employes shall be laid off in the inverse order of seniority. It is undisputed that Eschke was partially laid off by 15 minutes and a literal reading of Section B would require that a less senior employe should be subject to the partial layoff. Article VIII, Section B, must be read in conjunction with Article XIV which reserves to the District the right to layoff and to set hours of work. The District has the right to make requisite changes in hours to meet its operational needs. If Eschke could perform Neibauer's duties at a different time such that Neibauer could be reduced 15 minutes, then Neibauer should be reduced as she is the less senior. However, where the District's operational requirements are such that Eschke and Neibauer are required to work at the same time, reducing Neibauer's hours would not benefit Eschke because Eschke is not available to work the hours. Additionally, increasing Neibauer's hours by 30 minutes does not change the result because operational requirements prevented Eschke from picking up these hours.

For example, if the District had four classroom aides working in four different classrooms for four different teachers during the same hours and the most senior aide worked an additional hour tutoring a student who had fallen behind due to illness and then that student moved out of the District so the

tutoring was not required, the District could reduce the most senior aide the one hour because the necessary work of all other aides was scheduled at the same time as the senior aide, so reduction of the least senior aide would create a nonsensical result. Here, the reduction of Eschke's work schedule by 15 minutes likewise did not violate the layoff clause because she was already working during the time that the less senior employe was also working so a reduction would not make sense. The decision in this case is based on the particular facts presented here and a reduction of another aide would not result in the restoration of time to Eschke, so in this case, the District did not violate Article VIII. If the facts were different, a different result may have been reached.

With respect to the alleged violation of Article IX, the parties' contract provides that "When there is a vacancy within the bargaining unit," the District must notify all bargaining unit employes of it. The issue here is whether the increase in Neibauer's hours of work by 30 minutes created a vacancy. A review of the cases cited by the parties reveals the following:

In Howard-Suamico School District, (Schiavoni, 4/90), the arbitrator found that where the hours were significantly changed, i.e. shifts, and at least half the job duties were altered, the District created a new job requiring posting. For lesser changes, the arbitrator stated a job may be modified such that a new job is not created.

In Muskego-Norway, (Gratz, 8/92), the contract required "a regular schedule of hours for each employe and defined 1st, 2nd and 3rd shifts and when a vacancy was posted, the contract required that the schedule of hours be included. The arbitrator held that the District could not change an incumbent's hours so that they fell into a different contractually-defined shift without re-posting but could alter the starting time of an incumbent with a modified schedule of hours within the contractually-defined shift without posting the position.

In Eggers Industries, (Shaw, 10/90), the Company changed a job which it posted as a part-time job, but it then became full time and the arbitrator required it be re-posted as a full-time position.

In St. Croix County, (Shaw, 8/91), the arbitrator held that where the only change was a change in hours, a new position was not created. In that case four part-time employes went to full time and three part-time employes had their hours increased. The arbitrator indicated that the Union's only recourse was to challenge the reasonableness of the changes but posting was not required.

In Sheboygan Area School District, (Jones, 5/84), a change in the work schedule of a full-time position was not required to be posted.

A review of these cases establishes that posting depends on the language of the contract and whether there are substantial changes in hours of work. In the instant case, the mere addition of 30 minutes to an employe whose final total hours was less than more senior employes and whose hours are the only ones that could be changed during the time that the work was needed is not a change of a sufficient degree to require that the position be posted as it did not rise to the level of a vacancy.

The Union could challenge the District's increase of hours on the basis that the District acted in an arbitrary, capricious or discriminatory manner; however, the facts presented here establish that the District exercised its discretion in a reasonable manner and did not violate Article IX by not posting Neibauer's position after it increased her hours.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 13th day of October, 1994.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator