BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WISCONSIN DELLS SCHOOL DISTRICT EMPLOYEES UNION LOCAL 1401-A, AFSCME, AFL-CIO and WISCONSIN DELLS SCHOOL DISTRICT	Case 32 No. 51040 MA-8469

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Ms. JoAnn M. Hart, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P. O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the District.

ARBITRATION AWARD

Wisconsin Dells School District Employees Union Local 1401-A, AFSCME, AFL-CIO, hereafter the Union, and Wisconsin Dells School District, hereafter the District or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. Hearing was held on November 1, 1994, in Wisconsin Dells, Wisconsin. The hearing was transcribed and the record was closed on February 20, 1995, upon receipt of written argument.

ISSUE:

The parties were unable to stipulate to a statement of the issue. At hearing, the Union framed the issue as follows:

Did the Employer violate the collective bargaining agreement or previous practice when it unilaterally transferred several custodial employes to different buildings and/or different shifts?

If so, what is the appropriate remedy?

The District framed the issue as follows:

Did the District violate Article 10 of the collective bargaining agreement when it changed hours of work and locations of work for employes in the unit?

If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

Did the District violate the collective bargaining agreement by implementing the changes set forth in the memo of March 3, 1994 and the memo of March 24, 1994?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

Article 2 - Management Rights

2.01 Except as otherwise provided in this Agreement, nothing herein shall limit the Employer in the exercise of the rights and functions of ownership or management, including, but not limited to, the right to manage the operations of the Employer and direct the working forces, the right to hire new employees, to assign work, to determine the number and location of its operations, the services required therein, and the quality of such service, including the means and processes of services and the materials used therein. This provision shall not be used to discriminate against any employee.

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Article 5 - Grievance Procedure

5.01 The School Board and the Union each recognizes the right of any bargaining unit employee to present grievances to his/her employer in person, or through a representative of his/her own, and the corresponding right of the Employer to confer with him/her in relation thereto. Without limiting the preceding legal rights and duties, the parties to this Agreement agree as follows:

a. Definition

Grievance is defined to be limited to a dispute concerning the interpretation or application of the terms of the written agreement entered into between the parties on wages, hours, and conditions of employment for the employees for whom Local 1401-A, WCCME, AFSCME, AFL-CIO is the negotiating representative.

5.02 Procedural Steps:

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d. Grievances not settled in Section 5.02 (c) of the grievance procedure may be appealed to arbitration provided:

1. Written notice of a request for arbitration is made with the Clerk of the Board within 10 work days of receipt of the Board's answer in Section 5.02 (c).

2. The issue is limited to the interpretation or application of a specific provision(s) of the Agreement.

. . .

f. The arbitrator shall schedule a hearing on the grievance and, after hearing such evidence as the

parties desire to present, shall render a written decision. The arbitrator shall have no power to advise on salary adjustments, except as to the improper application thereof. Nor shall the arbitrator have the power to hear or determine any dispute except those limited to the interpretation or application of the express and specific provision(s) of this written agreement, nor to add to, subtract from, modify or amend any terms of this agreement. The arbitrator shall have no power to substitute his discretion for that of the Board in any manner not specifically contracted away by the Board. The decision of the arbitrator shall, within the scope of his authority, be final and binding upon the parties.

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Article 9 - Seniority

9.01 It is the policy of the Employer to recognize seniority. There shall be five (5) departments defined as follows for employees covered by Local 1401-A:

a. Maintenance and Custodial (including Laundry);
b. Clerical and Secretarial;
c. Food Service;
d. Aides;
e. Transportation.

For the purposes of this Article, Building Support Services Assistants shall be considered to be in Departments c and d. Effective July 1, 1991, the Building Support Services Assistants shall be considered to be in Departments a and b as well; the incumbents in those positions shall begin to accrue seniority in departments a and b on July 1, 1991.

. . .

9.08 Job Posting and Transfer:

A. When filling vacancies within a job category or where new jobs are created within a job category in

the bargaining unit, those regular employees with the most seniority in the job category shall be given preference in filling such vacancies, provided that among internal applicants, no employee is objectively superior on the basis of skill and ability.

B. When a vacancy occurs, a notice shall be posted no less than five (5) working days after the vacancy has occurred. Vacancies shall be posted for five (5) work days. Employees wanting such posted jobs shall communicate, in writing, their interest to the person designated in the notice. A copy of the notice shall be provided to the Union. Vacancies occurring between June 1 and September 1 shall be advertised on one occasion in the official school paper. The notice shall include the following statement: "Current employees shall receive preference for this position." During the summer break, the Union President shall be notified.

C. Any employee selected to fill a vacancy shall be given at least fifteen (15) working days to qualify, and this period may be extended by mutual agreement.

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Article 10 - Hours of Work

10.01 The hours of work (see Appendix C) for each employee shall be the status quo which existed for the members of the bargaining unit as of October 6, 1988. The Employer has the right to change such hours of work for each employee for operational reasons provided it gives the affected employee(s) five (5) working days prior notice.

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APPENDIX C - HOURS OF WORK

Position	Hours
Department: Custodian	

Head Custodian/Spring Hill	7:00 a.m. - 3:30 p.m.
Custodian/Spring Hill	1:30 p.m. - 10:00 p.m.
Custodian/Big Spring	3:30 p.m. - 6:30 p.m.
Custodian/Briggsville	4:00 p.m. - 6:00 p.m.
Custodian/Briggsville	4:00 p.m. - 6:00 p.m.
Custodian/High School	3:30 p.m. - 12:00 a.m.
Custodian/Lake Delton	7:00 a.m. - 3:30 p.m.
Custodian/High School	4:00 a.m. - 12:30 a.m.
Laundry/High School	6:30 a.m. - 12:30 p.m.
Custodian/High School	9:00 a.m. - 5:30 p.m.
Custodian/Lake Delton	4:30 p.m. - 8:30 p.m.
Custodian/High School	3:30 p.m. - 12:00 p.m.
Custodian/Spring Hill	3:00 p.m. - 11:30 p.m.

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BACKGROUND:

On or about March 3, 1994, the School District's Superintendent of Building Grounds, Doug Fisk, issued the following Memorandum:

> TO: Spring Hill & High School Custodians
> FROM: Doug Fisk
> DATE: March 03, 1994
> RE: Change of hours
>
> Per 2.01 and 10.01 of the master agreement please note the following work assignments effective March 14 and will continue through March 25.
>
> | | | |
> |---|---|---|
> | Jason Willamarck | High School | 3:30 p.m. to 12:00 p.m. |
> | Bob Olson | " " | 7:00 a.m. to 3:30 p.m. |
> | Tom Farber | " " | 6:00 p.m. to 2:30 a.m. |
> | Hugh Schavier | " " | 6:00 p.m. to 2:30 a.m. |
> | Kathy Egge | Spring Hill | 7:00 a.m. to 3:30 p.m. |
> | Katherine Evans | " " | 3:30 p.m. to 6:30 p.m. |
> | Bev Rothe | " " | 6:00 p.m. to 2:30 a.m. |

Don Kallberg " " 6:00 p.m. to 2:30 a.m.
Don Chambers " " 6:00 p.m. to 2:30 a.m.
Larry Landers " " 6:00 p.m. to 2:30 a.m.

The hours of work for the Easter Break will be 7:00 a.m. to 3:30 p.m. for the following employees: Jason Willamarck, Bob Olson, Tom Farber, and Hugh Schavier report to the High School. Larry Landers, Don Kallberg, and Don Chambers will work at Spring Hill. Any questions with regards to hours or assignments, please contact my office. Thank you.

Thereafter, Doug Fisk issued the following:

MEMO

TO: Spring Hill & High School Custodians
FROM: Doug Fisk
DATE: March 24, 1994
RE: Change of Hours

Per 10.01 of the master agreement, please note the following work assignments effective Monday, April 4.

Jason Willamarck High School 7:00 a.m. to 3:30 p.m.
Bob Olson " " 3:30 p.m. to 12:00 p.m.
Tom Farber " " 6:00 p.m. to 2:30 a.m.
Hugh Schavier " " 6:00 p.m. to 2:30 a.m.
Kathy Egge Spring Hill 7:00 a.m. to 3:30 p.m.
Katherine Evans " " 3:30 p.m. to 6:30 p.m.
Bev Rothe " " 6:00 p.m. to 2:30 a.m.
Don Kallberg " " 6:00 p.m. to 2:30 a.m.
Don Chambers " " 6:00 p.m. to 2:30 a.m.
Larry Landers " " 6:00 p.m. to 2:30 a.m.

Any questions with regards to hours or assignments, please contact my office. Thank you.

At the time of the memo dated March 3, 1994, Jason Willamarck worked as a Custodian at the High School during the hours of 7:00 a.m. to 3:30 p.m. and Bob Olson worked as a Custodian at the High School during the hours of 3:30 p.m. to 12:00 p.m. The memo of March 24, 1994,

returned both employes to their previous positions.

At the time of the memo of March 3, 1994, Hugh Schavier worked as a Custodian at Spring Hill during the hours of 7:00 a.m. to 3:30 p.m.; Kathy Egge worked as a Custodian at Spring Hill during the hours of 6:00 p.m. to 2:30 a.m.; and Don Kallberg worked as a Custodian at the High School during the hours of 6:00 p.m. to 2:30 a.m. The memo of March 24, 1994, confirmed that the changes of March 3, 1994, involving Egge, Schavier, and Kallberg, would be permanent.

At the time of the memo of March 3, 1994, Rothe worked at Spring Hill during the hours of 4:00 p.m. to 12:30 a.m. The memo of March 24, 1994 confirmed that the changes of March 3, 1994, would be permanent.

On or about March 15, 1994, a Union group grievance was filed alleging that "management has discriminated, refused to recognize seniority and violated a past practice."

In this grievance, the Union requested the District to "honor the terms of the contract, discontinue changing positions, and make all affected employees whole." 1/ The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Union

Traditionally, arbitrators give greater weight to arguments based on specific contract language than to arguments based on language containing a general statement of rights. Additionally, arbitrators avoid contract interpretation which results in provisions of the contract being rendered surplusage. Under either approach, the District's arguments must fail.

Job posting is governed by the language of Sec. 9.08. It has been the consistent practice of the parties to include the building assignment and shift assignment of the position being posted. Employes choose to sign, or to not sign, based upon information contained in the posting. Given that the Sec. 9.08 preference for the senior applicant is limited to those employes "within a job category," the right to post for a vacancy has little meaning except to obtain a preferred building assignment or a preferred shift.

Sec. 9.01 states that "It is the policy of the District to recognize seniority." If the District may unilaterally change a custodian's building assignment and/or shift, then the Sec. 9.08 right to obtain these positions on the basis of seniority (or any other contractually defined basis) is destroyed.

The Union does not deny that management has the right to determine the number of custodial positions. Positions eliminated are subject to the layoff provisions and positions created are subject to the vacancy provisions of the contract. However, the District is not exercising these rights. There are the same number of positions in each building, working the same number of hours. The only change has been in the identity of the individuals performing the work.

The District argues that, if the listing of schools in Appendix C had any significance to the parties, then this information would be updated as one building was vacated and another was occupied. This argument is flawed because the record is silent as to when one building has been vacated and another occupied. The parties would not have the opportunity to update information if changes occurred after the contract had been settled. The parties have updated the Appendix C

1/ The Easter Break hours referenced in the memo of March 3, 1994, are not at issue. During periods when school is not in session, custodial employes work a day shift.

during bargaining.

During periods when school is not in session, all custodial and maintenance employes move to first shift. The memos contained in District Exhibit 2 reference this change in hours. The Union accepts this practice. Nor does the Union contest the right of the District to modify assignments to fill in for an absent employe, or to permit employes to attend seminars. At issue, are permanent unilateral changes in work shifts and building assignments which are contrary to postings.

The Arbitrator should find that the District violated the collective bargaining agreement when it unilaterally changed the permanent shift and building assignments of various custodians in the spring of 1994. The Arbitrator should order the District to immediately reinstate the former assignments and make all employes whole for losses incurred as a result of the contract violation.

District

Under the management rights clause, the District retains all rights and functions of ownership or management, except as limited in the agreement, including the right to manage the operations and direct the working forces; the right to assign work; and the right to determine the number and location of its operations. Article 10.01 of the collective bargaining agreement provides the District with the right to change hours of work for operational reasons and with five working days' notice.

The District has established its operational reasons for making the change. The Union has not raised any challenge to the District's operational reasons. It is undisputed that the requisite five working days' notice was given.

Sec. 9.08 does not state that "transfers," or "work locations," or "shifts" shall be governed by seniority. Nor, during the negotiation of the initial contract, did the Union advise the District that the job posting language limited the District's right to assign work or work locations. The Arbitrator has no authority to read into the job posting language a restriction that does not exist.

The fact that job postings have contained then-existing work hours and work locations does not negate express language granting the District the right to change work hours and locations. Moreover, since the instant dispute does not involve any vacancy, the job posting provision is not controlling.

Acceptance of the Union's argument would require a finding that Sec. 9.08 gives employes the right to choose their work site by seniority and to change their work assignments, based on seniority, without any vacancy existing. The result would be absurd.

Appendix C, entitled "Hours of Work," and the contract language referencing Appendix C demonstrates that the only function of Appendix C is to establish the "status quo" of hours of work at the time the original contract was negotiated. The limited significance of Appendix C is further supported by the fact that several schools listed in Appendix C no longer exist. If the listing of schools had any significance to the parties, then Appendix C would be updated.

Past practice has no bearing on this grievance because the parties' contractual language governing the hours of work and job posting is unambiguous. Moreover, the express terms of the arbitration clause precludes the arbitrator from relying upon past practice.

The District's change of work hours and locations for summer vacations and seasonal breaks is an exercise of its express rights and not a "practice." The Union ignores the change in 1991, when Doug Fisk changed the starting times of the District's two Custodians II, Bob Olson and Larry Landers. The change, which was not grieved, was made in conjunction with a move to a new school and the decision that the Custodians II, who are lead workers, should be in the building at the time when the greatest number of custodians are in the building.

The Union argues that the District's failure to obtain the word "transfer" in the management rights clause now prevents the District from exercising the right to assign work. If the District had obtained the right to "transfer employes," it could have transferred bus drivers to cook or aide positions and secretaries to custodian positions. In the present case, the District has assigned custodial work to custodians, consistent with its contractual rights.

As is evident from the record, every custodial employe is virtually guaranteed that work hours and locations will change repeatedly. Employes know this, which may explain why no employe signed the grievance or appeared at the hearing other than Don Kallberg, who is no longer employed by the District.

The District has expressly retained the right to make the changes in work hours and work locations. The grievance must be denied.

DISCUSSION

Sec. 9.08, Job Posting and Transfer, establishes a posting procedure for "filling vacancies within a job category or where new jobs are created within a job category." Having obtained a position in accordance with Sec. 9.08, an employe has a Sec. 9.08 right to continue in that position. Absent such a right, the posting provision would be meaningless.

"Vacancies" and "new jobs" posted pursuant to Sec. 9.08 have always identified a building and work hours. Appendix A of the collective bargaining agreement also identifies custodial

positions by building and work hours. 2/ The language of Appendix A, as well as the conduct of the parties in applying the language of Sec. 9.08, persuades the undersigned that custodial positions are not fungible, but rather, are defined by work hours and building. Thus, the Sec. 9.08 right to continue in a position includes the right to the building and the work hours of the position.

At the time of the memo of March 3, 1994, each of the employes affected by the memos of March 3 and March 24, 1994, occupied a custodial position with the District. It not being evident that these employes were not contractually entitled to their positions, each of these employes has a Sec. 9.08 right to continue in the position which he/she occupied on March 3, 1994.

Sec. 10.01, the language relied upon by the District, states that the hours of work for each employee is the status quo which existed for the members of the bargaining unit as of October 6, 1988. Sec. 10.01 further states that the District has the right to change the status quo hours of work "for operational reasons provided it gives the affected employee(s) five (5) working days prior notice."

2/ Apparently, Appendix C was intended to record the status quo at the time that the original contract was bargained in 1988. Thus, it is not significant that the building assignments and work hours contained in Appendix C do not reflect the status quo on March 3, 1994.

Prior to and after the memos of March, 1994, there was only one custodial position which experienced a change in work hours, i.e., the position occupied by Bev Rothe. Each of the other positions experienced only a change in the identity of the employe occupying the position, i.e., each employe was removed from his custodial position and placed in another employe's custodial position. 3/

By changing the identity of the employe occupying a custodial position, the District did change employe work hours. However, to construe the Sec. 10.01 right to change work hours to include the right to remove an employe from his/her position and to place the employe in a position occupied by another employe would be to disregard rights guaranteed by Sec. 9.08. Neither the language of Sec. 10.01, nor any other record evidence, persuades the undersigned that such a construction is reasonable.

Sec. 10.01 does provide a limitation upon an employe's Sec. 9.08 right to continue in a position. This limitation, however, is upon the employe's right to continue to work the hours of a position. Sec. 10.01 does not provide the District with the right to change the identity of the individual who occupies a position.

The District changed the work hours of the position occupied by Rothe to conform the position's hours to the hours worked by other custodians at Spring Hill. The change in the work hours of Rothe's position was preceded by five working days notice and was made for operational reasons. The change in the work hours of Rothe's position is permitted by Sec. 10.01.

3/ Olson was placed in Willamarck's position; Willamarck was placed in Olson's position; Schavier was placed in Kallberg's position; Kallberg was placed in Egge's position; and Egge was placed in Schavier's position.

The changes implemented by the memo of March 3, 1994, affecting Schavier, Olson, Willamarck, Egge, and Kallberg, were temporary changes made for the purpose of providing Willamarck and Schavier with the opportunity to try a new cleaning technique at the High School. Since the temporary changes are consistent with prior practices 4/ and do not undermine the integrity of the Sec. 9.08 posting process, the undersigned has not found the temporary changes to violate Sec. 9.08.

The changes implemented by the memo of March 24, 1994, affecting Schavier, Egge, and Kallberg, were permanent changes. 5/ It is not evident that Egge was placed in Schavier's position for any reason other than Egge's desire to work days. It is not evident that Kallberg was placed in Egge's position for any reason other than Fisk's belief that the work at Spring Hill would be easier on Kallberg's feet. 6/

Kallberg's position at the High School, which was filled by Schavier, was one of the positions assigned to the cleaning team. While it appears that the District preferred to have Schavier on the cleaning team, it is not evident that Kallberg was incapable of performing the work of the cleaning team. These permanent changes, unlike the temporary changes, are not consistent with prior practices and do undermine the integrity of the Sec. 9.08 posting process.

As the District argues, Article 2, Management Rights, provides the District with a right to manage its operations and direct its work force, including the right to assign work and determine

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4/ Work hours and/or building assignments have been changed to permit employes to attend in-services and training sessions.

5/ Since Willamarck and Olson were returned to their original positions, they were no longer at issue.

6/ While it is evident that Kallberg complained about his feet, it is not evident that Kallberg requested a transfer to Spring Hill or that such a transfer was medically necessary.

the number and location of its operations. The District's right to assign work and/or determine the number and locations of its operations is not at issue. 7/ At issue is who will perform the assigned work at the locations determined by the District.

In the present case, the determination of who will perform the work is governed by Sec. 9.08. Since the management rights relied upon by the District have been limited by other provisions of the collective bargaining agreement, these management rights are not controlling.

7/ The number of custodial positions, the location of the custodial positions, and the nature of the custodial work remained unchanged. To be sure, the High School was now cleaned by a three member team. It is not evident, however, that this cleaning involved any task which had not been previously performed by custodial employes.

In summary, Schavier, Egge, and Kallberg have a Sec. 9.08 right to continue to occupy the custodial positions which each occupied on March 3, 1994. Neither Sec. 10.01, nor Article 2, provides the District with the right to permanently remove Schavier, Egge and Kallberg from the positions which they occupied on March 3, 1994 and to place Schavier, Egge and Kallberg in positions occupied by other employes. By implementing the changes set forth in the memo of March 24, 1994, affecting Schavier, Egge, and Kallberg, the District has violated Sec. 9.08 of the collective bargaining agreement.

It is not evident that any employe lost any wages or fringe benefits as a result of the District's contract violation. Accordingly, the appropriate make whole remedy is to return Hugh Schavier, Kathy Egge, and Don Kallberg to the positions which they occupied on March 3, 1994. However, since Don Kallberg is no longer employed by the District, the Arbitrator has not ordered any remedy with respect to Don Kallberg.

Based upon the above, and the record as a whole, the undersigned issues the following:

AWARD

1. The District did not violate the collective bargaining agreement when it implemented the temporary changes set forth in the memo of March 3, 1994.

2. The District did violate the collective bargaining agreement when it implemented the permanent changes set forth in the memo of March 24, 1994 affecting Hugh Schavier, Kathy Egge, and Don Kallberg.

3. In remedy of this violation of the collective bargaining agreement, the District shall immediately return Hugh Schavier to the custodian position at Spring Hill which he occupied on March 3, 1994, and return Kathy Egge to the custodian position at Spring Hill which she occupied on March 3, 1994.

Dated at Madison, Wisconsin, this 10th day of May, 1995.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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