BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SUPERIOR SCHOOL DISTRICT EMPLOYEES LOCAL #1397, AFSCME, AFL-CIO and SCHOOL DISTRICT OF SUPERIOR	Case 105 No. 50382 MA-8234 Case 107 No. 50384 MA-8236

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1701 East Seventh Street, Superior, WI 54880, on behalf of Superior School District Employees Local #1397, AFSCME, AFL-CIO.

Mr. Kenneth A. Knudson, Hendricks, Knudson & Gee, S.C., Attorneys at Law, 312 Board of Trade Building, Superior, WI 54880, on behalf of School District of Superior.r

ARBITRATION AWARD

The Superior School District Employees Local #1397, AFSCME, AFL-CIO (hereinafter Union) and the School District of Superior (hereinafter Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for the final and binding arbitration of unresolved disputes by an arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission) from its staff. On January 18, 1994, the Union filed with the Commission requests to initiate grievance arbitration in these matters. The Employer concurred in said requests. On February 22, 1994, the Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on May 18, 1994, in Superior, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was not transcribed, and the parties filed briefs and reply briefs, the last of which was received February 6, 1995. Full consideration has been given the evidence and arguments of the parties in reaching this decision.

STATEMENT OF THE FACTS

In Case 105, Mary Palumbo (hereinafter Grievant or Palumbo) is a Kitchen Assistant at Superior Senior High School. The Grievant requested a transfer to a long-term subbing position as a Kitchen Assistant at Superior High School working the same number of hours as her current position. The Grievant's request was denied.

In Case 107, Sharon LaValley (hereinafter Grievant or LaValley) is a Kitchen Assistant working three hours a day at Cooper Elementary School. In September, 1993, a long-term substitute position at Superior Senior High School was open for bid. Grievant LaValley bid for the position, which bid was denied

Both denials were grieved. Said grievances proceeded through the parties' grievance procedure without resolution and are properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

Article 6 - Salary Schedule - Paydays - Guaranteed Hours of Work Shift Differential Pay - Overtime Pay

Section 1.

. . .

D. All food service workers, custodians, engineers, and bus drivers will request in writing, to their immediate supervisor, an interest to move to a temporarily vacated position. If approved, the employee will begin to receive pay for the position the day they begin, or no later than two (2) working days following the date the request was received.

1. The school district must know or be reasonably assured that a job will be vacated for seven (7) working days or more beyond the receipt of request.

2. The district agrees that any decision regarding a regular employee moving to a position made available as a result of the absence of another regular employee would not be made in an arbitrary or capricious manner.

E. Regular employees substituting in a higher paying job classification receive the salary or rate of pay for that step of the substitute position that is listed for the step they currently hold in their regular position.

Regular employees substituting in a lower paying job classification shall not receive less in pay than their regular salary.

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Article 22 - Management Rights

Section 1. The Board, on its own behalf, and on behalf of the electors of the district, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and the United States, included, but without limiting the generality of the foregoing, the right:

A. To the executive management and administrative control of the total school system and its properties and facilities, and the assigned school activities of the employees;

B. To hire all employees;

C. To establish job specifications for their employees, the reasonableness of which shall be subject to arbitration.

Section 2. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

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ISSUES

The parties stipulated that the Arbitrator would frame the issue in the Award.

In Case 105, the Union would frame the issue as follows:

> Did the Employer act in an arbitrary and capricious manner in violation of the Collective Bargaining Agreement when the Employer denied the Grievant the opportunity to fill a vacant substitute position?
>
> Likewise, did the Employer also violate the agreement by setting the arbitrary criteria that an employee must realize a financial gain when such a criteria was never bargained with the Union?
>
> And if so, the Employer shall allow the Grievant the opportunity to fill vacant positions based upon seniority and qualifications.

In Case 107, the Union would frame the issue as follows:

> Did the Employer violate the terms of the Collective Bargaining Agreement by denying the Grievant the opportunity to bid on a long term substitute position in the Food Service Department?
>
> And if so, the Employer shall allow the Grievant and other union represented employees the opportunity to bid on long term substitute positions based upon seniority and qualifications.

The Employer would frame the issue in both cases as follows:

> Did the Employer violate the Collective Bargaining Agreement by assigning substitute employees to work in temporary vacancies which are the subject of grievances #3 and #4?

I frame the issue in both cases as follows:

1. Did the Employer violate the collective bargaining agreement by making its decisions in an arbitrary or capricious manner to deny the employe's requests to move to a temporarily vacated position?

2. If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

In Case 105, the Union argues on brief that the issue in this case is the right of an employe to exercise seniority rights to secure an open position; that the Employer's self-imposed standard that an economic gain must be realized by employe who is interested in a position is an arbitrary and capricious act; that the standard of an economic gain was never negotiated with the Union; that employes change jobs for any number of reasons, not just to achieve a financial gain; that the beneficial aspects of allowing employes the choice in securing job positions when available based upon seniority is clear for both the District and the employes; that the jobs in question at Superior Senior High School have specific job assignments; that the Employer has separate Staff Bulletins for each of these positions; that the job assignment for each position is listed as being different; that the various jobs in the Food Service Department are all different; that these jobs are not interchangeable; that the long-standing past practice is that each open position is looked at as a separate and unique position; that these positions were never interchangeable; and that, in fact, these positions are specialized according to very specific duties associated with each job.

In Case 107, the Union argues on brief that the issue in this case is whether employes have the right to exercise their seniority rights to secure positions for reasons other than economic and financial gain; that employes have used their seniority for bidding upon open positions; that employes have the right to choose or to make a change in positions for a number of reasons; that seniority has always been the only determining factor in securing long-term subbing positions; that no employe before this Grievant has ever been denied a long-term subbing position; that the past practice as related to this matter has been clearly established; that what the Employer has done is to set up an arbitrary standard; that this newly imposed standard required seniority rights to be modified by the standard that a financial gain must be realized; that this is certainly an arbitrary and capricious act by the Employer; and that, as such, it is a direct violation of Article 6; that the Employer's argument about disruption of operations seems weak at best; that any disruptive actions are mitigated by the seven day requirement; that there is no valid reason to deny the Grievant this position; that by denying the Grievant this position, the District acted in an arbitrary and capricious manner; and that the contractual rights of the Grievant have been violated.

In Cases 105 and 107, the Employer argues in its brief that both grievances seek to remove management's right to assign job duties to promote the most efficient operation of the Food Service program and delivery of services to the children in the School District; that it is disruptive to move an employe from job duties that they were trained to perform, to performing other job duties on a temporary basis if there is not a financial gain to the employes; that the Union would have employes move from location to location and from job duty to job duty based solely on seniority without consideration of any disruption; that instead of one potentially inexperienced substitute employe in a position on a short-term basis, the Union recommends the District be faced with two employes learning their jobs for each substitution; that this does not make sense and is a violation of management rights; that the Employer does allow for this kind of disruption if there is any economic gain either in pay or in hours worked to the employe; that in both of these cases, the

issue is whether employes can move where there is no economic benefit involved; 1/ that it would be poor management practice to deal with the disruption caused by the temporary vacancy by creating an additional disruption when a trained employe is moved to a different job or location for the short term and bring in a second substitute to replace the employe; that this is contrary to good management principals and a violation of the public trust; that the Union's reliance on seniority in making these decisions is an over-simplification of what is really important in management; that management does not have the luxury of relying on only one factor in making its decisions; that management must and should consider the needs of its employes in balance with the needs of the student served by those employes and the cost benefit to the public; that, in other words, management must manage as provided in Article 22 in the collective bargaining agreement; and that these grievances should accordingly be denied.

In its reply brief in Case 105, the Union argues that seniority rights are not limited to economic matters; that what the Employer has done in this case is limit employes in their use of seniority to bid upon open positions; that the Employer uses an arbitrarily imposed standard that economic gain must be the criteria to be met before employes may exercise their seniority option; that this is an imposed standard which has never been negotiated across the bargaining table; that nowhere within the collective bargaining agreement does such a restriction exist; that seniority has always been the sole determining factor when employes take long-term substitute positions; that such has been the long-standing past practice in the Food Service Department; that disruption at the work place is a non-issue; that these jobs are often filled by interested employes with no financial gain in mind; that the Employer admits that if financial gain is a factor, then employes have the opportunity to take vacant substitute positions; that under such circumstances, disruption is allowed; that, in reality, the movement of employes to fill vacant positions has been the norm for a long time; and that the disruptive factor, if any, is minimal and overstated by the Employer in this matter.

In its reply brief in Case 107, the Union argues that seniority rights are not limited to economic matters; that the Employer has limited employes in their use of seniority to bid upon open positions; that employes use their seniority for reasons other than economic gain; that the District uses an arbitrarily imposed standard that economic gain must be the criteria before employes may exercise their seniority option; that this is an imposed standard which has never been negotiated across the bargaining table; that nowhere within the collective bargaining agreement does such a restriction exist; that seniority has always been the sole determining factor

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1/ As noted in the Union's brief, during the processing of Case 107, the Employer became aware of an economic loss of 15 minutes per day to the Grievant, whereupon the Employer made the proper adjustment to make the Grievant financially whole. The Union and the Employer agree that no financial loss is involved in these two cases.

when employes take a long-term substitute positions; that disruption at the work place is a non-issue; that jobs are often filled by interested employes with no financial gain in mind; that the Employer admits that if financial gain is a factor, then employes have the opportunity to take vacant substitute positions; that under such circumstances, the so-called disruption is allowed; and that, in reality, the movement of employes to fill vacant positions has been the norm for a long time.

DISCUSSION

Before I can decide these two cases, it is important to view what is the relationship between the parties in regard to employes transferring to temporarily vacated positions.

As noted in the previous arbitration award between these parties issued by Arbitrator Coleen A. Burns on August 24, 1990, the parties repudiated any past practice regarding temporary transfers when they entered into an agreement in 1987 to add Article 6, Section 1. D. to the collective bargaining agreement.

I specifically do not make a finding as to whether any binding past practice has or has not been created since that time. I decline to make such a finding because the absence or presence of any such past practice does not impact on the decision reached here.

Article 6, Section 1, Subsection D does not grant employes the right to move to a temporarily vacated position; instead, it grants employes the right to "request in writing, to their immediate supervisor, an interest to move to a temporarily vacated position." The right granted is one to "request," not to "move." A move can occur "if approved." Said approval is a decision made by the School District. Said decision cannot be made "in an arbitrary or capricious manner."

So the issue before me is whether the decision made by the District to deny the moves to temporarily vacated positions by the employes in these cases was arbitrary or capricious.

In Case 105, the Grievant requested to transfer to a temporarily vacated position with the same job title, the same salary, with the same hours, at the same location. There was testimony that these positions are somewhat interchangeable, that the head cook, a member of the bargaining unit, assigns employes to various jobs as needed. While an employe usually does the same job on a daily basis, it is within the discretion and authority of the head cook to move employes to best meet the needs of the Employer.

In an instance in which an employe wants to transfer to a temporarily vacated position with the same job title, at the same salary, with the same hours, and at the same location, and in which the two positions are interchangeable and are interchanged within the discretion of the immediate supervisor, I do not find a denial of said request to be either arbitrary or capricious.

In Case 107, the Grievant requested a transfer to a temporarily vacated position with the

same job title, at the same salary, with the same hours 2/ but at a different location. The Employer argues that employes are not entitled to transfer to a temporarily vacated position where there is no economic benefit involved.

I disagree. The benefits that come to an employe from any particular job assignment exceed that of the monetary gain. The Employer's argument does not take into consideration, for example, that while the hourly wage and number of hours may be the same, a transfer may allow an employe to work more desirable hours, a benefit to the employe even though it does not show up in the pay check. In this case, the Grievant's temporary transfer from Cooper Elementary School to Superior Senior High School may have allowed the Grievant to work at a more desirable work place, closer to home or day care or whatever, a benefit to the Grievant that would not show up in the pay check.

Therefore, I find that to deny an employe a transfer to a temporarily vacated position on the basis that no economic benefit was involved is arbitrary. And if this was the only reason that the Employer denied the Grievant's transfer to the temporarily vacated position, I would find said denial a violation of the collective bargaining agreement.

However, the Employer had another reason for denial of this transfer: the Grievant was in the process of being trained for her current position. The Grievant had just permanently transferred into her current position at Cooper Elementary School and was still in training when she requested to transfer to Superior Senior High School where she had worked previously. The Employer's interest in having this employe trained in a timely fashion was reasonable, and its denial of the Grievant's request to transfer based upon that interest was neither arbitrary nor capricious but a reasonable exercise of its discretion.

Therefore, for the reasons stated above, the Arbitrator issues the following:

AWARD

1. That the Employer did not violate the collective bargaining agreement by denying the employes' requests to move to temporarily vacated positions in these matters.

2. That the grievances are denied and dismissed.

2/ As noted in Footnote 1, the number of hours was discovered to be different; however, the Employer has made the Grievant whole for lost wages based on the lost hours. The parties agreed that the issue before me should be decided as if the hours were the same.

Dated at Madison, Wisconsin, this 29th day of August, 1995.

By James W. Engmann /s/
James W. Engmann, Arbitrator

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