BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 3055, AFSCME, AFL-CIO	Case 178 No. 52812 MA-9112
and	
GREEN BAY AREA PUBLIC SCHOOL DISTRICT	

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. J. D. McKay, Attorney at Law, appearing on behalf of the District.

ARBITRATION AWARD

The Union and Employer named above are parties to a 1994-96 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a grievance concerning night shift substitutes. The undersigned was appointed and held a hearing in Green Bay, Wisconsin, on August 24, 1995, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 17, 1996.

ISSUE:

The parties ask:

> Did the Board violate the contract when it assigned night shift substitutes to work at Wequiock and Jefferson Elementary Schools rather than assigning overtime to Tom Bennett and Tom Van Calster, the regular custodians at these schools? If so, what is the remedy?

BACKGROUND:

Thomas Bennett is a custodian at Wequiock School and has been at that location for 18 years. His normal hours are 7:30 a.m. to 4:30 p.m. There is no other maintenance or custodial employee assigned to Wequiock.

In the past, Bennett has worked some overtime at that school. During the 1994-95 school year, there were occasions when the school was open after Bennett's shift ended and other employees, such as Len Zellner, John Kapla, and Dan Wochenske came in to clean up after activities and lock up the building. Zellner was regularly assigned to Baird School on the day shift, and he worked at Wequiock when Bennett was not able to work overtime. Kapla was assigned to day shift work and would work Bennett's shift when Bennett was off.

The District has 14 night shift and four day shift substitutes -- employees who are full time but not assigned to a specific school or building and are used as floaters. Wochenske, a Level 2 custodian, is a substitute who is not assigned to a building.

Bennett believes that if there is any work that needs to be done at Wequiock School outside of his shift, he should be assigned to do that work on overtime. He is not grieving work that Zellner and Kapla did on overtime, because they worked at times that he was not available anyway. However, he is grieving Wochenske's work on overtime because there were times that Wochenske worked on overtime when Bennett was available, particularly the dates of February 21, March 9 and March 20, 1995.

Wochenske did not receive overtime pay for his work on the three dates just mentioned, and the work he performed at Wequiock was part of his assigned work for those days.

Thomas Van Calster is a custodian at Jefferson School, and has worked there for the past eight years on the day shift. No one else is assigned regularly at Jefferson. He has previously worked overtime for night conferences or voting, and has been assigned to work overtime in the 1994-95 school year. Wochenske was assigned to work a night program and during a primary election at Jefferson on March 29 and April 4, 1995. Wochenske did not get overtime for this work but was assigned it as part of his work shift.

Van Calster believes, as does Bennett, that when work is assigned at Jefferson School after Van Calster's shift has ended, it should be assigned to him as overtime.

During the summer and fall of 1994, the parties negotiated for the 1994-1996 collective bargaining agreement. The Union proposed that the following language be added to the contract:

> Overtime -- Extra work in a particular school will be offered to maintenance employees in that school first. Work will then be assigned to those signing a master eligibility list (posted twice a year) on a rotating basis using seniority as the starting point for offering such overtime. All maintenance employees will be eligible to sign this list

including the outside crew.

The previous Supervisor of Human Resources, Lori Gmack, made a note on the Union's proposal -- "How work with sub?" She was concerned that the District's use of floaters or substitutes would be impacted if the term "extra work" was used, as the Union proposed, because the use of substitutes has the potential to eliminate overtime.

The District proposed the following language for overtime assignment:

> When it is known in advance that overtime is needed in a school, it shall be offered to employees in that particular school. If no employee in that school accepts the assignment, the overtime will be assigned according to a master voluntary overtime list of custodial employees. The list will be established twice a year for six-month time periods.
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> Employees on the list will be assigned overtime on a rotation basis by seniority. When employees are contacted for an assignment they will be marked off the list for that rotation whether the assignment is accepted or declined, or the employee cannot be personally contacted by phone. Once the list has been exhausted, the procedure will begin again at the top of the list.
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> If the overtime assignment is expected to be less than three (3) hours, the District may contact the next available employee on the list who is scheduled to work immediately prior to or after the assignment and call-in provisions will not apply.

The District's proposal was accepted by the Union and became part of the contract language for the 1994-1996 contract. The above three paragraphs were added to the existing paragraph on overtime in Article X in the 1992-1994 contract, which remains in the successor contract, and which states:

> All work performed outside of the normal workday and/or work week shall be compensated for at the rate of time and one-half the employee's rate of pay. All overtime work will be allotted by the Employer, and as nearly as possible, be equally divided among employees in their respective schools. As far as is practical, employees shall be limited to

three (3) appearances per week for overtime work.

THE PARTIES' POSITIONS:

The Union:

The Union states that the question posed by this grievance is whether the regular employees in these two schools should stay after their shifts to complete work, albeit on overtime, or can the District assign this work to a substitute working on the second shift so that no overtime is worked. During 1994-95 school year, the District changed its past practice of assigning the school custodians or another day shift employee from another school to perform duties at Jefferson and Wequiock schools on overtime, and it started assigning substitutes to those two schools.

The Union argues that the past practice should have been maintained, citing Article IV of the labor agreement regarding existing practices. The language prohibits the District's action of unilaterally eliminating the practice of assignments on overtime without discussion with the Union.

While the District made a big deal of the phrase "extra work" in the Union's proposal on overtime, there is not much difference between the proposals submitted by the Union and the District. The central feature of the Union's proposal was the use of a voluntary sign up list that would be open to all employees and which would rotate, and this feature is in the District's proposal. The Union was not trying to establish two categories of work by the phrase "extra work" but was referring to work which would necessitate overtime assignments at a given school. This was the practice for schools with more than one shift, and the Union was proposing language which would cover instances when the custodial staff in a given school couldn't perform the work.

The Union asserts that the essential change proposed by the Union and accepted by management in its counter proposal on the overtime list was to expand the opportunity to work overtime beyond the employees of any given school by the use of a voluntary sign-up list for these assignments. The Union never proposed giving employees the right to determine when overtime would be necessary. The Union believes that the contract was violated when the practice of assigning additional duties outside of normal work hours at Jefferson and Wequiock schools to the custodians working there was not maintained, and its asks that the grievances be upheld and the appropriate remedy ordered.

The District:

The District stated that the contract does not provide a guarantee of overtime, and Article X clearly states that all overtime will be allotted by the Employer. Even the employees aggrieved here testified that they had no contractual right to overtime, and the

Union does not dispute this fact. Thus, the District did not violate the contract when it assigned custodial "floaters" to perform work at Jefferson and Wequiock schools during their regular shifts rather than incurring overtime.

The District asserts that assigning work to available personnel rather than incurring overtime is an appropriate exercise of management rights. Because second shift custodial floaters were available to perform the extra work at Jefferson and Wequiock schools, they were used rather than allocating overtime to the day shift custodians. The District has the sole discretion to determine if and when overtime is worked -- it is only after the decision to provide overtime is made by management that the overtime language is relevant.

The Union's interpretation of the overtime language lacks merit, as it is based on the supposition that any custodial work associated with Jefferson and Wequiock falls under the exclusive domain of the day shift custodians at those schools because there are no night shift custodians assigned at those schools. The proprietorship of any school in the District belongs to the District. The contract language states that when it is known in advance that overtime is needed in a school, it shall be offered to employees in that particular school. But it is only when overtime is known and allotted by the District. The Union correctly states that overtime must first be offered to employees in the school where the overtime work is to be performed. But the District must first designate the work as overtime. Where the work was never allotted as overtime, the District had no contractual obligation to provide the day custodians with first refusal.

The District contends that the fact that overtime was offered to day custodians in the past does not mean that the work has to be performed on an overtime basis in the future. The assignment of overtime in the past does not rise to the level of a guarantee that all work in the future will be assigned on an overtime basis. Furthermore, past practice cannot be used to change the clear and unambiguous language in the contract, namely, Article X which states that all overtime work will be allotted by the Employer.

The District submits that the Union is trying to gain through arbitration that which it could not through negotiations. The Union proposed that "extra work" at a particular school be offered to the respective custodians, which would have limited the used of floaters and increased overtime costs. But the District rejected that language. To sustain the grievance now would provide the Union that which it could not achieve in bargaining. The grievance should be denied.

In Reply:

The Union takes issue with the District's argument that the past practice is not valid. The practice involves offering additional work at Jefferson and Wequiock to the respective custodians, and that practice is one that explains how the contract operates as to these two schools and no other schools. In the other schools, there are employees that

replace the day shift custodians, and there is no question that work that is not finished during the day shift goes to those night shift employees coming in to work. The practice that the Union is arguing to maintain is one that exists only because of the unique nature of these two schools, a practice followed by those two schools and those two employees.

The Union views that discussions during negotiations for the 1994-96 labor contract as a smoke screen over the issue of past practice. This grievance would not have been affected under either the Union's or the District's proposal, because it involves a past practice as to the assignment of work at only these two elementary schools. The Union contends that in these schools, if there is work that cannot be done by the existing staff during normal hours, it will be designated as overtime because there is no other way of doing it. It was the Employer that established this practice, presumably because of its operating needs. The unilateral elimination of this practice violates Article IV of the contract.

The District responds to the Union by pointing out that Article IV pertains to all existing practices "not specifically mentioned in this Agreement," and the Agreement contains specific language governing overtime in Article X. Therefore, Article IV does not apply.

While the Union argued that the two bargaining proposals with respect to overtime were essentially the same, the Union's proposal containing the language of "extra work" would have required the District to offer all extra work to the employees at a particular school first. The Union admits that "extra work" in this context would refer to work which would necessitate overtime assignments within a given school. The Union's proposal mirrors the issue in this grievance, the fact that extra work was not given to employees assigned to Jefferson and Wequiock.

DISCUSSION:

The Union relies heavily on Article IV, which states:

> All existing practices pertaining to hours, working conditions, rules and regulations not specifically mentioned in this Agreement shall continue in force as at present until they are adjusted by mutual agreement between the Employer and the Union. The Employer further agrees to maintain all existing benefits not contained in this Agreement.

The District cites Article X, which states:

> All work performed outside of the normal workday and/or work week shall be compensated for at the rate of time and one-half the employee's rate of pay. All overtime work will be allotted by the Employer, and as nearly as possible, be equally divided among employees in their respective schools. As far as is practical, employees shall be limited to three (3) appearances per week for overtime work.
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> When it is known in advance that overtime is needed in a school, it shall be offered to employees in that particular school. If no employee in that school accepts the assignment, the overtime will be assigned according to a master voluntary overtime list of custodial employees. The list will be established twice a year for six-month time periods.
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> Employees on the list will be assigned overtime on a rotation basis by seniority. When employees are contacted for an assignment they will be marked off the list for that rotation whether the assignment is accepted or declined, or the employee cannot be personally contacted by phone. Once the list has been exhausted, the procedure will begin again at the top of the list.
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> If the overtime assignment is expected to be less than three (3) hours, the District may contact the next available employee on the list who is scheduled to work immediately prior to or after the assignment and call-in provisions will not apply.

Clearly, Article X applies to this grievance, not Article IV. The general language of a maintenance of standards clause cannot overcome specific contract language that applies to a situation. Bennett and Van Calster are grieving the fact that they were not assigned overtime. They want the night work that was assigned to night shift substitutes, and they want it on an overtime basis and paid at overtime rates. Article X must apply. While the Union argues that the past practice involved in this case is a special situation that lends contractual interpretation to assignment of work at only two schools, it would need a side letter of agreement or something more specific to overcome the contract language in Article X that should be applied everywhere, absent such side agreement.

There are significant differences in the language proposed by the Union regarding

overtime and the language accepted by the parties for insertion in the labor contract. The Union proposed that "Extra work in the particular school will be offer to maintenance employees in that school first." If that language had been accepted by the District, the Union would have a strong case here to sustain this grievance, in that it could easily argue that the night work at Jefferson and Wequiock falls within the phrase "extra work in the particular school." While the Union asserts that the thrust of its proposal was to establish a voluntary sign up list for overtime, the Union must accept all the language that it agreed to in the final version of the tentative agreements which became contract language.

The District's interpretation of Article X is the better one -- the District determines in the first place whether work is to be done on overtime or straight time. If the District can get work done on straight time rather than overtime, Article X does not apply. If the District has to have the work done on overtime, Article X then says those hours get offered to the employees in that school first.

In this case, the District used substitutes to perform work at Jefferson and Wequiock after hours that the regular custodians work. If the regular custodians had done the work, it would have had to be on overtime. But the substitutes were not working on overtime, just on their regular hours. If the substitutes had also been on overtime instead of regular hours, the Union would have a case. Absent a showing that the work was done on overtime, there is no merit to Bennett and Van Calster's claim for such work to go to themselves on an overtime basis. The fact that this work had been done in the past on an overtime basis does not prevent the District from using substitutes to do the work on a straight time basis, where the District determines in the first instance when overtime is needed, pursuant to the language in Article X.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this ___ day of February, 1996.

By _____
Karen J. Mawhinney, Arbitrator