

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 3055, AFSCME, AFL-CIO

and

GREEN BAY AREA PUBLIC SCHOOL DISTRICT

Case 181  
No. 52815  
MA-9115

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 the Employer named above are parties to a 1994-96 collective bargaining agreement that provides for final and binding arbitration. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a grievance regarding the replacement of absent employees. 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 issue here is:

Did the Employer violate the collective bargaining agreement when it did not replace an employee at East High School who was absent on March 17, 1995, the second day of a two-day absence? If so, what is the remedy?

BACKGROUND:

Tom Deffke has worked for the District for 11 years and has been a building engineer at East High School for the last two and a half years. Deffke oversees the cleanliness of the building and takes care of maintenance matters, such as boilers and heating systems. There are seven custodians at East High School -- two on the day shift, three on the second shift and two on a late (or third) shift. Bob Bridenhagen and Shirley Ross are the custodians on the day shift. Bridenhagen was absent on March 16 and 17, 1995. On March 19, 1995, Deffke filed a

grievance alleging that the "2nd day out policy" was violated because a day shift custodian was out for two days on March 16 and March 17, 1995, and not replaced after the first day.

Deffke testified that during the absence of an employee, other employees cover for that absence on the first day by picking up the work that the absent employee normally performs. But in the past, the absent employee was replaced if he or she were gone a second day, either by bringing in a substitute or by shifting the hours of others and incurring some overtime. Substitutes are full-time employees whose assignments vary. Deffke believes that procedure to be the practice in the 11 years that he has been with the District, and that the practice was called the "2nd day out policy." He stated that the common practice was for the District to get substitutes to work, rather than bring someone off a night shift to put him or her on a day shift and then either cover the night with overtime or get a night substitute. He knew of one exception at East High School during a Packer football game, but he did not know of any exceptions to the 2nd day out policy at Preble High School where he worked before coming to East High.

When a day custodian is gone from East High, Deffke helps mop floors and hallways, in addition to his regular duties as engineer. He has never been disciplined for not getting his own work done or getting the custodian work done when the crew was short-handed. He has been directed by management to make sure that the areas get covered when a custodian is absent on the first day, and he believes that he could be disciplined if he did not get the work covered.

Bridenhagen has worked in the District for 19 years and been at East High for seven or eight years. He testified that if he or Deffke were off, they would cover for each other on the first day of an absence, and a floater or substitute was normally sent in on the second day of an absence. He did not know of any exceptions.

Jack Krueger has worked for the District for 16 years and is now the building engineer at Franklin Middle School. The custodial staff includes a day shift male custodian, a mid-day shift female custodian, three and a half custodians on the second shift, and one custodian on the third shift. Krueger believes absences at Franklin Middle School are covered just as they are at East High School. On the first day of an absence, the remaining crew picks up the work, and on the second day of an absence, the absent employee is replaced with a substitute or someone works overtime to cover that absence. There was a period of time where the replacement procedure was inconsistent, when the mid-day person was off for a long illness and there were periods of up to a week where there was no substitute. No grievance was filed over that incident, although Krueger talked to management about the situation and the problem was resolved.

Krueger believes that the 2nd day out policy came about in the early 1980's when he was a substitute at Kennedy Elementary School for the first half of his shift and floated to different places on the second half of his shift. He was the first employee to have that type of designation. Krueger testified that management wanted to use more substitutes, and the Union was asked if it would allow postings for jobs in elementary schools that would include assignments at other schools. Krueger recalled that the parties agreed that there would be eight buildings at the elementary level where postings would include substitute work. He also recalled that management

proposed to bring in a substitute or pay someone overtime every time an employee was absent the second day.

Thomas Steeno has been employed by the District 32 years and has worked at Preble High School for the last 11 years. He is the building engineer at Preble. The staff size is similar to that at East High, except there is one more person on the night shift. He testified that prior to the 1994-95 school year, if someone were absent from the day shift, that person was always replaced, even on the first day of absence, as well as for each additional day of absence. Usually someone from the night shift replaced the day shift person and then worked an extra four hours overtime into the night shift or substitutes were brought in for the night shift. Absent employees on the second and third shift were rarely replaced with substitutes on the first day of their absences. Steeno speculated that first day absences were replaced at Preble because the school is in two different buildings and there is a food preparation area there. He only became aware of this replacement procedure when he started working at Preble.

Colleen Ottum has worked for the District for nearly ten years and has worked at Preble High for six years and East High for almost two years. She works a second shift, starting at 3:00 p.m. For the first day of an absence, she continued to work her second shift, and on the second day, a substitute was brought in or overtime was incurred to cover the absence. She was absent on November 10, 11, and 14 of 1994 -- a Thursday, Friday and Monday. She did not know if a substitute was brought in on November 11 or 14. Deffke could not recall either whether a substitute was brought in, and did not know whether school was in session on those days. If school were not in session, there would not have been a substitute sent in for Ottum's absence. It is also possible that Ottum's area could have been cleaned on a Saturday by someone on overtime, which is not reflected in the records.

When employees are absent for one day, it is generally not known on that day whether they will be absent for a second day or not.

Fred DuChateau started with the District in 1951. DuChateau was the general manager of the custodial staff from 1969 until his retirement in 1987. He was unfamiliar with the term "2nd day out policy." However, he described the procedure to replace absent employees going back to 1951, when employees worked 7:00 a.m. to 5:00 p.m. There was no night shift, and when a person was ill, those still working would cover the work during the day with no overtime.

When DuChateau was general manager, the crew covered the work the first day someone was absent. He went to the buildings and let them know someone was off. If a woman custodian was absent, he brought in someone on overtime to clean bathrooms, by bringing in a woman on the night shift to work overtime during the day. He testified that if someone was absent on a second day, that work was covered with overtime. Sometime after 1969 the District employed half-time people that were used to cover absences. During DuChateau's tenure as general manager, this replacement procedure was always done. There was no written policy, but

DuChateau testified that in every instance when someone was absent a second day, he made sure there was a substitute available or the job was filled with a replacement, and that he could not leave it unfilled. DuChateau stated that the Director of Buildings and Grounds, Gerald Ahl, told him that those were his options. When school was not in session during summer or vacation periods, there were times that DuChateau did not bring in a substitute or someone on overtime to fill in for absent employee after the first day.

James Jossie the Manager of Custodial Services until the 1994-1995 year and is currently the Manager of Operations and Safety. He put together a record (Exhibit #4) of various custodial employees' absences and days that floaters were substituted for them. That document shows:

John Storzer - Custodian 3 night shift - Washington Middle School  
Days absent - Sept. 22, 23, 1994  
Days custodial floater subbed in - Sept. 23 - 5 hrs

Colleen Ottum - Custodian 3 night shift - East High School  
Days absent - November 10, 11, 14, 1994  
Days custodial floater subbed in - Nov. 14

Gail Wielgus - Custodian 2 mid-day shift - Washington Middle School  
Days absent - Dec. 14, 15, 16, 1994  
Days custodial floater subbed in - Dec. 15, 16 - 2 hours each

Bob Bridenhagen - Custodian 2 day shift - East High School  
Days absent - Jan. 17, 18, 19, 20, 23, 24, 25, 26, 27, 1995  
Days custodial floater subbed in - Jan. 19, 20, 23, 24, 25, 26

Bruce VandenAvond - Custodian 2 day shift - Preble High School  
Days absent - Feb. 3, 1995  
Days custodial floater subbed in - Feb. 3, 1995

The above exhibit is not a complete record of all absences and substitutes. Jossie testified that the records vary for the first day, second day, third day, depending on circumstances and need. On February 16, 1994, Jossie sent a memorandum to Tom Tedford, an officer of the Union, regarding custodians' absences:

The Green Bay Area Public School District has no policy pertaining to how we cover a custodian's absence from their job.

No two areas or schools are alike and cannot be subbed or picked up in the same manner. No hard fast rule can apply that covers all situations.

The decision to substitute in, authorize overtime, or have the building custodians cover a vacant area is decided using several methods. How the area or building is being used, if scheduled weekend overtime may cover it or a portion of it, if there are down days involved, weather conditions, common sense, and most of all input from the building custodian.

We have been given the charge of providing the best custodial services possible to the district within the approved budget. The custodial managers will continue to monitor all custodial vacancy situations and make certain the quality of cleaning in the schools does not fall below an acceptable level.

Also, during a labor-management meeting held on November 10, 1993, managers told union representatives present that there is no policy on "first night out" in buildings, and that building custodians pick up that person's area without overtime.

Jossie testified that when managers determine how to cover absences, it depends on circumstances such as the needs of the school, whether there's a holiday or summer recess. John Wied has the responsibility for those decisions.

#### THE PARTIES' POSITIONS:

##### The Union:

The Union contends that the overwhelming testimony established a past practice for covering absences in schools that existed for more than 25 years in the District. Until the filing of the grievance, management made every effort to see that this practice was followed as consistently as possible in covering absences on days when students are in school. DuChateau called the practice beneficial to both the Union and management over the years.

The District's current decision of not filling vacancies on the second day of an absence or other subsequent days means existing employees have to cover the absent employee's work as well as their own for the entire length of the absence. The Union asserts that this is an unreasonable burden on these employees. It admits that there have been no instances of discipline at this time, but points out that employees take pride in their work and want the schools to be cleaned properly.

The Union views the lack of coverage for absent employees as similar to a speed up in a factory, expecting the crew to cover all of the assignments in the same amount of time.

The Union points out that Article IV of the labor contract calls for all existing practices pertaining to hours, working conditions, rules and regulations to be continued. The practice in question pertains to both working conditions as well as rules and regulations. Management originally proposed this method of handling absences, and it was mutual in that both parties understood what it meant.

The Union presented several witnesses who testified to the existence of the 2nd day out practice. Steeno testified that employees are replaced on their first day of absence at Preble High School, because of the separate buildings involved. The practice for covering second day absences is the same as that in other schools. Krueger testified that the same procedure was used at Franklin Middle School. Bridenhagen testified how the procedure worked at East High School. Ottum also described the replacement procedure at both Preble and East High Schools. While the District noted dates that she was absent but not replaced on the second day, Deffke testified that the 2nd day out policy is not followed on dates that school is not in session. The dates that Ottum was out were in November, a time when teachers' convention is normally held. Or she might have been covered by scheduled weekend overtime. The policy was not followed during Christmas and spring breaks, summer recess, and other dates that students were not in school. The Union notes that there was a long term absence due to terminal illness not always covered by a substitute, but believes that one isolated instance of an exception does not mean that no practice existed.

The Union does not seek any monetary remedy -- it only asks that the policy be reinstated. The trade off in the past for adequate coverage for absences of longer than one day was for staff to cover as much as possible on the first day. Now, they are expected to do this ad infinitum.

#### The District:

The District points out that there is no contract language that would require it to replace absent employees on the second day of absence. On the other hand, there is language that gives management the right to determine hours of duty and assignment of work, as well as manage the work force and determine the number of employees required. The District also has the contractual right to determine when it will use overtime.

The Grievant testified that the District's options for covering the work of absent employees was to bring in a substitute or use overtime. Because the District did not provide either a substitute or use overtime to replace an absent employee, the Grievant felt the District violated the so-called second day out policy. All Union witnesses agreed that the District had either used substitutes or overtime to cover absent employees on the second day of the absence. The labor contract states that all overtime will be allotted by the Employer, and the District cannot be

required to incur overtime. Even if the District had in the past replaced absent employees with substitutes, it did not violate that practice because substitutes were not available.

While the contract is silent with respect to the issue at hand, the Union contends that the parties entered into an unwritten agreement. The District asserts that the evidence shows that the parties did not have a binding past practice accepted by both parties. The witnesses' testimony referred to their own school and what happened during absences at those schools, and it does nothing to demonstrate a district wide policy. DuChateau had never heard of a second day out policy, but it was his procedure to cover absent employees because of the amount of work that needed to be accomplished.

Witnesses agreed that the amount of work needed to be done and the availability of substitutes influenced management in deciding whether or not to replace absent employees. There was no consistent policy on replacing absent employees. For example, the District did not call in a substitute until the third day that Ottum was absent. Only two hours of a substitute were used for the second and third day of Wielgus' absence. In Bridenhagen's case, a substitute was not called until the third day of absence and no substitute was used on the ninth day of absence. But VandenAvond's absence was covered on the first day. Without a clear and unequivocal showing of a practice, the grievance cannot be sustained.

The District submits that the alleged practice was not mutually accepted by both parties. In 1993, management made it clear that there was no policy to cover absences during a labor management meeting. A memo to Union officer Tom Tedford in February of 1994 stated that there was no policy to cover a custodian's absence. The lack of a Union response to that memo is evidence that the Union did not view the alleged policy as a binding practice.

Even if, *arguendo*, a past practice existed, it relates solely to management's right to direct the work force rather than an employee benefit, and therefore is not binding. The practice relates to management's method of operation and direction of the work force, and the contract provides management with the right to determine the number of employees required, assign work and allot overtime. The determination to cover an absence is a management prerogative, and a change in the method of determining when to cover an absence cannot be construed as a violation of a binding past practice.

In Reply:

The Union submits that the District misquotes DuChateau in its fervor to deny that a replacement system existed. DuChateau would not use the term policy, but was familiar with a procedure that he clearly described. Whether the second day out concept was either a policy or a procedure does not determine whether it is a binding past practice. The practice can be seen as a "frame-work" of an agreement between the management of the Maintenance Department on the coverage to be used for absences and work normally assigned to the absent employee. There

never was an absolute agreement or pact as to the specific way to cover these absences. But the staff has seen an attempt by their managers to respond to absences along the

general line of this practice, and the elimination of the practice while denying its existence is seen as a slap in the face of employees who made every effort to cover the jobs in their schools when there is one day of absence. The practice the Union refers to pertains to secondary schools during the time when students are present. The practice may vary from school to school, depending on conditions.

The Union objects to the District's statement that if there were a practice, it only benefitted management. It was a mutual practice, where employees accepted a trade off between not having additional or substitute coverage on the first day of absence, with the understanding that for longer absences, arrangements would be made to cover the assigned to the absent employee. The practice has mutual advantages to both management and employees. It is a benefit seen and enjoyed by employees. When it disappeared, employees were conscious of its absence. It existed over such a length of time and served as an example of labor/management cooperation in terms of accommodating each party's needs that it is not a unilateral creation. It should not be unilaterally eliminated.

The District takes issue with the Union's assertion that the practice was a mutual one, that both parties understood what it meant. Jossie testified that absent employees would be replaced or not depending on the needs of the District. Even the Grievant testified that the use of substitutes to replace absent employees was based on need or circumstance. Further evidence of the lack of a mutually accepted practice is the District's February 1994 letter to Tedford, as well as the notice in November 1993 that no policy existed for covering employee absences.

While the Union tries to bolster its argument with Article IV of the contract, the District notes that the language refers to all practices not specifically mentioned in the agreement, and the agreement contains language that gives management the right to determine the number of employees required and allot overtime. Even if a floater custodian had been available to cover the absence, management has the right to determine where to assign an employee. The District contends that the Union failed to carry its burden of proof in this case. Contrary to demonstrating a clear and unequivocal practice, the evidence showed that the response of management varied, and the practice was neither consistently applied or mutually accepted.

#### CONTRACT LANGUAGE:

The parties' contract, in Article IV, contains the following statement:

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 contract also contains a statement of management rights, in Article II, which in part says:

The Employer, on its own behalf, hereby retains and reserves unto itself . . . the rights:

. . .  
3. To determine hours of duty and assignment of work;

. . .  
5. To manage the work force and determine the number of employees required;

. . .  
And Article X of the contract states:

. . .  
The Employer shall determine the number of employees to be assigned to any job classification and the job classifications needed to operate the Employer's facilities.

. . .  
All overtime work will be allotted by the Employer, and as nearly as possible, be equally divided among employees in their respective schools.

. . .  
DISCUSSION:

What the Union seeks in this grievance is to have absent employees replaced on the second day of their absence with substitutes or overtime. In essence, the Union wants to tell the District how to staff the place. This infringes directly on the District's authority to determine the number of employees required, as Article II states, the number of employees to be assigned to any job classification and the allotment of overtime, as Article X states. Article IV only intends to keep existing practices that are not specifically mentioned in the labor agreement in place. The staffing of positions is addressed by both Article II and Article X, and therefore, Article IV does not apply.

Assuming, for a moment, that there is a past practice of some sort which is not addressed

by the contract -- replacing employees who are absent, there is still a problem with the Union's position. The elements of a binding past practice are that the practice must be unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fix and established practice accepted by both parties. The practice, procedure, or policy (no difference in this case) lacks those elements.

The Union has brought forth evidence of a method of operation which employees have long considered to be the "second day out policy," where management replaces an absent employee on his or her second day out, but not the first day out. The Union also says this practice is confined to secondary schools when students are present.

However, there the practice is not unequivocal -- at Preble, for example, day shift absences were covered from the first day of absence, not the second day, but night shift absences were rarely covered at all. At East, a floater or substitute was normally sent in on the second day of an absence. Even the Grievant, Deffke, knew of one exception during a Packer game. When Ottum was gone for two days in a row at East High School, she was not replaced on the second day. The Union speculates that this day might have been a teacher conference day but brings forth no school calendar to prove that this was a non-student day. Therefore, the practice lacks clarity and consistency, just by the exceptions alone at Preble and East.

DuChateau had a strong practice of bringing in help to cover the second day of an absence. He knew of no exceptions when he was a manager. Since he retired, that practice may have changed, because Jossie's records show that a substitute is not always brought in on the second day of an absence, or a substitute may be brought in for only a few hours. Some of his records pertained to middle schools, and the Union claims that the practice only pertains to high schools.

It appears that the District had a method of operation for a long period of time to provide extra help when employees were absent for more than one day. However, there were exceptions to that method, and it was not a mutually accepted practice from the District's standpoint, as it pointed out to the Union in 1993 and 1994. Even if the practice had some element of mutual agreement, it clearly infringed on the management rights spelled out in the contract, and the past practice cannot stand in contrast to contract language. Language always takes precedence over past practices that exist in conflict with the language.

#### AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 17th day of February, 1996.

By Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator