BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TOMAH AREA SCHOOL NON-TEACHING EMPLOYEES LOCAL 1947-B, WCCME, AFSCME, AFL-CIO and TOMAH SCHOOL DISTRICT	Case 62 No. 53303 MA-9303

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, appearing on behalf of the Union.

Lathrop & Clark, Attorneys at Law, 122 West Washington Avenue, Suite 1000, P. O. Box 1507, Madison, Wisconsin 53701-1507, by Ms. Jill Weber Dean, appearing on behalf of the District.

ARBITRATION AWARD

Tomah Area School Non-Teaching Employees Local 1947-B, WCCME, AFSCME, AFL-CIO, hereafter the Union, and Tomah Area School District, hereafter District or Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. The Union, with the concurrence of the Employer, 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 February 21, 1996, in Tomah, Wisconsin. The hearing was transcribed and the record was closed on April 23, 1996, upon receipt of post-hearing written argument.

ISSUE:

The parties have stipulated to the following statement of the issue:

> Did the School District violate the collective bargaining agreement by the manner in which it adjusted the Grievant's hours of work commencing October 16, 1995, and, if so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 8 - SENIORITY

Section 1. It is understood and agreed that the rules of seniority shall prevail. In the event of a reduction in the workforce, the last person employed in the job category shall be laid off, providing that the remaining employes are qualified to perform the available work. An employe laid off may elect to displace the least senior employe in another job category, provided he/she is qualified and is more senior than the displaced employe. In rehiring, the last person laid off shall be the first person rehired, provided s/he is qualified. No new employe shall be hired until all regular employes laid off who wish employment and are available have been called back to work. For purposes of this Article, job categories are defined as:

Certified Teacher's Aides
Noncertified Teacher's Aides
Clerk I
Clerk II
A.V. Technician
Building Maintenance
Vehicle Maintenance
Custodians
Cooks & Helpers/Servers
Food Service Assistant
Bus Drivers
Groundskeepers

. . .

Section 3.

A. In filling vacancies within a job category, making promotions, or where new jobs are created within a job category in the bargaining unit, those regular employes with the most seniority in the job category shall be given preference in filling vacancies, if qualified and available. If a vacancy is not filled from within a job category, employes from other job categories shall be given preference in filling such vacancy. The most senior applicant who is qualified and available will be selected.

B. When a vacancy occurs, or when any job other than a certified aide job is increased in time by doubling the hours per day or by increasing the hours by two hours or more per day, whichever is less, or when any certified aide job is increased in time by three hours or more per day, a notice shall be posted no less than five (5) workdays after the vacancy has occurred. Vacancies shall be posted for five (5) workdays. Employes 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 employes shall receive preference for this position." The Employer agrees to number job postings.

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ARTICLE 15 - STANDARDS AND PRACTICES

The Union agrees that the Employer may continue its practice of hiring outside the bargaining unit on a temporary basis to perform services during school vacation periods; provided that, during summer vacation periods, the Employer agrees to offer routine cleaning work to existing part-time custodians in order of seniority before hiring outside the bargaining unit. For purposes of this Article, the term "routine cleaning work" includes cleaning functions that are performed regularly by custodians throughout the school year, such as cleaning restrooms; vacuuming, scrubbing, and waxing floors; and washing and dusting walls, classroom furniture, light fixtures, and windows; but "routine cleaning work" does not include building maintenance or repair, painting, groundskeeping, carpet cleaning, relocation of classrooms or programs, or any cleaning functions that are nonroutine or normally scheduled exclusively during summer vacation periods.

The Employer agrees that the privileges and benefits that primarily relate to wages, hours, and conditions of employment enjoyed by the employes covered by this Agreement prior to their designation of the Union as the bargaining agent shall be continued unless changed by mutual consent of the parties.

ARTICLE 16 - MANAGEMENT

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 workforce, the right to hire new employes, 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 employes.

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ARTICLE 18 - EMPLOYE DEFINITION, WORKDAY, WORKWEEK, AND PREMIUMS

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Section 2. The workday shall consist of eight (8) hours and the workweek shall consist of forty (40) hours for full-time employes. This shall not be construed as establishing either a minimum or a maximum workday or workweek.

During the term of this Agreement, reductions in hours by the Employer shall not occur without advance written notice to the employe. Within ten (10) workdays of receiving notice of reduction, the affected employe may exercise the right to displace any employe with less seniority in the job category who has a greater number of scheduled hours, if qualified to do the work by informing the Employer in writing of the employe to be displaced. The Employer shall give written notice to the displaced employe, and within five (5) workdays of receiving notice of displacement, a displaced employe may exercise the right to displace any employe with less seniority in the job category who has a greater number of scheduled hours, if qualified to do the work, by informing the Employer in writing of the employe to be displaced. The Employer may implement the reduction and any resultant displacement(s) thirty (30) days after the notice of reduction or five (5) workdays after the last displacement is exercised, whichever occurs first. For purposes of this Section, notice shall be complete upon personal delivery or mailing by registered or certified mail to employe's last

known address according to the

Employer's records, and job categories shall be defined as in Article 8, Section 1. The notice provisions of Section 6 do not apply to job changes effected (sic) by displacement under this Section.

. . .

Section 5. An employe who works a night shift (any shift starting later than 3:00 P.M.) shall be paid twenty cents (20¢) per hour in addition to his/her scheduled rate of pay.

Section 6. The Employer shall establish and post regular work schedules setting forth daily and weekly hours of work for all employes. As needs change, the regular work schedules may be changed by the Employer, provided that employes affected by a change shall be given two (2) weeks notice. Split shifts may be scheduled; however, employes assigned split shifts who have greater seniority may exercise the right to displace employes with lesser seniority in order to maintain a straight shift.

. . .

ARTICLE 29 - COMPLIANCE

The parties agree to comply with all applicable state and federal laws, rules, regulations, and decisions of courts of record or of duly authorized administrative agencies of competent jurisdiction consistent with the terms and provisions of this Agreement.

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BACKGROUND:

Prior to the 1995-96 school year, the Middle School building housed the Junior High and had three custodians, i.e., Donald Neitzel, hereafter the Grievant, who worked days; Rick Schwantz, who worked evenings; and Clifford Zukas, who worked nights. In a letter dated August 11, 1995, Zukas was advised of the following:

As you are aware from the construction that is taking place, the Senior High School will become a grade 9 through 12 building this year. The Middle School will have grades 7 and 8 in it for the

1995-96 school year. In 1996-97 the Middle School will become

> a 6-7-8 grade building and the elementary schools will become K-5 schools. Since the student population at the Middle School will decrease by more than one third as a result of this movement of the ninth grade students, and since a significant portion of the building will be under construction during the 1995-96 school year, the District has decided to shift custodial responsibilities to the Senior High School. After meeting with Sandy Murray and Tom Hill, it was decided to move Rick Schwantz to the Senior High School working from 3:00 p.m. - 11:30 p.m. Don Neitzel's hours will remain the same as last year, 6:30 a.m. - 3:00 p.m. As a result of these changes, your new hours will be from 3:00 p.m. -11:30 p.m., Monday through Friday.
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> . . .

In a letter dated September 29, 1995, Business Manager Robert T. Fasbender advised the Grievant as follows:

> As you are aware, the Tomah Junior High School has and still is undergoing a major renovation. Along with the changes that have taken place in the remodeling and the ages of the students, the District is also exploring changes in how to best maintain the newness of the building. At the start of the school year, Mr. Hill met with the custodians to explore several options for cleaning and maintaining the building in a more efficient manner. One of the options discussed was to rotate the work schedules and cleaning areas of the custodians. Please be advised that at this time, the District is exercising its managerial right to change work schedules.
>
> Article 18, Section 6 of the Negotiated Agreement states "As needs change, the regular work schedules may be changed by the Employer, provided the employees affected by a change shall be given two (2) weeks notice." The purpose of this letter is to inform you that effective October 16, 1995, your work schedule will be changed. Your work hours will be from 3:00 p.m. until 11:30 p.m. Monday through Friday with two (2) fifteen minute rest periods and one (1) half hour lunch period. This schedule will remain in effect for two (2) weeks at which time you will revert back to 6:30 a.m. until 3:00 p.m. for two weeks. Unless otherwise notified, you will rotate back to the p.m. shift two weeks later and will continue to rotate between day shifts and p.m. shifts every two weeks.

A review of the effectiveness of this change in work schedules will be made after one month. This work schedule may be subject to additional changes for which you will be properly notified.

Please feel free to contact your immediate supervisor should you have any questions.

The Grievant received this letter on October 3, 1995.

In a letter dated September 29, 1995, Fasbender advised Zukas as follows:

As you are aware, the Tomah Junior High School has and still is undergoing a major renovation. Along with the changes that have taken place in the remodeling and the ages of the students, the District is also exploring changes in how to best maintain the newness of the building. At the start of the school year, Mr. Hill met with the custodians to explore several options for cleaning and maintaining the building in a more efficient manner. One of the options discussed was to rotate the work schedules and cleaning areas of the custodians. Please be advised that at this time, the District is exercising its managerial right to change work schedules.

Article 18, Section 6 of the Negotiated Agreement states "As needs change, the regular work schedules may be changed by the Employer, provided the employees affected by a change shall be given two (2) weeks notice." The purpose of this letter is to inform you that effective October 16, 1995, your work schedule will be changed. Your work hours will be from 6:30 a.m. until 3:00 p.m. Monday through Friday with two (2) fifteen minute rest periods and one (1) half hour lunch period. This schedule will remain in effect for two (2) weeks at which time you will revert back to 3:00 p.m. until 11:30 p.m. for two weeks. Unless otherwise notified, you will rotate back to the day shift two weeks later and will continue to rotate between day shifts and p.m. shifts every two weeks.

A review of the effectiveness of this change in work schedules will be made after one month. This work schedule may be subject to additional changes for which you will be properly notified.

Please feel free to contact your immediate supervisor should you

have any questions.

On October 17, 1995, a grievance was filed which stated as follows:

> Don was told to make a lateral transfer. The letter was dated 9/29/95 but not postmarked until 10/2/95 and not received until 10/3/95 which is less than two weeks. That makes it procedurally defective.

The grievance further stated as follows:

> Nowhere in the contract does it say that lateral transfers can be made. Article 8, Section 6, states work schedules may be changed. Not lateral transfers. Also Article I.

The grievance requested that the Grievant remain in his posted position. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Union

Article 8, Section 1, of the collective bargaining agreement reads, in pertinent part: "It is understood and agreed that the rules of seniority shall prevail." As the record demonstrates, the Grievant has more seniority than Clifford Zukas.

Article 8, Section 3, addresses job postings. The Grievant posted for and was awarded a day custodial position. To permit the District to unilaterally implement rotating shifts, thereby giving a less senior employe a more desirable shift, would be to compromise the job posting and seniority provisions of the contract.

As the testimony of Business Manager Fasbender demonstrates, during Fasbender's tenure with the District, this is the first instance in which the District has changed the hours of two employes by rotating the shifts of the two employes. Rotating shifts are a mandatory subject of bargaining which, under Article 15, cannot be implemented without the "mutual consent of the parties." The Union has not consented to rotating shifts.

Any reliance on Article 16, Management Rights, is misplaced because this provision is

subject to limitation by the other contract provisions. Moreover, Article 16 states that "This

provision shall not be used to discriminate against any employes." The District discriminated against the Grievant because the Grievant is more senior than Zukas and the Grievant was awarded the day shift through the job posting provisions of the contract.

Article 18, Section 6, permits work schedule changes "as needs change." There has not been a "needs change" because the work performed on the day shift and the night shift remains the same. Since there has not been a "needs change," the Crowley decision may be distinguished on its facts.

The District has not "changed" the regular work schedule of any employe, but rather, has merely rotated two employes through existing work schedules. The District did not provide the Grievant with two weeks' written notice of the work schedule change, as required by Article 18, Section 6.

During negotiations, the District proposed language which would permit the District to make a lateral transfer. The District's proposal was rejected by the Union. The District is attempting to achieve that which it could not achieve in bargaining.

The District has violated the collective bargaining agreement. The arbitrator should sustain the grievance and order the District to reassign the Grievant to his day custodian position.

District

In a prior decision, issued by Examiner Crowley, an employe claimed that he had a seniority right to the work schedule that he preferred, or to which he had originally posted. Citing the provisions of Article 18, Section 6, Examiner Crowley rejected this claim. The binding force of this decision has been strengthened by the fact that the parties, subsequent to the issuance of the decision, failed to change the terms of Article 18, Section 6.

Custodial work schedules were changed because there had been a reduction in the square footage which was utilized for classroom instruction and in the number of students attending classes in the building. Moreover, employe suspicions concerning inequitable workloads had eroded morale.

The Union's claim that the District failed to provide at least two weeks' advance notice is without merit. The contract does not require written notice and the record is replete with evidence that Principal Hill told the Grievant about the schedule change on September 29, 1996.

The District did not laterally transfer the Grievant. Rather, the District exercised its Article 18, Section 6, right to change the Grievant's regular work schedule. Since the right to establish and change work schedules is fully addressed in Article 18, the Union's reliance on Article 15 is misplaced.

The grievance is without merit. The Union should be ordered to pay the costs and attorney fees involved with re-litigating an issue already decided by the WERC.

DISCUSSION:

Contrary to the belief of Union witnesses, Zukas has not been placed in the Grievant's position. 1/ Rather, the Grievant and Zukas each have been assigned a new work schedule.

Article 18, Section 6, relied upon by the District, provides as follows:

> The Employer shall establish and post regular work schedules setting forth daily and weekly hours of work for all employes. As needs change, the regular work schedules may be changed by the Employer, provided that employes affected by a change shall be given two (2) weeks notice. Split shifts may be scheduled; however, employes assigned split shifts who have greater seniority may exercise the right to displace employes with lesser seniority in order to maintain a straight shift.

Since this provision does not restrict the District to any particular type of work schedule, the District has bargained the right to establish a work schedule which contains rotating shifts and the right to change a straight shift work schedule to a rotating shift work schedule.

Given that Article 18, Section 6, expressly provides the District with the right to establish and to change the regular work schedules of employes, it is concluded that the posting rights contained in Article 8, Section 3, do not include a right to maintain the work schedule which was in effect at the time that the position was posted. Thus, contrary to the argument of the Union, the fact that the Grievant posted into a straight day shift does not provide the Grievant with a right to continue to work a straight day shift.

1/ Accordingly, there is no need to consider whether such a placement would violate the posting and seniority provisions of Article 8.

As the Union argues, Article 8, Section 1, contains the following sentence: "It is understood and agreed that the rules of seniority shall prevail." However, as Examiner Crowley concluded in a prior case before the Wisconsin Employment Relations Commission, this sentence "cannot be taken out of context and applied to Article 18, Sec. 6 because when the agreement is read as a whole, the application of seniority is restricted and only applies where specifically so stated." 2/

A review of Article 18, Section 6, reveals that the "rules of seniority" are applicable to only one type of work schedule change, i.e., a schedule change which involves the assignment of a split-shift. Specifically, an employe assigned to a split-shift may displace a less senior employe for the purpose of maintaining a straight shift. Since the Grievant was not assigned to a split-shift, the Grievant's seniority does not provide the Grievant with any right to maintain a straight shift. Nor does the Grievant's seniority otherwise preclude the District from making the changes to his work schedule which were effective October 16, 1995.

Relying upon Article 15, Standards and Practices, the Union argues that the District cannot establish a work schedule which includes rotating shifts because the District has not previously established such a schedule. The Union's argument, however, ignores the fact that, by adopting the language of Article 18, Section 6, the parties have "mutually consented" that the regular work schedules enjoyed by "employes covered by this Agreement" may be changed by the District. Accordingly, a straight shift work schedule is not a "privilege" and a "benefit" which is required to be continued under the terms of Article 15.

As the Union argues, there must be a "needs change" before the District can effectuate an Article 18, Section 6, change to the regular work schedule of an employe. The undersigned is persuaded, however, that the renovation of the Middle School building, with the accompanying reduction in occupied area and student population, changed the custodial needs of the District.

2/ Tomah Area School District, Dec. No. 26708-B (Crowley, 5/91), at p. 9.

While the Union suggests that the Grievant may have an age discrimination complaint against the District, the record is devoid of any evidence that the Grievant's age was a factor in the decision to change the Grievant's work schedule. The undersigned is persuaded that the work schedules of the Grievant and Zukas were changed for the purpose of equalizing the workload which remained at the Middle School and to expose each Custodian to all facets of the work which remained at the Middle School. 3/

Article 18, Section 6, requires the District to provide two weeks' notice of work schedule changes, but does not state that this notice must be written. The undersigned is satisfied that, if the parties had intended this notice to be written, then they would have so stated, as they did in Article 18, Section 2.

On September 29, 1995, Principal Hill orally notified the Grievant that the Grievant's regular work schedule would be changed effective October 16, 1995. On that same date, Hill orally notified the Grievant of the work schedule changes which would be effective October 16, 1995. Since this oral notice was provided more than two weeks prior to the effective date of the Grievant's work schedule change, the District has complied with the notice provisions of Article 18, Section 6.

As the Union argues, when the parties bargained the present agreement, the District proposed that Article 8, Section 3, be modified to permit the District to make "lateral transfers." The Union rejected this proposal and the language of Article 8, Section 3, was not changed.

The District's proposal defines a "lateral transfer" as "job movement within a job category." The District believes that the District enunciated an intent to use the proposed language to transfer an employe into a vacancy, while the Union believes that the District enunciated an intent to use the proposed language to remove an employe from one position and to place the employe into another position, regardless of whether or not the latter position was vacant.

The Grievant was not transferred into a vacancy. Nor was the Grievant removed from his position and placed into Zukas' position. 4/ Accordingly, the instant dispute does not involve a

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3/ Prior to the change in the work schedules, Zukas and the Grievant had complained to Principal Hill about an unequal distribution of workload and Hill was unable to determine which complaints, if any, were legitimate. Since the day Custodian and the evening Custodian perform distinct tasks, rotating the two employes between days and evenings distributes the workload equally between the two Custodians.

4/ At hearing, Union President Habelman, who was present during the most recent contract negotiations, stated that the instant dispute involved a "lateral transfer" because the two employes had "traded" places. However, if the two employes had "traded" places, then the Grievant would be working straight evenings and Zukas would be working straight

lateral transfer within either party's understanding of the District's bargaining proposal.

Contrary to the argument of the Union, the District has not attempted to exercise a right which it sought, but did not obtain, in bargaining. Rather, the District has exercised a right which it obtained in bargaining when the Union and the District agreed to the provisions of Article 18, Section 6.

In summary, the Grievant does not have a seniority right, nor a posting right, to continue to work Monday through Friday, 6:30 a.m. to 3:00 p.m. Rather, the District has an Article 18, Section 6, right to make the changes to the Grievant's work schedule which were effective October 16, 1995. Given this contractual right, there is no merit to the Union's argument that the District has used its management rights to discriminate against the Grievant in violation of Article 16.

The parties' collective bargaining agreement does not provide the arbitrator with authority to assess costs and attorney fees against the losing party. Accordingly, the District's request for costs and attorney fees is denied.

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days.

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

AWARD

1. The School District did not violate the collective bargaining agreement by the manner in which it adjusted the Grievant's hours of work commencing October 16, 1995.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 10th day of January, 1997.

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

CAB/mb
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