

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL #95, AFL-CIO
and

MID-STATE VOCATIONAL, TECHNICAL &
ADULT EDUCATION DISTRICT

Case 71
No. 54042
MA-9533

Appearances:

Mr. Gary Nuber, Business Agent, appearing on behalf of the Union.

Michael, Best & Friedrich, Attorneys, by Mr. Thomas W. Scrivner, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1995-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance arising from the Employer's decision not to post certain work associated with "Tiny Tech" as an available job.

The undersigned was appointed and held a hearing on September 12, 1996 in Wisconsin Rapids, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on November 5, 1996.

Issues:

The Union proposes the following:

1. Did the Employer violate the collective bargaining agreement when it failed to post the "Tiny Tech" support staff position?

The Employer proposes the following:

1. Was paragraph 1003.1 of the 1995-1997 labor agreement violated when certain Tiny Tech clerical duties were assigned, without a job posting, to the employment assistant in the placement office?

The parties agree that the corollary issue is:

2. If so, what remedy is appropriate?

Relevant Contract Provisions:

ARTICLE II

MANAGEMENT RIGHTS

201 -- Board Responsibilities

Development, implementation, and maintenance of an educational environment within the Mid-State Technical College District jurisdiction requires that all personnel employed by the Board have a clear understanding of the rights, authority, and responsibilities vested in the Board by the Constitution of the United States, and the laws and Constitution of the State of Wisconsin. The rights, authority, and responsibilities of the Area Board of Mid-State Technical College as set forth in the Organizational Manual, Chapter I, page 2, adopted January 14, 1970, by official Board action are as follows:

...

201.4 -- To create, develop, combine, or eliminate any or all employee positions deemed necessary or advisable.

...

201.8 -- To determine the duties, responsibilities, assignments terms and conditions of employment, and location of employment of all non-professional District personnel.

. . .

1003 -- Job Posting

1003.1 -- Notice of each job vacancy shall be posted on all bulletin boards furnished by the Board for Union purposes within ten (10) working days of the termination creating the vacancy. This notice will remain on the bulletin boards for three (3) working days, and shall include the job classification and a brief description of the job duties, including minimum qualifications and required skills. Only those employees who make application during the three-day posting period will be considered for the job. All employees who make application for a job shall be notified as to who received the position.

Administration shall forward a copy of all job postings to the unit chairperson, or designee, and they may submit applications on behalf of individual bargaining unit members.

1003.2 -- The Board shall fill job vacancies from within the bargaining unit before hiring new employees, providing employees are available with the necessary qualifications to fill the vacant position. If more than one employee from within the bargaining unit makes application for the job vacancy and meets the necessary qualifications of such job, then the employee with the most seniority shall be awarded the job from among those who so qualify. The Board shall determine job qualifications and be the sole judge of employee qualifications. The Board shall not act arbitrarily, capriciously, or in bad faith.

Discussion:

The facts are not significantly disputed. Mid-State Technical College operates under its own roof a facility known as "Tiny Tech", a day care facility primarily designed to make it possible for students with small children to attend class. Tiny Tech has nine employees, and had a manager named Charlotte Arndt, who resigned about May, 1995. At the time of Arndt's resignation, Tiny Tech was perceived by the college to be losing significant sums of money, such as to threaten the future existence of the program. A review of Arndt's work convinced Student Services Dean John Bingham that Arndt had actually been spending about half her time on work which could be described as clerical in nature. Bingham determined to redistribute Arndt's hours to existing staff.

Bingham approached Union Chairperson Carole Prochnow with a suggestion that Kate McMillan be assigned the clerical aspects of the work Arndt had been doing temporarily. There is no dispute that McMillan was interested in increasing her hours from half-time to full-time, that having her perform this work was significantly less expensive than hiring a new manager

to perform it, and that McMillan is highly capable. Prochnow testified that she was agreeable to the temporary assignment on behalf of the Union, but had indicated to Bingham that the job might ultimately have to be posted. Prochnow testified that Bingham told her that he considered McMillan the most qualified, but that they would go by the contract.

Union's Exhibit 2 shows the work McMillan performed prior to the assignment of the Tiny Tech work:

DUTIES AND

RESPONSIBILITIES:

1. Work in the Student Services area under the direction of an assigned supervisor.
2. Handle incoming calls.
3. Type job information and postings.
4. Process job notices to instructors, counselors, department heads, students, graduates and employees.
5. Perform data-entry function of placement information.
6. Maintain student/graduate credential files.
7. Follow up with employers on satisfaction with the placement service and MSTC graduates employed.
8. Assist with arrangements for on campus interviews.

9. Process job information to other campuses.
10. Keep the placement board information up-to-date.

- QUALIFICATIONS:
1. Must have high school diploma or equivalent.
 2. Typing skills; minimum of 45 w.p.m.
 3. Operate general office machines.
 4. One year office experience.
 5. Advanced training at postsecondary level desirable.
 6. Computer skills required.

Union's Exhibit 1 shows the additional work assigned to McMillan as a result of the change:

Support Staff Responsibilities

Determine billable hours each Monday and enter fillable hours in computer.

Enter accounts receivable from Julie weekly - Monday of each week

Print sign in sheets weekly - Thursday or Friday

Enter changes in contracted hours

Fill in weekly DPI forms

- * attendance records - Monday or later
- * weekly menus; production reports from Consolidated Management (file)
- * at month's end - send in by 5th of month
 1. Grand total/day
Staff=P (Program)
 2. Reimbursement claim to DPI
Agreement #76-6808

- N=Needy, Non-Needy

- F=Free/Needy

Add both & total

Average days of attendance=total children/month divided by # of days

Snacks="Supplement"

Send 2 copies to DPI, keep 1 for file

DPI forms at end of month - Mail by the 5th of the month (Daily Participation Record)

Fill in voucher forms for payments for

* monthly -

- Portage County DHSS - Due by 5th of the following month

- Adams County DHSS - Due by 5th of the following month

- Wood County DHSS - Due by 2nd of the following month

* 1st and 15th of the month

- JOBS - 8th Street

- JOBS - Marshfield

* Bi-weekly - (same as time sheets)

- JOBS - Options

- JTPA

Print invoice monthly for parents after end of the month

Prepare monthly report for Mark Klabon - End of the month

* Balance report

Prepare loading report for Administration and Nelson Dahl

monthly - End of the month

Type monthly Tiny Tech newsletter

Filing

Post hours available to parents in Tiny Tech regarding billing questions

Complete, sign, and mail all agency vouchers for child care

Enter each individual child's records into the computer (medical, emergency information, family information, DPI form)

Print out and post emergency numbers of children and staff for Tiny Tech office and for each specialist.

Add names to "waiting list" (computer)

Keep employee files updated and cumulative continuing education and in-service forms updated.

Provide information to parents prior to signing contract in cooperation with Administrator. Explain contract

- how payments are to be made

- Parents Handbook

- forms - medical, child care enrollment, immunization, parent information sheet, DPI food program forms.

Prochnow testified that when the Union was considering agreeing to McMillan's temporary assignment of the work, Business Agent Gary Nuber expressed concern that McMillan would have an advantage when and if the position became permanent, and that this concern was borne out by the Employer's subsequent decision simply to have McMillan continue to perform the work without posting a job. Prochnow testified that in her 14 years with the college, no job has ever been filled within this bargaining unit without posting. The Union introduced into evidence a series of job postings.

Bingham testified that there were sound service-related reasons for combining the work previously done by McMillan with the clerical work previously done by Arndt. Bingham testified without contradiction that by having one full-time employee perform both kinds of service, students who needed placement service and clients whose children were at Tiny Tech could both access the appropriate employee throughout the day. Bingham also testified that Tiny Tech was short of space for a part-time clerical person, so that locating that work at a pre-existing desk elsewhere combined with McMillan's strong technical skills to ensure that the work would be performed in an efficient manner. Bingham added that for the initial few months of the assignment, Dana Catalona, a manger in student services, was assigned the management functions of Tiny Tech, and worked in an area close by McMillan's work area, which made for effective communication. 1/ McMillan was hired on or about August 23, 1995, and the assignment of the additional work took place shortly thereafter.

Human Resources Director Bob Beckstrom testified that the Employer's several union contracts all have similar management rights clauses, but that the posting language differs. The Employer introduced as Employer's Exhibit 6 the most recent contract between OPEIU and the college in the Tiny Tech unit which this Union also represents. That contract provides in pertinent part:

1203 -- Job Posting

Notice of each job vacancy during regular school and

1/ Subsequently, the college determined that Catalona could not effectively supervise the employees of Tiny Tech because she was not located in the child care center and the employees were thought not to be responding to off-site supervision. The assignment of Catalona was then changed and an on-site manager was retained, but McMillan's assignment continued.

summer session shall be posted on all bulletin boards furnished by the Board for Union purposes for a period of at least five (5) working days, and shall include the job classification and a brief description of the job duties, including minimum qualifications and required skills. Only those employees who make application for the job will be considered. All employees who make application for a job shall be notified as to who received the position.

The Board shall fill job vacancies from within the bargaining unit before hiring new employees, providing employees are available with the necessary qualifications to fill the vacant position. The methods of selection from the Promotions Section below shall apply.

1204 -- Promotions/Change of Status

Promotions will be based on seniority, provided that the candidate meets the necessary qualifications and abilities that are required of the vacant position. Promotions shall be considered to be a change of job classification from a Teacher Aide/Specialist to a Teacher/Specialist and change of status shall mean a change of status from part-time to a full-time position.

At the hearing, in response to a question by the Employer's counsel, Union Representative Gary Nuber agreed that the Union was not seeking posting of a full-time clerical position of the combined Tiny Tech and employment assistant duties, but rather the posting of a .5 part-time position associated with the Tiny Tech clerical duties. 2/

The Union contends that the specific language of Article 10 modifies the more general language of the management rights clause here. The Union contends that Article 10 does not make any exception to the posting requirement for financial or convenience reasons, and that Section 1003.1 clearly states that "notice of each job vacancy shall be posted . . ." without restriction based on the grounds argued by the Employer. The Union further notes that the Employer's representation that McMillan was particularly qualified for this position represents a misinterpretation of Section 1003.2, which specifies on its face that the employe selected is to be the senior employe possessing the necessary qualifications. The Union points out that this is a "sufficient ability" clause, not a "relative ability" clause. The Union further notes that even with a relative ability clause, posting would still be required, since that would be necessary to determine

2/ Tr. pp. 8 - 9.

which parties were interested and to uphold principles of seniority contained even within relative ability clauses.

The Union argues that with respect to the distinction drawn by the Employer between the regular clerical agreement and the Tiny Tech OPEIU agreement in posting language, the difference is illusory because the Union's concern at the time of negotiation of the Tiny Tech agreement was that a full-time Aide had been used in the past even though only part-timers were employed at the time of the negotiations. The Union contends that the language difference referring to posting for change in status from part-time to full-time is explicit in that contract specifically because the Union was concerned that the Aide who had worked full time would be given that opportunity again if the Employer deemed it advisable to create a full-time position again. The Union further notes that that language pertains to an increase in hours while performing the exact same functions, and that the Union does not argue those to be the circumstances of the present dispute.

The Union contends that the Employer's examples of "non-posting" events are fundamentally dissimilar to the current circumstances, because in each case these represent increases in workload within the same kind of work, not the addition of a second position to make a full-time job out of two part-time jobs. The Union contends that the Tiny Tech duties are "quite substantially financial" in nature, noting that these include determining billable hours and accounts receivable, as well as a number of other voucher and miscellaneous financial matters. The Union contends that while the Employment Assistant position is in pay grade 2, every other position which has financial responsibilities is located in pay grades 3 and 4. The Union argues that this indicates the distinct and dissimilar nature of the two positions. The Union argues, citing Webster's Dictionary and Robert's Dictionary of Industrial Relations, that a job vacancy exists here and that the college has an obligation to post it.

The Employer argues that the decision to give the clerical work of the Tiny Tech manager to McMillan was an efficiency-led move which resulted in the sought-for efficiencies. The Employer contends that improved service to both parents of Tiny Tech children and students seeking employment was improved by consolidating this work, and that Ms. McMillan was an excellent choice to perform that work. The Employer characterizes both kinds of work as fundamentally clerical in nature, and as requiring knowledge of various computer software, which McMillan possessed. The Employer contends that under Section 1003.1 of the Agreement, only job "vacancies" have to be posted, and that no vacancy existed in this setting. The Employer argues that in numerous instances testified to by Beckstrom, the college had increased, reduced and reassigned functions and hours of employees in the clerical unit without any grievance being filed, and that this is merely another example of such on-going necessary changes. The Employer argues that the agreement is devoid of any language giving the Union the right to determine when a vacancy exists, citing numerous arbitration awards consistent with that view. The Employer also contends that Section 201.4 of the Agreement authorizes the College "to create, develop, combine, or eliminate any or all employe positions deemed necessary or advisable". The District contends that in view of such clear contract language, past practice of the parties is irrelevant, but that even

if past practice were to be considered, Beckstrom's uncontradicted testimony shows that a number of the positions discussed in Union Exhibits 3 through 15 had undergone changes over time after the posting, but that this had not resulted in re-posting of the positions or in grievances.

The Union requests that the Employer be ordered to post the Tiny Tech position and award said position to the most senior qualified candidate. The Employer requests that the grievance be denied.

In analyzing the merits of this matter, I must immediately note that what is before me (in either party's definition of the issue) is limited to the question of whether the college had an obligation to post an independent position at .5 of full-time to cover the clerical aspects of the work previously done by Charlotte Arndt. The Union has explicitly declined to argue that the full-time position actually created by the college should be posted.

I therefore decline to speculate as to whether the Employer's decision not to post the resulting full-time position might violate the Agreement. I will note, however, that under some circumstances arbitrators have found an obligation to post when duties added or combined effectively resulted in the creation of an entirely new position.

Since that issue is not before me, however, I find that this matter falls explicitly within rights guaranteed to management by Section 201.4 of the Agreement. In particular, the express inclusion of the ability to "combine" employe positions as deemed necessary or advisable is an exact description of what happened here. The College made a determination, since demonstrated as resulting in efficiencies and improved service according to uncontradicted testimony, that it was at the least "advisable" to combine the work formerly done by McMillan with the clerical aspects of the work formerly done by Arndt. No separate position was therefore created; and this appears entirely consistent with the phrases "develop" and "eliminate" employe positions also expressed in Section 201.4. This is sufficient to determine the outcome of this matter: the Union simply cannot prevail in the attempt to maintain a separate position under these circumstances and in the face of this (quite commonly found) contract language. I would add, however, that the circumstances differ from the instances given as examples by the Union in its exhibits and testimony. In each of those instances, the College had decided to create a position, before it posted one. Here, no position was created, and rather jobs were combined, which the Employer was explicitly authorized to do by Section 201.4.

I make no ruling with respect to whether the Employer appropriately characterized the combined position in terms of salary or grade level. The Union's rights to argue that the financial aspects of McMillan's duties may be inappropriately placed at Grade 2 are not within the scope of this proceeding.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Employer did not violate the collective bargaining agreement by refusing to post as a .5 position the work assigned to Kate McMillan and associated with the Tiny Tech facility.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 24th day of February, 1997.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator