

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ELCHO SCHOOL DISTRICT

and

NORTHERN TIER UNISERV - EAST

Case 34
No. 56401
MA-10270

Appearances:

Ms. Carol J. Nelson, Executive Director, Northern Tier UniServ-East, 200A South Lake Avenue, Post Office Box 9, Crandon, Wisconsin 54520-0009, on behalf of the Association.

Ruder, Ware & Michler, by **Attorney Cari L. Westerhof**, Suite 700, 500 Third Street, Post Office Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the District.

ARBITRATION AWARD

On April 15, 1998 the Association filed a request with the Wisconsin Employment Relations Commission requesting the Commission to appoint a Commissioner or a member of its staff to serve as the sole arbitrator to hear and decide a grievance pending between the parties. The matter was assigned to the undersigned who held an evidentiary hearing on August 12, 1998 at the District offices in Elcho, Wisconsin. A transcript of the proceedings was taken and produced by Harter Reporting Service, Wausau, Wisconsin. Briefs have been filed and exchanged, and the record was closed November 12, 1998.

ISSUE

The Association submitted the issue as:

Whether or not the district violated the collective bargaining agreement by refusing to deduct Union dues for an employe the District now asserts is casual.

The District submitted the issue as:

Whether the District violated the collective bargaining agreement by failing to recognize the Association as the bargaining representative of Barbara Ament, and, if so, what is the appropriate remedy?

I conclude that the issue is:

Whether the District violated the collective bargaining agreement when it failed to recognize the Association as the exclusive bargaining representative of employe Barbara Ament and, if so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

Article II Recognition

The Board recognizes the Association as the exclusive bargaining representative for all regular full-time and regular part-time non-professional employees of the Elcho School District, excluding all confidential supervisory, managerial and professional employees as defined by the Wisconsin Employment Relations Commission and all substitute, summer help, temporary and casual employees for the purpose of bargaining collectively on matters pertaining to wages, hours and conditions of employment.

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Article VIII Employee Definitions

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- E. Casual Employees: A casual employee is defined as an employee who is not regularly scheduled to work or who is hired to replace a bargaining unit employee who is absent or on leave under the provisions of the contract. This employee is not part of the bargaining unit.

BACKGROUND AND FACTS

The District and the Association have been signatories to a series of collective bargaining agreements, the relevant terms of which have been set out above. This dispute involves the interpretation of the agreement as it relates to the work of employe Barbara Ament.

Barbara Ament began work for the District in January 1997. The District advertised for an Administrative Assistant at two half days per week in April 1997 and Barbara Ament was hired into that position. Thereafter she worked every month not less than 49 hours nor more than 144 hours for an average through July 1998 of 70 hours per month or sixteen hours per week. Ms. Ament has worked in many roles, most often in support of the school's

confidential Administrative Secretary, Susan Shuster and/or the District's confidential Financial Assistant, Veronica Weyner. She has also substituted as a teacher's aide, worked in the cafeteria, etc., but generally is asked to come in to assist Ms. Shuster and Ms. Weyner with work they are unable to perform in their usual workweek. The job description for her position denominates the position title as Administrative Assistant Secretary. Other facts will be set out in explanation of the decision.

POSITIONS OF THE PARTIES

Position of the District

The District cites the general WERC rule that casual employes are excluded from municipal bargaining units when the irregular nature of their work conflicts with the interests of regular employes. Citing Commission decisions, the District points out that the determinative factor to be considered is the regularity of employment. In determining regularity of employment, the Commission has considered whether the employe can accept or reject work when offered, whether there are defined work periods and hours, and whether there is a sufficient community of interest with other regular employes based on similarity of job functions and wages and conditions of employment.

The District posits that the Commission has consistently found an employe to be casual where the employe worked on an "on call" basis and the employe was free to refuse work offered. The District cites several cases in which the Commission has so held, including on call employes of a county highway department and on call employes of a county sheriff department.

The District concludes that the Association's grievance should, therefore, be dismissed because "she does not possess a reasonable expectation of regularity of employment, she works on an as needed basis with no defined work periods or work hours and is free to turn down available work without consequence."

Next the District argues that even if the employe is not a casual employe, she should be excluded from the bargaining unit as a confidential employe under Sec. 111.70(1)(i), Stats. The District acknowledges that for an employe to be confidential, the employe must deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and employer. Noting the Commission's responsibility to balance an employe's right to engage in concerted activity with an employer's right to conduct labor relations through employes whose interests are aligned with management, the District points out that the Commission considers the amount of confidential work to be performed, the number of existing and available confidential employes, and the degree of disruption that would be caused to the District's operation if confidential work is done by existing confidential staff.

Applying these principles to Ms. Ament's work, the District asserts that the record shows that much of Ms. Ament's work is confidential and that, since the District's other confidential employees are not available to do the work, it would be unduly disruptive to District operations to require them to do so. Confidential duties include assembling packets of mostly confidential information for school board members, and typing and proofing minutes of board meetings including closed session minutes. The District calculates that Ms. Ament spends approximately 32 hours per month or half of her work time on confidential matters. Finally, the District offers that even if the Arbitrator considers the amount of confidential work to be de minimus, the Arbitrator should still find the position exempt as confidential because other confidential staff do not have the time available.

In reply to the Association's brief, the District asserts that the Association has misrepresented the Commission's ruling in ELCHO SCHOOL DISTRICT, DEC. NO. 27640-C, (WERC, 4/97) when the Association argued that the Commission has by decision limited the number of confidential employees the District may have. The District denies that it is attempting to include an inordinately large number of employees as confidential by responsibilities, and asserts it is only working Ms. Ament on an as needed basis and those duties necessarily include confidential duties.

Position of the Association

At hearing the District asserted that the grievance was untimely and raised the question of arbitrability. Expecting the District to pursue this issue, the Association, in its brief, cites several cases for the proposition that the acts of the District constitute an ongoing violation of the contract so that the time limits of the grievance procedure have not been reached. Further, since the District was aware as early as the fall of 1997 of the Association's concern, and since the District changed its position regarding the employee's status, the time limits should not apply.

The Association cites Commission cases which define the elements that make an employee confidential. When applying those elements to the instant facts, the critical elements are met at most in a de minimus manner, and where exposure to confidential materials (in the labor relations sense) does occur, the tasks could easily be performed by either of the two full time exempt employees. The employee has never costed bargaining proposals, participated in strategy sessions or otherwise had more than incidental contact with labor relations functions.

Regarding the asserted casual status, the Association points out that Ms. Ament works every week, an average of two days per week, is the only employee trained to enter information into a specialized computer system, has been issued a key to the school and is the only employee called in to help in to assist the Administrator's Secretary and the Financial Assistant.

DISCUSSION

The employe in question has worked continuously for the District an average of two days per week, normally assisting the Administrative Secretary and Financial Assistant with work that because of workload, they cannot accomplish in the normal work week. She arranges her schedule in conjunction with the office staff.

While the recognition clause of the contract excludes casual employes and the contract contains a definition of casual employes, the parties have argued solely Commission precedent. Therefore, I conclude that the parties intend the contract definition to be the same as the Commission's definition of a causal employe.

The Commission has held that "the determinative factor in deciding whether employes are regular part-time or casual employes is the regularity of employment rather than the particular number of hours per week or month." VILLAGE OF MAPLE BLUFF, DEC. NO. 26746 (WERC, 1/91). "Regularity of employment means that the employment itself, not necessarily the particular hours of assignment, is regular or recurring; one can have 'regularity of employment' without necessarily having standardized shifts." VILLAGE OF SPRING GREEN, DEC. NO. 29334 (WERC, 3/98).

I have considered the District's argument and cases cited regarding on call employes as casual employes and find that the cited cases are not controlling because in each of those cases there were multiple employes with a resulting uncertainty regarding the assurance of employment for any individual employe. In the instant case Ms. Ament is the only employe who has been hired pursuant to the published job offering, is the only employe who runs the hot lunch computer program, is the only employe who assists the Secretary and Financial Assistant in work which, by their testimony, cannot be accomplished in their normal work week and which totals approximately twenty hours per week. Further, in addition to having a key to the school, Ms. Ament testified that she views herself as reporting to Dr. Johnson. She is assured of all the excess work in the office because there is no one else that it will be given to. Thus, this is employment unlike that found casual in the cases cited by the District. Ms. Ament can rely on an average of seventeen hours of work per week. If she turns down hours of work the work will still be hers to do later. She therefore has a reasonable expectation of regularity of employment.

Given the foregoing, I find this work to have that degree of regularity such that it cannot be considered casual under the definition in Article VIII, Section E of the collective bargaining agreement or Commission precedent.

The remaining question is whether the employment in question is exempt as confidential as defined by Commission interpretation of Chapter 111.70, Wis. Stats. The parties agree that central to that definition is that the employment must have more than a de minimus component of labor relations and/or contract administration work.

The job description (Union 4) for the position is as follows:

Elcho School District

Job Description

Direct Supervisor: Elcho School District Administrator

Position Title: **Administrative Assistant Secretary**

Qualifications: High School Diploma or Equivalent

Experience as Secretary in Business or Education

Must Be Proficient in the Use of the Typewriter, Calculator, and Other Office Machines.

The ability to communicate effectively; work with others; organize and maintain appropriate records.

A working knowledge of bookkeeping, record keeping, and general office procedures.

General Responsibilities:

Shall be responsible for providing the support and clerical services needed for effective district office administration.

Shall assist both the district Office Secretary and District Financial Assistant in fulfilling their duties and will take over those responsibilities in their absence.

Shall assist in confidential district matters including the maintenance of personnel files and preparation of materials for collective negotiations.

Shall coordinate the financial accounting and collections for the cafeteria program.

Specific Responsibilities:

Shall perform general office duties in the absence of the administrative secretary such as during scheduled breaks.

Shall be responsible for confirming all deliveries other than food service or custodial deliveries. Shall be responsible for ordering teacher and district office supplies.

Shall be responsible for screening calls and visitors who wish to see the district administrator.

Shall be responsible for the word processing and duplication of central office correspondence.

Shall provide input to the District Administrator concerning matters relative to the improvement of services to the Elcho School District.

Shall assist the District Administrator with any other program related activities.

Shall be responsible for the collection and accounting of cafeteria monies.

Other duties as assigned by the District Administrator.

The work actually performed by Ms. Ament includes the following:

1. has filled in for student school secretary [Tr. p. 20, ln 3]
2. has been trained on and is the sole operator of the computerized food entitlement program [Tr. p 22, ln 6-12]
3. has substituted for a teacher's aide [Tr. p 25, ln 11-20]
4. has worked in food service program [Tr. p 27, ln 25]
5. has substituted for Ms. Sue Schuster for all of March, 1998
6. has maintained personnel records including social security numbers, immunization shots, and has created files for new hires and closed files for employes who leave [Tr. p 31, ln 22-25; p 32, ln 1-10]
7. has worked on the packet for monthly board meeting including typing, proofing, copying, collating and delivering the packet to board members [Tr. p 38 ln 14]
8. has seen minutes for both open and closed board meetings [Tr. p 39, ln 6]
9. has worked on workmen's compensation files [Tr. p 39, ln 21-23]
10. has opened mail including that marked confidential [Tr. p 40, ln 3]

While the job description references preparation of materials for collective bargaining, Ms. Ament testified that she has never prepared information for teacher collective bargaining or for the support staff collective bargaining. [Tr. p 31, ln 6-9] Ms. Ament considers that much of her work deals with confidential information [Tr. p 38-40, 41-42] and estimates that she spends more than half of her work time on such matters. That work involves confidential

information in the ordinary sense of the phrase including workmen's compensation, opening confidential mail, and personal financial information. Some of the material in school board packets would be of a confidential nature in the ordinary sense of the word, as contrasted to confidential information relative to labor relations.

In determining whether employment is confidential, we look to see its labor relations or contract administration components. In this record, there is very little of that kind of work. Only that material regarding labor relations or contract administration that would go into the board packets might qualify. Ms. Ament has never been solely responsible for the board packet.

I conclude from the record that Ms. Ament's responsibilities and work contain at most a de minimus amount of confidential work as defined by Sec. 111.70(1)(I), Stats., and I reject the assertion that limiting her assignments to non confidential work will unduly disrupt the District's ability to perform its administrative functions.

Having determined that the position is not confidential, it is not necessary to answer the question of whether ELCHO SCHOOL DISTRICT, DEC. NO. 27640-C (WERC, 4/97) limits the number of confidential employees the District may have.

AWARD

The grievance is sustained. The District shall immediately recognize the Association as the exclusive bargaining representative of the Administrative Assistant Secretary and commence to deduct union dues pursuant to the collective bargaining agreement.

Dated at Madison, Wisconsin this 3rd day of March, 1999.

James R. Meier /s/

James R. Meier, Arbitrator