BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1752-E, AFSCME, AFL-CIO

and

THE SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE

Case 29
No. 56816
MA-10424

(Grievance of Karen Anderson)

Appearances:

Mr. David A. Campshure, Staff Representative, on behalf of the Union.

Godfrey & Kahn, S.C., by **Mr. Robert W. Burns**, and **Mr. John A. Haase**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "District", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Pembine, Wisconsin, on January 4, 1999. The parties there agreed that I would retain my jurisdiction if the grievance is sustained. The hearing was transcribed and both parties filed briefs and reply briefs that were received by April 6, 1999. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the District violate Article X, Section 2(C), of the contract when it failed to offer work to grievant Karen Anderson in the summer of 1998, and, if so, what is the appropriate remedy?

BACKGROUND

Grievant Anderson, a full-time Custodian, has been employed by the District for about 15 years. Throughout that time, she worked under a nine-month contract commensurate to the regular school year. Anderson also worked as a Custodian during the summers of 1990, 1991, 1992, 1993, 1994 and 1997. She did not work in the summer of 1995 and 1996 because her husband died.

When Anderson worked in past summers, neither she nor any other summer employes were paid the contractually-provided wages and benefits they received during the regular school year. Instead, their wages and benefits were unilaterally determined by the District.

Asked why she acceded to the District's failure to pay her the contractual wage rate, Anderson replied that in about 1989-1990: "we were told [by then-District Superintendent Cornelius VanderZeyden] we wouldn't be working if we didn't take a cut in pay." For the summers of 1990-1994, the District purported to subcontract out the summer work by running newspaper advertisements seeking summer help; by accepting "bids" for the summer work; by providing all of the cleaning materials required; and by signing contracts with the individuals hired. The 1991 contract, for example, (Joint Exhibit 7), thus stated:

. . .

School District of Beecher-Dunbar-Pembine
Custodial Cleaning Contract

1. This contract is for the summer period of June 10, 1991, through August 14, 1991.

2. This contract cannot be sold or assigned without the agreement and consent of the Board of Education.

3. The sub-contractors are:
   Ms. Karen Anderson
   Ms. Barbara Faucett
   Mrs. Lila Dal Santo

4. The contractors must do the follow general clean-up of the school building.

   A. Wipe and clean chairs and tables and desks. 370
   B. Wipe and clean lockers. 192

C. Wipe and clean light fixtures. 245
D. Wash and clean windows inside 446
E. Wash and wipe 53,000 square feet of walls, and spot clean main areas.
F. Clean all bathrooms.
G. Before school starts, wash and clean outside windows.
H. Wash and mop dry the gym floor.
I. Shampoo all carpets including hallway rugs.
J. Strip all tile floors and wax.

5. The payment for the above mentioned work 4. A through J will be $6,000.00

6. Omitted areas are:

A. Wood Shop
B. Gymnasium Floor
C. Kitchen cupboards and walls

7. The work is to be done to the satisfaction of the Building and Grounds Committee of the Board of Education and the District Administrator. Any unfinished work to be completed by union members is to be costed out and subtracted from the contracted price of $6,000.00 or if were (sic) held up do (sic) to maintenance delay we will not be docked of our $6,000.00.

8. It is understood that as independent contractors, taxes, social security, L.T.D. and Workman's Compensation is the responsibility of the sub-contractor.

. . .

This contract was signed by the three employes hired and then-District Superintendent VanderZeyden.

Anderson – who was not on layoff status at the time and who was not suffering from any reduction in hours - applied for summer work in 1998 that paid $7.50 an hour, but she was turned down when the District hired three other individuals: Custodian Kris Willis, Janitor Debbie Hilsabeck, and college student Adam Schmidt. That marked the first time Anderson – or any other District employe for that matter - had ever been turned down for

summer work. District Superintendent Daniel Nylund testified that he did not select Anderson because she would not make "a good team" working with Hilsabeck, a matter he never discussed with Anderson before he summarily decided to not hire her in the summer of 1998.

Nylund added that the employes hired in the summer of 1998 represented a form of subcontracting; that the District in 1997 earlier paid withholding taxes on Anderson's wages and took out Social Security taxes when she worked during the summer of 1997; that it also did so in 1998 for the individuals hired, at which time it also deducted money for Medicare and the Wisconsin Retirement System; and that the District "from 1995 for sure" to the present has deducted from the summer paychecks whatever was required to be deducted from school district employes. He added that the District has not solicited subcontracting bids since 1995. Thus, all summer employes hired since then have been directly hired and paid by the District.

The instant grievance protesting Anderson's non-hire was filed on May 26, 1998.

POSITIONS OF THE PARTIES

The Union maintains that the District violated Article X, Section C, of the contract because that language is "clear, unambiguous, and determinative" in stating that the District during school recesses must hire qualified, senior members of the bargaining unit before it can hire non-bargaining unit employes. The Union also contends that a prior arbitration award, the Burns Award, supports its position because it found that a subcontractor under the contract cannot be a bargaining unit employe. It thus argues that the District here "did not subcontract the 1998 summer custodial work" and that the District also "did not hire independent contractors to perform the 1998 summer custodial work." As a remedy, the Union asks that Anderson be made whole for all the wages and benefits she would have earned during the 1998 summer recess.

The District, in turn, asserts that its 1998 summer hiring practice conformed to the subcontracting proviso found in Article XXII of the contract; that a past practice supports its position; and that the Union's reliance on Article X, Section 2, is "misplaced" because summer breaks are not covered by the term "school recesses", as reflected by the "consistent, clear and understood practice of the parties".

DISCUSSION

This case partly turns on Article X of the contract, entitled "Hours of Work, Overtime, and Sunday Pay", which states in pertinent part:

1. This Article is intended only to provide a basis for calculating overtime and shall not be construed as a guarantee of hours of work per day or per week. Overtime shall not be paid more than once for the same hours of work.

2. A) The work week and work hours, including lunch hours and coffee breaks, shall be as presently posted until changed by negotiations. However, the parties agree the Employer has the right to establish the work hours for newly-created positions. Employees must take at least a ten (10) minute non-work break for lunch.

B) School term employees work the 180 days that students are present, and, if requested, up to five (5) days before the start of school and, if requested, up to five (5) days after the finish of school.

C) During school recesses, school term emloyees and regular part time employees will be offered any available work before anyother employee is hired provided that the employee has satisfactorily preformed the work before. Positions will be offered to employees on a seniority basis provided that the employee is qualified. The Board's determination of qualifications shall be final. The employee selected shall be notified a minimum of five (5) days in advance. Employees may refuse such work during school recesses without penalty.

. . .

The key question to be answered under this language is whether summer custodial work falls within the definition of "school recesses" in Section C. The District argues that "recesses" only refers to breaks during the regular school year – such as winter and spring breaks – and that it does not apply to summer work. The record indeed shows that the District for about the last ten years has hired summer help without paying the contractually provided wages and benefits and without following seniority, thereby supporting the District's position. This practice under most circumstances would be enough to carry the day for the District since the record also shows that Anderson in 1998 was not laid-off and that she did not have her hours reduced.

Here, though, Anderson testified that she in past years never sought her rights under the contract because former District Superintendent VanderZeyden once warned her: "We wouldn't be working if we didn't take a cut in pay." I therefore find that the practice here came about because of VanderZeyden's threat and that, as a result, the practice should not be

given much weight. To do otherwise would in effect reward the District for VanderZeyden's threat – which is something I will not do.

The term "school recesses", then, must be given its ordinary meaning, one which by definition includes the summer "recess", because that is the longest school "recess" of the year.

Elsewhere, Article XXII, entitled "Subcontracting", states:

> The District has the right to subcontract work, provided that no present employee(s) shall be laid off or suffer a reduction in hours as a result of subcontracting or by the use of volunteers and/or teachers.

The District asserts that the word "subcontracting" is ambiguous and that it therefore is proper to consider the past practice that has arisen over summer work.

I disagree. The word "subcontracting" is a word of art which means the hiring of *outside* employes. Accordingly, it cannot by definition refer to the hiring of current employes who are already covered by a collective bargaining agreement and who are already on an employer's payroll. Since the District in the summer of 1998 hired two employes who were in the bargaining unit – i.e. Willis and Hilsabeck – it is rather obvious that that situation did not entail "subcontracting" under the normal definition of that term. Hence, there is no merit to the District's claim that it was free to not hire Anderson because it "subcontracted" out summer work in 1998.

The District argues for a contrary result by claiming that its right to contract out summer work was upheld by arbitrator Coleen A. Burns in a prior subcontracting case between the parties, BEECHER-DUNBAR-PEMBINE SCHOOL DISTRICT, Case 18, No. 35907, MA-3900 (7/86). That case though, as correctly pointed out by the Union, centered on the narrow issue of whether the District could subcontract out work during the summer recess when no unit employes were laid-off and when none of them had their hours reduced. Arbitrator Burns ruled that the District in those circumstances could subcontract work. In so ruling, however, Arbitrator Burns expressly wrote, at 6:

. . .

> The undersigned reminds the parties that the undersigned was asked to determine whether or not the work in dispute could be performed by subcontractors. The undersigned was not required to make a determination as to whether any individual is or is not a subcontractor and the undersigned does not make such a determination herein.

. . .

Here, we are not dealing with "subcontractors" as that term is commonly understood. We, instead, are dealing with the hiring of District employes (Willis and Hilsabeck) and the hiring of a non-District employe (Schmidt) who was not a subcontractor. The Burns Award hence centered on a different issue.

However, the Burns Award is instructive on the question of whether summer work takes place during a "recess", as the District there apparently conceded that it was since the stipulated issue before Arbitrator Burns was:

> Must bargaining unit members be offered bargaining unit work caused by absent bargaining unit members or during summer recesses, before the District may subcontract such work?
>
> Id, at 1.

This stipulated issue and the District's then-failure to claim that summer work was not covered by the term "school recesses" referenced in Article X, Section 2(C), of the contract undermines the District's contrary argument here. It also shows that both the District and the Union over thirteen years ago agreed on what the term "school recesses" covered and that it is the District, not the Union, which is now attempting to change the meaning of this key term.

The Burns Award is also instructive because in determining the meaning of the word "subcontract" in Article XXII, Arbitrator Burns found, at 4: "Applying the ordinary and commonly-accepted meaning herein, a 'subcontractor' is not an 'employe'". That rather rudimentary point was true in 1986 when Arbitrator Burns issued her decision and that is true today, which is why there is no merit to the District's claim here that its use of summer help in 1998 constituted some form of "subcontracting" authorized by Article XXII.

The District further claims in its reply brief, at 3-4: "The District's summer work practice in 1998 was consistent with the parties' repeated past practice and was, therefore, within the definition of subcontract work under Article XXII of the collective bargaining agreement."

This claim ignores the fact that the District up to 1998 had always hired Anderson and other bargaining unit members whenever they applied for summer work. The District therefore breached that past practice in 1998 when – for the first time in over a decade – it passed over Anderson. This claim also ignores the fact that the District up to at least 1995 went through the motions of subcontracting the summer work through the device of subcontracting "bids" and by having the successful "bidders" sign the kind of contracts

referenced above that purportedly reflected their independent contractor status. By 1998, the District no longer went this route since all three summer employes it hired were clearly District employes and not subcontractors.

The District also asserts that its position is supported by Arbitrator Christopher Honeyman's decision in LOCAL 587, DISTRICT COUNCIL 48, AFSCME, AFL-CIO, AND MILWAUKEE AREA DISTRICT BOARD OF VOCATIONAL, TECHNICAL ADULT EDUCATION, Case 417, No. 4593, MA-6808 (1992), wherein he ruled that: (1), the term "subcontracting" is ambiguous, thereby warranting the use of parol evidence to properly ascertain its meaning; and (2), the practice before him represented the subcontracting out of work. Arbitrator Honeyman thus ruled:

. . .

> [I]n this particular development, the evidence is that such arrangements have continued on a repeated basis for at least 20 years, sometimes for years at a time. I note also that the evidence submitted by the employer to the effect that in numerous rounds of collective bargaining, the Union has attempted to obtain restrictions on subcontracting, as well as a broader definition of who constitutes an employee, always without success in the final bargain. . .I therefore find that on balance the bargaining history and the well known past practice of such use of contractors in this department are a more persuasive guide to the interpretation of the subcontracting and employee definition causes than is the 'right to control' test, which as a legal concept does not show the same evidence of mutual past acceptance by these parties. . .I am persuaded, however, that as an arbitrator bound to interpret the meaning of an agreement between the parties, such evidence of the mutually understood and accepted [if grudgingly] past practice is a more reliable guide to the meaning of this agreement than is even a commonly-accepted principle of legal interpretation.

. . .

Here, by contrast, the Union in negotiations never attempted to broaden the definition of the word "employee" the way the union did there. Hence, it is the District which is trying to broaden the meaning of this term so that it includes "subcontractors". Moreover, there is no evidence that the Union here ever tried to obtain restrictions on subcontracting in negotiations the way the union did there. In addition, the employer there did not provide for unemployment compensation or worker's compensation, and it also did not take out taxes or provide health insurance, sick leave, or any other benefits normally found in an employer-employer - employe relationship. Here, on the other hand, Superintendent Nylund acknowledged that the District in 1998 deducted withholding taxes on the summer wages

earned; that it also paid Social Security taxes on those wages; that it deducted money for Medicare; and that it made contributions to the Wisconsin Retirement System on behalf of the employes hired. The summer employes thus were treated as the District's employes – which is not surprising since the record establishes that they were employes, and not subcontractors.

I therefore conclude that the District violated Article X, Section 2(C), of the contract when it refused to hire Anderson for the 1998 summer work since she was fully qualified to perform that work after being a full-time Custodian for about 15 years and after performing similar work in the summers of 1990, 1991, 1992, 1993, 1994, and 1997 - all without any complaint from the District.

That, then, raises the question of what Anderson should have earned for an hourly rate had she been hired for the 1998 summer work. The District points out that it for years unilaterally established the summer hourly rate; that the Union never attempted to bargain over the summer rate; and that it paid its summer help $7.50 an hour in 1998 without any objection from the Union.

One problem with this claim is that Appendix "A" of the contract, entitled "Hourly Rates", provides:

	Effective 7/1/97	**Effective 7/1/98**
Head Cook	$9.79	$10.08
Assistant Cook	9.20	9.48
Custodian	9.79	10.08
Secretary	9.79	10.08
Teacher Aide	9.79	10.08

The Employer shall be allowed to hire a grass cutter for summer months and such employee shall not be entitled to any of the benefits contained in this Agreement and shall be considered a temporary employee.

* Pursuant to Article X, Employees receive an additional $.20 per hour shift differential for all hours worked after 4:00 p.m.

Since this language states that only the summer grass cutter will not receive the contract rates and benefits listed above, the necessary implication is that all other summer employes are to receive whatever wages and benefits they are paid during the regular school year. Hence, Anderson was entitled to be paid the $10.08 an hour set forth in the contract, along with all other contractual applicable benefits.

The second problem with the District's claim is that the District was able to pay the $7.50 per hour summer rate only after Superintendent VanderZeyden threatened Anderson that she would not receive any summer work unless she agreed to whatever hourly rate was unilaterally set by the District. That being so, there is no reason why the District should profit from that threat any longer by forcing Anderson (or any other employes for that matter) to accept anything less than the hourly rate and benefits mandated in the contract.

The District thus must make her whole by immediately paying to her all monies and benefits she would have earned for the 1998 summer work at the hourly rate of $10.08, minus any monies she would not have earned but for the District's refusal to hire her.

In addition, and lest there be any further violation of Anderson's rights or the rights of any other employes, I find that the District must satisfy all of the following factors in order to establish a true subcontracting relationship as that term is used in Article XXII of the contract: (1), its decision to subcontract bargaining unit work must be based on good faith considerations which are not aimed at subverting the protections provided by Article X, Section 2(c), of the contract; (2), it cannot make any retirement or Social Security contributions on behalf of any workers hired and it cannot deduct any state or federal taxes from their wages; (3), the workers hired must have the option of either using their own equipment and materials or District equipment and materials; (4), the workers must be, in fact, independent contractors over whom the District has no right of control other than to review the end product of their work; (5), the workers cannot be part of any District-employe relationship when they perform subcontracting work; and, (6), the workers cannot be required to punch any District time card or to in any other way keep track of their individual work time for the District. If the District fails to meet each and every one of these factors, it must make whole any affected employes by paying to them all wages and benefits they would have earned had they been hired. See CONTINENTAL CAN CO., INC., 29 LA 67 (Sembower, 1956); BRIDGEPORT BRASS CO., 25 LA 151 (Donnelly, Chair, 1955); WEBER AIRCRAFT CORP., 24 LA 821 (Jones, 1955); MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 6746-E (12/86).

In light of the above, it is my

AWARD

1. That the District violated Article X, Section 2(C), of the contract when it failed to offer custodial work to grievant Karen Anderson for the 1998 summer recess.

2. That to rectify said contract violation, the District shall make Karen Anderson whole by immediately taking the remedial action stated above.

3. That if the District chooses to have summer work performed in the absence of a true subcontracting arrangement as set forth above, the District must hire Karen Anderson and any other qualified bargaining unit employes on the basis of seniority before it can hire any non-bargaining unit employes.

4. That to resolve any questions that may arise over application of my Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 11th day of May, 1999.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

AAG/gjc
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