

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 3833, AFSCME, AFL-CIO**

and

**HARTLAND-LAKESIDE JOINT SCHOOL DISTRICT NO. 3**

Case 19  
No. 57059  
MA-10504

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Appearances:

**Mr. Sam Froiland**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Ms. Eileen A. Brownlee**, Krammer, Brownlee and Infield, LLC, Attorneys at Law, appearing on behalf of the District.

**ARBITRATION AWARD**

The Union and Employer named above are parties to a 1996-1999 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear the grievance of Becky Zingler regarding summer employment. A hearing was held on February 26, 1999, in Hartland, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by April 26, 1999.

**ISSUE**

The issue to be decided is:

Did the School District violate the collective bargaining agreement when it paid Becky Zingler at the rate of \$6.50 per hour as a seasonal custodial worker for work that she performed between June 9 and August 14, 1998? If so, what is the appropriate remedy?

## CONTRACT LANGUAGE

### ARTICLE 5 EMPLOYEE DEFINITIONS

A. Regular Full-Year, Full-Time Employee: A regular full-year, full-time employee is hereby defined as an employee working at least thirty-five (35) hours per week on a calendar year basis forty (40) hours for maintenance and custodial employees.

. . .

F. Seasonal Employees: A seasonal employee is defined as an employee working during summer vacation, or winter or spring break.

. . .

### ARTICLE 8 JOB POSTINGS AND TEMPORARY ASSIGNMENTS

A. Vacancies: Whenever any vacancy occurs, which the District deems is necessary to fill, due to the retirement or termination of the incumbent employee, the creation of a new position, or for whatever reason, the job vacancy shall be made known to all employees through job postings.

B. Posting: Job vacancies shall be posted on the Union bulletin board in each school for ten (10) consecutive work days. Jobs shall be posted simultaneously in all locations, and shall include the date that the posting goes up, and the date that the posting is to be taken down. The local Union president will be given a copy of all job postings when they are posted.

C. Notice: The job posting shall set forth the job title, work location, schedule of hours, rate of pay, and a brief description of the job requirements as set forth by Board policy, and the qualifications desired.

. . .

G. Temporary Assignment: The Employer may temporarily assign an employee to any job on the same shift, and shall not be required to follow the procedure set forth in Section 8(A) and 8(B) above.

1) Employees temporarily assigned to a job in a lower rated range will retain their regular rate of pay.

2) Employees temporarily assigned to a higher rated range shall receive the rate of pay equivalent to their current step on the salary schedule.

. . .

ARTICLE 10  
HOURS OF WORK

. . .

G. Additional Work: With the exception of work performed by two seasonal custodial employees, and clerical/aide assistance work performed for summer school, and checking in of supplies (unless the persons performing that work as of July 1, 1990 no longer perform that work), if additional work to be paid for out of the District's budget which is normally performed by bargaining unit employees become available during periods when school term employees are not working, such work shall be offered to school term employees on a seniority basis before non-bargaining unit employees are scheduled or called in provided however, that such school term employees are qualified and capable of performing the available work.

. . .

**BACKGROUND**

The Grievant, Becky Zingler, has been a special education teacher's aide in the District since 1994. During the summer of 1998, she worked as a seasonal custodian in the District. She signed a job posting for the work, which stated that a seasonal custodial worker position would be available between June 8, 1998, and August 21, 1998, at the pay rate of \$6.50 per hour. Her regular rate was \$10.62 in 1998 until June 30<sup>th</sup>, when it became \$11.44 per hour.

Zingler started the seasonal position on June 9, 1998, and continued in that position until August 14, 1998. She cleaned carpets, furniture, walls, windows, offices, and moved furniture. Her supervisor was Sherry Brown, and she worked with all the custodians, both regular and seasonal custodians. Union dues were deducted from her paycheck during that summer, and she received health insurance benefits without paying a portion of July's premium as required for school-year employees. Zingler did not question the wage rate of the seasonal position until the middle of the summer. She filed a grievance on July 22, 1998, requesting that her regular rate of pay be paid retroactively.

Sherry Brown is a custodian at the District. She has worked at the District for 21 years and is currently the President and Chief Steward of the Union. She has held those Union positions since the employees were represented by the Union starting in 1987. She was involved in contract negotiations, and recalled that the exceptions in the language in Article 10(G) gave the District flexibility. In the first contract, the District had to post everything. In negotiations for the second contract, Brown recalled that the District said it did not want the financial burden of paying a bargaining unit employee compared to a seasonal employee, so the Union agreed to two seasonals in Article 10(G).

Brown testified that the two seasonal custodians have typically mowed the lawn and done the yard work. On rainy days or when the yard work was done, they helped the custodial staff with summer cleaning. Seasonal employees do not pay Union dues and the Union does not bargain for their wages or benefits.

The parties' first contract for 1987-1990 called for all additional work to be offered to school term employees before others in Article 10(G). During the negotiations for the 1990-1993 contract, the District wanted to be able to use seasonal employees, and the Union agreed to change Article 10(G) to allow the District to hire two seasonal employees without offering those positions to bargaining unit employees first. The parties also carved out a couple of other exceptions in Article 10(G) for clerical/aide assistance for summer school and the person checking in supplies. The clerical/aide assistant, Emilie Beaumont, works every summer at her regular salary of a special education aide. Beaumont also performs some of the work of checking in supplies, along with Pat Hetznecker. Hetznecker was also a special education aide and was paid her regular rate for the summer work, although she has since resigned that job. Both Beaumont and Hetznecker paid Union dues during the summer.

In bargaining for the 1993-1996 labor agreement, the District proposed to eliminate the two seasonal employees from Article 10(G) and put seasonal employees in the contract without any limit on the number of them. The District proposed to delete the word "two" from the section, but the Union resisted the proposal and the language was not changed.

During the negotiations for the 1996-1999 contract, the District proposed to eliminate Article 10(G) from the contract. The District wanted to have more seasonal employees and believed it could hire two seasonal employees for the cost of one Union employee, according to Brown. The Union's position was that bargaining unit employees should be able to have the summer custodial work if they were qualified, and that they should receive Union wages.

The District hired two seasonal employees for the summer of 1998 --- Devin Webb and Scott Geiser. Seasonal employees do not get any insurance or other benefits under the labor contract. The District has posted the openings for seasonal work around bulletin boards and in the District office with the wage rate of \$6.50 per hour. No one from the bargaining unit other than Zingler took summer custodial work, although others expressed an interest in the work. Bob Benzel made more than the \$6.50 per hour but he was hired as a temporary employee at \$8.50 per hour. Benzel also worked as a substitute and worked in the summer.

The Director of Business Services for the District is Pete Balzer. He has been employed by the District since 1990 and took part in contract negotiations. He recalled that the District wanted to expand its seasonals from two to four because the regular custodial staff was restricted to taking vacation and compensatory time off largely in the summer months. The District was left short handed in the summer. Balzer testified that two seasonal employees were not getting the outside work done, so the District wanted four young, physically capable college students.

Balzer did not recall specifically whether the payroll person asked about him withholding Union dues from Zingler's summer paychecks. He assumed that Brown must have indicated to payroll that Union dues be withheld. He was not certain about the contract language regarding insurance for the summer months, and decided to err on behalf of the employee and pay the premium for Zingler for July.

Balzer stated that the District has consistently paid seasonal employees the \$6.50 per hour rate. He thought that the rate had perhaps stopped other bargaining unit employees from accepting the position after they inquired and found out that they would be paid \$6.50 per hour. Balzer stated that Benzel was not hired as a seasonal employee, but he was hired as a temporary employee and could be confused with summer help from the records. Two other employees, Bob Sizer and Rex Ford, were hired as substitute custodians and may have worked during the time when they could be confused with summer help.

The current Director of Buildings and Maintenance is Stephen Hogan, who started working for the District in the summer of 1998. He noted that the summer custodial staff does more of the menial work, the heavy lifting, moving, or non-technical work. They also do some cleaning without using equipment such as buffers or scrubbers, although they use vacuums. Brown oversaw the seasonal staff during the summer of 1998 and assigned their work.

### **THE PARTIES' POSITIONS**

#### **The Union**

The Union relies on the bargaining history to show that the language of Article 10(G) favors its position that bargaining unit members should get their regular rates when taking seasonal work. Brown participated in bargaining for every contract negotiated between the Union and the District, and she testified that the District sought to limit the application of Article 10(G) by allowing the District to hire seasonal employees without posting the work. In the first contract, Article 10(G) required that all additional work be posted. Brown testified that the District sought to hire seasonal employees before posting additional work for bargaining unit members in order to pay them at a lower rate.

During the 1990-93 negotiations, the Union agreed to the District's proposals to exempt a couple of positions from the posting requirement. It agreed to exempt the clerical/aide assistant work that Beaumont performs every year. Beaumont is paid at her school year special education aide rate for performing this work. Also during the 1990-93 negotiations, the Union agreed to the District's proposal to exempt the work of checking in of supplies from the posting requirement. Hetznecker performed this work for many years, and she was also paid at her school year rate of a special education aide for the additional summer work of checking in supplies.

During the negotiations for the 1996 contract, the District sought further exceptions to the obligation to post additional work. The District wanted to be allowed to hire four seasonal employees before posting the additional work, because Balzer thought the District could get two seasonals for the price of one bargaining unit employee.

The Union notes that Zingler had Union dues deducted from her wages over the summer, just as Beaumont and Hetznecker have who also performed additional work as Union employees. Zingler's insurance premiums were also paid by the District throughout the summer. The District had no examples of paying health insurance benefits for seasonal employees. The facts of the dues deductions and the insurance benefits fly in the face of the District's contention that Zingler is a seasonal employee.

The Union concludes that the only manner in which the District treated the Grievant as a seasonal employee is from the perspective of her rate of pay. It erred in paying her as a seasonal employee. She is a bargaining unit employee who performed additional summer work. She should be paid the difference between her contractual rate of pay as a special education aide and \$6.50 per hour for all hours worked between June 9 and August 14, 1998.

### **The District**

The District contends that the collective bargaining agreement does not require that bargaining unit members employed as seasonal workers be paid at their regular rate of pay. The wage provisions of Article 8 do not apply to seasonal work. Under the terms of Article 10(G), bargaining unit members have a right of first refusal for seasonal work positions once the District has exercised its right to hire two seasonal employees. Bargaining unit members have the right to determine whether or not to apply for and accept such seasonal positions, and Zingler had that right as well. The District notes that it has posted seasonal positions in the past for several years. No bargaining unit employee has accepted one of these positions until Zingler did in 1998, although some bargaining unit members inquired about positions.

The District asserts that Article 10 is silent as to the compensation to be paid for seasonal work. While the Union has argued that the compensation provisions of Article 8 govern the compensation to be paid to bargaining unit members doing seasonal work, Article 8 does not apply to the filling of seasonal positions under Article 10. Neither article cross references the other. Article 8 clearly contemplates a transfer from one bargaining unit position to another on a permanent basis. The provisions of paragraph E describe completion of a probationary period, probationary and permanent rates of pay, the right to bump back into a previously held position if the transfer is unsuccessful, the procedure for posting positions and the selection criteria.

Article 10 also establishes a posting procedure, criteria for selection for employment and time parameters for applying for seasonal positions. The District maintains that if the provisions of Article 8 were intended to apply to the hiring of seasonal help, Article 10 would be superfluous as Article 8 also covers those matters. A contract interpretation which renders

contractual language superfluous is not condoned under either labor or contract law. Thus, the District states, it appears that the Union's argument is that the parties intended that only the wage provisions of paragraph (E)(2) of Article 8 be incorporated wholesale into Article 10. Nothing in the bargaining history or in the language of the contract lends itself to such an interpretation.

Although the Union has argued that the wage provisions under Article 8 apply to seasonal employment under Article 10, it has further argued that employees be paid what they would receive during the school year for performing the work they ordinarily do during the year. The Union wants Zingler paid at her special education aide rate for work done as a seasonal custodial worker. That is inconsistent with Article 8. The job classification in which Zingler worked would first have to be identified. There is no seasonal custodial worker in the classification system.

The District states that the Union is asking that the wage provisions of Article 8 be incorporated into Article 10 through arbitration, and that the provision be rewritten to enable bargaining unit members to earn their regular wage during the summer regardless of what duties they perform in the summer. Such a result compels the arbitrator to either add terms to the collective bargaining agreement or modify the terms of the agreement, which is not allowed under the agreement.

The District asserts that neither the bargaining history nor past practice support the Union's interpretation of Article 10. The Union has pointed to the fact that Zingler paid Union dues over the summer and got insurance benefits ordinarily not paid for school year employees. There is no evidence that the Union dues were withheld from Zingler at the behest of the District. Balzer testified that the language of the contract with respect to the payment of insurance premiums was ambiguous to him, and he erred in favor of the employee. The District erred in paying the premiums on behalf of Zingler for the month of July. It was only required to pay one-half of the July premium for regular full-time full year employees and for school year employees required to work in July, and Zingler was not required to work in July, and she was not a full-time full year employee.

While the Union argued that the District acknowledged it would have to pay more to bargaining unit members who work as seasonals during negotiations, there was no evidence that a wage rate was negotiated for such employees. The parties did not discuss how such a wage or benefits would be calculated. There was no agreement that the wage provisions of Article 8 would apply to such work. By contrast, the District had a long established practice of setting the seasonal wage rate, posting that rate on Union bulletin boards and then paying that rate. The Union never questioned the propriety of this practice. There is a clear past practice of establishing the wages for such work. The parties have a zipper clause, and the Union should not now be entitled to obtain through arbitration what it neither requested nor obtained in negotiations.

Finally, the District states that if it violated the agreement, the wages should be paid at the custodial aide rate less benefits paid out for insurance. Zingler was not performing special education aide duties during the summer. The work she performed most closely follows the duties of custodial aides. If any wage should be paid, it should be the difference between \$6.50 and \$9.17 an hour for work through June 30, and the difference between \$6.50 and \$9.49 an hour for summer work after July 1, 1998. Any back wage award should be offset by one-half of her health insurance premium for July which the District paid, and holiday pay, if any.

### **The Union Reply**

The Union takes issue with the District's assertion that there was no evidence that a wage rate was negotiated for employees such as Zingler. Brown testified as to the terms under which the parties agreed to compensate bargaining unit employees when they performed additional work. Both Beaumont and Hetznecker are paid at the special education aide rates even though neither performs the work of a special education aide during the summer. The Union is asking nothing more for the Grievant in this case.

Zingler testified that she performed the same work during the summer that the day and evening shift custodians were performing, contrary to the District's position. The District chose to post this work as seasonal custodial and pay a bargaining unit employee at a rate far below the rate agreed to for custodians. The clear language of the labor agreement and the testimony of Brown should prevent such an effort by the District.

The District has argued that if it is found to have violated the agreement, the arbitrator will have to determine which section of the wage scale is appropriate. Zingler's unrefuted testimony is that she performed the same work as day shift and night shift custodians. The Union could have requested that this be construed as a promotion. In fact, Zingler performed work of a higher classification throughout the summer. The District may argue that this was a temporary assignment, but the language of Article 8 spells out how rates are impacted under such circumstances. Applying the language of Article 8 as it relates to temporary assignments, it could be argued that Zingler was entitled to day shift custodian rates of \$13.81 and \$14.86 an hour.

The Union believes that the clear language and bargaining history stand in stark contrast with the District's assertion that the Union should not now be entitled to obtain through arbitration what it did not request or obtain in negotiations. The bargaining history establishes that the District sought to expand its right to use non-bargaining unit employees in an effort to limit costs. The District now seeks to obtain through the grievance arbitration process what it specifically requested and was unable to obtain at the bargaining table. The District treated Zingler the same way other bargaining unit members were treated as to dues deductions and insurance, except for her rate of pay. The District determined that this position was a seasonal employee despite the fact that they had already hired their two seasonal custodial employees.



## DISCUSSION

The District correctly states that Article 8 does not apply to this situation. The language of Article 8(G) for temporary assignments states in the first sentence that the Employer is not required to follow the posting procedures of Article 8(A) and (B) for temporary assignments. This was a posted position that was required to be posted under both Article 8(A), which requires a posting for “whatever reason,” and Article 10(G), which is for additional work. Zingler was not temporarily assigned to a job in a lower rated range by the District – she posted for additional hours for the seasonal custodial position. Thus, any reliance on Article 8(G)(1) to retain the aide’s rate of pay is misplaced.

However, Article 10(G) applies to this case. The most important phrase is: “. . . such work shall be offered to school term employees on a seniority basis before non-bargaining unit employees are scheduled . . .” The language gives bargaining unit employees the opportunity to get the work. It is a right of first refusal, after the exceptions carved out for seasonal custodians and the clerical/aide and person who checks in supplies. There is no mention of what pay rates will be given for this additional work. The wage rates in Appendix A do not list any rates for seasonal work.

The Union notes that the two exceptions for bargaining unit employees – the clerical/aide assistance for summer school and the person who checks in supplies – are both paid at their regular bargaining unit rates. It therefore assumes that any bargaining unit employees should retain their regular rates of their bargaining unit positions when taking additional work under Article 10(G). However, in carving out the two exceptions for the bargaining unit employees who had those jobs as of July 1, 1990, the parties grandfathered those employees for such work. One could view the situation with Beaumont and Hetznecker in two ways. One way would be that when bargaining unit members take summer work, they retain their bargaining unit wages. The other way would be that the situation with Beaumont and Hetznecker was specifically carved out, so that as long as those two individuals held those positions, they would be treated differently than other people taking summer work.

Clearly, there was no meeting of the minds on what wage rates would be paid to other employees who might be offered additional work after the District hired two seasonal custodial employees.

The bargaining history of Article 10(G) is of limited value. On one hand, the District sought to expand its right to hire seasonal help without offering the positions to bargaining unit employees. Why would it need to bypass bargaining unit employees if it could pay them seasonal rates and not their regular bargaining unit rates? Brown testified that the District thought it could get two seasonals for the price of one bargaining unit member. On the other

hand, Balzer testified that the District wanted the opportunity to get younger, physically capable college students to do some heavy lifting or more physical type of work. It also wanted more seasonals because the regular custodial staff was restricted to taking vacation and compensatory time mostly in the summer and the two seasonal employees were not getting the outside work done.

It is not clear from the bargaining history that the parties intended that seasonal work being offered to bargaining unit employees would be paid at their regular school year wage rates. The parties do not agree on the rationale that was being offered by the District for its bargaining proposals. The language itself only guarantees that work will be offered to bargaining unit employees after the exceptions noted in Article 10(G). Nothing in the language nor the bargaining history clearly shows what the parties intended for wage rates for additional work being offered to bargaining unit employees.

The past practice is that the District posted this seasonal custodial work for several years at a rate that it unilaterally determined, \$6.50 per hour. The Union never grieved it, even though bargaining unit members inquired about it and declined to take the positions being offered at that rate. If the Union thought that this seasonal work was to be paid at the wage rates paid to bargaining unit members when it was posted, it could have grieved it and not waited until someone took the position as it was being offered.

The fact that the District paid Zingler's health insurance premium should not necessarily be held against it in this case. The District was unsure about the matter and opted in favor of the employee. Zingler got an unexpected benefit by the District's action. While it might be inappropriate for the District to try to recover the portion of the premium that it already paid out, the District should not be forced to pay wage rates which have not been negotiated on that basis alone. The record is unclear as to why Zingler's paycheck included a dues deduction, and it may have been at the direction of the Union President, not at the direction of the District. Again, that fact should not be held against the District.

The parties have made suggestions of four different wage rates in this case – from the posted seasonal rate of \$6.50 per hour - to the custodial aide rate - to the special education aide rate - to the day shift custodial rate. There is no sound basis to grant any of those rates except for the posted seasonal rate of \$6.50 per hour because of the following reasons. First, the job was posted at that rate, and the Grievant accepted the position as posted and did not grieve it until she had been on the job for several weeks. Secondly, this position had been posted several times in the past, and other employees, possibly with more seniority than the Grievant, had not taken the job. Third, the Union never grieved the posted wage rate either in the past or when the current posting went up. Fourth, the language of Article 8 does not apply and the language of Article 10(G) provides only that the work be offered to bargaining unit employees. Fifth, the bargaining history and practice do not help to determine the parties'

understanding of the wage rate to be applied. And sixth, and most importantly, the parties never negotiated a wage rate for this seasonal work. While the Union has asked that Zingler be paid at her contractual rate of pay, there is no contractual rate of pay for the work she performed, and until the parties negotiate such a wage rate, there is no contract violation for paying a seasonal rate established by the District.

For all of those reasons, I find that the District did not violate the collective bargaining agreement by paying Becky Zingler the rate of \$6.50 per hour as a seasonal custodial worker for the work she performed between June 9<sup>th</sup> and August 14<sup>th</sup> in 1998, and the grievance will be denied.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 3rd day of June, 1999.

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