BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEKOOSA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

NEKOOSA SCHOOL DISTRICT

Case 48
No. 57275
MA-10576

(Food Service Grievance)

Appearances:

Mr. Thomas Ivey, Executive Director, Central Wisconsin UniServ Council, appeared on behalf of the Association.

Mr. David Scarpino, Superintendent of Schools, Nekoosa School District, appeared on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on April 14, 1999 in Nekoosa, Wisconsin. Afterwards, the parties filed briefs, whereupon the record was closed on May 6, 1999. Based upon the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Association framed the issues as follows:

> Did the District violate the terms and conditions of the Master Contract when they regularly assigned baking duties to employees outside of the "Baker" employment classification without compensating them for the baking duties? And if so, what should the remedy be?

The District framed the issue as follows:

> Did the District violate the terms and conditions of the Master Agreement when it did not pay an employee baker's wages for performing temporary baking duties?

Having reviewed the record and the arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

> Did the District violate the collective bargaining agreement when it did not pay the grievant at the baker's rate for performing baking duties? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1997-99 collective bargaining agreement contains the following pertinent provisions:

ARTICLE III – DEFINITION OF EMPLOYEES

. . .

F. EMPLOYEE CLASSIFICATION

5. Food Service

Cook: Employees in this classification shall be part-time school term employees. Employees in this classification shall perform the duties of a server, assist where needed in the preparation of food and may be assigned some responsibilities in the transportation of prepared foods to various locations in the District. Cook employees will also be responsible for any and all duties assigned by their immediate supervisor, the building principal or Superintendent of Schools.

. . .

7. Baker

Employees in this classification may be full-time or part-time employees as needed and shall be skilled in baking as well as in cooking. Employees in this classification shall be school-term employees and shall be responsible for the baking which occurs, shall assist in the cooking of food wherever possible, and shall assist in the serving of food. Employees in this classification shall have the responsibility to keep the ovens clean and shall assist in the cleanup of the kitchen area. Bakers will also be responsible for any and all duties assigned by their immediate supervisor, the building principal or Superintendent of Schools.

. . .

ARTICLE IV – CONDITIONS OF EMPLOYMENT

. . .

O. SUBSTITUTE PAY

Cleaner employees, when required to substitute for Maintenance/Custodian employees will be paid at the Maintenance/Custodian Probationary First 90 Days rate for all time worked.

Educational Assistants shall be paid at the Special Education Assistant rate if required to substitute for the Special Education Assistant rate if required to substitute for the Special Education Assistant who is absent from work.

In the event a Cook employee is required to perform work normally performed by a higher-paid Food Service employee for a full normal work day, the employee will be entitled to pay at the higher rate for work performed.

In the event an Assistant employee is required to perform work normally performed by a Secretarial employee for a period of more than five consecutive days, the Assistant employee shall receive pay at the probationary rate for the Secretarial position starting on the sixth consecutive work day in that position. This qualifying time for the additional pay only needs to met (sic) one time each year before the employee receives the additional pay.

. . .

Q. SUPPORT STAFF ASSIGNMENT

Any individual within the support staff assigned to do Clerical Assistant work while currently doing Teacher Assistant work shall be paid at the Clerical Assistant rate.

. . .

ARTICLE XV – WAGES:

. . .

1998-99	Start	3 Mos.	6 Mos.	9 Mos.	12 Mos.
. . .					
Baker	7.92	8.78	. . .	. . .	. . .
Cook	7.80	8.68	. . .	. . .	. . .
Assistant Cook	7.79	8.14	. . .	. . .	. . .
Utility	7.62	7.97	. . .	. . .	. . .

FACTS

The District operates a K-12 public school system. The Association represents the District's support staff employes, including the food service employes. Grievant Sandy Skerven is a food service employe.

Four of the District's food service employes work at Humke Elementary School. The four food service workers at Humke prepare all the District's food. Some of the food prepared at Humke is loaded in a van and delivered to the middle school and high school where it is served. All four food service workers at Humke prepare the food, serve it, and clean up afterwards. They have different job titles though: one is a supervisor, one is a baker, one is a cook, and one is a utility employe. They are paid in that descending order, with the baker being paid $.10 an hour more than the cook (after the probationary period).

Prior to May, 1996, Skerven was a (kitchen) utility worker. In May, 1996, she posted for a job as a cook at Humke and got it. She has been in the cook classification since then. Skerven's main job is to make desserts, and she spends half to two-thirds of her time doing so. Skerven currently works four hours a day. Skerven is also regularly assigned to assist the baker at Humke, Connie Henke, make and bake bread and rolls. This work involves pinching buns, filling bread pans and baking the bread and rolls in the oven. Skerven spends one to two hours doing this work on those days that bread and rolls are served. This happens almost daily.

The record indicates that on March 27, 1998, Henke was absent and Skerven worked the entire day as her replacement. Skerven was paid at the baker's rate for that day. This is the only day Skerven has worked as the baker for the entire day.

With the exception of the one day just noted, Skerven has always been paid at the cook's rate, not the baker's rate.

In October, 1998, Skerven kept track of the time she spent doing cooking duties and baking duties, and submitted a time card which broke them into two separate areas. This time card identified 22 hours as cooking and 10.5 hours as baking. Skerven sought to be paid at the baker's rate for the 10.5 hours she performed baking duties. The District denied her request for baker's pay, and she grieved. The grievance was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that the District violated the labor agreement when it regularly assigned the grievant, a cook, to baking duties and did not pay her at the baker's rate. It makes the following arguments to support this contention.

First, the Association views this case as "a matter of appropriate pay for work done." As a result, it relies on Article III, F (the Employe Classification language) and Article XV (the pay schedule) to support its case. The Association notes that these provisions delineate between a cook and a baker, and provide a different wage for each. According to the Association, this delineation means that if someone is assigned to do baking work, they are to be paid at the baker's rate. The Association argues that if the arbitrator finds otherwise, this will render the distinctions between the job classifications and wage rates meaningless.

Second, the Association contends that "it is only fair and equitable that employes be compensated when asked to do work in higher paying categories beyond their normal assignments." To support this premise, it cites several arbitration awards wherein the arbitrators found that employes who were assigned to higher paying job categories should be paid at the higher rate for their time.

Third, the Association argues that the contractual language which the District relies on (i.e., the Substitute Pay provision) should not be given any weight by the arbitrator. As the Association sees it, that language is irrelevant herein because Skerven is not (currently) substituting for Henke; instead, she is assigned baking duties on an ongoing basis.

Next, the Association argues that the grievance should be sustained because if it is not, the District will unfairly enrich itself at the expense of its employes by regularly assigning employes in a lower job classification to regularly work in a higher-paid job classification without paying them at the higher wage rate.

Finally, the Association emphasizes that it is not attempting here to restrict employes from assisting co-workers during the day, or to restrict the District from assigning work outside an employe's regular classification (which it acknowledges is a management right). However, the Association submits that when such work outside the employe's regular classification becomes part of the employe's regular assignment, then the District must pay the employe at the higher rate.

In order to remedy this (alleged) contractual breach, the Association asks that Skerven be allowed to resume baking bread with Henke, and be paid at the baker's rate for this work. The Association is not seeking backpay in this matter.

District

The District contends it did not violate the labor agreement when it assigned the grievant, a cook, to baking duties and did not pay her at the baker's rate. In its view, its actions do not violate the labor agreement. It makes the following arguments to support this contention.

First, the District essentially sees this case as a working-out-of-class dispute. That being so, it relies on Article IV, O (which it believes covers working-out-of-class) to support its position here. The District submits that that provision only requires it to pay an employe the higher rate when the employe works "the entire day" in the higher-rated job. According to the District, that did not happen here because the grievant is not baking for "the entire day". The District avers that since Skerven is baking for less than "the entire day", it is not obligated to pay her at the baker's rate.

Second, the District calls the arbitrator's attention to the fact that Skerven once worked the entire day as a baker. The District notes that when this happened in March, 1998, it paid Skerven at the baker's rate. According to the District, this instance shows how Article IV, O works (namely, that the employe has to work in the higher-rated position for the entire day to be paid at the higher rate). The District believes that prior instance establishes that its actions herein comport with the labor agreement.

Finally, the District submits that if the Association wants to change the outcome here (so that Skerven is paid at the baker's rate for working in that job for less than the entire day), the way to accomplish that result is through the negotiating process – not grievance arbitration.

Based on the above, the District contends that the grievance should be denied and no remedy awarded.

DISCUSSION

My discussion begins with a review of the pertinent facts. Skerven is currently classified as a cook and paid at the cook's pay rate. Her main job is to make desserts. Additionally, she is assigned almost daily to assist the baker make and bake bread and rolls. Skerven spends one to two hours doing this (baking) work on those days that bread and rolls are served. The District is not paying Skerven at the baker's rate for the time she spends doing this (baking) work.

It is apparent from the foregoing facts that the District is assigning baking work to a cook, and not paying her at the baker's rate for that work. The Association does not dispute the District's managerial right to do the former (i.e. assign baking work to a cook), but it does dispute the District's right to do the latter (i.e. not pay her at the baker's rate for doing that work). Thus, in this case the assignment is not in question – just the pay for that assignment. The Association contends the grievant should be paid at the baker's rate for the time she spends doing baking work, while the District disputes that contention.

The parties have approached this pay dispute from different perspectives. The Association characterizes this case as "a matter of appropriate pay for work done", and relies on those portions of the contract which identify the various food service classifications and their corresponding pay (namely, Article III, F and XV). In contrast, the District sees this case as a working-out-of-class case and therefore relies on the contract provision which it believes covers same (namely, Article IV, O). Although these contract provisions have not yet been reviewed, suffice it to say here that the undersigned considers Article III, F and XV to be general language and Article IV, O to be more specific language as it relates to the instant pay dispute. Arbitrators routinely hold that specific language governs over general language. The undersigned holds likewise. That being the case, I find that Article IV, O governs the outcome of this pay dispute. My analysis follows.

Attention is focused first on the contract provisions which the Association relies on, namely Article III, F and XV. These provisions will be addressed in the order just listed. Article III, F lists all the classifications which are included in the bargaining unit and identifies, in broad terms, what work the employes in those classifications perform. There are four food service classifications listed therein: cook, assistant cook, baker and utility. All the employes in those four classifications prepare the food, serve it, and clean up afterwards. While there are certainly differences between the work performed by the various food service workers, Article III, F does not identify exactly what those differences are except that the cook cooks and the baker bakes. Specifically, Article III, F does not identify what work differentiates a cook from an assistant cook, or an assistant cook from a (kitchen) utility worker. Article XV (the pay schedule) then specifies the wages which are paid for the classifications listed in Article III, F. The rate of pay that an employe receives is based on their official classification. For example, Henke, a baker, is paid at the baker's rate. Skerven's official classification is that of cook, and she has been paid at that rate with the exception of one day in March, 1998 when she was paid at the baker's rate because she worked the entire day as the baker's replacement. The Association reads Articles III, F and XV together to provide that when someone in one classification regularly works in a higher paid classification, they are to be permanently paid at the higher rate. Specifically, when a cook does baking work, they are to be paid at the baker's rate. The problem with this interpretation is that nothing in Articles III, F and XV explicitly or implicitly says that. In point of fact, nothing in either of those provisions specifies that when an employe regularly

works outside their normal work classification, they are considered to have been permanently moved or reclassified into the other classification and the pay rate that accompanies it. That being so, neither of the contract provisions just referenced mandates that a cook who does some baking work has to be paid at the baker's rate for that work. That, of course, is the situation here, so neither provision requires the District to pay the grievant at the baker's rate when she does some baking work.

Attention is now turned to the contract provision which the District relies on, namely Article IV, O. It is noted at the outset that many labor agreements contain what is commonly known in labor relations circles as a working-out-of-class provision. Generally speaking, such provisions provide that if an employe performs work in a higher-rated position or works outside their regular classification for a certain amount of time, they receive extra pay for the time they spent doing so. This contract contains that type of language in Article IV, O, which I read to be a working-out-of-class provision. The language from that section which is pertinent here is found in the third paragraph and provides thus: "in the event a cook is required to perform work normally performed by a higher paid food service employee" they will be paid "at the higher rate". The only prerequisite which the language establishes for an employe to be paid at the higher rate is a time requirement. The time requirement which this paragraph sets for the cooks is that the employe must perform this work for "a full normal work day." Obviously, the length of an employe's "normal work day" can vary. If an employe's normal work day is eight hours, this language means that an employe must perform the higher-rated work for eight hours. On the other hand if their normal work day is four hours, they must perform the higher rated work for four hours. In this case, Skerven did not satisfy the time requirement because she did not perform baking work for her entire work day; instead, she did so for just a portion of the day (namely, one to two hours). Since she did not satisfy the time requirement of Article IV, O, she is not contractually entitled to be paid at the baker's rate.

In so finding, the undersigned is well aware that Article IV, O, is entitled "Substitute Pay" and that Skerven was not working as Henke's "substitute" when she did the baking work in question. Be that as it may, what controls here is not what the section is entitled; it is what the language says. As just noted, the language in the third paragraph of Article IV, O, specifies that the person who works out of their classification has to do so for their entire work day in order to be paid at the higher rate. That did not happen here, so Skerven did not satisfy this requirement.

In closing, it is noted that I am mindful of the fact that there are five employes in the bargaining unit who have split jobs with the District. These employes permanently work in two different classifications and are paid a blended pay rate. The Association implies that since these employes are paid a blended rate, the grievant could be also. Certainly the

grievant could be paid a blended rate like the employes just referenced. However, that is for the parties to negotiate – not for the undersigned to impose on the District. The reason is this: the record indicates that four of the employes who have split jobs are teacher assistants/clerical assistants. The record does not indicate how their split positions came into existence. For example, did the employes formally bid for the second job, or was it simply an assignment which was unilaterally imposed on them by the District? Whichever it was, the existence of Article IV, Q (the Support Staff Assignment provision) shows that the parties have negotiated in the past over the pay rates applicable to employes with split jobs. Since the parties negotiated over the pay rates applicable to these employes and their split jobs, the parties can do so as well for the grievant and any other similarly-situated employe.

Any matter which has not been addressed in this discussion has been deemed to lack sufficient merit to warrant individual attention.

In light of the above, it is my

AWARD

That the District did not violate the collective bargaining agreement when it did not pay the grievant at the baker's rate for performing baking duties. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 20th day of July, 1999.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
5901