

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

WESTERN WISCONSIN TECHNICAL COLLEGE

Case 33
No. 57780
MA-10737

Appearances:

Mr. Gene Gowey, Business Representative, Teamsters Union Local No. 695, 1314 North Stoughton Road, Madison, Wisconsin 53714-1293, appearing on behalf of Teamsters Union Local No. 695.

Mr. Robert Salls, Human Resources Manager, Western Wisconsin Technical College, 304 Sixth Street, North, P.O. Box C-0908, LaCrosse, Wisconsin 54601, appearing on behalf of Western Wisconsin Technical College.

ARBITRATION ADVISORY OPINION

Teamsters Union Local No. 695, hereinafter Union, and Western Wisconsin Technical College, hereinafter College, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The parties by mutual agreement asked the Commission to appoint Paul A. Hahn to hear a grievance against the College in an informal, non-contractual arbitration setting seeking an advisory written opinion. Such agreement was confirmed by the parties in a letter from the Union to Commissioner Paul A. Hahn dated July 15, 1999 and received by the Commission on July 16, 1999. The Commission appointed Paul A. Hahn on July 16, 1999 to hear the advisory grievance arbitration. Hearing in this matter was held on September 27, 1999 at Western Wisconsin Technical College in LaCrosse, Wisconsin. The hearing was not transcribed. The parties were given the opportunity but declined to file post hearing briefs. The record was closed on September 27, 1999.

ISSUE

Union

Did the College violate the collective bargaining agreement between the parties when it reassigned Grievant's duties to other College employees following Grievant's return from a medical leave of absence in March of 1999 and was such reassignment discipline and demotion of the Grievant? If so, what is the appropriate remedy?

College

Did the College have the right to reassign job duties to Grievant upon his return from a medical leave of absence in January of 1999? If not, what is the appropriate remedy?

Arbitrator

The statements of the issue by both parties reasonably frame the issues for me to decide. Therefore, I do not set out a separate statement of the issue by the Arbitrator.

RELEVANT CONTRACT PROVISIONS

ARTICLE 2. RECOGNITION

2.01 The District recognizes the Union as the exclusive bargaining representative in the collective bargaining unit consisting of all regular full-time and regular part-time custodial employees of Western Wisconsin Technical College, excluding clerical, office, confidential, supervisory and managerial employees, as their representative; and that pursuant to the provisions of Section 111.70 of the Municipal Employment Relations Act, said organization is the exclusive collective bargaining representative of all such employees for the purposes of collective bargaining with the above named District, or its lawfully authorized representatives on questions of wages, hours and conditions of employment.

...

ARTICLE 4. MANAGEMENT RIGHTS

4.01 Management retains all rights of possession, care, control and management that it has by law and retains the right to exercise these functions under the terms of the Collective Bargaining Agreement except to the extent such functions and rights are restricted by the terms of this Agreement.

. . .

ARTICLE 5. GRIEVANCE AND ARBITRATION PROCEDURE

5.01 Definition. A grievance shall be discussed orally by the grieved employee with the employee's immediate supervisor within five (5) working days of the date upon which the employee knew, or should have known of the cause of the grievance. At the election of the grievant, a Union representative shall be present at the discussion.

. . .

5.03 Arbitration, Final and Binding. The decision of the arbitrator shall be final and binding on all parties. The arbitrator shall have no authority to add to, detract from or in any way modify, alter or amend the provisions of this Agreement. (By agreement of the parties, the decision in this matter shall not be final and binding on all parties, but shall be advisory only).

. . .

ARTICLE 10. DISCIPLINE AND DISCHARGE

10.01 Standard. The District agrees no non-probationary employee shall be progressively disciplined, suspended or discharged without just cause.

. . .

ARTICLE 11. MAINTENANCE OF STANDARDS

11.01 The District agrees that all conditions of employment relative to wages, hours and working conditions shall be maintained and that the conditions of employment shall be modified wherever specific provisions for modification are made elsewhere in this Agreement.

ARTICLE 12. NON-BARGAINING UNIT WORK AND WORK ASSIGNMENT

12.01 The District shall not direct or require its employees who are not members of the bargaining unit to perform work which is recognized as the work of the employees in said units where to do so would deprive bargaining unit employees of their regularly assigned work hours.

ARTICLE 13. EQUIPMENT, ACCIDENTS, REPORTS, WORK RULES AND UNIFORMS

...

13.03 The District shall have the right and responsibility to create work rules. The Union shall have the right to grieve/arbitrate any work rules it feels is (sic) unreasonable.

...

ARTICLE 14. EXAMINATIONS AND EDUCATION

...

14.02 From time to time employees may need additional training in order to perform their duties on behalf of the District. Costs for such training shall be paid for by the District. Such items as lodging, food, registration fees, lost wages, educational materials and mileage shall be included.

...

ARTICLE 16. SAFETY, HEALTH AND SECURITY

16.01 The District shall make reasonable provisions for the safety, health and security of the employee(s) while such employee(s) are in the course of their employment.

...

ARTICLE 18. SENIORITY RIGHTS, LAYOFF AND RECALL

18.01 Definition of Seniority.

(a) **Seniority.** Seniority shall be determined by length of service as an employee of the District and shall commence with the employee's most

recent date of hire into the bargaining unit. Part-time employee(s) shall accrue seniority commencing with the date of full-time employment in the bargaining unit.

STATEMENT OF THE CASE

This grievance involves Teamsters Union Local No. 695, representing the employees set forth in Article 2, Recognition. (Jt. 1) The Union alleges a contractual violation in that while the Grievant was on a medical leave of absence from January 22, 1999 through March 8, 1999, the College reassigned duties that the Grievant, as lead custodian under the collective bargaining agreement, had performed. (Jt. 2)

The Grievant has been employed by the College for 29 years and 10 months as of the hearing in this matter. Grievant was originally hired as a custodian and assigned to clean the Kumm Building. Grievant performed the normal custodial cleaning duties upon employment with the College. Grievant's first immediate supervisor was Kellicet. In 1985 Kellicet left the employment of the College. At that time Grievant assumed Kellicet's supervisory duties and was not assigned to any particular cleaning duties although he may have been doing some cleaning work in the Techniques Building. Grievant may also have been performing some leadman duties prior to assuming Kellicet's duties in 1985, although without apparent official designation. In 1986 Jack J. Jansky was hired by the College to assume the duties of Physical Plant Manager. Grievant reported directly to Jansky and commenced to again perform regular custodial duties along with some leadman duties. In March of 1986 the College posted for a custodial foreman day shift; Grievant was one of three individuals interviewed and was awarded the job. (Er. 1)

In 1993 there were major changes at the College providing for construction and remodeling that led to an increased time commitment by Jansky who was to oversee certain aspects of the construction. Jansky recommended a Position Authorization and Description for the Grievant dated May 12, 1993 which outlined increased supervisory responsibilities for Grievant due to Jansky's involvement with construction. (Jt. 2) On May 14, 1993, Jansky in a memorandum to Human Resources Manager Salls also requested a job reclassification for the Grievant which involved transferring supervision of the custodial department to a custodial foreman. (Er. 2) Salls via Tom Fider, VP for Finance, referred this reclassification request by Jansky to College President Rasch on June 1, 1993. (Er. 4) Said reclassification was approved by Rasch and Grievant assumed those duties. (Er. 3)

In a representation election conducted by the Wisconsin Employment Relations Commission resulting in recognition of the Union, the Union challenged the vote of Grievant as being a supervisor since at that time he was not assigned to clean a building and had supervisor responsibilities. Following the representation election and during negotiations for

the first collective bargaining agreement (Jt. 1) the parties resolved Grievant's situation by creating a position of custodial lead referenced in Appendix A - Wages of the collective bargaining agreement. (Jt. 1)

In March of 1998 Jansky retired and, in the interim before new plant manager Albrecht was employed on October 1, 1998, Director of Finance Tom Fider took over the direction of the physical plant operation of the College; Grievant reported directly to Fider. In a meeting of the custodial staff on March 11, 1998, Fider in essence set forth the roles for various individuals to carry out the custodial function, particularly until such time as a new physical plant manager was hired by the College. Grievant was designated to remain the lead coordinator of the custodial staff. (U. 1) In September of 1998 an additional WWTC custodial work assignment document was produced setting forth the basic cleaning and backup priorities for assigned building areas. This document also set out the lead worker (Grievant) responsibilities which were essentially to see that the District's custodial function took place in a quality manner. (U. 2)

On October 1, 1998, new physical plant manager Albrecht started his employment. Albrecht, after spending some time in this capacity, commenced to reorganize the operations of the custodial department. Albrecht met with Grievant in December of 1998 and advised him of certain concerns by other custodial staff regarding the Grievant's leadership qualities, in particular the fact that Grievant was not actually performing any custodial work which Grievant declined to do. Grievant left on a medical leave of absence on or about January 22, 1999. Albrecht commenced to take over the purchasing of supplies for the physical plant (custodial operation), took over the handling of moves on and off campus and at off-campus locations and arranged for work orders for the custodial staff to be computerized and posted in the custodial break room for self-assignment by the custodians, most of whom are senior custodians in length of service.

Grievant returned from his medical leave on March 8, 1999. During the course of Grievant's medical leave, his duties as a lead person or of a supervisory nature were removed from the lead custodial position held by the Grievant and reassigned to employees in and out of the collective bargaining unit, including duties assumed by Albrecht. Grievant was not informed about this reorganization or the fact that he would lose these previously assigned duties before he left on his medical leave of absence. Upon his return, Grievant was assigned to the College mail room to temporarily fill a vacancy. The employees in the mail room are represented by a different union but there is a history at the College that custodial employees have helped out in the mail room. The mail room job has been posted under the collective bargaining agreement for the mail room bargaining unit.

Shortly after returning from his medical leave of absence and not being satisfied with the response from the College regarding the reassignment of his custodial lead position duties

and his assignment to the mail room, Grievant filed a complaint (grievance) on March 19, 1999 alleging a violation of his contractual rights. (Jt. 2) The College (by Human Resources Manager Salls) responded to and denied the grievance on April 15, 1999. (U. 3)

The parties processed the grievance through the contractual grievance procedure and were unable to settle the grievance. No issue was raised as to the arbitrability of the grievance. The parties agreed to ask an arbitrator to hear the matter and provide a written advisory opinion which would not be binding on the parties and would allow them to go to binding arbitration if either party wished to do so. Hearing in this matter was held by the Arbitrator on September 27, 1999 in the City of LaCrosse, Wisconsin at the administrative offices of Western Wisconsin Technical College. The hearing adjourned at 3:00 p.m.

POSITIONS OF THE PARTIES

Union Position

The position of the Union is best set forth in its statement of the issue of this advisory grievance arbitration, through its presentation on the record and through its submission of alternative remedies as part of its closing argument. Essentially the Union takes the position that while it recognizes management's right to assign duties under the contractual management rights clause, it regards the removal of custodial supervisory duties from the custodial lead position held by the Grievant and assigning them to non-bargaining unit personnel as violating the collective bargaining agreement.

The Union further alleges that the removal of these duties and the assigning of Grievant to the mail room has the practical effect of disciplining the Grievant and demoting him from the custodial lead position. The Union takes the position that this discipline was without just cause and notes that the Grievant was never counseled as to the reorganization of the department, and he was not counseled as to any deficiency in his job performance. Further, Grievant has never been disciplined in his 30 years of employment with the College. The Union argues that said actions by the College directed toward Grievant have an effect on other employees in the bargaining unit when management reassigns duties to employees outside the collective bargaining unit.

Lastly, the Union requests as its first remedy that Grievant be made whole by being restored to the custodial lead position with appropriate duties; and in the alternative the Union submits that the Grievant be assigned duties as a custodian with lead duties attached to a working custodial lead position.

College Position

The College takes the narrow position that this is purely a work assignment issue and that it has the right to assign employees their work duties. The College argues that the record shows that during Grievant's medical leave of absence it was identified that there were flaws in the custodial supervisory and management process. The College submits that the record substantiates that the custodial work was performed better while Grievant was absent, but the College, when Grievant returned, assigned him the mail room duties without reducing his custodial lead pay based on his length of service with the College. The College points out that when the mail room job, which currently is posted, is filled the College will find other appropriate duties for the Grievant and will maintain his custodial lead pay rate. Lastly, the College argues that it has not violated the collective bargaining agreement with its actions toward the Grievant and requests that the grievance be denied.

DISCUSSION

The main issue in this case is whether the College had the right to unilaterally remove certain leadman duties from Grievant's job assignment and to assign him to non-custodial duties upon his return from a medical leave of absence in March of 1999. I do not believe the record supports a finding that Grievant's current assignment in the College mail room and the removal of said leadman duties constitutes discipline. There further has not been any formal demotion of the Grievant as alleged by the Union. The record reveals that Grievant is still paid the contractual rate of custodial lead pursuant to Appendix A of the labor agreement. Nor did the record establish that the custodial lead job has been eliminated or that that title no longer belongs to Grievant. However, one might legitimately argue that constructively the classification has been eliminated and Grievant no longer acts in that capacity. But, I do not find that the actions taken by the College in this regard were done to punish or discipline Grievant. I find that the College's reassignment of duties was for legitimate business reasons. The issue, as stated, is whether the College had the right of reassignment under the terms of the parties' labor agreement. 1/

1/ I have reviewed the articles of the parties' labor agreement as cited by the grievance. (Jt. 2)

11.01 Maintenance of Standards I do not find applicable as there was no change to the wages, hours or working conditions of bargaining unit employees.

12.01 Non-Bargaining Unit Work and Work Assignment This provision goes to the issue in this case and is addressed by my decision. It should be noted that no unit employe or Grievant were deprived based on the evidence presented to me of their regularly assigned work hours.

13.03 Work Rules There is no issue as to work rules based on the record.

14.02 Training and 16.01 Safety Nothing was presented at the hearing to cause me to consider these provisions of the parties' labor agreement. While the statement by Grievant attached to the grievance (Jt. 2) might be considered to have discussed training and health, this was not pursued at hearing or in either the Union's or College's arguments or statements of the issue.

Grievant's work history, spanning thirty years with the College, is not crystal clear from the record. It is without dispute that Grievant started his employment as a custodian performing normal custodian duties. At some point prior to 1986, he was also performing lead duties, although the record is vague as to the extent of those duties. In March of 1986, a custodial foreman position was posted; this was prior to the Union representing the custodial employees. (Er. 1) This was approximately the time that Grievant's supervisor Kellicut retired. While Grievant does not remember this posting or signing for it, Jack Jansky who replaced Kellicut and was assigned the new position of Physical Plant Manager in October of 1985, testified that he interviewed three employees for the foreman position. Grievant was selected by Jansky for the position. Clearly the posting and the resulting position were for a permanent custodial foreman position with the duties stated therein. (Er. 1)

The confusion in this case I believe occurs from the events that took place in 1993. In that year the College, pursuant to a Master Plan, constructed and remodeled a number of buildings. The College considered hiring a construction manager but dropped that idea as being too expensive; it then fell to Jansky, the Plant Manager, to assume many of those responsibilities. As Jansky felt he could not adequately take care of the custodial end of his duties and take care of the construction responsibilities, he proposed a reclassification for Grievant. (Jt. 2) By this reclassification, Grievant took on duties beyond his custodial foreman position, where he was still doing cleaning, and made him a supervisor who was not assigned cleaning duties. The issue is whether those duties were temporary or permanent. I believe the record, established by documentary evidence, is clear that the reclassification and the supervisory duties attached to it were temporary. On May 12, 1993, Jansky wrote the reclassification for custodial supervisor. (Jt. 2) This was recommended by Jansky to become effective on July 1, 1993. On May 14, 1993, Jansky made this recommendation to Salls, the Human Resources Manager. (Er. 2) On June 1, 1993, Fider, the Vice President of Finance, passed on this request for reclassification to the College President, Lee Rasch definitively referring to it as a "temporary" reclassification. (Er. 4) On June 2, 1993, Rasch sent Salls a Memorandum approving a temporary upgrade in classification for the Grievant. (Er. 3) As with labor agreements, these memorandums and job description for a custodial supervisor must be considered together and in the context of the situation at the time. I therefore find that the increased duties assigned to the Grievant were for a temporary period because of Jansky's need for supervisory assistance over the custodial crew.

I believe it is an open question whether Grievant was ever told this was a temporary position as Jansky states and as Grievant denies. I believe both of these individuals testified creditably. It is apparent that Grievant had some of these supervisory duties still at the time the Union organized the custodial bargaining unit leading to the challenge of Grievant's right to vote in the representation election. Subsequently, Grievant was in the unit as a custodial lead in a classification created by the parties bargaining for their first contract, the one before me now.

In March of 1998, Jansky retired and Fider took over the responsibilities of Plant Manager while the College searched for a replacement for Jansky. That replacement, Albrecht, was hired in October of 1998. During that interim period, it is apparent that some of Grievant's lead duties were being assigned to others. Grievant testified that a fellow bargaining unit member, Gary Thorsen, was doing some of his duties. Julie Dahl had been and continued to be involved with purchasing; a non-unit employe. Jean Powers, also a non-unit employe, was performing some of the duties related to work orders. Fider testified that the organization of the custodial department was changing. There was less need for a supervisor and the responsibilities associated with the Custodial Foreman position of 1986 (Er. 1) were no longer needed. In a meeting with the custodial staff on March 11, 1998, Fider was trying to sort out what his relationship was going to be with the custodians, what Dahl would do to assist him and what responsibilities Grievant would assume. (U. 1) Grievant was assigned to oversee the custodial staff as he had been doing before the labor agreement and representation by the Union.

When Albrecht arrived to take over the Physical Plant Manager position in October of 1998, he informed the custodians that he would be organizing the custodial department. He asked Grievant if he would return to cleaning as some of the custodians were upset with Grievant's leadership and he thought it would help if Grievant returned to cleaning as well as perform his lead duties; Grievant refused. Albrecht found that purchasing by the custodial department was not following College guidelines. Albrecht believed that purchasing, directing moves on and off campus and supervising work orders were not proper responsibilities for a non-management employe, in this case the Grievant.

Grievant was on a medical leave of absence in January and February of 1999. When Grievant returned in March, he was assigned to the mail room. Albrecht, while Grievant was gone, essentially removed all of Grievant's lead duties. Albrecht took over the purchasing, directed the moves and determined when the custodians would be assigned to various maintenance employes to assist them. Most of the work order function had been automated between requesters and Albrecht's office, and, rather than have the work assignments handed out to the custodial crew, as Grievant had done, they were merely posted on a bulletin board at a location where the crew started their day. Thorsen testified that this worked well as the crew was senior and did not need someone telling them what their assignments would be; Thorsen also testified that he was to a degree involved in purchasing and supplying cleaning equipment to the department.

When the Grievant came back from his medical leave in early March, 1999, Albrecht testified that he assigned Grievant to the mail room to fill a temporary vacancy that was being posted in another bargaining unit (custodians had a past practice of helping in the mail room despite it being in the jurisdiction of another union). Albrecht never asked Grievant if he was willing to clean based on Grievant's refusal in December of 1998 before he went on leave.

Based on the facts and the record, which I have described above, it is my opinion that the College did have the contractual right to remove these duties from the Grievant and assign them to other employees both within and without the bargaining unit. I believe that arbitral opinion supports this decision under the facts of this case. 2/ I decline the Union's offer to declare that what I decide here establishes generally the respective rights of the College and the Union as it relates to job assignments. Arbitrators rarely engage in declaratory rulings and I will not do so in this case. In this case, a strong argument can be made that the duties taken away from the Grievant were those he temporarily received as a result of the Jansky situation in 1993. Some of these duties, such as work orders and purchasing, have never been the sole responsibility of the Grievant. It is also clear, as in the cited cases, this is a position that has evolved into a different job than was in place before the Union organized. The very agreement to make the job a custodial lead necessitated a removal of certain supervisory duties in order for the Grievant to be in the bargaining unit.

2/ The ability of management to create and eliminate jobs and assign duties has been recognized as a traditional right of management, particularly in any case where the collective bargaining agreement has a reserved rights clause.

The employer eliminated a fourth assistant power plant operator job classification which was set forth in the labor agreement. Some of the job's previous duties were to be assigned to other bargaining unit employees. The reason for the employer's action resulted from automating certain aspects of the job and the employer acted in good faith and for business reasons.

The Arbitrator denied the union's grievance that the employer had unilaterally eliminated a contractual job classification. The Arbitrator found that management retains all of its traditional rights absent agreements to the contrary. One of those traditional rights includes elimination of a job classification. The fact that the classification is listed in the agreement does not constitute a guarantee or "freeze" on existing classifications for the life of the agreement. The Arbitrator noted that the employer in this case restructured jobs, reassigned residual duties and avoided laying off a single employee, noting that contracts are to be given a "reasonable construction, so as to avoid harsh, illogical, and/or absurd results."

FINCH, PRUYN & COMPANY, 111 LA 1, 5-7 (BABISKIN, 1998)

This case lends support to the actions of the College in my case, and, I note, nothing in the record indicates that the College is eliminating the custodial lead position. I note also that in Article 18 – Seniority, Section 18.04, the Grievant would have bumping rights in the event of job elimination.

In another case, the arbitrator was confronted with a fact situation where a maintenance clerk spent 18 to 20 hours per week entering new and completed maintenance repair orders manually in a log book. The employer automated this system eliminating a substantial portion of the clerk's duties. This data entry was now performed by non-unit supervisors and took them about 15 to 19 minutes per day. The union grieved the use of supervisors doing this work. The arbitrator denied the grievance finding that the union does not necessarily retain work changed by technological advances.

WHITE – NEW IDEA FARM EQUIPMENT COMPANY, 101 LA 461, 463 (HIGH, 1993).

In my case, the College has automated the work order system, which has always to a degree involved non-unit clerical staff and eliminated the need for a foreman or lead custodian to assign jobs to the custodial staff. This is the very type of flexibility arbitrators hold that employers must have in order to upgrade their operations.

In still another case which is useful to my analysis of the issue between WWTC and Local No. 695, the company eliminated a lab technician classification and the employees were demoted to lower paying jobs but no employee was laid off. The union argued that work was not eliminated but just re-assigned to other employees. The company responded that quality control was now done on the line and this system had evolved over time and the union was well aware of the changes. The arbitrator, in ruling for the company, held that it was not for the arbitrator to judge the employer's decision only if it was consistent with the labor agreement. The arbitrator ruled that the change was business related and justified re-assignment of tasks. The Technician position was at least significantly altered and the company did not have to eliminate all tasks to justify elimination of the job.

INTERNATIONAL PAPER COMPANY, 108 LA 1207, 1210-1211, (HART, 1997).

The contract language in these three cases, while not exactly the same, is similar to the language in the agreement I interpret here. The fact situations to some degree are more extreme than what the College did to the custodial lead position and Grievant in this case.

The discussion of the cases I have cited makes abundantly clear that in the absence of contract language restricting its right the employer, the College, must have flexibility to run its operation. I believe this is particularly the case when it comes to the assignment of supervisory duties. Management must be able to have control over its supervisory functions if it is to operate efficiently and provide the appropriate level of services to its customers as circumstances change for the delivery of those services. 3/

3/ I have found in this case that the College did not violate the collective bargaining agreement by the assignment of Grievant to the mail room, which appears to be temporary, and by re-assigning some lead duties to other employees within and without the bargaining unit. I am concerned that the Grievant may not have totally been treated in good faith by the lack of communication with him regarding his duties and job assignment and job performance. This is true even though the College stated on the record that Grievant would continue to receive custodial lead pay and would be assigned to other duties when the mail room job is permanently filled. I encourage the College to be aware of and not repeat this lack of communication with Grievant.

I believe it would have been better management if Albrecht had asked Grievant on his return from medical leave if he were willing to be assigned custodial duties, but I cannot totally fault him for relying on Grievant's refusal in December of 1998 to perform such duties. If Grievant is willing to perform custodial duties, he has seniority rights under the Agreement which would come into play when the mailroom position is filled.

Based on the foregoing and the record in this matter I make the following

ADVISORY AWARD

The College did not discipline, demote or violate the collective bargaining agreement when it removed lead duties from the Grievant and when it assigned him to a temporary position in the mailroom. The grievance is denied.

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

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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