BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN BAY BOARD OF EDUCATION EMPLOYEES (MAINTENANCE) UNION, LOCAL 3055, AFSCME, AFL-CIO

and

GREEN BAY AREA PUBLIC SCHOOL DISTRICT

Case 203
No. 57141
MA-10526

(Tom Tedford – Glazier Work Grievance)

Appearances:

Mr. Robert Baxter, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2065 East Baraboo Circle, DePere, Wisconsin 54115, appearing on behalf of Local 3055.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker**, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Green Bay Area Public School District.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties Green Bay Board of Education Employees (Maintenance) Union, Local 3055, AFSCME, AFL-CIO (hereinafter referred to as the Union) and the Green Bay Area Public School District (hereinafter referred to as the District or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator and to hear and decide a dispute over the assignment of glazier work in the District. A hearing was held at the District's offices in Green Bay, Wisconsin, on May 12, 1999, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and argument as were relevant to the dispute. The parties submitted post-hearing briefs, and the Union submitted a reply brief. On August 16, the District advised the arbitrator that it would stand on its original argument, whereupon the record was closed.

Now, having considered the testimony, exhibits, and other evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

ISSUE

The parties stipulated that the issues before the arbitrator are:

(1) Was the grievance timely? If so

(2) Did the Employer violate the collective bargaining agreement and/or past practice by unilaterally transferring the glazier work from the grievant, Tom Tedford, to the Level 7 Maintenance Mechanic classification? If so

(3) What is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II
MANAGEMENT RIGHTS

The Employer, on its own behalf, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the constitutions of the State of Wisconsin and of the United States, including, but without limiting the generality of the foregoing, the rights:

1. To the executive management and administrative control of the school system and its properties and facilities;

2. To hire all employees and, subject to the provisions of law and this Agreement, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion, and to promote and transfer all such employees;

3. To determine hours of duty and assignment of work;

4. To establish new jobs and abolish or change existing jobs;

5. To manage the work force and determine the number of employees required.

6. To subcontract where staff vacancies have been created by quit, discharge for cause, retirement or any other reason, but not for or by staff layoff. Subcontracting shall be done by attrition and in accordance with Article XXXIV of this Agreement.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employee's right of appeal.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Employer, the adoption of policies, rules and regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes, Section 111.70, and then only to the extent such specific and express terms are in conformance with the constitution and laws of the State of Wisconsin and the Constitution and laws of the United States.

. . .

ARTICLE IV
PRACTICES

All existing practices pertaining to hours, working conditions, rules and regulations not specifically mentioned in this Agreement will continue in force as at present until they are adjusted by mutual agreement between the Employer and Union. The Employer further agrees to maintain all existing benefits not contained in this Agreement.

. . .

ARTICLE VII
SENIORITY

The Employer agrees to the seniority principle.

Seniority shall be established for each employee and shall consist of the total calendar time, lapsed since the date of h/er regular employment. Seniority rights terminate upon discharge, or quitting.

. . .

ARTICLE X
PAY POLICY

Attached as appendices to this Agreement are the job classifications and pay schedules. The pay plan attached shall remain in effect without change for the term of the labor agreement.

The Employer shall determine the number of employees to be assigned to any job classification and the job classifications needed to operate the Employer's facilities. The Union shall be notified in advance of any change to be made in the number and kind of classifications.
Prior to establishing a new job or changing an existing job which materially affects the duties of the job, the Employer shall inform the Union.

Subsequent to Union notification, the Employer will evaluate the new or materially changed job in comparison with other jobs whose relative worth is comparable and will inform the Union of the new rate and effective date. The Union may immediately enter into negotiations with the Employer concerning such rate. Changes in such rate agreed upon with (sic) sixty (60) days, or an extended time mutually agreed to, shall be made retroactive to the effective date of the job changes or new job installation which occasioned the rate adjustment. The establishment of disputed wage rates shall be a subject of arbitration.

. . .

ARTICLE XVII
GRIEVANCE PROCEDURE

All grievances which may arise shall be processed in the following manner:

Step 1. The aggrieved employee shall present the grievance orally to h/er immediate supervisor within fifteen (15) workdays of the time in which the employee knows of or should have known of the suspected improper application. The aggrieved employee, with the representation of h/er steward if s/he so elects, shall attempt to resolve the grievance with the immediate supervisor, who may call higher level superiors into the discussion. If it is not resolved at this level within ten (10) workdays of its initial presentation, the grievance may be processed further by the employee as outlined in Step 2.

Step 2. The grievance shall be presented in writing to the immediate supervisor within ten (10) workdays of the supervisor's answer at Step 1; and if not resolved within ten (10) workdays at this level, it may be processed further by the employee, as outlined in Step 3.

. . .

Step 5. Within ten (10) workdays of the Human Resources Committee's answer at Step 4, the grievance may be submitted by the employee to the Wisconsin Employment Relations Commission for arbitration by one of its members. The Arbitrator, after hearing both sides of the controversy, shall hand down h/er decision in writing and such decision shall be final and binding on both parties to this Agreement. The Arbitrator shall have no power to add to, or subtract from or modify any term(s) of this Agreement. The cost, if any, of the Arbitrator shall be divided equally between the Employer and the Union.

Time Limits: Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been resolved on the basis of the last preceding answer of the Employer. Grievances not responded to by the Employer within the designated time limits in any step of the grievance procedure shall be considered denied by the Employer, and appeals taken from such a denial to other steps of the procedure must be within the time limits set for appeal after an answer to the grievance. The parties may mutually agree in writing to extend the time limits in any step of the grievance procedure.

. . .

ARTICLE XXIII
JOB POSTINGS

When new jobs are created or vacancies occur, such jobs shall be posted immediately and a job outline shall be included. The posting shall contain the following information: school or business location, hours of work and rate of pay. Said postings shall remain posted for five (5) workdays before operation begins.

. . .

ARTICLE XXVIII
NEGOTIATIONS

Negotiations on all matters covered by this Agreement or on other proposals with respect to wages, hours and/or conditions of employment shall be conducted annually, or other time period mutually agreed upon, and any agreement reached in negotiations shall become effective the following July 1.

> Negotiations shall proceed in the following manner: the party requesting negotiations shall notify the other party in writing of its request not earlier than the first (1st) day of February. An initial meeting of the parties shall be called within thirty (30) days of the notice of such request, but not earlier than the first (1st) day of March. The party upon whom such request is made shall have the opportunity to study such request and make an offer or counteroffer to the other party within fifteen (15) days thereafter. Negotiations shall continue until resolved or until it is clear that no agreement can be reached.
>
> . . .

BACKGROUND

The District provides educational services to the citizens of the Green Bay area, in northeastern Wisconsin. The Union is the exclusive bargaining representative of the District's maintenance employes, including those in the Utility classification. The grievant, Tom Tedford, is a utility worker.

Prior to 1985, the District employed a full-time glazier, who was classified as a Maintenance Mechanic, to install, repair and maintain the windows in its buildings. In 1985, the incumbent glazier retired and the District determined that the volume of work did not warrant hiring a full-time glazier to replace him. Instead, the position was offered internally among employes in the lower paid Utility Worker classification, with the understanding that the Utility Worker performing the work on an as-needed basis would receive Maintenance Mechanic's pay for all time spent as a glazier. A closed posting was prepared:

> CLOSED JOB POSTING
> Utility Workers and Utility Worker/Substitute Custodian Only
>
> The position of full time glazier has been discontinued. However, as there still is a need for an estimated 10 hours per week of glazier work, we are looking for a qualified individual among the utility group who would be interested in this assignment on an as needed basis.
>
> The utility worker or utility worker/substitute Custodian IV who requests this assignment shall be fully capable of performing the necessary work to replace glass in all types of windows generally associated with our school buildings. I.E., marine glazing, thermopane, tempered and safety glass, double glaze and triple glazing, plus the old standby wood sash and putty. This individual shall be capable of the high work required to repair/replace windows on multi-story

> buildings and shall have knowledge and ability of measurement techniques for proper fittings of glass, plus the knowledge and ability to handle ladders and scaffolds with safety. Work shall be reviewed by manager of maintenance services.
>
> The individual who qualifies shall be assigned the glazier work as needed (exception - full glass, or stile and rail doors are carpenters work). The hourly pay differential at Level V shall be applied after the completed work order is turned in. Pay shall be calculated in 1/2 hour segments according to the amount of time shown on the completed work order and approved by supervisor.
>
> Only the designated utility worker/glazier person shall be considered for differential pay in situations where another utility worker is assigned
>
> The individual who is placed in this assignment may remove themself (sic) from this assignment by a letter of request giving 30 days notice.

From 1985 until this grievance, the senior interested Utility employe was awarded the glazier work whenever the position fell vacant.

In 1997, the District met with the Union over revisions in two Maintenance Mechanic job descriptions. Among other things, the District advised the Union that it planned to have the glazier work added to the job description for the Maintenance Mechanic who was responsible for window blinds, with the Utility Workers handling any overflow. This change was prompted in part by a decrease in the other work available to Maintenance Mechanics, and in part by the fact that many of the windows being installed in District buildings over the last ten years had the blinds incorporated into the window itself. The Union objected to the change, to no effect. The change was made, and the modified Maintenance Mechanic positions were posted. Union President Tom Tedford was the Utility Worker who was then performing the glazier work. Tedford posted unsuccessfully for the Maintenance Mechanic's job, which was awarded to Gary Larson, effective August 26, 1997. While the transfer of glazier work was discussed in passing several more times after Larson filled the modified Maintenance Mechanic's job, no change was made in the job description, and the Union did not demand bargaining over the effects of the change. When the collective bargaining agreement expired in June of 1998, neither party made proposals about the glazier's work.

When Larson took over the modified Maintenance Mechanic's job, there was a backlog of other work for him to do, and he was not immediately assigned all of the glazier's work. Tedford continued to perform the work, and Larson gradually took over. In October of 1998, Tedford became aware that Larson was being assigned glazier work while he, Tedford, was available for the work. He filed the instant grievance, alleging that even though Larson could

do glazier work while he was absent or while he was also engaged in doing glazier work, it violated the contract and past practice for Larson to be assigned the work to the exclusion of the Utility Worker.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Arguments of the District on Timeliness

At the outset, the District takes the position that the grievance is untimely. A grievance must be filed within 15 days of the "suspected" violation. On August 8, 1997, the District directly informed the Union's committee (including the grievant) that it was going to reassign the primary responsibility for glazier's work to the Maintenance Mechanic. It then proceeded to post and fill the new position. The successful applicant, Gary Larson, gradually took over the glazier's duties. Fourteen and a half months after the Union was informed of the change, this grievance was filed. In the interim, a new collective bargaining agreement was negotiated, without a word from the Union about the proper assignment of glazier's work. If the time limits in the contract are to have any meaning at all, the arbitrator should dismiss this claim as untimely.

The Arguments of the Union on Timeliness

The Union disagrees with the District's theory that the mere announcement of a change gives rise to a grievance. It notes Arbitrator Gratz's Award in CITY OF OSHKOSH (6/15/94), wherein the arbitrator found that it was the actual subcontracting of work, rather than the announcement of a subcontracting agreement, that triggered the time limits for filing a grievance. In this case, the grievant continued to receive out-of-class pay for glazier work on a regular basis until October of 1998. He believed that Larson was merely performing the work when he was not available. On or about October 16th, it became apparent that Larson was going to be assigned the glazier work to the exclusion of the grievant. That is the grievable event, and this grievance, filed on October 29th, falls within the 15-day limit specified by the grievance procedure. Even if there may have been some grievable event before October 16th, the misassignment of bargaining unit work is a continuing violation, which may be raised at any point. Thus the arbitrator should find that the grievance was timely filed.

The Arguments of the Union on the Merits

The Union takes the position that the glazier work is primarily the job of Utility Workers, and that transferring the work to the Maintenance Mechanic violates the agreement.

The labor agreement provides that past practices related to working conditions and benefits not specifically mentioned in the agreement will continue. The contract also recognizes the principle of seniority. There is a clear and long-standing practice of having glazier work performed by the senior Utility Worker who wants the duty. This practice is consistent with a written memorandum from 1985, when the parties engaged in impact bargaining over the District's decision to eliminate the full-time glazier's job. The letter spells out the parties' mutual agreement that glazier work will be assigned to the senior qualified person in the Utility classification who signs a closed posting for the job. This letter has the same weight as contract language, and it is clear and unambiguous. The arbitrator does not have the option of ignoring it, nor even interpreting it. Instead, it must be applied as written. Giving this language its plain meaning, the District cannot unilaterally transfer glazier work out of the Utility classification.

The arbitrator should not accept the District's claim that it somehow canceled the prior practice by its announcement in August of 1997 that it wanted to have a Maintenance Mechanic do this work. While a past practice is subject to termination if clear notice is given during contract negotiations, there were no negotiations in August of 1997. The contract still had eleven months to run at that point. When the contract was reopened and the parties met to negotiate, the grievant was still being assigned glazier work and was still receiving out-of-class pay. The District never mentioned that it intended to stop that practice during bargaining, and thus the Union had no reason to bargain over the topic.

The grievant is entitled to perform glazier work, since he is the senior qualified Utility Worker. The practice and the underlying agreement are clear, and they are consistent with the labor agreement. No effective notice of termination of the practice was given by the District during bargaining, and there has been no agreement to change the practice, the 1985 agreement or the labor contract itself. Accordingly, the arbitrator must find that the District violated the agreement, and order that the grievant be made whole.

The Arguments of the District on the Merits

The District takes the position that the grievance is wholly without merit and should be denied. The Union's entire theory depends upon past practice, but a past practice cannot supersede clear contract language. Here, the contract clearly vests the District with the right to assign work, and to create, abolish and change jobs. The wage impacts of job changes during the term of the agreement are subject to negotiation and even arbitration, but the initial decision to make a change lies with the District. The District exercised its rights, and gave the Union a chance to exercise its rights. It notified the Union of the Maintenance Mechanic job and the transfer of primary responsibility for glazier's work to that position. It met with the Union to get input. It effected the change. This is precisely what the contract allows. The alleged practice cannot negate the District's rights.

Even if there was a binding practice of some sort, the District gave timely notice that it was terminating the practice and the Union subsequently failed to protect the practice during negotiations. Thus it did not continue into the term of the current contract. While the Union claims that the 1985 posting form is a free-standing agreement, with independent force and effect, it clearly is not. It is not styled as an agreement, and it has none of the standard features of an agreement -- no signature lines, no effective date, no termination date, no acknowledgment of bargaining. There is no evidence that the parties intended to be bound by this document, and no evidence that either party ever ratified this document, even though the Union's officials admit that binding agreements must be ratified. There was no one at the arbitration hearing who knew what this 1985 letter was, only that it had been found in the Union's files after this grievance was filed. If it was some type of agreement, it must be subject to the general rules governing agreements, including the one that says agreements having no expiration date are subject to termination on reasonable notice. The August 1997 meeting served to give the Union notice that the District was canceling whatever agreements it had on the assignment of glazier work.

Finally, assuming for the sake of argument that the 1985 posting is an agreement, and that it has somehow endured, it has not been violated. By its express terms, it promises that Utility Workers "shall be assigned the glazier work as needed . . ." This cannot be read as a promise that this work will be exclusively assigned to Utility Workers, and it is undisputed that the grievant is still being assigned this work "as needed." For all of these reasons, the District asks that the grievance be denied.

DISCUSSION

Timeliness

As with most collective bargaining agreements, the labor contract here requires prompt filing of grievances:

> The aggrieved employee shall present the grievance orally to h/er immediate supervisor within fifteen (15) workdays of the time in which the employee knows of or should have known of the suspected improper application.

There are two facets to this grievance. The Union first asserts that glazier work is the exclusive province of the Utility Workers and that the Maintenance Mechanic may not perform this work. In the alternative, the Union argues that the work may be shared between the two positions, but that the Utility Worker must be given priority in the assignment of the work.

As to the first aspect of the grievance, the October 1998 filing clearly does not meet the timelines in the collective bargaining agreement. The District advised the Union in August of 1997 that it would be reassigning the glazier work to the Maintenance Mechanic, and that the Utility Workers would only be handling the work on an overload basis. It proceeded to post and fill the modified position. The Union was well aware of the posting, since the grievant unsuccessfully sought the job. Between August of 1997 and October of 1998, the Maintenance Mechanic did, in fact, perform glazier work, and the Union knew that he performed the work. To the extent that the grievance claims that glazier work is the exclusive province of the Utility Workers, it cannot possibly be made to fit within the 15 workday time frame for filing grievances. This aspect of the grievance was not unclear to the Union at any time after August of 1997 nor, if exclusivity is the issue, was there anything incremental about the alleged violation. There were three specific acts that might have given rise to a grievance over exclusivity -- the announcement of the change, the posting and filling of the modified job, or the first occasion on which Larson performed glazier work. All of these events passed without a timely grievance.

The timeliness of the other aspect of the grievance -- whether the Maintenance Mechanic may perform this work to the exclusion of the Utility Worker -- is not as clear cut. If the violation consists of assigning glazier work to the Maintenance Mechanic without first making it available to the Utility Worker, the grievable event is the first time that the grievant knew or should have known that such an assignment was made. Reviewing the testimony and the time records, it cannot be said with positive assurance that Tedford should have known this was happening until October of 1998. Accordingly, I find that the second theory of the grievance is timely presented.

Merits

The Union relies on two substantive theories to establish Tedford's right to the glazier work. First, it looks to the past practice clause at Article IV of the collective bargaining agreement, which obligates the Employer to maintain "All existing practices pertaining to hours, working conditions, rules and regulations not specifically mentioned in this Agreement . . . until they are adjusted by mutual agreement between the Employer and Union." The Union asserts that this provision clearly requires that the District continue to give the Utility Worker first claim to the work since it has done so for 12 years and has not negotiated any change. The second substantive theory is that the 1985 posting document was a negotiated agreement over the effects of eliminating the full-time glazier, and that it remains in effect. Assuming for the sake of analysis that the practice remains binding, and that the 1985 document actually is a negotiated agreement, I nonetheless find that the Union misreads the scope of the practice and the wording of the document, and that there is no violation under either theory.

The Union focuses on the District's assignment of glazier work to the Utility Workers from 1985 to 1997 without giving any consideration to the circumstances under which that

assignment was made. Specifically, the District made this assignment as the result of effects bargaining. The bargain was triggered because the District had unilaterally exercised its management right not to replace the Maintenance Mechanic who had previously performed the work. The language of the 1985 document expressly recognizes this as the reason for the assignment: "The position of full time glazier has been discontinued. However, as there still is a need for an estimated 10 hours per week of glazier work, we are looking for a qualified individual among the utility group who would be interested in this assignment on an as needed basis." That document, and the practice resulting from it, can most reasonably be understood as setting the parameters for the assignment of glazier work in the absence of a Maintenance Mechanic. The document and the practice cannot be understood as an agreement to read the Management Rights Clause out of the contract. That is not what the practice has been, and it is not what the 1985 document says. The Management Rights clause continues to give the District the right to "establish new jobs and abolish or change existing jobs." The express contract language provided the basis of the District's original choice in 1985, and it provides the basis for the decision to re-establish the Maintenance Mechanic position.

The past practice has been that, in the absence of a Maintenance Mechanic, the glazier work has been assigned to the senior, interested Utility Worker. That too is what the 1985 document calls for. That practice, and the procedure set forth in the 1985 document, continue to govern the assignment of overload glazier work. The District acknowledged that this arrangement would continue in the August 1997 meeting and it has continued to assign glazier work to Tedford on an as-needed basis since that time. Accordingly, I conclude that the District has not violated the past practice, nor has it deviated from the 1985 document.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The grievance is timely filed as to the claim that the glazier work may not be assigned to the Maintenance Mechanic to the exclusion of the Utility Worker.

2. The District did not violate the collective bargaining agreement and/or past practice by unilaterally transferring the glazier work from the grievant, Tom Tedford, to the Level 7 Maintenance Mechanic classification.

3. The grievance is denied.

Dated at Racine, Wisconsin, this 16th day of November, 1999.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

DJN/mb
5972.doc